UNITED
NATIONS

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

Case No.: IT-95-16-A

Date: 23 October 2001

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IN THE APPEALS CHAMBER

Before: **Judge Patricia Wald, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar: **Mr. Hans Holthuis**

Judgement of: **23 October 2001**

PROSECUTOR

v

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
VLADIMIR ŠANTIC

APPEAL JUDGEMENT

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The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 14 January 2000 in the case of *Prosecutor* v *Zoran Kupreški}, Mirjan Kupreški}, Vlatko Kupreški}, Drago Josipovi}, Dragan Papi} and Vladimir [anti}*.[1]

Having considered the written and oral submissions of the parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

[1] For a list of the terms and abbreviations used in this Judgement, *see* Annex B.

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I. INTRODUCTION

1. In the early morning of 16 April 1993, Bosnian Croat forces attacked Ahmi}i, a small village in central Bosnia. The Trial Chamber found that this attack resulted in the deaths of over a hundred of the Bosnian Muslim civilian inhabitants of the village, the wounding of numerous others and the complete destruction of Muslim houses and two mosques. The Trial Chamber convicted Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} for various forms of crimes against humanity, including persecution, under Article 5 of the Statute of the Tribunal, because of their individual involvement in this attack. The Trial Chamber defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5".[2] The Trial Chamber, however, acquitted the Defendants on certain counts, either because it found the evidence to be insufficient or due to cumulative conviction considerations. For the convictions, the Trial Chamber imposed prison sentences ranging between six and twenty-five years.

2. All of the Defendants,[3] are now appealing against their convictions, as set out below in the individual sections pertaining to each of them and all of the Defendants appeal against the sentences imposed by the Trial Chamber. To the extent necessary, this aspect of their appeals is discussed in a separate part of the Judgement confined to sentencing matters. In addition, the Appeals Chamber has identified certain issues that are of general interest to all of the Defendants. These issues are dealt with in an initial part of the Judgement under the heading "General Issues".

3. The Prosecution, as well as Josipovic, has also raised cumulative conviction considerations. This appeal is discussed in a separate section devoted to the issue of cumulative convictions.

4. The procedural background of these appellate proceedings is found in Annex A.

5. Insofar as this Judgement refers to testimony in this case, either before the Trial Chamber or the Appeals Chamber, given in closed session or any other material filed under seal, that testimony or material is released to the extent that it is recited or relied upon herein.[4]

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[2] Trial Judgement, para. 621.
[3] Although [anti} no longer disputes his guilt he, nonetheless, makes various challenges to the Trial Chamber's findings about the extent of his participation in the April 1993 Ahmi}i attack.
[4] Order of the President on the Request for the Release of Confidential Witness "AT" Material from the Case *The Prosecutor* v *Kordi} and ^erkez* in the Case *The Prosecutor* v *Kupre{ki} et al.*, filed in French on 4 October 2001. The English translation was filed on 9 October 2001.

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II. THE DEFENDANTS

1. Zoran Kupreški}

6. Zoran Kupre{ki} was born on 23 September 1958. He is married with three children. Prior to the conflict, he was an employee of the Slobodan Princip Seljo factory in Vitez, where he was in charge of maintenance for one of the units.[5] The Trial Chamber found undisputed evidence of Zoran Kupreški}'s general good character.[6]

7. The Trial Chamber concluded that Zoran Kupre{ki} was a local HVO Commander at the time of the attack on Ahmi}i on 16 April 1993.[7] The Trial Chamber further concluded, on the basis of the evidence of Witness H, that Zoran Kupre{ki}, on that same day, was armed, in uniform and with polish on his face, in the house of Suhret Ahmi} immediately after Suhret Ahmi} and Meho Hrstanovi} were shot and killed, and immediately before the house was set on fire and the Suhret Ahmi} family was expelled.[8] In addition, the Trial Chamber found that Zoran Kupreškic participated in the attack on Ahmi}i by providing local knowledge and the use of his house as a base for the attacking troops.[9]

8. The Trial Chamber accordingly found Zoran Kupre{ki} guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1), for which he was sentenced to ten years of imprisonment.

2. Mirjan Kupre{ki}

9. Mirjan Kupre{ki} was born on 21 October 1963. He is the brother of Zoran Kupre{ki}. He is married with two children. He was employed as a mechanical technician until February 1992 in the Slobodan Princip Seljo Factory. From August 1992 until April 1993, he worked for his cousin Ivica, first in the Sutra[10] store in Ahmi}i and then, ten days before the conflict, at a store in Vitez. In April 1994, when he was demobilised, he returned to work in the Sutra store.[11] As with his brother Zoran, it was undisputed that Mirjan Kupreškic had previously been of good character.[12]

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[5] Trial Judgement, para. 370.
[6] Trial Judgement, para. 372.
[7] Trial Judgement, para. 422.
[8] Trial Judgement, paras 426, 776 and 779.
[9] Trial Judgement, para. 430.
[10] The Trial Judgement used the spelling "Sutre" for the name of the store and some of the documents filed during the trial proceedings used the spelling "[utre".
[11] Trial Judgement, para. 371.
[12] Trial Judgement, paras 372 and 421.

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10. The Trial Chamber found that Mirjan Kupre{ki} was an "active" member of the HVO and that, together with his brother, Zoran, he participated in the attack on Ahmi}i on 16 April 1993 as an HVO soldier.[13] The Trial Chamber concluded, based upon the testimony of Witness H, that Mirjan Kupre{ki}, on that same day, was armed, in uniform and with polish on his face, in the house of Suhret Ahmi} immediately after Suhret Ahmi} and Meho Hrstanovi} were shot and killed, and immediately before the house was set on fire and the Suhret Ahmi} family was expelled.[14] In addition, the Trial Chamber found that, along with his brother Zoran, Mirjan Kupre{ki} participated in the Ahmi}i attack by providing local knowledge and the use of his house as a base for the attacking troops.[15]

11. For his part, the Trial Chamber found Mirjan Kupre{ki} guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1). He was sentenced to eight years of imprisonment.

3. Vlatko Kupre{ki}

12. Vlatko Kupre{ki} was born on 1 January 1958. He is married with two children. He is the cousin of Zoran and Mirjan Kupre{ki} and co-owner of the Sutra store.[16] The Trial Chamber found that in 1992 and 1993, Vlatko Kupre{ki} was an active operations officer in the police with the rank of inspector, and that he unloaded weapons from a car in front of his house in October 1992.[17]

13. The Trial Chamber concluded that Vlatko Kupre{ki} "was involved in the preparations for the attack on Ahmi}i in his role as police operations officer and as a resident of the village", and furthermore, "allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before."[18] The Trial Chamber determined that Vlatko Kupre{ki} was in the vicinity of Suhret Ahmi}'s house at about 5:45 a.m. on 16 April 1993, shortly after Suhret Ahmi} was murdered, and that "he was present and ready to lend assistance in whatever way he could to the attacking forces".[19]

14. The Trial Chamber accordingly found Vlatko Kupre{ki} guilty of aiding and abetting persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1) and sentenced him to six years of imprisonment.

[13] Trial Judgement, paras 421 and 779.
[14] Trial Judgement, paras 426, 776 and 779.
[15] Trial Judgement, para. 430.
[16] Trial Judgement, para. 432.
[17] Trial Judgement, para. 463.
[18] Trial Judgement, para. 466.
[19] Trial Judgement, para. 470.

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4. Drago Josipovi}

15. Drago Josipovi} was born on 14 February 1955. He was a life-long resident of Ahmi}i. Before the conflict, he worked in a factory. The Trial Chamber found that Josipovi}, prior to 16 April 1993, was a member of the HVO. It also found that he was a member of the Ahmi}i village guard and that he was seen in Ahmi}i with a rifle and wearing a uniform.[20] On the basis of the evidence of Witness EE, the Trial Chamber held that Josipovi}, on 16 April 1993, was a participant in the attack on, and burning of, Musafer Pu{}ul's house, which resulted, *inter alia*, in the murder of Musafer Pu{}ul.[21]

16. Furthermore, relying on the evidence of Witness DD, the Trial Chamber concluded that Josipovi} was, while in a "commanding position with regard to the troops involved",[22] a participant in the 16 April 1993 attack on the house of Nazif Ahmi}, which resulted in the murder of Nazif and his 14-year old son.

17. Accordingly, the Trial Chamber found Josipovi} guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1) for the active part he played in the "killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and expulsion of Bosnian Muslims from the Ahmi}i–[anti}i region" and, in particular, the incidents involving the Pu{}ul and Ahmi} families described above.[23] Josipovi} was also convicted of the murder of Musafer Pu{}ul as a crime against humanity pursuant to Article 5(a) of the Statute (count 16), and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (count 18). Josipovi} was sentenced to 10 years of imprisonment on count 1, 15 years of imprisonment on count 16, and 10 years of imprisonment on count 18, to be served concurrently.

5. Vladimir [anti}

18. Vladimir [anti} was born on 1 April 1958. Prior to the conflict, he was, by profession, a policeman.[24] Based upon the evidence of Witness B and Witness AA, the Trial Chamber concluded that, in April 1993, [anti} was the Commander of the 1st Company of the 4th Battalion of the Military Police and that he was, in fact, the Commander of the "Jokers", "a specialist, anti-terrorist unit of the Croatian Military Police".[25]

[20] Trial Judgement, para. 502.
[21] Trial Judgement, paras 503 and 859.
[22] Trial Judgement, para. 504.
[23] Trial Judgement, para. 859.
[24] Trial Judgement, para. 475.
[25] Trial Judgement, paras 132, 500 and 501.

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19. Accepting the testimony of Witness EE, the Trial Chamber concluded that [anti}, on 16 April 1993, participated in the attack on and the burning of Musafer Pu{}ul's house, which resulted, *inter alia*, in the murder of Musafer Pu{}ul.[26] The Trial Chamber held that [anti} "played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region."[27]

20. The Trial Chamber found [anti} guilty of persecution as a crime against humanity pursuant to Article 5(h) of the Statute (count 1); murder as a crime against humanity pursuant to Article 5(a) of the Statute (count 16); and inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute (count 18). [anti} was sentenced to 25 years of imprisonment on count 1, 15 years of imprisonment on count 16, and 10 years of imprisonment on count 18, to be served concurrently.

III. GENERAL ISSUES

A. Appropriate grounds of appeal

21. In view of the nature of the arguments advanced by some of the parties to this appeal, the Appeals Chamber considers it appropriate to discuss initially the issue of the grounds of appeal that an appellant can legitimately raise. Such a discussion begins with Article 25 of the Statute, which provides the authority for the Appeals Chamber's function to hear appeals. This provision states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following two grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

22. As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*.[28] On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the

[26] Trial Judgement, paras 503 and 862.
[27] Trial Judgement, para. 862.
[28] *Tadi}* Rule 115 Decision, para. 41 (referring to *Prosecutor* v *Erdemovi}*, Case No.: IT-96-22-A, Judgement, 7 October 1997, para. 15); *Furund`ija* Appeal Judgement, para. 40; *Tadi}* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 29.

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Tribunal's jurisprudence.[29] Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

23. Some of the parties in the instant case have advanced arguments that do not fall within the scope of Article 25 of the Statute and to which the exception to the general rule does not apply. For example, Zoran Kupre{ki} appears to take issue with certain general allegations set out in paragraph 9 of the Amended Indictment, such as the accusations that he helped prepare the April attack on Ahmi}i- [anti}i by participating in military training; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village; and concealing from the other residents that the attack was imminent.[30] A review of the factual and legal findings pertaining to Zoran Kupre{ki} demonstrate that these allegations did not play a part in his conviction on count 1 (persecution). In such a situation, the argument does not have the potential to affect the outcome of this appeal and, therefore, does not constitute an appropriate ground of appeal. Zoran Kupre{ki} further complains that the Trial Chamber failed to establish whether he was a perpetrator or a co-perpetrator of the crime for which he was convicted.[31] The Appeals Chamber considers this argument to be misconceived. The Trial Chamber found in paragraph 782 of the Trial Judgement that he, in the commission of persecution, "acted as a co-perpetrator…within the meaning of Article 7(1) of the Statute".

24. The Appeals Chamber finds that these arguments made by Zoran Kupre{ki} illustrate grounds of appeal that cannot appropriately be argued on appeal since they fail to raise errors of law or fact that invalidate the judgement or that have occasioned a miscarriage of justice. Accordingly, they are dismissed.

25. In a similar vein, the Appeals Chamber dismisses Zoran and Mirjan Kupre{ki}'s common argument that the Trial Chamber incorrectly attributed the defence of reciprocity (*tu quoque*) to them. The Trial Chamber rejected this as a legitimate defence. The Trial Judgement stated that "[d]efence counsel have indirectly or implicitly relied upon the *tu quoque* principle".[32] Zoran and Mirjan Kupre{ki} have both emphatically denied that they raised such a defence before the Trial Chamber. It may well have been that neither Zoran nor Mirjan Kupre{ki} intended to raise this particular defence, but that the Trial Chamber interpreted their arguments to fall under the *tu*

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[29] *Tadi}* Appeal Judgement, para. 247.
[30] Zoran Kupre{ki} Appeal Brief, para. 10. Zoran Kupre{ki} also takes issue with the allegation that he helped prepare the onslaught on Ahmi}i by preparing his home and the homes of his relatives as staging areas and firing locations for the attack. Due to the fact that this allegation did play a part in his conviction it is dealt with in substance *infra* paras. 233-241.
[31] Zoran Kupre{ki} Appeal Brief, para. 143. *See also* para. 146 (restating the argument that the Trial Chamber failed to establish whether he was considered to be a perpetrator or a co-perpetrator).
[32] Trial Judgement, para. 515.

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quoque principle. Whether the Trial Chamber was correct or not in so doing is a matter upon which the Appeals Chamber expresses no view. It is sufficient to observe that the point raised by Zoran and Mirjan Kupre{ki} is of no significance for the purpose of deciding this appeal as it had no bearing upon the convictions of the Defendants. In such circumstances, this argument constitutes an inappropriate ground of appeal.

26. Mirjan Kupre{ki} has made certain submissions in respect of the preconditions for crimes against humanity and the elements of the crime of persecution under Article 5(h) of the Statute.[33] The Appeals Chamber notes that he appears to be rearguing the same case that he raised before the Trial Chamber. A comparison between Mirjan Kupre{ki}'s Closing Brief, filed at trial, and his Appeal Brief shows that his submissions on these issues in the two documents are virtually identical.[34] Importantly, the relevant section of Mirjan Kupre{ki}'s Appeal Brief does not identify any legal error on the part of the Trial Chamber, such as, for example, a discrepancy between the elements of the crime identified by him and those identified by the Trial Chamber. Admittedly, alleged errors of law do not require that the appellant make as specific a showing of an error by the Trial Chamber as do alleged errors of fact. In the *Furund`ija* Appeal Judgement, the Appeals Chamber held that

> [w]here a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[35]

27. The Appeals Chamber notes, however, that a party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber. The Appeals Chamber, therefore, finds that the arguments of Mirjan Kupre{ki} relating to the preconditions of crimes against humanity and elements of persecution must be dismissed for failure to identify any legal error on the part of the Trial Chamber.

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[33] Mirjan Kupre{ki} Appeal Brief, 140-147.
[34] Mirjan Kupre{ki} Appeal Brief, 140-147; Mirjan Kupre{ki} Closing Brief, 86-91.
[35] *Furund`ija* Appeal Judgement, para. 35 (discussing the standard applied to determine legal errors).

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B. Reconsideration of factual findings made by the Trial Chamber

1. General principles

28. Under this heading, the Appeals Chamber will discuss the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. The vast majority of the grounds of appeal raised by the Defendants in this case concerns alleged errors of fact. Several of the parties to the present appeal have also raised questions of a more general nature relating to the Appeals Chamber's review of errors of fact under Article 25(1)(b) of the Statute.[36] In light thereof, the Appeals Chamber considers it appropriate to elaborate upon this matter.

29. In order for the Appeals Chamber to overturn a factual finding by the Trial Chamber, an appellant must demonstrate that the Trial Chamber committed a factual error and the error resulted in a miscarriage of justice.[37] The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[38] Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice.[39]

30. 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. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[40]

31. As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to "admit any relevant evidence which it

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[36] *See, e.g.*, Josipovi} Appeal Brief, 8 and 20; Zoran Kupre{ki} Appeal Brief, para. 42 (questioning the probative value of a single identification witness); Zoran Kupre{ki} Appeal Brief, para. 83 (questioning acceptability of evidence in light of factors such as the passage of time between the events and the testimony, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place); Zoran Kupre{ki} Appeal Brief, para. 12 (arguing that the Trial Chamber is obliged to refer to all pieces of evidence relied upon or to refer to all pieces of possibly contradictory evidence); Zoran Kupre{ki} Appeal Brief, paras 23 and 50 (questioning reasoning as to why the evidence of one witness is preferred but not the evidence of another).

[37] *Furundžija* Appeal Judgement, para. 37 (citing *Serushago* Sentencing Appeal Judgement, para. 22).

[38] *Furund`ija* Appeal Judgement, para. 37 (quoting Black's Law Dictionary (7th ed., 1999)).

[39] *Furund`ija* Appeal Judgement, para. 37.

[40] *Tadi}* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *^elebi}i* Appeal Judgement, paras 434 and 491; *Tadi}* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 30.

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deems to have probative value", as well as to exclude evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."[41] As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the "fundamental features" of the evidence.[42] The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable.[43] Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.

32. The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence.[44] Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute. In the *Furundžija* Appeal Judgement, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[45]

33. It follows from the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.[46] With the exception of the testimony of a child not given under solemn

[41] Rules 89(C) and (D).
[42] *^elebi}i* Appeal Judgement, paras 485 and 496-498.
[43] *^elebi}i* Appeal Judgement, paras 485 and 496-498.
[44] *Furund`ija* Appeal Judgement, para. 37.
[45] *Furundžija* Appeal Judgement, para. 69. This decision recalls principles drawn from the case-law of the European Court of Human Rights, which indicate that "the extent to which this duty…applies may vary according to the nature of the decision" and "can only be determined in the light of the circumstances of the case". *Ruiz Torija* v *Spain*, 303 Eur. Ct. H. R. (series A) at para. 29 (1994). However, a "tribunal" is not obliged to give a detailed argument in respect of every argument. *See* Van de Hurk v *The Netherlands*, 288 Eur. Ct. H. R. (series A) at para. 61 (1994).
[46] *Tadi}* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *^elebi}i* Appeal Judgement, para. 492 and 506; *Kayishema* Appeal Judgement, para. 154.

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declaration,[47] the Trial Chamber is at liberty, in appropriate circumstances, to rely on the evidence of a single witness.

34. The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognise the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations. In the well known United Kingdom case of *R.* v *Turnbull*, the court held that, when a witness has purported to identify the accused under difficult circumstances, the judge should "withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification…". It further underscored the need always to caution a jury about the dangers of identification evidence.[48]

35. The *Turnbull* principles are reflected in the jurisprudence of many other common law countries.[49] The High Court of Malaya, for example, has pointed out that

> [t]here have been many cases of wrongful convictions based on mistaken eyewitness identification. It has been held that evidence as to identity based on personal impressions, however bona fida, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict.[50]

36. Similarly, the Supreme Court of the United States, has emphasised that the

> 'influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor--perhaps it is responsible for more errors than all other factors combined'…And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest…the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification….[51]

37. Despite the deference afforded to trial court findings of fact in domestic legal systems, particularly on issues of witness credibility, appellate courts have, on occasion, found the factual

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[47] Rule 90(B).

[48] *R.* v *Turnbull*, [1976] 63 Cr. App. R. 132.

[49] Regarding the position in Canada, *see R.* v *Carey* (1996), 113 C.C.C. (3d) 74 (requiring "a special warning on the frailties of eyewitness identification" be given to a jury by a trial court "whenever the defence alleges such identification to be mistaken…")(citations omitted); *see also R.* v *Mezzo*, [1983] 10 W.C.B. 247. Regarding the position in Australia, see *Domican* v *R.*, [1992] 106 A.L.R. 203 (1991).

[50] *Jafaar bin Ali* v *PP* [1998] 4 M.L.J. 406; *see also Arumugam s/o Muthusamy* v *PP* [1998] 3 M.L.J. 73.

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findings upon which lower courts have based their conclusions unreasonable and have quashed resulting convictions. In one of the appeals considered in *Turnbull*, for example, the appellate court found that the decision of the trial court to convict the accused was unsafe and unsatisfactory. In doing so, the court noted that there was no suggestion that the identification witnesses were dishonest and that one of the witnesses, in particular, was acknowledged to have been a very "impressive" witness. Nonetheless, the appellate court found that "the quality of the identifications was not good, indeed there were notable weaknesses in it and there was no evidence capable of supporting the identifications made." Accordingly, the court allowed the appeal against conviction.[52]

38. Most civil law countries adopt the principle of "free evaluation of evidence", allowing judges considerable scope in assessing the evidence put before them.[53] The decisive element is the intimate conviction of the trial judge, which determines whether or not a given fact has been proven. However, the Federal Court of Germany, for example, has pointed out that a trial judge must exercise extreme caution in the evaluation of a witness' recognition of a person.[54] Particularly in cases where the identification of the accused depends upon the credibility of a witness testimony, the trial judge must comprehensively articulate the factors relied upon in support of the identification of the accused and the evidence must be weighed with the greatest care.[55] The Supreme Court of Austria, has emphasised that, where the identification of the accused depends upon a single witness, a fact finder must be extremely careful in addressing specific arguments raised by the defendant about the credibility of the witness.[56] Similarly, the Supreme Court of Sweden has held, on numerous occasions, that all imprecision or inaccuracy in a witness' testimony must be addressed and analysed thoroughly by the fact finder.[57]

39. In cases before this Tribunal, a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing a witness' identification of the accused made under difficult circumstances. While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification

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[51] *U.S.* v *Wade*, 388 U.S. 218, 228-229 (1967)(citation omitted).

[52] *R.* v *Turnbull*, [1976] 63 Cr. App. R. 132, 141.

[53] For the position in Austria, *see* § 258 (2) Strafprozessordnung; for the position in Germany, *see* § 261 Strafprozessordnung; for the position in Italy, *see* Art. 192 Codice di Procedura Penale; for the position in Portugal, *see* Art. 127 Codigo de Processo Penal; for the position in Sweden, *see* Chapter 35 § 1 Rättegångsbalken; for the position in Spain, *see* Art. 741 Ley de Enjuiciamiento Criminal.

[54] *See, e g.*, Entscheidungen des Bundesgerichtshofs in Strafsachen Vol. 16, p. 204 and Vol. 28, p. 310.

[55] *See, e.g.*, Bundesgerichtshof, *reprinted in* Strafverteidiger 409 (1991); *see also* Bundesgerichtshof, *reprinted in* Strafverteidiger 555 (1992).

[56] *See, e.g.*, Oberster Gerichtshof, 10 December 1992, 15 0s 150 / 92; 4 June 1996, 11 0s 59 / 96 and 20 March 2001, 11 0s 141 / 00.

[57] *See e.g.,* Nytt Judiriskt Arkiv 725 (1980), 446 (1992) and 176 (1996).

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evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". In particular, a reasoned opinion must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence. As stated by the Canadian Court of Appeal in *R.* v *Harper*:

> Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.[58]

40. Courts in domestic jurisdictions have identified the following factors as relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable or renders a conviction unsafe: identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant;[59] identifications occurring in the dark[60] and as a result of a traumatic event experienced by the witness;[61] inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event;[62] misidentification or denial of the ability to identify followed by later identification of the defendant by a witness;[63] the existence of irreconcilable witness testimonies;[64] and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[65]

41. In sum, where the Appeals Chamber is satisfied that the Trial Chamber returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was "wholly erroneous", it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.[66] This is the standard the Appeals Chamber will apply when considering the challenges raised by the Defendants to the Trial Chamber's factual findings in the present case.

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[58] *R.* v *Harper*, [1982] 1 S.C.R. 2.
[59] *R.* v *Turnbull*, [1976] 63 Cr. App. R. 132.
[60] *R.* v *Turnbull*, [1976] 63 Cr. App. R. 132.
[61] *Jaafar bin Ali* v *PP*, [1998] 4 M.L.J. 406.
[62] *People (DPP)* v *Cox*, 28th April, 1995, (CCA) 4/93.
[63] *Domican* v *R.*, [1992] 186 A.L.R. 203.
[64] *People (DPP)* v *McNamara*, 22nd March, 1999, (CCA) 111/95.
[65] *R.*v *Burke*, [1996] 1 S.C.R. 474. In *Burke*, at para. 53, the appellate court found it unacceptable that the trial judge "made no comment on the frailty of the identification evidence" other than the general statement that she found the witness' evidence credible and therefore accepted it.
[66] *Tadi}* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; and *^elebi}i* Appeal Judgement, para. 491.

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2. Reconsideration of factual findings where additional evidence has been admitted under Rule 115

(a) Introduction

42. During this appeal, a total of 26 motions were filed before the Appeals Chamber by the Defendants pursuant to Rule 115 of the Rules, seeking to admit a wide variety of additional evidence, including the evidence of new witnesses, documents obtained from Croatian State archives and other sources, as well as video-recordings.[67] During the Appeal Hearing, the Defendants contended that the additional evidence would cast new light upon the evidence already presented at trial, putting the Appeals Chamber "in a much better position to see the fuller picture, to evaluate [and] to recognise the limitations of the evidence" before the Trial Chamber upon which the Defendants' convictions were based.[68] As a result of the applications, seven Appeals Chamber decisions were issued, an oral hearing was held, and an evidentiary hearing conducted involving the testimony of live witnesses.[69]

43. Rule 115 refers to "additional evidence", but variously during the course of these appellate proceedings, the terms "fresh evidence" and "new evidence" were also used to describe evidence submitted after the trial was over. This Chamber uses all three terms synonymously.

44. Article 25 of the Statute mandates the Appeals Chamber to hear appeals from persons convicted by the Trial Chambers or from the Prosecution on the ground of "an error of fact which has occasioned a miscarriage of justice". The decision of the Trial Chamber may be affirmed, reversed or revised. As stated above, where an appellant establishes that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the Appeals Chamber will allow the appeal and enter a judgement of acquittal.[70] A miscarriage of justice may equally be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the evidence presented at trial that is reasonable at the time (and thus would not fall within the category of error of fact just mentioned) but, *in reality*, is incorrect.[71] As a result of a perfectly reasonable decision based upon seemingly reliable

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[67] The video recordings depicted visibility conditions in the villages of Ahmici and Šantici, and an oath-taking ceremony in Vitez.
[68] Appeal Transcript, 612.
[69] For a discussion of these matters, *see* Procedural Background, Annex A.
[70] *Celebici* Appeal Judgement, para. 435; *see also Tadic* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Furundžija* Appeal Judgement, para. 37.
[71] *See Tadic* Rule 115 Decision, paras 37-38 (stating that, regarding Art. 25(1)(b), providing for appeals on the ground of "an error of fact which has occasioned a miscarriage of justice", "it is difficult to see how the Trial Chamber may be said to have committed an error of fact where the basis of the error lies in additional evidence which, through no fault of

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evidence before it, the Trial Chamber may have convicted an innocent person. There are a host of reasons as to why evidence that was accepted as reliable by a Trial Chamber may subsequently be shown to be incorrect: the numerous practical difficulties that all parties at trial before the Tribunal face in locating all relevant witnesses and documentary evidence from distant countries, not always co-operative with the Tribunal, is one such problem. There is a real danger of a miscarriage of justice when a Trial Chamber is deprived of crucial evidence relating to the guilt or innocence of an accused that does not surface until the trial is completed – through no fault of the parties. Where, during the appellate proceedings, a party is successful in locating additional evidence demonstrating that a Trial Chamber's finding of guilt is erroneous, it will fall within the Appeals Chamber's jurisdiction to hear an appeal on the ground of "an error of fact that has occasioned a miscarriage of justice".

45. A review of some of the world's legal systems reveals that, where new facts or new evidence demonstrate that first instance decisions are erroneous, appellate courts are permitted to revisit their factual determinations. Civil law systems provide the accused with the right to appeal to a superior court against a judgement of conviction, which involves reconsideration of both fact and law. Such an appeal enables the merits of a case to be re-determined,[72] with the accused being able to adduce, without any restriction, new evidence that was not before the court of first instance. Additionally, civil law systems normally provide a further appeal to a supreme court confined to errors of law,[73] whereby the court may confirm or quash a conviction, or order a retrial before a lower court.

46. By contrast, in the common law criminal systems, if an appellant is permitted to appeal against a judgement of conviction, there is no automatic entitlement to adduce new evidence before the appellate body. The admission of additional evidence is generally governed by statutory provisions. In England and Wales, the Court of Appeal can receive fresh evidence adduced by an

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the Trial Chamber, was not presented to it…[i]t is only by construing the reference to 'an error of fact' as meaning objectively an incorrectness of fact disclosed by relevant material…that additional material may be admitted.")

[72] Examples are the systems of "*appel*" in France (Art. 546 *et seq.*, Code de Procedure Penale) and Belgium (Art. 199 *et seq.*, Code d'Instruction Criminelle); "*Berufung*" in Germany (§§ 312-332, Strafprozessordnung (1999)); "*appello*" in Italy (Arts. 593-605, Codice di Procedura Penale (2001)); "*hogerberoep*" in the Netherlands (Arts. 404; 425 *et seq.*, Strafvordering: Tekst & Commentaar (1997)); "*anke*" and "*fuldstoendig anke*" in Denmark (§ 943-960, Administration of Justice Act); "*recurso de apelacion*" in Spain (Arts. 795-796, 846 (*bis*), Ley de Enjuiciamiento Criminal of 1882 (1996)); "*Žalba na presudu*" in Bosnia and Hercegovina (Arts. 357; 360; 381, Federation Criminal Procedure Code (1998)).

[73] Examples are "*pourvoi en cassation*" in France (Arts. 592-596; 599, Code de Procedure Penale (2001)) and Belgium (Art. 416 *et seq.*, Code d'Instruction Criminelle); "*Revision*" in Germany (§§333-358, Strafprozessordnung (1999)); "*ricorso per cassazione*" in Italy (Arts. 606-628, Codice di Procedura Penale (2001)); "*cassatieberoep*" in the Netherlands (Art. 427 and 441, Strafvordering: Tekst & Commentaar; Art. 99, Wet op de Rechtelijke Organisatie (1997)); "Revising Appeal" in Denmark (§ 943-960, Administration of Justice Act); "*recurso de casacion*" or "*recurso de queja*" in Spain (Arts. 847; 849(1) and (2), 850-851, 901 (*bis*)(a), Ley de Enjuiciamiento Criminal of 1882 (1996)).

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appellant if it is of the view that the evidence "may afford any ground for allowing the appeal".[74] Similarly, in Canada, Section 683(d) of the Criminal Code, setting out the powers of the Court of Appeal, permits the admission of new evidence where it is considered to be "in the interests of justice".[75] The test for admission is whether the fresh evidence is of sufficient strength that it might reasonably affect the verdict of the jury.[76] In the United States of America, a person convicted of a federal crime may challenge his or her conviction by petitioning an appellate court of the appropriate jurisdiction for review, and ultimately, reversal of the lower court verdict. However, an appellate court will not, upon review of legal error, review the findings of fact made by the court of first instance; it is not free to disturb the findings of fact made by the original trial court by considering new facts not presented to the trial court. In such a case, the Federal Rules of Criminal Procedure prescribe that the convicted person may file a motion for a new trial on the basis of newly discovered evidence before the trial court, which may grant the motion "if the interests of justice so require".[77] It is to be noted that motions for new trial based upon newly discovered evidence are disfavoured by the U.S. courts.[78] In Australia, all jurisdictions provide for the admission of new evidence at the appeal stage in the state courts, if the court thinks "it necessary or expedient in the interests of justice".[79] In South Africa, appellate courts are empowered to hear additional evidence.[80] In order to admit new evidence, the appellate court must consider the evidence to be materially relevant to the outcome of the trial.[81] In Malaysia, following an appeal

[74] Section 23 of the Criminal Appeal Act 1968 (as amended and repealed in part by the Criminal Appeal Act 1995).

[75] The section provides that "the court of appeal may, where it considers it in the interests of justice, receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness".

[76] *R.* v *McMartin* [1965] 1 C.C.C. 142.

[77] Fed. R. Crim. P. 33 provides: "On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may -- on defendant's motion for new trial -- vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based upon newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period".

[78] *United States* v *Oates*, 445 F. Supp. 351 *aff''d without op*, 591 F.2d 1332 (2nd Cir. 1978). This caution is reflected in the specific factors enunciated and applied by the federal courts to determine the validity of a motion for a new trial based upon discovery of new evidence. The courts have consistently stated that such evidence: (1) must be discovered after the trial, such as to assure the court of the diligence of the movant during the trial; (2) the evidence must not be "merely criminal or impeaching" but material to the issues involved in the earlier trial; (3) the evidence must be such that it would "probably produce" acquittal upon retrial. *See United States* v *Ortiz*, 23 F.3d 21, 27 (1st Cir. 1994); *see also generally Johnson* v *United States*, 32 F.2d 127 (8th Cir. 1929); *United States* v *Marachowsky*, 213 F.2d 235 (7th Cir. 1954), *cert. den.*, 348 U.S. 826 (1954); *United States* v *Joselyn*, *et al.*, 206 F.3d 144 (1st Cir. 2000).

[79] Section 574 of the Victorian Crimes Act of 1958, for example, permits the Full Court of the Supreme Court of Victoria to allow the admission of new evidence upon an appeal if it thinks it necessary or expedient in the interests of justice.

[80] Art. 304(2) (*b*) and Art. 309(3) of the Code of Criminal Procedure grant a local division of the Supreme Court sitting as a court of appeal the authority to hear evidence. Section 22 of the Supreme Court Act 59 of 1959 grants provincial and local courts the power to preside over and grant appeals. The court is also empowered under section 304(2)(c)(v) and section 22 of the Supreme Court Act to remit or remand the case to the magistrate's court, the court of first instance, with directions regarding the evaluation of the new evidence.

[81] In *S* v *De Jager*, 1965 (2) SA 612 (A), it was held that "the requirements which should be complied with before the Appellate Division or any other court of appeal … would be prepared to hear new evidence are set out as 613 C-D as

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from a Magistrates' or Sessions Court judgement to the High Court, a High Court Judge may, if he thinks additional evidence necessary, take that new evidence himself or direct it to be taken by a Magistrate (i.e., in the lower court).[82]

47. It may also be noted that the Rome Statute of the International Criminal Court, like the Statute of the Tribunal, provides that, when it revisits a first instance judgement in light of new evidence showing that such a judgement is erroneous, the Appeals Chamber may remand a "factual issue" to the original Trial Chamber for it to determine a new factual issue that arises on appeal, or may itself call evidence to determine the issue.[83] As to revision of conviction or sentence, a party may apply to the Appeals Chamber to revise a final judgement on the grounds that new evidence has been discovered that "is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict".[84]

(b) Tribunal jurisprudence relating to Rule 115

48. The Appeals Chamber first addressed the issue of admitting additional evidence under Rule 115 of the Rules during the *Tadic* appellate proceedings. There, Tadic sought to call more than 80 new witnesses as well as to adduce new documentary material. In its decision of 15 October 1998 (*Tadic* Rule 115 Decision), the Appeals Chamber considered whether the appropriate vehicle for the presentation of additional evidence during the pendency of appeal was a "review proceeding" under Article 26 of the Statute and Rule 119, or as part of "appellate proceedings" under Article 25 and Rule 115. In *Tadic*, the Appeals Chamber held that

> where an applicant seeks to present *a new fact* which becomes known only after trial, ... Rule 119 is the governing provision. In such a case the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact".[85]

Further, "[t]he mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules".[86] Rule 115 was held to be

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follows: (a) there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; (b) there should be *prima facie* likelihood of the truth of the evidence; (c) the evidence should be materially relevant to the outcome of the trial". This standard, and underlying considerations, are relevant to the work of all appellate courts, regardless of whether they are local, provincial or national. *See R.* v *De la Bat*, (1) 1959 (3) SA 67 (c) 69G-70D; *S* v *Steyn*, 1981 (4) SA 385 (c) 386D-F).

[82] Section 317 of Criminal Procedure Code of Malaysia (F.M.S. Cap. 6) (as in force on 15th May 1991).

[83] *See* Rome Statute of the International Criminal Court, 17 Aug. 1998, PC NICC/1999/INF/3, Art. 83.

[84] Rome Statute of the International Criminal Court, 17 Aug. 1998, PC NICC/1999/INF/3, Art. 84.

[85] *Tadic* Rule 115 Decision, para. 30 (emphasis added).

[86] *Tadic* Rule 115 Decision, para. 32.

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applicable in *Tadic* because the appellant proposed to admit "additional evidence of facts put in issue at trial".[87]

49. The Appeals Chamber thus ruled that Rule 115 could be utilised to admit new evidence on appeal that had not been put before a Trial Chamber provided that it was *additional* to evidence adduced at trial in respect of what was variously termed, "a fact that was considered at trial", "a fact which was known at trial" or "facts put in issue at trial". To summarise, Rule 115 is applicable provided that the new evidence goes to prove an underlying fact that was at issue in the original trial. The Appeals Chamber then proceeded to consider the applicable criteria for admitting additional evidence under Rule 115.

(i) Not available at trial

50. As to Rule 115(A)'s requirement that the evidence "was not available" to the party at trial, the Appeals Chamber in *Tadic* held, following the approach adopted for Rule 119, that a party must demonstrate that due diligence had been exercised by the moving party at trial.[88] The Statute imposes "a duty to be reasonably diligent" upon trial counsel.[89] This requirement conforms with the position in many of the common-law criminal systems. Moreover, *Tadic* held that the duty to act with reasonable diligence includes making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber".[90] This means, for example, that if a party experiences difficulty in calling a witness to testify at trial, it must apprise the Trial Chamber so that the Chamber may consider imposing coercive or protective measures. Otherwise, the party will not be able to demonstrate that it has acted with reasonable diligence.[91]

51. The Appeals Chamber also recognised an exception to the requirement that the new evidence "was not available" in cases where "*gross negligence is shown to exist*"[92] on the part of counsel at trial.

(ii) Admission required in the interests of justice

52. Rule 115(B) requires that "the Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require". In interpreting this Rule, the Appeals Chamber in *Tadic* held that

[87] *Tadic* Rule 115 Decision, para. 32.
[88] *Tadic* Rule 115 Decision, para. 36.
[89] *Tadic* Rule 115 Decision, para. 44.
[90] *Tadic* Rule 115 Decision, para. 47.
[91] *Tadic* Rule 115 Decision, para. 62.
[92] *Tadic* Rule 115 Decision, para. 48 (emphasis added) and para. 50.

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[f]or the purposes of this case, the Chamber considers that the interests of justice require admission only if:

(a) the evidence is relevant to a material issue;

(b) the evidence is credible; and

(c) the evidence is such that it would probably show that the conviction was unsafe.[93]

53. In *Tadic*, having found that there were items of additional evidence that satisfied the requirement of non-availability at trial, the Appeals Chamber was not satisfied that it was necessary to admit any of those items in the interests of justice.[94] The Chamber did not elaborate, however, upon precisely how the criteria enunciated above were applied to these items.

54. The third component of the *Tadic* criteria (the evidence is such that it would probably show that the conviction was unsafe) was developed further by the Appeals Chamber in *Jelisic*. There, the Appeals Chamber held that "the admission of additional evidence is in the interests of justice if it is relevant to a material issue, if it is credible and if it is such that it would probably show that a conviction *or sentence* was unsafe".[95] This permits of the possibility that an item of fresh evidence, while lacking the capacity to demonstrate that a conviction is unsafe, could reveal that factors taken into account by the Trial Chamber *during sentence* were incorrect and, therefore, that the culpability of the appellant for an offence may be reduced.

(iii) Rule 89(C)

55. In both *Furundžija* and *Celebici*, appeals were filed challenging the fairness of the trial. In *Celebici*, it was alleged that one of the trial judges was disqualified from being a judge of the Tribunal; in *Furundžija*, an attack was made on the impartiality of one of the trial judges. In each appeal, the appellants sought to adduce new evidence before the Appeals Chamber to support their arguments, however, Rule 115 was held to be inapplicable.[96] Nonetheless, the appellants in those cases were permitted to file new evidence before the Appeals Chamber. In *Celebici*, the Appeals Chamber held that

[w]hile Rule 115 of the Rules of Procedure and Evidence limits the extent to which evidence upon matters relating to the guilt or innocence of the accused may be given before the Appeals Chamber (being the issue

[93] *Tadic* Rule 115 Decision, para. 71.
[94] *Tadic* Rule 115 Decision, para. 74.
[95] *Prosecutor* v *Jelisic*, Case No.: IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 Nov 2000, 3 (emphasis added).
[96] *See Prosecutor* v *Furundžija*, Case No.: IT-95-17/1-A, Order on Defendant's Motion to Supplement Record on Appeal, 2 Sept 1999, 2; *Prosecutor* v *Delali} et al.,* Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 October 1999, 4. The Court held that Rule 115 was inapplicable because the new evidence was concerned with facts not at issue at trial and "not [concerned] with the guilt or innocence of the Appellant".

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litigated in the Trial Chamber), when the Appeals Chamber is hearing evidence which relates to matters other than the issues litigated in the Trial Chamber, *the Appeals Chamber is in the same position as a Trial Chamber, so that Rule 107 applies to permit the Appeals Chamber to admit any relevant or probative evidence pursuant to Rule 89(C)*...[97]

56. Under sub-Rule 89(C), a Trial Chamber has residual discretion to admit any item of evidence it deems to have probative value. Rule 107 of the Rules, setting out general provisions governing appellate proceedings, provides that the rules of procedure and evidence governing proceedings in the Trial Chambers also apply *mutatis mutandis* to proceedings in the Appeals Chamber, although not all Rules applicable at the trial stage automatically apply at the appellate stage.[98]

57. It follows that Rule 115 does not provide the sole basis for the admission of evidence during appellate proceedings. A question then arises as to which is the applicable Rule when a party is seeking to admit new evidence: Rule 115 or 89(C)? In the *Kupreškic* appellate proceedings, in deciding whether Rule 115 was the applicable Rule in dealing with the motions, the Appeals Chamber adopted the *Tadic* approach. If the Appeals Chamber considered that the proposed additional evidence related to a fact or issue already litigated at trial, Rule 115 was usually applied.[99] In view of the extension of Rule 115 to sentencing matters in *Jelisic*, the Appeals Chamber in the present appeal did not limit its consideration to whether the new evidence related to the "guilt or innocence of the accused", as did some of the earlier Appeals Chamber decisions on the applicability of Rule 115.[100]

[97] *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order in Relation to Witnesses on Appeal, 19 May 2000, 3 (emphasis added); *see also Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 Feb 2000, 3; *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, 2. *See also Prosecutor* v *Akayesu*, Case No.: ICTR-96-4-A, Decision (Concerning Motions 2, 3, 4, 5, 6 and 8 Appellant's Brief Relative to the Following Motions Referred to by the Order Dated 30 November 1999), 24 May 2000, 4.

[98] *Prosecutor* v *Blaškic*, Case No.: IT-95-14-T, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 Sept 2000, para. 32. Rule 107 enables "the Appeals Chamber to import rules for trial proceedings to fill a lacuna in appellate proceedings, subject to appropriate modifications".

[99] *See* Rule 115 Decision of 26 February 2001, para. 13; Rule 115 Decision of 11 April 2001, para. 13.

[100] *See, e.g.*, *Prosecutor* v *Furundžija*, Case No.: IT-95-17/1-A, Order on Defendant's Motion to Supplement Record on Appeal, 2 Sept 1999, 2; *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999, 4; *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order in Relation to Witnesses on Appeal, 19 May 2000, 3; *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 Feb 2000, p. 2; *Prosecutor* v *Delalic et al.*, Case No.: IT-96-21-A, Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, 2. Also applied by the Appeals Chamber of the ICTR in *Prosecutor* v *Akayesu*, Case No.: ICTR-96-4-A, Decision (Concerning Motions 2, 3, 4, 5, 6 and 8 Appellant's Brief Relative to the Following Motions Referred to by the Order Dated 30 November 1999, 24 May 2000, 4.

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(iv) Miscarriage of justice

58. Rule 115, as interpreted in *Tadic*, sets a strict standard for the admission of additional evidence. As to Rule 115(A), subject to the exception of proof that counsel at trial was grossly negligent, the evidence must not have been available at trial to counsel acting with reasonable diligence. A less rigid application of this sub-Rule was adopted in *Semanza*, which concerned an interlocutory appeal. The *Tadic* Rule 115 Decision emphasised that the principle of finality of decisions does not "prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice".[101] In *Semanza*, the Appeals Chamber of the ICTR interpreted this to mean that the "principle [of finality] may exceptionally be rendered less absolute by the need to avoid a miscarriage of justice".[102] In that case, Semanza had applied to the Trial Chamber for release on the basis that the ICTR lacked jurisdiction due to his alleged illegal arrest and detention. Following dismissal of the motion, he appealed to the Appeals Chamber of the ICTR. During the appellate proceedings, the Prosecution sought to admit fresh evidence under Rule 115 to demonstrate further that Semanza's arrest and detention was lawful. Finding that the Prosecution had failed to demonstrate that the evidence was unavailable at trial, and thus had failed to satisfy the requirement of Rule 115(A), the Appeals Chamber, nonetheless, admitted certain items of evidence. It did so on the basis that, "if henceforth it refuses to admit certain items of evidence in the instant case a miscarriage of justice will result".[103] While *Semanza* was concerned with the admission of additional evidence during the course of an interlocutory appeal, the Appeals Chamber of the ICTY in *Jelisic* confirmed the applicability of this principle to ICTY appellate proceedings on the merits. In that case, the Appeals Chamber held that it "maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice".[104]

(c) Application of the above principles in *Kupreškic*

59. Against this jurisprudential background and with these principles in mind, the Appeals Chamber dealt with the many motions for the admission of fresh evidence in this appeal.

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[101] *Tadic* Rule 115 Decision, para 72.
[102] *Prosecutor* v *Semanza*, Case No.: ICTR-97-20-A, Decision, 31 May 2000, para. 41.
[103] *Prosecutor* v *Semanza*, Case No.: ICTR-97-20-A, Decision, 31 May 2000, para. 45.
[104] *Prosecutor* v *Jelisic*, Case No.: IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 Nov 2000, 3. A similar principle, that the Appeals Chamber would not be constrained by the express meaning of the Rules where the admission of evidence was necessary in order to avoid a miscarriage of justice, was established by the Appeals Chamber of the ICTR during "request for review" proceedings in *Prosecutor* v *Barayagwiza*, under Art. 25 and Rule 120 of the ICTR Statute and Rules (corresponding to Art. 26 and Rule 119 of the ICTY Statute and Rules). There, the Appeals Chamber took account of new facts presented to it by the Prosecution, notwithstanding its finding that the Prosecution may have known of them, or could have discovered them, during the earlier proceedings. The Appeals Chamber held that the words of Rule 120 were "directory" in nature and, "in the face of a possible miscarriage of

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(i) Not available at trial

60. The decision as to whether the evidence in issue was available at trial sometimes required the Appeals Chamber to carry out a preliminary factual determination. In relation to those motions seeking to admit documents from the Croatian State archives, the issue of non-availability was not in dispute as the Prosecution conceded that, since the documents had not been available to it, they would not have been available to the Defendants during trial either.[105] Where non-availability was in issue, however, the moving party was required to supplement the material presented to the Appeals Chamber relating to the substantive value of the evidence with material tendered for the purpose of demonstrating why the additional evidence was not available at trial.[106] For example, in explaining why the additional evidence that he proposed to tender under Rule 115 was not available at trial, Vlatko Kupreškic sought to rely upon the exception to Rule 115(A), where "gross negligence is shown to exist". He attempted to demonstrate that counsel representing the Defendant at trial had been grossly negligent in the performance of his duties, by failing to present any adequate defence to the persecution charge. In addition to the additional evidence itself, Vlatko Kupre{ki} also tendered evidence to demonstrate the existence of gross negligence.[107] The Appeals Chamber confirmed that proof of gross negligence by trial counsel constitutes an exception to Rule 115(A). It then considered whether, on the material presented to it by the parties, Vlatko Kupreškic had demonstrated that the performance of counsel at trial fell outside of the range of reasonable professional assistance.[108] In this case, the Defendant was unable to do so.

(ii) Admission required in the interests of justice

61. The Appeals Chamber in the present appeal gave detailed consideration to the three components that must be fulfilled in order to satisfy the "interests of justice" requirement: the evidence must be relevant to a material issue; credible; and such that it would probably show that the conviction or sentence was unsafe. Following the *Tadi}* formulation, the Appeals Chamber was

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justice", account was to be taken of the new facts. *See Prosecutor* v *Barayagwiza*, Case No.: ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 65.

[105] Prosecution's Consolidated Response to the Motions by Zoran Kupreškic, Mirjan Kupreškic, Vlatko Kupreškic and Drago Josipovic to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 20 Nov 2000, paras 2.30 and 3.6.

[106] The Prosecution stated that "[t]o meet the requirements of Rule 115 there is inevitably two categories of evidence presented to the Appeals Chamber; first, evidence offering the explanation as to why the additional evidence was not available at trial; and, second, the additional evidence itself, tendered for admission as relevant to the guilt or innocence of an accused". Prosecution's Consolidated Response to the Motions by Zoran Kupreškic, Mirjan Kupreškic, Vlatko Kupreškic and Drago Josipovic to Admit Additional Evidence Pursuant to Rule 115, 20 Nov 2000, para. 1.30.

[107] Evidence consisted of the defence closing brief for the Accused Vlatko Kupreškic, a letter from Dr. Krajina and Mr. Par dated 28 July 2000 to present counsel, the draft appellant's brief, a statement of Vlatko Kupreškic, the draft rule 115 motion prepared by former counsel, statements of Ljubica Kupreškic, statement of AVK 5, statement of AVK 6, and a list of witnesses for the defence at trial.

[108] Rule 115 Decision of 11 April 2001, paras 24 and 25.

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concerned that only new evidence with the potential to demonstrate a miscarriage of justice should be admitted.

62. As to the relevance component, if the new evidence does not relate to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence, then the new evidence is not capable of demonstrating that a miscarriage of justice had been occasioned, and thus will not be admitted.

63. The credibility component is linked to the danger that appellate proceedings can be abused by a party presenting evidence to the appeal body that appears to be relevant to a material issue, but that has not been tested in the crucible of a trial. In this case, however, the Appeals Chamber was also concerned that, at the relatively early stage of the appeal that the motions for additional evidence were received, the main proceedings should not be unduly delayed by protracted proceedings litigating credibility of evidence tendered in the Rule 115 motions. It would have been counter-productive for the Appeals Chamber to require the parties to present copious amounts of supplementary evidence to demonstrate the veracity of the new evidence, taking up time and resources of the court as well as the parties, only to rule later that the additional evidence did not have the potential of demonstrating that a conviction or sentence was unsafe. The most appropriate course, it was felt at the time, was to apply a relatively low threshold for credibility in admitting additional evidence, with the issue of its weight being decided at a later stage. Accordingly, the Chamber asked itself: does the evidence appear to be reasonably capable of belief or reliance?[109] In doing so, the Appeals Chamber was not accepting the evidence as true, but was acknowledging that there was nothing inherently unbelievable or incredible about it. On the basis that the veracity of the additional evidence would have to be tested at a later stage, in each instance the evidence was admitted, "without prejudice to a determination of the weight to be afforded".[110] However, the Appeals Chamber acknowledged there were instances where credibility had to be determined by hearing witnesses in open court where they could be subjected to cross-examination and it conducted such hearings in the case of three witnesses.[111]

64. The final requirement, that the new evidence must be such that it "would probably show that a conviction or sentence was unsafe", was the most difficult to interpret and has been the focus of vigorous debate between the parties on appeal. In the course of interpreting what that standard means, the Appeals Chamber had cause to reflect whether it is the standard best suited to the initial decision on admissibility or whether it is more effectively used as the criterion when the new

[109] Rule 115 Decision of 26 February 2001, para. 28.
[110] Rule 115 Decision of 26 February 2001, para. 58; Rule 115 Decision of 11 April 2001, paras 17 and 30.
[111] Witness ADA, Miro Lazarevic and Witness ADB.

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evidence is weighed alongside the old in determining the final outcome on appeal. The standard set out in Rule 115 says that the Appeals Chamber shall consider the new evidence if "the interests of justice so require". However, if the standard from *Tadi}*, namely that the additional evidence "would probably show that the conviction was unsafe", is applied at the time of admission, the Appeals Chamber must, at that early point, gauge the capacity of the additional evidence to demonstrate that a conviction has occasioned a miscarriage of justice.

65. It may be the case with some convictions that a new item of evidence is so powerful that its capacity to demonstrate a miscarriage of justice is beyond question. For example, a DNA sample may show that a man could not have been responsible for a rape, or incontestable video footage may emerge showing clearly that somebody other than the convicted person committed a murder. In such a case, an appeal body could conclude with certainty that, had the new evidence been before the Trial Chamber, the new evidence *would* have had effect upon its decision to convict and that a miscarriage of justice has been occasioned. However, in proceedings before this Tribunal, the offences for which the accused are charged and tried usually comprise a series of acts spread over a period of time. The Appeals Chamber is, therefore, far less likely to find situations at the beginning of the appellate proceedings where discrete items of additional evidence so clearly lead it to conclude that a Trial Chamber's finding of guilt was erroneous.

66. In determining whether the new evidence would probably show that a conviction or sentence was unsafe, the Appeals Chamber, in deciding the many Rule 115 motions in this case, first assessed the rationale of the Trial Chamber and the evidence before the Trial Chamber in making its decision. Then, taking into account the submissions of the parties in their written pleadings, the Appeals Chamber made a judgement as to whether the new evidence *could* have had an impact on the Trial Chamber's decision to convict. The application of this principle was expressed in different ways. For example: "if some of the proposed evidence had been presented to the Trial Chamber at trial, and had been accepted, it could have affected some of the Trial Chamber's findings leading to its decision to convict the appellant";[112] it "would probably show that the conviction or sentence is unsafe";[113] "this evidence could have had an effect on the Trial Chamber's findings at trial";[114] and "had the Trial Chamber had such evidence before it, it probably would have come to a different result".[115] Although expressed in these various ways, a realistic evaluation of the standard applied throughout the Rule 115 process shows it to be lower than a strict requirement that the new evidence *would* have had an impact on the Trial Chamber's decision and

[112] Rule 115 Decision of 26 February 2001, para. 28.
[113] Rule 115 Decision of 26 February 2001, para. 58.
[114] Rule 115 Decision of 26 February 2001, para. 106.
[115] Rule 115 Decision of 11 April 2001, para. 6.

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is more akin to a test of whether the new evidence *could* have had an impact on the Trial Chamber's decision. Much of the additional evidence proffered under Rule 115 was rejected, because on assessment by the Chamber, it was clear that it was not capable of having such an impact. In those instances, the Appeals Chamber satisfied itself that, had it been before the Trial Chamber, the evidence could not have made any difference to the outcome. Often, the Chamber stated this with certitude: "The Appeals Chamber is not satisfied that, if the evidence of this witness had been adduced before the Trial Chamber, it would have issued any different findings. The evidence certainly would not have led to a different verdict".[116]

67. The Appeals Chamber must acknowledge, however, that this may not have been true in every instance. In the main appeal of Zoran and Mirjan Kupreškic, the Appeals Chamber's decision that the evidence of Witness AT would not have impacted upon their convictions turned out, on closer inspection of the record, not to be accurate. However, since Witness AT's testimony was available in the record for all the Defendants to utilise, no prejudice resulted.

68. During its deliberations, having heard the submissions of the parties at the Appeal Hearing, the Appeals Chamber has had the opportunity of reviewing its earlier decisions concerning the admission of additional evidence under Rule 115 and is satisfied that no injustice has been caused to the parties that has not been compensated for in the determination of this appeal. The Appeals Chamber does, however, take this opportunity to clarify that, in its view, the more appropriate standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence "could" have had an impact on the verdict, rather than whether it "would probably" have done so.

69. The Appeals Chamber considers this change from the earlier *Tadic* formulation as more a matter of timing than substance. The "would probably" standard is still basically appropriate for the ultimate determination of whether a miscarriage of justice has occurred requiring a reversal. The Appeals Chamber emphasises too that, regardless of the standard used, it is a difficult task to determine whether the interests of justice require the admission of new evidence. The Appeals Chamber, therefore, expects a party seeking to admit evidence to specify clearly the impact the additional evidence could have upon the Trial Chamber's decision. If it fails to do so, it runs the risk of the evidence being rejected without detailed consideration.

[116] Rule 115 Decision of 26 February 2001, para. 41; *see also* Rule 115 Decision of 26 February 2001, para. 48.

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(iii) Testing the admitted evidence

70. Where the Rule 115 evidence is accepted for consideration, the Appeals Chamber has, in effect, decided that the evidence is sufficiently important that, if it had been before the Trial Chamber at trial, the conclusion of guilt could have been different. At that stage in the proceedings, the new evidence may not have been subjected to any form of adversarial scrutiny, save for the Appeals Chamber's initial assessment as to whether it was, on its face, credible. It may be that there is no dispute between the parties as to this issue. But, in the more likely case that the opposing party challenges the veracity of the additional evidence, the Appeals Chamber is faced with a choice – either it can test the evidence itself to determine veracity, or order the case to be remitted to a Trial Chamber (either the Trial Chamber at first instance, or a differently constituted Trial Chamber) to hear the new evidence. In the present case, the Prosecution wished to challenge the veracity of several pieces of additional evidence submitted by the Defendants[117] and the Appeals Chamber decided that the most appropriate course was to hold an evidentiary hearing.[118] In another instance, it admitted two pieces of conflicting evidence without such a hearing, without prejudice to the determination of the weight to be attached thereto.[119]

71. Obviously, an Appeals Chamber may choose to delay its entire decision on the admissibility and weight of new evidence until the time of the main appeal and decide, at one stage, whether the new material will be admitted and whether it will reverse the conviction. Such an approach has advantages since the Appeals Chamber will be making its decision on impact at the same time it considers all the other evidence in the case and after it has completed its study of the trial record. The disadvantage to this procedure is that the parties, in making their main submissions on appeal, are not informed as to whether they can rely on the additional evidence or not. In some cases, the final appeal hearing will be prolonged considerably. The present Rule 115 does not require the admissibility of new evidence to be decided at any particular time. Thus, the Appeals Chamber should choose whether it is most expeditious to postpone hearing the evidence until the time of the main appeal hearing, or to do it earlier, according to the complexity of the new material and of the trial record in the context of what will be assessed. It should be noted that Rule 117 instructs the Chamber to pronounce judgement on the basis of the record on appeal along with any additional evidence it has received. This suggests that, even if the decision to admit the evidence is made at

[117] Prosecution's Consolidated Response to the Motions by Zoran Kupreškic, Mirjan Kupreškic, Vlatko Kupreškic and Drago Josipovic to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 20 Nov 2000, para. 5.4 (stating that "[i]n the event that, contrary to the Prosecution's submission, any of the Motions are granted and the additional evidence admitted by the Appeals Chamber, the Prosecution expressly reserves its right to submit evidence in rebuttal and, if necessary, to request the right to cross-examine any witnesses from whom statements have been proffered").

[118] The Evidentiary Hearing was held on 17, 18 and 25 May 2001.

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the same time as the main appeal, a two-step process is nonetheless envisioned in which new evidence, once admitted, will then be assessed as to its effect upon the appeal as a whole.

(d) Determining miscarriage of justice where additional evidence has been admitted

72. Where additional evidence has been admitted, the Appeals Chamber is then required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice.

73. During the Appeal Hearing, Josipovi} advanced arguments on this issue on behalf of all the Defendants[120] and submitted that the Appeals Chamber should adopt the test existing in most common-law jurisdictions, namely: might or could the additional evidence have caused the Trial Chamber to have arrived at a different verdict.[121] If the answer is 'yes', the Appeals Chamber would allow the appeal, quash the conviction and consider whether to order a retrial.[122] This, it was submitted, is consistent with the Rules relating to review proceedings, which provide that where a new fact has been discovered after judgement, the Chamber rendering the original decision determines whether that new fact *could* have been a decisive factor in reaching a different verdict and, if so, reviews the judgement and makes a further judgement.[123]

74. The Prosecution notes that the Appeals Chamber is not bound by jurisprudence from national jurisdictions[124] and submits that the standard for allowing an appeal where additional evidence has been admitted should be that "[t]he additional evidence must be sufficiently compelling that when assessed in light of all the evidence in the record on appeal, and if believed, it would have tilted the balance in favour of another verdict if it was made available before the Trial Chamber".[125] In reply, the Defendants cautioned against accepting such a "would" standard, which could result in injustice in cases that were not crystal clear.[126] Numerous cases from various jurisdictions were cited in support of both tests.[127]

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[119] The statement of Witness CA was admitted pursuant to the Rule 115 Decision of 26 February 2001. The statement of Witness DD statement was admitted pursuant to the Decision on Prosecution Motion to Admit Additional Evidence in Rebuttal to Additional Evidence Admitted under Rule 115, 6 July 2001.
[120] Appeal Transcript, 557-573; Josipovic Supplemental Document, paras 2-2.9; Josipovic Reply, paras 2.1-2.36.
[121] Appeal Transcript, 560; Josipovi} Supplemental Document, para. 2.5; *see also* Vlatko Kupreškic Supplemental Document, para. 8.
[122] Josipovi} Supplemental Document, para. 2.9(iii).
[123] Josipovi} Supplemental Document, para. 2.7.
[124] Prosecution Response, para. 4.87.
[125] Prosecution Response, para. 4.93; *see also* Prosecution Response, para. 4.90.
[126] Josipovi} Reply, paras 2.1-2.36.
[127] Regarding England and Wales, *see R.* v *Stafford and Luvaglio*, 58 Cr. App. Rep., 256-257 (1973); *R.* v *McNamee*, 1998 C.A. 17 December 1998; *R.* v *McLoughlin*, C.A. 30 November 1999; *R.* v *Clegg*, N. Ir. L. R. 27 February 1998. Regarding Canada *see R.* v *Palmer* [1980] S.C.R. 759 at 760 ("if believed could reasonably…be expected to have

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75. Having considered the submissions of the parties, and the case-law cited, the Appeals Chamber has decided against importing tests from domestic jurisdictions, such as the "would" or "could" test. The test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence has been admitted before the Chamber is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings. In framing the test in this manner, the Appeals Chamber has been guided by Rule 117(A) which provides that "[t]he Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it".

76. In summary, the Appeals Chamber may exercise its discretion as to whether to decide upon the admissibility of additional evidence under Rule 115 during the pre-appeal phase of the proceedings or, alternatively, at the same time as the appeal hearing. In determining whether to admit the evidence in the first instance, the relevant question is whether the additional evidence could have had an impact on the trial verdict. In deciding whether to uphold a conviction where additional evidence has been admitted, the relevant question is: has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings. In the subsequent sections of this judgement, these principles will be applied to the additional evidence admitted under Rule 115 in the current proceedings.

IV. APPEAL AGAINST THE CONVICTIONS OF ZORAN KUPREŠKIC AND MIRJAN KUPREŠKIC

A. Introduction

77. The convictions of Zoran and Mirjan Kupreškic for persecution as co-perpetrators of a common plan to ethnically cleanse the village of Ahmici of its Bonsian Muslim inhabitants[128] were primarily based upon two factors: their involvement with the HVO prior to 16 April 1993[129] and

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affected the result"); *R.* v *McMartin* [1964] S.C.R. 464 at 493 ("the proposed evidence is of sufficient strength that it might reasonably affect the verdict of the jury"). Regarding Australia, *see* Australian Legal Monthly Digest § 7105 (2000) ("would have produced a significant possibility that the verdict would have been one of acquittal"). Regarding New Zealand, *see R.* v *Dougherty* [1966] 3 NZLR 257 at 265 ("might reasonably have led the jury to return different verdicts"). Finally, regarding South Africa, *see S* v *Ndweni & Ors.* 1999 (4) SA 877 (A) at 880 ("materially relevant").

[128] Trial Judgement, para. 782. The Trial Chamber further found that the attack on Ahmici was part of a broader Bosnian Croat campaign to forcibly expel the Bosnian Muslims from the entire Lašva Valley region, and that the Kupreškic brothers knew this was the context in which their acts occurred. *See* Trial Judgement, paras. 783 and 790.

[129] Trial Judgement, paras. 421-422.

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their role in the attack on Ahmici on the morning of 16 April 1993.[130] The mere involvement of the Defendants in the HVO prior to 16 April 1993 does not, of itself, amount to criminal conduct. However, the Trial Chamber found that the attack on Ahmici was carried out by "military units of the HVO and members of the Jokers.[131] Accordingly, the Trial Chamber's findings that both Defendants were active members of the HVO,[132] and that Zoran Kupreškic was a local HVO Commander,[133] appear to have been viewed as support for evidence purporting to show that Zoran and Mirjan Kupreškic were participants in the planning and execution of the 16 April 1993 attack. Regarding their activities on 16 April 1993, the Trial Chamber found that, by 15 April 1993, Zoran and Mirjan Kupreškic knew of plans for the attack on Ahmici the following morning and were ready to play a part in it.[134] Most importantly, the Trial Chamber found that, on 16 April 1993, they "were in the house of Suhret Ahmic immediately after he and Meho Hrstanovic were shot and immediately before the house was set on fire…[and] were participants in the attack on the house as part of the group of soldiers who carried it out".[135] The Trial Chamber further concluded that Zoran and Mirjan Kupreškic provided "local knowledge and their houses as bases for the attacking troops."[136]

78. The evidence of Witness H is the lynchpin of the convictions entered against Zoran and Mirjan Kupreškic. The Trial Chamber rejected the evidence given by two out of three eyewitnesses about the participation of the two Defendants in the attack of 16 April 1993, but accepted Witness H's evidence relating to the house of Suhret Ahmic. Witness H was present in the Ahmic house that morning and the Trial Chamber accepted her evidence that Zoran and Mirjan Kupreškic were amongst the group of soldiers who attacked, killed Suhret Ahmic and Meho Hrstanovic, set the house on fire and expelled Witness H and her surviving family members.[137] In the case of Zoran Kupreškic, the Trial Chamber also relied upon the testimony of Witness JJ as further evidence that he was involved in the attack on Ahmici. According to Witness JJ, following the April 1993 attack on Ahmici, Zoran Kupreškic admitted to her that, during the attack, members of the Jokers had been firing upon fleeing Bosnian Muslim civilians. Upon being forced by the Jokers to do likewise, Zoran Kupreškic said that he shot into the air with the pretence of aiming at civilians.[138] This, the Trial Chamber found, further undermined the claim made by Zoran Kupreškic that he did not

[130] Trial Judgement, para. 430.
[131] Trial Judgement, para. 334. The Trial Chamber also found that "able-bodied Croatian inhabitants of Ahmici provided assistance and support in various forms." The Trial Chamber described the "Jokers" or "Jokeri" as a special anti-terrorist unit of the Croatian military police. *See* Trial Judgement, para. 132.
[132] Trial Judgement, paras 421, 773 and 789.
[133] Trial Judgement, paras 422 and 773.
[134] Trial Judgement, paras. 423 and 773.
[135] Trial Judgement, para. 426.
[136] Trial Judgement, para. 430.
[137] Trial Judgement, paras 425-426 and 775-776.
[138] Trial Judgement, para. 407.

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participate in the conflict,[139] although Witness JJ's evidence does not directly corroborate the involvement of Zoran Kupreškic in the events at the Ahmic house.

B. Vagueness of the Amended Indictment

79. The Appeals Chamber understands Zoran and Mirjan Kupre{ki}'s complaint on appeal to be that the Trial Chamber erred in law by returning convictions on the basis of material facts not pleaded in the Amended Indictment. They argue that the trial against them was thereby rendered unfair, since they were deprived of fair notice of the charges against them. This ground of appeal requires the Appeals Chamber to discuss the issue of the vagueness of the Amended Indictment from a somewhat unusual perspective. Normally, an allegation pertaining to the vagueness of an indictment is dealt with at the pre-trial stage by the Trial Chamber, or, if leave to pursue an interlocutory appeal has been granted, under Rule 72(B)(ii), by the Appeals Chamber. In the instant case, this stage has passed, and Zoran and Mirjan Kupreškic have already been found guilty solely on the charge of persecution (count 1). Consequently, their complaint about the vagueness of the Amended Indictment will be considered only in relation to the criminal conduct for which Zoran and Mirjan Kupre{ki} was convicted under count 1.

80. The original indictment did not charge Zoran and Mirjan Kupre{ki} with persecution under Article 5(h) of the Statute. Instead, they were charged in count 1 with a grave breach under Article 2(d) of the Statute (unlawful and wanton destruction of property not justified by military necessity) for participating in an unlawful attack against the civilian population and individual citizens of the village of Ahmi}i between 16 April and, or about, 25 April 1993, which caused human deaths and the total destruction of the Muslim homes in that village.

81. In February 1998, the Prosecution requested leave from the Trial Chamber to amend the original indictment. In respect of count 1, the Prosecution sought leave to replace the previous charge brought under Article 2(d) of the Statute with a persecution charge under Article 5(h) of the Statute. The reason for this request appears to have been a desire on the part of the Prosecution to avoid having to prove the internationality of the conflict, as would be required under Article 2 of the Statute.[140] Accordingly, the Prosecution requested leave to reclassify the alleged criminal conduct, based on the evidence that was already in its possession, as a crime against humanity under Article 5 which applies to violations committed in armed conflict whether of international or

[139] Trial Judgement, para 428.
[140] Trial Transcript, 3-4 (recording the motion hearing of 10 March 1998).

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internal character. The Trial Chamber granted leave to amend the indictment as requested in an oral decision during a hearing on 10 March 1998.[141]

82. There are two parts to the Amended Indictment: the first part, count 1, charges each Defendant, including Zoran and Mirjan Kupre{ki}, with having participated in certain categories of persecutory conduct, whereas the second part, counts 2-19, "set forth specific acts of the various accused which constitute further violations of international law."[142]

83. The relevant parts of the Amended Indictment read:

> 9. ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] helped prepare the April attack on the Ahmi}i-[anti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-[anti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.
>
> 10. The HVO attack on Ahmi}i-[anti}i targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmi}i-[anti}i from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmi}i-[anti}i.
>
> 11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmi}i-[anti}i. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmi}i-[anti}i, along with two mosques.
>
> [...]
>
> 20. From October 1992 until April 1993, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.
>
> 21. As part of the persecution, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] participated in or aided and abetted:
>
> (a) the deliberate and systematic killing of Bosnian Muslim civilians;
>
> (b) the comprehensive destruction of Bosnian Muslim homes and property;
>
> (c) and the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.

[141] Trial Transcript, 33 (recording the motion hearing of 10 March 1998). At the time, the Trial Chamber stated that a subsequent decision setting out the reasons would be issued at a later date. The Appeals Chamber has, however, been unable to locate any such decision on the record.
[142] Prosecution Pre-Trial Brief, para. 26.

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22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] committed the following crime:

Count 1: A **CRIME AGAINST HUMANITY**, punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the Tribunal.

84. Zoran and Mirjan Kupre{ki} were also charged in counts 2 through to 11 in the Amended Indictment with murder, inhumane acts and cruel treatment under Articles 3 and 5 for their alleged participation in a specific event that took place at Witness KL's house in Ahmi}i in the early morning of 16 April 1993, and which resulted, *inter alia*, in the death of four people, including two young children.[143]

85. The Prosecution case at trial against Zoran and Mirjan Kupre{ki} on count 1 rested on proof of only three main allegations: (1) their participation in murder and arson at the house of Witness KL; (2) their participation in murder and arson at the house of Suhret Ahmi}; and (3) their presence as HVO members in Ahmi}i on 16 April 1993.[144] Accordingly, the Prosecution sought to establish during trial that Zoran and Mirjan Kupre{ki} participated, as active HVO members, in the attack on the houses of Suhret Ahmi} and Witness KL. To that end, the Prosecution introduced the evidence of Witness H (the attack on Suhret Ahmi} house), Witness KL (the attack on his house) and Witness C (further evidence of their presence as HVO members in the village on 16 April 1993). Notably, the Prosecution did not present any substantial evidence relating to the allegation that Zoran and Mirjan Kupre{ki} helped prepare the attack on Ahmi}i by the various means set out in paragraph 9 of the Amended Indictment. Neither did it specifically attempt to introduce evidence supporting the allegation in paragraph 20 of the Amended Indictment that Zoran and Mirjan Kupre{ki} had been involved in the planning and organising of the attack. For this reason, and because of the insufficiency of Witness KL's evidence, the Prosecution managed to prove its remaining case to the satisfaction of the Trial Chamber only in part.

86. Zoran and Mirjan Kupre{ki} were found guilty as co-perpetrators of persecution (count 1). The Trial Chamber based this conviction almost exclusively on the testimony of Witness H. It concluded that Zoran and Mirjan Kupreški}, armed, in uniform and with polish on their faces, were in the house of Suhret Ahmic immediately after he and Meho Hrstanovic were shot and immediately before the house was set on fire and the family of Suhret Ahmi} was forcibly removed.[145] Zoran and Mirjan Kupre{ki} were, however, acquitted on counts 2 through to 11 (the attack on Witness KL's house). The Trial Chamber rejected the evidence of Witness KL and found that it was "not satisfied beyond reasonable doubt that [Zoran and Mirjan Kupre{ki} were] present

[143] Naser Ahmi}, his wife Zehrudina Ahmi} and their two children, Elvis and Sejad.
[144] Trial Judgement, paras 388, 405-407.

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at the scene of the crime and thus [could not] draw any inferences as to [their] possible participation in these events."[146]

87. In order to address the complaint raised by Zoran and Mirjan Kupre{ki}, the Appeals Chamber has to determine (i) whether the Trial Chamber returned convictions on the basis of material facts not pleaded in the Amended Indictment; and (ii) if the Appeals Chamber finds that the Trial Chamber did rely on such facts, whether the trial of Zoran and Mirjan Kupre{ki} was thereby rendered unfair. The first aspect of this determination begins with a discussion of the statutory framework relating to indictments and how this body of law has been interpreted in the jurisprudence of the Tribunal.

1. Were the convictions based on material facts not pleaded in the Amended Indictment?

88. An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.[147] Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

89. The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the

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[145] Trial Judgement, paras 426 and 779.

[146] Trial Judgement, paras 786 and 793. The Trial Chamber also rejected the evidence of Witness C who testified with regard to Zoran and Mirjan Kupre{ki}'s presence as HVO members in the Ahmi}i village on 16 April 1993, *see* Trial Judgement, para. 774.

[147] *Furund`ija* Appeal Judgement, para. 147. *See also Krnojelac* Decision of 24 February 1999, paras 7 and 12; *Krnojelac* Decision of 11 February 2000, paras 17 and 18; and *Br|anin* Decision of 20 February 2001, para.18.

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accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.[148] Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".[149]

90. Such would be the case where the Prosecution alleges that an accused participated, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment.[150] Similarly, an accused may be charged with having participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in large numbers of killings and forced removals. In such a case the Prosecution need not specify every single victim that has been killed or expelled in order to meet its obligation of specifying the material facts of the case in the indictment. Nevertheless, since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so.[151]

91. Despite the broad-ranging allegations in the Amended Indictment, the case against Zoran and Mirjan Kupre{ki} was not one that fell within the category where it would have been impracticable for the Prosecution to plead, with specificity, the identity of the victims and the dates for the commission of the crimes. On the contrary, the nature of the Prosecution case at trial was confined mainly to showing that Zoran and Mirjan Kupre{ki} were present as HVO members in Ahmi}i on 16 April 1993 and personally participated in the attack on two different houses resulting, *inter alia*, in the killing of six people. Clearly, in such circumstances, an argument that the sheer scale of the alleged crimes prevented the Prosecution from setting out the details of the alleged criminal conduct is not persuasive.

92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed.[152] In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material

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[148] *See generally Krnojelac* Decision of 11 February 2000, para. 18; *Br|anin* Decision of 20 February 2001, para. 22.
[149] *Kvo~ka* Decision of 12 April 1999, para 17; *Brdanin* Decision of 26 June 2001, para. 61.
[150] *See Prosecutor* v *Erdemovi}*, Case No.: IT-96-22, Indictment, 22 May 1996, para. 12 (identifying the victims as "hundreds of Bosnian Muslim male civilians").
[151] *Kvo~ka* Decision of 12 April 1999, para. 23.

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aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[153] There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.

93. The Appeals Chamber observes that the case against Zoran and Mirjan Kupre{ki}, however, does not fall within this category either. Instead, the thrust of the persecution allegation against them somehow changed between the filing of the Amended Indictment and the presentation of the Prosecution case, so that the latter was no longer reflected in the former. The allegations in the Amended Indictment were broad and imprecise and there was, for example, a substantial part of the allegations under count 1, as noted above, upon which the Prosecution presented no evidence at all. In effect, the main case against Zoran and Mirjan Kupre{ki} was dramatically transformed from alleging integral involvement in the preparation, planning, organisation and implementation of the attack on Ahmi}i on 16 April 1993, as presented in the Amended Indictment, to alleging mere presence in Ahmi}i on that day and direct participation in the attack on two individual houses, as presented at trial. The Trial Chamber rejected all evidence relating to one of these houses and the other was not mentioned in the Amended Indictment.

94. In view of the factual basis of the conviction of Zoran and Mirjan Kupre{ki}, the relevant facts of the Prosecution case pleaded in the Amended Indictment are: i) the deliberate and systematic killing of Bosnian Muslim civilians; ii) the comprehensive destruction of Bosnian Muslim homes and property; and iii) the organised expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.[154] The Prosecution contends that the Amended Indictment thereby pleads the material facts underlying the persecution charge on which Zoran and Mirjan Kupre{ki} were found guilty with sufficient detail. The Appeal Chamber disagrees.

95. In the circumstances of the present case, the Prosecution could, and should, have been more specific in setting out the allegations in the Amended Indictment. In particular, the Appeals Chamber notes the absence of any detailed information about the nature of Zoran and Mirjan Kupre{ki}'s role in the three alleged categories of criminal conduct. The Amended Indictment in no way particularises what form this alleged participation took. By framing the charges against

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[152] *Krnojelac* Decision of 24 February 1999, para. 40.
[153] *Krnojelac* Decision of 11 February 2000, para. 23.
[154] Organised detention listed in paragraph 21 of the Amended Indictment is excluded because the Prosecution did not present any evidence of such criminal conduct and, accordingly, the Trial Chamber did not address any such allegations in the Trial Judgement.

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Zoran and Mirjan Kupre{ki} in such a general way, the Amended Indictment fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence. Pursuant to Articles 18(4), 21(2), 21(4)(a) and 21(4)(a) and (b) of the Statute, the Prosecution should have articulated, to the best of its ability, the specific acts of the Defendants that went to the three different categories of conduct pleaded in the Amended Indictment.

96. The Appeals Chamber notes the Prosecution's argument that

> in the case of murder, clearly, you need to put a list of the individuals that you have killed. That's a natural consequence of the crime you are pleading as a Prosecutor. But as far as crimes of persecution are concerned, then basically the Prosecution – [in] the indictment ... provid[ed] ... notice by describing which acts the Prosecution considered to amount to persecution, and then it was a matter of disclosure of the evidence at trial or before trial much.[155]

97. Why the same "natural consequence" would not apply in the present case, where the Prosecution was alleging two clearly identifiable attacks on houses, resulting, *inter alia*, in murders, as the primary criminal conduct underlying persecution, is unclear to the Appeals Chamber.[156] Admittedly, persecution, as a crime against humanity under Article 5(h) of the Statute, is an offence that can encompass various forms of criminal conduct. In most instances it comprises a course of conduct or a series of acts, even though a single act can constitute persecution, provided this act occurred within the necessary context.[157]

98. However, the fact that the offence of persecution is a so-called "umbrella" crime does not mean that an indictment need not specifically plead the material aspects of the Prosecution case with the same detail as other crimes. Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal,[158] that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statute, is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.

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[155] Appeal Transcript, 861-862.
[156] The allegations relating to four of those murders were not upheld at trial.
[157] This is possible when the particular act took place within the context of a widespread or systematic attack directed against a civilian population (occurring during an armed conflict) and when the accused knew of this wider context.
[158] *Br|anin* Decision of 26 June 2001, para. 61.

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99. As discussed above, the Prosecution case at trial against Zoran and Mirjan Kupre{ki} was founded on three principle allegations: (i) their presence as HVO members in Ahmi}i on 16 April 1993; (ii) their participation in the attack on the house of Suhret Ahmi}; and (iii) their participation in the attack on the house of Witness KL. The attack on Suhret Ahmi}'s house was, as conceded by the Prosecution during the trial,[159] not specifically charged in the Amended Indictment. In the view of the Appeals Chamber, the allegations relating to this attack and its consequences were clearly material to the Prosecution case against Zoran and Mirjan Kupre{ki} in the sense that the verdict on the persecution count was critically dependent upon it. Had the Trial Chamber not concluded that the Prosecution had successfully proven that allegation beyond reasonable doubt, Zoran and Mirjan Kupre{ki}'s conviction on the persecution count could not conceivably have been sustained.[160] The Appeals Chamber, accordingly, finds that the allegation that Zoran and Mirjan Kupre{ki} were part of a group of soldiers who, in the early morning of 16 April 1993, participated in the attack on Suhret Ahmi}'s house, which resulted in the murder of Suhret Ahmi} and Meho Hrustanovi}, the house being set on fire, and the surviving members of the Suhret Ahmi} family being expelled, constituted material facts in the Prosecution case against them. Thus, the attack on the house and its consequences should have been specifically pleaded in the Amended Indictment.

100. In this connection, the Appeals Chamber notes that the reason that the Prosecution chose not to formally charge Zoran and Mirjan Kupre{ki} with the specific attack on Suhret Ahmi}'s house appears to have been expediency. The Prosecution claimed, prior to and during trial, that evidence relating to the attack on Suhret Ahmi}'s house (Witness H) came into its possession late in the day and that it was anxious not to delay the commencement of the trial by amending again the already once Amended Indictment.[161] In the view of the Appeals Chamber, the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial. If expediency was a priority for the Prosecution, it should have proceeded to trial without the evidence of Witness H.

101. The Appeals Chamber further observes that the trial record demonstrates that the absence of any specific reference to the attack on Suhret Ahmi}'s house was a matter of some concern to the Trial Chamber.

102. The trial commenced on 17 August 1998. On 3 September 1998, during the Prosecution's examination-in-chief of Witness H, the Presiding Judge sought clarification from the Prosecution on

[159] Trial Transcript, 1696-1697.
[160] Although the Trial Chamber relied upon some peripheral evidence, in addition to the evidence of Witness H, in support of the persecution charge, it is insufficient to sustain the persecution charge. *See infra* paras. 228 *et seq.*
[161] Prosecution Pre-Trial Brief, para. 27; Trial Transcript, 1696-1697.

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whether it alleged that Zoran and Mirjan Kupre{ki} played a part in the killing of Witness H's father.[162] He stated:

> Before we move on to the cross-examination, may I ask you to clarify one point, Mr. Moskowitz? Mr. Moskowitz, are you alleging that the accused Zoran Kupreškic and Mirjan Kupreškic had a role in the killing of the witness's father? Or do you exclude any such role.

103. The Prosecution responded:

> We do not exclude that role. We allege that they were in the house, that they were, therefore, participants in the murder of the father and of Meho Hrustanovi}. It is not charged in the indictment. This is information that we gave serious consideration to charging in the indictment. However, we decided that -- not to delay further the trial and reamend the indictment once again, but to instead proceed with the evidence as we had it, and to have that evidence used by this Tribunal for purposes of the persecution count which has been alleged, and also to corroborate the murder counts that have also been alleged. So it was our decision that instead of reamending the indictment once again, to proceed to trial as quickly as possible, as I think everyone wanted, and simply introduce this evidence for the purposes I've just mentioned. And I believe in our brief, our Pre-Trial Brief, we may have made a brief reference to the fact that additional information has come to us fairly recently, and that rather than amending the indictment, we will proceed with the evidence as we have it.[163]

104. Counsel for Mirjan Kupre{ki} then complained of the late notification of the charges against her client. She stated:

> Mr. President, I believe that a basic rule of a fair trial is for the accused to be informed of what they are charged with. We now, for the first time, are told that he is charged with the killing of Meho Hrustanovi}. The Prosecution has said that this is within the framework of the persecution charge, that the killing of Meho Hrustanovi} is going to be part of that charge, as well as the killing of a member of his family, and that this will all be dealt with within the context of the persecution charge. My understanding was that this will be part of the persecution charge further on.[164]

The Presiding Judge responded in the following manner:

> As for the charges, it's very clear. I think Mr. Moskowitz made it very clear a few minutes ago following my question, that they are not charging the accused Zoran and Mirjan Kupreškic with murder in this particular case, but only with persecution. So there's been no change. I wanted the Prosecutor to clarify his position. I don't see any particular problem.[165]

105. The Appeals Chamber finds that the response of the Presiding Judge that Zoran and Mirjan Kupre{ki} were not charged with murder, *only* with persecution, is ambiguous and does not adequately address the concern raised by Mirjan Kupre{ki} as to whether he was charged with a role in killing the two victims. Furthermore, this exchange between the Prosecution and the Bench demonstrates a failure to distinguish between the "umbrella" nature of persecution as a legal concept and the need to identify and plead the acts of the accused that constitute that crime with the requisite detail. The material facts of the Prosecution case against the accused must be determined

[162] Trial Transcript, 1696.
[163] Trial Transcript, 1696-1697.
[164] Trial Transcript, 1697-1698
[165] Trial Transcript, 1700.

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by reference to the latter, not the former. The accused is entitled to be informed of the material facts of the specific allegation that the Prosecution is making against him so as to prepare his defence adequately. Hence, in the context of persecution, the indictment must set out the material facts as they allegedly pertain to the persecutory acts of the accused.

106. The Trial Chamber returned to the issue of the failure of the Amended Indictment to plead Zoran and Mirjan Kupre{ki}'s participation in the murders of Suhret Ahmi} and Meho Hrustanovi} on the next to last day of the trial, during the Prosecution's closing submissions. The Presiding Judge asked counsel for the Prosecution the following question:

> In the brief which you filed last week, you accused Zoran and Mirjan Kupreški}, among other things, of the murder of the father of Witness H. And perhaps you would remember that on the 3rd of September I had asked that same question of your colleague Mr. Moskowitz when I asked him whether the Prosecution was going to bring charges, a specific charge that is, against the two accused in respect of that murder. And at that time Mr. Moskowitz said, "Yes, we had thought about bringing a specific charge, but we decided not to ask that the indictment be amended. In any case, you will take into account the evidence that we have presented." And I have in front of me the relevant pages of the transcript. These are pages 1.696 FF. And he added, "And you must decide to what extent one could take into account that evidence as regards persecution." All right. Now, here is my question: What is your position now about that murder? I repeat. In the written brief you accused the two accused of that murder, which, however, does not appear officially, in the indictment. To what extent can the Tribunal take into account the charges that were not actually formulated in an official way in the indictment itself, but which were put forth during the trial?[166]

107. Counsel for the Prosecution answered as follows:

> Mr. President, I will answer you analogously as – like the way Mr. Moskowitz said for the Prosecution, and which you've just recalled. It is true that the murder of Witness H's father is not in the indictment. It is true that the evidence, at least this is the point of view of the Prosecution, that the evidence that was presented to the Tribunal shows that most probably one or the other of the accused, Zoran and Mirjan, both of them were near it when that happened. But we do not say that they themselves are the perpetrators of that murder. We do not know who were the ones who killed Witness H's father. However, we do know that the two accused, according to the Prosecution evidence, were there. Therefore, according to the point of view that I am expressing today, it seems to me that it is pursuant to the charge of persecution that this aspect of the -- both of their behaviours can be taken into account, the behaviour in front of Witness H's house, not as a specific crime which could be ascribed to them personally, but we have a more reliable source, and this is the point of view of the Prosecution, is that they were in the house a few moments after Witness H's father was murdered, and the exchange that took place there between the two accused and the Witness H. Therefore, my answer to the question, Mr. President, goes back to the one which was already given to you by Mr. Moskowitz.[167]

108. The Presiding Judge continued:

> Well, very well. Well, let me ask you another question then. Therefore, you are suggesting that we take into account, assuming that the Trial Chamber is convinced by the Prosecution evidence, that you want this --[168]

109. To which counsel for the Prosecution added:

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[166] Trial Transcript, 12709.

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> Well, more specifically, the Prosecution suggests to the Trial Chamber to take into account, pursuant to Count number 1, persecution, the behaviour of the accused, in front of and inside Witness H's house, as it appeared through the Prosecution's evidence, which the Tribunal, of course, will evaluate. Once again, we cannot state -- we know that Witness H's father was shot, was executed on that location at that time, in front of his house. We also know that the accused, Zoran and Mirjan Kupre{ki}, were a few metres away from there, but we do not know any more about what their role was in that execution. However, we do know through Witness H what their role was in Witness H's house, and lastly, pursuant to persecutions that were carried out against that family.[169]

110. From the above exchange, the Appeals Chamber must conclude that the question whether the Trial Chamber would take into account the attack on Suhret Ahmi}'s house, which resulted in the murder of Suhret Ahmi} and Meho Hrustanovi}, the house being set on fire, and the surviving members of the Suhret Ahmi} family being expelled, as a possible basis for liability in respect of the persecution count was, until the very end of the trial, not settled. The Appeals Chamber also notes that this matter appears not to have been completely resolved in the Trial Judgement. The Trial Chamber stated in paragraph 626 that

> in the light of its broad definition of persecution, the Prosecution cannot merely rely on a general charge of "persecution" in bringing its case. This would be inconsistent with the concept of legality. To observe the principle of legality, the Prosecution must charge particular acts (and this *seems* to have been done in this case). These acts should be charged in sufficient detail for the accused to be able to fully prepare their defence.[170]

111. The Appeals Chamber notes that a similar issue arose in relation to Drago Josipovi}.[171] In the legal findings pertaining to Drago Josipovi} on count 1 (persecution), the Trial Chamber found that both the allegations relating to the attack on Musafer Pu{cul's house and Nazif Ahmi}'s house had been made out. On the basis of the evidence of Witness EE, it held that Drago Josipovi} participated in the attack on the Pu{cul house on 16 April 1993 as a member of the group of soldiers who attacked and burned the house and murdered Musafer Pu{cul. The Trial Chamber further found that

> Drago Josipovi} also participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14 year old son were killed. This was not charged as a separate count in the indictment, nor did the Prosecutor request after the commencement of the trial to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge. Consequently, in light of the principle set out above in the part on the applicable law, these facts cannot be taken into account by the Trial Chamber as forming the basis for a separate and specific charge. They constitute, however, relevant evidence for the charge of persecution.[172]

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[167] Trial Transcript, 12710-12711.
[168] Trial Transcript, 12710.
[169] Trial Transcript, 12712.
[170] Emphasis added.
[171] *See* the further discussion of this issue *infra* paras 306-326.
[172] Trial Judgement, para. 811. The Appeals Chamber assumes that "the principle set out above" is the principle of legality discussed in para. 626 of the Trial Judgement.

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112. Compared to Drago Josipovi}, the Trial Chamber was not as explicit in its legal findings relating to Zoran and Mirjan Kupre{ki}. Nevertheless, it is a reasonable assumption that the Trial Chamber applied the same logic in relation to Zoran and Mirjan Kupre{ki} in returning convictions on the persecution count based upon a factual basis not pleaded in the Amended Indictment. The Appeals Chamber understands the Trial Chamber's reasoning to be as follows. By alleging participation during a seven-month period in (i) the deliberate and systematic killing of Bosnian Muslim civilians; (ii) the comprehensive destruction of Bosnian Muslim homes and property; and (iii) the organised detention and expulsion of Bosnian Muslims, the Amended Indictment pleaded the underlying criminal conduct of the accused with sufficient detail. On that basis, the Trial Chamber was satisfied that Zoran and Mirjan Kupre{ki} had sufficient information to prepare their defence. Consequently, any allegation of specific criminal conduct not pleaded in the Amended Indictment, such as the attack on Suhret Ahmi}'s house, could be taken into account as relevant evidence for the charge of persecution (count 1). This was so regardless of the fact that the specific criminal act constituting the primary basis for holding Zoran and Mirjan Kupre{ki} criminally liable for persecution was not pleaded in the Amended Indictment.

113. The Appeals Chamber is unable to agree with this reasoning. As found above, the attack on Suhret Ahmi}'s house and its consequences constituted a material fact in the Prosecution case and, as such, should have been pleaded in the Amended Indictment. Absent such pleading, the allegation pertaining to this event should not have been taken into account as a basis for finding Zoran and Mirjan Kupre{ki} criminally liable for the crime of persecution. Hence, the Trial Chamber erred in entering convictions on the persecution count because these convictions depended upon material facts that were not properly pleaded in the Amended Indictment.

114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

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2. Did the defects in the Amended Indictment render the trial unfair?

115. The second inquiry that the Appeals Chamber must make is whether the trial against Zoran and Mirjan Kupre{ki} was rendered unfair by virtue of the defects in the Amended Indictment. The Prosecution submits that, in the event that the Amended Indictment did not plead the material facts with the requisite detail, Zoran and Mirjan Kupre{ki} must be considered to have been put on notice by the Prosecution Pre-Trial Brief, or through the knowledge acquired during the trial.[173] The Prosecution specifically claims that the Pre-Trial Brief, which was filed in mid-July 1998, adequately informed Zoran and Mirjan Kupre{ki} of the charges against them.[174] The Appeals Chamber disagrees with the Prosecution's contention.

116. The Appeals Chamber observes that, in its Pre-Trial Brief, the Prosecution simply stated that at the outset of the attack in the early morning of 16 April 1993, Zoran and Mirjan Kupre{ki}

> were accompanying HVO troops unfamiliar with Ahmi}i, pointing out Muslim houses suitable for destruction. Both Mirjan and Zoran joined in the attack on several of these homes, participating in at least a half a dozen murders in the area, including the killing of an eight year old child and a three month old baby boy crying in his crib.[175]

The Pre-Trial Brief further stated that the Prosecution anticipated

> presenting recently acquired evidence of individual acts of violence perpetrated by the accused. This conduct has not been specifically charged as individual crimes, because the evidence upon which it is based was not available until after the Amended Indictment was confirmed. Since such evidence is, in any event, admissible as relevant to Count 1 Persecution charge, no further request to amend the [Amended] Indictment by adding new Counts has been made in an effort to avoid delay to the trial schedule.[176]

117. In the Appeals Chamber's view, the information given in the Prosecution Pre-Trial Brief is extremely general in nature and it is difficult to see how it could have assisted Zoran and Mirjan Kupre{ki} in the preparation of their defence. In the short section pertaining directly to Zoran and Mirjan Kupre{ki} it is stated that they "joined in the attack" on several houses, "participating in at least a half a dozen murders".[177] There is no mention of which particular houses they attacked or whose murders they participated in. Similarly, the paragraph referring to "recently acquired evidence of individual acts of violence" does not establish whether those acts were additional to the attacks on the two houses and "the half a dozen murders".[178] In light of the evidence actually presented at trial, it appears that they were not.

[173] Appeal Transcript, 862-863.
[174] Appeal Transcript, 838-839, 862.
[175] Prosecution Pre-Trial Brief, para. 23.
[176] Prosecution Pre-Trial Brief, para. 27.
[177] Prosecution Pre-Trial Brief, para. 23.
[178] Prosecution Pre-Trial Brief, para. 27.

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118. During the opening statements, on the first day of the trial, the Prosecution stated that Zoran and Mirjan Kupre{ki} committed "specific crimes" during the attack on Ahmi}i on 16 April 1993. Although referring specifically to the attack on Witness KL's house in this connection, the Prosecution made no reference whatsoever to the attack on Suhret Ahmi}'s house or to Zoran and Mirjan Kupre{ki}'s involvement in that event (Witness H's evidence).[179]

119. In light of the above, the Appeals Chamber is not persuaded by the Prosecution's submission on this point that the "mechanics of the process of the indictment, notice in the Prosecution Pre-Trial Brief, and disclosure of the evidence" put Zoran and Mirjan Kupre{ki} on sufficient notice of the factual charge underpinning the persecution count, i.e., the attack, including the resulting murders, on Suhret Ahmi}'s house.[180] The Appeals Chamber accepts that, from what occurred during the trial on 3 September 1998, it appears that, by that time, Zoran and Mirjan Kupre{ki} had been informed that the allegation pertaining to the attack on Suhret Ahmi} house was relevant to the persecution count. Nonetheless, the information provided on that day did not adequately convey the relevance of Witness H's evidence for the persecution count. No certain conclusion could be drawn as to how that evidence was going to be relied upon by the Trial Chamber for the purpose of deciding the issue of Zoran and Mirjan Kupre{ki}'s criminal liability for persecution. What transpired on the next to last day of the trial only confirms the uncertainty surrounding this matter. In these circumstances, the conclusion that this uncertainty materially affected Zoran and Mirjan Kupre{ki}'s ability to prepare their defence is unavoidable.

120. Moreover, the Appeals Chamber is disturbed by how close to the beginning of the trial the Prosecution disclosed Witness H's statement to Zoran and Mirjan Kupre{ki}. Pursuant to an order of the Trial Chamber, Witness H's statement was disclosed to them only approximately one to one-and-a-half weeks prior to trial and less than a month prior to Witness H's testimony in court.[181] The Trial Chamber's reason for accepting the delay in the disclosure of Witness H's statement was that the delay only concerned one witness and that, therefore, no prejudice was caused to the Defendants.[182] In hindsight, it is obvious that, in this case, the issue of prejudice was not dependent on the number of witness statements of which disclosure was delayed, but the materiality of the witness' evidence to the question of Zoran and Mirjan Kupre{ki}'s criminal responsibility. Considering the significance of Witness H's evidence, the timing of the disclosure of that evidence was essential for the preparation of Zoran and Mirjan Kupre{ki}'s defence. The Prosecution's

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[179] Trial Transcript, 96-127.
[180] Appeal Transcript, 863.
[181] The Trial Chamber's Order for the Protection of Victims and Witnesses, 9 July 1998; *see also* Prosecution Response, para. 11.20.
[182] Order for the Protection of Victims and Witnesses, 9 July 1998, 2.

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motion requesting the delay reveals that it had some merit.[183] However, it cannot be excluded that Zoran and Mirjan Kupre{ki}'s ability to prepare their defence, in particular the cross-examination of Witness H, was prejudiced by the fact that disclosure took place so close to the commencement of the trial and to Witness H testifying in court.

121. The Appeals Chamber also bears in mind the radical "transformation" of the prosecution case against Zoran and Mirjan Kupre{ki}. Based on the Amended Indictment, they had to mount a defence against an allegation of wide-ranging criminal conduct against Bosnian Muslim civilians in the Ahmi}i-[anti}i region during a seven-month period, such as systematic and deliberate killing, comprehensive destruction of houses, and organised detention and expulsion. However, when it came to trial, this was not the case that the Prosecution tried to prove. Instead, it pursued a trial strategy which sought to demonstrate that Zoran and Mirjan Kupre{ki} were guilty of persecution, principally, because of their participation in two individual attacks (Suhret Ahmi}'s house and Witness KL's house).[184] Considering this drastic change in the Prosecution case, in conjunction with the ambiguity as to the pertinence of Witness H's evidence for the persecution count and the late disclosure of Witness H's evidence, the Appeals Chamber is unable to accept that Zoran and Mirjan Kupre{ki} were informed with sufficient detail of the charges against them, so as to cure the defects the Appeals Chamber has identified in the Amended Indictment.

122. The Appeals Chamber emphasises that the vagueness of the Amended Indictment in the present case constitutes neither a minor defect nor a technical imperfection. It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet. If such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupre{ki}'s ability to prepare their defence was not materially impaired. In the absence of such a showing here, the conclusion must be that such a fundamental defect in the Amended Indictment did indeed cause injustice, since the Defendants' right to prepare their defence was seriously infringed. The trial against Zoran and Mirjan Kupre{ki} was, thereby, rendered unfair.

123. Finally, the Appeals Chamber observes that no waiver argument has been raised by the Prosecution in this case since Zoran and Mirjan Kupre{ki} objected to the form of the Amended Indictment, *inter alia*, on the same ground as they are now raising before the Appeals Chamber. On 15 May 1998, the Trial Chamber rejected their objection. As to the specific question of whether the

[183] Prosecutor's Request for Additional Time to Disclose the Statement of One Witness, 7 July 1998 (*Ex Parte and Under Seal*).
[184] The latter allegation was not upheld because of insufficient evidence.

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material facts were pleaded with sufficient details, the Trial Chamber did not provide any reasons for its finding. It simply held that the Amended Indictment met the requirements of Rule 47(C).[185]

3. Conclusion

124. For the foregoing reasons, the Appeals Chamber holds that the Amended Indictment failed to plead the material facts of the Prosecution case against Zoran and Mirjan Kupre{ki} with the requisite detail. By returning convictions on count 1 (persecution) on the basis of such material facts, the Trial Chamber erred in law. The Appeals Chamber is unable to conclude that Zoran and Mirjan Kupre{ki} were, through the disclosed evidence, the information conveyed in the Prosecution Pre-Trial Brief, and knowledge acquired during trial, sufficiently informed of the charges pertaining to the attack on Suhret Ahmi}'s house, his resulting murder as well as that of Meho Hrustanovi}, the destruction of Suhret Ahmi}'s house, and the expulsion of the surviving members of the Suhret Ahmi} family. The right of Zoran and Mirjan Kupre{kic to prepare their defence was thereby infringed and the trial against them rendered unfair. Accordingly, this ground of appeal by Zoran and Mirjan Kupreški} is allowed.

125. Having upheld the objections of Zoran and Mirjan Kupreškic based on the vagueness of the Amended Indictment, the question arises as to whether the appropriate remedy is to remand the matter for retrial. The Appeals Chamber might understandably be reluctant to allow a defect in the form of the indictment to determine finally the outcome of a case in which there is strong evidence pointing towards the guilt of the accused. However, additionally, Zoran and Mirjan Kupreškic have raised a number of objections regarding the factual findings made by the Trial Chamber. If accepted, these complaints would fatally undermine the evidentiary basis for the convictions of these two Defendants, rendering the question of a retrial moot. Accordingly, the Appeals Chamber now proceeds to consider the objections raised by the Kupreškic brothers as to the Trial Chamber's factual findings.

C. Participation of Zoran and Mirjan Kupreškic in the attack on the house of Suhret Ahmic on 16 April 1993

126. As outlined above, the Trial Chamber accepted the evidence of Witness H and, in the case of Zoran Kupreškic, Witness JJ, and found that both of these Defendants participated in the attack on the house of Suhret Ahmic on 16 April 1993.[186] Zoran and Mirjan Kupreškic maintain that they

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[185] Decision on Defence Challenges to Form of the Indictment, 15 May 1998, 2.

[186] The Trial Chamber's finding that the two Defendant's provided local knowledge and the use of their houses as bases for the attacking forces is considered *infra* paras 233-241.

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played no role in the attack and they challenge the credibility of the evidence relied upon by the Trial Chamber to establish that they did.

1. Witness H

127. Both Defendants argue that the Trial Chamber erred in accepting Witness H as a credible witness.[187] In April 1993, at the time of the events in Ahmici, Witness H was 13 years old, and she was 18 years old when she gave evidence before the Trial Chamber. She testified that she was present during the attack on the house of her father, Suhret Ahmic, and that she recognised Zoran and Mirjan Kupreškic amongst the group of soldiers that committed the associated crimes. In summary, Witness H's evidence was that on the morning of 16 April 1993, she was asleep with her two young sisters in their bedroom. She awoke to a burst of gunfire that shattered glass in the room. She got out of bed quickly and her father and Witness SA (a close relative who was in the house at the time) came into the children's room and ushered her and her sisters into a shelter in the basement of their house. The entrance to the shelter was through a small trap-door in the children's room and was accessed by pulling a cover off the floor. While the family was taking shelter in the basement, Witness H heard explosions in the house. Shortly thereafter, Witness H heard voices coming from the front of the garage and calling her father by name. Witness H thought they were friends or relatives who had come to seek shelter with her family. She therefore urged her father to open the garage, which was connected to a door in the basement shelter, and let them in. Witness H's father went to the garage door and unlocked it. Witness H, who remained in the shelter, was able to see what was happening in the garage through a small opening. She observed that the garage door was open and heard the attackers say to her father "Balija, come out." Witness H's father started crying and said "[p]lease don't kill me. Whatever befalls my children, let the same fate befall me." Witness H then moved away from the door and, as she did so, heard a burst of fire and a cry of pain. Next Witness H recalled that the trap-door to the basement shelter was lifted and a voice asked if anyone was down in the shelter. Witness H went out of the shelter and immediately recognised Zoran Kupreškic standing in the children's room. She recognised him by both his voice and his physical appearance. Witness H and Zoran Kupreškic had a short conversation. She told him that Witness SA and her sisters were down in the shelter and, in response to his question, confirmed that they had no weapons. He told her he had been ordered to kill everyone and demanded that Witness H go back down into the shelter, which she did. Witness H then heard Zoran Kupreškic conferring with another person about whether Witness H, her sisters and Witness SA were to be killed. He came back and called for them to come out of the shelter.

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Witness H went out first and helped Witness SA to lift the children out. Witness SA came out last. As Witness H came out of the shelter in the children's room, she realised that the person Zoran had been conversing with was his brother Mirjan, because she saw him climbing the stairs to the top floor of the house. Three other soldiers were ransacking and setting the house on fire. Witness H, passing through the kitchen, saw it was in flames and an unidentified soldier told her to get out of the house. As Witness H fled she noticed the dead body of a neighbour, Meho Hrustanovic, at the front entrance to the house and the body of her father in front of the garage.[188]

128. Zoran and Mirjan Kupreškic did not dispute that Witness H was present in the Ahmic house when it was attacked on the morning of 16 April 1993, or that her father and neighbour were killed during the course of that attack. Without doubt, Witness H lived through an unimaginable horror that morning. A great deal of Witness H's testimony was not contested: being awoken by gunfire, taking refuge with her family in the basement shelter, the invasion of her home by the rampaging soldiers, her father being taken out and shot and the desperate plight of the surviving family members as they fled their burning house. There is no question that Witness H was an eyewitness to all of these events. The only contentious matter was Witness H's identification of Zoran and Mirjan Kupreškic amongst the attackers.

129. In deciding to accept the evidence of Witness H, the Trial Chamber stated that any criticisms of her credibility were

> ...outweighed by the impression made by the witness upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken. The Trial Chamber is in no doubt that she was a truthful and accurate witness of events on 16 April.[189]

130. The Appeals Chamber must accord a degree of deference to the Trial Chamber's assessment of the evidence. The Trial Chamber directly observed the witness and had the opportunity to assess her evidence in the context of the entire trial record. It is only in cases where the evidence relied upon could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is "wholly erroneous", that the Appeals Chamber will intervene.[190] Nonetheless, as already noted,[191] an appellate body will carefully consider the manner in which identification

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[187] Zoran Kupreškic Appeal Brief, paras. 37 *et seq.* and 67 *et seq.*; Zoran Kupreškic Supplemental Document, 17 *et seq.*; Mirjan Kupreškic Appeal Brief, 76 *et seq.*; Mirjan Kupreškic Supplemental Document, 3 *et seq.*; Appeal Transcript, 654-656, 677-682, 685-689, 693-701, 703-707.

[188] *See generally,* Trial Transcript, 1617-1695.

[189] Trial Judgement, para. 425.

[190] *Tadic* Appeal Judgement, para. 64; *Aleksovski* Appeal Judgement, para. 63; *Celebici* Appeal Judgement, paras 434, 491. *See also* the discussion *supra* paras 28-30.

[191] *See* the discussion *supra* paras 34-40.

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evidence, particularly where identification is made under difficult circumstances, has been assessed by the fact-finder.

131. In the present case, Zoran and Mirjan Kupreškic have raised a number of serious problems associated with the testimony of Witness H, several of which were not dealt with in the Trial Judgement. The overall thrust of their argument is that, in light of the many errors made by the Trial Chamber in assessing Witness H's evidence, the Appeals Chamber must come to the conclusion that the Trial Chamber's decision to rely on the evidence of Witness H was "wholly erroneous". In such circumstances, maintain the Defendants, the Appeals Chamber should intervene in order to avert a miscarriage of justice. The Appeals Chamber has given careful consideration to each of the complaints the Defendants have raised in connection with Witness H's testimony and will address them in turn before ultimately considering whether the convictions of either or both of the Defendants are unsafe.

(a) The difficult circumstances under which Witness H's identification of Zoran and Mirjan Kupreškic was made

132. Zoran and Mirjan Kupreškic strenuously argue that the Trial Chamber erred in accepting the evidence of Witness H despite the difficult circumstances in which she apparently recognised them on the morning of 16 April 1993. They maintain that, although it was still dark at the time the attack commenced, Witness H stated there were no lights on in her house. Visibility was also reduced because it was foggy and raining that morning.[192] The Defendants point to other witness testimony that indicates it was not possible to see without the assistance of lights at that time of the morning.[193] Zoran and Mirjan Kupreškic further argue that Witness H only had a very brief opportunity to view the attackers whose faces were heavily masked with paint.[194] They also contend that the difficulty of accurately identifying the attackers was exacerbated by the chaotic and traumatic experience that Witness H underwent that morning. While the Trial Chamber rejected the evidence of another 13-year old witness, Witness C, on this ground, it took a different approach in the case of Witness H.[195] Overall, argue the Defendants, the Trial Chamber erred in finding that Witness H could have identified the individuals involved in the assault on her house that morning

[192] Zoran Kupreškic Appeal Brief, paras. 72-73; Zoran Kupreškic Supplemental Document, 18-19; Mirjan Kupreškic Appeal Brief pp. 85-87; Mirjan Kupreškic Supplemental Document, 5-6; Appeal Transcript, 681-682, 694-695.
[193] The defence refers specifically to the evidence of Witness KL (who was in the house next door to Witness H's house and said that it was dark and so the electric lights in his house were on at the time of the attack), Witness GG (she turned the lights on in the room at the commencement of the attack), Witness K (it was so dark that her husband was unable to find his trousers), Witness C (it was "pitch dark"), Witness ADA (it was dark at the time the attack commenced).
[194] Mirjan Kupreškic Appeal Brief, 85-86; Appeal Transcript, 694-695.
[195] Mirjan Kupreškic Appeal Brief, 91-92; Mirjan Kupreškic Supplemental Document, 7.

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and, further, erred in using her uncorroborated evidence to sustain the conviction against the Kupreškic brothers. The Prosecution responds that other evidence on the trial record indicates that visibility conditions posed no barrier to identification at the time the attack commenced.[196] In any event, even if it is accepted that visibility was poor, the Prosecution maintains, the Trial Chamber was satisfied with Witness H's description of the events.[197]

133. The Appeals Chamber accepts that Witness H's identification of the Defendants was carried out in very difficult circumstances. This is apparent from even the briefest review of her testimony. The attackers descended upon her and her family while they were sleeping; her father was killed as the family hid in the basement; she and Witness SA were trying to protect two young children at the time and they witnessed the house being set alight and destroyed. The attackers had also masked their faces with paint in an attempt to camouflage themselves. Witness SA made three statements following the attack in which she specifically said that she was unable to identify any of the attackers due to both the prevailing state of chaos and to the fact that the attackers had obscured their faces with paint. Although Witness SA did not testify before the Trial Chamber, her statements were admitted into evidence.[198] Witness KL, who is Witness H's grandfather and who was an eyewitness to the attack on a nearby house, also made statements in the weeks following the attack in which he said he could not recognise any of the attackers due to their masked faces.[199] Although, as the Prosecution points out, there is evidence on the trial record suggesting that dawn was breaking at the time of the attack, the early hour further supports the conclusion that Witness H's identification was made under difficult conditions. However, as the Prosecution argues, this was an issue that was fully litigated at trial. Indeed, in the Trial Judgement, the Trial Chamber referred to the fact that Witness H purported to recognise the Defendants under extremely "stressful" conditions, although it did not touch upon the other factors cited above that increased the difficulty of her task.

134. The Appeals Chamber reiterates that a Trial Chamber must always, in the interests of justice, proceed with extreme caution when assessing evidence given by a single identification witness under difficult circumstances.[200] Indeed, prior to embarking upon its consideration of the role of each of the Defendants in the Ahmici attack, the Trial Chamber in this case stated that, in

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[196] Prosecution Response, para. 12.60; Appeal Transcript 843-844. In particular, the Prosecution referred to Witness E (it was dawn when she awoke); Witness D (it was still dark when the shooting started but later when she ran out of her house there was light and the rain had started); Witness G (it was visible because some houses were burning); Milutin Vidovic (at 5:15 a.m. the darkness was receding and dawn was breaking); and Zoran Kupreškic (dawn had broken at the time the shooting began).
[197] Prosecution Response, para. 12.61.
[198] *See* the discussion of Witness SA and her various statements, *infra* paras 164 *et seq.*
[199] *See* the discussion of Witness KL and his various statements, *infra* paras 194-195.
[200] *See supra* paras. 39.

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examining the evidence presented, it had "kept at the forefront of its consideration…the need to proceed with caution in connection with [identification evidence] particularly in cases where a witness obtained no more than a fleeting glance of a suspect."[201]

135. The Appeals Chamber is not persuaded by the Defendant's arguments that the difficult circumstances in which Witness H found herself that morning completely eliminated any possibility of her recognising the attackers and that no reasonable Trial Chamber could have accepted that she did. However, the Trial Chamber was certainly required to explain adequately its decision to accept her testimony and to consider comprehensively Witness H's evidence in light of the trial record as a whole, explaining any inconsistencies between the two. While the Trial Chamber is not obliged to refer to every piece of evidence on the trial record, it is required to provide a "reasoned opinion".[202] Where a finding of guilt is made on the basis of identification evidence given by single witness under difficult circumstances, the Trial Chamber must be especially rigorous in the discharge of this obligation. The Appeals Chamber bears this factor in mind as it proceeds to examine the other complaints raised by the Defendants in relation to the evidence of Witness H.

(b) Reliance upon the confident demeanour of Witness H

136. In assessing Witness H's evidence, the Trial Chamber concluded:

> This witness appeared confident and forceful. She was in no doubt at all about her identification of the three accused [Zoran, Mirjan and Vlatko Kupreški}[203]] whom she knew well as they had been her neighbours all her life. Although the circumstances could not have been more stressful, she had a good opportunity to identify all three accused since they were in close proximity to her.[204]

The Trial Chamber acknowledged that there were some criticisms levelled at Witness H's credibility but found that

> …these criticisms are outweighed by the impression made by the witness upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken.[205]

Thus, the Trial Judgement reveals that Witness H's confident demeanour was a critical component of the Trial Chamber's assessment of her credibility. When counsel for Mirjan Kupreškic

[201] Trial Judgement, para. 339 (c).
[202] *See supra* paras. 32 and 39.
[203] Witness H testified that she saw Vlatko Kupreškic near her home as she was fleeing on the morning of 16 April 2001. *See infra* paras 297-298.
[204] Trial Judgement, para. 403, (footnotes omitted).
[205] Trial Judgement, para. 425.

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challenged the identification that Witness H made of Mirjan Kupreškic relating to the events of 16 April 1993, the witness responded: "[n]ot that I'm 100 per cent sure, I'm 1,000 per cent sure."[206]

137. On appeal, Zoran and Mirjan Kupreškic argue that the Trial Chamber erred in relying so heavily upon the confident demeanour of Witness H, despite the many objections they raise in connection with her identification evidence.[207] The Prosecution responds that a witness' demeanour is a legitimate and critical factor to be considered in determining the credibility of the witness.[208] Moreover, the Prosecution maintains that it is mere speculation to state that the Trial Chamber relied solely on Witness H's demeanour in finding her to be a credible witness and that "it is clear from the Judgement that the Trial Chamber accepted [only] the pertinent aspects of her evidence."[209]

138. The Appeals Chamber expects a Trial Chamber to be influenced by the demeanour of a witness in assessing the credibility of his or her evidence. That is the reason that the Trial Chamber is ordinarily best positioned to assess the evidence: it has the opportunity to observe the witness first hand.[210] Nonetheless, a Trial Chamber must be careful to allow for the fact that, very often, a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy. These cautions are reflected in evidence given by Professor Willem Wagenaar during the trial. He gave expert testimony about the problem of identification evidence and emphasised that an enormous amount of research has determined that the relationship between the certainty expressed by a witness and the correctness of the identification is very weak. Rather, the degree of certainty expressed by a particular witness is "more an aspect of personality than an aspect of the quality of what they saw or what they remember". Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.[211]

139. Against this backdrop, the Appeals Chamber will consider the Trial Chamber's reliance upon Witness H's confident demeanour in light of other objective factors on the trial record that suggest that her certainty was a reflection of her personality and not necessarily an indicator of the reliability of her identification evidence.

[206] Trial Transcript, 1729.
[207] Zoran Kupreškic Appeal Brief, paras 31 and 74; Mirjan Kupreškic Appeal Brief, 96-97; Appeal Transcript, 697-698.
[208] Prosecution Response, para. 12.51.
[209] Prosecution Response, para. 12.50.
[210] *See, e.g.*, *Celebici* Appeal Judgement, paras. 497.
[211] Trial Transcript, 9861-9862. Professor Wagenaar is an experimental psychologist. He was called by the defence as an expert witness on the question of identification evidence in criminal trials. He has published more than 150 articles, many of them dealing with problems of human perception and memory. *See* Trial Transcript, 9841-9842.

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(i) Witness H's denial that the signature on the December 1993 Statement was hers

140. During cross-examination by counsel for Zoran and Mirjan Kupreškic, Witness H was confronted with a statement that had been taken by an investigating judge, Ms. Dijana Ajanovic, in Zenica in December 1993 ("December 1993 Statement").[212] The statement recounted the attack on the Ahmic house on the morning of 16 April 1993 and appeared to be signed by Witness H. There were several inconsistencies between the December 1993 Statement and the evidence given by Witness H before the Trial Chamber.[213]

141. At least eight times during her testimony, Witness H categorically denied that the signature on the December 1993 Statement was hers or that she had ever given a statement to an investigating judge in Zenica.[214] She could not have been more insistent on this point.

142. The Defendants initially undertook to obtain an expert analysis of Witness H's handwriting in order to prove that it was her signature on the December 1993 Statement. However, inquiries revealed that this was not possible because Witness H was only 13 years old at the time she allegedly signed the document. Her handwriting as an 18 year-old would have been so dramatically different that no useful comparison could be made.[215] Instead, the Defendants called Ms. Ajanovic, the investigating judge, to testify before the Trial Chamber. This witness gave detailed testimony about the procedure employed for taking witness statements by investigating judges of the Superior Court in Zenica, which had been tasked with examining the events of April 1993 in Ahmici. She testified that, prior to giving a statement, every witness was given a thorough caution about the consequences of giving false evidence or withholding evidence.[216] She emphasised that, during the course of her investigations into the Ahmici events, she faithfully implemented this procedure[217] and that she employed a meticulous system for ensuring that the recorded statement was an accurate reflection of what the witness had said to her.[218] Although, in view of the volume of witnesses interviewed, Ms. Ajanovic was not able to specifically recall Witness H, she did remember interviewing a girl who was about 13 years old who told a story similar to that of Witness H.[219] It was possible, although not certain, that this interview took place in a refugee camp.[220] Ms Ajanovic underscored that, despite the absence of an official setting, together with the particular attention that she paid to putting young witnesses at ease, she always made sure that the witness well knew that

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[212] Exhibit D 1/2.
[213] *See* the discussion of these inconsistencies *infra* paras. 155-163.
[214] Trial Transcript, 1703-1705, 1730-1731.
[215] Trial Transcript, 2067-2068.
[216] Trial Transcript, 8979.
[217] Trial Transcript, 8980.
[218] Trial Transcript, 8984-8986, 9046.
[219] Trial Transcript, 8988-8989.
[220] Trial Transcript, 9034-9036.

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she was there as a court official.[221] Finally, Ms. Ajanovic confirmed that the witnesses she examined always signed their written statement in her presence and, upon being shown the statement signed in Witness H's name, confirmed that it could not have been signed by any one other than the person who gave the statement.[222] Ms. Ajanovic also identified her own signature, in her capacity as the investigating judge, on the document.[223] In light of Ms. Ajanovic's evidence, there was no doubt that the individuals making the statements must have been aware, at the time it was made, that it was an official statement and must have had the statement read back to him or her prior to signing it in Ms. Ajanovic's presence.

143. The Prosecution did not subsequently argue that the December 1993 Statement was made by someone other than Witness H.[224] To the contrary, during closing argument at trial, the Prosecution expressly accepted that Witness H had spoken to the examining magistrate in Zenica in December 1993.[225] Thus, the record reveals that, despite her absolute conviction that she had never given a statement to the investigating judge and had not signed the document, Witness H was in error on this point. Although Witness H was an extremely confident and self-assured witness, her denial that she made the December 1993 Statement is an example of at least one occasion where she was obviously wrong about a matter upon which she expressed absolute certainty.

144. The Trial Chamber made no specific finding as to whether Witness H had made the December 1993 Statement. Upon noting that Witness H had been cross-examined about discrepancies between the December 1993 Statement and her in-court evidence, the Trial Chamber simply stated that the witness had denied speaking to the investigating judge or signing the statement, and it did not address the discrepancies further. The only reference to the evidence given by Ms. Ajanovic was a footnote that stated "…the Defence called the Investigating Judge, Mrs. Dijana Ajanovic, who took the statement from the witness, and confirmed that the signature was that of the witness."[226] However, it is apparent from the Trial Chamber's subsequent discussion of Witness H that it did proceed on the assumption that Witness H made the December 1993 Statement. It referred to some of the inconsistencies between "her" December 1993 Statement and her in-court testimony and acknowledged the Defendants' criticism of her credibility based on her denial that it bore her signature.[227] However, in the circumstances of this case, where the Trial Chamber relied so heavily upon the confident demeanour of Witness H, it is troubling that the Trial

[221] Trial Transcript, 9039, 9043-9044 and 9051-9052.
[222] Trial Transcript, 8992-8994.
[223] Trial Transcript, 8992.
[224] Prosecution Closing Brief, para. 5.40.
[225] Prosecution Closing Statement, Trial Transcript, 12642.
[226] Trial Judgement, para. 402 and footnote 518.
[227] Trial Judgement, para. 425.

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Chamber did not make an express finding that she was wrong when she categorically denied making the statement.

145. Ultimately, however, the Trial Chamber accepted Witness H's evidence based, in large part upon her confident demeanour, notwithstanding her adamant and yet, mistaken, denial that the statement was hers. On appeal, Zoran and Mirjan Kupreškic argue that the Trial Chamber erred in doing so.[228] The Prosecution responds that it was open to the Trial Chamber to accept the explanations given by the witness, to disregard the December 1993 Statement as immaterial and to rely solely upon the evidence she gave before the Trial Chamber.[229] However, the trial record reveals that Witness H gave no explanation about why she may have been confused about whether or not she made the December 1993 Statement. Moreover, the significance of the December 1993 Statement, for the present purposes, lies not in the contents of the document, but in the fact that Witness H denied she made it at all. Given that the Trial Chamber's assessment of Witness H hinged so dramatically upon its assessment that her confident in-court testimony was an indicator of reliability, her mistake as to the December 1993 Statement took on increased significance.

(ii) Familiarity with her neighbours

146. The Trial Judgement reveals that, one of the factors that persuaded the Trial Chamber of the reliability of Witness H's identification evidence, was her claim that, as she had been Zoran and Mirjan Kupre{ki}'s neighbour all her life, she knew the Defendants well.[230]

147. This issue received considerable attention during the testimony of Witness H. It was undisputed that Witness H did, in fact, live near Vlatko, Zoran and Mirjan Kupreškic. During her examination-in-chief, Witness H stated that she knew Zoran and Mirjan Kupreškic "very well" and that she saw them "practically every day".[231] She accepted that her family and the Kupreškic family did not visit each other in their houses.[232] Nonetheless, they often met in the street[233] and Witness H expressed complete confidence in her ability to identify the Defendants accurately on the basis of these encounters.

148. Upon cross-examination, Witness H accepted that the Defendants were much older than she was and that, therefore, the adult members of her family knew the Defendants a great deal better than she did.[234] This, the Defendants argued, made it surprising that Witness H would have

[228] Zoran Kupreškic Appeal Brief, para. 68; Mirjan Kupreškic Appeal Brief pp. 77-78; Appeal Transcript, 698.
[229] Prosecution Response, para. 12.11.
[230] Trial Judgement, para. 403.
[231] Trial Transcript, 1621.
[232] Trial Transcript, 1749.
[233] Trial Transcript, 1749.
[234] Trial Transcript, 1719.

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recognised them during the attack when a close adult relative did not. Most significantly, in her December 1993 Statement, Witness H maintained that she was immediately able to recognise Zoran Kupreškic during the Ahmici attack because she knew him very well from the store where he used to work, a place that Witness H frequented.[235] In her testimony before the Trial Chamber, Witness H adhered to her claim that Zoran Kupreškic worked in this store, which was owned by Ivica Kupreškic.[236] In fact, it was Mirjan Kupreškic (along with another male employee), not Zoran Kupreškic, who worked in the store.[237] The Trial Chamber specifically found that Zoran was an employee of the Slobodan Princip Seljo factory in Vitez[238] and that, from August 1992 until 15 April 1993, Mirjan was employed by Ivica Kupreškic, first in the Sutra store in Ahmici and then, shortly before the conflict, at the Sutra store in Vitez.[239] However, the Trial Chamber made no reference to the fact that Witness H had incorrectly asserted that Zoran Kupreškic worked in the store and accepted, without discussion, that Witness H knew each of the Kupreškic brothers well.

149. On appeal, Zoran and Mirjan Kupreškic argue that the Trial Chamber erred in failing to assess critically Witness H's claims that she knew them very well in light of her erroneous claim that Zoran Kupreškic worked in the store.[240] In turn, the Prosecution argued that any error Witness H may have made in the identification of Zoran Kupreškic is irrelevant to the case against Mirjan Kupreškic and that, even assuming that Witness H incorrectly identified Zoran Kupreškic, this does not impugn her identification of Mirjan Kupreškic.[241]

150. At first glance, Witness H's confusion may appear to be a relatively insignificant matter of mixing up the two brothers, one of whom worked in the store and the other did not. However, as argued by Mirjan Kupreškic,[242] Witness H's evidence was not that she had heard or believed that Zoran Kupreškic worked in the store, but that she had personally been to the store and seen him working there on many occasions. That is how, she said, she came to immediately recognise him when she saw him in her house on the morning of the Ahmici attack. Once again, this is a matter about which Witness H, despite the certainty she expressed, was mistaken. It is, moreover, a matter of considerable importance going directly to Witness H's ability to accurately and specifically

[235] Exhibit D 1/2 (the December 1993 Statement).
[236] Trial Transcript, 1720. Although Witness H denied that she had made the December 1993 Statement, she accepted that aspects of the statement were correct.
[237] Trial Transcript, 1180 and 11183 (explaining that Zoran Kupre{ki} was employed in the Slobodan Princip Seljo factory near Vitez from May 1983) and 11512 (explaining that Mirjan Kupre{ki} worked in the Sutra store); Trial Transcript, 11559 (referring to Mirjan Kupre{ki}'s work in the store). *See also* Mirjan Kupreškic Closing Brief, 68; Trial Transcript, 12788 (the closing argument of counsel for Zoran and Mirjan Kupre{ki} that Witness H's claim to know the Defendants well was called into question as a result of her erroneous claim that Zoran worked in a store).
[238] Trial Judgement, para. 370.
[239] Trial Judgement, para. 371.
[240] Mirjan Kupreškic Appeal Brief, 89-90; Zoran Kupreškic Appeal Brief, para. 70; Appeal Transcript, 679.
[241] Prosecution Response, paras 12.69-12.72.
[242] Mirjan Kupreškic Appeal Brief, 90.

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identify each of the two Defendants and the roles they played during the difficult conditions resulting from the attack on her house on the morning of 16 April 1993. It was a matter that the Trial Chamber was expected to address.

(iii) Witness H's detailed description of the attack

151. Witness H gave a detailed description of the attack on her house on the morning of 16 April 1993. The Prosecution argues that Witness H's ability to give precise details about the attack (including the appearance of Zoran and Mirjan Kupreškic) on the morning of 16 April 1993, is a factor supporting her credibility. In particular, the Prosecution pointed out that

> she was able to provide details such as the colour of the Mirjan Kupreškic uniform (black); the weapons he was carrying (a rifle and a hand-held rocket launcher) and that he had smeared shoe polish on his face…She immediately recognised the Appellant Zoran Kupreškic standing just one meter in front of her, wearing a uniform and black paint over his face.[243]

152. Certainly, in her examination-in-chief, Witness H confidently described the black paint on the face of Zoran Kupreškic on the morning of the attack and she recalled with certainty that he was wearing a uniform and carrying an automatic rifle in his hands and a rocket launcher on his back.[244] Similarly, she testified that Mirjan Kupreškic had his face painted, was wearing a uniform, had a rifle in his hand and a rocket launcher on his back.[245] However, during cross-examination, upon being pressed for further details of the weapons she saw, Witness H stated that she had not paid attention to the weapons being carried by the attackers.[246] The following exchange occurred between counsel for Zoran Kupreškic and Witness H in relation to the weapon carried by Mirjan Kupreškic.

> Q. Tell us now what kind of weapon Mirjan had.
>
> A. All I cared about was his face.
>
> Q. Do you know this or not? I am satisfied with whatever answer you give me. If you didn't pay attention to the weapon Mirjan had, never mind.
>
> A. I didn't see it. I was just looking at the faces, because that is what was important to me, to see who it was.
>
> Q. But you said that you remember details very well, and that is why I asked whether you noticed details regarding the weapons.
>
> A. I saw that they had rifles and that they had rocket launchers on their backs, but I know nothing about weapons.[247]

[243] Prosecution Response, para. 12.7.
[244] Trial Transcript, 1642-1643.
[245] Trial Transcript, 1645-1646.
[246] Trial Transcript, 1758.
[247] Trial Transcript, 1759-1760.

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153. Thereafter, the Presiding Judge intervened to stop any further questioning along this line on the basis that the witness had clearly said that "she was not paying any attention to the weapon in the case of Mirjan."[248] Witness H's admission that she was only looking at the faces of her attackers, along with her inability to describe the weapons carried by Mirjan Kupreškic, does not, in isolation, detract significantly from her credibility. However, it is at odds with her confident assertion, made during her direct examination, that she knew which weapons the Kupreškic brothers were carrying during the attack.

(iv) Conclusions

154. In light of the foregoing discussion, the Appeals Chamber accepts the Defendant's argument that, in the circumstances of this case, the Trial Chamber erred in relying so heavily upon Witness H's confident demeanour. There are several strong indications on the trial record that her absolute conviction in her identification evidence was very much a reflection of her personality and not necessarily an indicator of her reliability.

(c) Witness H's prior inconsistent statement

155. The Trial Judgement lists three inconsistencies between Witness H's testimony before the Trial Chamber and the December 1993 Statement. On appeal, Zoran and Mirjan Kupreškic argue that the Trial Chamber erred in failing to give due weight to the inconsistencies referred to in the Trial Judgement and, moreover, failed to address other material inconsistencies between Witness H's in-court testimony and her December 1993 Statement.[249] The Prosecution accepts that there are inconsistencies between Witness H's December 1993 Statement and the evidence she gave before the Trial Chamber. Indeed, under cross-examination, Witness H agreed there were inconsistencies between the statement and her testimony.[250] Rather, the Prosecution counters that the alleged discrepancies are peripheral in nature, that the Trial Chamber turned its mind to, but rejected these discrepancies and, finally, that it was open to the Trial Chamber to disregard Witness H's December 1993 Statement and to rely solely upon the evidence she gave, under solemn declaration, in The Hague.[251]

156. The three inconsistencies between the December 1993 Statement and Witness H's in-court testimony referred to in the Trial Judgement were: whether her father had a rifle with him in the shelter, whether she witnessed her father's killing and whether she saw Zoran and Mirjan Kupreškic

[248] Trial Transcript, 1760.
[249] Zoran Kupreškic Appeal Brief, para 68; Mirjan Kupreškic Appeal Brief, pp. 78-85; Appeal Transcript, 698.
[250] Trial Transcript, 1711.
[251] Prosecution Response, paras. 12.52-12.57; Appeal Transcript, 841.

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setting fire to the upper floor of her house.[252] Regarding these discrepancies, it is not the function of the Appeals Chamber to second-guess the deliberations of the Trial Chamber. The Appeals Chamber defers to the Trial Chamber's decision to accept her evidence notwithstanding these difficulties. The jurisprudence of this Tribunal clearly recognises that a Trial Chamber is at liberty to accept a witness' evidence notwithstanding inconsistent prior statements.[253]

157. It is a different matter, however, where it is clear that the Trial Chamber has failed to address material discrepancies. The Appeals Chamber accepts that, generally, the mere fact that the Trial Chamber fails to refer to a discrepancy does not necessarily mean that it has not been considered. However, in this case, the Trial Chamber clearly listed the discrepancies it took into account and it is apparent from this list of discrepancies that there were several important omissions. Furthermore, as discussed below, these omissions are magnified when regard is had to the statements made by Witness SA, which were also not taken into account by the Trial Chamber.[254] In the circumstances of this case, particularly bearing in mind that the identification of the Defendants was made in difficult circumstances, the interests of justice require that the Appeals Chamber carefully assess whether any of the discrepancies the Trial Chamber overlooked between the December 1993 Statement and Witness H's evidence specifically undermine Witness H's direct identification of Zoran and Mirjan Kupreškic that morning.[255]

158. This is not a case where the discrepancies in Witness H's statements reveal such a recurring problem with her testimony that they cast doubt upon her recollection in its entirety. There is no dispute between the parties that Witness H was an eyewitness to the attack on her home on the morning of 16 April 1993, and the gist of her December 1993 Statement and her in-court testimony about these events are consistent. Moreover, some of the alleged discrepancies were likely due to the passage of time. Matters such as whether Witness H looked out of the window when she was awakened on the morning of 16 April 1993,[256] the total number of attackers, the precise

[252] Trial Judgement, para. 402.
[253] *See, e.g.*, *^elebici* Appeals Judgement, para. 497.
[254] *See* the discussion *infra* para. 186.
[255] Although there was no English translation of the December 1993 Statement on the trial record, the Appeals Chamber obtained an official translation of this document in order to consider the impact of the alleged inconsistencies on Witness H's credibility.
[256] The December 1993 Statement specifies that Witness H looked out the window, but Witness H denied this during her testimony before the Trial Chamber. Trial Transcript, 1733.

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whereabouts of the unidentified perpetrators at various times during the attack[257] and whether or not Witness H stopped to put on her sneakers as she fled the house,[258] potentially fall into this category.

159. While the Trial Chamber referred to discrepancies in Witness H's statements about whether her father had a rifle in the shelter on the morning of the attack, this was only a minor aspect of a broader criticism raised by the Defendants. In her December 1993 Statement, Witness H said that, while the family was sheltering in the basement, her father had gone, armed with a rifle, to unlock the garage door, declaring that he would try to defend the entrance to the house. He went from the shelter into the garage and was then seized by the attackers. By contrast, during her testimony at trial, Witness H maintained that, while in the shelter, she heard familiar voices, which she thought to be those of relatives outside the house, calling her father by name. Upon Witness H's urging, her father, unarmed, opened the garage door to let them into the shelter. He was then apprehended by the attackers and killed. Thus, according to the version of events that Witness H presented at trial, the attackers must have been people who knew her father's name and who had familiar voices. This is materially different from what she said in the December 1993 Statement which related that her father went forth alone and armed to face unknown attackers in order to protect his family. Similarly, in the December 1993 Statement, Witness H said that, when the attackers were calling her father out of the shelter, they referred to him as "Mujahedin" (Islamic fighter); in court she testified that she thought they were friends or relatives because they were calling her father by his name. Thus the significance of this discrepancy lies in the possibility that, between December 1993 and September 1998, Witness H introduced into her version of events, new details supporting her claim that familiar people (i.e., her neighbours) must have been involved in the attack. This is a material inconsistency and the Trial Chamber erred in categorising it as merely a discrepancy as to whether Witness H's father had a rifle or not.

160. The Trial Chamber also omitted to consider an inconsistency in Witness H's recollection of the conversation she had with Zoran Kupreškic during the attack. Before the Investigating Judge, Witness H recounted that Zoran Kupreškic lifted the hatch to the shelter and spoke to her. She made no mention of having left the basement prior to the conversation. Thus, according to this version of events, Witness H only had an opportunity to recognise Zoran Kupreškic, who was standing in the children's room, from her constrained vantage point in the basement. However, at trial, Witness H stated that, when Zoran Kupreškic lifted the door to the shelter, she came out and

[257] According to the December 1993 Statement, Witness H recalled that there were nine attackers in and around her, house, including two in front of the garage. At trial, Witness H referred to only five and made no mention of any soldiers in front of the garage. Trial Transcript, 1647.

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spoke to him in the children's room, thus affording her an opportunity to identify him, before going back down into the shelter and then coming out again.[259] As a matter of logic it is questionable whether soldiers attacking a house in such chaotic and brutal circumstances would allow one of the occupants to go back and forth between the shelter in this manner, especially when it was not known with certainty whether any weapons were kept there. This discrepancy is extremely material as it goes directly to Witness H's claim that she was in close proximity to Zoran Kupre{ki} and therefore had an adequate opportunity to identify him. A discrepancy is also discernible in the content of the conversation that Witness H allegedly overheard between Zoran and Mirjan Kupreškic during the attack. In her December 1993 Statement, Witness H said that she heard the Kupreškic brothers discussing whether or not she and her family would have to come out of the house. At trial, her evidence changed to a discussion between the Kupreškic brothers as to whether they would kill Witness H and her family, imparting a more grievous aspect to their participation. Furthermore, in her description of events at trial, Witness H recounted seeing Zoran Kupreškic in her house twice, once when she came out of the shelter the first time to speak to him in the children's room and then again when she had gone back down into the basement and Zoran came back to order her out of the house. The December 1993 Statement refers to only one encounter with Zoran Kupreškic, which occurred while he was in the children's room and she was down in the shelter. The Trial Chamber addressed none of these matters.

161. Finally, in the December 1993 Statement, Witness H made no reference to having identified Vlatko Kupreškic in the vicinity of her house as she fled with Witness SA and her sisters on the morning of 16 April 1993. However, in the December 1993 Statement, Witness H did mention that the sniper fire was coming from the direction of Vlatko Kupre{ki}'s house and so had obviously turned her mind to the question of his involvement in the attack. During her in-court testimony, she stated with certainty that she saw him outside her house wearing a blue overcoat at the time that she fled her house.[260]

162. The Appeals Chamber allows for the fact that the December 1993 Statement was not lengthy and that the witness obviously had much greater scope to describe the events in detail when she appeared before the Trial Chamber. Nonetheless, contrary to the arguments put forward by the Prosecution, the discrepancies described above are not inconsequential and relate directly to

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[258] In her testimony Witness H said that she sat down on the door-step to put on her sneakers before she left the house. Trial Transcript 1654. By contrast, in her December 1993 Statement, Witness H said she simply walked out of the house.
[259] Trial Transcript, 1641 and 1644.
[260] Trial Transcript, 1657-1659.

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Witness H's identification of the Defendants that morning. Although a Trial Chamber is at liberty to accept a witness' evidence notwithstanding prior inconsistent statements, in this case the Trial Chamber erred in failing to consider material discrepancies going directly to her identification of the Defendants. She changed the circumstances surrounding her father's departure from the shelter and introduced into her account of the events new details suggesting that the assailants knew her father by name. She altered her version of events from one where she had a very limited opportunity to identify Zoran Kupreškic from a difficult angle on a single, fleeting, occasion, to one where she saw him twice and had a face-to-face conversation with him. She also implicated an additional member of the Kupreškic family in the attack.

163. Although the Trial Chamber stated that Witness H was thoroughly cross-examined on all of the discrepancies between the December 1993 Statement and her in-court-testimony, a review of the trial record reveals that, to a great extent, attempts to cross-examine her on these inconsistencies were thwarted by her erroneous denial that she ever made the December 1993 Statement. Thus her credibility on the stand appeared to remain largely intact. This conclusion, however, should have been reassessed in light of the evidence from the investigating judge, Ms. Ajanovic, supporting the Defendant's argument that Witness H made the December 1993 Statement.

(d) Witness SA

164. Foremost amongst the concerns raised by the Defendants was the Trial Chamber's handling of matters relating to Witness SA, who is a close relative of Witness H. Witness SA was present in the Ahmic house at the time of the attack on 16 April 1993 and was the only eyewitness, other than Witness H, who could potentially recount the events that occurred there that morning.[261]

165. On 21 April 1993, just a few days after the Ahmici attack, Witness SA gave a statement ("First Statement") to the Security Service in Zenica in which she specifically stated that she was unable to identify the perpetrators of the attack on her house, both because of her distressed state and because the soldiers were dressed in HVO camouflage uniforms with their faces painted in different colours. She made no reference to any other member of her family having identified the perpetrators.[262] On 23 April 1993, Witness SA made another statement ("Second Statement"), this time to the Centre for Investigation of War Crimes and Genocide against Muslims. Witness SA stated that Witness H had seen Zoran Kupreškic in her house during the course of the attack. No mention was made of Mirjan Kupreškic having been involved in the attack, although Witness SA

[261] Witness H's two siblings were also present but were too young to testify about the events.
[262] Exhibit C 1.

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did refer to his name when listing the Croat inhabitants of the Šutre hamlet in which she had lived prior to the attack.[263] A few weeks later, on 9 May 1993, Witness SA made a further statement ("Third Statement") to the Centre for Investigation of War Crimes and Genocide against Muslims in Zenica, in which she repeated that she had been unable to identify any of the perpetrators of the attack on the Ahmic house, but that Witness H had recognised Zoran Kupreškic.[264] Again, no mention was made of Mirjan Kupreškic's involvement in the attack, but Witness SA commented that he was one of the soldiers she used to see in HVO uniform prior to the conflict. On 20 December 1993, Witness SA made a statement ("Fourth Statement") before an Investigating Judge in Zenica in which she recalled having seen "Zoran, Mirjan, Ivica and Vlatko Kupreškic in full combat gear" in her home during the attack.[265] The Prosecution subsequently interviewed Witness SA, on 18 October 1994, ("Fifth Statement") and she repeated her allegation that Zoran, Mirjan, Ivica and Vlatko Kupreškic were all involved in the attack on her house.[266]

166. Witness SA was initially included on the Prosecution's list of witnesses, although there is little doubt that, in view of her prior statements, her identification of the Defendants as participants in the attack would have been subjected to serious challenge upon cross-examination. On 2 September 1998, the Prosecution informed the Defendants and the Trial Chamber that it had not made a final decision as to whether it would call Witness SA to testify, although it intimated that it was unlikely.[267] The following day, during her cross-examination of Witness H, counsel for Mirjan Kupreškic complained that the Defendants still did not know whether Witness SA would testify for the Prosecution and that this impacted upon their cross-examination of Witness H. Emphasising the importance of hearing Witness SA, who was the only other eye-witness who could testify about the events in the Ahmic house on the morning of 16 April 1993, the Defendants raised the possibility that, if the Prosecution did not call Witness SA, the Trial Chamber should intervene and call her as a court witness.[268] Upon the conclusion of Witness H's testimony on 3 September 1998, the Trial Chamber announced that it recognised the rights of the Defendants to have an opportunity to cross-examine Witness SA and that it would, therefore, require that the Prosecution call her the following afternoon. The Presiding Judge reiterated to the Prosecution"…you should understand that it is in the interest of justice that this witness be called here before the Tribunal to give that witness's testimony."[269]

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[263] Exhibit C 2.
[264] Exhibit C 3.
[265] Exhibit C 4.
[266] Exhibit C 5.
[267] Trial Transcript, 1569.
[268] Trial Transcript, 1698-1699.
[269] Trial Transcript, 1847.

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167. On 4 September 1998, the day that Witness SA was due to testify, the Prosecution informed the Trial Chamber that Witness SA was not well enough to attend. The previous day, upon being told that she would be called to give evidence the following day, the witness had collapsed in distress. The Prosecution expressed concern about the impact that the rigours of trial and, particularly cross-examination, would have upon the health of the witness. Witness SA had reacted similarly on several previous occasions, although at times she had been strong enough to answer questions put to her by the Prosecution.[270] At this juncture, counsel for Zoran Kupreškic again emphasised that, in view of the prior statements made by the witness, it was crucial for the Defendants that she be heard and requested further information about her medical condition.[271] The Trial Chamber acknowledged the concerns of the Defendants stating that it was "only proper for the Defence to insist on her being heard here in court."[272] Later that day, a representative from the Tribunal's Victims and Witnesses Unit appeared and informed the Trial Chamber that Witness SA was being treated by a physician. The representative expressed the view that the witness was not, at that time, fit to make a statement before the court and that this had been confirmed by the preliminary assessment of the physician. No information was available as to whether the witness would be able to attend court at some later date.[273] Upon hearing this, counsel for Zoran Kupreškic requested that the Trial Chamber obtain a professional diagnosis of Witness SA's condition and the Trial Chamber agreed that this would be done.[274] The Trial Chamber subsequently informed the parties that, in view of the medical information about Witness SA that had been provided to the Trial Chamber, the witness was being released so that she could return home. However, the Trial Chamber reiterated its intention to call her back, under Rule 98 (in conjunction with Rule 89), to give evidence and assured the Defendants it would "take all the necessary steps short of…forcing the witness to come back to The Hague."[275]

168. On 18 September 1998, defence counsel again raised the issue of whether Witness SA would be called to testify. The Presiding Judge responded that the medical report regarding the witness' health was expected within the next week. He went on to say:

> …it is better for the witness to be a witness called by the Trial Chamber to give evidence in court, also because this might appear to the witness herself as a way of protection, a way of protecting her in coming here. So she might find a psychological incentive in coming here to give evidence because of the request put forward by the Court…If she refuses, we don't want to subpoena her, for a lot of obvious psychological reasons. However, we might either take a deposition when we go to Bosnia-Herzegovina…We might even decide to admit in evidence her statements, her various statements. This is a fallback. I would prefer either her to come over here or to take a

[270] Trial Transcript, 1854-1857, and 1859-1861.
[271] Trial Transcript, 1857-1858.
[272] Trial Transcript, 1861.
[273] Trial Transcript, 1879-1881.
[274] Trial Transcript, 1881-1882.
[275] Trial Transcript, 1970-1971.

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> deposition, because it's better to have the witness in front of us. However, as I say, as a fallback solution, we might eventually decide to enter into evidence those statements which, I think, the Defence intends to stress.[276]

The medical report relating to Witness SA was conveyed to the parties on 28 September 1998.[277] The tests performed on Witness SA had revealed no physical abnormalities and, accordingly, the Trial Chamber decided it would call Witness SA as a court witness. A confidential summons was issued on 30 September 1998 asking Witness SA to appear before the Court in the week commencing 5 October 1998. As the Presiding Judge had foreshadowed, the summons specified that the Trial Chamber did not, at that stage, "contemplate any penalties for non-compliance" and merely urged "the witness to comply with (the)…summons in the interests of justice."[278] However, on 7 October 1998, the Trial Chamber received a copy of a fax from a staff member of the Victims and Witnesses Unit in its Sarajevo office reporting that Witness SA was not in a condition that would enable her to travel to The Hague to testify before the Trial Chamber.[279] The Deputy Head of the Victims and Witnesses Unit attended before the Trial Chamber and conveyed his opinion that, in light of the fax he had received from his staff member, Witness SA would not be able to come. The staff member in Sarajevo had expressed the view that the witness was suffering from post-traumatic stress disorder ("PTSD").[280] At that time, counsel for Mirjan Kupreškic inquired as to whether a suitably qualified medical practitioner had examined the witness and provided appropriate medical documentation. The Deputy Head of the Victims and Witnesses Unit confirmed that, although his staff member was qualified as a social worker and was very experienced in dealing with survivors of war trauma, neither she, nor any other staff member of his unit, was qualified to carry out a medical assessment of Witness SA.[281]

169. Upon hearing this report from the Victims and Witness Unit, the Presiding Judge of the Trial Chamber stated:

> You may remember that we decided to summon this lady as a Court witness; however, without going so far as to subpoena her. Now, we fully trust the competence and the experience of the various members of the Victims and Witnesses Unit who have been dealing with this particular lady, and we feel that it is probably not necessary now to insist to call her as a witness. However, we decide to admit into evidence her…written statements, so that they will be part of the evidence of this Tribunal.[282]

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[276] Trial Transcript, 2429-2430.
[277] *See* Witness Summons by the Chamber Pursuant to Rule 98 of the Rules of Procedure and Evidence, 30 September 1998.
[278] Witness Summons by the Chamber Pursuant to Rule 98 of the Rules of Procedure and Evidence, 30 September 1998.
[279] Trial Transcript, 3983-3984.
[280] Trial Transcript, 3985-3987.
[281] Trial Transcript, 3987-3990.
[282] Trial Transcript, 3990-3991.

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The six statements of Witness SA were subsequently admitted as court exhibits on 15 October 1998.[283] The defence case commenced in early 1999.[284]

170. On appeal, both Zoran[285] and Mirjan Kupreškic[286] argue that the Trial Chamber erred in accepting the diagnosis of PTSD by a social worker from the Victims and Witnesses Unit and, on that basis, deciding that it was not necessary for Witness SA to testify. In response, the Prosecution claims that, pursuant to Rule 98, the Trial Chamber has complete discretion as to whether it will call a witness to testify and that the parties have no right to insist upon a particular person be named as a court witness.[287]

171. The Appeals Chamber accepts that the Trial Chamber erred in failing to call for a professional medical opinion to follow up the assessment made by the staff member of the Victims and Witnesses Unit as to the inability of Witness SA to testify due to PTSD. Although the staff member may have been extremely experienced in working with trauma survivors and, no doubt, would have encountered the symptoms of PTSD many times, this Tribunal can only accept the diagnosis of such a complex psychological condition when it is made by a person with appropriate medical training. Further, as has been previously acknowledged by this Tribunal, an individual suffering from PTSD may, nonetheless, be a perfectly credible witness.[288] This is an additional reason to require that the assessment of a witness' inability to testify as a result of PTSD be carried out by an appropriately qualified health professional. That was not done in the present case. The Appeals Chamber agrees that, pursuant to Rule 98, the Trial Chamber has complete discretion as to whether it will name a particular person as a court witness. The Appeals Chamber further notes that, in this case, the Trial Chamber specifically refrained from issuing a formal subpoena for Witness SA, settling instead for a summons that expressly stated there would be no penalty for non-compliance. Nonetheless, having named Witness SA as a court witness, it was not open to the Trial Chamber to retract that decision in the absence of certification from a qualified health professional demonstrating that the witness was medically unfit to attend.

172. The question then arises as to whether any prejudice followed from the Trial Chamber's treatment of matters relating to Witness SA's proposed in-court appearance. It is true that, in the absence of an ability to sanction Witness SA for non-attendance, the Trial Chamber could not, in any event, have ensured her live testimony. As argued by the Prosecution, it was also, theoretically,

[283] Trial Transcript, 4891-4982.
[284] On 11 January 1999, counsel for Zoran Kupre{ki} presented the joint opening statement for the Kupre{ki} brothers. Trial Transcript, 5026-5044.
[285] Zoran Kupre{ki} Appeal Brief, paras 33 and 76; Appeal Transcript, 658 and 685.
[286] Mirjan Kupre{ki} Appeal Brief, 59-61.
[287] Prosecution Response, para. 12.41; Appeal Transcript, 846-847.
[288] *Prosecutor* v *Furundžija,* Case No.: IT-95-17/1-T, Judgement, 10 December 1998, para. 109.

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open to the Defendants to call Witness SA as their own witness if they believed their rights had been prejudiced as a result of the Trial Chamber's decision to release her from her obligation to attend.[289] The present Appeals Chamber adopted a similar position in its earlier decision on a motion by Zoran and Mirjan Kupre{kic to call Witness SA at the appeal stage pursuant to Rule 115.[290]

173. After a more complete review of the trial record, however, the Appeals Chamber concludes that, in practice, the matter was more complicated. In the course of the trial, defence counsel had expressed concerns about their ability to arrange for Bosnian Muslims to travel to The Hague and appear before the Trial Chamber as defence witnesses regarding the events in Ahmici. Muslim witnesses who, in principle, were willing to testify for the Defendants refused to do so due to fear of the condemnation and harassment within the close-knit Muslim community that would surely follow from associating themselves with the Defendants. As one defence counsel explained:

> After the war, there is still great distrust between the Croats and the Muslims. For those reasons, if a Muslim witness does have contacts with the Defence lawyers of the accused Croats, he is often called a traitor in his own environment and is often, therefore, mistreated in different ways.[291]

174. In order to resolve this problem, the Defendants proposed that Muslim witnesses be called as court witnesses rather than as defence witnesses, which would not be viewed by the Muslim community as suggesting any improper association with the Croat side on the part of the witnesses.[292]

175. The Trial Chamber, accepting the concerns expressed by the Defendants, agreed that the court would summon the proposed witnesses on their behalf.[293] In a situation where a witness was not even willing to testify for the Defendants in principle, as would have been the case with Witness SA, there would have been little hope of Zoran and Mirjan Kupre{ki} securing her co-operation. Thus the Trial Chamber was well aware of the enormous difficulty the Defendants would have in obtaining the attendance of Witness SA as their own witness. Undoubtedly, that is why the Trial Chamber agreed to name Witness SA as a court witness in the first instance. Upon concluding that

[289] Prosecution Response, para. 12.39.
[290] Decision on the Motions of Drago Josipovic, Zoran Kupreškic and Vlatko Kupreškic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), 8 May 2001, para. 10 (stating "...it is clear from the trial transcript that this witness could have been called during the course of the *Kupreškic* trial as part of the defence case, had the defence wished to call her. Furthermore, it is clear from the transcript that the defence did not object at the time to the Trial Chamber's decision not to call the witness, or even challenge it by way of appeal...the defence has no right to assume what a Chamber will or will not accept in making its findings; it must put forward its best case in the first instance. If the defence had wanted to emphasise a particular issue in relation to Witness SA during the trial, then it ought to have called Witness SA during the course of the defence case, or objected to the Trial Chamber's decision not to call Witness SA at the time. That failure cannot be rectified at the appeals stage.")
[291] Trial Transcript, 3693-3694.
[292] Trial Transcript, 3694.
[293] Trial Transcript, 3758-3759.

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Witness SA was not well enough to appear as a court witness, the solution proposed by the Trial Chamber was to admit her statements into evidence. In the circumstances it would have been futile for the Defendants to appeal the decision of the Trial Chamber to abandon calling Witness SA, although it is abundantly clear that they had repeatedly insisted that the witness' medical condition should be professionally appraised and documented.

176. Counsel settled for the admission of Witness SA's statements into evidence, on the assumption that these apparently conflicting documents would be carefully analysed by the Trial Chamber. It is clear that the Defendants relied heavily upon the Trial Chamber's decision to admit the documents. Throughout the trial, they remained adamant that the testimony of Witness SA was critical, both because she was the only other eyewitness who could testify about the events in the Ahmic house and because they believed that her prior statements were at odds with the evidence given by Witness H. In the Defendants' view, they constituted an important check on the evidence of Witness H.[294] This position was articulated forcefully in the Closing Brief filed by Mirjan Kupreškic who argued:

> The statement of…[Witness SA], although she was a prosecution witness initially, is of exceptional importance to the defence, since it might be used as a check on the statements of Witness H. Both these persons were in the same place on April 16, 1993, and they gave different accounts of the fundamental circumstances, and it would have been of crucial importance for the establishment of the truth to determine all the relevant facts in direct examination.[295]

177. For its part, the Trial Chamber, on several occasions throughout the course of the trial, acknowledged that it was in the interests of justice for the Trial Chamber to consider the evidence of Witness SA.[296] It only became apparent when the Trial Judgement was rendered that the Trial Chamber had given no consideration at all to Witness SA's statements. The Trial Chamber explained:

> …little or no weight can be placed upon the [Witness SA] statements purporting to identify the accused. It was not until her fourth statement that the witness made any identification. She did not give evidence, and was, therefore, not subject to cross-examination about those discrepancies.[297]

178. On appeal, Zoran and Mirjan Kupreškic argue that the Trial Chamber erred in failing to examine critically the evidence of Witness H in light of the Witness SA statements and, furthermore, misled them by admitting the documents and then refusing to consider them on the grounds stated in the Trial Judgement. Had they known the statements would be disregarded, argued the Defendants on appeal, alternative means for getting the evidence before the Trial

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[294] Trial Transcript, 1698-1699.
[295] Mirjan Kupre{ki} Closing Brief, 55.
[296] *See* the discussion *supra* paras 166-167.
[297] Trial Judgement, para. 404.

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Chamber (such as renewing demands to have the witness called before the Trial Chamber) would have been more vigorously pursued.[298] In response, the Prosecution maintains that the Trial Chamber relied solely on the identification evidence of Witness H to reach its conclusion that Zoran and Mirjan Kupreškic had participated in the attack on the Ahmic house and that arguments about Witness SA are, therefore, irrelevant.[299] As to the argument that the Defendants were misled by the Trial Chamber's decision to admit the statements into evidence, the Prosecution argued that the Defendants were confusing issues concerning the admission of evidence and the weight the Trial Chamber subsequently attached to it.[300]

179. The Appeals Chamber accepts the Defendants' argument that the Trial Chamber overlooked the link between the Witness SA statements and the credibility of Witness H. Certainly it was reasonable for the Trial Chamber to conclude that it could not rely on Witness SA's belated recognition of Zoran and Mirjan Kupreškic in the attack on the Ahmic house as corroboration of the testimony given by Witness H on that same matter. However, it failed to take the next critical step, so strenuously and repeatedly argued by the Defendants, namely to consider whether the statements made by Witness SA cast doubt upon the identification evidence of Witness H. In these circumstances, it was a mistake for the Trial Chamber to admit the Witness SA statements into evidence (the solution the Trial Chamber itself devised in light of its inability to obtain live testimony from Witness SA) knowing that they were inconsistent with each other and had not been subjected to cross-examination and then to find that these factors precluded their use. Although the later statements of Witness SA may well have been not credible as a means of corroborating the testimony of Witness H, the Trial Chamber should have considered whether the statements, in their totality, cast doubt on the testimony of Witness H.

180. The arguments made by the Defendants about the manner in which the Witness SA statements impugn the credibility of Witness H fall into two general categories. First, the Defendants maintain there are material discrepancies between the evidence of Witness H and the statements of Witness SA. Second, they contend that the statements of Witness SA suggest a distinct possibility that Witness H may have been unduly influenced by speculation amongst her family members that their Croat neighbours were involved in the 16 April 1993 attack on Ahmici.

(i) Discrepancies

181. The Defendants point to a number of inconsistencies between the version of events given by Witness H in her testimony and that given by Witness SA in her various statements and argues that

[298] Mirjan Kupre{ki} Appeal Brief, 61-62.
[299] Prosecution Response, para. 11.28.

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the Trial Chamber failed to analyse these discrepancies.[301] In response, the Prosecution claims that the Trial Chamber did in fact analyse the evidence of Witnesses H and SA and refers to paragraphs 400 to 404 of the Trial Judgement.[302] This claim has no foundation. In none of these paragraphs does the Trial Chamber address any possible inconsistencies between the evidence given by Witness H and the Statements of Witness SA. The only inconsistencies noted by the Trial Chamber are those apparent within Witness SA's own statements.

182. In her Second Statement, Witness SA said that Witness H had recognised Zoran Kupreški} in the kitchen of her house, whereas, during her testimony, Witness H said she recognised him in the children's room. It is possible that Witness SA was simply imprecise in recounting Witness H's recollections in this respect and that it would not have seriously impacted upon Witness H's credibility. However, it is a matter that was never resolved during cross-examination of Witness SA, and so remained as an inconsistency on the face of the trial record.

183. The Appeals Chamber is not satisfied that the Defendants have successfully established the existence of another of the inconsistencies argued. According to Mirjan Kupreškic, the first three statements made by Witness SA reveal that all of the occupants of the Ahmic house came out of the shelter together and of their own accord when called upon to surrender and that the attackers were unaware of the existence of the concealed shelter in the house.[303] By contrast, Witness H's evidence at trial was that her father went out through the garage and was killed first. Then, according to Witness H, Zoran Kupreškic appeared at the trap-door to the shelter and Witness H climbed out of the shelter and spoke to him alone in the children's room before going back down into the shelter to Witness SA and her siblings. When Zoran Kupreškic told them all to come out of the shelter, Witness H came out first and saw Mirjan Kupreškic climbing the stairs to the upper level of the house.[304] The importance attributed to this alleged discrepancy is that Witness H's version of events evolved to incorporate an opportunity for a direct, one-on-one, dialogue with Zoran Kupreškic during the attack.[305] A further implication is that Witness SA was not present when this occurred, which explains why Witness H was able to identify the attackers but Witness SA, in her early statements, did not.

184. However, a careful review of the first three statements made by Witness SA reveals that the Defendants are incorrect in maintaining that the statements suggest that all the family members

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[300] Prosecution Response, para. 12.34.
[301] Mirjan Kupre{ki} Appeal Brief, 65, 72-75; and Appeal Transcript 699-700.
[302] Prosecution Response, para. 12.35.
[303] Mirjan Kupreškic Appeal Brief, 72-75.
[304] Trial Transcript, 1641-1645.

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came out of the shelter at the same time and that the attackers did not know about the shelter. The Appeals Chamber bears in mind that this First Statement given by Witness SA was brief and did not go into extensive detail about the events that occurred in the Ahmic house on the morning of 16 April 1993. Overall, the broad outline given by Witness SA was not inconsistent with the testimony of Witness H. Witness SA expressly stated that Witness H's father was the first one out of the shelter and did not give any further details about the order in which the rest of the family emerged from the shelter. Nor did she specify whether the attackers had come upon the entrance to the shelter when they called for the occupants of the house to surrender.

185. In her Second Statement, Witness SA again recalled being in the shelter with her family. However, this time Witness SA specifically stated that the trap-door to the shelter had not been closed and that, when the attackers entered the house, they came to the trap-door and called out to see if anyone was inside. At that point the family surrendered and Witness H's father was taken outside. Witness SA then begged the attackers not to kill the children and was told to come out. She recalled that Witness H went out first and then took the smaller children out with her. Thus Witness SA's description of the presence of the attackers at the door of the shelter and Witness H leaving the shelter first is consistent with Witness H's own description of these events. It is also apparent from Witness SA's Third Statement that Witness H's father went out of the shelter first and that the attackers spoke to Witness SA in the shelter before she came out. Thus the Appeals Chamber rejects the Defendant's argument that there is a substantial discrepancy between the statements of Witness SA and the evidence of Witness H as regards the attackers' knowledge of the shelter and the order in which the occupants of the house came out of the shelter.

186. Nonetheless, Witness SA's first three statements provide no corroboration for the evidence of Witness H on several important issues that were raised as inconsistencies between H's December 1993 Statement and her in-court testimony.[306] In particular, Witness SA made no mention of having heard familiar voices calling Witness H's father by name, prompting him to open the door to the shelter. Nor did Witness SA recall that Witness H had gone out of the shelter, spoken with the attackers, come back into the shelter and then gone out again so as to afford Witness H with an opportunity for a one-on-one encounter with Zoran Kupreškic. There are also some express inconsistencies between the version of events given by Witness SA and Witness H. According to Witness SA's Second Statement, the attackers knew the family was in the shelter because the trap-door had been left open. By contrast, Witness H recounted that Zoran Kupreškic lifted the lid of the trap-door and called down to them. This is not an insignificant matter as Witness H's claim that

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[305] Appeal Transcript, 699.

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Zoran Kupreškic opened the trap-door was an integral part of her identification evidence implicating him.

187. By far the most significant discrepancy though, relates to Witness SA's account of the individuals that Witness H identified in her house that morning. In her First Statement, made on 21 April 1993, Witness SA made no mention of Witness H having identified anybody during the course of the attack. However, the First Statement does reveal that, by this time, Witness SA was speculating about the involvement of her neighbours in the attack. She stated that it was her "belief" that neighbours, who were HVO members, "were connected with the individuals who committed the murders and burned houses." In Witness SA's Second Statement (23 April 1993) and Third Statement (9 May 1993), Witness SA added that Witness H identified Zoran Kupreškic amongst the group of soldiers that attacked the house of Suhret Ahmi} on the morning of 16 April 1993. On 9 May 1993, Witness SA repeated this comment in her Third Statement. The notable aspect of Witness SA's Second Statement and Third Statement is that, while she recounted that Witness H had mentioned Zoran Kupreškic, she made no reference to Witness H having identified Mirjan Kupre{ki} amongst the attackers. By contrast, in her December 1993 Statement and in her evidence before the Trial Chamber, Witness H maintained that she had identified both Zoran and Mirjan Kupre{ki} in her house on the morning of 16 April 1993.

188. Defence counsel for Mirjan Kupreškic attempted to pursue Witness H's apparently belated recognition of her client during cross-examination of Witness H. The witness maintained that, following the 16 April 1993 attack, she informed Witness SA that she had recognised both Zoran and Mirjan Kupreškic.[307] When asked why Witness SA did not, in her first few statements, mention that Witness H had recognised Mirjan Kupreškic, Witness H suggested that Witness SA was acting in the interests of Witness H's safety by concealing this information.[308] Defence counsel continued to press the issue, pointing out that Witness SA had not been concerned about the safety implications of mentioning that Witness H had recognised Zoran Kupreškic when she was making her statements.[309] At this point the Presiding Judge of the Trial Chamber intervened and disallowed any further questions along these lines on the basis that such questions should be reserved for Witness SA if, and when, she was called.[310] As already discussed, Witness SA was never called and defence counsel were unable to pursue the matter further.

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[306] *See* the discussion *supra* paras 159-161.
[307] Trial Transcript, 1716.
[308] Trial Transcript, 1717.
[309] Trial Transcript, 1717.
[310] Trial Transcript, 1717.

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189. Thus, the statements of Witness SA raise the possibility that Witness H's recognition of Zoran Kupreškic, and, certainly of Mirjan Kupre{ki}, was a matter of reconstruction rather than immediate recognition. Identification evidence based on subsequent reconstruction of events is considerably less reliable than identification evidence based upon immediate recognition, due to the possibility that subsequent information may have influenced the witness' recollection.[311] The Witness SA statements raised an important question as to who Witness H immediately recognised in the house during the attack. In the absence of testimony from Witness SA, this discrepancy remained on the face of the trial record and the Trial Chamber should have considered it.

190. As the Appeals Chamber has already determined, even if the Trial Chamber had not erroneously withdrawn its summons to Witness SA, it is unlikely that this witness would have ever testified in The Hague. Her distress at the prospect of doing so is abundantly clear from the trial record and it is unlikely that she would have complied with the summons initially issued by the Trial Chamber. As unsatisfactory as this inability to secure all relevant evidence may be, it is a situation that is not uncommon in cases before this Tribunal. A Trial Chamber faced with such a problem must, therefore, proceed with great caution before convicting an accused person based upon a trial record that contains patent omissions. The difficulty of obtaining all relevant evidence, so inherent in the cases that come before this Tribunal, cannot be permitted to reduce the Prosecution's burden of proving the guilt of the accused to one below the unassailable standard of proof "beyond reasonable doubt". In this case, Witness SA was the only other eyewitness who could potentially testify about the events in the Ahmic house on the morning of 16 April 1993. She was closely related to Witness H and had made prior statements that were admitted into evidence and raised doubts about the evidence given by Witness H on the critical question of whether her identification of the Defendants, particularly Mirjan Kupreškic, was spontaneous or whether she had arrived at her conclusions later and by degree. As articulated by the Trial Chamber in the *Tadic* Judgement

> [W]hen there is more than one conclusion reasonably open on the evidence, it is not for…[the] Trial Chamber to draw the conclusion least favourable to the accused…[312]

[311] *See e.g.*, Trial Transcript, 9858-9860 (testimony of Professor Wagenaar, the defence expert on the question of identification evidence, who testified that "[r]ecognition is usually a process that happens very quickly. You see something. You say, "I know who that is". Recognition is not something that is spread out over a month, so that first, you didn't know it; after several months, you know it. That process, very gradually, you start to realise what or whom you saw, is totally different from immediate perception. It is a construction. When you start to realise, you use all sorts of information to make the vague image that you have in your head sharper, and at the end you know—"Ah, but now I know what that vague image in fact means". But that's not perception; that is reconstruction, and reconstruction is very much influenced by the information you receive during that period." The possibility that Witness H's evidence could have been influenced by the views of other family members is considered *infra* paras 191-201.

[312] *Prosecutor* v *Tadic*, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 240.

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(ii) Influence

191. Both at trial and on appeal, Zoran and Mirjan Kupreškic argued that Witness H should not have been accepted as a credible witness due to the possibility that other family members had influenced her recollection of the events of 16 April 1993.[313] The relationship between Witness SA and Witness H has already been noted. In addition, the Trial Chamber heard evidence from Witness KL, who is Witness H's grandfather and an eyewitness to an attack in a separate, although nearby, house on the morning of 16 April 1993.

192. The Defendants argue that the totality of the evidence supports the following scenario. Witness H came from a family that had suffered enormously as a result of the attack on Ahmici on 16 April 1993. Many of their loved ones were killed before their eyes, their homes were destroyed, and they were forced to flee and consigned to life as refugees for a lengthy period of time. This family's need to see the perpetrators of the attack brought to justice was understandably strong. Suspicions that their Croat neighbours must have been involved grew in the days following the attack. As the family members talked about the events, they became convinced that their neighbours had participated in the attack and gradually this suspicion developed into a conviction that they had seen their neighbours in their houses on the morning of 16 April 1993. It is not surprising that the Kupreškic family, one of the few Croat families to live in the predominantly Muslim section of Ahmici, was implicated.[314] In his Closing Brief at trial, Mirjan Kupreškic put it this way:

> The Kupreškic men were their next-door neighbours, their houses were the closest to the houses of the victims, the firing came from the direction of their houses; it is normal to conclude that if firing comes from the direction of a house, then it is the house's owner that is firing; their families suffered no losses, their houses remained entire, and Zoran was considered to have a certain standing and influence in the village, and thus in this way they arrived at the name of Zoran Kupreškic, and then at that of his brother Mirjan Kupreškic, and then Vlatko and Ivica Kupreškic. All of them are mentioned in a certain way in various roles in the statements of these witnesses. It is characteristic that these persons are NOT mentioned in the first statements of the witnesses, but are arrived at only later and by degrees.[315]

193. The Prosecution interprets the Defendants' argument as an allegation of deliberate falsification or collusion by Witness H and her family. In the Prosecution's view, such an allegation cannot be put forward in the absence of "some concrete foundation based on the evidence adduced before the Trial Chamber". Accordingly, argues the Prosecution, it is for the Defendants "to prove the falsehood of the witness' statements and to establish that they were made with harmful intent, or at least, that they were made by a witness who was aware that they were false."[316]

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[313] Mirjan Kupreškic Appeal Brief, 93-95; Zoran Kupreškic Appeal Brief, para. 67; Appeal Transcript, 657, 705-706.
[314] Mirjan Kupreškic Appeal Brief, 93-94.
[315] Mirjan Kupreškic Closing Brief, 73.
[316] Prosecution Response, para. 12.83.

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The Appeals Chamber does not understand the Defendants to be arguing deliberate falsification on the part of Witness H. Rather, the question is whether Witness H's belief that Zoran and Mirjan Kupreškic were amongst the attackers in her house may have been engendered or influenced by discussions, commencing in the days immediately following the Ahmici attack, amongst her family about the involvement of their neighbours. As to this possibility, the Prosecution argues there was no evidence on the trial record to suggest that Witness H discussed the events with her family members and that the Trial Chamber "attached little weight to assertions of collusion for lack of evidence."[317]

194. The Prosecution is incorrect in maintaining that there was no evidence on the trial record suggesting that this family had influenced each other's recollection of the events of 16 April 1993 in Ahmici or that the Trial Chamber gave no credence to such arguments. In considering the evidence of Witness KL, the Trial Chamber noted that it was not until ten months after the attack that he made a statement identifying Zoran and Mirjan Kupreškic amongst the attackers in his house. Witness KL made several statements prior to that in which he made no mention of the involvement of the Kupreškic brothers. On the basis of this and other material discrepancies between his evidence and his prior statements, the Trial Chamber rejected the evidence of Witness KL and specifically found that

> [a] possible explanation for the omissions and discrepancies may be that after conversations with others (notably his granddaughter), he had convinced himself that this is what he saw. He did not appear to the Trial Chamber to be an untruthful witness or one who had set out to lie deliberately; however he may have been mistaken.[318]

195. An inspection of the prior statements given by Witness KL reveals the progression in his story, from his initial statements, commencing on 18 and 19 April 1993, in which he did not divulge the identity of the attackers, to a statement made on 7 May 1993 where he said that his neighbours from down the road were responsible; to a statement made on 1 October 1993 where Witness KL told an investigating judge that the attackers "resembled" Zoran and Mirjan Kupre{kic; and, finally, to his statement made in February 1994 followed by his in-court testimony where he claimed to have directly and positively identified Zoran and Mirjan Kupre{kic, and to have been in the same room and witnessed Zoran Kupre{kic killing the other occupants of the house, and Mirjan Kupre{kic setting the room alight.[319]

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[317] Prosecution Response, paras 12.89-12.90.

[318] Trial Judgement, para. 399.

[319] The various statements relating to Witness KL referred to in the Trial Judgement are as follows: 18-19 April 1993 (Witness KL was interviewed for a local television station and did not divulge the identity of the attackers); 22 April 1993 (Witness KL was interviewed by investigators and stated that he did not recognise the attackers because they were masked with caps and paint although he did refer to the fact that he noticed some of his neighbours, not including Zoran and Mirjan Kupreškic, moving around the village a few days prior to the attack); 7 May 1993 (Witness KL made a

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196. At this juncture the further significance of Witness SA's statements becomes apparent. The development in Witness SA's recollection of the events strongly resembles the progression in Witness KL's recall that can be traced through his successive statements and reflects the same suggestion that, gradually, conjecture about who was involved in the attack was transformed into conviction. In her First Statement (21 April 1993), Witness SA maintained that, although she could not name any of the attackers, it was her "belief" that her neighbours, who were HVO members, "were connected with the individuals who committed the murders and burned houses". In her Second Statement (23 April 1993), Witness SA again stated that she had been unable to recognise any of the attackers, but specifically mentioned that the Croat houses in the hamlet of Šutre belonged to Vlatko, Frano, Anto, Zoran, Mirjan, Ivo and Ivica Kupre{kic. In her Third Statement (9 May 1993), Witness SA was still personally unable to identify any of the attackers but mentioned Mirjan, Ivica and Vlatko Kupre{kic as amongst the uniformed HVO soldiers that she used to see prior to "the conflict". In her Fourth Statement (20 December 1993), Witness SA told an investigating judge in Zenica that she recognised Zoran, Mirjan, Vlatko and Ivica Kupre{kic amongst the attackers. This allegation was repeated in her Fifth Statement (18 October 1994) given to the Prosecution.

197. Information on the trial record, particularly the Witness SA statements, suggests that Witness H's description of the events also underwent a degree of development. In sum, on 21 April 1993, Witness SA made no mention of Witness H having identified either of the Defendants, despite the fact that, by this time, Witness SA herself was already pre-occupied with the theory that her neighbours were implicated in the attack. In fact she specifically stated that she was "not able to name the killers of…[Suhret Ahmi}] and…[his] neighbours or those who burned houses." If Witness H had immediately recognised the Kupreškic brothers as participants in the attack, it seems unlikely that she would not have communicated that to Witness SA at once or that Witness SA would not refer to that when making a formal statement about the perpetrators of the attack. On 23 April 1993 and 9 May 1993, Witness SA mentioned that Witness H had identified Zoran Kupreškic. During her December 1993 Statement, Witness H purported to identify both Mirjan Kupreškic and Zoran Kupreškic. Finally, during her testimony at trial, Witness H further added Vlatko Kupreškic's name to those of her neighbours she implicated in the attack.

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statement to a United Nations Centre for Human Rights officer and said that he knew his neighbours from the "first house down the road" were responsible but he did not state their names. Witness KL also said that he was in a different room when his family was killed); 1 October 1993 (Witness KL was interviewed by an investigating judge and claimed the figures "resembled" Zoran and Mirjan Kupre{kic. Although the Trial Judgement refers to the date of this statement of 1 October 1998, a review of the transcript reveals that this is an error and that the correct date is 1 October 1993. *See* Trial Transcript, 2038—2039 and 2046). In February 1994, Witness KL definitely identified Zoran and Mirjan as

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198. In addition to their identification of Zoran and Mirjan Kupre{kic, other pertinent details about the attack converged in the final statements of Witness H, Witness KL and Witness SA and/or the in-court testimony of Witnesses KL and H. In her First Statement, Witness SA said all the attackers were dressed in camouflage uniforms and were masked with hats and paints of different colours. By contrast, in her Fifth Statement, Witness SA reported that some of the soldiers wore camouflage uniforms, but that Zoran and Mirjan Kupre{kic were in black uniforms with their faces painted. She made no further reference to the attackers wearing hats. On 1 October 1993, during his statement to the investigating judge in Zenica, Witness KL had said that he saw two attackers dressed in black uniforms,[320] making him the first person in this closely related group of people to make a statement referring to this detail. In his testimony before the Trial Chamber, he stated that both Zoran and Mirjan Kupreškic were wearing black uniforms that day.[321] While giving her evidence before the Trial Chamber, Witness H, when pressed for details, also said that she thought Zoran and Mirjan Kupre{kic were wearing black uniforms on the morning in question. Similarly, Witness KL's description of the attackers changed from men wearing black hats,[322] to his testimony before the Trial Chamber where he claimed to see Zoran Kupre{kic with his face painted black and without a hat.[323] In her testimony before the Trial Chamber, Witness H made no mention of the attackers wearing hats. Further, during her examination-in-chief before the Trial Chamber, Witness H gave very specific evidence that all of the perpetrators had their faces painted with black lines, a description that accorded precisely with the evidence given by Witness KL.[324] However, in her December 1993 Statement, Witness H had said that she could not recognise any of the attackers, other than Zoran and Mirjan Kupreškic, because their faces were painted in "different colours".

199. A review of the changes in the statements of Witness SA and Witness KL leaves little room for doubt that this family talked extensively and in detail about the events of 16 April 1993. There are other indications on the trial record confirming this. During her cross-examination, counsel for Mirjan Kupre{ki} asked Witness H whether her family discussed matters relating to the attack. Witness H agreed that she had talked to Witness SA about whom she recognised amongst the

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perpetrators in the attack for the first time. *See* Trial Judgement, paras 393-394; 396-398; Trial Transcript, 2019-2047 and 2068-2097 (cross-examination of Witness KL on his prior statements).

[320] Trial Transcript, 2041 (cross-examination of Witness KL regarding the 1 October 1993 statement).

[321] Trial Transcript, 2105-2106.

[322] Trial Transcript, 2073 (recording the cross-examination of Witness KL regarding the statement he made on 22 April 1993 in which he referred to the attackers wearing black caps with slits for their eyes); Trial Transcript, 2072 (cross-examination of Witness KL regarding the statement he made to the investigating judge on 1 October 1993).

[323] Trial Transcript 1911 and 2072.

[324] Trial Transcript, 1642 (stating that Zoran Kupreškic's face was painted with lines drawn with black shoe cream) and 1709 (specifying that all of the attackers had the same black lines on their faces).

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attackers.[325] Witness H also testified that, after Witness KL left hospital and had recovered somewhat, she spoke to him about the events of 16 April 1993, although she maintained that details, such as the manner in which the perpetrators were dressed, were not discussed.[326] Thus, Witness H herself accepted that she had conversations with two adult members of her family during which the attack was discussed. Witness H's insistence that they did not discuss details cannot be sustained in light of the similarities in the details given in the final statements of all three witnesses (in contrast to some of the earlier statements made by Witness KL and Witness SA). These family members must have discussed the details of the attack and the appearance of the attackers in considerable depth.

200. Witness H identified Mirjan Kupreškic in her statement to the investigating judge three days prior to Witness SA's statement along similar lines although, by this time, Witness KL had already made his statement (several months earlier) to the investigating judge where he stated that the attackers resembled Zoran and Mirjan Kupreškic. Thus, it is possible that Witness H's identification of Mirjan Kupreškic was influenced by Witness KL's belief that Mirjan Kupreškic was involved. By contrast, there can be no dispute that Witness H was the first person in her family circle to implicate Zoran Kupreškic in the attack. This is apparent from the statements of Witness SA. Thus, the Defendants cannot succeed with an argument that Witness H named Zoran Kupreškic only after she had heard Witness SA and her grandfather formally denounce him as a participant in the attack. The only way that Witness H could have been influenced regarding her identification of Zoran Kupreškic, is if discussions amongst these close family members in the days immediately following the attack about their beliefs that their neighbours were implicated, led Witness H to ascribe the name of Zoran Kupreškic (whom she thought she remembered from a store she visited frequently[327]) to one of the attackers she had seen in her house on the morning of 16 April 1993.

201. The issue of influence in the context of these three witnesses is complex. The Trial Chamber obviously turned its mind to the possibility that Witness H had influenced Witness KL's testimony, but did not entertain the possibility that the reverse may also have been true to some degree. On the other hand, the Trial Chamber overlooked the impact of the Witness SA Statements, which reflect the possibility of a gradual development in Witness H's own recollection of the events, as described above. The likelihood that Witness H could have been dramatically influenced by speculation amongst her surviving family members as to who was responsible for the atrocities

[325] Trial Transcript, 1716. This is confirmed in Witness SA's Second Statement and Third Statement where she expressly stated that Witness H told her that she recognised Zoran Kupre{kic amongst the attackers.
[326] Trial Transcript, 1713-1714.
[327] *See* the discussion, *supra* paras 146-150.

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that had torn apart their lives is strengthened by the fact that she was only 13 years old at the time of these events. She was therefore more susceptible to influence, particularly by close family members, such as Witness SA and her grandfather, than an adult in a similar situation would have been.[328] This issue is closely linked to the Trial Chamber's erroneous dismissal of Witness SA's statements and is a factor that the Appeals Chamber must consider, along with the other errors identified, in ultimately discerning whether the convictions of Zoran and Mirjan Kupreškic are unsafe.

(e) Inconsistencies between Witness H's evidence and the remainder of the evidentiary record

202. Zoran and Mirjan Kupreškic make a general argument that the Trial Chamber erred in failing to assess carefully the evidence of Witness H in light of all of the evidence on the trial record.[329] If the Trial Chamber had carried out this further examination, they maintain, it would have been apparent that her evidence was critically at odds with other aspects of the evidence adduced about the Ahmici attack. The Appeals Chamber agrees that it is incumbent upon a Trial Chamber to consider the evidence of every witness in light of the entire trial record and to explain why, despite material inconsistencies, it nonetheless accepts the evidence of the witness. It is a fundamental principle, affirmed in the jurisprudence of this Tribunal, that the credit of a witness can never be finally determined until all of the evidence has been given.[330]

203. In assessing the complaints made by Zoran and Mirjan Kupreškic about the consistency between the evidence of Witness H and the remainder of the evidentiary record, it is not only the evidence before the Trial Chamber that must be considered. The record on appeal is an expanded version of that available to the Trial Chamber. The Appeals Chamber admitted various items of additional evidence under Rule 115, including evidence given by a witness known as 'AT' who testified in the *Kordic* case. The Witness AT material is comprised of two statements given by Witness AT to the Prosecution, one on 25 May 2000 and the other on 15, 16 and 17 August 2000, as well as the transcript of Witness AT's testimony as a prosecution witness in the *Kordi}* trial on 27 and 28 November 2000. The Trial Chamber in *Kordic* expressed some concerns about the credibility of Witness AT. In particular, it noted defence criticisms that he was:

> ...a participant in the [Ahmici] attack; and as such, has been convicted by the International Tribunal of crimes against humanity, involving persecution and murder, and received a substantial

[328] As argued by Zoran Kupre{ki}, it is also somewhat at odds with the usual relationship dynamics existing within the patriarchal Bosnian Muslim community for a 13-year old girl to have influenced her 60-year old grandfather on such a significant matter rather than the reverse. *See* Trial Transcript, 657.

[329] Zoran Kupreškic Appeal Brief, para. 73; Zoran Kupreškic Supplemental Document, 20-21; Mirjan Kupreškic Appeal Brief, 87-88, 101104; Mirjan Kupreškic Supplemental Document, 7; Appeal Transcript, 680-681, 703.

[330] *Prosecutor* v *Kunarac et al.*, Case No.: IT-96-23-T and IT-96-23/1-T, Decision on Motion for Acquittal, 3 July 2000, para. 4.

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> sentence (against which he has appealed). Furthermore, although he did not give evidence himself at his trial, he had put forward a lying alibi defence and refused even now to admit to any part in the murder…[331]

However, the *Kordic* Trial Chamber concluded:

> Although he could not bring himself to tell the full truth of his own involvement in the attack…the Trial Chamber is satisfied that he did tell the truth about the preparations for the Ahmi}i attack, including the meetings at Hotel Vitez and the subsequent briefings.[332]

204. Similarly, in considering whether to admit the Witness AT material as additional evidence on appeal, the Appeals Chamber in the present case accepts that his account about the preparation of the 16 April 1993 Ahmici attack and the troop movements related to it were credible.

205. Although the Rule 115 motions of Zoran and Mirjan Kupreškic relating to the Witness AT material were unsuccessful, the Appeals Chamber granted the Rule 115 motion of Vlatko Kupreškic and admitted the Witness AT material into the appeal. In its decision on the Witness AT material, the Appeals Chamber specifically stated that, having admitted the material based on the motion of Vlatko Kupreškic, all other Defendants in the present case and the Appeals Chamber were also entitled to avail themselves of it.[333] Thus, an additional task before the Appeals Chamber is to consider whether the evidence of Witness H is at odds with the evidentiary record on appeal, including the Witness AT material.

206. The Defendants argue that the physical description that Witness H gave of them suggests that she mistook them for members of the Jokers (whom the Trial Chamber accepted were involved in the attack[334]) and that the Trial Chamber erred in failing to assess her evidence in light of this.[335] The Prosecution responds that this argument is speculative and that the Defendants failed to refer to any part of the trial record to support this assertion.[336]

207. The Appeals Chamber cannot agree with the Prosecution's claim that there is no basis in the trial record for questioning the description that Witness H gave of Zoran and Mirjan Kupreškic. Witness H was certain that the Kupreškic brothers had been wearing uniforms with their faces masked in lines of black polish during the attack on her house. When pressed for details of the colour of their uniforms, she said that she thought they were black and that all of the attackers were dressed in the same way. During her direct examination, she was adamant that the Defendants were

[331] *Kordic* Trial Judgement, para. 627.
[332] *Kordi}* Trial Judgement, para. 630.
[333] Decision on Motions to Admit Material Relating to Witness AT into Evidence Pursuant to Rule 115 and to Call Additional Witnesses, 29 May 2001, para. 17.
[334] Trial Judgement, para. 333-334.
[335] Mirjan Kupreškic Appeal Brief, 87-88; Mirjan Kupreškic Supplemental Document, 7-8; Appeal Transcript, 680-681, 694, 703-705.
[336] Prosecution Response, paras 12.66-12.67.

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armed with automatic rifles and rocket launchers although, as previously noted, under cross-examination, she was considerably less sure about the weapons carried by Mirjan Kupre{ki}.[337] Some other eyewitnesses to the Ahmici massacre described the attackers in a similar fashion.[338] Many witnesses recalled soldiers in black uniforms, with faces painted with black lines, and carrying automatic weapons and rocket launchers.[339] However, the critical question is whether Zoran and Mirjan Kupreškic would have been attired in such a manner on that day.

208. There was no dispute amongst the parties during the trial that black was the colour of the uniforms characteristically worn by the Jokers, who had played a dominant role in the brutal attack on Ahmici. Indeed, in its opening statement on the first day of the trial, the Prosecution clearly stated that soldiers engaged in the Ahmici attack wore camouflage uniforms in the case of the HVO and black uniforms in the case of the Jokers.[340] Furthermore, the Trial Chamber specifically accepted that black shirts and face paint were part of the Jokers' "special operations" profile.[341] Brigadier Dzambasovic, explained that membership of elite groups such as the military police, to which the Jokers belonged, was tightly circumscribed:

> …there was a significant difference [between military police and other military units]…in terms of armament, equipment, and training. Special units, which include, of course, the military police, in practice, always had better equipment, more up-to-date weaponry, and also they had chosen soldiers, because the members of these special units, after all, according to certain characteristics and according to certain principles, did differ from rank-and-file soldiers. So not anybody, so to

[337] Trial Transcript, 1642-1646, 1721 and 1723-1724. See the discussion, *supra* para. 152-153 (regarding the cross-examination of Witness H on this point).

[338] Many witnesses also saw soldiers in camouflage uniforms. *See,* e.g., Trial Judgement, para. 206 (Witness A); Trial Judgement, para. 209 (Witness C); Trial Judgement, para. 214 (Witness E); Trial Judgement, para. 220 (Witness G); Trial Judgement, para. 234 (recording Witness O's description of the "motley uniforms" of the soldiers); Trial Judgement, para. 215 (Witness F); Trial Judgement, para. 228 (Witness J); Trial Judgement, para. 237 (Witness Q); Trial Judgement, para. 248 (Witness W); Trial Judgement, para. 270 (Witness GG); Trial Judgement, para. 273 (Witness CA). Witnesses also saw soldiers with their faces painted with colours. *See,* e.g., Trial Transcript, 3255 (recording Witness X's observation that the soldiers wore green paint). Others saw soldiers with caps concealing all of the face with only small slits for the eyes, ears and nose. *See,* e.g., Trial Judgement, para. 214 (Witness E); Trial Judgement, para. 262 (Witness CC).

[339] Trial Judgement, para. 222 (recording Witness G's description of the soldiers black uniforms); Trial Judgement, para. 206 (recording Witness A's statement that the soldiers' faces were painted black); Trial Judgement, para. 214 (recording Witness E's statement that the soldiers' faces were painted black); Trial Judgement, para. 215 (recording Witness F's statement that the soldiers' faces were painted black); Trial Judgement, para. 228 (recording Witness J's statement that the soldiers' faces were painted black); Trial Judgement, para. 262 (recording Witness CC's statement that the soldiers' faces were painted black); Trial Judgement, para. 270 (recording Witness GG's statement that the soldiers' faces were painted black); Trial Judgement, para. 215 (recording Witness F's observation that the soldiers carried automatic weapons); Trial Judgement, para. 215 (recording Witness F's observation that the soldiers carried rocket launchers); Trial Judgement, para. 255 (recording Witness Y's observations that the soldiers carried rocket launchers).

[340] Prosecution Opening Statement, Trial Transcript, 114. Witness AT confirmed that members of the HVO military police, including him, were wearing camouflage uniforms during the attack. Trial Transcript, 27617. Although he was not specifically asked to confirm the colour of the uniforms worn by the Jokers, Witness AT's statements proceed on the assumption that it was common knowledge that the Jokers wore black uniforms. For example, during his cross-examination in the *Kordic* case, Witness AT was asked: "Well, he says that he saw you in the company of these 13 members of the Jokers, wearing a black uniform without any insignia, like the rest of the Jokers. Did you, during the month of April, wear a black uniform?" Witness AT replied that he had not. *See* Witness AT, *Kordic* Trial Transcript, 27682.

[341] Trial Judgement, para. 132. *See also* Trial Judgement, para. 135.

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speak, could have been in these special units. They had to meet certain criteria, such as a level of training and schooling, physical fitness, swiftness, and intellectual capabilities. And all special units, including the military police, had special training for the purposes they were intended for.[342]

209. According to Witness AT, a section of the Jokers' unit had indeed been assigned to attack the area of Ahmici in which Witness H's house is located. Specifically, he said that the first group of attackers, which included about half of the Jokers platoon, was deployed to the "so-called Kupre{ki} houses and that this was the largest group deployed.[343] Consequently, it is not surprising that many witnesses recounted seeing attackers attired in the characteristic manner of the Jokers. However, at no stage did the Prosecution ever allege that Zoran and Mirjan Kupreškic were members of the elite Jokers unit (or indeed of the military police more generally), so as to explain why they would have been attired in such a manner during the attack.

210. This raises the question of the capacity in which the Trial Chamber found that the Kupreškic brothers participated in the attack. According to the Trial Chamber "both accused participated in the attack on Ahmici on 16 April 1993 as soldiers in the HVO."[344] Although it is not entirely clear from the Trial Judgement, it is possible the Trial Chamber concluded that Zoran and Mirjan Kupreškic were members of the HVO Vitez Brigade.

211. The Kupreškic brothers argue that the Vitez Brigade was the only HVO unit with which the Prosecution sought to link them and the only possible HVO brigade they could belong to as it covered the geographic area in which they lived.[345] Indeed, in reaching its conclusion that both Defendants were "active members of the HVO", the Trial Chamber relied upon the Register of the HVO Vitez Brigade, which listed both Zoran and Mirjan Kupreškic as "reservists" between 8 April 1992 and 22 and 23 January 1996.[346] In the case of Zoran Kupreškic, the finding also rested upon evidence that he was at an HVO oath-taking ceremony at the Vitez stadium.[347]

[342] Trial Transcript, 12136.
[343] *Kordic* Trial Transcript, 27606. Although, at certain points in the English translation of his statements to the Prosecution, Witness AT referred to the Jokers being deployed to the "Kupreškic brothers' house", the Appeals Chamber does not consider that this gives rise to an implication that Zoran and Mirjan Kupreškic were involved in the organisation of the attack. Mirjan Kupre{ki} pointed out during the Appeal Hearing that the original B/C/S version of Witness AT's statement refers to the "Kupreškic houses" and that the English translation was in error. Furthermore, the brothers lived in separate houses so that any reference to "the "Kupreškic brothers' house" could not have been directed at them. *See* Appeal Transcript, 690-693. The Prosecution did not argue to the contrary. The reference to the "Kupreškic houses" appears to have been solely made by way of designating a strategic landmark for the attackers. *See* Witness AT Statement, 25 May 2000, 33. Accordingly, the Appeals Chamber does not, on the basis of this alone, draw any adverse inference about the Kupreškic brother's involvement in the preparations for the Ahmici attack. Refer to the further discussion *infra* paras 233-241 about the participation of the Defendants in the preparations for the attack.
[344] Trial Judgement, para. 430.
[345] The defence also referred to the expert testimony of Prosecution witness Brigadier Dzambasovic to the effect that the HVO was organised on the basis of the territorial principle. *See* Trial Transcript, 12123.
[346] Trial Judgement, para. 377.
[347] Trial Judgement, para. 378.

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212. On appeal, the Prosecution argues that the Trial Chamber was correct to conclude that a broad range of regular HVO forces, notably the Vitez Brigade, were involved in the Ahmi}i attack. In particular, the Prosecution points out that the Trial Chamber had before it evidence such as a "certificate of wounding" stating that the HVO Vitez Brigade member Nikola Omazi} was wounded during the 16 April 1993 Ahmi}i operation and also that HVO Home Guard Commander, Nenad [anti},was involved in the attack.[348]

213. However, on the basis of the evidentiary record before the Appeals Chamber, particularly the Witness AT material, it is difficult to accept the suggestion that the Vitez Brigade was deployed to Ahmi}i to participate in the attack in the early morning of 16 April 1993 as a unit. The commander of the Vitez Brigade had received instructions to engage in military activities in other villages in the Vitez area at the relevant time. During cross-examination at trial, the Prosecution's military expert, Brigadier Asim Dzambasovic, was shown an order issued by General Tihomir Bla{ki} on 16 April 1993 at 1:30 a.m.[349] The order directed the Commander of the Vitez Brigade to operate in the area of Krušcica, Vranjska, Donja Veceriska commencing at 05:30 hours on 16 April 1993, almost exactly the same time that the Ahmici attack commenced. Of these locations, Brigadier Dzambasovic agreed, Vranjska was the closest to Ahmici and that was still some three to four kilometres away.[350]

214. Similarly, when questioned about the units participating in the Ahmici attack, Witness AT stated that, on the afternoon of 15 April 1993

> ...at the meeting of military commanders a decision was made on the direction of attack for all units...this is in my opinion...It was known that the military police would attack Ahmici. Žuti would attack Stari Vitez from the position in Krušcica. The civilian police would attack from the side of Lašva. The [Vitez] brigade was assigned to other villages, Donja Veceriska, Gacice, Krušcica, Vranjska...I am telling you of the villages I know...Divjak.[351]

Thus, the evidence of Witness AT about the villages to which the Vitez Brigade was deployed on the morning of 16 April 1993 accords with the order issued to the Vitez Brigade, directing them to attack villages other than Ahmici on the morning of 16 April 1993, which was admitted into evidence during the trial of this case. Given that Witness AT was a participant in the Ahmici attack at the level of commander, it seems unlikely that there would have been forces formally deployed for the purpose of the attack that he was unaware of. On this basis, it is difficult to see how Zoran and Mirjan Kupreškic could have been formally assigned to participate in the attack as part of the

[348] Appeal Transcript, 850-851.
[349] Exhibit D 38/2. *See* Prosecution Closing Brief, para. 4.27.
[350] Trial Transcript, 12236-12240. The Trial Chamber referred to this exhibit in para. 284 of the Trial Judgement as part of the evidence adduced to show that the HVO had been placed on a "higher state of readiness" but did not consider whether it also showed that the Vitez Brigade had been deployed to villages other than Ahmi}i on the morning of 16 April 1993.

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HVO Vitez Brigade. Even if they had been (or had they been deployed as part of any other regular unit of the HVO), they should have been, in accordance with the Prosecution's own opening statement at trial, dressed in camouflage uniforms. Only the Jokers were alleged to be wearing black uniforms.[352]

215. However, in addition to "HVO forces" and the Jokers, the Trial Chamber found that

> The Croatian inhabitants of Ahmici, or at least those of them who belonged to the HVO or were in contact with Croatian armed forces, knew that in the early morning of the 16 April 1993, Croatian forces would initiate a massive military attack.[353]

Similarly, the Trial Chamber concluded that

> …the attack was carried out by military units of the HVO and members of the Jokers. The able-bodied Croatian inhabitants of Ahmici provided assistance and support in various forms. Some of them took part in the military operations against the Muslims.[354]

216. Witness AT confirmed that some local inhabitants of Ahmici did, indeed, join in the attack on the early morning of 16 April 1993, but he emphasised that this was done on an individual, *ad hoc* basis, rather than as part of an organised plan.[355] The following exchange took place between Witness AT and Judge May during the course of the *Kordic* trial:

> Q. And besides the military police, were there any other units, to your knowledge, involved in the operation in Ahmici?
>
> A. In the sense of units, I think not. There was the local population and local members of the HVO. But they did not all take part in the operation. There were individuals who joined of their own initiative. Not all the local population took part.[356]

217. Had Zoran and Mirjan Kupreškic taken part in the attack on the house of Witness H, not as HVO soldiers officially deployed for the operation, but as local members of the HVO who joined in, it seems odd that they would have been dressed in black uniforms. A further question arises as to whether such local individuals, who were not formally integrated into the operation, would have had access to weapons such as rocket launchers.

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[351] Witness AT Statement, 25 May 2000, 28. *See also Kordi}* Trial Transcript, 27598-27599 and 27755-27756.
[352] Prosecution Opening Statement, Trial Transcript 114. *See* the discussion *supra* para. 208.
[353] Trial Judgement, para. 333.
[354] Trial Judgement, para. 334.
[355] Witness AT Statement, 15 August 2000, 11. To illustrate his point, Witness AT recounted how, in the early hours of 16 April 1993, as his group of military police were crouched in their positions waiting for the signal to descend upon the sleeping village of Ahmici, a young local man came up to them. One member of the group knew him and the young man offered to provide information about the layout of the village and then proceeded to accompany the group in their assault on the Bosnian Muslim homes that morning.[355] Upon being asked whether there was a pattern of local individuals joining in the operation Witness AT said, "I wouldn't say there was a pattern, but there was some

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218. Witness H's description of Zoran and Mirjan Kupre{ki} does not conclusively prove that she was wrong about their participation in the attack. It is, of course, theoretically possible that they could have attired themselves in black uniforms similar to the Jokers and somehow accessed weapons such as rocket launchers. However, having regard to the trial record as a whole, the symmetry between Witness H's description of them that morning and the "special operations" profile of the Jokers (who, indisputably, were heavily involved in the attack), together with the likelihood that any involvement of the local Croat inhabitants of Ahmi}i in the attack was *ad hoc*, gives rise to an obvious inference that the two people Witness H saw were, in fact, members of the Jokers. By contrast, the Appeals Chamber notes that witnesses who testified to having seen Drago Josipovi} during the 16 April 1993 attack recalled seeing him wearing a camouflage uniform and armed with a rifle.[357] This is more consistent with the notion that he was a local inhabitant who joined in the attack of his own volition. No other witnesses gave identification evidence that corroborates the description that Witness H gave of Zoran and Mirjan Kupreškic that day.[358] It is true that Witness H was not certain when she said she thought the two Defendants were dressed in black, although she was sure they had been wearing uniforms and not simply civilian clothes. The Appeals Chamber recalls, however, that Witness H's grandfather, Witness KL, purported to identify the Defendants wearing black uniforms during the attack on his house (which the Trial Chamber rejected), raising at least a suggestion that Witness H may have been influenced by his discussion of the attackers' appearance that morning.[359] Either way, it is a factor impacting negatively on Witness H's credibility. The Trial Chamber should have considered the possibility that Witness H mistook two members of the Jokers unit for Zoran and Mirjan Kupreški} on the morning of the Ahmici attack. The additional evidence of Witness AT magnifies the importance of this inquiry by revealing that the Jokers were deployed to attack the area in which Witness H's house was located and that local inhabitants of Ahmici were not integrated into the attacking units in a formal way.

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individuals who, on their own initiative, joined. Those who were braver, younger local people." *Kordi}* Trial Transcript, 27620.

[356] *Kordi}* Trial Transcript, 27770.

[357] *See* Trial Judgement, para. 258 (recounting that Witness Z saw Drago Josipovic, in the afternoon of 16 April 1993, in camouflage uniform, with an automatic rifle but without face paint, in the company of four other soldiers with rifles). *See also* Trial Judgement, para. 275 (recounting that Witness CA saw Drago Josipovic in camouflage uniform on the day of the attack); Trial Judgement, para. 480 (recounting that Witness EE saw Drago Josipovic wearing a camouflage uniform and camouflage cap during the attack on her house).

[358] Although Witness KL also described them as being present during the attack on his house and attired in an identical manner to Witness H, the Trial Chamber rejected his evidence as incapable of belief. *See* the discussion *supra* para. 194. Similarly, Witness C gave evidence that the Kupre{ki} brothers were wearing camouflage uniforms and that their faces were not painted, but his evidence was also rejected by the Trial Chamber. *See* Trial Judgement, paras 405 and 427.

[359] *See* the discussion, *supra* para. 198.

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(f) Absence of any evidence on the trial record corroborating Witness H's testimony

219. The Defendants argue that the Trial Chamber erred in accepting the identification evidence of Witness H in the absence of any corroboration. As Mirjan Kupreškic points out, none of the other 1,000 Muslim inhabitants of Ahmici gave credible evidence of having seen him participating in the 16 April 1993 attack.[360] The Prosecution answers by referring to the clearly enunciated principle, reflected in the jurisprudence of this Tribunal, that a Trial Chamber is at liberty to found a conviction on the uncorroborated evidence of a single witness.[361]

220. The Prosecution is correct in maintaining that "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration".[362] Rather, the absence of corroboration is simply one factor to be taken into consideration by the Trial Chamber in weighing the evidence and arriving at its determination of witness credibility. Certainly, in cases hinging on a single witness' identification of the accused made in difficult circumstances, corroborative evidence takes on more importance.[363] However, of itself, the absence of corroboration is not a ground for the Appeals Chamber to intervene in a factual finding made by the Trial Chamber.

221. In the present case, the Appeals Chamber notes that the Trial Chamber did refer to evidence that loosely supported Witness H's claim that Zoran Kupreškic was involved in the Ahmici attack, namely the evidence of Witness JJ. When she took the stand before the Trial Chamber, Witness JJ recounted a conversation she had with Zoran Kupreškic after the 16 April 1993 events in Ahmici, in which he told her that, under duress from members of the Jokers unit, he had fired into the air in the pretence of shooting at civilians.[364] The Trial Chamber accepted the evidence of Witness JJ and found that it was "an admission of some participation on the part of Zoran Kupreškic" and further served to undermine his claim that he did not participate in the conflict.[365] Obviously though, Witness JJ's evidence, taken at its highest, does not corroborate Witness H's contention that Zoran Kupre{ki} was in her house on the morning of the attack or even constitute similar fact evidence of his involvement in attacks on other houses.[366] There was no other evidence on the trial record that supported Witness H's identification of Mirjan Kupreškic.

[360] Witness KL and Witness C both purported to identify them, but the Trial Chamber rejected the evidence of both these witnesses as incapable of belief. *See* Trial Judgement, paras 397-399, 424, and 427.
[361] Prosecution Response, paras 12.63-12.64.
[362] *Aleksovski* Appeal Judgement, para. 62. *See* the further discussion *supra* para. 33.
[363] *See* the discussion *supra* paras 34-36.
[364] Trial Judgement, para. 407.
[365] Trial Judgement, para. 428.
[366] *See* the further discussion of Witness JJ's evidence *infra* paras 228-232. On similar fact evidence, see the discussion *infra* para. 321-323.

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(g) Witness H: Conclusions

222. It is apparent from her testimony before this Tribunal that Witness H is a remarkable young woman who has, in her short life, borne more sorrow than most people could imagine. In the wake of the Ahmici massacre in April 1993, she has assumed a significant degree of responsibility for her surviving family members and her courage permeated her testimony before the Trial Chamber. That such a witness should make an enormous and positive impression upon the Trial Chamber is not surprising. However, the preceding discussion reveals a collection of errors in the Trial Chamber's assessment of her evidence.

223. The Appeals Chamber recalls once again the Trial Chamber's explanation of why it accepted the evidence of Witness H:

> The Trial Chamber takes into consideration the criticism of her credibility arising from: (a) the discrepancies between her statement and her evidence [whether her father had a rifle, whether she saw her father killed in a burst of gunfire, and whether she saw Zoran and Mirjan Kupreškic setting fire to the upper floor of her house]; and (b) her denial that the signature on the statement is hers. However, these criticisms are outweighed by the impression made by the Witness upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken.[367]

Thus, the Trial Chamber's assessment of Witness H is that of a strong and persuasive witness who, despite a few minor criticisms of her credibility, was completely certain about her identification of the Defendants during the attack on her house. After careful review, the Appeals Chamber reluctantly concludes that this assessment is seriously at odds with the extensive difficulties revealed on the evidentiary record and discussed at length in the preceding paragraphs, which strike at the core of Witness H's evidence. The Trial Chamber omitted to make specific factual findings about crucial matters, such as whether she had made the December 1993 Statement and whether she was mistaken in her claim to have recognised Zoran Kupreškic as an employee of a store that she frequented. The Trial Chamber did not direct itself to Witness SA's Statements, which raised the distinct possibility that Witness H's identification of her neighbours' in the attack had been a gradual development in the months following the April 1993 atrocity. It erred in retracting its decision to call Witness SA and first admitting but ultimately not considering whether her statements raised doubts about Witness H's identification evidence. The Trial Chamber further overlooked material discrepancies between Witness H's December 1993 Statement and her in-court testimony relevant to her identification of the two Defendants. Furthermore, it is appropriate to recall the Appeals Chamber's earlier finding that the Zoran and Mirjan Kupre{ki} were prejudiced as a result of first, the Prosecution's failure to allege the attack on Witness H's house in the Amended Indictment and, second, the late provision of her statement to them. They had just a few

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weeks to prepare for the cross-examination of this witness who turned out to be the nucleus of the case against them. Thus their ability to challenge her under cross-examination was inevitably limited as a result.

224. The Appeals Chamber accepts that a Trial Chamber must be accorded a degree of flexibility in setting out its reasoning in its judgement. This flexibility is always circumscribed, however, by the obligation to provide a reasoned explanation of its decision in any given case. This is a matter of fundamental fairness for all the parties concerned. The Appeals Chamber underscores that this is not a case where the Trial Chamber addressed all the relevant issues and the Appeals Chamber simply disagrees with the Trial Chamber's conclusion. Rather, this is a situation where the Trial Judgement evidences a failure to consider several matters going directly to the credibility of Witness H. Although the Trial Chamber itself acknowledged the need to proceed with caution in assessing eye-witness identifications made under difficult circumstances, such caution is not sufficiently reflected in the treatment accorded to the evidence of Witness H: a witness, who purported to identify the Defendants in extremely difficult circumstances, whose credibility was strenuously opposed by the Defendants in a detailed manner and whose identification of them turned out to be uncorroborated by any other credible evidence on the trial record.

225. The question as to what constitutes a "wholly erroneous" evaluation of the evidence must, of course, be determined on a case-by-case basis. The Appeals Chamber cannot and should not, legislate the circumstances that suffice to meet this test. In the present case one or even a selection of the errors identified by the Appeals Chamber may not have been sufficient to render the Trial Chamber's evaluation "wholly erroneous". However, the task of the Appeals Chamber is to consider the combined effect of these criticisms on the Trial Chamber's decision to accept the evidence of Witness H beyond reasonable doubt. In doing so, the Appeals Chamber concludes that the Trial Chamber's assessment of Witness H's evidence, as reflected in the Trial Judgement, diverges so significantly from that apparent upon review by the Appeals Chamber, that the former must be rejected as "wholly erroneous". As in the *^elebi}i* appeal, the Appeals Chamber in the present case believes the question to be answered is whether the Trial Chamber erred in its overall evaluation of the evidence as being compelling and credible and, in particular, whether it erred "in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond a reasonable doubt."[368] The Appeals Chamber is assured that, had the Trial Chamber fully addressed itself to all of the difficulties associated with Witness H's testimony, it would not have accepted the identification evidence of this single witness as the basis upon which to convict the Defendants.

[367] Trial Judgement, para. 425; *see also* Trial Judgement, para. 402.

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The Appeals Chamber has also had the benefit of the additional evidence of Witness AT regarding the April 1993 Ahmici attack, which has served to highlight some of the difficulties associated with the Trial Chamber's factual findings.

226. On appeal, the Prosecution argues that it was not incumbent upon the Trial Chamber to apply the standard of "beyond reasonable doubt" in evaluating the evidence of Witness H.[369] Rather, it contends, the Trial Chamber was at liberty to simply assess the evidence of Witness H by reference to the standard of probative value applicable to evidence generally. In particular, argues the Prosecution, the evidence of Witness H "...forms nothing more than a constituent in the entire composition of evidence against the Appellant for count 1 [persecution]."[370] The Appeals Chamber disagrees. The Prosecution's argument reflects the same misconception that the attack on Witness H's house was only evidence of persecution, not a material fact integral to the crime of persecution as identified in the preceding discussion on the defects in the Amended Indictment.[371] The persecution conviction of Zoran and Mirjan Kupreškic hinged upon their participation in the attack on Witness H's house. The Prosecution's argument that the Trial Chamber was at liberty to employ anything other than the standard of proof beyond reasonable doubt in assessing Witness H's evidence implicating Zoran and Mirjan Kupreškic in that attack cannot be sustained.

227. Having determined that the Trial Chamber erred in accepting the identification evidence of Witness H, no basis remains for the Trial Chamber's finding that Mirjan Kupreškic was amongst those who attacked the village of Ahmici on 16 April 1993. However, in the case of Zoran Kupreškic, the Trial Chamber also referred to the evidence of Witness JJ to support its conclusion that he was amongst the attacking forces that day. The Appeals Chamber will now proceed to examine the significance that the Trial Chamber attributed to the evidence of Witness JJ and whether, in the absence of Witness H's evidence, it is a sufficient basis for the finding that Zoran Kupreškic should incur criminal responsibility for participating in the attack on Ahmici.

2. The evidence of Witness JJ regarding the activities of Zoran Kupreškic in Ahmici on 16 April 1993

228. The Trial Chamber accepted the evidence of Witness JJ, a Prosecution witness, who testified that, sometime in April or May 1993, Zoran Kupreškic came to her home and talked to her about the events of 16 April 1993. In the course of their conversation, Zoran told her that

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368 *^elebi}i* Appeal Judgement, para. 498.
369 Prosecution Response, paras 12.104-12.119.
370 Prosecution Response, paras 12.112-12.119.
371 *See* the discussion *supra* paras 79 *et seq.*

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> ...on that day, the 16th of April, when he came there [to Ahmici after evacuating his family], civilians were fleeing, those who managed to run away from Ahmici; they were fleeing somewhere. They [the Jokers] were shooting after them. One of them noticed that Zoran was not shooting at them and threatened Zoran that he would kill him if he would not shoot at civilians, and that he raised his gun and said that he would shoot Zoran if he did not shoot at civilians. Zoran said, "They are terrible. He'd actually kill me." And then Zoran, in order to save himself, shot into the air. He did not want to shoot at civilians. He shot into the air.[372]

229. When he took the stand at trial, Zoran Kupreškic maintained that the only explanation he could give for Witness JJ's assertion was that she had confused information about 16 April 1993 with other events that occurred in the days following the Ahmici attack.[373] However, in assessing her evidence, the Trial Chamber concluded that there was no reason to believe that Witness JJ had lied about this matter

> ...and every reason for thinking that she told the truth. This is not to say that Zoran Kupreškic, himself, told the truth in his admission to Witness JJ. It was no more than a partial admission by someone who was troubled by the horror of what had transpired that day. However, it is an admission of some participation on the part of Zoran Kupreškic and, as such, serves to undermine his contention that he did not participate in the conflict.[374]

230. On appeal, Zoran Kupreškic argues that the Trial Chamber erred in accepting the evidence of Witness JJ despite a number of perceived problems associated with her testimony.[375] Indeed, the Appeals Chamber admitted additional evidence that Zoran Kupre{ki} argues shows that Witness JJ was mistaken in her identification of him at an HVO oath-taking ceremony in Vitez.[376] However, the Appeals Chamber does not consider it necessary to examine the arguments made on appeal relating to the credibility of Witness JJ.

231. The Appeals Chamber recalls the Trial Chamber's finding about the participation of Zoran and Mirjan Kupreškic in the Ahmici attack:

> In summary, the Trial Chamber concludes that both accused participated in the attack on Ahmici on 16 April 1993 as soldiers in the HVO. It is reasonable to conclude that their part involved their providing local knowledge and their houses as bases for the attacking troops. In addition, they participated in the attack on at least one house.[377]

Thus, the Trial Chamber confined the participation of Zoran Kupreškic in the Ahmici attack to three actions: providing local knowledge, providing his house as a base for the attacking troops and

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[372] Witness JJ, Trial Transcript, 12335-12336.
[373] Trial Judgement, para. 412 (k). *See also* Trial Transcript, 11514-11515 (stating that Witness JJ may have been thinking of 18 April 1993, at which time he was mobilised into the HVO, and was forced to dig a trench or, alternatively, events that took place in Zume where military policeman shot over the heads of people in order to scare them into going back home).
[374] Trial Judgement, para. 428.
[375] Zoran Kupreškic Appeal Brief, paras 82-92; 144-14; Appeal Transcript, 673-674.
[376] Decision on the Motions of Appellants Vlatko Kupreškic, Drago Josipovic, Zoran Kupreškic and Mirjan Kupreškic to Admit Additional Evidence, 26 February 2001, para. 106. Zoran Kupreškic argues this footage shows that he was merely an observer at the ceremony dressed in civilian clothes and not a participant taking the oath dressed in camouflage uniform as Witness JJ had testified. *See* Appeal Transcript, 673.
[377] Trial Judgement, para. 430.

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participating in the attack on at least one house. The evidence of Witness JJ is not relevant to the first two modes of participation.[378] Rather, it appears that the Trial Chamber used this evidence as general support for Witness H's testimony about the participation of Zoran Kupreški} in the attack on her house. The Trial Chamber did not seek to use Witness JJ's evidence to ascribe a specific act of participation to Zoran Kupreškic for which he could be held criminally responsible. For example, it did not find that he had encouraged the attack by his presence amongst the Jokers and by shooting into the air.

232. The Appeals Chamber notes that the Trial Chamber was confronted with a similar issue in assessing the criminal responsibility of Josipovic for the attack in which Fahrudin Ahmic was killed. Witness CA testified that during the attack, she saw the dead body of Fahrudin Ahmic who was her neighbour. She subsequently saw Josipovic in the company of another man, both dressed in camouflage uniforms and armed. Witness EE asked Josipovic where he was when Fahurdin was killed. Josipovic cried and said he would have done something if he could but it had not been possible.[379] The Trial Chamber declined to hold Josipovic responsible for the attack on the house of Fahrudin Ahmic, finding that "[a]t most, his comments to Witness CA amount to his saying that he knew of the incident and had not been able to do anything to prevent it."[380] Similarly, in the absence of the evidence of Witness H,[381] the testimony of Witness JJ is an insufficient basis upon which to conclude that Zoran Kupreškic took part in the attacks on any Bosnian Muslim house that morning, in order to sustain the Trial Chamber's finding.

D. The Trial Chamber's finding that Zoran and Mirjan Kupreškic provided local knowledge and the use of their houses as a base for the attacking troops

233. With respect to Zoran and Mirjan Kupreškic, the Trial Chamber found that, in addition to participating in the attack on Witness H's house on the morning of 16 April 1993

> [i]t is reasonable to conclude that their part [in the Ahmici massacre] involved their providing local knowledge and their houses as bases for the attacking troops.[382]

The Trial Chamber accepted the evidence of Witness V that he saw a group of about ten soldiers, armed and in camouflage uniform, in front of the house of Zoran Kupreškic at around 5:00 p.m. on

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[378] The Trial Chamber's findings that the Kupreškic brothers provided local knowledge and the use of their houses as a base for the attacking troops is considered *infra*, paras 233-241.
[379] Trial Judgement, para. 486.
[380] Trial Judgement, para. 505.
[381] The Appeals Chamber notes that the Prosecution has conceded this point stating that "[i]t is clear from a reading of the Judgement that the Trial Chamber did not consider this fact [Witness JJ's evidence] to be conclusive of the Appellant's guilt, but that it forms a component in the composition of evidence against the Appellant." *See* Prosecution Response, para. 14.12.
[382] Trial Judgement, para. 430.

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15 April 1993.[383] This is the only specific piece of evidence referred to by the Trial Chamber in support of its conclusion that Zoran and Mirjan Kupreškic were providing local knowledge and the use of their houses for the attackers.

234. Mirjan Kupreškic argues that the Trial Chamber provided no basis for its finding that he and his brother provided local knowledge or their houses as bases for the attackers. There were, he argues, other ways the attackers could have acquired any necessary local information, for example from members of the military police who came from the local area and through general knowledge about physical differences between Muslim and Croat houses and so on.[384] The Defendants also contest the Trial Chamber's finding on the basis of the Witness AT material which, they argue, demonstrates that the attacking forces did not need any help from the locals in order to identify houses belonging to Bosnian Croats or Bosnian Muslims.[385] The Prosecution simply responds by asserting that the Trial Chamber was entitled to reach the conclusion that the Defendants provided local knowledge and the use of their houses "based on the evidence of Witness V, who has not been shown by the Appellant to be incredible or unreliable."[386]

235. The Prosecution's position regarding Witness V does not advance consideration of this dispute. The pertinent question, in the first instance, is whether Witness V's evidence, even accepting that it is credible, provided a sufficient foundation for the Trial Chamber to infer that the Defendants provided local knowledge and their houses as bases for the attackers. Second, it falls to the Appeals Chamber to further consider whether the Trial Chamber's finding can be sustained in light of the Witness AT material admitted as additional evidence under Rule 115.

236. On 15 April 1993, Witness V recalled driving in his car past "Vlatko Kupreškic's" at about 5.00 p.m. He said:

> I saw from the car a group of soldiers, perhaps ten of them altogether, and two civilians in front of the house of Zoran Kupreškic, on the crossroads between Zoran's and Ivica's place. That's where it was.[387]

Later, Witness V reiterated that the soldiers were between Ivica's house and Zoran's house.[388] He maintained that the soldiers wore camouflage uniforms and carried weapons.[389] However, Witness V confirmed, under cross-examination, that he did not see either Zoran or Mirjan Kupreškic with

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383 Trial Judgement, paras 388 and 423.
384 Mirjan Kupreškic Appeal Brief, 135-137.
385 Zoran Kupreškic Supplemental Document, 10 and 16.
386 Prosecution Response, para. 21.12.
387 Trial Transcript, 3041; *see also* Trial Transcript, 3042.
388 Trial Transcript, 3045.
389 Trial Transcript, 3042.

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the soldiers or even in their vicinity.[390] The Trial Chamber considered that Witness V's description of soldiers reconnoitring in the vicinity of Zoran Kupreškic's house at around 5:00 p.m. in the afternoon of 15 April 1993 was evidence of the Kupreškic family's advance knowledge of the attack and its participation in the planning of it.

237. The Appeals Chamber accepts the Defendants' argument that the mere presence of soldiers at a cross-roads outside someone's home is a slender basis upon which to conclude that the owner of the house (in this case Zoran Kupreškic) knew about it, let alone invited the soldiers to use it as a strategic base. In the case of Mirjan Kupreškic, the finding is particularly speculative as Witness V did not specifically say the soldiers were outside Mirjan's house although, admittedly, he lived close to his brother.

238. Although not expressly referred to by the Trial Chamber in this context, the trial record is replete with evidence from numerous witnesses that gunfire during the Ahmici attack was coming from the direction of the Kupreškic houses (particularly the house of Vlatko Kupreškic). For example, Witness K thought that the gunshots fired at her house came from the direction of the "Kupreškic houses". She therefore assumed that the Muslim inhabitants in that part of the village had been attacked by their Croat neighbours since the Muslims' properties were destroyed and Muslims were killed, whereas the Croatian houses were left untouched and their children were unharmed.[391] Undoubtedly, this fact laid the foundation for the view held by many local Bosnian Muslim inhabitants, and subsequently accepted by the Trial Chamber, that the Kupreškic family must have played an integral part (including the provision of their houses and local knowledge) in the planning and execution of the 16 April 1993 attack on Ahmici. However, it is circumstantial evidence of the most general nature and the statements of Witness AT provide an important new lens through which to assess its plausibility.

239. According to Witness AT, the HVO did not decide to attack Ahmici until the afternoon of 15 April 1993 and, furthermore, Witness AT was unaware of any military reconnoitring in the Ahmici area on 15 April 1993.[392] Witness AT recalled that sketches of the village layout and the assignment of groups to particular sections of the town did not occur until the early morning hours of 16 April 1993.[393] Thus, the likelihood that Witness V had observed a sizeable group of armed

[390] Trial Transcript, 3085.
[391] Trial Judgement, para. 231.
[392] *Kordic* Trial Transcript, 27759.
[393] Witness AT Statement, 25 May 2000, 14-15.

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soldiers preparing for the attack in the vicinity of Zoran Kupreškic's house that afternoon is seriously called into question.[394]

240. The Appeals Chamber also accepts the Defendants' argument that, according to the Witness AT material, the military police were not reliant upon the assistance of local Croat inhabitants from Ahmici to plan the attack. In particular, on the night between 15 and 16 April 1993, when they were assembled in the "Bungalow",[395] a commander of the Military Police asked who amongst them knew the layout of the houses. Several members of the military police who came from the area stepped forward.[396] These military police were then sent with a group to make sketches of the area.[397] Had the Kupreškic brothers been called on to provide local knowledge, surely they would have been involved in this process. These sketches formed the basis upon which the groups of military police were subsequently given their assignments for the attack.[398]

241. In the Appeals Chamber's view, the Trial Chamber's finding that Zoran and Mirjan Kupreškic participated in the attack by providing local knowledge and their homes as a base cannot be sustained. On the basis of the trial record, it was a tenuous finding, with little evidentiary basis and the Witness AT material, admitted as additional evidence on appeal, fatally undermines it.

E. Conviction of Zoran and Mirjan Kupreškic for persecution during the period from October 1992 to 16 April 1993

242. On appeal, Zoran Kupreškic challenges the Trial Chamber's finding that he and his brother were involved in a persecutory campaign from October 1992 until 16 April 1993. He argues that there was no factual basis upon which the Trial Chamber could have concluded that the Bosnian Muslims of Ahmici were persecuted by the Bosnian Croats in October 1992 and no evidence showing that the Defendants were involved in any such activity.[399]

243. The persecution count in the Amended Indictment covers the period from October 1992 until April 1993. In assessing the evidence against the Defendants, the Trial Chamber referred to their conduct as "active members of the HVO" prior to April 1993. However, the only illegal action attributed to them related to their activities in connection with the 16 April 1993 attack. Nonetheless, the Trial Chamber found both Zoran and Mirjan Kupreškic guilty of persecution "on

[394] A similar issue arises in Vlatko Kupre{ki}'s appeal against his conviction. *See* the further discussion of this issue, *infra* paras 295 (section on Vlatko Kupreškic).
[395] The "Bungalow" was the headquarters of the Jokers. It was located in Nadioci and was between five and ten minutes from Ahmi}i by foot. *See* Trial Judgement, para. 134.
[396] Witness AT Statement, 25 May 2000, 15.
[397] Witness AT Statement, 25 May 2000, 15.
[398] Witness AT Statement, 25 May 2000, 15.
[399] Zoran Kupre{ki} Appeal Brief, paras 7 and 46.

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the basis of…[their] participation in the events from October 1992 until 16 April 1993…".[400] The Trial Judgement does not explain what constituted the illegal conduct of the Defendants in the period from October 1992 until 15 April 1993 when they were found to have been involved in the preparation and then the implementation of the Ahmici attack. On the contrary, Zoran was found to have assumed responsibility for facilitating the safe return of Muslims after the events in October 1992. In fact, the Trial Chamber recounts the evidence of a witness that Zoran Kupreškic was tasked with providing security and ensuring there would be no problems regarding the return of the Bosniac population.[401] He was also involved with the village guard, but there is nothing to indicate that this action was unlawful. The only evidence in relation to Mirjan Kupreškic is that he joined the village guard in February or March 1992 and, again, there is no discernible culpability in this. In an earlier section of the Trial Judgement, the Trial Chamber specifically concluded that "[e]vidence about…[the conflict on 20 October 1992]…plays no specific part in the Prosecution case against these two accused" and specifically declined from making any findings in relation to it.[402] In the circumstances, the Trial Chamber's finding that the Defendants were guilty of persecution stemming back to October 1992 must be rejected as unreasonable due to the absence of any evidentiary basis to support it. Although not formally raised by Mirjan Kupreskic as a ground of appeal, the interests of justice require that the Appeals Chamber's conclusion on this issue also be applied to his case.[403]

F. Remaining Grounds of Appeal

244. Zoran and Mirjan Kupreškic have raised a multitude of other grounds of appeal, some in common and some individually, over and above the ones discussed in the preceding pages. All of these relate to alleged errors of fact in the Trial Judgement and include matters such as whether the Trial Chamber: failed to accord due weight to evidence supporting the Defendants' version of events from 16 to 18 April 1993; erred in its factual findings about the degree of Bosnian Muslim and Bosnian Croat participation in the October 1992 conflict in Ahmici; erred in concluding there was no unit of the ABiH in Ahmici on 16 April 1993; erred in concluding that Ahmici was undefended and not a legitimate military target at the time of the attack; erroneously concluded that the attack was ethnic cleansing; erred in concluding that they were active members of the HVO; in the case of Zoran Kupreškic erred in finding that he was a local HVO commander; erred in finding that the Defendants had the discriminatory intent required for persecution; and erred in accepting the evidence of the expert witness Tone Bringa regarding the changing nature of relationships

[400] Trial Judgement, para. 780 and 790.
[401] Trial Judgement, para. 379.
[402] Trial Judgement, footnote 589.
[403] *See e.g. ^elebi}i* Appeal Judgement, paras 391, 414 and 427.

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between Muslims and Croats in Ahmici following the outbreak of the conflict. However, in view of the preceding analysis, the Appeals Chamber does not consider that any of these issues impact upon the outcome of the appeal. Accordingly, the Appeals Chamber declines to give them further consideration.

G. Conclusion

245. In the absence of Witness H's testimony, the cases against Zoran and Mirjan Kupreškic cannot stand. The other evidence submitted does not sustain the convictions of the two Defendants. Having decided that the Trial Chamber erred in relying upon the evidence of Witness H, the Appeals Chamber must conclude that a miscarriage of justice has occurred in the present case.

246. The Appeals Chamber emphasises that the task before the Trial Chamber in this case was enormously difficult. The problems stemming from the Amended Indictment and the lack of clarity about the nature of the case against these two Defendants, still apparent on the second to last day of the trial, have been discussed at length. The Trial Chamber also confronted problems triggered by a trial record that contained important omissions, such as the testimony of Witness SA: a key eyewitness who had made prior statements raising important doubts about aspects of Witness H's evidence. These difficulties, which also exist to some extent in domestic jurisdictions, are magnified in the context of the cases before this Tribunal. It is the task of this Appeals Chamber to ensure that such problems, understandable as they might be, do not result in a miscarriage of justice. In the circumstances of this case it is not appropriate for the Appeals Chamber to remand the case against Zoran and Mirjan Kupreškic for retrial. The convictions against these Zoran and Mirjan Kupre{ki} must be reversed.

V. APPEAL AGAINST THE CONVICTION OF VLATKO KUPREŠKIC

A. Introduction

247. Vlatko Kupreškic was found guilty of count 1 of the Amended Indictment, persecution, a crime against humanity punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the International Tribunal, on the basis of aiding and abetting.[404] He was acquitted of four other offences: count 12 (participating in or aiding and abetting in the killing of Fata Pezer as a crime against humanity); count 13 (participating in or aiding and abetting in the killing of Fata Pezer as a violation of the laws or customs of war); count 14 (participating in or aiding and abetting in the shooting of Dženana Pezer as a crime against humanity); and count 15

[404] Trial Judgement, para. 804.

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(participating in or aiding and abetting in the shooting of Dženana Pezer as a violation of the laws or customs of war).

248. As to aiding and abetting, the mode of participation upon which Vlatko Kupreškic was convicted, the Trial Chamber held:

> [a]n aider and abettor as opposed to a principal perpetrator carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime; this support must have a substantial effect upon the perpetration of the crime. The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.[405]

249. As a consequence of the motions for the admission of additional evidence, the Appeals Chamber has admitted the following additional evidence relevant to Vlatko Kupreškic's appeal:

(1) Transcripts of interviews conducted with Witness AT and his testimony during the *Kordic* trial;

(2) The statement, exhibits and testimony of Witness ADA;[406]

(3) The statement, exhibits and testimony of Miro Lazarevic; [407]

(4) The statement, exhibits and testimony of Witness ADB;[408]

(5) The statement and exhibits relating to Witness ADC.[409]

250. The evidence relating to Witness ADA, Miro Lazarevic, Witness ADB and Witness ADC was not admitted pursuant to Rule 115, as Vlatko Kupre{ki} failed to demonstrate that the exception to Rule 115(A), that the evidence had not been adduced at trial due to the gross negligence of trial counsel, had been made out. Notwithstanding its availability at trial, the evidence was admitted on the basis that "in the exceptional circumstances of his case, if certain items were excluded the result could be a miscarriage of justice".[410] The new evidence was admitted without prejudice to the determination of the weight to be afforded to it and, at the evidentiary hearing, the Appeals Chamber heard the live testimony of Witness ADA, Miro Lazarevic, and Witness ADB for the purpose of determining its veracity.

251. Vlatko Kupreškic's appeal is based upon Article 25(1)(b) of the Statute: an error of fact which has occasioned a miscarriage of justice. Vlatko Kupre{ki} has made no complaint

[405] Trial Judgement, para. 772.
[406] Exhibit AD 1/3; Exhibit AD 2/3.
[407] Exhibit AD 3/3; Exhibit AD 4/3; Exhibit AD 5/3; Exhibit AD 6/3.
[408] Exhibit AD 7/3; Exhibit AD 8/3; Exhibit AD 9/3.
[409] Exhibit AD 10/3; Exhibit AD 11/3.
[410] Rule 115 Decision of 11 April 2001, para. 30.

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concerning either the definition of persecution or of aiding and abetting applied by the Trial Chamber.

252. The arguments made by Vlatko Kupre{ki} fall into two general categories:[411]

1. The Trial Chamber erred in finding Vlatko Kupreškic guilty of count 1 of the Amended Indictment on the basis of the tenuous evidence presented by the Prosecution; and

2. The Trial Chamber did not hear relevant and credible evidence (i.e., that of Witness ADA, Witness ADB, Witness ADC, Miro Lazarevi} and Witness AT) that would have met, rebutted, and cast reasonable doubt upon the Prosecution evidence on count 1. Had this evidence been available to the Trial Chamber, he argues, it might very well have substantially changed the Trial Chamber's assessment of the case against him. Vlatko Kupreškic therefore contends that his conviction is unsafe and has occasioned a miscarriage of justice.

253. The Appeals Chamber will now consider these arguments so as to determine whether there has been an "error of fact which has occasioned a miscarriage of justice". In doing so, the Appeals Chamber will carry out its assessment based on all the evidence before it -- both the record on appeal and the additional evidence, rather than carrying out an initial assessment as to whether the evidence before the Trial Chamber was factually sufficient to sustain the persecution conviction, and then considering the impact of the additional evidence at a separate stage.[412] As enunciated in the general issues section of this Judgement,[413] the applicable standard, in view of the additional evidence admitted on appeal, is whether Vlatko Kupreškic has established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appellate proceedings.

B. Review of the evidence before the Appeals Chamber

254. To convict Vlatko Kupreškic of aiding and abetting the offence of persecution, the Trial Chamber had to be satisfied beyond reasonable doubt that the elements of the offence had been fulfilled. From the Trial Chamber's unchallenged definitions, it follows that aiding and abetting the perpetration of persecution requires proof that Vlatko Kupreškic carried out acts specifically directed to assisting, encouraging or lending moral support to the perpetration of the offence of

[411] *See* Vlatko Kupreškic Supplemental Document, para. 11.
[412] In adopting such an approach, account is taken of Rule 117(A) of the Rules, requiring the Appeals Chamber to pronounce the judgement on appeal on the basis of the record on appeal together with such additional evidence as has been presented. During the Appeal Hearing, counsel for Vlatko Kupreškic indicated that the second ground was to be considered as an alternative to the first ground of appeal. *See* Appeal Transcript, 924.

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persecution which, in this case, consisted of the deliberate and systematic killing of Bosnian Muslim civilians; the comprehensive destruction of Bosnian Muslim homes and property; and the organised detention and expulsion of the Bosnian Muslims from Ahmici-Santici and its environs. Further, his support must have a substantial effect on the perpetration of the persecutory acts, and he must have known that the acts performed by him assisted the commission of a persecution by others.

255. In a section of the Trial Judgement entitled "Legal Findings", the Trial Chamber set out its findings as to how the elements of the offence of persecution as a crime against humanity were fulfilled.[414] It held:

> 796. … In 1992-1993, Vlatko Kupreškic was a member of the police, namely an "Operations Officer for the Prevention of Crimes of Particular State Interest", with the rank of Inspector 1st class. The accused was not merely concerned to make inventories of supplies for the police, as he instead claims. He was unloading weapons from a car in front of his house in October 1992.
>
> 797. With regard to the evidence of the accused that he did not return to Ahmici on 15 April until the evening when he got back from the trip to Split, the Trial Chamber accepts the prosecution evidence that he was seen in Ahmici during the morning of 15 April, at the Hotel Vitez and during the afternoon and in the early evening in the vicinity of soldiers who were at his house.
>
> 798. The Trial Chamber also accepts the testimony given by the prosecution witnesses in relation to the troop activity in and around the accused's house on the evening of 15 April, which is also confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreškic houses.
>
> 799. Vlatko Kupreškic was involved in the preparations for the attack in his role as police operations officer and as a resident of the village. He allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before.
>
> […]
>
> 801. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, of the accused being in the vicinity of Suhret Ahmic's house at about 5.45 a.m., and shortly after the latter was murdered. The Trial Chamber finds that this identification was correct and that Vlatko Kupreškic was in the vicinity shortly after the attack on Suhret Ahmic's house. There is no further evidence as to what the accused was doing there, but he was present, ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge.
>
> 802. The evidence of the accused and his witnesses as to non-participation is not credible.
>
> 803. Vlatko Kupreškic helped to prepare and support the attack carried out by the other accused, the HVO and Military Police, by unloading weapons in his store and by agreeing to the use of his house as a strategic point and staging area for the attacking troops. His role is thus not quite as prominent as that of the other accused, so he merely supported the actions of others, conduct which must be subsumed under aiding and abetting and not under co-perpetration. Vlatko Kupreškic had the requisite *mens rea*, as he was aware that his actions would substantially and effectively assist the attackers in their activities, that he would help them in carrying out their

[413] *See* the discussion *supra* para. 75.
[414] Trial Judgement, para. 795-804.

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mission of cleansing Ahmici of its Muslim inhabitants. He also knew that the attack would not be a battle between soldiers, but that the Muslim civilians of his own village would be targeted.

256. The evidence leading the Trial Chamber to conclude that Vlatko Kupreškic had carried out acts specifically directed to assist, encourage or lend moral support to the perpetration of persecution, with the requisite *mens rea*, can be discerned from these findings. Essentially, the crucial evidence is as follows:

(1) Vlatko Kupreškic was an Operations Officer for the Prevention of Crimes of Particular State Interest, with the rank of Inspector 1st class;

(2) Vlatko Kupreškic unloaded weapons from a car in front of his house in October 1992;

(3) Vlatko Kupreškic was present in front of the Hotel Vitez on 15 April, the day before the Ahmici attack;

(4) Vlatko Kupreškic was in Ahmici during the morning, afternoon and in the early evening of 15 April, and there was troop activity in and around his house on the evening of 15 April;

(5) Vlatko Kupre{ki} was in the vicinity of the house of Suhret Ahmic at about 5.45 a.m. on 16 April shortly after that person was murdered.

257. The Appeals Chamber will review the evidence relating to these topics separately.

1. Vlatko Kupreškic was an Operations Officer for the Prevention of Crimes of Particular State Interest

(a) Evidence at trial

258. This evidence consisted of two reports adduced by the Prosecution, Exhibits P 377 and P 378. The former is a document dated 28 December 1992 from Commander Mirko Šamija of Vitez Police Station to the Department of the Interior, Mostar, concerning manning levels at the Vitez Police Station. In it, the final entry on the list of personnel is Vlatko Kupreškic, who is described as an "Operations Officer for the Prevention of Crimes of Particular State Interest" with the rank of Inspector 1st class. Exhibit P 378 is a report, dated 22 February 1993, by Anto Šimic, Assistant Chief of the Operations Service for the Criminal Investigations Police, compiled following an inspection on 19 February 1993 of Vitez Police Station. It stated that, concerning staffing levels, "the function of officer for the prevention of crimes of particular state interest is being performed by Vlatko Kupreškic".

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259. At trial, the Prosecution first raised the issue of Vlatko Kupreškic's involvement with the police during the cross-examination of Ljubica Kupreškic, the Defendant's wife. The Prosecution confronted her with the Report of the Inventory Commission dated 12 February 1993, for the purpose of establishing that the signature on the report belonged to Vlatko Kupreškic.[415] Evidence on this issue further arose during the subsequent examination-in-chief of Vlatko Kupreškic, when he testified as to his background prior to the Ahmici attack. He stated that he was an economist by profession and, after leaving the financial department of Slobodan Princip Seljo factory in November 1991, he joined Stefani-Bosna, a company owned by his cousin, Ivica Kupreškic. Vlatko Kupreškic later re-named this company "Sutra".[416] He further testified: "temporarily I worked at the police station. The head of the police at the time, Mirko Samija, asked me to compile an inventory at the police station, and this was in the latter part of December 1992, and I was involved in that until about 25 February, 1993".[417]

260. Under cross-examination by the Prosecution, Vlatko Kupreškic explained that he was approached by Mr. Mirko Samija, who asked him to "help them take the stock, the inventory, at the police station and to make a statement of accounts and a kind of balance sheet, as there was nobody in the police station who would know how to do it professionally".[418] Although it was agreed that he would work part-time, "for an hour or two, for a day or whatever…", he denied that he undertook any other duties whilst he was there.[419] When presented with Exhibits P 377 and P 378, Vlatko Kupreškic stated:

> [t]he budget of every state provides resources for social services, including the police. … in order to be able to pay me for the job I would do, they had to include me in their job descriptions; they had to assign me to a particular post in the police station so that they could pay me from the resources that were allocated to them, and that is probably why the chief of police, Mirko Samija, included me in this post".[420]

261. He explained that, formally, he was assigned to the office of the crime prevention service[421] and, following the completion of the inventory, he did not return to the police station.[422] He provided names of potential witnesses who could confirm his explanation: Muhamed Trako, Miro Lazarevic (recorded as Miro Azarovic in the Trial Transcript) and a Muslim man called Sejo.[423]

262. As previously noted, on the basis of the evidence presented at trial, the Trial Chamber found that Vlatko Kupreškic was a member of the police, that his activities were not limited to making

[415] Trial Transcript, 9396.
[416] Trial Transcript, 11751.
[417] Trial Transcript, 11751.
[418] Trial Transcript, 11857.
[419] Trial Transcript, 11858.
[420] Trial Transcript, 11861.
[421] Trial Transcript, 11863.
[422] Trial Transcript, 11865.
[423] Trial Transcript, 11865-11866.

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inventories of supplies for the police and that, in his police role, he assisted in the preparation of the attack by unloading weapons in front of his house.

(b) The additional evidence

263. The following additional evidence was admitted on this issue: the statements, exhibits and testimony of Witnesses ADA, Miro Lazarevic and Witness ADB. It was further touched upon in the statements of Witness AT to the Prosecution. In addition, the Appeals Chamber admitted a written statement of Witness ADC that supported the oral testimony given by the other witnesses called by Vlatko Kupreškic about his police role.

(i) Miro Lazarevic

264. Miro Lazarevic testified at the Evidentiary Hearing that he had been an inspector for commercial crime at the Vitez Police Station during 1992 and 1993.[424] In October 1992, after the period generally referred to as the first conflict in Ahmici, there was a split in the structure of the police force; the Croat policemen continued working at the police station, whereas the Bosnian Muslim policemen did not return. After the split, there were vacant positions. The Chief of Police, Mirko Samija, told him that another inspector for commercial crime was required; Vlatko Kupreškic was considered and, subsequently, offered the position. Vlatko Kupreškic then commenced employment as an inspector for commercial crime. Every year an inventory was made at the police station, and Vlatko Kupreškic was appointed to perform this task along with two others. Lazarevic believed that the inventory was carried out between 18 January and 23 February 1993, but could not be sure of this. Apart from work on the inventory, Vlatko Kupreškic familiarised himself with the police code and participated in an on-site inspection. Lazarevic said that Vlatko Kupreškic did not work at the police station after 23 February 1993 and, furthermore, never held the position of Operations Officer for the Prevention of Crimes of Particular State Interest, with the rank of Inspector 1st class. Lazarevic confirmed that the information contained in Exhibit P377 was inaccurate in relation to Vlatko Kupreškic as well as four other persons mentioned in it. In cross-examination, he said that Vlatko Kupreškic had not been working at the police station long before starting on the inventory. He was not sure if Vlatko Kupreškic continued to work after the completion of the inventory.

(ii) Witness ADB

265. At the Evidentiary Hearing, Witness ADB, a Muslim, testified that, from 1978, he worked as an Operations System Controller at Vitez Police Station until October 1992, when he was

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wounded in his arm.[425] He returned to work in mid-November, but did not continue with his regular duties due to his injury. Around the end of November, he was asked to work on an inventory. He was also given responsibility for the salaries at the police station. He was told by the Chief of Police that Vlatko Kupreškic "should begin working at the MUP",[426] and that Vlatko Kupreškic would work on the inventory until the "procedure over him being taken in to the MUP went through".[427] Commencing after the New Year holidays in 1993, Witness ADB, Vlatko Kupreškic and another person worked on the inventory. Witness ADB was not aware of Vlatko Kupreškic performing any other job or task at the Vitez Police Station during the time they were working on the inventory. During that period, Vlatko Kupreškic also did work for his private company. Following completion of the inventory, all three members of the committee signed the report. Vlatko Kupreškic did not work as an inspector of commercial crime. Although he was supposed to get that job, he did not commence working in this position during the period in which the report was prepared. Witness ADB did not see Vlatko Kupreškic at the police station after 23 February 1993. He further confirmed that Vlatko Kupreškic did not perform the job of Inspector 1st class for the Prevention of Crimes of Particular State Interest. As to Exhibit P377, Witness ADB testified that this document was given to him so that he could pay the salaries for December and that the job description in it ascribed to Vlatko Kupreškic is inaccurate.

266. The monthly log-book of working hours for the police station, discussed by Witness ADB, shows an entry for Vlatko Kupreškic beginning on 18 January 1993 and the last entry on 23 February 1993.[428]

(iii) Witness ADC

267. Witness ADC was not called to testify at the Evidentiary Hearing, as the Prosecution only requested that defence Witness ADA, Miro Lazarevic and Witness ADB be available for cross-examination.[429] In his statement,[430] Witness ADC explains that he was a policeman in Vitez until 1994 and knew that the Chief of Police had approached Vlatko Kupreškic to carry out an inventory at the police station. Vlatko Kupreškic started work on the inventory sometime in early 1993 and finished the work around 20 February 1993 and he did no other work for the police. The witness

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[424] Transcript of Evidentiary Hearing, 288-349.
[425] Transcript of Evidentiary Hearing, 360-414.
[426] MUP is an abbreviation for "Vitez Police force".
[427] Transcript of Evidentiary Hearing, 362.
[428] Exhibit AD 14/3 (tendered by counsel for Vlatko Kupreškic during the evidentiary hearing and admitted into evidence by the Appeals Chamber). *See* Decision on the Admission of the Prosecution's Rule 92 *bis* Statements and the Exhibits Tendered at Evidentiary Hearing, 6 June 2001.
[429] *See* Prosecution Notice of Cross-Examination Material and Potential Evidence in Rebuttal for the Evidentiary Hearing on 17 & 18 May 2001, 8 May 2001, para. 7.

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was not aware of Vlatko Kupreškic working in the field of commercial crime, or as an Inspector 1st Class for the Prevention of Crimes of Particular State Interest.

(iv) Witness AT

268. Witness AT stated that when he left the police station in Vitez in October 1992, Vlatko Kupreškic "was employed there. I think that he replaced me, but not in my function. I do not know how long he remained in the police station".[431] He stated that Vlatko Kupreškic worked in the criminal department, though he could not say what Vlatko Kupreškic was doing.

(c) Discussion

269. According to Vlatko Kupre{ki}, the Trial Chamber's finding that he was a member of the police department was an integral component of its conclusion that he was involved in the Ahmici attack.[432] He argues that Exhibits P 377 and P 378 demonstrate that Croats, Serbs and Muslims all worked as employees of the police at Vitez, and, as such, these documents, therefore, provide tenuous evidence from which to draw an inference that Vlatko Kupreškic was involved in the Ahmici attack. In sum, the Defendant argues, the Trial Chamber simply attached too much weight to the two documents.[433] Furthermore, had the Trial Chamber heard the additional evidence, the Trial Chamber would not have found that he was an Operations Officer for the Prevention of Crimes of Particular State Interest.[434]

270. In response, the Prosecution argues that Vlatko Kupreškic's role with the police was not the only basis for his conviction.[435] It suggests that the additional evidence of Miro Lazarevi} and Witness ADB is so inconsistent that both of these testimonies should be disregarded.[436] The Prosecution further notes that, according to Miro Lazarevic, when Vlatko Kupreškic commenced his work as an inspector for commercial crime, he went to the scene of a fire. This, the Prosecution argues, is inconsistent with Vlatko Kupreškic's own evidence at trial that he was involved solely in the preparation of the inventory.[437]

271. The Trial Chamber, in its findings of fact, stated:

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430 Exhibit AD 10/3.
431 Witness AT Statement, 15 August 2000, 23; *see also* Witness AT Statement, 25 May 2000, 4 (stating that he left the Vitez police station in October 1992).
432 Appeal Transcript, 609.
433 Vlatko Kupreškic Appeal Brief, para. 18.
434 Vlatko Kupreškic Appeal Brief, para. 17.
435 Prosecution Response, para. 29.23.
436 Prosecution Response, para. 29.30.
437 Appeal Transcript, 882.

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[t]he Trial Chamber rejects the evidence of the accused to the effect that he was concerned merely to make inventories of supplies for the police, and find that he was an active operations officer".[438]

It relied upon this finding to conclude:

[t]his occupation explains why he was seen unloading weapons from a car in front of his house in October 1992 ...",[439]

and to infer that

Vlatko Kupreškic was involved in the preparations for the attack in his role as police operations officer and as a resident of the village.[440]

272. In the Appeals Chamber's view, the Trial Chamber considered the two reports to be valuable pieces of evidence, enabling it to draw important conclusions; contrary to the argument of the Prosecution, they formed a substantial basis of the conviction.

273. In its Rule 115 Decision of 11 April 2001, the Appeals Chamber considered the unusual circumstances under which the reports came to light.[441] At trial, the Prosecution had not alleged involvement with the police in the Amended Indictment and the Prosecution had not brought forth any such evidence during its case-in-chief. As noted previously, the issue of police involvement first arose during the cross-examination of Ljubica Kupreškic, Vlatko Kupre{ki}'s wife, and then during his examination-in-chief, Vlatko Kupreškic volunteered the information that he had worked for the police. The two reports were first adduced by the Prosecution during cross-examination of the Vlatko Kupre{ki}. No other evidence was called to support his version of events, namely that he was merely engaged by the police to produce an inventory.

274. Having heard the live testimony of Miro Lazarevic and Witness ADB, the Appeals Chamber considers them to be reliable and cogent witnesses. However, there are inconsistencies between Vlatko Kupreškic's version of what he did for the police and their versions. Most significantly, Vlatko Kupreškic testified that he was employed solely for the purpose of undertaking the inventory and that the post of Operations Officer for the Prevention of Crimes of Particular State Interest was probably just a title assigned to him so that he could receive payment. By contrast, according to Miro Lazarevi}, Vlatko Kupreškic started work as an inspector for commercial crime. The evidence of Witness ADB and Witness AT also suggests that Vlatko Kupreškic was actually engaged, for a period of time, as an inspector with the police in Vitez. Putting aside the precise nature of Vlatko Kupreškic's employment, all the evidence overwhelmingly suggests that any duties undertaken by Vlatko Kupreškic ceased in February 1993. There is no satisfactory evidence

[438] Trial Judgement, para. 463.
[439] Trial Judgement, para. 463.
[440] Trial Judgement, para. 799.

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to find that Vlatko Kupreškic's employment with the police continued until the time of the Ahmici attack in April 1993. Therefore, in the light of the additional evidence, the Appeals Chamber finds that no reasonable tribunal of fact could conclude that Vlatko Kupreškic was an active operations officer at the time of the attack. That finding therefore cannot be sustained.

2. Unloading weapons from a car in front of his house in October 1992

275. At trial, Witness T testified that in October 1992, just before dusk, she saw Vlatko Kupreškic, his wife and a man unload weapons from a Yugo car and take them into Vlatko Kupreškic's house.[442]

276. Vlatko Kupre{ki} alleges that the Trial Chamber erred in accepting, beyond reasonable doubt, the correctness of Witness T's allegation that weapons were being taken into the house. There was, he argues, no evidence as to what type of weapons the witness saw, the sighting was made at dusk and, furthermore, the distance between Witness T and Vlatko Kupreškic was some 50 metres. In combination, maintains Vlatko Kupre{ki}, these factors raise a significant risk that the observation was inaccurate. Moreover, during cross-examination of Witness T at trial, defence counsel failed to challenge her purported observation of Vlatko Kupreškic.[443] However, the Defendant does rely upon Witness T's acceptance, under cross-examination, that in October 1992 there was tension in the Vitez area of Bosnia-Herzegovina between Croats and Serbs, rather than Croats and Muslims.[444] Consequently, according to Vlatko Kupre{ki}, Witness T's testimony cannot be used to support a finding that he was involved in the Muslim attack in April 1993.[445] The Prosecution counters that Witness T's evidence is "cogent and compelling".[446] No new evidence was admitted on appeal in relation to this issue. Rather, Vlatko Kupre{ki} asks the Appeals Chamber to find that the Trial Chamber erred in reaching this conclusion on the basis of the original trial record.

277. As to the complaint that the witness was not cross-examined on her observation, responsibility for the failure to challenge Witness T's purported observation must rest with defence counsel. However, so far as the witness' vague reference to "weapons" is concerned, responsibility must rest with the Prosecution, which failed to elicit, from its own witness, any clarification of what the term "weapons" meant. The Appeals Chamber finds that the probative value of this vague

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[441] Rule 115 Decision of 11 April 2001, para. 30.
[442] Trial Transcript, 2946.
[443] Vlatko Kupreškic Appeal Brief, para. 22 (a)-(f); Appeal Transcript, 629.
[444] Trial Transcript, 2978.
[445] Vlatko Kupreškic Appeal Brief, para. 23; Appeal Transcript, 630.
[446] Prosecution Response, para. 28.3.

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testimony as evidence of an act specifically directed to assist, encourage or lend moral support to the perpetration of persecutory acts is very low indeed. This is particularly so considering that an act of aiding and abetting must have had a substantial effect on the commission of persecutory acts. There was no evidence that the "weapons", whatever they were, were ever used during the Ahmici attack. Also, the length of time between Witness T's observations and the attack on Ahmici the following April (some six months), diminishes the likelihood that the weapons were intended to be used for attacking the local Muslim population. In sum, the Appeals Chamber finds that the Trial Chamber erred in using the evidence of Witness T that she saw Vlatko Kupreškic unloading weapons from his car in October 1992 in order to support an inference that he thereby assisted with the April 1993 attack on Ahmici.

3. Vlatko Kupreškic was in front of the Hotel Vitez on 15 April 1993

278. Evidence as to Vlatko Kupreškic's presence in front of the Hotel Vitez on 15 April 1993 came from a single witness: Witness B.[447] He testified that he saw Vlatko Kupreškic at the Hotel Vitez three to five times between October 1992 and April 1993. Further, on 15 April, while travelling past the hotel in a car at around 2 or 3 p.m., he saw Vlatko Kupreškic standing in civilian clothes with two or three men in uniform. He specified that Vlatko Kupreškic was not more than 30 metres away from the front door of the entrance to the hotel.

(a) The additional evidence

279. The evidence of Witness AT casts additional light on the events at the Hotel Vitez on 15 April 1993. According to Witness AT, General Blaškic held two meetings at the Hotel Vitez during which the plan to attack Ahmici on 16 April was announced. One meeting involved the civilian leaders of the HVO and at the other, the military leaders were in attendance. Witness AT notes that Mirko Samija, Chief of Police of Vitez Police Station, was present at both meetings.

(b) Discussion

280. Vlatko Kupre{ki} argues that Witness B's observations were made in difficult circumstances. He was in a moving car and the distance between his vehicle and the person observed was some 30 metres. In such circumstance, the Defendant suggests, there was "an even chance of mistaken identification".[448] Further, the sighting could only have been fleeting, and the image obscured.[449]

[447] Trial Transcript, 728-927.
[448] Appeal Transcript, 628; Vlatko Kupreškic Appeal Brief, para. 41 (k).
[449] Vlatko Kupreškic Appeal Brief, para. 41 (l).

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281. The Prosecution argues that the Trial Chamber acted reasonably in accepting the evidence of Witness B.[450] Furthermore, according to the Prosecution, the presence of Vlatko Kupreškic, a civilian, outside the Hotel Vitez, a place where decisions were being made to attack Ahmici, creates a "very strong and almost irreversible inference" that he was involved in the meeting to plan the attack.[451]

282. The Appeals Chamber finds no error on the part of the Trial Chamber in accepting Witness B's observation. The Appeals Chamber notes that Witness B knew Vlatko Kupreškic,[452] a fact not challenged at trial. Thus Witness B's ability to recognise Vlatko Kupreškic was not in dispute. No satisfactory reason has been put forward to satisfy the Appeals Chamber as to why the Trial Chamber should not have accepted the evidence. While the circumstances of the observation were difficult, the finding was not one that no reasonable tribunal of fact could have made. As to the probative value of this evidence, the Trial Chamber heard and accepted evidence that the Hotel Vitez was, at that time, the HVO 4th Battalion Military Police Headquarters and the base of "the HVO commanders".[453] The exact impact or importance of this finding is not discussed in the Trial Judgement. According to Witness AT, the actual plan to attack Ahmici was made at the Hotel Vitez on the same day that Vlatko Kupreškic was seen outside.

283. Still, mere presence outside the Hotel Vitez cannot be said to amount to an act specifically directed towards assisting, encouraging or lending moral support to the offence of persecution. In that sense, the fact that the Hotel Vitez was the headquarters of the HVO and that decisions were taken there to attack Ahmici, does not provide sufficient evidence to infer reasonably that Vlatko Kupreškic was in some way associated with the planning of the attack. Thus, while the Appeals Chamber does not accept that the Trial Chamber erred in accepting the identification evidence of Witness B, it upholds the Defendant's argument that it was not open to the Trial Chamber to infer thereby that he, merely by virtue of his presence outside the Hotel Vitez, assisted in the Ahmici attack.

4. Vlatko Kupreškic was in Ahmici during the morning, afternoon and in the early evening of 15 April and there was troop activity in and around his house on the evening of 15 April

284. The evidence at trial regarding events relating to Vlatko Kupreškic on 15 April 1993 came from Witnesses L,[454] M,[455] , O[456] and the diary of Witness V.[457]

[450] Prosecution Response, para. 28.18.
[451] Appeal Transcript, 884.
[452] Trial Transcript, 778.
[453] Trial Judgement, para. 135 and footnote 136.
[454] Trial Transcript, 2336-2369.

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285. Witness L was a Muslim neighbour of Vlatko Kupreškic in Ahmici and a member of the village guard. He testified that, on 15 April 1993, he had been digging a septic tank in Zume (a nearby village) and walked home at around 5 to 6 p.m. His route took him past Vlatko Kupreškic's store (Sutra), where he saw Vlatko Kupreškic sitting outside with Ivica Kupreškic and two other unknown men, drinking beer. As he continued his journey home, he passed Vlatko Kupreškic's house, where he saw 20-30 uniformed soldiers, wearing summer uniforms, on the lower balcony of the house. He said it was not usual to see soldiers, and it was almost dark. He later told his commander about what he had seen and went on patrol. At that time, he did not think there was any immediate danger. In cross-examination, Witness L stated that there were five men outside the store; Vlatko Kupreškic, Ivica Kupreškic, and Mirko Vidovic, along with two others, and the soldiers were wearing black and white military uniforms. The road on which he was walking was not far from the house of Vlatko Kupreškic.

286. Witness M, a female Muslim refugee in April 1993, was living in the home of Witness L at the time of the attack, not far from Vlatko Kupreškic's house. On the evening of 15 April, she was at the water tap outside the house next to Vlatko Kupreškic's house and could see his house from where she was standing. At around dusk, she observed a truck arrive with soldiers. She saw five or six soldiers get down from the truck. Although she did not see them enter Vlatko Kupreškic's house, she did see them go somewhere below the house to a basement or a storage place of some kind. She did not tell anyone about what she had seen.

287. Witness O, the husband of Witness M, was also staying at Witness L's home on the evening before the attack and corroborated her evidence. He testified that he was standing near Witness L's house, near the water fountain, when he saw four or five or six soldiers near Witness L's house and also down in front of Vlatko Kupreškic's house. It was dark at this time. The troops were actually in Vlatko Kupreškic's yard. Witness O did not tell anybody about what he saw: he didn't think it was important. Later that night, Witness O went on village guard patrol with Witness L.

288. The diary of Witness V records that, on 15 April 1993, before dark, he "learned that the Croats were concentrating around the Kupreškic houses".[458]

289. On appeal, Vlatko Kupre{ki} alleged that his trial counsel failed to challenge Witness M's purported identification of troops at the home of Vlatko Kupreškic.[459] As to Witness L, Vlatko

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[455] Trial Transcript, 2432-2460.
[456] Trial Transcript, 2608-2631.
[457] Exhibit D 8/2.
[458] Exhibit D 8/2, 19.

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Kupre{ki} highlights the part of Witness L's testimony where he suggests that Mirko Vidovi} was drinking outside the Sutra store with Vlatko Kupreškic on 15 April. During the trial, Mirko Vidovi} appeared as a defence witness and testified that he was in Germany between April 1993 and June 1993.[460] Convincing documentary evidence was provided in support of his assertion.[461] The Trial Chamber made no reference to Witness L's mistaken identification of Mirko Vidovi} in the Trial Judgement and gave no indication of how this factor affected its overall assessment of Witness L's testimony. Vlatko Kupre{ki} now relies upon these factors to argue that "the Trial Chamber erred in failing to find that this was compelling evidence of the unreliability of Witness L."[462]

(a) The additional evidence

(i) Witness ADA

290. The statement of Witness ADA and associated exhibit were admitted as additional evidence, and the Appeals Chamber heard testimony from him at the evidentiary hearing. Witness ADA, a Muslim inhabitant of Ahmici, testified that, on 15 April 1993, he was on the hill outside Vlatko Kupreškic's store (Sutra) from 11 or 12 a.m. to 6 p.m., waiting for a delivery of timber. He did not see Vlatko Kupreškic at the store that day or any soldiers. Nor did he see Witness L pass by. Between 8 and 10 p.m., he saw 30 HVO soldiers in front of Branko Kupreškic's house.

(ii) Witness AT

291. In his testimony in the *Kordi}* trial, Witness AT gave a detailed explanation as to the planning that took place on 15 April 1993 for the attack on Ahmici the following day. At the Hotel Vitez, following the two meetings held by Bla{ki}, he was informed that the Military Police would attack Ahmici and Nadioci villages. Witness AT then summoned all members of the Military Police to the television room to be briefed. Later that day, the Military Police went to the "Bungalow" to wait. After midnight (on 16 April) they received further orders about the attack. They made maps of the locations of Muslim and Croat homes in Ahmici and the men were then split into five or six groups. One group was ordered to go to the "Kupreškic houses". It left for that destination around 4.30 to 4.45 a.m. on 16 April.

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[459] Vlatko Kupreškic Appeal Brief, para. 30.
[460] Trial Transcript, 8594-8595.
[461] He produced his HVO permit for his trip, his passport and a certificate from the city of Frankfurt.
[462] Vlatko Kupreškic Appeal Brief, para. 40.

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(b) Discussion

292. It appears to the Appeals Chamber that the testimony of L, M, O and Witness V's diary provide the only potential evidence to show that Vlatko Kupreškic carried out acts specifically directed to assist, encourage or lend moral support for the perpetration of persecution. This evidence led the Trial Chamber to conclude that Vlatko Kupreškic had "allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before".[463] Vlatko Kupreškic has pointed out the deficiencies concerning this evidence, such as the failure to cross-examine Witness M. In fact it appears from the trial record that Witnesses L and O were also not challenged as to their observations.

293. Witness L's evidence is summarised briefly in paragraph 437 of the Trial Judgement, setting out the Prosecution evidence as to Vlatko Kupreškic's role on 15 April. In the section of the Trial Judgement setting out the defence evidence with respect to Vlatko Kupreškic's role on 15 April,[464] no mention is made of Mirko Vidovi}'s evidence refuting Witness L's observations. In its findings, the Trial Chamber held that it was not prepared to accept that Witness L was mistaken in his identification of the Defendant later on 15 April 1993 and that Witness L, "a neighbour,...knew the accused and there is no reason to think either that [he was] mistaken or that [he was] lying during [his] evidence".[465] The mere fact that the Trial Judgement does not refer to the evidence of Mirko Vidovi} does not necessarily mean that this piece of evidence was not considered in assessing the value of Witness L's evidence.

294. As to Witness ADA, his evidence was not compelling upon the issue as to whether Vlatko Kupreškic was outside the Sutra store and whether there were soldiers at his home. There were a number of inconsistencies in his testimony.

295. However, if Witness AT is correct, and the Appeals Chamber accepts that he is in this regard, the plan to attack Ahmici was only announced on the afternoon of 15 April 1993 and the Military Police was the only military unit assigned to attack Ahmici. Further, that unit was not deployed to the "Bungalow" (just outside Ahmici) until late on 15 April, i.e., many hours after Witnesses L, M and O purported to see the troops in and around the house of Vlatko Kupreškic. Witness AT stated that one of the groups of Military Police was sent to the "Kupreškic houses" but they did not leave the "Bungalow" till around 4.30 to 4.45 a.m. on 16 April. The Appeals Chamber considers it unlikely that another set of troops would have been dispatched to Vlatko Kupreškic's

[463] Trial Judgement, para. 466.
[464] Trial Judgement, paras 438 to 441.
[465] Trial Judgement, para. 464.

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house much earlier in the day, particularly when one considers the timing between the meetings where the plan was announced and the sighting of the troops.

296. In the light of the additional evidence, the Appeals Chamber finds there is a serious doubt as to whether there were troops at Vlatko Kupreškic's house on the evening of 15 April 1993. The Chamber concludes that no reasonable tribunal of fact could have found beyond reasonable doubt that there were.

5. <u>Presence in the vicinity of the house of Suhret Ahmi} at about 5.45 a.m. shortly after that person was murdered</u>

297. At trial, Witnesses H[466] and KL[467] both gave evidence that Vlatko Kupreškic was present outside the house of Suhret Ahmi} shortly after he was murdered during the early morning of 16 April 1993.

298. The main part of Witness H's evidence has been considered at length in the section of this Judgement dealing with Zoran and Mirjan Kupreškic's appeal against conviction. Insofar as her evidence relates to Vlatko Kupreškic, she testified that he was a close neighbour and that, on 16 April 1993, following the murder of Suhret Ahmi}, she left her house at around 5.30 a.m. with Witness SA and two sisters and set off in the direction of Redzib Ahmi}'s house. They turned back, however, because they were in danger of being shot. On her return, she saw Vlatko Kupreškic in front of the garage of her house at about 5.45 a.m. He was wearing a blue overcoat, with something under it, and was headed in the direction of Witness H's garage. At that time, the body of Witness H's father was lying in the yard and Vlatko Kupreškic did not attempt to provide any assistance to him.

299. At trial, the evidence given by Witness KL was primarily relevant to the Prosecution's case against Zoran and Mirjan Kupreškic. Insofar as his evidence related to Vlatko Kupreškic, he testified that, following the attack on his home, he went to the window and saw members of the HVO in his front yard. As he looked out of his window, he saw Vlatko Kupreškic leave the yard of Suhret Ahmi}'s house, cross Witness KL's garden and go towards Vlatko Kupre{ki}'s own house. Vlatko Kupreškic was wearing a blue coat with something underneath it.

300. In its findings, the Trial Chamber held that Witness H

> knew Vlatko Kupreškic and had no doubt of her identification of him. Her evidence was supported by the evidence of Witness KL. The Trial Chamber finds that this identification was

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[466] Trial Transcript, 1617-1766.
[467] Trial Transcript, 1884-2128.

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> correct and that Vlatko Kupreškic was in the vicinity shortly after the attack on Suhret Ahmic's house. There is no further evidence as to what the accused was doing there, but the Trial Chamber concludes that he was present and ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge.[468]

301. Vlatko Kupre{ki} argues that Witness H's evidence "was slender" and the deduction that Vlatko Kupreškic was "ready to lend assistance" amounted to mere speculation and conjecture.

302. The Appeals Chamber finds that Witness KL's value as a corroborative witness to Witness H's sighting is not strong. In the section of the Trial Judgement, dealing with Witness KL's account of Zoran and Mirjan Kupreškic as perpetrators of the attack on his family, the Trial Chamber found his evidence "wanting in credibility"[469] and concluded that he "may have been mistaken".[470] However, the more pertinent question is whether the evidence of Witness H, taken at its highest, afforded a sufficient basis for the Trial Chamber to conclude that Vlatko Kupreškic was assisting in the attack. The Appeals Chamber notes that Witness H did not see Vlatko Kupreškic directly participating in any part of the attack on Ahmici that day. Nor was he wearing a military uniform or carrying a weapon. In a similar way that Vlatko Kupreškic's presence at the Hotel Vitez could not be said to amount to an act specifically directed to assist, encourage or lend moral support, his presence in Witness H's yard provides only the merest of circumstantial evidence that he was a participant in the attack and is an insufficient basis upon which to found his conviction for persecution.

C. Conclusion

303. The case against Vlatko Kupreškic at trial was wholly dependent upon circumstantial evidence. The Appeals Chamber first notes that there is nothing to prevent a conviction being based upon such evidence. Circumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt.

304. The two most crucial issues upon which Vlatko Kupreškic's appeal really turns relate to the findings that there were troops at Vlatko Kupreškic's house on 15 April and that he was a member of the police. As to both, the Appeals Chamber has concluded that the findings cannot be upheld. It appears to the Appeals Chamber that the finding that Vlatko Kupreškic was an active police officer was an important factor in the Trial Chamber's decision to convict him of persecution. From his police status, support was drawn to infer that Vlatko Kupreškic's conduct amounted to acts directed to assist, encourage or lend moral support to the perpetration of persecution, and that he had the requisite *mens rea*. The conviction was delicately balanced upon all of the five factors

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[468] Trial Judgement, para. 470 (footnote omitted).
[469] Trial Judgement, para. 424.

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identified earlier, with the Trial Chamber relying on all of them to draw its ultimate inferences of aiding or assisting the attack. The Appeals Chamber has determined that the additional evidence has demonstrated errors of fact as to two of them, namely Vlatko Kupre{ki}'s police membership and the presence of troops at his house on 15 April 1993. The Appeals Chamber finds that no reasonable tribunal of fact could find Vlatko Kupre{ki} guilty as an aider and abettor of persecution based on the remaining evidence. The Appeals Chamber, therefore, finds that a miscarriage of justice has been occasioned. It allows the appeal of Vlatko Kupre{ki} and reverses his conviction under count 1 of the Amended Indictment. Finally, the Appeals Chamber notes that, unlike Zoran and Mirjan Kupre{ki}, Vlatko Kupre{ki} did not challenge the persecution count in the Amended Indictment on the grounds of vagueness. Nonetheless, considerations of fairness would have required that the pleading principles identified in relation to Zoran and Mirjan Kupre{ki}'s appeal also be applied to Vlatko Kupre{ki}. However, given that the Appeals Chamber has allowed his appeal on other grounds, it is not necessary to consider this issue further.

VI. APPEAL AGAINST THE CONVICTION OF DRAGO JOSIPOVI]

A. Introduction

305. Josipovi} advances four grounds in support of his appeal against conviction[471] -- first, that the Trial Chamber erred in basing his conviction for persecution on material facts that were not pleaded in the Amended Indictment; second, that the Trial Chamber acted unreasonably in accepting the evidence of Witness EE as a basis to convict; third, that the new evidence of Witness AT was admissible and cast doubts over Josipovi}'s involvement in the attack; and fourth, that the additional evidence of Witness CA casts serious doubts on the veracity of Witness DD's evidence at trial.[472] Additionally, although formally abandoned as a ground of appeal by Josipovi} during the appeals process, the Appeals Chamber will consider whether there was sufficient evidence before the Trial Chamber to conclude that Josipovi} played any command role over soldiers during the Ahmici attack.

B. Vagueness of the Amended Indictment

306. Like Zoran and Mirjan Kupre{ki}, Drago Josipovi} complains that the Amended Indictment lacked factual particularity in relation to the count of persecution (count 1). The Appeals Chamber understands the pertinent question to be whether the Trial Chamber erred in law by returning a

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[470] Trial Judgement, para. 399.
[471] *See generally*, Josipovi} Reply.
[472] Appeal Transcript, 714.

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conviction for persecution on the basis of material facts not pleaded under count 1 in the Amended Indictment. As with Zoran and Mirjan Kupre{ki}, Drago Josipovi}'s argument regarding the vagueness of the Amended Indictment will be considered only in relation to the criminal conduct for which he was convicted under count 1.

307. The above discussion of the procedural background to the Amended Indictment and the content of count 1 in relation to Zoran and Mirjan Kupre{ki}, also applies to Drago Josipovi}.[473]

308. In addition to the persecution charge (count 1), the Amended Indictment charged Drago Josipovi}, together with Vladimir [anti}, in counts 16 and 17 with murder under Articles 5(a) and 3(1)(a) of the Statute, and in counts 18 and 19 with inhumane acts and cruel treatment under Articles 5(i) and 3(1)(a) of the Statute. These charges related to Josipovi}'s alleged participation in a specific event that took place at Musafer Pu{}ul's house in Ahmi}i in the early morning of 16 April 1993. During this attack, Musafer Pu{}ul was killed, his house burnt to the ground and his family, including two young daughters, forcibly removed from the family home.

309. At trial, the prosecution case against Drago Josipovi} rested on proof of three main allegations: (i) his participation in the attack on the Pu{}ul house, including the murder of Musafer Pu{}ul, and expulsion of surviving family members; (ii) his participation in the attack on Nazif Ahmi}'s house, during which Nazif Ahmi} and his 14-year old son, Amir, were killed; and (iii) his participation in the attack during which Fahrudin Ahmi} was killed. To that end, the Prosecution introduced the evidence of Witness EE (the attack on Musafer Pu{}ul's house), Witness DD (the attack on Nazif Ahmi}'s house) and Witness CA (the attack in which Fahrudin Ahmi} was killed).

310. The Trial Chamber was not satisfied, beyond reasonable doubt, that Josipovi} participated in the attack during which Fahrudin Ahmi} was killed. Nonetheless, Drago Josipovi} was found guilty of persecution (count 1); murder (count 16); and inhumane acts (count 18).[474] The Trial Chamber based these convictions mainly on the testimony of Witnesses EE and DD. The basis for Josipovi}'s conviction on count 1 (persecution), was, accordingly, his participation in the Musafer Pu{}ul and Nazif Ahmi} attacks.

311. The legal analysis set out above relating to Zoran and Mirjan Kupre{ki} applies *mutatis mutandis* to Drago Josipovi} and is hereby incorporated by reference.[475]

[473] *See* the discussion *supra* paras 79-83.
[474] The acquittals on counts 17 and 19 were based on cumulative conviction considerations. *See* the further discussion *infra* paras 379-388.
[475] *See* the discussion *supra* paras 88-114.

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312. In the Appeals Chamber's view, the factual allegation that Josipovi} was involved in the attack on Musafer Pu{}ul's house, his murder, and the expulsion of his surviving family members, as well as the attack on Nazif Ahmi}'s house, during which Nazif and his 14-year old son, Amir, were killed, was undoubtedly material to the Prosecution case against Drago Josipovi}. As evidenced by the Trial Judgement, the verdict on the persecution count was critically dependent upon these two events. The attack on Musafer Pu{}ul's house was pleaded only under counts 16 to 19.[476] The attack on Nazif Ahmi}'s house was not pleaded in the Amended Indictment at all. In the opinion of the Appeals Chamber, both of these attacks should have been pleaded under count 1, because of their materiality to Josipovi}'s criminal liability for persecution. As already noted, the attack on Musafer Pu{}ul's house was pleaded elsewhere in the Amended Indictment. However, the Prosecution should have incorporated the factual allegations relating to counts 16 to 19, at least by way of reference, into the persecution count, so that Josipovi} knew that the case he had to answer on that count also involved the attack on Musafer Pu{}ul's house.

313. In contrast to the case of Zoran and Mirjan Kupre{ki}, the Appeals Chamber is unaware of any indication in the trial record that the Trial Chamber expressed concern over the fact that the attack on Nazif Ahmi}'s house was not specifically charged in the Amended Indictment. Counsel for Josipovi}, however, did.[477] In responding to Josipovi}'s complaint about the evidence of Witness DD at trial, the Prosecution argued that the crimes described by Witness DD could be considered under the persecution count.[478] The Trial Chamber appears to have accepted this suggestion, without providing any explanation as to exactly how it intended to deal with this matter.[479] When counsel for Josipovi} attempted to impress his concern upon the Trial Chamber, he was asked to proceed with the cross-examination of Witness DD.[480]

314. The Trial Chamber's reasoning for relying on the Musafer Pu{}ul and Nazif Ahmi} attacks in convicting Josipovi} on the persecution count appears to be that, in the Trial Chamber's view, the Amended Indictment pleaded this underlying criminal conduct with the requisite detail and that Josipovi} thereby had sufficient information to prepare his defence.[481] The Appeals Chamber is unable to agree with this reasoning. Furthermore, the Appeals Chamber does not share the Trial Chamber's view that allegations of specific criminal conduct not pleaded in the Amended Indictment, such as the attack on Nazif Ahmi}'s house, can serve as a basis for conviction on the charge of persecution (count 1).

[476] Counts 17 and 19 charged Josipovi} cumulatively for the same alleged criminal conduct.
[477] Trial Transcript, 3949: "I believe that the events described by the witness fall outside the scope of the indictment, and I think the witness should not be questioned in respect of that".
[478] Trial Transcript, 3950.
[479] Trial Transcript, 3950-3951.

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315. The Prosecution submits that, even if the persecution count did not plead the material facts with sufficient detail, Josipovi} has failed to prove that he was prejudiced. The Appeals Chamber does not accept this submission and notes the following in relation to the attack on Nazif Ahmi}'s house.

316. Prior to submitting its Pre-Trial Brief, the Prosecution was asked by the Trial Chamber during a Status Conference to

> include in [the Pre-Trial Brief] how it is [that the Prosecution] put the case against each Defendant, how it is [the Prosecution] say[s] that each Defendant is implicated in the offence for which he is charged.[482]

317. Despite this request, the Prosecution Pre-Trial Brief contains little information to that effect. In the opinion of the Appeals Chamber, the information given is certainly not sufficient to properly inform Josipovi} of the charges against him. It is limited to the following statement:

> [As the attack began in the early morning of 16 April 1993, Josipovi}] was seen on several occasions, armed and in uniform, participating in the murder of Muslim civilians in his neighbourhood. Involved in one of those murder incidents with [him] was Vladimir [anti}. [Josipovi}] was also seen assisting in the escort of surviving Muslims to holding areas for their eventual expulsion from the village and ordering Muslim men to pick up their dead.[483]

318. The Pre-Trial Brief further stated that the Prosecution anticipated

> presenting recently acquired evidence of individual acts of violence perpetrated by the accused. This conduct has not been specifically charged as individual crimes, because the evidence upon which it is based was not available until after the Amended Indictment was confirmed. Since such evidence is, in any event, admissible as relevant to Count 1 Persecution charge, no further request to amend the [Amended] Indictment by adding new Counts has been made in an effort to avoid delay to the trial schedule.[484]

319. The information given in the Prosecution Pre-Trial Brief is extremely general in nature and it is difficult to see how it could have assisted Josipovi} in the preparation of his defence, particularly in view of the fact that his defence at trial was that he was present in Ahmi}i on 16 April 1993, but took no part in the military activities. Accordingly, information as to which particular houses were attacked, or whose murders the Prosecution alleged that Josipovi} participated in, was essential for the preparation of his defence. Nonetheless, no such references were included in the Prosecution Pre-Trial Brief. The short section pertaining directly to Josipovi} contains nothing but imprecise allegations. Similarly, paragraph 27 referring to "recently acquired evidence of individual acts of violence" does not establish, with any clarity, the nature of those acts.

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[480] Trial Transcript, 3950-3951.
[481] Trial Judgement, para. 811. *See supra* para. 111 (setting out the relevant passage).
[482] Trial Transcript, 10.
[483] Prosecution Pre-Trial Brief, para. 20.

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During the opening statement, the Prosecution alleged that Josipovi} was responsible for the death of Musafer Pu{}ul and the destruction of his house.[485] There was no mention of Josipovi}'s participation in the Nazif Ahmi} attack.[486]

320. In view of the foregoing, the Appeals Chamber is unable to conclude that Josipovi} received clear and consistent information spelling out the factual basis underpinning the charges against him relating to the attack on the Nazif Ahmi} house. In conjunction with the drastic change in the Prosecution case between the Amended Indictment and the evidence adduced at trial,[487] the failure to plead the attack on Nazif Ahmi}'s house compels the Appeals Chamber to reject the Prosecution's assertion that Josipovi} was not prejudiced by the defect in the Amended Indictment. Consequently, this attack cannot serve as a legitimate foundation for returning a conviction on the persecution count.

321. The Appeals Chamber, however, finds that Witness DD's testimony concerning Josipovi}'s presence at the Ahmi} house may still be considered as corroborating evidence for the determination of Josipovi}'s involvement in the offence that was set out in the Amended Indictment, i.e., the attack on Musafer Pu{}ul's house. Support for this position can be found in Rule 93 of the Rules, which allows for the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice. Similarly, under the so-called principle of "similar fact evidence", courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.[488]

322. In the case at bar, Josipovi} was formally charged with murder, inhumane acts and cruel treatment relating to the event at Musafer Pu{}ul's house. To that charge, he mounted a "not me" defence claiming that he was present in the village of Ahmi}i during the 16 April attack, but spent the day assisting others, including Muslims, during the onslaught. In such circumstances, evidence of Josipovi}'s participation in an additional attack of a similar nature to the attack charged, occurring in the same vicinity and during the same time period, i.e., in the early hours of the

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[484] Prosecution Pre-Trial Brief, para. 27.
[485] Trial Transcript, 125-126.
[486] Trial Transcript, 96-127.
[487] As discussed in relation to Zoran and Mirjan Kupre{ki} *supra*, para. 93.
[488] *See* Archbold: Criminal Pleadings, Evidence and Practice 2000, § 13-37 (P.J. Richarson et al. eds, 2000); *See also* John Strong, McCormick on Evidence § 190, at 797-812 (4th ed. 1992).

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morning of 16 April 1993, can be considered relevant to the question of Josipovi}'s guilt for the crime charged in the Amended Indictment (the Musafer Pu{}ul attack).

323. Having reached this conclusion, the Appeals Chamber, however, stresses that the Prosecution is not at liberty to introduce similar fact evidence without proper notice to the defendant. In this connection, the Appeals Chamber notes that Rule 93 of the Rules provides specifically that the Prosecution must disclose any evidence of a consistent pattern of conduct to the defence pursuant to Rule 66. The Appeals Chamber also observes that there is recent Trial Chamber jurisprudence going still further which holds that notice, by service of witness statements under Rule 66(A), that the Prosecution will plead evidence of facts not pleaded in the indictment is not sufficient.[489] This conclusion is based on the recently amended Rule 65*ter* of the Rules requiring the Prosecution to identify, in its Pre-Trial Brief, the relevant evidence for each count in the indictment.[490] This is indeed a salutary development, but the Appeals Chamber notes that, at the time of disclosure of Witness DD's statement to Josipovi} under Rule 66, the current version of Rule 65*ter* had not yet been adopted.[491] The Appeals Chamber, therefore, takes the view that the interests of justice would be best served in this instance by permitting the evidence to remain on the record, and to be used for the purpose of corroborating the evidence relating to the offence charged, providing that such an approach would not be critically unfair to the defendant. In that respect, the Appeals Chamber notes that, so far as the record indicates Witness DD's evidence was timely disclosed to Josipovi} pursuant to Rule 66, the only Tribunal guidance on the subject at that point in time. Accordingly, the Appeals Chamber can identify no cogent reason for excluding Witness DD's evidence from the record.

324. As to the attack on Musafer Pu{}ul's house, the Appeals Chamber recalls that this event was not pleaded under the persecution count, but that it was specifically pleaded elsewhere in the Amended Indictment.[492] Preferably, the Prosecution should have adopted a pleading style that ensured it was clear, on the face of the Amended Indictment, that the factual allegations relating to the Musafer Pu{}ul attack were relevant also for the persecution count. However, the Appeals Chamber finds that Josipovi} was not prejudiced in preparing his defence on the facts against the Musafer Pu{}ul incident because it was fully described elsewhere in the Amended Indictment. The only prejudice that could have resulted from this incident not being set out under the persecution count would be the time that Josipovi} wasted on preparing to challenge other grounds for the

[489] *Br|anin* Decision of 26 June 2001, para. 62.
[490] *Br|anin* Decision of 26 June 2001, para. 62 (referring to Rule 65*ter* (E)(i)).
[491] The current version of Rule 65*ter*(E)(i) was adopted at the Twenty Third Plenary Session, 12 April 2001, and entered into force on 4 May 2001. Rule 65*ter*(E)(ii)(C) originally appeared as Rule 65*ter*(E)(iv)(c) and was introduced at the Twenty First Plenary Session, 15 – 17 November 1999, and entered into force on 7 December 1999.
[492] *See* Amended Indictment, paras 32 to 35 (outlining counts 16 to 19).

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persecution charge. The Appeals Chamber's review of the record suggests that he did not present any defence based on other theories. Thus, the Appeals Chamber finds this to be one of the rare cases where the Prosecution's failure to plead the material facts with sufficient detail was harmless. Consequently, the Appeals Chamber concludes that Josipovi}'s participation in the attack on the Pu{}ul house can still serve as a valid basis for his conviction on the count of persecution.

325. Finally, the Appeals Chamber observes that no waiver argument has been raised by the Prosecution in this case since Josipovi} objected to the form of the Amended Indictment, *inter alia*, on the same ground as he now raises before the Appeals Chamber.[493] On 15 May 1998, the Trial Chamber rejected Josipovi}'s objection. As to the specific question of whether the material facts were pleaded with sufficient detail, the Trial Chamber did not provide any reasons for its finding. It simply held that the Amended Indictment met the requirements of Rule 47(C).[494]

326. For the foregoing reasons, the Appeals Chamber holds that count 1 of the Amended Indictment failed to plead the material facts relating to the attack on Nazif Ahmi}'s house and Musafer Pu{}ul's house. By returning a conviction on count 1 (persecution) on the basis of these attacks, the Trial Chamber erred in law. The Appeals Chamber is unable to conclude that Josipovi} was sufficiently informed of the charges pertaining to the attack on Nazif Ahmi}'s house. Since his right to prepare his defence in relation to this allegation was thereby infringed, it cannot serve as a legitimate foundation for returning a conviction on the persecution count. The evidence relating to this allegation may nevertheless be considered as corroborating evidence for the determination of Josipovi}'s involvement in the offence that was set out in the Amended Indictment, i.e., the attack on Musafer Pu{}ul house. With regard to the latter attack, the Appeals Chamber finds that the Trial Chamber's error was harmless because it was pleaded elsewhere in the Amended Indictment. Consequently, this incident may still validly serve as a basis for Josipovi}'s conviction on the persecution count.

C. Witness EE

327. Josipovi} asserts that the evidence of Witness EE was so unreliable and inconsistent that no reasonable Trial Chamber could have accepted it as a basis to convict.[495] The Trial Chamber relied upon the evidence of Witness EE to find that Josipovi} was one of the attackers at her home in Ahmici on 16 April 1993. However, the Trial Chamber found that Witness EE was mistaken in her identification of two of the six attackers whom she identified. At trial, evidence was adduced to

[493] Objection of the Counsel of the Accused Drago Josipovi} Because of Defects in the Form of Indictment, 16 April 1998.
[494] Decision on Defence Challenges to Form of the Indictment, 15 May 1998, 2.
[495] Appeal Transcript, 720.

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demonstrate that neither Stipo Alilovic nor Marinko Katava, each of whom Witness EE purported to identify, was in Ahmici on the day of the attack. Alilovic was in The Netherlands and Katava in Vitez.[496] The thrust of Josipovi}'s argument is that, if Witness EE was mistaken in her identification of two of the six attackers, her evidence can no longer provide a safe basis upon which to convict Josipovi} or indeed anyone else.[497] He argues that no reasonable tribunal could conclude that the evidence of Witness EE was reliable and a safe basis upon which to convict. The evidence of Witness EE, Josipovi} asserts, is "dangerous evidence".[498] Josipovi} maintains that, as she made a fundamental error in relation to two people she knew well, it is impossible to be satisfied, beyond reasonable doubt, that she was correct in her identification of any of the other attackers.[499]

328. In response, the Prosecution argues that the Trial Chamber did not conclude that Witness EE was mistaken in her identification of two of the six attackers. The Prosecution relies on the following passage of the Trial Judgement to assert that the Trial Chamber only concluded that EE *may* have been mistaken in her identification of Katava and Alilovi}:[500]

> … even if…[Witness EE]…was mistaken about her identification of Katava (and Alilovi} and Livanci}) it does not necessarily mean that she was mistaken in her identification of Drago Josipovi} and Vladimir [anti}.[501]

The Prosecution also points to the Trial Chamber's conclusion that Witness EE was a "trustworthy and careful witness who identified the two accused in a statement made within three weeks of these offences and has not in any way retracted it."[502]

329. The Prosecution draws attention to the fact that Witness EE consistently named Josipovi} as one of the soldiers participating in the attack upon her home.[503] It further asserts that the bulk of the inconsistencies in Witness EE's evidence pertain to her identification of other soldiers. The Prosecution states that the presence of the other soldiers, their identities and their exact movements are not relevant for the purpose of deciding whether there was sufficient evidence to establish that Josipovi} was present at the scene and committed the crimes of which she complained. The Prosecution submits that the probative value of any inconsistencies must be placed in perspective considering Witness EE's unwavering and consistent identification of Josipovi} and his general

[496] Trial Judgement, para. 482.
[497] Appeal Transcript, 728.
[498] Appeal Transcript, 731.
[499] Appeal Transcript, 730.
[500] Prosecution Response, para. 4.7 and para. 4.22.
[501] Trial Judgement, para. 483.
[502] Prosecution Response, para. 4.7 (referring to the Trial Judgement, para. 503).
[503] Prosecution Response, para. 4.11.

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conduct in the attack.[504] The Prosecution submits that the most cogent reason for accepting the Trial Chamber's reliance on EE's evidence for the purpose of convicting Josipovi} was the fact that the Trial Chamber had the opportunity to "hear and observe" the witness and that it was open to it to conclude that EE was a reliable and credible witness when recounting the events of 16 April 1993.[505] In conclusion, the Prosecution submits that Witness EE's evidence is not inherently implausible and that the inconsistencies do not detract from the salient aspects of her testimony upon which the Trial Chamber relied.[506]

330. The Appeals Chamber is of the view that the Trial Chamber did not merely find that Witness EE *may* have been mistaken about the presence of Katava and Alilovi} as asserted by the Prosecution. The Trial Chamber found beyond a peradventure that neither Katava nor Alilovi} was present during the attack on the Pu{}ul house. The Trial Chamber relied upon the evidence of Mrs. Dragica Krizanac and Ms. Johanna Hume which demonstrated that Alilovi} was in The Netherlands on 16 April 1993, and the evidence of Witness CD and Katava himself which led the Trial Chamber to conclude that Katava was in Vitez on the morning of 16 April 1993.[507] The Prosecution, either inadvertently or disingenuously, has failed to draw the Appeals Chamber's attention to the following statement by the Trial Chamber in the Trial Judgement:

> It is accepted by the Trial Chamber that the witness was mistaken in her identification of Katava and Alilovi}, since there is compelling evidence that neither was in Ahmi}i that morning.[508]

Nonetheless, the Trial Chamber ultimately concluded that it does not follow from the fact that the witness was mistaken about two of the participants, that she was mistaken in her identification of Josipovi} and [antic.[509]

331. At first glance, Josipovic's assertion that the Trial Chamber erred in accepting the evidence of Witness EE bears similarities to the arguments raised by Zoran and Mirjan Kupreškic regarding Witness H. Certainly, the Trial Chamber was required to exercise caution prior to convicting Josipovi} on the basis of Witness EE's testimony, having regard to the difficulties inherent in identification evidence and described earlier in this Judgement.[510] However, on closer inspection, there are important differences between the arguments raised by Zoran and Mirjan Kupre{ki}, on the one hand, and Josipovi} on the other. While the Appeals Chamber accepts that the Trial Chamber erred in failing to direct itself to material aspects of the trial record in assessing the

[504] Prosecution Response, para. 4.25.
[505] Prosecution Response, para. 4.26.
[506] Prosecution Response, para. 4.27.
[507] Trial Judgement, paras 402 and 482 (a)-(b).
[508] Trial Judgement, para. 503.
[509] Trial Judgement, para. 503.
[510] See the discussion *supra* paras. 34-40.

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evidence of Witness H, Josipovic has not demonstrated any such omission on the Trial Chamber's part relevant to the testimony of Witness EE. Rather, it is obvious from the paragraph just cited that the Trial Chamber was fully aware that Witness EE was mistaken in her identification of two of the six attackers and, indeed, made a specific finding to that effect. The Trial Chamber, nonetheless, accepted that Witness EE was accurate in her identification of two of the other attackers: Josipovic and [antic. Thus, in essence, Josipovic simply asks the Appeals Chamber to re-examine the same issue addressed by the Trial Chamber and reach a different conclusion, namely, that Witness EE was mistaken in her identification of him because she was mistaken in her identification of two other men.

332. It is of course open to a Trial Chamber, and indeed any tribunal of fact, to reject part of a witness' testimony and accept the rest. It is clearly possible for a witness to be correct in her assessment of certain facts and incorrect about others. In the present case, the Trial Chamber heard evidence from Witness EE as to who had attacked her home and killed her husband on 16 April 1993. It found her a "trustworthy and careful witness who identified the two accused in a statement made within three weeks of these offences and has not, in any way, retracted it."[511] The Trial Chamber did not accept Witness EE's evidence as to the presence of Alilovi} and Katava in Ahmici that morning. This does not, however, preclude the Trial Chamber from relying on the evidence of Witness EE to find that Josipovi} and [antic did attack her house on 16 April 1993. Indeed, the Trial Chamber's finding that [antic was present during the attack, despite his assertion of alibi at trial, has subsequently been borne out by Witness AT's testimony.

333. The jurisprudence of this Tribunal confirms that it is not unreasonable for a tribunal of fact to accept some, but reject other, parts of a witness' testimony.[512] The situation before the Appeals Chamber in the present case is akin to those cases within the jury system where a jury returns different verdicts on different counts even though the evidence for all counts comes from one witness. In the instant case, had Alilovi} and Katava been on trial with Josipovi} they would, based on the alibi evidence, have most certainly been acquitted.

334. During its analysis of the complaints raised by Zoran and Mirjan Kupreškic about the Trial Chamber's assessment of Witness H's evidence, the Appeals Chamber emphasised the importance of assessing the credibility of a witness in light of the trial record as a whole. The Appeals

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[511] Trial Judgement, para. 503.

[512] *Prosecutor* v *Tadi}*, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, paras 296-302. The same applies in domestic courts. For example, in England and Wales, in cases where different counts depend on the uncorroborated evidence of the same witness and the credibility of the witness is put in issue, different verdicts on the different counts would not render the convictions unsafe. *See* Archbold: Criminal Pleadings, Evidence and Practice 2000, § 7-70 (P.J. Richardson *et al*. ed., 2000) (citing to *R.* v *Bell* [1997] 6 *Archbold News* 2 CA, *R.* v *Van der Molen* [1997] Crim.L.R. 604, and *R.* v *Clarke and Fletcher* [1997] 9 *Archbold News* 2, CA); *see also R.* v *Markuleski* [2001] NSWCCA 290.

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Chamber has reiterated the importance of such a holistic approach to assessing credibility within its own jurisprudence:

> A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case.[513]

335. A similar approach must be adopted in considering the Trial Chamber's assessment of Witness EE. In determining whether the Trial Chamber erred in fact, occasioning a miscarriage of justice, the Appeals Chamber is permitted to look at all of the evidence before the Trial Chamber and indeed any additional evidence admitted pursuant to Rule 115. Again, significant differences between the evidence of Witness H and Witness EE emerge. Whereas, apart from the evidence of Witness H, no other credible eyewitnesses observed Zoran and Mirjan Kupreškic participating in the 16 April 1993 attack, there is other evidence, which was accepted by the Trial Chamber, that gave support to Witness EE's claim that Josipovi} was a participant in the attack on Bosnian Muslim houses in Ahmici.

336. Witness DD gave evidence that Josipovi} participated in the attack upon the house of Nazif Ahmi}, during which Nazif and his 14-year old son, Amir, were killed. Josipovi} was seen among soldiers who were shooting at Nazif Ahmi}'s house and who then went to the house. A soldier took Amir behind the house and a shot was heard. Josipovi} then came from behind the house. He told a soldier with whom Witness DD had been struggling to leave her alone. Witness DD had known Josipovi} for 21 years prior to the attack.[514] The Appeals Chamber notes that this attack took place in the same vicinity as the attack on the Pu{}ul house and during the same time period, i.e., the early hours of the morning on 16 April 1993. The Appeals Chamber has held that, because the attack on the house of Nazif Ahmi} was not pleaded in the Amended Indictment, it cannot constitute a material fact for the conviction against Josipovic. Nonetheless, Witness DD's evidence remains on the trial record and can be used to corroborate Witness EE's identification evidence. On appeal, Josipovi} has not pursued a claim that the Trial Chamber acted unreasonably in accepting the evidence of Witness DD.[515]

337. Josipovi} also argues that, in finding that Witness EE was not mistaken about her identification of Livanci}, one of the other six attackers, the Trial Chamber effectively reversed the burden of proof by requiring the defence to prove that he was not there, rather than making the

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[513] *Prosecutor* v *Tadi}*, Case No.: IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, para. 92.
[514] Trial Judgement, para. 485.
[515] The only challenge Josipovi} has pursued regarding the credibility of Witness DD is based upon the additional statement of Witness CA admitted under Rule 115 on appeal. *See infra* paras 349-353.

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Prosecution prove that he was there. Josipovi} implies that the Trial Chamber also imposed such a burden of proof upon him. Thus he bore the burden of proving that Witness EE was mistaken about his presence whereas, Josipovic points out, the Prosecution was required to prove that the witness was not mistaken. These assertions that the Trial Chamber imposed such a burden of proof on Josipovic are rejected by the Appeals Chamber. The Trial Chamber made a positive finding that Katava and Aliliovi} did not participate in the attack. They also made a positive finding that Josipovi} and [anti} did participate in the attack and accordingly found them guilty of the various offences charged. However, Livanci} was not an accused on trial. Accordingly, the Trial Chamber did not need to make a positive finding as to his involvement in the attack and it did not make such a finding. The Trial Chamber only went so far as to state that it had not been proved that Witness EE was mistaken about him.[516] This is subtly, yet significantly, different from finding that Livanci} did, in fact, participate in the attack. Josipovi} cannot, therefore, claim that the Trial Chamber effectively reversed the burden of proof in its findings regarding Livanci}.

D. Additional evidence of Witness AT

338. As the Appeals Chamber has already stated in the discussion regarding Zoran and Mirjan Kupreškic, despite the Appeals Chamber's decision of 29 May 2001 that the Witness AT material satisfied the requirements of Rule 115 for Vlatko Kupreškic only, all other parties to the appeal are permitted to avail themselves of this material. The Appeals Chamber will accordingly consider the extent to which this material can be said to call into question the safety of Josipovi}'s conviction. The relevant parts of these documents for the purposes of Josipovi}'s appeal are set out below.

339. In his interview with the Prosecution on 16 August 2000, Witness AT was asked about Josipovi}'s role on 16 April 1993.[517]

> Michael Blaxill: When…one last person if you would, Mr. Drago Josipovi}. Could you tell us about his movements and actions on the 16th?
>
> …[Witness AT]: I cannot tell you anything about Drago. I did not see him on the 16th. I knew Drago from before because he is a close relative of my wife…I first saw Drago during the war on 13 June 1993…
>
> Michael Blaxill: You say that you have known him since before April 1993. Where [*sic*] you aware of Mr. Josipovi}'s membership of, or any affiliation with the HVO?
>
> …[Witness AT]: He was in the same situation as the others we have mentioned, Zoran, Mirjan and Vlatko. As far as I know, he was a reservist.

[516] Trial Judgement, para. 503.

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...

Michael Blaxill: Can you recall the numbers of people that you saw near you when you were at the Pu{}ul house on 16 April?

...[Witness AT]: I am not sure about one person. I think there were 11 or 10 people with me. Ten, or eleven people and myself.

Michael Blaxill: Do you recall if all the people with you started out in your group, or did this include one or two reservists who may have turned up?

...[Witness AT]: The young, blonde, tall man I mentioned joined the group.

Michael Blaxill: You heard some names suggested by a witness...that perhaps Mr Marinko Katava was there at some point. Was he?

...[Witness AT]: It is not true.

Michael Blaxill: Did you, I am just trying to remember, did you actually see Mr. Mustafa Pu{}ul being removed from the house or taken away?

...[Witness AT]: No.

Michael Blaxill: And so, whilst you where [*sic*] near that house, where [*sic*] you able to see all the people from the HVO who were there or were they all round and about and many of them you did not see for periods of time?

...[Witness AT]: Correct. I could not see all of them....

Michael Blaxill: So, if any other local reservists had perhaps come in...you know, come up to her house from the other side of the wall you were on, you would not have seen that person?

...[Witness AT]: No.

Michael Blaxill: Alright.

340. In the *Kordi}* trial, Witness AT gave the following evidence when under cross-examination on 27 November 2000:[518]

A: Sir, with all due respect to Witness EE who really experienced tragedy and great sorrow, but for this part of the statement before this Honorable Chamber I must say that that part where she refers to Zeljo Livanci} is not true. That is, Zeljo Livanci} was not in the group which was in front of the house of this bereaved lady.

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[517] Witness AT Statement, 15 August 2000, 27.

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Q. And I must suggest to you, Witness AT, that he was there….

A: That is not true…

341. On 28 November 2000, in re-examination,[519] Witness AT stated as follows:

Q: As to Witness EE at the house, in so far as she -- and I think this is right from what was put to you on that particular version of the statement, said that Zeljko said that [Musafer Pu{}ul]…was to go out. Was she right in that or wrong or can't you remember?

A: No. I can say that Zeljko Livanci} was not with the group. Stipo Alilovi}, Marinko Katava, and Drago Josipovi} were not in the group.

342. Josipovi} argues that the Trial Chamber either would or might have come to a different determination as to Josipovi}'s guilt in light of Witness AT's testimony.[520] It is submitted by Josipovi} that the additional evidence of Witness AT casts doubt on the trial verdict in two respects. First, it confirms that Josipovi} was not one of the attackers at Witness EE's house and second, it confirms that Zeljo Livanci} was also not present during the attack.[521] The Prosecution refutes the argument that any weight can be placed on Witness AT's evidence because it has not satisfied the Rule 115(B) test. It asserts that the burden is on Josipovi} to demonstrate that Witness AT's evidence is compelling enough to have an effect upon the verdict of the Trial Chamber.[522]

343. In order to impress upon the Appeals Chamber that the evidence of Witness AT is reliable and casts doubt on the Trial Chamber's findings in the present case, Josipovi}[523] relies upon representations by the Prosecution in its Closing Brief in *Kordi}* where it stated:

> The evidence of Witness AT meets all the safeguards of reliability that have been adopted in international human rights organs and domestic jurisdictions.[524]

Further reliance is placed on the Prosecution statement that

> AT is either telling the whole truth, the truth about everything except his own personal involvement or a pack of lies. The latter is inconceivable for all the obvious reasons and because of the corroborative material. As between the first two alternatives there is little significance for this trial as his own personal involvement does not affect the defendants' culpability even if it would tend to raise the level of caution by which he should be approached. The Prosecution has no position on whether he has been entirely frank on his own involvement or on what he saw identifiable others do by way of killings. The Prosecution does, however, assert that all the

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[518] *Kordi}* Trial Transcript, 27654.
[519] *Kordi}* Trial Transcript, 27778.
[520] Appeal Transcript, 742.
[521] Appeal Transcript, 743.
[522] Appeal Transcript, 824.
[523] Appeal Transcript, 745.
[524] *Prosecutor* v *Kordi} et al.*, Case No.: IT-95-14/2-T, Prosecutor's Closing Brief, 13 December 2000, 75.

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> indicators show his evidence on everything else is consistent (internally and externally) and to be relied on.[525]

344. The Appeals Chamber disagrees with this analysis. Witness AT, for the purposes of Josipovi}, is not a reliable witness. In *Kordi}*, the Prosecution took the position that Witness AT's evidence on the strategy and preparations for the attack was reliable and capable of belief. The Appeals Chamber took a similar view in deciding to admit the Witness AT material into the appeal record. Accordingly, the Appeals Chamber has already considered the impact of Witness AT's evidence regarding preparations for the Ahmici attack upon the Trial Chamber's convictions of Zoran and Mirjan Kupreškic.[526] However, in *Kordi}* the Prosecution took no position on whether Witness AT had been truthful about his own involvement or what he saw identifiable others do. What is certain is that, after seeing Witness AT give evidence, the Trial Chamber in *Kordi}* came to the conclusion that

> [a]lthough he could not bring himself to tell the full truth of his own involvement in the attack, and the Trial Chamber finds that he was mistaken in his evidence about the use of the mosque for defence purposes (which is not supported by the evidence of other witnesses) the Trial Chamber is satisfied that he did tell the truth about the preparations for the Ahmi}i attack, including the meetings at the Hotel Vitez and the subsequent briefings.[527]

Josipovi} summarises this conclusion of the Trial Chamber in the following terms:

> The Trial Chamber was saying, "We cannot be satisfied beyond a reasonable doubt that the witness AT, who was an impressive witness, whose demeanour we were impressed by, but we can't be satisfied beyond a reasonable doubt that he was telling the truth about his own involvement and, therefore, we must proceed upon the basis that he could not bring himself to tell the full truth about his own involvement in the attack.[528]

In effect, Josipovi} asserts that the Trial Chamber did not conclude that Witness AT's evidence was incapable of belief or that he was lying about it.[529] Josipovi} argues that the finding of the Trial Chamber is that Witness AT's evidence was capable of belief but that the Trial Chamber was not satisfied beyond a reasonable doubt as to the nature of Witness AT's involvement in the attack.[530]

345. Josipovi} misconstrues what the Trial Chamber held as to Witness AT's truthfulness regarding his own involvement in the attack. The Trial Chamber stated in no uncertain terms that it found that Witness AT "could not bring himself to tell the full truth of his own involvement in the attack."[531] The Trial Chamber did not find that he "may" have or only "could" have been

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[525] *Prosecutor* v *Kordi} et al.*, Case No.: IT-95-14/2-T, Prosecutor's Closing Brief, 13 December 2000, para. 234.
[526] *See* the discussion *supra* paras 203-205, 214, 216, 218, and 238-240.
[527] *Prosecutor* v *Kordi} et al.*, Case No.: IT-95-14/2/T, Judgement, 26 February 2001, para. 630.
[528] Appeal Transcript, 739.
[529] Appeal Transcript, 739.
[530] Appeal Transcript, 739.
[531] Appeal Transcript, 739.

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withholding. The Trial Chamber made a positive finding that AT was not being completely truthful with the Chamber.

346. Given that the Trial Chamber in *Kordi}* found that Witness AT could not bring himself to tell the truth about his own involvement in the Ahmi}i attack, the Appeals Chamber concludes that he is not a reliable witness for the purpose of Josipovi}'s appeal. Josipovi} does not seek to rely on Witness AT's evidence as to the preparation and planning of the attack. Rather, he attempts to rely on Witness AT's statements about what happened and which individuals were present during the attack that Witness AT himself was involved in, namely the Pu{}ul house.[532] If Witness AT was untruthful as to his own role, it follows that he is not a sufficiently reliable witness as to the involvement or non-involvement of other individuals in the attack. This is particularly so in light of the fact that, in his interview with the Prosecution, Witness AT confirmed that Josipovi} is a close relative of Witness AT's wife.[533] In the Appeals Chamber's view, this relationship further renders the Witness AT material so unreliable as to be incapable of making the Trial Chamber's finding that Josipovi} participated in the attack on the Pu{}ul home unsafe.

347. Even if Witness AT were a reliable witness for Josipovi}'s purposes and his evidence were taken into consideration by the Appeals Chamber in assessing the safety of Josipovi}'s conviction, the Appeals Chamber is of the view that Witness AT's evidence does not advance Josipovi}'s case greatly. In his interview with the Prosecution, Witness AT confirmed that Josipovi} was a reservist,[534] that at least one reservist joined the attack on the Pu{}ul home -- a young, tall, blonde man[535] -- and he accepted that he would not necessarily have seen any other local reservists come up to the house.[536] Accordingly, Witness AT allowed for the possibility that other local reservists, of whom Josipovi} was one, may have joined the attack without his knowledge.

348. Josipovi} also asserts that Witness AT's evidence casts doubt on the Trial Chamber's finding that Zeljo Livanci} was one of the six attackers of the Pu{}ul home. It is argued that if Witness AT's evidence supports a finding that Livanci} was not one of the attackers, it follows that Witness EE was mistaken about three of the six attackers. This, argues Josipovi}, would shift the balance in favour of a finding that Witness EE cannot be relied upon in her identification of Josipovi} as an attacker.[537] This reasoning is rejected by the Appeals Chamber. First, Josipovi}'s argument that Witness AT's evidence undermines Witness EE's reliability is flawed in the sense that Witness AT's evidence also indicates that Witness EE was right in her identification of [anti}

[532] Trial Judgement, para. 503.
[533] Witness AT Statement, 15 August 2000, 27.
[534] Witness AT Statement, 15 August 2000, 27.
[535] Witness AT Statement, 15 August 2000, 27.
[536] Witness AT Statement, 15 August 2000, 28.

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as one of the attackers, although that was denied by [anti} at trial. Second, even if such doubt were created, as already described, Witness EE's identification of Josipovic as a participant in the April 1993 Ahmici attack is supported by the evidence of Witness DD. In the Appeals Chamber's view, therefore, Josipovic has failed to established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber, together with the additional evidence admitted during the appellate proceedings.

E. Additional evidence of Witness CA

349. The Appeals Chamber admitted a statement made by Witness CA as additional evidence on 26 February 2001.[538] The additional evidence of Witness CA is comprised of a statement given by her on 15 September 2000 to the investigative judge Slavco Mari} in Vitez at the request of counsel for Josipovi}.[539] Witness CA testified that approximately two weeks after the attack in Ahmici, she received a telephone call from Witness DD who asked:

> You remained in the house last. Do you know anything of...[Nazif and Amir Ahmi}] are they alive?[540]

Witness CA stated that she was sure that, at the time of the call, that Witness DD did not know whether Nazif or Amir Ahmi} were alive.[541]

350. The Prosecution tendered evidence to rebut Witness CA's additional evidence in the form of an additional statement from Witness DD. In this statement, Witness DD essentially denied making the call to Witness CA as alleged. Josipovi} did not object to the admission of this evidence for consideration by the Appeals Chamber. It was, accordingly, admitted by the Appeals Chamber.[542]

351. Josipovi} advances two arguments in respect of the additional evidence of Witness CA. First, it is asserted that Witness CA's evidence casts doubt upon whether Witness DD knew the fate of her husband and son in the aftermath of the Ahmici massacre.[543] Second, and more significantly, it is argued that in light of Witness DD's denial that she made the phone call to Witness CA, the only conclusion open is that either Witness CA or Witness DD is lying about the call. Josipovi}

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537 Appeal Transcript, 741 and 743.
538 Rule 115 Decision of 26 February 2001, para. 58.
539 Request for the Derivation of Additional Proofs, 2 October 2000, Annex 2 ("Information on the Witness of the Defense").
540 Request for the Derivation of Additional Proofs, 2 October 2000, Annex 2 ("Information on the Witness of the Defense").
541 Request for the Derivation of Additional Proofs, 2 October 2000, Annex 2 ("Information on the Witness of the Defense").
542 Rule 115 Decision of 6 July 2000, 2.
543 Appeal Transcript, 746.

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argues that it is impossible for the Appeals Chamber to determine who of the two is lying, because neither witness has given evidence on this point before the Chamber. Josipovi} asserts that, if Witness DD is lying, this has a bearing on her credibility and the concomitant acceptance of her evidence by the Trial Chamber. It is claimed that if the Trial Chamber had known of the phone call and of Witness DD's denial, this could have cast doubt on the remainder of her evidence, leading the Trial Chamber to treat her initial evidence in a different light.[544]

352. In response, the Prosecution claims that if the Appeals Chamber, after consideration of both the additional evidence of Witness CA and rebuttal evidence of Witness DD, is unable to determine which witness is telling the truth, the Appeals Chamber should put aside the rebuttal evidence of Witness DD and consider whether, if believed, the evidence of Witness CA would have had an effect on the verdict of the Trial Chamber.[545] The Prosecution asserts that Witness CA's evidence would not render the verdict on count 1 unsafe as there was still sufficient evidence before the Trial Chamber on the persecution count.[546] Furthermore, the Prosecution states that, even if believed, Witness CA's evidence does not affect the credibility of Witness DD. It claims that, even if the phone call were made by Witness DD, it cannot be inferred that Witness DD was mistaken about her identification of Josipovi}'s involvement in the attack.[547]

353. With regard to Josipovi}'s first argument in respect of Witness CA's evidence, the Appeals Chamber is of the view that it does not cast any real doubt on the evidence of Witness DD at trial. At trial, Witness DD testified that Nazif and Amir Ahmi} were taken from their house and that she subsequently heard shots being fired.[548] Nowhere does she actually testify to seeing them killed, though it was a more than reasonable inference that they were. Accordingly, two weeks after the attack, when the alleged phone call was made, Witness DD could be expected to attempt to ascertain for sure whether Nazif and Amir Ahmi} were dead, despite being almost certain of the fact. Furthermore, even if the call were made and Witness DD were subsequently found to have lied about it, the Appeals Chamber is of the view that this would not sufficiently undermine Witness DD's credibility to such an extent as to render her identification of Josipovi} as one of the attackers on her home as unreliable and unsafe.

F. Evidence of command role

354. The Trial Chamber relied upon the evidence of Witness DD to conclude that in relation to the attack on Witness DD's home, Josipovi} was "in a commanding position with regard to the

[544] Appeal Transcript, 746.
[545] Appeal Transcript, 831.
[546] Appeal Transcript, 831.
[547] Appeal Transcript, 832.

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troops involved."[549] The Trial Chamber also accepted the evidence of Witness Z who claimed to see Josipovi} leading soldiers on the afternoon of 16 April 1993.[550] From these findings, the Trial Chamber held that Josipovi}, at times, had command over a group of soldiers.[551] Josipovi} asserts that the Trial Chamber's findings were unreasonable in relation to its acceptance of Witness DD's testimony as to his role as commander[552] and in relation to their acceptance of Witness Z's testimony that Josipovi} had been leading a group of soldiers on 16 April 1993.[553]

355. Both these allegations of error were subsequently abandoned by Josipovi},[554] although the Prosecution had previously responded to these allegations.[555] The Appeals Chamber is of the view that the complaints merit consideration as they may be relevant to sentencing.

356. At the end of Witness DD's testimony, the Presiding Judge asked the witness the following questions:

> Presiding Judge: When you were there on that tragic day in the morning, did you get the feeling that one of the various soldiers was in command, that there was somebody in command, namely issuing orders to the other soldiers, and if so, who was, according to your impression, your feelings, in command?
>
> A. It seemed to me that it was Drago.
>
> Presiding Judge: How did you form this impression?
>
> A. Because the others were waiting for Drago to come around the house. They didn't take away my husband, he didn't proceed with taking me away. They didn't separate us. But when Drago approached us, he first said, "Leave her alone," and the soldier left me alone. Then he came close to the window and he fired this burst of gunfire. On the basis of that, I made my conclusions. And they started leading us away, myself, Nazif and others, as long as he arrived, and this is what they did at that moment.
>
> Presiding Judge: Thank you, Madam.[556]

357. The Appeals Chamber is of the view that it was unreasonable for the Trial Chamber to conclude from this exchange that Josipovi} played a command role in the attack on Witness DD's home. Witness DD and the Trial Chamber appear to base their conclusion that Josipovi} played a command role in the attack on the fact that, when he told a soldier, from whom Witness DD struggled to escape, to leave her alone, the soldier complied.[557] This was not a sufficient basis upon

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[548] Trial Transcript, 3899-3907.
[549] Trial Judgement, para. 504.
[550] Trial Judgement, para. 506.
[551] Trial Judgement, paras 811, 812, and 813.
[552] Josipovic Appeal Brief, 25.
[553] Josipovic Appeal Brief, 28.
[554] Josipovic Reply, Annex 2 ("Abandonment of Grounds of Appeal Settled by Previous Counsel"), para. 5:3.
[555] Prosecution Response, paras 4.73, 4.74 and 4.116.
[556] Trial Transcript, 3982-3983.
[557] Trial Judgement, para. 485; *see also* Trial Transcript, 3983.

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which Witness DD could reasonably conclude that Josipovi} played a command role in the attack. There are a plethora of reasons why Josipovi} would have told the soldier to leave Witness DD alone and why the soldier would have complied other than the fact that Josipovi} held a superior position to the soldier. From this exchange between Josipovi} and the soldier alone it is impossible to be satisfied beyond reasonable doubt that Josipovi} was superior to the soldier and that Josipovi} played a command role in the attack. It is further noted that, as this exchange with the judge occurred after Witness DD had already finished her direct testimony and cross-examination, Josipovi} had not the usual opportunity to cross-examine and challenge the witness on this point.

358. The Trial Chamber also relied upon the following evidence of Witness Z to conclude that Josipovi} was leading a group of soldiers on 16 April 1993:

> Q. So you stepped into the UNPROFOR APC. At that precise moment in time did you notice anything else around you?
>
> A. When I went in I saw Aladin on the right-hand side waving to us. At that moment it was my turn to go into the vehicle, and I looked to the left where I saw a group of soldiers led by -- I saw Drago Josipovi} with four other men, four other soldiers who were with him, and they were wearing camouflage uniforms.[558]

359. The Appeals Chamber is of the view that it is unreasonable to conclude from this evidence that Josipovi} was actually leading the group of soldiers. First, it is clear that Witness Z did not actually state that Josipovi} was leading the group of soldiers. At most it can be said that Josipovi} was with them. Second, even if the evidence is interpreted as meaning that Josipovi} was "leading" the soldiers, at most it could be concluded that he was "leading" them in the sense that he was walking in front of them rather than as exercising any authority over them.

360. Accordingly, the Appeals Chamber concludes that there was no evidence before the Trial Chamber upon which it could conclude, as it did, that Josipovi} played any kind of command role over soldiers during the attack on Ahmici on 16 April 1993.[559]

G. Conclusion

361. In sum, the Appeals Chamber accepts Josipovi}'s argument that the Trial Chamber erred in relying upon his participation in the attack on the house of Nazif Ahmi}, which was not pleaded in the Amended Indictment, as part of his persecution conviction. The Appeals Chamber also accepts that there was insufficient evidence to find that Josipovi} played a command role during the Ahmi}i attack and finds that the Trial Chamber erred in doing so. The effect of these errors upon Josipovi}'s sentence will be considered below in the sentencing section of this Judgement. The

[558] Trial Transcript, 3617.
[559] Trial Judgement, paras 811, 812 and 813.

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Appeals Chamber finds no merit in any of the grounds of appeal advanced by Josipovi} concerning his conviction. In particular, having regard to the evidentiary record as a whole, the Appeals Chamber must defer to the Trial Chamber's decision to rely upon Witness EE's evidence to find that he was involved in the attack on the Pu{}ul home.

VII. APPEAL AGAINST THE CONVICTION OF VLADIMIR [ANTI]

A. Introduction

362. In "The Motion of the Appellant Vladimir [anti} According to the Order of the Appeals Chamber Dated 30 May 2001" filed on 12 June 2001 ("12 June Motion"), [anti} states that he is not contesting that he was formally commander of the 1st Company of the 4th Battalion of the Military Police on 16 April 1993, nor that he was present while plans were sketched depicting Muslim houses in the village of Ahmici on the eve of the attack, nor that he was a member of the group which carried out the attack. However, [anti} does dispute (i) the Trial Chamber's finding that he played a role as commander of the group, and (ii) his active role in killing and destruction of property, including the Pu{}ul attack.[560] With regard to both he asserts that the additional evidence of Witness AT casts doubt on the Trial Chamber's findings.[561] [anti} further complains that (iii) the Trial Chamber took into account his alleged status as a commander as an aggravating circumstance for the purposes of sentencing, despite the fact that he had not been charged as a commander in the Amended Indictment.[562] During the Appeal Hearing, [anti} further clarified the remaining issues in dispute and reiterated the issues contained in the 12 June Motion. However, during [anti}'s reply to the Prosecution response, counsel for [anti} stated that [anti} was "not dodging responsibility. We are just talking about the level of participation and, therefore, the length of the sentence imposed."[563] The Appeals Chamber, therefore, understands that he simply disputes some of the Trial Chamber's factual findings as to his level of participation. These findings, he argues, are relevant to his sentence. The factual findings that [anti} disputes will be considered in this section despite [anti}'s assertion that they are merely relevant for sentencing.

B. Command Role

363. The Trial Chamber found that in April 1993 [anti} was commander of the 1st Company of the 4th Battalion of the Military Police[564] and Commander of the Jokers.[565] Since he was a

[560] [anti} Supplemental Document, 5.
[561] [anti} Supplemental Document, 7.
[562] [anti} Supplemental Document, 3.
[563] Appeal Transcript, 921.
[564] Trial Judgement, para. 500.
[565] Trial Judgement, para. 501.

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commander, the Trial Chamber, when determining his sentence, considered that he "assisted in the strategic planning of the whole attack"[566] and "passed on orders from his superiors to his subordinates, which amounted to the reissuing of the orders that were illegal in the circumstances."[567] [anti} complains that there was insufficient evidence before the Trial Chamber to conclude that he played a command role in the attack on Ahmici on 16 April 1993.[568] He argues the Trial Chamber only heard evidence of [anti}'s position before and after 16 April 1993, but no evidence as to his command position on the day itself.[569]

364. In finding that [anti} was commander of the 1st Company of the 4th Battalion of the Military Police, the Trial Chamber relied upon the evidence of Witness B, a Muslim Territorial Defence Security Officer. Witness B testified that [anti} was superior to Anto Furund`ija, who was a commander of the Jokers.[570] The Trial Chamber also relied on a number of documents signed by [anti} in his capacity as commander. These documents were described to the Trial Chamber by Brigadier Asim Dzambasovi} of the ABiH.[571] The Trial Chamber also relied on the evidence of Witness AA, a Muslim member of the HVO Military Police and Jokers, to find that [anti} was Commander of the Jokers.[572] Witness AA testified that [anti} approved the election of Anto Furund`ija as "Immediate Commander" of the Jokers.[573] [anti} signed three orders in March 1993 imposing various punishments on Witness AA.[574] The Trial Chamber also accepted the evidence of Witness AA that, on viewing a video tape of a TV report relating to the events on the evening of 16 April 1993,[575] he identified a scene at 22:48 hours showing [anti} in the "Bungalow" with the Jokers.[576]

365. The Appeals Chamber is of the view that there was ample reliable evidence before the Trial Chamber to conclude that, on 16 April 1993, [anti} was both Commander of the 1st Company of the 4th Battalion of the Military Police and the Jokers. There was also evidence from Witness EE, that [anti} was present in Ahmici with the attacking forces on 16 April 1993. From this, it was reasonable for the Trial Chamber to infer that on 16 April 1993 [anti} was in Ahmici and, given his position in the hierarchy of the units involved in the attack, that he must have been carrying out a command role during that attack. Similarly, the Appeals Chamber can find no error in the Trial

566 Trial Judgement, para. 862.
567 Trial Judgement, para. 862.
568 Appeal Transcript, 750-751.
569 Appeal Transcript, 751.
570 Trial Judgement, para. 476(a).
571 Trial Judgement, para. 476(b).
572 Trial Judgement, para. 477.
573 Trial Judgement, para. 477.
574 Trial Judgement, para. 477 (referring to Exhibits P250-252).
575 Trial Judgement, para. 489 (b) (referring to Exhibit P253).
576 Trial Judgement, paras 489 and 507.

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Chamber's conclusion that [anti} passed on orders from his superiors to his subordinates regarding the 16 April 1993 attack. Having found that [anti} was a commander of troops involved in the assault, it was a reasonable inference that his role encompassed such actions. However, it is not possible, in the Appeals Chamber's view, to infer also that [anti} was involved in the overall strategic planning of the attack. For this it would have been necessary for the Prosecution to adduce evidence demonstrating the role he played in planning the attack, of which there was none.

366. [anti}'s argument that the Trial Chamber's finding that he was Commander of the Jokers is incompatible with the finding of the Trial Chamber in *Furund`ija* that Furund`ija was Commander of the Jokers is similarly dismissed. It is clear to the Appeals Chamber that in *Furund`ija*, the Trial Chamber did not conclude that Furund`ija was "the" Commander of the Jokers, but that he was "*a* commander of the Jokers".[577] Such a finding is not incompatible with the finding that [anti} was Commander of the Jokers and Furund`ija his subordinate.

367. [anti} further argues that the additional evidence of Witness AT clarifies the actual role he played during the attack and raises questions as to the validity of the Trial Chamber's finding that he played a command role.[578] The Appeals Chamber disagrees. Certainly, as already determined by the Appeals Chamber,[579] [anti}, like all the other Defendants, is entitled to avail himself of the Witness AT material. However, for the purpose of [anti}'s appeal, as with Josipovic's, Witness AT is an unreliable witness. Furthermore, the Appeals Chamber is of the view that the interposition by [anti} of a new defence after trial through the testimony of Witness AT must be viewed with extreme scepticism; it is not the same as arguing additional evidence in support of a defence already litigated at trial.

368. Having thoroughly reviewed the Witness AT material, however, the Appeals Chamber concludes that, even if the evidence had been presented to the Trial Chamber, the same conclusion would have been reached -- that [anti} played a command role on 16 April 1993. Far from challenging the Trial Chamber's findings, the Witness AT material in fact confirms them. Under cross-examination, Witness AT stated:

> Mr. Sayers: And I wonder if I could ask the usher to put this on the stand. This is a statement given by Witness EE in February of 1995. Just draw your attention to the top of it, where Witness EE says, "Vlado was the commander of this group." And that's true, is it not, Witness AT?
>
> A. I said at the outset that I think the policemen saw…[[anti}] as their commander. I stated so yesterday.

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[577] *Furund`ija* Trial Judgement, para. 262 (emphasis added).
[578] Appeal Transcript, 755-756.
[579] *See* the discussion *supra* paras 205.

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Q. Well, not only did the policemen see…[[anti}] as their commander, you saw…[[anti}] as their commander, didn't you, Witness AT?

A. You could put it that way.[580]

Accordingly, save for [anti}'s complaint that the Trial Chamber erred in finding that he took part in the strategic planning of the attack, this ground of appeal is dismissed.

C. Active role in the Pušcul attack

369. [anti} does not dispute that he was a member of the group that attacked the Pu{}ul home. However, he challenges the Trial Chamber's finding as to the degree of his involvement in the attack.[581] It is claimed that Witness EE described the attack in different terms from those related by the Trial Chamber and that the Witness AT material sets out [anti}'s true role in the attack.[582] [anti} asserts that the Trial Chamber incorrectly found that he took part in the attack on the Pu{}ul house, its burning, and the killing of Musafer Pu{}ul, because Witness EE only testified to the fact that Musafer Pu{}ul was taken behind the shed and then she heard shots. Witness EE did not, however, actually see the murder itself. It is therefore asserted, that the testimony of Witness EE does not support the findings of the Trial Chamber.[583] Furthermore, [anti} argues that if the Trial Chamber had been aware of the statement of Witness AT, the Trial Chamber would have had a clearer picture of [anti}'s role and this would have been relevant to his sentence.[584]

370. After careful analysis of the testimony of Witness EE at trial,[585] and the findings of the Trial Chamber,[586] the Appeals Chamber is of the view that the evidence of Witness EE fully supports the findings made by the Trial Chamber as to [anti}'s role in the attack on the Pu{}ul home. The findings of the Trial Chamber not only reflect, but are fully consistent with the evidence given by Witness EE at trial.[587] The Appeals Chamber has already expressed why it was not unreasonable for the Trial Chamber to rely upon the evidence of Witness EE.[588] Accordingly, [anti}'s complaints regarding the Trial Chamber's findings are dismissed.

371. [anti}'s argument that the additional evidence of Witness AT casts doubt on the safety of the Trial Chamber's conclusions as to his role within the Pu{}ul attack is similarly dismissed. Witness AT stated that, during the attack, [anti} did not participate but held back and "lean[ed]

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580 *Kordi}* Trial Transcript, 27665-27666.
581 Appeal Transcript, 770.
582 Appeal Transcript, 770-771.
583 Appeal Transcript, 775.
584 Appeal Transcript, 775.
585 Trial Transcript, 4064-4263.
586 Trial Judgement, paras 479, 480 and 503.
587 Trial Judgement, para. 479 (summarising Trial Transcript pages 4077-4083, 4085-4091, 4109-4113, and 4116); and Trial Judgement, para. 480 (summarising Trial Transcript pages 4152-4153, 4216-4217, 4221, 4258 and 4159).

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against the wall".[589] Witness AT stated that [anti} was recognised by Witness EE during the attack.[590] [anti} put forward the surprising argument that had he been a real criminal, after being recognised by her, he would not have left Witness EE alive.[591] This argument does not advance [anti}'s case very far. As stated above, the Witness AT material is not sufficiently reliable for [anti}'s purposes to cast any real doubt upon the Trial Chamber's findings on [anti}'s role in the attack.

D. <u>Insufficient pleading of command role</u>

372. [anti} argues that his command role in the 16 April 1993 Ahmi}i attack was not sufficiently pleaded in the Amended Indictment so as to notify him that his status as a commander could be used as an aggravating circumstance in the determination of his sentence. He states that he was, accordingly, unable to contest these facts at trial.[592] [anti} asserts that the Amended Indictment did not allege that he was a commander: on the contrary, the allegations against him were based on his personal responsibility as defined in Article 7(1) of the Statute. He complains that at no time prior to the close of evidence was it hinted that his status as a commander was relevant to any issue in the trial. [anti} asserts that he, therefore, did not present evidence on his status. He claims that it was only when the Prosecution filed its Closing Brief at trial that he learned of its assertion that the Trial Chamber should sentence him more severely on account of his position of command and that by this stage it was too late for him to call evidence to show that he was did not play a commanding role during the Ahmi}i attack. In [anti}'s view, therefore, the sentencing procedure at trial was fundamentally unfair and he requests that his sentence be vacated. [anti} asks that the question of sentence be remanded to the Trial Chamber for further proceedings to allow him to present fresh evidence as to his status.[593]

373. In the Amended Indictment [anti} is described in the following terms:

> VLADIMIR [ANTI], also known as "VLADO", was born on 01 April 1958 in Donja Ve}eriska. Before the war he lived in Vitez and was a policeman by profession. He was a HVO soldier in Vitez.[594]

In count 1 (Persecution) [anti}, along with his co-Defendants, was alleged to have

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[588] *See* the discussion *supra* paras 327-337.
[589] Witness AT Statement, 25 May 2000, 18; Witness AT Statement, 16 August 2000, 28; *Kordi}* Trial Transcript, 27615.
[590] Witness AT Statement, 25 May 2000, 18; Witness AT Statement, 15 August 2000, 28; *Kordi}* Trial Transcript, 27615.
[591] Appeal Transcript, 778.
[592] Appeal Transcript, 758.
[593] [anti} Appeal Brief, para. 2.1.
[594] Amended Indictment, para. 17.

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> … persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.[595]

As part of the persecution count, [anti} and his co-Defendants were said to have

> … participated in or aided and abetted:
>
> (a) the deliberate and systematic killing of Bosnian Muslim civilians;
>
> (b) the comprehensive destruction of Bosnian Muslim homes and property; and
>
> (c) the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.[596]

374. Under count 16 (Murder of Musafer Pu{}ul), [anti} and Josipovi} are alleged to have committed murder "[b]y killing or aiding and abetting the killing of Musafer Pu{}ul …".[597] Under count 18 (Inhumane Acts and Cruel Treatment), [anti} and Josipovi} are alleged to have committed inhumane acts "by forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home".[598]

375. It is clear that the Amended Indictment makes no reference to [anti} playing a command role during the Ahmi}i attack or his position as a commander. In the Appeals Chamber's opinion, it would have been preferable for the Prosecution to allege in the Amended Indictment that [anti} held such a position instead of merely describing him as an HVO soldier. Matters such as whether the defendant holds a position of command may be relevant to the form of criminal responsibility to be ascribed to a defendant under Article 7 of the Statute in the event of conviction, as well as to sentencing. However, in the present case, [anti}'s command role was not a material fact in the Prosecution's case against him. Rather, the Trial Chamber relied upon [anti}'s command role only for the purposes of determining his sentence. Accordingly, the Appeals Chamber considers that his complaints are without merit and must be dismissed for the following reasons.

376. The Appeals Chamber notes that, as a matter of principle, there is no requirement that the Prosecution plead aggravating factors in an indictment. Such a requirement is not reflected in the Statute or Rules of this Tribunal. Furthermore, even though he knew that the Prosecution had adduced evidence about his command role during the course of the trial, he made no effort to dispute facts of that nature. Instead, he continued to defend himself by relying upon a false alibi that was rejected by the Trial Chamber.[599] Indeed, on appeal, [anti} conceded the finding of the

[595] Amended Indictment, para. 20.
[596] Amended Indictment, para. 21.
[597] Amended Indictment, para. 35.
[598] Amended Indictment, para. 35.
[599] Trial Judgement, paras 497, 500, and 507-508.

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Trial Chamber that he was commander of the 1st Company of the 4th Battalion of the Military Police. The only issue he disputes is the Trial Chamber's finding that he played a command role on 16 April 1993 during the Ahmi}i attack. The Appeals Chamber, however, has upheld this finding which was relevant only to sentencing. In these circumstances, [anti} has been unable to demonstrate that he was prejudiced by the fact that the Amended Indictment did not make express reference to his command role.

377. [anti}'s complaint that the Amended Indictment is limited to allegations pursuant to Article 7(1) and not superior responsibility pursuant to Article 7(3)[600] is similarly without merit. It was not alleged by the Prosecution that [anti} incurred criminal responsibility on account of his failure to prevent or punish the crimes of his subordinates. Accordingly, liability pursuant to Article 7(3) would not have been appropriate. [anti} was alleged to have been and was convicted of being a direct perpetrator of the crimes contained in the Amended Indictment. There was sufficient evidence presented to the Trial Chamber to find him guilty of those crimes on the bases reflected in the Amended Indictment. [anti}'s command role was not a factor that was relevant in determining [anti}'s guilt of the crimes alleged. Accordingly, his command role was purely an aggravating factor and, for the reasons stated above, it was not fatal for the Prosecution to omit reference to this in the Amended Indictment.

E. Conclusion

378. In sum, the Appeals Chamber accepts [anti}'s argument that the Trial Chamber erred by inferring that he had played a role in the overall strategic planning of the Ahmi}i attack. The implications of this error for his sentence is considered below. The Appeals Chamber finds no merit in any of the other grounds of appeal advance by [anti}.

VIII. APPEALS OF THE PROSECUTION AND JOSIPOVI] ON THE ISSUES OF CUMULATIVE CHARGING AND CUMULATIVE CONVICTIONS BASED ON THE SAME ACTS

A. Introduction

379. The Trial Chamber found Josipovic guilty of murder as a crime against humanity under Article 5(a) of the Statute (count 16), but declined to convict him of murder as a violation of the laws or customs of war under Article 3 of the Statute (and recognised by Article 3(1)(a) of the Geneva Conventions) (count 17), on the basis that it considered such convictions, being based on

[600] [anti} Appeal Brief, para. 2.2.

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the same acts, to be impermissibly cumulative.[601] The Trial Chamber also found Josipovic guilty of other inhumane acts under Article 5(i) (count 18), but declined to convict him of cruel treatment under Article 3 of the Statute (and recognised by Article 3(1)(a) of the Geneva Conventions) (count 19), on the basis of cumulative conviction considerations.[602] In addition, Josipovic was found guilty of persecution on political, racial and religious grounds under Article 5(h) (count 1).

380. Similarly, the Trial Chamber found Šantic guilty of murder under Article 5(a) of the Statute (count 16), but declined to convict him of murder under Article 3 of the Statute (and recognised by Article 3(1)(a) of the Geneva Conventions) (count 17), on the basis of cumulative conviction considerations.[603] The Trial Chamber also found Šantic guilty of inhumane acts under Article 5(i) of the Statute (count 18), but declined to convict him of cruel treatment under Article 3 of the Statute (and recognised by Article 3(1)(a) of the Geneva Conventions) (count 19), on the basis of cumulative conviction considerations.[604] In addition, Šantic was found guilty of persecution on political, racial and religious grounds under Article 5(h) (count 1). On appeal, both the Prosecution and Josipovic challenge aspects of the Trial Chamber's interpretation of the principles regulating cumulative convictions and sentencing.[605]

B. Prosecution appeal against acquittal of Josipovic and [antic for murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute

381. The Prosecution appeal is primarily concerned with an alleged error by the Trial Chamber, based on its interpretation of the principles regulating cumulative charging and cumulative convictions, in acquitting Josipovic and Šantic on two counts of the Amended Indictment.

382. The Prosecution maintains that the Trial Chamber erred in law by acquitting Josipovic and Šantic on count 17 (murder as a violation of the laws or customs of war) and count 19 (cruel treatment as a violation of the laws or customs of war) of the Amended Indictment on the basis that convictions had already been entered for murder as a crime against humanity and other inhumane acts as a crime against humanity.[606] The Prosecution asserts that cumulative convictions based on the same acts under Articles 3 and 5 of the Statute are permissible under the reasoning of the

[601] Trial Judgement, paras 823-824.
[602] Trial Judgement, paras 823-824.
[603] Trial Judgement, paras 831-833.
[604] Trial Judgement, paras 831-833.
[605] It should be noted that [anti} has not appealed the issue of cumulative convictions. However, due to the fact that their convictions are identical, the Appeals Chamber's conclusions on this issue concerning Josipovi} should also be applied to [anti}. *See ^elebi}i* Appeal Judgement, paras 391, 414 and 427 (although Land`o did not lodge an appeal on the issue of cumulative convictions, the findings of the Appeals Chamber in relation to his co-appellants, Muci} and Deli}, were also applied to his convictions).
[606] Prosecution Amended Appeal Brief, paras 1.3, 1.12 and 1.15.

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Celebici Appeal Judgement, as confirmed by the *Jelisic* Appeal Judgement.[607] As to cumulative charging, the Prosecution submits that the Trial Chamber erred in law by holding that count 17 (murder under Article 3) and count 19 (cruel treatment under Article 3) had been "improperly charged cumulatively with the more serious offences under Article 5 of the Statute."[608]

383. Josipovic admits that, under the Tribunal's jurisprudence, the Trial Chamber erred in acquitting him on counts 17 (murder under Article 3) and 19 (cruel treatment under Article 3) of the Amended Indictment.[609] He claims, however, that, if the Appeals Chamber proceeds to impose a sentence with respect to these counts, then the same sentence should be passed on count 17 as was passed on count 16 (15 years of imprisonment). Similarly, the same sentence should be passed on count 19 as was passed on count 18 (10 years of imprisonment).[610] Furthermore, Josipovic points out that the Prosecution did not request an increase in sentence in the event that the Appeals Chamber proceeds to convict him in respect of counts 17 and 19.[611] During the Appeal Hearing, the Prosecution conceded that it was only seeking a reversal of the acquittals and not an increase in sentence.[612]

384. Šantic argues that cumulative charging in the case of two crimes based on the same underlying conduct is impermissible, but that alternative charging is permissible.[613] He submits that the Prosecution cannot bring cumulative charges and the Trial Chamber cannot impose cumulative convictions, as well as "deliver two sentences," for the offences of murder as a crime against humanity and murder as a violation of the laws or customs of war.[614] He appears to make the same argument with respect to inhumane acts as a crime against humanity and cruel treatment as a war crime.[615]

385. As to the issue of cumulative charging, the Appeals Chamber recalls the *Celebici* Appeal Judgement, in which the Appeals Chamber held that cumulative charging on the basis of the same acts "is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven."[616]

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[607] Appeal Transcript, 603.
[608] Prosecution Amended Appeal Brief, para. 3.19 (referring to Trial Judgement, para. 823).
[609] Josipovic Response, 3; Appeal Transcript, 719.
[610] Josipovic Response, 4-5.
[611] Josipovic Response, para. 4.7; Appeal Transcript, 719.
[612] Appeal Transcript, 604-605.
[613] [antic Response, 10.
[614] [antic Response, 10
[615] [antic Response, 10.
[616] *Celebici* Appeal Judgement, para. 400.

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386. In this case, the Trial Chamber held that counts 17 (murder as a violation of the laws or customs of war) and 19 (cruel treatment as a violation of the laws or customs of war) had been improperly charged cumulatively with the counts containing Article 5 charges for murder and for inhumane acts as crimes against humanity.[617] The Appeals Chamber accepts the Prosecution's assertion that this holding was in error. Under the reasoning set forth in the *Celebici* Appeal Judgement, cumulative charging on the basis of the same set of facts is generally permissible. As a result, the Trial Chamber erred in holding that the Article 3 counts had been impermissibly charged with the Article 5 counts.

387. Addressing the issue of cumulative convictions under Article 3 and Article 5 of the Statute, the Appeals Chamber recalls that in the *Jelisic* Appeal Judgement, following the reasoning of the *Celebici* Appeal Judgement, the Appeals Chamber held that cumulative convictions under both Articles 3 and 5 are permissible. In *Celebici*, the Appeals Chamber articulated a two-pronged test to be applied to the question of cumulative convictions. It held that

> … reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[618]

In *Jelisic*, the Appeals Chamber, applying the test set out in *Celebici*, stated:

> …Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible.[619]

388. Following this reasoning, the Appeals Chamber in this case holds that the Trial Chamber erred in acquitting Josipovic and Šantic on counts 17 and 19, and reverses these acquittals. Because the Prosecution has not sought an increase in sentence with respect to the reversal of these acquittals, the Appeals Chamber declines to address the issue of the potential impact on sentencing that the entry of cumulative convictions might have had in relation to these counts.

[617] Trial Judgement, para. 823.
[618] *Celebici* Appeal Judgement, paras. 412-413.
[619] *Jelisic* Appeal Judgement, para. 82.

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C. Appeal of Josipovic against conviction for multiple crimes under Article 5 of the Statute

389. Josipovic asserts that cumulative convictions under Article 5(a) (murder) (count 16) and Article 5(h) (persecution) (count 1) are impermissible, and that he was impermissibly charged under both Article 5(a) (murder) (count 16) and Article 5(i) (other inhumane acts) (count 18).[620] He maintains that

> when a form of the crime from Article 5 of the Statute is in question, then the cumulation of the crime of persecution from Article 5(h) of the Statute and murder from Article 5(a) of the Statute is not permissible, because the crime of persecution is consumed by the crime of murder.[621]

390. Josipovic adds that convicting an accused of two crimes based on the same act and imposing two sentences is not possible, but that "charging and sentencing for persecution would be possible…if no other form of a crime from Article 5…[were] implicated."[622] He concludes that crimes against humanity necessarily constitute prolonged, continuous acts, and that when an accused commits several forms of that crime, "he may be convicted only for one criminal act from Article 5 of the Statute."[623]

391. In response, the Prosecution states that count 16 (murder as a crime against humanity) and count 18 (other inhumane acts as a crime against humanity) were not based on the same underlying facts and that, therefore, the question of cumulative convictions with respect to these counts did not even arise.[624] However, with respect to the convictions under count 1 (Article 5(h)) and count 16 (Article 5(a)), and under count 1 (Article 5(h)) and count 18 (Article 5(i)), the Prosecution argues as follows. It states that, pursuant to the principles on cumulative charging and convictions established in the *Celebici* Appeal Judgement, an individual may be charged and convicted cumulatively for persecution and murder as crimes against humanity.[625] Similarly, with regard to the crimes against humanity of persecution and other inhumane acts, the Prosecution submits that the Trial Chamber's conclusion that an accused can be charged and convicted, on the basis of the same conduct, under both of these offences, is correct.[626] With respect to Josipovi}'s claim that crimes against humanity are continuous, prolonged offences, the Prosecution submits that a single

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[620] He also states that he did not "participate in the murder of Musafer Pušcul as a co-perpetrator by acting or omissions, nor did he stimulate others to commit murder, nor was he a commander. Thus he cannot be responsible for any inhumane acts committed by others." Josipovic Appeal Brief, 34. However, this appears to be an evidentiary issue, unrelated to the legal question of cumulative convictions.
[621] Josipovic Appeal Brief, 34.
[622] Josipovic Appeal Brief, 34.
[623] Josipovic Appeal Brief, 35.
[624] Prosecution Response, para. 9.8. For an explanation of the difference in the underlying facts, see the discussion *infra* para. 393.
[625] Prosecution Response, paras 9.19-9.21.
[626] Prosecution Response, para. 9.38.

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act can constitute a crime against humanity.[627] The Prosecution also submits that Josipovi}'s contention, that charging and sentencing for persecution is possible only if no other offence under Article 5 are involved, is erroneous.[628]

392. During the Appeal Hearing, the Prosecution claimed that, according to its understanding of the appeal documents filed by Josipovic, his separate ground of appeal concerning the permissibility of cumulative convictions for persecution (Article 5(h)) and murder (Article 5(a)), and for persecution (Article 5(h)) and other inhumane acts (Article 5(i)), had been abandoned.[629] Counsel for Josipovic subsequently confirmed, at the same hearing, that this ground had indeed been abandoned.[630]

393. As to Josipovic's claim that he was impermissibly charged under Article 5(a) (murder) (count 16) and Article 5(i) (other inhumane acts) (count 18), the Appeals Chamber accepts the Prosecution argument that the acts underlying these counts were dissimilar. The acts underlying the Article 5(a) (murder) charge involved killing or aiding and abetting the killing of Musafer Pušcul (count 16), whereas the acts underlying the Article 5(i) (other inhumane acts) charge involved forcibly removing a family from its home and holding family members nearby while Musafer Pušcul was being killed and burning the family home (count 18). Therefore, the question of cumulative charging on the basis of the same acts does not arise with respect to them.

394. Josipovic has also claimed that he was impermissibly charged under Article 5(h) (persecution) (count 1) and Article 5(a) (murder) (count 16). In general, he claims that charging for the crime of persecution would be permissible only if no other Article 5 offence were implicated. The Appeals Chamber does not share this view. It reiterates that in general, cumulative charging is to be allowed, and therefore, Josipovic and Šantic were not impermissibly charged under the Article 5 counts.

395. As to Josipovic's argument that he was impermissibly convicted under Article 5(h) (persecutions) (count 1) and Article 5(a) (murder) (count 16) on the one hand and Article 5(h) (persecutions) (count 1) and Article 5 (i) (other inhumane acts) (count 18) on the other,[631] the Appeals Chamber declines to rule upon this issue as this ground of appeal was abandoned by Josipovic and never raised by [antic.

[627] Prosecution Response, para. 9.57.
[628] Prosecution Response, para. 9.66.
[629] Appeal Transcript, 934.
[630] Appeal Transcript, 934.
[631] Josipovi} Appeal Brief, 34-35.

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D. Conclusion

396. The Appeals Chamber reverses the Trial Chamber's entry of acquittals for Josipovic and Šantic under counts 17 and 19 of the Amended Indictment. It further finds that the Trial Chamber erred in holding that the Article 3 counts had been impermissibly charged with the Article 5 counts.

IX. APPEALS AGAINST SENTENCE

A. Introduction

397. Given that the Appeals Chamber has allowed the appeals against conviction filed by Vlatko, Mirjan and Zoran Kupreškic and reversed the Trial Chamber's findings of guilt, it is not necessary for it to pronounce on the issues raised in their respective appeals against sentence. However, two appeals against sentence remain, namely those filed by Josipovic and Šantic. Further, although not raised as a formal ground of appeal, the Prosecution made submissions about the penalty imposed upon Josipovic for his conviction of murder as a crime against humanity as compared to the penalty imposed for his conviction of persecution as a crimes against humanity.

398. The grounds of appeal advanced by Josipovic and Šantic against sentence may be summarised as follows:

Appeal against sentence filed by Josipovic

Failure to consider certain mitigating factors.

Error in failing to give adequate consideration to the general practice of the courts of the former Yugoslavia as to sentence.

Error in assessment of Josipovic's role in relation to his criminal conduct in Ahmici.

Appeal against sentence filed by Šantic

Error in considering Šantic's command role as an aggravating circumstance.

Error in consideration of the sentencing practice of the courts of the former Yugoslavia and violation of the principle *nullum crimen sine lege.*

Unlawful reliance on exhibits P 390 and P 391.[632]

Incorrect determination of aggravating factors.

Failure to consider all relevant mitigating circumstances.

Error in failing to consider sentences imposed on other accused before this Tribunal and before other international courts.

[632] [anti} Appeal Brief, para. 2.5.

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399. Šantic also requests that the Appeals Chamber take into account his post-conviction co-operation with the Prosecution and reduce his sentence.

B. Findings by the Trial Chamber

1. Trial Chamber's findings on Josipovic's participation and considerations as to sentence

400. The Trial Chamber found that Josipovic was a member of the HVO prior to 16 April 1993, a member of the village guard and he was seen in the village with a rifle and in uniform.[633] It found that he participated in the attack on the Pušcul house and was part of the group of soldiers who attacked and burned the house and murdered Musafer Pušcul,[634] and that he went to the house with the common intent to kill and/or expel the inhabitants and set it on fire.[635] The Trial Chamber found that Josipovic participated in the attack on the house of Nazif Ahmic in which Nazif and his 14-year old son were killed and was in a commanding position with regard to the troops involved,[636] that he led soldiers near the Ogrev plant on the afternoon of 16 April, wearing a camouflage uniform and a multi-coloured cap and with an automatic rifle,[637]and that he was armed and active, playing his full part in the attacks on his neighbours sometimes having command over a group of soldiers.[638] Finally, the Trial Chamber found that he "was aware that he would be attacking unarmed and helpless civilians, and that this attack was part of a large-scale campaign of 'ethnic cleansing' of Muslims from the Lašva River Valley."[639]

401. Josipovic was convicted of three counts in the Amended Indictment: persecution, murder and other inhumane acts as crimes against humanity.[640] The Appeals Chamber has also now reversed the Trial Chamber's entry of acquittal for counts 17 and 19 (violations of the laws or customs of war, murder and cruel treatment respectively).[641] When sentencing, the Trial Chamber found that Josipovic had played an active role in the killing of Bosnian Muslims[642] and that "he was actively involved in the burning of private property."[643] The Trial Chamber recalled that he participated in the attack on the Pušcul house, during which Musafer Pu{}ul was killed and the family expelled after having been forced to witness his murder. In addition, it recalled the fact that

[633] Trial Judgement, paras 502 and 809.
[634] Trial Judgement, para. 810.
[635] Trial Judgement, para. 814.
[636] Trial Judgement, paras 504 and 811.
[637] Trial Judgement, paras 488 and 812.
[638] Trial Judgement, paras 509 and 813.
[639] Trial Judgement, para. 814.
[640] Counts 1, 16 and 18 respectively.
[641] *See supra* paras 388 and 396.
[642] Trial Judgement, para. 859.
[643] Trial Judgement, para. 859.

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he participated in the attack on the house of Nazif Ahmic in which he and his son were killed as well as Josipovi}'s active involvement in the burning of private property.

402. Finally, as to mitigating factors, the Trial Chamber found that Josipovic lent an HVO army vest to a Mr. Osmanovic, a Muslim, to assist him to escape, that during the attack on 16 April he stopped other soldiers from killing Witness DD and that he voluntarily surrendered to the Tribunal.[644] He was sentenced to 10, 15 and 10 years of imprisonment for persecution, murder and other inhumane acts as crimes against humanity respectively, the Trial Chamber ordering that these terms should be served concurrently.

2. Trial Chamber findings on Šantic's participation and considerations as to sentence

403. The Trial Chamber found that Šantic was a commander of the 4th Battalion of the Military Police and commander of the Jokers,[645] and that he participated in the attack on the Pušcul house and was part of the group of soldiers who attacked, burned the house and murdered Musafer Pušcul.[646] The Trial Chamber could infer from his position as a company commander of the military police and commander of the Jokers that he passed on the orders of his superiors to his men while his presence on the scene of the attack also served as an added encouragement for his subordinates to carry out the orders they had received.[647]

404. Consequently, Šantic was convicted of three counts in the Amended Indictment: persecution, murder and other inhumane acts as crimes against humanity.[648] The Appeals Chamber has also now reversed the Trial Chamber's entry of acquittal for counts 17 and 19 (violations of the laws or customs of war, murder and cruel treatment respectively).[649] In determining his sentence, the Trial Chamber found that, with regard to the conviction for persecution, Šantic's "role was most serious, *since he was a commander*, who assisted in the strategic planning of the whole attack."[650] It found that he passed on orders from his superiors to his subordinates, which amounted to reissuing illegal orders. The Trial Chamber further found that such a role "renders particularly grave his participation in the offences committed."[651] In general, it considered that he played an active role in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian homes and property and the expulsion of Bosnian Muslims from the region and referred, in particular, to

[644] Trial Judgement, para. 860.
[645] Trial Judgement, para. 826.
[646] Trial Judgement, paras. 503 and 827.
[647] Trial Judgement, para. 827.
[648] Counts 1, 16 and 18 respectively. The Appeals Chamber has also now substituted verdicts of guilt for counts 17 and 19 (violations of the laws or customs of war, murder and cruel treatment respectively).
[649] *See supra* paras 388 and 396.
[650] Trial Judgement, para. 862(emphasis added).
[651] Trial Judgement, para. 862.

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the attack on the Pušcul home, including the expulsion of the family after having been forced to witness the murder of Musafer Pušcul. Finally, it referred to the fact that the attack had been "launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape."[652] As to mitigating factors, the Trial Chamber noted Šantic's voluntary surrender to the Tribunal[653] and sentenced him to 25, 15 and 10 years of imprisonment for the convictions on persecution, murder and other inhumane acts as crimes against humanity respectively, ordering that these sentences should be served concurrently.

C. Standard of review in appeals against sentence

1. Overall standard of review

405. Both the Prosecution and the two Defendants have made submissions on the standard of review in appeals against sentence. During the Appeal Hearing, counsel for Josipovic argued on behalf of all Defendants.[654] He submitted that the test applied by the Appeals Chamber to date is "a rather onerous way of approaching a question of an appeal against sentence."[655] He stated that, although there can be no such thing as one right sentence, as different judges acting reasonably can properly arrive at different sentences, sentences ought to be subject to review if they were "capricious or perhaps more likely excessive."[656] He maintained that this "opens the door to a fair review of an excessive sentence not by the appellant seeking to identify a discernible error, but by demonstrating that when looked at the case in the round and putting all the factors into account, the sentence is out of reasonable proportion with the line of sentences passed in similar circumstances for the same offences."[657] In this regard, the Defendants submit that there is a recognisable range of tariffs or sentences, and a discernible pattern of sentencing, created by relevant precedents.[658]

406. Concerning the general overall standard of review in appeals against sentence, the Prosecution relies largely on submissions put forward in previous appeals before the Tribunal and submits that "[i]t has not been shown that the Trial Chamber committed errors of substantive law in its sentencing procedure. Nor has it been demonstrated that the Trial Chamber imposed sentences outside the discretionary framework provided by the Statute and the Rules."[659]

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[652] Trial Judgement, para. 862.
[653] Trial Judgement, para. 862.
[654] Joint argument was presented by Mr. Clegg, counsel for Josipovi}. *See* Appeal Transcript, 573 *et seq.*
[655] Appeal Transcript, 574.
[656] Appeal Transcript, 575; *see also* Josipovic Reply, para. 3.8.
[657] Appeal Transcript, 575; *see also* Josipovic Reply, para. 3.8 (submitting that, "in principle, a sentence may be thought to be capricious or excessive if it is not of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.")
[658] Appeal Transcript, 575-576.
[659] Prosecution Response, para. 34.26; *see also* Appeal Transcript, 891–894.

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407. The Appeals Chamber has, in previous cases, considered the question of the standard of review in appeals against sentence in some depth. It does not intend to rehearse the same discussion in detail here, having been presented with no reason to depart from the settled jurisprudence. It suffices simply to summarise that jurisprudence.

408. The most important point to recall is the fact that "[t]he appeal process…is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing."[660] Appellate proceedings do not constitute a trial *de novo* and are, rather, of a "corrective nature." The standard to be applied in this appeal will therefore be the following:

> [A]s a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless 'it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.' The Appeals Chamber will only intervene if it finds that the error was 'discernible.' As long as a Trial Chamber does not venture outside its 'discretionary framework' in imposing sentence, the Appeals Chamber will not intervene. It therefore falls on each appellant…to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did.[661]

409. This is the standard that will be applied to the present appeals.

2. Standard of review when faced with material not advanced before the Trial Chamber

410. As to whether a defendant may appeal his or her sentence based on material not advanced before the Trial Chamber, the Defendants rely on Article 24 of the Statute and, what they submit to be, the duty or obligation of a Trial Chamber to satisfy itself that the requisite material is before it.[662] They assert that "[i]t follows … that if, on appeal, the Trial Chamber can be demonstrated not to have taken account of factors identified by Article 24 and, as a consequence, injustice has resulted, then the Appeal Chamber is certainly entitled…to review the sentence in the light of that."[663]

411. Relying on Rule 85(A)(vi) of the Rules, the Prosecution submits that an appellant is precluded, "as a general principle, from raising for the first time on appeal matters…pertaining to sentence that should have been raised and could have been raised at trial."[664] In particular, it submits that, in the case of represented accused, "it is a matter for counsel representing the accused

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[660] *Celebici* Appeal Judgement, para. 724 (citing *Prosecutor* v *Erdemovic*, Case No.: IT-96-22-A, Judgement, 7 October 1997, para. 15).

[661] *Celebici* Appeal Judgement, para. 725 (citations omitted).

[662] *See* Josipovic Reply, para. 3.15 (submitting that "[t]he silence of defence Counsel or of an unrepresented defendant does not absolve the Trial Chamber from its obligation under the Statute.")

[663] Appeal Transcript, 577; *see also* Josipovic Reply, para. 3.14 (submitting that "[i]f material exists which demonstrates that the sentence is excessive then that material ought to be received by the Appeals Chamber even if it were not placed before the Trial Chamber."); *see also* Josipovi} Reply, para. 3.16.

[664] Appeal Transcript, 812.

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to present whatever mitigating circumstances that are available."[665] It submits that additional evidence concerning sentence adduced on appeal should be subject to the requirements of Rule 115.[666]

412. In part, the Defendants raise factors before the Appeals Chamber not specifically presented to the Trial Chamber. Clarifying their general submissions during the Appeal Hearing, they appear to suggest that the Trial Chamber was under an obligation to search for information or factors that were not specifically raised before it by the accused. At that hearing, the following exchange took place between the Presiding Judge and counsel for Josipovi}:

> Q: Are you suggesting the Trial Chamber or the Appellate Chamber is under such an obligation? For instance, suppose a Defence counsel does not raise anything about individual circumstances which is mentioned in Article 24 in mitigation, are you suggesting that the Appellate Chamber has an obligation to go hunt around and see if there was some mitigating circumstances even though the Defence counsel didn't raise them in the trial court?
>
> A: Firstly, I'm suggesting the Trial Chamber has that obligation and Article 24…
>
> Q: How could a Trial Chamber have an obligation to look for individual circumstances if the Defence counsel doesn't raise them?
>
> A: Well, there might not be a Defence counsel. You may have somebody who –
>
> Q: Well, assuming there is one.
>
> A: One has got to reflect on what the position would be then, what does Article 24 enjoin the Trial Chamber if you have somebody that refuses to recognise the Court and they are convicted? Then the Trial Chamber, in those circumstances, in my submission, would probably seek the assistance of the Prosecutor and ask the Prosecutor to indicate what individual circumstances they were aware of, and also to identify itself from the evidence heard what other individual circumstances may assist on sentence and to specify that in it's sentencing remarks.
>
> …
>
> My submission is that would apply if Defence counsel were less than helpful.[667]

413. Ultimately, counsel appears to confine his assertion that the appellate court must independently scan the record for material that might be relevant in sentencing, to situations where an accused is not represented by counsel, refuses to recognise the court and is convicted, as well as to situations in which "[d]efence counsel were less than helpful."[668]

414. The Appeals Chamber notes that, in this case, both Defendants in question were represented by counsel and filed written submissions on sentencing (or their individual circumstances) before

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665 Appeal Transcript, 895.
666 Appeal Transcript, 813.
667 Appeal Transcript, 579-580.
668 Appeal Transcript, 580.

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the Trial Chamber.[669] Rule 85(A)(vi) provides that a Trial Chamber will consider "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more charges in the indictment." If an accused fails to put forward any relevant information, the Appeals Chamber does not consider that, as a general rule, a Trial Chamber is under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time. Counsel in this case has presented three scenarios that he submits would oblige the Appeals Chamber to look for new information. None of these appear to fit the Defendants in this case. In particular, as to the third category, counsel does not appear to have suggested that counsel at trial "were less than helpful." In these circumstances, the Appeals Chamber considers that no reason has been presented for it to consider and take into account any mitigating factors that, although available at the time, were not raised before the Trial Chamber.

D. Overlapping Issues in the appeals filed by Josipovic and Šantic

The practice of the courts of the former Yugoslavia and the Criminal Code of the SFRY

415. Šantic submits, in some detail, that the Trial Chamber is bound to follow the sentencing practice of the courts of the former Yugoslavia.[670] In particular, he relies on use of the word "shall" in Article 24(1) of the Statute as meaning that it is mandatory to follow this practice, though he omits to say that the "shall" precedes the words "have recourse to" not "be bound by".[671] Josipovic simply asserts, with no explanation, that the Trial Chamber did not "give adequate consideration to the general practice of imprisonment punishments in Courts of the former Yugoslavia."[672]

416. In response, the Prosecution relies on previous jurisprudence of the Tribunal, to the effect that the SFRY Criminal Code should only be used for guidance. It maintains that the Tribunal's consistent jurisprudence on this question should be followed and that no reason has been put forward to depart therefrom.[673]

417. As a preliminary point, the Appeals Chamber notes that Josipovic has put forward little to no argument in support of his assertion that the Trial Chamber failed to give adequate consideration to the practice of the courts of the former Yugoslavia. Although the Appeals Chamber could

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[669] *See generally* Josipovic Closing Brief; *see also* [anti} Closing Brief.
[670] [antic Appeal Brief, para. 3.4.5.
[671] [antic Appeal Brief, paras. 3.4.3-3.4.5.
[672] Josipovic Appeal Brief, 35. During the Appeal Hearing, counsel for [antic made a general submission on behalf of all Defendants on this topic. However, save for a general exposé of the factors taken into account in sentencing by the courts of the former Yugoslavia, no precise argument as to why the practice of these courts should be binding on the Tribunal was put forward. Similarly, no explanation was provided as to how the practice of the Tribunal digressed from this practice or how the Trial Chamber in the case of any of the Defendants had failed to apply these general principles. *See* Appeal Transcript, 589-596.

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dismiss Josipovic's argument on this basis alone, it will consider it further given the fact that the question has also been raised in more detail by Šantic.

418. Article 24(1) of the Statute does provide, *inter alia*, that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."[674] Jurisprudence on this subject from the Appeals Chamber of this Tribunal, has consistently provided that, although the general practice of the courts of the former Yugoslavia may provide guidance (and should be considered), a Trial Chamber is not bound to act exactly as a court of the former Yugoslavia would.[675] The Appeals Chamber has found that, "in the interests of certainty and predictability, it should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[676] The question arises as to whether the Defendants have put forward either different arguments or cogent reasons sufficient to justify the Appeals Chamber re-visiting this issue.

419. Turning first to the Trial Judgement, the Appeals Chamber believes that the Trial Chamber did have recourse to the practice of the courts of the former Yugoslavia regarding prison sentences, as required by the Statute and the Rules. The Trial Chamber stated it was

> clear from these provisions – in particular the phrase 'have recourse to' and 'take into account' – that the Trial Chamber is not bound to follow the sentencing practice of the courts of the former Yugoslavia. Reference should be made to the said sentencing practice as an aid in determining the sentences to be imposed by the Trial Chamber.[677]

420. The Trial Chamber considered in some detail, Articles 33, 38, 41, 48 and 142 of the SFRY Criminal Code, finding, in particular, that Article 41 of the Code (governing general principles in determining punishment), "is essentially similar to the sentencing provisions of the Statute and the Rules."[678] In noting this article, it set out, in detail, the factors that a court should consider, including mitigating and aggravating circumstances, the degree of criminal responsibility and the circumstances of the commission of the offence.[679]

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[673] For example, in relation to Josipovic's argument, the Prosecution responds that the Trial Chamber's consideration on this point is "legally unassailable." Prosecution Response, para 38.46; *see also* Prosecution Response, para. 39.3.

[674] Rule 101(B) provides, *inter alia*, that "[i]n determining the sentence, the Trial Chamber shall take into account the factors mentioned in Art. 24, paragraph 2, of the Statute, as well as such factors as:...(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia."

[675] *Jelisic* Appeal Judgement, para. 117; *Celebici* Appeal Judgement, para. 813. The ICTR has taken a similar approach to sentencing pursuant to Art. 23 of its own Statute, which requires that "the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda." *See, e.g.*, *Serushago* Sentencing Appeal Judgement, para. 30.

[676] *Aleksovski* Appeal Judgement, para. 107.

[677] Trial Judgement, para. 840.

[678] Trial Judgement, para. 841.

[679] Trial Judgement, footnote 989.

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421. Overall, the Appeals Chamber can find no error in this analysis. Neither Defendant has demonstrated why, contrary to consistent jurisprudence that was correctly followed by the Trial Chamber, the practice of the courts of the SFRY should be binding. However, in addition, they have failed to demonstrate how, even if it were binding, the Trial Chamber's analysis of their circumstances and their criminal culpability, could have differed. The Trial Chamber turned its attention to the relevant provisions of the code and then set out, in detail, the issues that it intended to consider.

422. Šantic also argues that his sentence of 25 years of imprisonment for persecution violated the principle of *nullum crimen sine lege* as such a long prison term was not available in the SFRY at the time his crimes were committed.[680] He points out that the crimes occurred on 16 April 1993 but the ICTY (which permits the higher sentence) was not created until the following month.[681] Šantic submits that at the time the offence was committed, "the only courts with jurisdiction to try the offences charged in the indictment were SFRY courts…[T]he maximum term of incarceration allowed was 15 or 20 years, depending on the view of SFRY law advanced."[682] Consequently, he submits that the sentence he received for count 1 of the Amended Indictment, should be reduced.[683] In response the Prosecution relies on the findings in the *Celebici* Appeal Judgement and submits that Šantic "does not offer any new substantial argument that would require the Appeals Chamber to revisit its prior jurisprudence."[684]

423. As pointed out by the Prosecution, this question has already been considered by the Appeals Chamber in the *Celebici* Appeal Judgement. The Appeals Chamber accepted that the principle that Trial Chambers are not *bound* by the practice of courts in the former Yugoslavia

> applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed.[685]

424. It recalled, however, that any sentence imposed must be founded on the existence of applicable law. In the case of the crimes being prosecuted before the Tribunal, it stated that there could "be no doubt that the accused must have been aware of the fact that the crimes for which they

[680] [antic Appeal Brief, para. 2.4. He submits that "it violates fundamental principles of both international and virtually every national legal system to assess a punishment for a crime which is greater than that authorised by law at the time of the acts constituting the offence."
[681] [antic Appeal Brief, para. 2.4(B).
[682] [antic Appeal Brief, para. 2.4(C).
[683] [antic Appeal Brief, para 2.4.
[684] Prosecution Response, para. 39.6.
[685] *Celebici* Appeal Judgement, para. 816.

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were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties."[686]

425. In this case, Šantic was sentenced to 25 years of imprisonment for the crime of persecution, based on acts found by the Trial Chamber to be particularly grave and serious. This sentence was permissible under the Rules of the Tribunal, which allow for a maximum sentence of life imprisonment.[687] As in the aforementioned case, the Appeals Chamber considers that Šantic could have been in no doubt that a very severe sentence, even up to this maximum, was a real possibility if convicted for the crimes alleged in the Amended Indictment.

426. Neither Šantic nor Josipovic has presented any basis for the Appeals Chamber to revisit these issues and depart from existing jurisprudence. For the reasons set out above, both arguments raised in this section are rejected.

E. Drago Josipovic's appeal against sentence

427. During the Appeal Hearing, Josipovic briefly summarised his appeal against sentence by stating

> that the sentence of 15 years is excessive in all the circumstances in this case bearing in mind particularly the role and standing of Josipovic as found by the Trial Chamber, his voluntary surrender to this Tribunal, and the assistance and help he gave on the evidence to Muslim families, particularly that of CA, on the day of the massacre himself.[688]

1. Error in failing to take account of certain mitigating factors

428. Josipovic submits that the Trial Chamber failed to take into account certain mitigating factors in determining the appropriate punishment.[689] In particular, he referred to the following factors: measures taken to care for Muslims in jeopardy, including those taken on 16 April 1993; measures taken to promote positive relations with his Muslim neighbours despite the conflict; the fact that he returned to the temporary arrest unit after being released for the funeral of his mother and that he voluntarily surrendered to the Tribunal; the fact that he was of prior good character, did not display any nationalist or ethnic prejudices and was not politically active; and finally his family responsibilities.

[686] *Celebici* Appeal Judgement, para. 817.
[687] Rule 101(A).
[688] Appeal Transcript, 747.
[689] Josipovic Appeal Brief, 35 *et seq.*

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429. The Prosecution submits that the weight attached to the evidence of acts of assistance was within the Trial Chamber's discretion and that Josipovic has failed to demonstrate otherwise.[690] In general, it maintains that Josipovic appears to be requesting a *de novo* determination of his sentence and that this misconceives the purpose of an appeal. It submits that he identifies no abuse of discretion and that the appeal ought to be rejected.[691]

430. The Appeals Chamber recalls that Rule 101(B)(ii) provides that a Trial Chamber in determining the appropriate sentence must take mitigating circumstances into account. The weight to be attached to such circumstances lies within the discretion of a Trial Chamber, which is under no obligation to set out in detail each and every factor relied upon. Contrary to Josipovi}'s assertion, a review of the relevant parts of the Trial Judgement demonstrates no failure on the part of the Trial Chamber in this respect.[692] For example, the Trial Chamber expressly stated that it considered, in mitigation, measures taken by Josipovi} to care for Muslims in jeopardy, such as lending an HVO army vest to a Muslim and stopping soldiers from killing Witness DD.[693] The Trial Chamber also took into account the fact that Josipovi} surrendered voluntarily to the International Tribunal. Moreover, the Trial Chamber expressly referred to the written submissions on sentencing which were file by Josipovi} at trial.[694] This is *prima facie* evidence that they were taken into account. The Appeals Chamber reiterates that appeal proceedings are not an opportunity for accused to have a trial *de novo* or, "for the Appeals Chamber to reconsider the evidence and factors submitted before the Trial Chamber."[695] The majority of the factors now presented were before the Trial Chamber in Josipovic's written submissions. The weight to be attached to them lay within the discretion of the Trial Chamber and Josipovic has failed to demonstrate this discretion was improperly exercised, such that his sentence should be reduced.

431. For these reasons, this argument is rejected.

2. <u>Error in the Trial Chamber's assessment of the relative role of the Defendants in the events in Ahmici</u>

432. Josipovic submits that the Trial Chamber failed to consider his limited personal responsibility for the events that took place at the home of Musafer Puš}ul. In particular, he submits that "[t]here is nothing in the Judgement to suggest that the Trial Chamber took into consideration the circumstance that Drago Josipovic did not take Musafer Pu{}ul from the house,

[690] Prosecution Response, para. 37.17.
[691] Prosecution Response, paras. 37.20-37.21.
[692] Trial Judgement, paras 834-838, 858-860.
[693] Trial Judgement, para. 860.
[694] Trial Judgement, para. 835.
[695] *Celebici* Appeal Judgement, para. 837.

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nor did he shoot at him or incite or encourage others to do so."[696] On the other hand, the Prosecution maintains that, contrary to Josipovic's argument, the Trial Judgement illustrates that he did not have a minor role in the events.[697]

433. Josipovic's argument that the Trial Chamber failed to consider correctly his personal responsibility in the attacks, or that his participation should in any way have been considered minimal, is misplaced. In convicting Josipovic, the Trial Chamber accepted the evidence of Witness EE that Josipovic participated in the attack on the home of Musafer Pušcul and that "he was part of the group of soldiers who attacked and burned the house and murdered Musafer Pušcul."[698] It found that he was

> present at the scene of the crime as part of a group that went to the house with the common intent to kill and/or expel its inhabitants and to set it on fire. He did this solely because the victims were Muslims...The accused was aware that he would be attacking unarmed and helpless civilians, and that this attack was part of the beginning of a large-scale campaign of 'ethnic cleansing' of Muslims from the Lašva River Valley.[699]

434. A suggestion that this role could in any way be considered minimal is misconceived. On the contrary, it is clear that the Trial Chamber correctly considered that the role played by Josipovic was by no means negligible, that his responsibility was grave, and that he should be sentenced accordingly.

435. For these reasons, this argument is rejected.

3. Evidence of involvement in the attack on the home of Nazif Ahmic and evidence of a command role

436. The Appeals Chamber has ruled that the evidence of Witness DD regarding Josipovic's involvement in the attack on the home of Nazif Ahmic constitutes material facts in the Prosecution case against Josipovi}, which were not pleaded in the Amended Indictment and so could not serve as the basis for the persecution conviction under count 1. This reduces his culpability under count 1 on the Amended Indictment for persecution. The Appeals Chamber has also found that there was no evidence before the Trial Chamber upon which it could conclude that Josipovic played any kind of command role over soldiers during the attack in Ahmici.[700] The Trial Chamber did not specifically refer to this finding when sentencing Josipovic or conclude that it would be taken into account as an aggravating factor. Nevertheless, the Trial Chamber is assumed to have considered

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[696] Josipovic Appeal Brief, 38.
[697] Prosecution Response, para. 37.18.
[698] Trial Judgement, para. 810.
[699] Trial Judgement, para. 814.
[700] *See* the discussion *supra* paras 354-360.

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the totality of the culpable conduct proven and imposed a sentence on this basis. In its findings, this conclusion was specifically recalled, the Trial Chamber stating:

> The Trial Chamber rejects the evidence put forward by Drago Josipovic of him spending the day moving around the locality to very little apparent purpose. The truth is that he was armed and active, playing his full part in the attacks on his neighbours, sometimes having command over a group of soldiers.[701]

437. Consequently, the Appeals Chamber considers that these findings must have had some influence on the sentence imposed on Josipovic and should be taken into account by the Appeals Chamber.

4. Conclusion

438. For the following reasons, the Appeals Chamber has decided to reduce Josipovic's sentence.

(i) The Trial Chamber erred, based on the evidence before it, in making the factual finding that Josipovic was in a command position.

(ii) Having found that the Amended Indictment was defective in its failure to plead the attack on the home of Nazif Ahmic, the basis for Josipovic's conviction under count 1 (persecution) is now reduced.

439. For these reasons, the Appeals Chamber reduces Josipovic's overall sentence from one of 15 years of imprisonment to 12 years of imprisonment.

F. Vladimir Šantic's Appeal Against Sentence

1. Comparison with sentences imposed in other cases before the ICTY and other war crimes tribunals

440. Šantic argues that his case should have been compared with the sentences imposed on other persons convicted of war crimes in either cases before the Tribunal or other war crimes tribunals.[702] He submits that he would have received a lower sentence, if the Trial Chamber had made such a comparison. Šantic refers to the sentencing practice of the Nuremberg and Tokyo Tribunals and submits that, despite the fact that certain named accused were convicted of very grave crimes, the

[701] Trial Judgement, para. 813.
[702] [antic Appeal Brief, paras 3.6-3.7.

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sentences of imprisonment received were less than his.[703] He argues similarly, with regard to certain cases before the ICTY.[704]

441. The Prosecution responds that the Trial Chamber's discussion of Šantic's sentence clearly illustrates that it followed its standard sentencing policy and that the principles enunciated by it, have been repeatedly confirmed by the Appeals Chamber.[705] It submits that Šantic "does not even offer the minimum elements that would justify a comparison" between his case and those cited.[706] It maintains that, as for comparison with cases before the Tribunal, there is no identifiable penal regime in the Tribunal and, as long as they stay within boundaries established by the Statute and the Rules, "Trial Chambers have unfettered discretion to apply the sentence they deem most appropriate for the case before them."[707]

442. The Appeals Chamber notes Šantic's submission that "the gravity of the offence is the decisive factor in imposing the sentence…The gravity of the crime includes the discussion of the consequences of the crime when imposing the sentence."[708] The Appeals Chamber concurs. In sentencing, a Trial Chamber must start from the position that "the gravity of the offence is the primary consideration in imposing sentence."[709] In this case, the Trial Chamber acted no differently. Indeed, the following principle in the Trial Judgement has now been endorsed in several decisions by the Appeals Chamber:

> The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[710]

443. In considering the inherent gravity of a crime, a Trial Chamber is under no obligation to expressly compare the case of one accused to that of another. Counsel on behalf of all the Defendants submitted that "[i]t must be fundamentally fair for people who have committed like crimes in like circumstances to receive like sentences."[711] The Appeals Chamber again does not dispute this assertion. However, although it has expressly found in a previous case that it "does not

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[703] [antic Appeal Brief, para. 3.6.
[704] [antic Appeal Brief, para. 3.7.
[705] Prosecution Response, paras 35.4-35.7.
[706] Prosecution Response, para. 39.10. The Prosecution submits that he fails to cite minimum elements "that would justify a comparison…such as demonstration of close similarity of criminal culpability, gravity of the crime, or degree of participation."
[707] Prosecution Response, para. 39.11.
[708] [antic Appeal Brief, para. 3.6
[709] *Celebici* Appeal Judgement, para. 731.
[710] Trial Judgement, para. 852. This principle has since been endorsed in the *Celebici* Appeal Judgement, para. 731 and the *Aleksovski* Appeal Judgement, para. 182. Although this paragraph is contained within the section devoted to Zoran and Mirjan Kupreškic, the Appeals Chamber considers that it is a principle that must have been applied by the Trial Chamber in its consideration of the sentences of the Defendants collectively, being general in nature.
[711] Appeal Transcript, 576.

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discount the assistance that may be drawn from previous decisions rendered", it has also found that this assistance can be limited:[712]

> While…[the Appeals Chamber]…does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.[713]

444. What is important is that due regard is given to the relevant provisions of the Statute and the Rules, jurisprudence of the Tribunal and ICTR, and the circumstances of the case.

445. Šantic has listed several cases from the Nuremberg and Tokyo Tribunals, together with cases from this Tribunal, arguing that the gravity of the crimes committed by each of those convicted was more serious, albeit the sentences imposed were less severe.[714] However, no real reasoning is put forward as to how these comparisons precisely assist in his case. In the absence of such reasons, the Appeals Chamber will neither embark on its own analysis of each case cited, nor consider in relation to each why Šantic's sentence should have been lower. Suffice to say that what is most important for a Trial Chamber is to individualise the penalty imposed.

446. In the Trial Judgement, as seen further below, the Trial Chamber considered Šantic's individual circumstances, the gravity of his crimes, and totality the of his culpable conduct. On this basis he was sentenced and the Appeals Chamber can find no error in the fact that it failed expressly to compare his case to others.

447. For these reasons, this argument is rejected.

2. Incorrect determination of aggravating factors

448. Šantic submits that the sentence he received was excessive.[715] Referring in particular to paragraph 862 of the Trial Judgement, he submits that the Trial Chamber erred in determining that certain of the factors mentioned were aggravating circumstances and, further, that certain of the circumstances mentioned existed at all. First, Šantic submits that the Trial Chamber erred in finding that his position as a commander was aggravating, since it was "a part of the factual allegation of the crime by itself, that is to say, a fact that constitutes a crime."[716] Second, he maintains that the Trial Chamber's finding that he passed on orders from his superiors to his subordinates should not have been viewed as an aggravating factor, but rather, could be a factor in

[712] *Celebici* Appeal Judgement, para. 721.
[713] *Celebici* Appeal Judgement, para. 719.
[714] [antic Appeal Brief, paras 3.6-3.7.
[715] [antic Appeal Brief, para. 3.1.
[716] [antic Appeal Brief, para. 3.8(7).

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mitigation of punishment.[717] Third, Šantic submits that, the section of the Trial Judgement relating to factual findings does not include a finding that he assisted in the strategic planning of the attack and that it was therefore not open to the Trial Chamber to rely upon this in aggravation of his sentence.[718] Fourth, Šantic argues that his very participation in the attack on the house of Musafer Pušcul and in the murder of Musafer Pu{}ul were not aggravating factors, but rather "mere allegations from the indictment."[719] That is to say, he argues that they were necessary elements of the offence on which he was to be sentenced. Šantic argues further that the Trial Chamber's reference to his active role in the killing of Bosnian Muslim civilians, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims "are pure speculations and conjectures of the Trial Chamber."[720]

449. The Prosecution refutes each of these arguments, in particular submitting that arguments three to five, "are mere re-cast allegations against the evidence underpinning the Appellant's conviction, which should be considered to be withdrawn." In any event, it submits that they "do not even allege an error of law or an abuse of discretion by the Trial Chamber that would merit the Appeals Chamber's consideration."[721]

450. Paragraph 862 of the Trial Judgement, relating to the sentencing of Šantic, reads as follows:

> Concerning the conviction on the persecution count, Vladimir Šantic's role was most serious, since he was a commander, who assisted in the strategic planning of the whole attack. He also passed on orders from his superiors to his subordinates, which amounted to the reissuing of the orders that were illegal in the circumstances. This role renders particularly grave his participation in the offences committed. Furthermore, he played an active role in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmici-[antici region. In particular, Vladimir Šantic participated in the attack on the Pušcul house, during which the house was burnt down, Musafer Pušcul was killed and the family was expelled from their home after having been forced to witness the murder of Musafer Pušcul. The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape.

451. As stated above, in sentencing a Trial Chamber is required to take into account and weigh the totality of an accused's culpability. In this case, Šantic was convicted of direct responsibility under Article 7(1) of the Statute. However, in addition, the Trial Chamber found he was a commander and the Appeals Chamber has upheld this finding.[722] The Appeals Chamber confirms that a Trial Chamber has the discretion to find that direct responsibility, under Article 7(1) of the Statute, is aggravated by a perpetrator's position of authority. This has most recently been affirmed in the *Celebici* Appeal Judgement, drawing upon the *Aleksovski* Appeal Judgement, where the Trial

[717] [antic Appeal Brief, para. 3.8(7).
[718] [antic Appeal Brief, para. 3.8(8).
[719] [antic Appeal Brief, para. 3.8(10).
[720] [antic Appeal Brief, para. 3.8(9).
[721] Prosecution Response, para. 39.15.

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Chamber considered the Defendant's superior responsibility to be a serious aggravating factor. In *Celebici*, the Appeals Chamber stated:

> The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.[723]

452. Similarly, in the present case, the Trial Chamber found that Šantic's position as a commander rendered his role more serious. The Appeals Chamber can find no error in this.

453. The second and third arguments raised by Šantic relate to the fact that, in sentencing him, the Trial Chamber said that he passed on orders relating to the Ahmici attack from his superiors to his subordinates and that he participated in the strategic planning of the whole attack. The Appeals Chamber has already examined the implicit finding that he assisted in the strategic planning of the whole attack and found it to be unsustainable.[724] Accordingly, the Appeals Chamber accepts that the Trial Chamber erred in relying upon that factor in aggravation of his sentence. On the other hand, the Appeals Chamber believes that the Trial Chamber could reasonably infer that, if he were a commander on that day, he passed on orders to others.

454. Finally, Šantic seems to allege that the Trial Chamber erred in taking into account, as aggravating factors, his very participation in the attack on the home of Musafer Pušcul. The Appeals Chamber disagrees. At this point in the Trial Judgement, the Trial Chamber was entitled to recall the matters for which Šantic had been convicted in order to set out the basis on which it intended to impose sentence, based on its "overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime",[725] the Appeals Chamber can find no error. Similarly, the Appeals Chamber can find no error in the Trial Chamber's reference to the role that Šantic played in the killing of Bosnian Muslim civilians in Ahmici, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmici-Šantici region. It is clear from the passage cited above that the Trial Chamber qualified this statement by reference to Šantic's participation in the attack on the Pušcul house. Moreover, the Trial Chamber was entitled to take into account the fact that Šantic's participation in the Pušcul attack took place in the context of the wider attack on Ahmici in which many Bosnian Muslim civilians were killed and injured and many houses were destroyed. For these reasons, this argument is rejected.

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[722] *See* the discussion *supra* paras 363-368.
[723] *Celebici* Appeal Judgement, para. 745 (citing *Aleksovski* Appeal Judgement, para. 183).
[724] *See* the discussion *supra* para. 365.
[725] *Celebici* Appeal Judgement, para. 717.

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3. Failure to consider all relevant mitigating circumstances

455. Šantic alleges that the Trial Chamber erred in both failing to mention in the Trial Judgement and to take into account in imposing sentence, the following mitigating circumstances: measures he took to protect and care for Muslims; his absence of any prior criminal record; his prior good character; good behaviour throughout the course of the trial and conduct at the Detention Unit; family circumstances and responsibilities; and the fact that he suffers from kidney disorders.[726]

456. The Prosecution submits that a Trial Chamber retains the discretion to attach appropriate weight to mitigating circumstances. It maintains that the Trial Chamber clearly referred to the fact that Šantic had filed submissions on sentence before it and that it was not required to expressly refer to each one when delivering judgement.[727] The burden is on an appellant to demonstrate an abuse of discretion. In this case, Šantic has simply enumerated the circumstances he submits should have been considered without reasons as to why the Trial Chamber should have attached particular weight or how the relevant factors impacted the sentence.[728]

457. The Appeals Chamber again recalls that, as stated above, a Trial Chamber must impose a sentence that reflects the totality of an accused's culpable conduct, involving consideration of the gravity of the crime and individual circumstances. Although a Trial Chamber is obliged to take appropriate mitigating circumstances into account, the final sentence to be imposed lies within its discretion. The burden rests on an accused to demonstrate that the Trial Chamber abused this discretion in failing to take a certain factor or circumstance into account.

458. Šantic alleges that the Trial Chamber failed to refer to certain mitigating factors. Although, as will be seen, this allegation is largely misplaced, it should also be recalled that a Trial Chamber in any event is not, "required to articulate…every step of its reasoning in reaching particular findings."[729] However, failure to list in the Trial Judgement, each and every circumstance placed before it and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question.

459. In this case, the Trial Chamber correctly recalled the factors that should be considered in imposing sentence, in particular referring to Article 24 of the Statute and Rule 101.[730] Again, although in doing so, it did not expressly list each factor that it considered in mitigation of Šantic's sentence, this does not support a contention that the factors pointed out were neither evaluated nor

[726] [antic Appeal Brief, para. 3.9.
[727] Prosecution Response, para. 39.8.
[728] Prosecution Response, para. 39.9.
[729] *^elebici* Appeal Judgement, para. 481.
[730] Trial Judgement, paras 836-847, 848-850 and 861-863.

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weighed. A reading of the Trial Judgement as a whole supports a finding that the Trial Chamber considered the circumstances of his case as a whole. In particular, the Trial Chamber referred to evidence by defence witnesses of Šantic's good character, his professional approach to his work, and his sociability, friendliness and willingness to help those in need regardless of religion.[731] Later, it recalled the fact that written submissions on sentence had been filed by Šantic before the Trial Chamber.[732] This supports a finding that they were weighed and evaluated.

460. Šantic's contention is really that these factors were not given due weight. The burden rests on him "to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion, and that it failed to…give adequate weight to…these factors."[733] As has been stated, this is primarily a matter within the discretion of the Trial Chamber and, in the absence of a discernible error, the Appeals Chamber will not intervene.[734] The Appeals Chamber considers that Šantic has failed to discharge this burden.

4. Substantial co-operation with the Prosecution

461. In his Supplemental Document, Šantic stated that, since his conviction, he has been co-operating with the Prosecution, which itself has assessed this co-operation as substantial.[735] He submits that the co-operation "was unconditional and full. It not only corroborated information that was known, but also brought completely new information."[736] Consequently, he requests that "[t]his circumstance should be honoured in an appropriate manner."[737] The Prosecution acknowledges that Šantic "has provided significant and valuable assistance" and that it may amount to substantial co-operation within the terms of Rule 101(B). It submits that the Appeals Chamber "has the authority either to decide the matter itself or to remit it to a Trial Chamber" in order to take this factor into account and determine a new sentence.[738] However, in all the circumstances, it submits that "there is no reason to believe that a Trial Chamber would be in a better position…to make this particular determination."[739] In particular, it states that there is

> agreement between the parties as to the fact that this is a case of substantial cooperation under Rule 101, and further, there is also agreement as to the following factors: that no promise was made to the appellant; that the appellant's decision to cooperate with the Prosecutor was an unconditional one, according to the appellant, motivated solely by the need to bring to light what

[731] Trial Judgement, para. 478.
[732] Trial Judgement, para. 835. *See generally* [anti} Closing Brief. In addition, the Appeals Chamber notes that in these submissions each of the factors referred to in [antic Appeal Brief were in fact presented before the Trial Chamber.
[733] *Celebici* Appeal Judgement, para. 837.
[734] *^elebi}i* Appeal Judgement, para. 725; *Aleksovski* Appeal Judgement, para. 187; *Tadi}* Sentencing Appeal Judgement, paras. 20-22.
[735] [anti} Supplemental Document, 7.
[736] Appeal Transcript, 779.
[737] [anti} Supplemental Document, 8.
[738] Appeal Transcript, 889; *see also* Prosecution Response, paras. 32.6 and 33.1.
[739] Appeal Transcript, 890.

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happened in Ahmici; ...and that his...[co-operation]...was very important; all factors that should, in our submission, be taken into account for the purposes of any determination under Rule 101.[740]

462. The Appeals Chamber considers itself properly seised of this matter and that it is not necessary to remit to a Trial Chamber for consideration. Indeed, neither party submits that the matter should be remitted to a Trial Chamber to decide. The Prosecution agrees that all relevant information is before the Appeals Chamber.

463. There is no provision in the Statute or the Rules that specifically permits the Appeals Chamber to take into account post-conviction substantial co-operation with the Prosecution.[741] What is clear, however, is that appellate proceedings are not intended to permit a *de novo* review of sentence, with Article 25 clearly limiting appeals to allegations of errors of law or fact invalidating the decision or occasioning a miscarriage of justice respectively. The instant case clearly does not fall within either category, as it is not alleged that the Trial Chamber erred in any way. However, the Appeals Chamber notes that Rule 101(B)(ii) requires the Trial Chamber to take into account "any mitigating circumstances including the substantial co-operation with the Prosecution by the convicted person before *or after* conviction."[742] In light of the Rule, the Appeals Chamber considers that, in appropriate cases, co-operation between conviction and appeal could be a factor that the Appeals Chamber too may consider in order to reduce sentence. This will of course depend on the circumstances of each case and the degree of co-operation rendered. In the present case, the interests of justice demand that this factor be taken into account.

5. Acceptance of guilt

464. As has been seen above, in his appeal on the merits, Šantic has put forward the evidence of Witness AT as support for a contention that his level of responsibility was lessened. On this basis he stated that he was "not dodging responsibility" and was accepting a certain degree of culpability. That is, he was admitting participation, albeit not to the degree found by the Trial Chamber. The Appeals Chamber has found that the Trial Chamber's findings on his participation were safe.

[740] Appeal Transcript, 889-890. For a general discussion, see Appeal Transcript, 921. In this section of the transcript [antic states that he agrees with all of the arguments presented by the Prosecution on this point. The Prosecution also considered the issue on the basis that it was a factor that had emerged after trial and stated that "as a general principle, material pertaining to new facts, to the extent that they are incapable of indicating any error by the Trial Chamber and therefore of rendering the sentence unsafe, are, as a principle, irrelevant and not admissible on appeal." However, based on an interpretation of Rule 101 "that ensures its useful effect," substantial co-operation with the Prosecution should be considered as an exception to the rule. Appeal Transcript, 814-815.

[741] It is noted that there is precedent to suggest that post-conviction *behaviour* is not relevant to assessment of sentence on appeal. In a pre-appeal hearing decision in the case of *Jelisic*, the Appeals Chamber accepted that a report from the detention unit as to the appellant's post-sentencing behaviour was unavailable at the time of the trial but that "the Defendant's post-sentence behaviour could be neither relevant to any issue before the Trial Chamber nor capable of being considered by it and therefore cannot show that the Trial Chamber committed any error in the exercise of its discretion." On this basis, the evidence was rejected. *Prosecutor* v *Jelisic*, Case No.: IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000.

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Nevertheless, it considers that Šantic's limited acceptance of guilt, even at this late stage, is relevant and should be given some consideration in terms of sentence.

6. Conclusion

465. Taking into account the findings made above, for the following reasons, the Appeals Chamber has decided to reduce Šantic's sentence.

(i) Although the Trial Chamber did not err in its overall findings as to the command role that Šantic played, it erred in stating on sentence that this role included assistance in the strategic planning of the whole attack. The Trial Chamber had not made an express factual finding to that effect and, moreover, the evidence on the trial record does not appear to support such a finding.

(ii) Although it has occurred at a very late stage in these proceedings and, consequently, any mitigation to be drawn is considerably limited, Šantic has now accepted, in part, his guilt and in particular he has admitted his command role.

(iii) Šantic has provided substantial co-operation to the Prosecution by providing information and valuable assistance.

466. For these reasons, the Appeals Chamber reduces Šantic's overall sentence from one of twenty-five years of imprisonment, to eighteen years of imprisonment.

G. Sentencing Issue raised by the Prosecution

467. The Prosecution alleges that the Trial Chamber erred in imposing a lower sentence for Josipovic on count 1 (persecution as a crime against humanity, 10 years of imprisonment) than count 16 (murder as a crime against humanity, 15 years of imprisonment). Josipovic submits that this issue was not properly raised as a ground of appeal and that the Appeals Chamber should ignore it in its deliberations. He submits that the first time it was raised was in the Prosecution Amended Appeal Brief, which was filed more than 16 months after judgement. Although he states that the Appeals Chamber may make any observation it wishes on an *obiter* basis, he submits that it cannot increase the sentence even if it feels that the Prosecution submission is well founded.[743]

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[742] Emphasis added.
[743] Appeal Transcript, 719.

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468. The Prosecution states that it is not requesting an increase in sentence. In its Amended Appeal Brief, it accepts that it "has not appealed against any of the sentences handed down" but that, nevertheless, it "wishes to seize this opportunity to appraise the Appeals Chamber" of what it believes to be an error by the Trial Chamber."[744] The Prosecution maintains that the Trial Chamber "erroneously gave Drago Josipovi} a lower sentence for the Count of *persecution (10 years imprisonment)* than for *murder (15 years imprisonment)*."[745] In its Reply, the Prosecution submits that, in the past, the Appeals Chamber has corrected propositions of law or holdings of the Trial Chamber even if they did not affect the outcome of the impugned decision.[746] It submits that if this error remains uncorrected, it will inevitably carry some weight in the future conduct of cases before the Tribunal. On this basis it asks that the Appeals Chamber note the above error "and make an appropriate correction, in the interests of justice and out of concern for the development of the Tribunal's jurisprudence."[747]

469. This allegation was not included in the Prosecution's notice of appeal, nor does it appear in its original Prosecution Appeal Brief. It was first pointed out in the Prosecution Amended Appeal Brief as a side issue, which appears to have no relation to the Prosecution's filed grounds of appeal.[748] In addition, at that time, the allegation was not made in the precise terms set out now in the Prosecution Reply. The Prosecution simply stated that it was taking the opportunity to appraise the Appeals Chamber of what it believed was an error in sentencing Josipovic.

470. The Appeals Chamber considers that the Prosecution has failed to justify adequately why the Appeals Chamber should consider this point. In addition, no application has been made to add it as an additional ground of appeal, based on, for example, the Appeals Chamber's recognised jurisdiction to consider, in certain circumstances, questions of "general significance for the Tribunal's jurisprudence."[749] Appellants should not be permitted to side-step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point out errors as and when they believe they have been identified.

[744] Prosecution Amended Appeal Brief, para. 3.9.
[745] Prosecution Amended Appeal Brief, para. 3.10.
[746] Prosecution Reply to Josipovi}, para. 2.20.
[747] Prosecution Reply to Josipovi}, para. 2.20. During the Appeal Hearing, the Prosecution again requested that the Appeals Chamber pronounce *obiter* on this question, stating that although it "believes that the total sentence handed down against Drago Josipovic is appropriate in view of the severity of his conduct…the way the sentencing was set out is, nonetheless, in error." Appeal Transcript, 604; *see also* Appeal Transcript, 835 ("perhaps an obiter pronouncement as to the correct imposition of sentence for persecution and murder under the circumstances would suffice and is appropriate"); Appeal Transcript, 891-892 and 932.
[748] Prosecution Amended Appeal Brief, para. 3.12 (stating that it intended to make further submissions on this error in its Prosecution Response regarding the appeal of Drago Josipovi}).
[749] *See, e.g., Tadic* Appeal Judgement, para. 281.

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471. For these reasons, the Appeals Chamber considers that it is not properly seised of this question and the Prosecution's request for correction is denied.

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X. DISPOSITION

For the foregoing reasons:

A. <u>The appeals of Zoran and Mirjan Kupreškic against conviction</u>

The Appeals Chamber unanimously:

ALLOWS Zoran and Mirjan Kupre{ki}'s ground of appeal objecting to the Trial Chamber's decision to return convictions under count 1 of the Amended Indictment on the basis of material facts not pleaded therein, namely participation in the attack on the house of Suhret Ahmic on 16 April 1993.

ALLOWS Zoran and Mirjan Kupre{ki}'s ground of appeal objecting to the Trial Chamber's decision to rely upon the identification evidence of Witness H to conclude that Zoran and Mirjan Kupreškic participated in the attack on the house of Suhret Ahmic on 16 April 1993, thereby committing an act of persecution under count 1 of the Amended Indictment.

In light of additional evidence admitted on appeal, ALLOWS Zoran and Mirjan Kupre{ki}'s ground of appeal objecting to the Trial Chamber's finding that they provided local knowledge and the use of their houses as bases for the forces attacking Ahmici on 16 April 1993, thereby committing an act of persecution under count 1 of the Amended Indictment.

ALLOWS Zoran Kupre{ki}'s ground of appeal objecting to the Trial Chamber's finding that he bears criminal responsibility for persecution stemming back to October 1992, under count 1 of the Amended Indictment, and applies this finding also to Mirjan Kupre{ki}.

DISMISSES or DECLINES TO CONSIDER all other grounds of appeal raised by Zoran and Mirjan Kupre{ki}.

Accordingly, the Appeals Chamber REVERSES the convictions of Zoran Kupreškic and Mirjan Kupreškic for persecution under count 1 of the Amended Indictment and FINDS Zoran Kupre{ki} and Mirjan Kupre{ki} not guilty on this count.

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B. The appeal of Vlatko Kupreškic against conviction

The Appeals Chamber unanimously:

In light of additional evidence admitted on appeal, ALLOWS Vlatko Kupre{ki}'s ground of appeal objecting to the Trial Chamber's finding that he was an Operations Officer for the Prevention of Crimes of Particular State Interest at the time of the 16 April 1993 Ahmici attack.

ALLOWS Vlatko Kupre{ki}'s ground of appeal objecting to the Trial Chamber's finding that he assisted with the 16 April 1993 attack on Ahmici by unloading weapons from his car in October 1992 and that he thereby aided and abetted persecution under count 1 of the Amended Indictment.

ALLOWS Vlatko Kupre{ki}'s ground of appeal objecting to the Trial Chamber's inference that, merely by virtue of his presence outside the Hotel Vitez at around 2 p.m. or 3 p.m. on 15 April 1995, he thereby aided and abetted persecution under count 1 of the Amended Indictment.

In light of additional evidence admitted on appeal, ALLOWS Vlatko Kupre{ki}'s ground of appeal objecting to the Trial Chamber's finding that there were troops at his house in the early evening of 15 April 1993 and that he thereby aided and abetted persecution as charged in count 1 of the Amended Indictment by allowing his house to be used as a staging area for the attacking forces.

ALLOWS Vlatko Kupre{ki}'s ground of appeal objecting to the Trial Chamber's inference that, on the basis of witness testimony placing him outside the house of Suhret Ahmic after it was attacked on 16 April 1993, he was ready to lend assistance to the attacking forces and that he thereby aided and abetted persecution as charged in count 1 of the Amended Indictment.

Accordingly, the Appeals Chamber REVERSES Vlatko Kupreškic's conviction for persecution under count 1 of the Amended Indictment and FINDS Vlatko Kupre{ki} not guilty on this count.

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C. The appeals of Drago Josipovic against conviction and sentence

1. Conviction

The Appeals Chamber unanimously:

ALLOWS Drago Josipovi}'s ground of appeal objecting to the Trial Chamber's decision to return convictions under count 1 of the Amended Indictment on the basis of material facts not pleaded therein, namely participation in the attack on the house of Nazif Ahmic, but FINDS that no remedy follows except with respect to his sentence (addressed below).

ALLOWS Drago Josipovi}'s ground of appeal objecting to the Trial Chamber's inference that he was in a position of command during the Ahmi}i attack on 16 April 1993.

DISMISSES all other grounds of appeal raised by Drago Josipovi}'s against his conviction.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Drago Josipovic on count 1, count 16 and count 18 of the Amended Indictment (adjustments to his sentence are set out below).

2. Sentence

The Appeals Chamber unanimously:

Having previously found that the Trial Chamber erred in concluding that Drago Josipovi} played a commanding role during the attack on the house of Nazif Ahmi}, FINDS that the Trial Chamber erred in relying upon this in aggravation of Drago Josipovi}'s sentence.

Having previously found that the Trial Chamber erred in considering Drago Josipovi}'s participation in the attack on the house of Nazif Ahmi} as part of his persecution conviction under count 1, FINDS that the bases for Drago Josipovi}'s conviction under count 1 are now reduced.

DISMISSES all other grounds of appeal raised by Drago Josipovi} against his sentence.

Accordingly, the Appeals Chamber REVISES Drago Josipovi}'s total sentence from FIFTEEN years of imprisonment to TWELVE years of imprisonment.

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D. Appeals of Vladimir Šantic against conviction and sentence

1. Conviction

The Appeals Chamber unanimously:

ALLOWS Vladimir [anti}'s ground of appeal objecting to the Trial Chamber's implicit finding (referred to in the sentencing section of the Trial Judgement) that he assisted in the strategic planning of the 16 April 1993 Ahmici attack.

DISMISSES all other grounds of appeal raised by Vladimir [anti} against his conviction.

Accordingly, the Appeals Chamber AFFIRMS the convictions of Vladimir Šantic under count 1, count 16 and count 18 of the Amended Indictment (adjustments to sentence are set out below).

2. Sentence

The Appeals Chamber unanimously:

Having previously found that the Trial Chamber erred in finding that Vladimir [anti} assisted in the strategic planning of the entire Ahmi}i attack, ALLOWS his ground of appeal objecting to the Trial Chamber consideration of this factor in aggravation of his sentence.

ALLOWS Vladimir [anti}'s ground of appeal based on the argument that his sentence should be reduced in light of his acceptance of guilt and his substantial co-operation with the Prosecution.

DISMISSES all other grounds of appeal raised by Vladimir [anti} against his sentence.

Accordingly, the Appeals Chamber REVISES Vladimir [anti}'s total sentence from TWENTY-FIVE years of imprisonment to EIGHTEEN years of imprisonment.

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E. The Prosecution's appeal on the issues of cumulative charging and cumulative convictions based on the same acts relating to Drago Josipovic and Vladimir Šantic

The Appeals Chamber unanimously:

ALLOWS the Prosecution's appeal against the Trial Chamber's ruling that counts 17 (murder as a violation of the laws or customs of war under Article 3 of the Statute) and 19 (cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute) were improperly charged cumulatively with the counts containing Article 5 charges for murder and for inhumane acts as crimes against humanity.

ALLOWS the Prosecution's appeal against the Trial Chamber's acquittal of Drago Josipovic and Vladimir Šantic under counts 17 and 19 of the Amended Indictment on the basis of cumulative convictions considerations.

Accordingly, the Appeals Chamber REVERSES the Trial Chamber's acquittal of Drago Josipovic and Vladimir Šantic under counts 17 and 19 of the Amended Indictment and FINDS Drago Josipovi} and Vladimir [anti} GUILTY on each of these counts.

F. The appeal of Drago Josipovic on the issue of cumulative convictions

The Appeals Chamber unanimously:

DISMISSES Drago Josipovi}'s ground of appeal by which he complains that he was impermissibly charged and convicted cumulatively of murder and other inhumane acts as crimes against humanity.

DISMISSES Drago Josipovi}'s ground of appeal by which he complains that he was impermissibly charged with both murder and persecution as a crime against humanity based on the same underlying conduct.

G. Credit for time served

Pursuant to Rule 101 (C) of the Rules, an accused is entitled to credit for time spent in custody "pending surrender to the Tribunal or pending trial or appeal." Accordingly, both Drago Josipovi}

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and Vladimir [anti} are entitled to credit for the time they have each spent in custody since their surrender to the Tribunal on 6 October 1997.

H. Enforcement of Sentences

In accordance with Rules 103 (C) and 107 of the Rules, the Appeals Chamber orders that Drago Josipovi} and Vladimir [anti} are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfers to the State(s) where their respective sentences will be served.

In accordance with Rule 99 (A) of the Rules, the Appeals Chamber orders that Zoran Kupre{ki}, Mirjan Kupre{ki} and Vlatko Kupre{ki}, be released immediately from the United Nations Detention Unit.

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

__________________ __________________ __________________

Patricia M Wald
Presiding

Lal Chand Vohrah

Rafael Nieto-Navia

Fausto Pocar

Liu Daqun

Dated this 23rd day of October 2001

At The Hague

The Netherlands

[Seal of the Tribunal]

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XI. ANNEX A: PROCEDURAL BACKGROUND

A. The Appeals

1. Notices of Appeal

472. Notices of appeal against the Trial Judgement were filed by the Defendants on the following dates: 24 January 2000 by Vladimir Šanti}; 26 January 2000 by Vlatko Kupre{ki} and Drago Josipovi}; 27 January 2000 by Zoran Kupre{ki}; 28 January 2000 by Mirjan Kupre{ki}. The Prosecution filed its notice of appeal on 31 January 2000.

2. Applications for extension of time to file appeal briefs

473. On 17 March 2000, Zoran and Mirjan Kupre{ki} and Drago Josipovi} filed an application for an extension of the time limit for filing their appeal briefs under Rule 111.[750] Similar requests were made on behalf of Vladimir Šantic and Vlatko Kupre{ki}.[751] The Prosecution responded to these applications,[752] and a reply was filed to those responses.[753] The Appeals Chamber ordered that the appeal briefs should be filed by 2 June 2000.[754] Subsequently, a further extension of 30 days was sought by Zoran and Mirjan Kupre{ki}, Drago Josipovi} and Vladimir Šantic,[755] which was opposed by the Prosecution.[756] On 16 May 2000, the Appeals Chamber ordered that all Defendants should file their appeal briefs on 2 July 2000.[757]

474. On 18 May 2000, the Registrar granted Vlatko Kupre{ki}'s request to withdraw the assignment of counsel acting on his behalf, and new counsel was assigned.[758] The new counsel

[750] The Request of the Counsels of Zoran and Mirjan Kupre{ki} and Frago [*sic*] Josipovi} for the Prolongation of the Appeal Period of the Verdict From 14.1.2000, 17 March 2000.
[751] The Request of the Counsel of Vladimir Šanti} for the Enlargement of the Time Limit for the Appeal Against the Judgement of 14 January 2000, 23 March 2000; Request for the Extension of Time Limit for the Appeal Against the Judgement of 14 January 2000in the Case of the Accused Vlatko Kupre{ki} (*Confidential*), 27 March 2000.
[752] Prosecution Response to the Defence Requests for an Extension of Time Filed on 17 March 2000 and 23 March 2000 and Motion for a Scheduling Order, 27 March 2000; Prosecution Response to the Confidential Defence Request for an Extension of Time Filed on 27 March 2000 (*Confidential*), 29 March 2000.
[753] Reply of the Counsels of Zoran Kupre{ki}, Mirjan Kupre{ki} and Drago Josipovi} Considering the Objection of the Prosecutor to the Counsel's [*sic*] Proposal for Prolongation of the Term for Explanation of the Appeal, 31 March 2000.
[754] Order Granting Extension of Time and Scheduling Order, 18 April 2000.
[755] Petition of the Counsels of Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi} and Vladimir Šantic with Which They Propose the Approval of the Petition Against the Decision of the Appeal Chamber from 18.4.00 and Lodge the Complaint or Alternatively the Repeated Proposal for Prolongation of the Term for the Appeal, 25 April 2000.
[756] Prosecution Response to the Defence Request for an Extension of Time Filed on 25 April 2000, 5 May 2000.
[757] Decision on Petition of the Counsels of Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi} and Vladmir Šantic, 16 May 2000.
[758] Decision of the Registrar of 18 May 2000 (withdrawing the Assignment of Mr. Krajina and Mr. Par as Counsel for the Vlatko Kupre{ki}); Decision of the Registrar of 24 May 2000 (appointing Mr. Abell as counsel for Vlatko Kupre{ki}, 24 May 2000; Decision of the Registrar of 16 June 200 (appointing Mr. Livingston as co-counsel for Vlatko Kupre{ki}).

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applied for a two-month extension for filing Vlatko Kupre{ki}'s appeal brief as they were experiencing difficulty in obtaining the case papers.[759] This was followed by another application for an extension of time by Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi} and Vladimir Šantic, in order to review documents that had recently become available because of the opening of the archives of the Croatian intelligence service.[760] The pre-appeal Judge granted Vlatko Kupre{ki}'s application, extending the time-limit for filing his appeal brief to 4 September 2000, but denied the other Defendants' request for an extension of time.[761] Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi} and Vladimir Šantic requested that the Appeals Chamber reconsider this decision.[762] On 4 July 2000, the full bench of the Appeals Chamber rejected that request.[763]

3. Filing of briefs on appeal

475. The Prosecution filed its appeal brief on 3 July 2000.[764] The same day, appeal briefs were filed by Zoran Kupre{ki},[765] Mirjan Kupre{ki},[766] Drago Josipovi},[767] and Vladimir Šantic.[768] In relation to the appeal briefs of Zoran and Mirjan Kupre{ki}, documents were attached which had not been part of the trial record.[769] Drago Josipovi}'s appeal brief also referred to material not before the Trial Chamber.

476. Motions to extend the time-limits for filing the respondent's briefs under Rule 112 were filed by the Prosecution,[770] and Vladimir Šantic and Drago Josipovi}.[771] Also, the Prosecution filed a confidential motion requesting that the Appeals Chamber order Zoran and Mirjan Kupre{ki} and Drago Josipovi} to file their motions pursuant to Rule 115 for the admission of the material

[759] Motion for Extension of Time to File Appellant's Brief on Behalf of Vlatko Kupre{ki}, 27 June 2000.

[760] Motion for Extension of the Time File [*sic*] Appelation's [*sic*] Brief on Behalf of Zoran Kupre{ki} Mirjan Kupre{ki}, Drago Josipovi} and Vladimir "Vlado" Šantic, 28 June 2000. The Prosecution did not oppose any of the Defendants' requests for an extension based upon the need to obtain the complete case file. *See* Prosecution Response to the Motion for Extension of Time to File Appellant's Brief on Behalf of Vlatko Kupre{ki}, 29 June 2000.

[761] Order on Motions for Extension of Time, 29 June 2000.

[762] Appeal of the Counsel of Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi} and Vladmir [*sic*] Šantic Against the Decision of the Pre-Appeal Judge Mohamed Bennouna Dated 29.6.00, 30 June 2000.

[763] Decision on "Appeal of the Counsel of Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi}, and Vladimir Šantic Against the Decision of the Pre-Appeal Judge from 29 June 2000", 4 July 2000.

[764] Prosecution's Appeal Brief, 3 July 2000.

[765] Appeal Reasons of the Counsels of Zoran Kupre{ki} Against the ICTY Verdict from 15.1.00 IT-95-16-T (*Partly Confidential*), 3 July 2000.

[766] Defendant's Appellate Brief (*Partly Confidential*), 3 July 2000.

[767] Drago Josipovi}'s Appeal Brief (*Confidential*), 3 July 2000.

[768] Appelate [*sic*] Brief of Vladimir Šantic, 3 July 2000. Vladimir Šantic subsequently withdrew that part of his client's appeal based on the defence of alibi. *See* Motion for the Withdrawal of the part of the Appeal based on the alibi Defence of the Appellant Vladimir Šantic, 30 October, 2000.

[769] Zoran Kupre{ki} attached 20 documents to his brief. There were four documents related to his family; 11 documents related to the welfare of his family; four "Hrvatska Information Slu`ba" (Croatian Intelligence Service)(HIS) reports from Croatian archives; and a report from a doctor relating to post-traumatic stress disorder. Mirjan Kupre{ki} attached six documents. Five of these related to his family and one was a HIS intelligence report.

[770] Motion for Extension of the Time to File Respondent's Brief of the Prosecution, 19 July 2000.

[771] Motion for Extension of Time to File Respondent's Brief of the Defence, 21 July 2000. The Prosecution responded to the latter. *See* Prosecution's Response to Motion for Extension of Time to File Respondent's Brief, 27 July 2000.

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attached to, or referred to in, their appeal briefs.[772] On 1 August 2000, the Appeals Chamber ordered that (i) the time limit for filing the respondent's briefs for all parties be extended to 4 October 2000, (ii) the Defendants supply an index of the documents attached to their appeal briefs by 4 September 2000 indicating whether the documents were before the Trial Chamber or not, and (iii) in respect of any document not before the Trial Chamber, a motion pursuant to Rule 115 was to be filed by 4 September 2000.[773] Zoran and Mirjan Kupre{ki} and Drago Josipovi} filed a motion for an extension of the deadline for filing their Rule 115 motions,[774] to which the Prosecution responded.[775] On 29 August 2000, the Appeals Chamber extended the date for filing the motions under Rule 115 to 4 October 2000, and further ordered that the respondent's briefs of all parties "shall be filed two weeks after a Decision on the Motion for additional evidence is issued".[776] This had the effect of suspending the appeal briefing schedule until the determination of the additional evidence motions. As the admission of additional evidence was decided in a series of decisions, the briefing schedule for the filing of respondent's briefs under Rule 112 and reply briefs under Rule 113 did not resume until the Appeals Chamber issued its scheduling order of 30 May 2001.[777]

477. On 5 September 2000, Vlatko Kupre{ki} filed his appeal brief under Rule 111.[778]

478. The Prosecution filed its respondent's brief under Rule 112 on 28 June 2001.[779] Because of the delay in the distribution of this document to the Defendants, the Appeals Chamber extended the time for the filing of their reply briefs under Rule 113 until 18 July 2001.[780] Replies were filed on

[772] Motion for a Scheduling Order for A Single Filing Date of Motions Under Rule 115 or, in the Alternative, Motion for an Order Rejecting The Admission of Additional Evidence (*Confidential*), 31 July 2000.
[773] Order on Motions for Extension of Time, 1 August 2000.
[774] Motion of the Counsels of Zoran Kupre{ki}, Mirjan Kupre{ki} and Drago Josipovi} With Which They Request The Extention [*sic*] of the Time Limit, 16 August 2000.
[775] Prosecution's Response to "Motion of the Counsels of Zoran Kupre{ki}, Mirjan Kupre{ki} and Drago Josipovi} With Which They Request The Extension of the Time Limit", 25 August 2000.
[776] Order, 29 August 2000.
[777] Scheduling Order, 30 May 2001.
[778] Confidential Appellant's Brief on Conviction on Behalf of Vlatko Kupre{ki}, 5 September 2001; Appellant's Brief on Sentence on Behalf of Vlatko Kupre{ki} (*Confidential*), 5 September 2000. Vlatko Kupre{ki} filed his appeal brief one day late. Therefore, he requested an extension of time. *See* Motion for Extension of Time to File Appellant's Brief on Behalf of Vlatko Kupre{ki}, 11 September 2000 (seeking a retrospective extension of time for the unintentional late filing). The Appeals Chamber granted this motion. *See* Order on Application for Extension of Time, 13 September 2000. Counsel for Vlatko Kupre{ki} subsequently filed a public version of the brief. *See* Redacted Appellant's Brief on Conviction on Behalf on Vlatko Kupre{ki}, 18 July 2001.
[779] Prosecution's Respondent's Brief *(Confidential)*, 28 June 2001. In its Order of 2 July 2001, the Appeals Chamber accepted the filing as valid despite the fact that it exceeded the prescribed page limits under the Practice Direction and that the Prosecution had failed to seek advance authorisation from the Appeals Chamber to file an over-sized document. *See* Practice Direction on the Lengths of Briefs and Motions (IT/184). The prosecution filed a public version of their respondent's brief. *See* Public Redacted Version of the Prosecution's "Respondent's Brief" Filed on the 28 June 2001", 18 July 2001.
[780] Scheduling Order Varying Time-Limit for Filing of Appellants' Brief in Reply, 5 July 2001. This order was varied by further extending the time-limit for Zoran and Mirjan Kupre{ki} to file their brief in reply until no later than 2 p.m. on 20 July 2001. *See* Scheduling Order Varying Time Limit for Filing of Appellants' Brief in Reply, 12 July 2001.

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18 July 2001 by Vlatko Kupre{ki},[781] Vladimir Šantic[782] and Drago Josipovi}.[783] Zoran and Mirjan Kupre{ki} filed a joint reply brief on 20 July 2001.[784]

479. On 15 May 2001, the Prosecution applied for leave to file an amended appeal brief and attached the amended appeal brief to the application.[785] The Appeals Chamber granted the application on 30 May 2001.[786] Out of all the Defendants, only Vladimir Šantic and Drago Josipovi} were affected by the Prosecution's appeal, and they filed their respondent's briefs on the 2 and 6 July 2001 respectively.[787] The Prosecution filed its replies to both responses on 16 July 2001.[788]

480. Pursuant to a scheduling order of the Appeals Chamber,[789] the Defendants were invited to file supplementary briefs explaining how the additional evidence that had been admitted by the Appeals Chamber affected the arguments set out in their appeal briefs. On 12 June 2001, Vladimir Šantic filed a supplementary brief.[790] On 13 June 2001, Zoran Kupre{ki}, Vlatko Kupre{ki} and Mirjan Kupre{ki} filed supplementary briefs.[791] Drago Josipovi} filed a supplementary brief on 14 June 2001.[792]

B. Rule 115 Motions

481. During the appellate proceedings, 26 applications for the admission of additional evidence were filed before the Appeals Chamber, leading to seven decisions. The first and second decisions were rendered on 26 February 2001 and 11 April 2001, after the filing of the following applications.

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[781] Reply to Respondent's Brief on Behalf of Vlatko Kupre{ki} (*Confidential*), 18 July 2001.
[782] Vladimir Šantic Briief [*sic*] in Replay [*sic*] Under Rule 113 of the Rules of Procedure and Evidence, 18 July 2001.
[783] Partly Confidential Appellant's Brief of Argument Under Rule 113 in reply to the Respondent's Brief of Argument of the Prosecution, 18 July 2001.
[784] Brief in Reply by Zoran and Mirjan Kupre{ki}, 20 July 2001.
[785] Prosecution's Motion Seeking Leave to File an Amended Appeal Brief, 15 May 2001.
[786] Decision on the Prosecution's Motion Seeking Leave to File an Amended Appeal Brief, 30 May 2001.
[787] Defence's Response of the Accused Vladimir [anti}on Prosecutor's Appeal Brief, 2 July 2001; Respondent's Brief of Argument under Rule 112 in Response to the Prosecution's Amended Appeal Brief, 6 July 2001.
[788] Prosecution Brief in Reply to the Respondent's Brief of Vladimir [anti} to the Prosecution's Amended Appeal Brief, 16 July 2001; Prosecution Brief in Reply to the Respondent's Brief of Drago Josipovi} in Response to the Prosecution's Amended Appeal Brief, 16 July 2001
[789] Scheduling Order, 30 May 2001.
[790] The Motion of the Appellant Vladimir Šantic According to the Order of the Appeals Chamber Dated 30 May 2001 (*Confidential*), 12 June 2001.
[791] Motion of the Counsel of Zoran Kupre{ki} With Which he Ammends [*sic*] the Letter of Appeal Based on the Court Acceptance of New Proofs (*Confidential*), 13 June 2001; Supplemental Appellant's Brief, on Behalf of Vlatko Kupre{ki}, Concerning Effect of Additional Evidence, Filed Pursuant to Scheduling Order Dated 20 May 2001 (*Confidential*), 13 June 2001; Confidential Suplemental [*sic*] Brief By Mirjan Kupre{ki} (*Confidential*), 13 June 2001. Following the Appeals Chamber's Order of 3 July 2001, public versions of Zoran and Mirjan Kupre{ki}'s supplemental briefs were filed on 17 July 2001.
[792] Supplemental Appellant's Brief Filed Pursuant to the Scheduling Order Dated 30th May 2001 on Behalf of Drago Josipovi} Partly Ex Parte Confidential (*Partly Confidential*), 14 June 2001.

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482. On 5 September 2000, Vlatko Kupre{ki} filed a motion in which he sought the admission of the statements of 19 witnesses and numerous exhibits and documentary evidence.[793]

483. On 31 August 2000, Drago Josipovi} filed a motion requesting the admission of a video recording dated 16 April 2000 of the visibility in [anti}i.[794] On 2 October 2000, he requested the admission of a statement provided by Witness CA, a witness during the trial, dated 15 September 2000.[795] On 4 October 2000, he requested the admission of four documents obtained from the Croatian State Archives.[796] A fourth motion was also filed that day, however, this filing was a duplicate of the second motion.[797] A fifth motion was filed on 12 December 2000 requesting the admission of the statement of Abdulah Serdarevi}.[798]

484. In addition to the documents attached to their appeal briefs, Zoran and Mirjan Kupre{ki} filed three joint motions for the admission of additional evidence. Their first motion of 4 October 2000 sought the admission of 20 documents from the Croatian State Archives and three video recordings.[799] The second motion of 15 November 2000 requested the admission of three further documents from the Croatian State Archives.[800] On 18 December 2000, their third motion sought

[793] Confidential Appellant's Brief and Motion, Pursuant to Rule 115, on Behalf of the Appellant Vlatko Kupre{ki}, 5 September 2000. Vlatko Kupre{ki} also filed a motion pursuant to Rule 75 for protective measures seeking pseudonyms for eight witnesses in his appeal brief and in his Rule 115 motion. *See* Confidential Motion, Pursuant to Rule 75, For Measures to be Taken for the Protection of Certain Witnesses Referred to in the Rule 115 Motion and Appellant's Brief on Behalf of Vlatko Kupre{ki}, 5 September 2000. This motion was granted by the Appeals Chamber. *See* Order on Motion of Vlatko Kupre{ki} for the Protection of Certain Witnesses (*Confidential, Ex Parte*), 26 February 2001. As the deadline for the filing of Rule 115 motions in relation to the other four Defendants was set as 4 October 2000 by the order of the Appeals Chamber of 29 August 2000, the Prosecution sought clarification as to when it should respond to Vlatko Kupre{ki}'s Rule 115 Motion. *See* Prosecution Motion for Clarification of the Time-Limit for Filing Response to Rule 115 Motion of Vlatko Kupre{ki}, or Alternatively for an Extension of Time (*Confidential)*, 15 September 2000. This was followed by a "Reply on Behalf of Vlatko Kupre{ki} to 'Prosecution Motion for Clarification of Time Limit for Filing Response to Rule 115 Motion for Vlatko Kupre{ki} or Alternatively for an Extension of Time', 25 September 2000". The Appeals Chamber ordered that the Prosecution could respond to Vlatko Kupre{ki}'s motion, as well as any other motions filed on or before 4 October 2000 by the other appellants, ten days after all the documents referred to in the motions were filed in an official language of the Tribunal. *See* Order on Motion for Clarification, 29 September 2000. Subsequently, clarification of this order was sought by Vlatko Kupre{ki} *See* Motion for Clarification of Order of Appeals' [*sic*] Chamber Dated 29th September 2000, 9 October 2000. The Appeals Chamber ordered that its order of 29 September 2000 did not need further clarification. *See* Order on Motion for Clarification, 18 October 2000.
[794] Motion for Additional Evidence, 31 August 2000.
[795] Request for the Derivation of Additional Proofs, 2 October 2000.
[796] Request of the Counsel of Drago Josipovi} for the Derivation of Additional Proofs Considering Rule 115 of the Book of Rules and Procedure [*sic*], 4 October 2000.
[797] Request for the Derivation of Additional Proofs, 4 October 2000.
[798] Request for Derivation of Additional Proofs, 12 December 2000.
[799] Motion of the Counsel of Zoran and Mirjan Kupre{ki} for the Acceptance of Additional Evidence, Which was Not Available at the Time of the Hearing Before the Trial Chamber (*Confidential*), 4 October 2000.
[800] Petition of the Counsels of Zoran and Mirjan Kupre{ki} for Derivation of Additional Proofs Before the Appeal Chamber, Which Proofs of the Counsels Were not Available During the Trial Before the Hearing Chamber (*Confidential*), 15 November 2000.

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the admission of the same witness statement sought to be admitted by Drago Josipovi} in his fifth motion (that of Abdulah Serdarevi}) and 20 documents from the Croatian State Archives.[801]

485. The Prosecution filed three separate responses to the Defendants' motions. On 20 November 2000, the Prosecution filed its response to all of the motions filed up until and including, 15 November 2000.[802] On 21 December 2000, the Prosecution filed its response to Drago Josipovi}'s fifth motion.[803] On 22 January 2001, the Prosecution filed its response to Zoran and Mirjan Kupre{ki}'s third motion.[804]

486. Replies to the first two Prosecution responses were filed on 18 December 2000 by Vlatko Kupre{ki},[805] Zoran and Mirjan Kupre{ki},[806] and Drago Josipovi}.[807] On 30 January 2001, Zoran and Mirjan Kupre{ki} filed a reply to the third Prosecution response.[808]

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[801] Motion No. 3 of the Counsels of Zoran and Mirjan Kupre{ki} with which they Request the Derivation of Additional Proofs, Based On the Rule 115 of the Rules of Procedure and Evidence, 18 December 2000.

[802] Prosecution's Consolidated Response to the Motions by Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki} and Drago Josipovi} to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 20 November 2000. This response was amended. *See* Corrigendum to Prosecution's Consolidated Response to the Motions by Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki} and Drago Josipovi} to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 22 November 2000.

[803] Prosecution Response to Motion Entitled "Request for Derivation of Additional Proofs" Filed 12 December 2000 by Drago Josipovi} to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 21 December 2000.

[804] Prosecution Response to "Motion No.3 of the Counsels of Zoran and Mirjan Kupre{ki} with Which They Request the Derivation of Additional Proofs, Based on the Rule 115 of the Rules of Procedure and Evidence"(*Confidential*), 22 January 2001. This filing was preceded by a Prosecution motion for an extension of time and an order of the Appeals Chamber granting that request. *See* Prosecution Motion for Extension of Time to File a Response to "Motion No. 3 of the Counsels of Zoran and Mirjan Kupre{ki}" Filed on 18 December 2000 (*Confidential*), 21 December 2000; Order on Prosecution Motion for an Extension of Time to File Response to Motion of Zoran and Mirjan Kupre{ki} (*Confidential, Partly Ex Parte*), 11 January 2001.

[805] Reply to the Prosecution's Response to Motion by Vlatko Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115(*Confidential*), 18 December 2000.

[806] Reply to the Prosecution's Consolidated Response to the Motions by Zoran, Mirjan, Vlatko Kupre{ki} and Drago Josipovi} to Admit Additional Evidence Pursuant to Rule 115 by Zoran and Mirjan Kupre{ki} (*Confidential*), 18 December 2000.

[807] Reply to the Prosecution's Consolidated Response to the Motions By Zoran, Mirjan, Vlatko Kupre{ki} and Drago Josipovi} to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 18 December 2000. These replies were filed after the Appeals Chamber granted a request by the four Defendants for an extension of time in which to file their replies: Order on Motions for Extension of Time, 13 December 2000. This order was preceded by the following filings. *See* Motion For Extension of Time to File A Reply to the Prosecution's Response to Motion to Admit Additional Evidence Pursuant to Rule 115 By Vlatko Kupre{ki}, 4 December 2000; The Joinder of the Counsel of Zoran and Mirjan Kupre{ki} and Drago Josipovi} to Motion for Extention [*sic*] of Time to Reply to the Prosecution Response to Motion to Admit Additional evidence According to the Rule 115 of the Procedure and Evidence, 7 December 2000; Prosecution's Response to Motions By Vlatko Kupre{ki}, Zoran Kupre{ki}, Mirjan Kupre{ki} and Drago Josipovi} for an Extension of Time to File A Reply in Relation to Motions to Admit Additional Evidence Pursuant to Rule 115, 7 December 2000.

[808] Reply to the Prosecution's Response to the Motion By Zoran and Mirjan Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (*Confidential*), 30 January 2001. Drago Josipovi} joined in this reply. *See* Joinder of the Accused Drago Josipovi} to Reply to the Prosecution Response to the Motion by Zoran and Mirjan Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence Dated January 2001(*Confidential*), 5 February 2001. The Prosecution opposed the filing of these replies on the basis that they were untimely. *See* Prosecution's Motion Opposing the Filing of the Reply of the Appellants Zoran and Mirjan Kupre{ki} on 30 January 2001 and The Reply of the Appellant Drago Josipovi} on 5 February 2001 (*Confidential*), 12 February 2001. However, the Appeals Chamber accepted the replies in its decision on the motions to admit additional

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487. On 13 December 2000, a status conference was held during which Vlatko Kupre{ki} requested an oral hearing to advance submissions with respect to his motion to admit additional evidence.[809] The other Defendants supported this request. The Prosecution filed a response,[810] and Vlatko Kupre{ki} replied.[811]

488. The admissibility of some of the evidence sought to be admitted under Rule 115 was determined after a review of the proposed additional evidence and consideration of the written submissions of the parties.[812] The admissibility of the remainder of the additional evidence was determined in a decision following an oral hearing on 30 March 2001.[813] As a result of the decision of 26 February 2001 and the decision of 11 April 2001,[814] rendered after the oral hearing of 30 March 2001, the Appeals Chamber determined the motions to admit additional evidence as follows.

489. The motion of Vlatko Kupre{ki} was granted insofar as the Appeals Chamber admitted the evidence of Witness ADA, Miro Lazarevi} and exhibits AD 4/3, AD 5/3 and AD 6/3; evidence of Witness ADB and exhibits AD 8/3 and AD 9/3; evidence of Witness ADC and exhibit AD 11/3. In respect of the motions of Drago Josipovi}, his second motion was granted and the evidence of Witness CA was admitted before the Appeals Chamber; the four other motions were dismissed. The documents attached to the brief of Zoran Kupre{ki} were rejected on the basis that he had failed to file a motion to admit them under Rule 115. The Appeals Chamber held that Rule 115 did

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evidence. See Decision on the Motions of Appellants Vlatko Kupre{ki}, Drago Josipovi}, Zoran Kupre{ki} and Mirjan Kupre{ki} to Admit Additional Evidence, 26 February 2001.

[809] Appeal Transcript, 25. This request was repeated in Vlatko Kupre{ki}'s Confidential Reply to the Prosecution's Response to Motion by Vlatko Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115 (*Confidential*), 18 December 2000.

[810] Prosecution's Response to Request for Oral Hearing of Appellants' Motions to Admit Additional Evidence on Appeal, 19 January 2001.

[811] Reply on Behalf of Vlatko Kupre{ki} to Prosecution's Response to Request for Oral Hearing of Appellant's Motions to Admit Additional Evidence on Appeal, 24 January 2001.

[812] Decision on the Motions of Appellants Vlatko Kupre{ki}, Drago Josipovi}, Zoran Kupre{ki}, Mirjan Kupre{ki} to Admit Additional Evidence (*Confidential*), 26 February 2001. A redacted version of the decision was issued on 30 May 2001.

[813] The date for the oral hearing was determined in an order of the Appeals Chamber dated 14 March 2001. *See* Scheduling Order, 14 March 2001. Subsequently, the Prosecution attempted to re-schedule the oral hearing. *See* Prosecution's Urgent Motion for a Re-Scheduling of the Date of the Oral Hearing and Variation of the Order for Protection of Certain Witnesses (*Confidential*), 19 March 2001. Counsel for Vlatko Kupre{ki} responded. *See* Urgent Response on Behalf of Vlatko Kupre{ki} to Prosecution's Urgent Motion for a Re-Scheduling of the Date of Oral Hearing and Variation of Order for Protection of Certain Witnesses (*Confidential*), 23 March 2001. The Appeals Chamber denied the Prosecution motion and postponed the issue of whether the identity of the additional witnesses of Vlatko Kupre{ki} should be revealed. *See* Order of Clarification, 23 March 2001. In its decision of 11 April 2001, the Appeals Chamber dismissed the request to have the identities of the witnesses revealed. The Prosecution then renewed its request. *See* Prosecution's Urgent Motion for Variation of Order for Protection of Certain Witnesses (*Confidential*, *Ex Parte*), 20 April 2001. Vlatko Kupre{ki} responded. *See* Reply to the Prosecution's Urgent Motion for the Variation of Order for the Protection of Certain Witnesses (*Confidential*, *Ex Parte*) 25 April 2001. The Appeals Chamber allowed the Prosecution motion to the extent that the identity of the protected witnesses could be revealed only to persons carrying out investigative work on behalf of the Prosecution. *See* Order on Prosecution's Urgent Motion for Variation of Order For Protection of Certain Witnesses (*Confidential*, *Ex Parte*), 26 April 2001.

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not apply to the documents attached to Mirjan Kupre{ki}'s brief concerning his family, as they had been part of the trial record, and thus he could rely on these documents in his appeal. The Croatian document attached to his brief was rejected, as he too had failed to move for its admission. In respect of the motions of Zoran and Mirjan Kupre{ki}, eight documents from the Croatian State Archives relating to Zoran Kupre{ki}'s command role were admitted. All other Croatian documents were rejected. The video-recording of the HVO oath-taking ceremony was admitted subject to Zoran Kupre{ki} providing further information identifying which portions of the video purported to show him.[815] The other video-recordings of visibility at [anti}i were rejected, as was the statement of Serdarevi} Abdulah.

490. The third Appeals Chamber decision with respect to motions for the admission of additional evidence was rendered on 8 May 2001,[816] having received the following filings. On 21 March 2001, Zoran Kupre{ki} filed a motion seeking the admission of the following documents: Report of the Croatian Intelligence Service "Massacre in Ahmi}i"; Report of Dr. Karla Pospisil-Zavrski; 13 documents relating to the family of Zoran Kupre{ki}; Order of Milivoj Petkovi} dated 18 April 1993; and a Press Release dated 16 April 1993 issued by Operations Zone Central Bosnia Command Forward Post Vitez. The motion also asked the Appeals Chamber to question Witness SA and Asim Dzambasovi} and for the judgement of the Trial Chambers in the cases of *Prosecutor* v *Kordi} and ^erkez* and *Prosecutor* v *Furundžija* to be admitted into the appellate proceedings pursuant to the provision for judicial notice (Rule 94(B)).[817] The Prosecution responded to this motion on 2 April 2001,[818] to which Zoran Kupre{ki} replied to this response on 9 April 2001.[819] Drago Josipovi} filed a motion on 21 March 2001 seeking the following: for Witness AT to be

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[814] Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001 (*Confidential*), 11 April 2001. A public version of the decision was issued on 30 May 2001.

[815] This recording was conditionally admitted in the Appeals Chamber decision of 26 February 2001. Zoran and Mirjan Kupre{ki} requested, and were granted, an extension of time in which to comply with the condition. *See* Motion of the Counsels of Zoran and Mirjan Kupre{ki} Considering the Request for the Extention [*sic*] of Time-Limit (*Confidential*), 9 March 2001; Prosecution's Response to the Defence Motion Requesting an Extension of the Time-Limit (*Confidential*), 13 March 2001; Order on Application for Extension of Time, 16 March 2001. Zoran and Mirjan Kupre{ki} subsequently and jointly filed an additional motion in response to the decision. *See* Motion of the Counsel of Zorana I Mirjana Kupre{ki}a With Which They Comply to the Order of the Appealing Chamber From 26.2.01 (*Confidential*), 21 March 2001.

[816] Decisions on the Motions of Drago Josipovi} and Vlatko Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001.

[817] Motion No. 5 of the Counsel of Zoran Kupre{ki} With Which He Proposes the Derivation of New Proofs According to the Rule 115 of the Rules and Proposal for the Insight in the ITCY [*sic*] Verdict in the Case Prosecutor v Dario Kordi} and Mario ^erkez, and the Insight in the Verdict in the Case Prosecutor v Anto Furundžija Based on the Rule 94 B of the Book of Rules and Procedure (*Confidential*), 21 March 2001.

[818] Prosecution Response to "Motion No. 5 of the Counsel of Zoran Kupre{ki} with which he Proposes the Derivation of New Proofs According to the Rule 115 of the Rules and Proposal for the Insight in the ICTY Verdict in the Case Prosecutor v Dario Kordi} and Mario ^erkez, and the Insight in the Verdict in the Case Prosecutor v Anto Furundžija Based on the Rule 94(B) of the Book of Rules and Procedure" (*Confidential*), 2 April 2001.

[819] Motion of the Counsel of Zoran Kupre{ki} with Which He Answers to the Motion of the Prosecutor from 2.4.01(*Confidential*), 9 April 2001.

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questioned before the Appeals Chamber, for the judgement in *Prosecutor* v *Kordi} and ^erkez* to be admitted into the appellate proceedings, and for the Order of Milivoj Petkovi} to be admitted into evidence.[820] The Prosecution responded to this motion on 2 April 2001.[821] Vlatko Kupre{ki} filed a motion on 6 April 2001 seeking the admission of the evidence of Witness AVK 9.[822] The Prosecution responded to this motion on 12 April 2001,[823] to which Vlatko Kupre{ki} filed a reply.[824] In its decision of 8 May 2001, the Appeals Chamber dismissed all of the above motions.[825]

491. The fourth Appeals Chamber decision on motions for the admission of additional evidence was rendered on 29 May 2001.[826] These motions, relating to disclosure issues, are discussed in the following section.

492. The fifth Appeals Chamber decision was rendered subsequent to an application by Zoran Kupre{ki} filed on 6 June 2001 for the admission of additional evidence. Zoran Kupre{ki} sought the admission of evidence relating to his wife's poor health condition.[827] The Prosecution opposed the application in its response of 18 June 2001.[828] On 28 June 2001, the Appeals Chamber dismissed the motion.[829]

493. On 15 June 2001, the Prosecution filed a motion to admit evidence in rebuttal to the additional evidence admitted under Rule 115.[830] The Prosecution sought the admission of two statements that, in its submission, undermined the credibility of Witness CA, whose statement had been admitted by the Appeals Chamber in its decision of 26 February 2001. Drago Josipovi} filed a

[820] Proposal of Drago Josipovi} for Derivation of Additional Proofs (*Confidential, Ex Parte*), 21 March 2001.
[821] Prosecution Response to "Proposal of Drago Josipovi} For Derivation of Additional Proofs" (*Confidential, Ex Parte*), 2 April 2000.
[822] Confidential Second Motion Pursuant to Rule 115 For Admission of Additional Evidence on Appeal by the Appellant, Vlatko Kupre{ki}, 6 April 2001.
[823] Prosecution Response to "Confidential Second Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant, Vlatko Kupre{ki}" (*Confidential, Ex Parte*), 12 April 2001.
[824] *Ex Parte* Confidential Reply to the 'Prosecution Response to Confidential Second Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant Vlatko Kupre{ki}', 23 April 2001.
[825] Decision on the Motions of Drago Josipovi}, Zoran Kupre{ki} and Vlatko Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001.
[826] Decision on Motions to Admit Material relating to Witness AT into Evidence Pursuant to Rule 115 and to Call Additional Witnesses.
[827] Motion of the Counsel of Zoran Kupre{ki} with Which He Proposes the Derivation of Additional Proof Considering the Rule 115 of Procedure and Evidence (*Confidential*), 6 June 2001.
[828] Prosecution's Response to "Motion of the Counsel of Zoran Kupre{ki} with Which He Proposes the Derivation of Additional Proof Considering the Rule 115 of Procedure and Evidence" (*Confidential*), 18 June 2001.
[829] Decision on Motion By Zoran Kupre{ki} for Admission of Additional Evidence, 28 June 2001.
[830] Prosecution Motion to Admit Evidence in Rebuttal to Additional Evidence Admitted Under Rule 115 (*Confidential*), 15 June 2001.

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response conceding that the evidence in rebuttal should be admitted.[831] On 6 July 2001, the Appeals Chamber admitted the statement into evidence.[832]

494. On 17 July 2001, the Appeals Chamber rendered a sixth decision,[833] in which it dismissed two motions by Zoran and Mirjan Kupre{ki} for the admission of certain material as additional evidence.[834] Vladimir Šantic had joined in one of these motions.[835]

495. On the same day, the Appeals Chamber rendered the seventh decision on additional evidence,[836] dismissing a motion by Zoran and Mirjan Kupre{ki} that sought to admit, as additional evidence, certain statements in the form of, *inter alia*, a newspaper interview and a petition.[837]

1. Disclosure and related issues

496. On 6 November 2000, Zoran and Mirjan Kupre{ki} filed a motion for the disclosure of the statements of Witness AT, who was a Prosecution witness in the case of *Prosecutor* v *Kordi} and ^erkez*.[838] The Prosecution responded to this motion on 14 November 2001.[839] The Appeals Chamber issued its decision in an order of 6 December 2000, which ordered, *inter alia*, that the Prosecution disclose to counsel for Zoran and Mirjan Kupre{ki} all redacted transcripts of the interviews conducted with Witness AT.[840]

[831] Response by Drago Josipovi} to Prosecution Motion to Admit Evidence in Rebuttal Filed 14 [*sic*] June 2001, 28 June 2001.
[832] Decision on Prosecution Motion to Admit Evidence in Rebuttal to Additional Evidence Admitted under Rule 115, 6 July 2001.
[833] Decision on the Motions of Zoran and Mirjan Kupre{ki} to Admit Additional Evidence, 17 July 2001.
[834] Motion of the Counsels of Zoran and Mirjan Kupre{ki} with Which They Propose the Derivation of New Proof Considering the Rule 115 of the Rules of Procedure and Evidence (*Confidential*), 26 June 2001; Motion of the Counsels of Zoran and Mirjan Kupre{ki} with Which They Propose the Acceptance of the New Proof, based on Rule 116 [*sic*] from the Rules and Procedure (*Confidential*), 6 July 2001.
[835] Joinder of the Accused Vladimir [anti} to the Motion of Counsels of Zoran and Mirjan Kupre{ki} with which they Propose the Derivation of New Proof Considering the Rule 115 of the Rules and Procedure and Evidence Dated 26 June 2001, 29 June 2001.
[836] Decision on Motion by Zoran Kupre{ki} and Mirjan Kupre{ki} for Admission of Additional Evidence, 17 July 2001.
[837] Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellants, Zoran and Mirjan Kupre{ki} (*Confidential*), 6 July 2001.
[838] Motion of the Counsels of Zoran and Mirjan Kupre{ki} (*Confidential, Ex Parte*) , 6 November 2000.
[839] Prosecution's Response to the Confidential "Motion of the Counsels of Zoran and Mirjan Kupre{ki}" (*Confidential, Ex Parte*), 14 November 2001. It also filed a motion for protective measures in relation to any material arising from Witness AT's testimony in *Kordi}* which was to be disclosed to the Defendant. *See* Prosecutor's Application for Protective Measures (*Confidential*, *Ex Parte*), 9 November 2000.
[840] Order on (1) Motion of Zoran and Mirjan Kupre{ki} for Disclosure and (2) Prosecution Motion for Protective Measures (*Confidential, Partly Ex Parte*), 6 December 2000. The Prosecution subsequently sought, and was granted, an extension of time in which to comply with that part of the order of 6 December 2000 requiring the disclosure of the transcripts of Witness AT's testimony in *Kordi}*. *See* Prosecution's Motion for an Extension of Time Within Which to Disclose Confidential Material (*Confidential*, *Partly Ex Parte*), 13 December 2000; Order on Prosecution's Motion for an Extension of Time Within Which to Disclose Confidential Material (*Confidential, Partly Ex Parte*), 15 December 2000. The Prosecution also filed "Prosecution's Motion for Clarification of Appeals Chamber's Order for Protective Measures Dated 5 December 2000" (*Confidential Ex Parte*) on 13 December 2000.

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497. On 18 January 2001, Trial Chamber III authorised the release of the transcripts of interviews with Witness AT to Zoran and Mirjan Kupre{ki}.[841] The Appeals Chamber then had to dispose of the applications of the other Defendants for disclosure of the same material.[842] The Prosecution sought the release of this material to all of the Defendants.[843] The Appeals Chamber issued a request to the President of the Tribunal pursuant to Rule 75(D) for the release of the redacted interviews with Witness AT to Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} and the testimony of the same witness to all Defendants.[844] On 10 April 2001, the President authorised the disclosure of the material to all of the Defendants.[845]

498. Drago Josipovi} and Vladimir Šantic filed applications for the disclosure of the Prosecutor's Closing Brief in *Kordi}* on 8 and 18 June 2001, respectively.[846] The President issued an order on 25 June 2001 in which he authorised the disclosure of relevant extracts from the Prosecution's Closing Brief in the *Kordi}* case.[847] On 25 July 2001, the President authorised the disclosure of the same material also to Vlatko Kupre{ki}.[848]

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[841] Decision on Disclosure of Confidential Material to Another Chamber Pursuant to Prosecution Request, 18 January 2001; Decision on Confidential Ex Parte Motion for Disclosure of Transcript and Statement of Protected Witness for Use in Appellate Proceedings, 18 January 2001.

[842] Petition of the Counsel of Drago Josipovi} (*Confidential, Ex Parte*), 8 December 2000. The Prosecution responded to this motion and made an application for an extension of time simultaneously. *See* Prosecution Motion for Extension of Time to File Response and Prosecution's Response to "Petition of the Counsel of Drago Josipovi}" Filed on 8 December 2000' (*Confidential, Partly Ex Parte*), 20 December 2000. The Appeals Chamber granted the Prosecution's motion for an extension of time and recognised its response to Drago Josipovi}'s petition. *See* Order on Prosecution Motion For An Extension of Time to File Response to Petition of Drago Josipovi}, 11 January 2001. Counsel for Drago Josipovi} filed an untimely response to the application of the Prosecution for an extension of time. *See* Response of the Counsel of Drago Josipovi} for the Extention [*sic*] of Time Limit for Presentation of the Answer and the Answer of the Prosecution on the Demand of the Counsel of Drago Josipovi} Submitted on 8.12.2000, 15 January 2001. The original petition was renewed by Drago Josipovi}. *See* Petition of Drago Josipovi} (*Confidential, Ex Parte*), 5 February 2001. A further petition was subsequently filed. *See* Request of the Appellant, Drago Josipovi}, for the Submission of Transcripts of the Prosecutor's Protected Witness Testimony (*Confidential, Ex Parte*), 12 February 2001. The Prosecution responded to these petitions. *See* Prosecution Response to "Petition of Drago Josipovi}" Filed 5 February 2001 and Prosecution Response to Request of Drago Josipovi} Filed 12 February 2001, 15 February 2001. The following motion was filed by Vlatko Kupre{ki} before Trial Chamber III. *See* Motion for Disclosure of Transcript and Statement of Protected Witness (*Confidential*, *Ex Parte*), 2 January 2001. Counsel for Zoran and Mirjan Kupre{ki} filed the following: Motion for Release to the Appeals Chamber of Witness Statement From the Trial of *Prosecutor* v *Kordi} and ^erkez* (*Confidential, Ex Parte*), 23 March 2001.

[843] Prosecution's Renewed Motion for Clarification of Appeals Chamber's Order for Protective Measures Dated 5 December 2000 and Request for Release of Confidential Material (*Confidential, Ex Parte*), 29 January 2001.

[844] Request to the President Pursuant to Rule 75(D), 3 April 2001.

[845] Ordonnance du Président aux Fins De Communication de la Version Expurgée des Auditions et du Compte Rendu de la Déposition d'un Témoin Protégé (*Confidential*), 10 April 2001.

[846] Application by Drago Josipovi} for Disclosure of Confidential Filing of Prosecution Closing Brief in *Prosecutor* v *Kordi} and ^erkez*, 8 June 2001; Application by V. Šantic For Disclosure of Confidential Filing of Prosecutor Closing Brief, 18 June 2001.

[847] Order of the President on the Defence Applications in the Case of *the Prosecutor* v *Kupre{ki} et al.* for Access to the Prosecutor's Confidential Closing Brief in the Case of *the Prosecutor* v *Kordi} and ^erkez*, 3 July 2001 (English version).

[848] Order of the President on the Motion by Vlatko Kupre{ki}'s Defence in the Case *the Prosecutor* v *Kupre{ki} et al.* for Disclosure of the Prosecutor's Confidential Closing Brief in the *Case the Prosecutor* v *Kordi} and ^erkez*, 30 July 2001 (English version).

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499. Subsequent to a request by Vlatko Kupre{ki},[849] the President of the Tribunal, on 12 July 2001, authorised the release of the statements and part of the in-court-testimony of Witness M from the *Bla{ki}* trial.[850]

2. Further motions to admit new evidence

500. On 29 May 2001, the Appeals Chamber rendered its fourth decision subsequent to the following filings.

501. On 27 April 2001, Vladimir Šantic filed a motion for the admission of additional evidence.[851] Zoran Kupre{ki}, Mirjan Kupre{ki}, Drago Josipovi}, and Vlatko Kupre{ki} filed motions on 1 May 2001.[852] These motions all sought to admit the interviews conducted by the Prosecution with Witness AT and his transcribed testimony given during the *Kordi}* trial. Drago Josipovi} also filed four motions on 21 March, 17 April, 23 April and 1 May 2001,[853] requesting that, additionally, the Appeals Chamber call several witnesses to testify.

502. The Prosecution responded to all of these motions.[854] Replies were filed by Vlatko Kupre{ki},[855] and Zoran and Mirjan Kupre{ki}.[856]

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[849] Motion to the President, on Behalf of Vlatko Kupre{ki}, for Disclosure of Transcript of Evidence of a Prosecution Witness in the Trial of *Prosecutor* v *Kordi} and ^erkez* (*Confidential*), 20 June 2001.

[850] Order of the Presiding Judge to Disclose a Transcript from the Case *the Prosecutor* v *Tihomir Bla{ki}* to Vlatko Kupre{ki} in the Case *the Prosecutor* v *Zoran Kupre{ki} et al.*, 12 July 2001 (English translation filed on 19 July 2001).

[851] Motion of the Appellant Vladimir Šantic for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence (*Confidential*), 27 April 2001.

[852] Proposal of the Counsel of Zoran Kupre{ki} for the Derivation of New Proofs, Based on the Rule 115 of the Rules ans [*sic*] Procedure (*Confidential*), 1 May 2001; Motion of Mirjan Kupre{ki} for Additional Evidence (*Confidential*), 1 May 2001; Request of the Counsel of Drago Josipovi} that the Interview and the Testimony of the Protected Witness AT Should be Regarded as the Additional Evidence on the Basis of Article 115 of Statute on Procedure and Evidence, May 1 2001; Confidential Third Motion Pursuant, to Rule 115, for Admission of Additional Evidence on Appeal by the Appellant, Vlatko Kupre{ki}, 1 May 2001. Zoran and Mirjan Kupre{ki} had previously filed a motion seeking the admission of the interviews into evidence. *See* Motion No. 4 for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Evidence and Procedure [*sic*] by Zoran and Mirjan Kupre{ki}, 28 February 2001.

[853] Proposal of Drago Josipovi} for Derivation of Additional Proofs, 21 March 2001; Request of Drago Josipovi} [title modified from original] (*Confidential*), 17 April 2001; Request of the Appellant Drago Josipovi} [title modified from original] (*Confidential*), 23 April 2001; Request of Drago Josipovi} that the Witness Asim Dzambazovi} is Summoned and Interrogated According to Article 115 of Statute on Procedure and Evidence (*Confidential*), 1 May 2001.

[854] Prosecution Response to "Request of Drago Josipovi}[title modified from original]", (*Confidential*), 25 April 2001; Prosecution Response to "Motion of the Appellant Vladimir Šantic for the Admission of Additional Evidence Pursuant to Rule 115 of Rules of Procedure and Evidence" (*Confidential*), 7 May 2001; Prosecution Response to "Request of Drago Josipovi} [title modified from original]" (*Confidential*), 3 May 2001; Prosecution's Response to "Request of Counsel of Drago Josipovi} that the Interview and the Testimony of the Protected Witness AT Should be Regarded as Additional Evidence on the Basis of Article 115 of Statute on Procedure and Evidence" and Request "That the Witness-Expert Asim Dsambasovi} is Summoned and Interrogated According to Article 115 of the Statute on Procedure and Evidence" (*Confidential*), 10 May 2001; Prosecution's Consolidated Response to "Proposal of the Counsel of Zoran Kupre{ki} for the Derivation of New Proofs, Based on Rule 115 of the Rules of Procedure" and to "Motion of Mirjan Kupre{ki} for Additional Evidence" (*Confidential*), 11 May 2001; Prosecution Response to "Confidential Third Motion, Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant Vlatko Kupre{ki}" (*Confidential*), 11 May 2001; Prosecution's Response to "Motion No. 4 of Appellants Zoran and Mirjan Kupre{ki} to Admit Additional Evidence Pursuant to Rule 115" (*Confidential, Partly Ex Parte*), 12 March 2001.

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503. In its decision of 29 May 2001, the Appeals Chamber granted the motion of Vlatko Kupre{ki} and admitted the material relating to Witness AT into the appeal. It denied all the other motions.[857]

504. Following the decision of 29 May 2001, motions for leave to appeal were filed by Vladimir Šantic[858] and Zoran and Mirjan Kupre{ki},[859] to which the Prosecution responded.[860] On 18 June 2001, these motions were dismissed by the Appeals Chamber as being manifestly ill-founded, and the Registrar was requested to consider withholding payment of any fees or costs involved in the preparation of these motions.[861]

3. Evidentiary Hearing and Rule 92(*bis*) motions

505. As outlined above, in its decision of 11 April 2001, the Appeals Chamber admitted into the appeal the evidence of Witness ADA, Miro Lazarevi}, Witness ADB and Witness ADC. This evidence was in the form of witness statements and exhibits. The Prosecution gave notice that it wished to cross-examine three of the additional witnesses: ADA, Miro Lazarevi} and ADB.[862] Subsequently, scheduling orders were issued on 12 April 2001 and 11 May 2001,[863] an evidentiary hearing was held on 17, 18 and 25 May 2001, with the purpose of testing the veracity of the three

[855] Confidential Reply on Behalf of Vlatko Kupre{ki} to Prosecution Response to Confidential Third Rule 115 Motion, 15 May 2001.
[856] Consolidated Reply of Zoran and Mirjan Kupre{ki} to the Prosecution Response to Motions According Rule 115 (*Confidential*), 21 May 2001. An application for an extension of time for filing the reply on behalf of Zoran and Mirjan Kupre{ki} and an order of the Appeals Chamber granting the application preceded this filing. *See* Motion of the Counsel of Zoran and Mirjan Kupre{ki} for the Extention[*sic*] of Time-Limit, Based on the Rule 127 of the Rules, 14 May 2001 and Order on Motion for Extension of Time, 16 May 2001. Vladimir Šantic's reply was filed after the expiry of the deadline for filing replies, hence the Appeals Chamber disregarded this filing.
[857] Decision on Motions to Admit Material Relating to Witness AT Into Evidence Pursuant to Rule 115 and to Call Additional Witnesses (*Confidential*), 29 May 2001.
[858] The Motion of the Appellant Vladimir Šantic for Leave to Appeal Against the Appeals Chamber's Decision on Motions to Admit Materijal [*sic*] Relating to Witness AT into Evidence Pursuant to Rule 115 and To Call Additional Witnesses Dated 29 May 2001 (*Confidential*), 30 May 2001; Motion of Vladimir Šantic for Leave to Appeal Against the Decision From 29 May 2001 According to the Rule 73(D)(I) and Appelant [*sic*] Motion Dated 30 May 2001 (*Confidential*), 7 June 2001.
[859] Motion of Zoran and Mirjan Kupre{ki} for Leave to Appeal Against the Decision From 29 May 2001 According to the Rule 73(D)(i) And Appeal Against the Decision From 29 May 01 (*Confidential*), 5 June 2001.
[860] Prosecution Response to "Motion of Zoran and Mirjan Kupre{ki} for Leave to Appeal Against the Decision From 29 May 2001 According to the Rule 73(D)(i) And Appeal Against the Decision From 29 May 2001" (*Confidential*), 15 June 2001; Prosecution Response to Motion of Vladimir Šantic Seeking Leave to Appeal the Decision of 29 May 2001 Rejecting the Additional Evidence of AT, 15 June 2001.
[861] Decision on Motions By Zoran Kupre{ki}, Mirjan Kupre{ki} and Vladimir Šantic for Leave to Appeal The Decision of the Appeals Chamber Dated 29 May 2001, 18 June 2001, para. 7.
[862] Prior to the hearing, the Prosecution gave notice of the cross-examination and rebuttal evidence. *See* Prosecution Notice of Cross-Examination Material and Potential Evidence in Rebuttal for the Evidentiary Hearing on 17 & 18 May 2001 (*Confidential*), 8 May 2001.
[863] Scheduling Order, 12 April 2001; Scheduling Order, 11 May 2001.

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witnesses. Both Vlatko Kupre{ki} and the Prosecution applied for protective measures for their witnesses,[864] and were granted them.[865]

506. In connection with this hearing, the Prosecution filed two motions seeking the admission of evidence under Rule 92 (*bis*).[866] The statements that the Prosecution sought to admit were for the purposes of rebutting the credibility of the witnesses called by Vlatko Kupre{ki} at the evidentiary hearing on 17 and 18 May 2001. The Prosecution and Vlatko Kupre{ki} made oral submissions on this motion at the hearing on 18 May 2001.[867]

507. The Appeals Chamber admitted the 92(*bis*) statement of one witness for the purpose of assessing the credibility of Witness ADA called by Vlatko Kupre{ki}. It rejected the other statements and admitted certain exhibits that were tendered at the evidentiary hearing by various parties.[868]

C. Provisional Release and Separation of Proceedings

508. On 20 February 2001, Zoran and Mirjan Kupre{ki} filed a motion for their provisional release, or alternatively for the separation of their cases from the those of their co-Defendants.[869] The motion for provisional release was based on material recently released to them by the Prosecution, which they claimed was of an exculpatory nature. The Prosecution opposed this motion in a response dated 2 March 2001.[870] The Appeals Chamber denied the motion on the basis that the evidence upon which Zoran and Mirjan Kupre{ki} were relying had at that date not been

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[864] Prosecutor's Motion for Protective Measures for Witnesses to be Called at Evidentiary Hearing on 17 and 18 May 2001 (*Confidential*), 15 May 2001; Confidential Motion on Behalf of Vlatko Kupre{ki} Regarding Requests for Witness Protection (*Confidential*), 14 May 2001.
[865] Transcript of Evidentiary Hearing, 17 May 2001, p. 180.
[866] Prosecution's Evidence (92 *Bis* Statements) In Rebuttal of Additional Evidence of Vlatko Kupre{ki} and Supplementary Material For Use at Evidentiary Hearing on 17 and 18 May 2001, 11 May 2001; Prosecution's Filing of Evidence of Ole Hortemo (Rule 92 *Bis* Statement) and Supplementary Filing of Six English Translations of Rule 92 *Bis* Declarations Previously Filed on 11 May 2001 (*Confidential*), 14 May 2001. Vlatko Kupre{ki} opposed these motions. *See* Appellant's Response to "Prosecution's Evidence (92 *Bis* Statements) in Rebuttal of Additional Evidence" (*Confidential*), 15 May 2001. The Prosecution subsequently withdrew one 92 (*Bis*) statement that it was seeking to have admitted: Prosecution's Notice of Withdrawal of Abdullah Abdi}'s Rule 92 *Bis* Statement Submitted on 11 May 2001 (*Confidential*), 22 May 2001.
[867] Vlatko Kupre{ki} filed information to assist the Appeal Chamber's determination as to whether to admit the Prosecution's Rule 92 *bis* statements: Motion Concerning New Information Relative to Prosecutor's Rule 92 *Bis* Statements (*Confidential*), 31 May 2001.
[868] Decision on the Admission of the Prosecution's Rule 92 *Bis* Statements and the Exhibits Tendered at Evidentiary Hearing (*Confidential*), 6 June 2001.
[869] Motion for Provisional Release of Zoran and Mirjan Kupre{ki} or Separation of Proceedings (*Confidential, Ex Parte*), 22 February 2001.
[870] Prosecution Response to Motion of Appellants Zoran and Mirjan Kupre{ki} for Provisional Release or Separation of Proceedings (*Confidential, Ex Parte*), 2 March 2001.

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admitted into the appellate proceedings, and that the Defendants had not established valid reasons supporting their request to separate their cases.[871]

509. On 31 May 2001, Vlatko Kupre{ki} filed a motion for his provisional release.[872] The Prosecution responded to this motion on 11 June 2001.[873] On 29 June 2001, the Appeals Chamber denied the motion on the basis that Vlatko Kupre{ki} had not demonstrated that special circumstances existed to warrant his release pending appeal.[874]

510. Subsequent to the appeals hearing, Vladimir [anti} sought provisional release in order that he may be present at his son's marriage ceremony.[875] The Prosecution opposed the request.[876] In its decision of 5 September 2001, the Appeals Chamber noted that Vladimir [anti} has failed to submit any guarantees or assurances from the competent authorities in Bosnia and Herzegovina, or from himself, that he would return to the Tribunal, if released. Consequently, it denied the request on the ground that the criteria of Rule 65(I) had not been met.[877]

D. Assignment of Judges

511. On 14 March 2000, by on order of the President of the Tribunal, Judge Vohrah, Judge Nieto-Navia, Judge Mohamed Bennouna, Judge Wald and Judge Pocar were assigned to sit on the appeal.[878]

512. On 16 May 2000, Judge Bennouna was appointed as pre-appeal Judge to deal with all motions of a procedural nature.[879] Judge Bennouna ceased to be the pre-appeal Judge upon his departure as Judge of the International Tribunal on 28 February 2001, and Judge Wald was appointed pre-appeal Judge on 14 March 2001.[880] She was subsequently elected Presiding Judge.

E. Status Conferences

513. Status conferences were held in accordance with Rule 65*bis* of the Rules on 13 September 2000, 13 December 2000, 10 April 2001 and 25 July 2001.

[871] Decision on Motion for the Provisional Release of Zoran and Mirjan Kupre{ki} or Separation of Proceedings, 24 April 2001.
[872] Motion for Provisional Release on Behalf of Vlatko Kupre{ki}, 31 May 2001.
[873] Prosecution's Response to Motion for Provisional Release on Behalf of Vlatko Kupre{ki}, 11 June 2001.
[874] Decision on the Motion of Vlatko Kupre{ki} for Provisional Release, 29 June 2001.
[875] Request for Provisional Release, Several days, Accused Vladimira [anti}a also known as "Vlado", filed on 23 August 2001.
[876] Prosecution Response to Motion Entitled "Request for Provisional Release, Several days, Accused Vladimira [anti}a also known as 'Vlado'", filed on 3 September 2001.
[877] Decision on the Request of Vladimir [anti} for Provisional Release, 5 September 2001.
[878] Ordonnance du Président Portant Affectation de Juges à La Chambre d'Appel, 14 March 2000.
[879] Order Appointing a Pre-Appeal Judge, 16 May 2000.
[880] Order Appointing a Pre-Appeal Judge, 14 March 2001.

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F. Appeal Hearing

514. The Appeal Hearing was held over three days, between 23 to 25 July 2001.

G. Other Issues

515. On 24 April 2001, Drago Josipovi} filed a request with the Registrar to have his lead counsel, Mr Luka Šušak withdrawn and a new counsel assigned. This request was granted on 4 May 2001 and Mr. William Clegg was assigned as lead counsel for Drago Josipovi}.[881]

[881] Decision of the Registrar, 4 May 2001.

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XII. ANNEX B: GLOSSARY

ABiH	Muslim Army of Bosnia-Herzegovina
Akayesu Appeal Judgement	*Prosecutor* v *Akayesu,* Case No.: ICTR-96-4-A, Judgement, 1 June 2001
Aleksovski Appeal Judgement	*Prosecutor* v *Aleksovski,* Case No.: IT-95-14/1-A, Judgement, 24 March 2000
Amended Indictment	*Prosecutor* v *Zoran Kupreški} et al.*, Case No.: IT-95-16-PT, Amended Indictment, 9 February 1998
Appeal Hearing	Appeal hearing of 23 to 25 July 2001 in *Prosecutor* v *Zoran Kupreški} et al.*, Case No.: IT-95-16-A
Appeal Transcript	Transcript of Appeal Hearing of 23 to 25 July 2001. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public
Blaški} Judgement	*Prosecutor* v *Blaški}*, Case No.: IT-95-14-T, Judgement, 3 March 2000
Br|anin Decision of 20 February 2001	*Prosecutor* v *Br|anin and Tali}*, Case No.: IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001
Br|anin Decision of 26 June 2001	*Prosecutor* v *Br|anin and Tali}*, Case No.: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001
Celebici Appeal Judgement	*Prosecutor* v *Delali} et al.,* Case No.: IT-96-21-A, Judgement, 20 February 2001
Defendants	Collective term for, Zoran Kupreški}, Mirjan Kupreški}, Vlatko Kupreški}, Drago Josipovi} and Vladimir [anti} or any combination thereof, depending upon the context of the discussion.
Evidentiary Hearing	Hearing of 17 and 18 May 2001 where witnesses whose additional evidence the Appeals Chamber had admitted into evidence were called to testify
4th Battalion of the Military Police	A unit of the HVO Military Police
Furundžija Appeal Judgement	*Prosecutor* v *Furundžija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000

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Hearing on Rule 115 Motions	Oral hearing of 30 March 2001 to determine various motions filed pursuant to Rule 115
HVO	The Croatian Defence Council
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994
International Tribunal or Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Jelisic Appeal Judgement	*Prosecutor* v *Jelisic*, Case No.: IT-95-10-A, Judgement, 5 July 2001
Jokers	Described by the Trial Chamber as "a specialist, anti-terrorist unit of the Croatian Military Police"
Josipovic	Drago Josipovic
Josipovic Appeal Brief	"Drago Josipovic's Appeal Brief", filed confidentially on 3 July 2000 (redacted public version filed on 24 July 2001)
Josipovi} Closing Brief	"Closing Argument of the Counsel of the Accused Drago Josipovi}", submitted to the Trial Chamber on 5 November 1999
Josipovic Reply	"Partly Confidential Appellant's Brief of Argument Under Rule 113 in Reply to the Respondent's Brief of Argument of the Prosecution", filed partly confidentially and *ex parte* on 18 July 2001
Josipovic Response	"Respondent's Brief of Argument under Rule 112 in Response to the Prosecution's Amended Appeal Brief", filed on 6 July 2001
Josipovic Supplemental Document	"Supplemental Appellant's Brief Filed Pursuant to the Scheduling Order Dated 30th May 2001 on Behalf of Drago Josipovic Partly Ex Parte Confidential", filed partly confidentially on 14 June 2001
Kambanda Appeal Judgement	*Prosecutor* v *Kambanda*, Case No.: ICTR-97-23-A, Judgement, 19 October 2000
Kayishema Appeal Judgement	*Le Procureur* v *Kayishema et Ruzindana*, Affaire No. ICTR-95-1-A, Motifs de l'ârret, 1er juin 2001 (English translation is not yet available)

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Kordic Judgement	*Prosecutor* v *Kordic and ^erkez*, Case No.: IT-95-14/2-T, Judgement, 26 February 2001
Kordic Trial Transcript	Transcript of trial in *Prosecutor* v *Kordic and ^erkez*, Case No.: IT-95-14/2-T
Krnolejac Decision of 24 February 1999	*Prosecutor* v *Krnolejac*, Case No. IT-97-25-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999
Krnolejac Decision of 11 February 2000	*Prosecutor* v *Krnolejac*, Case No.: IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000
Kunarac Judgement	*Prosecutor* v *Kunarac et al.*, Case No.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Kvo~ka Decision of 12 April 1999	*Prosecutor* v *Kvo~ka et al.*, Case No.: IT-98-30/1-PT, Decision on Defense Preliminary Motions on the Form of the Indictment, 12 April 1999
Mirjan Kupreški} Appeal Brief	"Defendant's Appellate Brief", filed partly confidentially on 3July 2000
Mirjan Kupreški} Closing Brief	"The Defence's Closing Brief", submitted to the Trial Chamber on 5 November 1999
Mirjan Kupreški} Supplemental Document	"Supplemental Brief by Mirjan Kupreški}", filed confidentially on 13 June 2001
OTP and Prosecution	The Office of the Prosecutor
Prosecution Amended Appeal Brief	"Prosecution's Amended Appeal Brief", 15 May 2001
Prosecution Appeal Brief	"Prosecution's Appeal Brief", 3 July 2000
Prosecution Closing Brief	"The Prosecutor's Closing Brief" submitted confidentially to the Trial Chamber by the Prosecution on 29 October 1999
Prosecution Pre-Trial Brief	"The Prosecutor's Pre-Trial Brief" submitted to the Trial Chamber by the Prosecution on 13 July 1998
Prosecution Reply to Josipovi}	"Prosecution's Brief in Reply to the Respondent's Brief of Drago Josipovi} in Response to the Prosecution's Amended Appeal Brief", filed on 16 July 2001
Prosecution Reply to [anti}	"Prosecution's Brief in Reply to the Respondent's Brief of Vladimir [anti} to the Prosecution's Amended Appeal Brief", filed on 16 July 2001
Prosecution Response	"Public Redacted Version of the Prosecution's 'Respondent's Brief' Filed on the 28 June 2001", filed on 18 July 2001 (original confidential version was filed on 2 July 2001)

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Rule 115 Decision of 26 February 2001	Decision on the Motions of Appellants Vlatko Kupreški}, Drago Josipovi}, Zoran Kupreški} and Mirjan Kupreški} to Admit Additional Evidence, 26 February 2001
Rule 115 Decision of 11 April 2001	Decision on The Admission of Additional Evidence Following Hearing of 30 March 2001", 11 April 2001
Rule 115 Decision of 29 May 2001	Confidential Decision on Motions to Admit Material Relating to Witness AT into Evidence Pursuant to Rule 115 and to Call Additional Witnesses, 29 May 2001
Rule 115 Decision of 6 July 2001	Decision on Prosecution Motion to Admit Evidence in Rebuttal to Additional Evidence Admitted under Rule 115, 6 July 2001
Rules	Rules of Procedure and Evidence of the International Tribunal
[antic	Vladimir [antic
[antic Appeal Brief	"Appelate [*sic*] Brief of Vladimir [antic", 3 July 2000
[anti} Closing Brief	"The Defence Trial Brief for the Accused Vladimir [anti} a/k/a 'Vlado', submitted to the Trial Chamber 5 November 1999
[antic Reply	"Vladimir [antic Brief in Reply Under 113 of the Rules of Procedure and Evidence", filed on 18 July 2001
[antic Response	"Defence's Response of the Accused Vladimir [antic on Prosecutor's Appeal Brief", 2 July 2001
[antic Supplemental Document	"Motion of the Appellant Vladimir [antic According to the Order of the Appeals Chamber Dated 30 May 2001", filed in a public version on 19 July 2001 (originally filed confidentially on 12 June 2001)
Serushago Sentencing Appeal Judgement	*Serushago* v *Prosecutor*, Case No.: ICTR-98-39-A, Reasons for Judgement, 6 April 2000
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
Tadi} Appeal Judgement	*Prosecutor* v *Tadi}*, Case No.: IT-94-1-A, Judgement, 15 July 1999
Tadi} Jurisdiction Decision	*Prosecutor* v *Tadi}*, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadi} Rule 115 Decision	*Prosecutor* v *Tadi}*, Case No.: IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-

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	Limit and Admission of Additional Evidence", 15 October 1998
Tadi} Sentencing Appeal Judgement	*Prosecutor* v *Tadi}*, Case No.: IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Transcript of Evidentiary Hearing	Transcript of evidentiary hearing held on 17, 18 and 25 May 2001 to take additional evidence under Rule 115. All transcript page numbers referred to are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public
Trial Judgement	*Prosecutor* v *Zoran Kupreški} et al.*, Case No.: IT-95-16-T, Judgement, 14 January 2000
Trial Transcript	Transcript of trial in *Prosecutor* v *Zoran Kupreški} et al.*, Case No.: IT-95-16-T. All transcript page numbers referred to are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public
Vlatko Kupreški} Appeal Brief	"Redacted Appellant's Brief on Conviction on Behalf of Vlatko Kupreškic", filed on 18 July 2001 (filed confidentially on 5 Sept 2000)
Vlatko Kupreški} Reply	"Reply to Respondent's Brief on Behalf of Vlatko Kupreški}", filed confidentially on 18 July 2001
Vlatko Kupreški} Supplemental Document	"Supplemental Appellant's Brief, on Behalf of Vlatko Kupreški}, Concerning Effect of Additional Evidence, Filed Pursuant to Scheduling Order Dated 30th May 2001", filed on 13 June 2001
Witness AT Statement, 15 August 2000	Transcript of interview with Witness AT conducted by the OTP on 15 August 2000
Witness AT Statement, 25 May 2000	Transcript of interview with Witness AT conducted by the OTP on 25 May 2000
Zoran Kupreški} Appeal Brief	"Appeal Reasons of the Counsels of Zoran Kupreški} Against the ICTY Verdict from 15.1.00 IT-95-16-T", filed partly confidentially on 3 July 2000
Zoran and Mirjan Kupreški} Reply	"Brief in Reply by Zoran and Mirjan Kupreški}", filed 20 July 2001
Zoran Kupreški} Supplemental Document	"Motion of the Counsel of Zoran Kupreški} With Which he Ammends [*sic*] the Letter of Appeal on the Court Acceptance of New Proofs", filed confidentially on 13 June 2001

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Annex C

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XIV. ANNEX D: AMENDED INDICTMENT

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case: IT-95-16-PT

IN THE TRIAL CHAMBER

Before: Judge Antonio Cassese, Presiding
Judge Richard May
Judge Florence Mumba

Registrar: Mrs. de Sampayo Garrido-Nijgh

Date Filed: 09 February 1998

THE PROSECUTOR

v.

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
DRAGAN PAPI]
VLADIMIR [ANTI]
also known as "VLADO"

AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal, charges:

ZORAN KUPRE[KI] , MIRJAN KUPRE[KI] , VLATKO KUPRE[KI] , DRAGO JOSIPOVI] , DRAGAN PAPI] and VLADIMIR [ANTI]

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR**, as set forth below:

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Background

1. On 03 March 1992, Bosnia and Herzegovina declared its independence; it was recognised as an independent state by the European Council on 06 April 1992.

2. From at least 03 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside Bosnia and Herzegovina.

3. From at least October 1992 until at least the end of May 1993, the HZ-HB armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an armed conflict with the armed forces of the government of Bosnia and Herzegovina.

4. From the outset of hostilities in January 1993, the HVO systematically attacked villages chiefly inhabited by Bosnian Muslims in the Lašva River Valley Region in Central Bosnia and Herzegovina. These attacks resulted in the death and wounding of numerous civilians.

5. The persecution of Bosnian Muslim civilians escalated in frequency throughout the early part of 1993, culminating in simultaneous attacks throughout the Lašva River Valley Region on 16 April 1993.

6. On 16 April 1993, at approximately 0530 hrs., HVO forces attacked the town of Vitez and the nearby villages of Donja Ve~eriska, Sivrino Selo, [anti}i, Ahmi}i, Nadioci, Stara Bila, Ga~ice, Piri}i and Preo~ica. All the villages are within a ten kilometre radius from the village of Ahmi}i.

7. During the attacks, groups of HVO soldiers went from house-to-house killing and wounding Bosnian Muslim civilians and burning houses, barns and livestock. The offensive, which lasted several days, was a highly co-ordinated military operation involving hundreds of HVO troops.

8. When the HVO forces attacked the villages and towns in the Lašva River Valley on 16 April 1993, the village of Ahmi}i experienced significant killing and destruction. Located approximately five kilometres east of Vitez, Ahmi}i had a pre-attack population of approximately 466 inhabitants, with approximately 356 Bosnian Muslims and 87 Bosnian Croats. After the attack, there were no Bosnian Muslims left living in Ahmi}i.

9. ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO

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JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] helped prepare the April attack on the Ahmi}i-[anti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-[anti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.

10. The HVO attack on Ahmi}i-[anti}i targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmi}i-[anti}i from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmi}i-[anti}i.

11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmi}i-[anti}i. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmi}i-[anti}i, along with two mosques.

The Accused

12. ZORAN KUPRE[KI], son of Anto and brother of Mirjan, was born on 23 September 1958 in the village of Piri}i. He was a HVO soldier in the Ahmi}i area. Before the war, he operated a business in Ahmi}i with his cousin, VLATKO KUPRE[KI].

13. MIRJAN KUPRE[KI], son of Anto and brother of Zoran, was born on 21 October 1963 in the town of Vitez. He was a HVO soldier in the Ahmi}i area, together with his brother, ZORAN KUPRE[KI], and cousin, VLATKO KUPRE[KI].

14. VLATKO KUPRE[KI], son of Franjo, was born on 01 January 1958 in the village of Piri}i. Before the war, he lived and worked in Ahmi}i where he operated a business with his cousin, ZORAN KUPRE[KI]. He was a HVO soldier in the Ahmi}i area, together with his cousins, MIRJAN KUPRE[KI] and ZORAN KUPRE[KI].

15. DRAGO JOSIPOVI], son of Niko, was born on 14 February 1955 in [anti}i. Before the war, he was a chemical worker by profession. He was a HVO soldier in [anti}i.

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16. DRAGAN PAPI] was born in the village of Šanti}i on 15 July 1967. He lived in Ahmi}i, Vitez and was a HVO soldier.

17. VLADIMIR ŠANTI], also known as "VLADO", was born on 01 April 1958 in Donja Ve~eriska. Before the war he lived in Vitez and was a policeman by profession. He was a HVO soldier in Vitez.

General Allegations

18. At all times relevant to this indictment, the accused were required to abide by the laws or customs governing the conduct of war.

19. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering, or otherwise aiding and abetting, in the planning, preparation or execution of any crimes referred to in Articles 2, 3 and 5 of the Tribunal Statute.

Charges

COUNT 1

(Persecutions)

20. From October 1992 until April 1993, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.

21. As part of the persecution, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] participated in or aided and abetted:

(a) the deliberate and systematic killing of Bosnian Muslim civilians;
(b) the comprehensive destruction of Bosnian Muslim homes and property; and
(c) the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.

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22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] committed the following crime:

Count 1: A **CRIME AGAINST HUMANITY**, punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the Tribunal.

COUNTS 2-9
(Ahmi} Family)
(Murder, Inhumane Acts and Cruel Treatment)

23. When the attack on Ahmi}i-[anti}i commenced in the early morning of 16 April 1993, Sakib Ahmi} was residing with his son, Naser Ahmi}, Naser's wife, Zehrudina, and their two children, Elvis (age 4) and Sejad (age 3 months).

24. Armed with an automatic weapon, ZORAN KUPRE[KI] entered the Ahmi} house and shot and killed Naser Ahmi}. ZORAN KUPRE[KI] then shot and wounded Zehrudina Ahmi}.

25. MIRJAN KUPRE[KI] then entered the Ahmic house and poured flammable liquid onto the furniture to set the house on fire. Then MIRJAN KUPRE[KI] and ZORAN KUPRE[KI], aiding and abetting each other, directed gunfire at the two children, Elvis and Sejad Ahmi}. When Sakib Ahmi} fled the burning residence, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire.

26. Naser Ahmi}, Zehrudina Ahmi}, Elvis Ahmi} and Sejad Ahmi} all died and Sakib Ahmi} received burns over his head, face and hands.

27. By the foregoing acts, ZORAN KUPRE[KI] and MIRJAN KUPRE[KI], aiding and abetting each other, committed the following crimes:

Counts 2 and 3
(Murder of Naser Ahmic)

Count 2: By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 3: By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**,

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punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 4 and 5
(Murder of Zehrudina Ahmic)

Count 4: By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 5: By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 6 and 7
(Murder of Elvis Ahmic)

Count 6: By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 7: By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 8 and 9
(Murder of Sejad Ahmic)

Count 8: By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 9: By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

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Counts 10 and 11
(Inhumane Acts and Cruel Treatment of Sakib Ahmi})

Count 10: By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

Count 11: By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 12-15
(Pezer Family)
(Murder, Inhumane and Cruel Treatment)

28. Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of VLATKO KUPRE[KI] in Ahmi}i. When the attack commenced, several HVO units used VLATKO KUPRE[KI]'s residence as a staging area. Other HVO soldiers shot at Bosnian Muslim civilians from VLATKO KUPRE[KI]'s house throughout the attack.

29. As the shooting continued, members of the Pezer family, who were Bosnian Muslims, gathered in their shelter to hide from HVO soldiers. Shortly thereafter, the Pezer family, along with other Bosnian Muslims who had taken refuge in the shelter, decided to escape through the forest.

30. As the Pezer family, with other Bosnian Muslims, ran by VLATKO KUPRE[KI]'s house toward the forest, VLATKO KUPRE[KI] and other HVO soldiers in front of VLATKO KUPRE[KI]'s house yelled at the fleeing civilians. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, shot at the group from in front of VLATKO KUPRE[KI]'s house. As the Pezer family fled toward the forest, VLATKO KUPRE[KI] and other HVO soldiers, aiding and abetting each other, wounded Dženana Pezer, the daughter of Ismail and Fata Pezer, and another woman. Dženana Pezer fell to the ground and Fata Pezer returned to assist her daughter. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, then shot Fata Pezer and killed her.

31. By the foregoing acts and omissions, VLATKO KUPRE[KI] committed the following

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crimes:

Counts 12 and 13
(Murder of Fata Pezer)

Count 12: By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 13: By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 14 and 15
(Wounding of Dženana Pezer)

Count 14: By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

Count 15: By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 16-19
(Killing of Musafer Pu{}ul and Burning of the Pu{}ul Home)

32. On 16 April 1993 numerous HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR [ANTI] attacked the home of Musafer and Suhreta Pu{}ul, while the family, which included two young daughters, was sleeping.

33. During the attack, DRAGO JOSIPOVI], VLADIMIR [ANTI] and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Pu{}ul.

34. As part of the attack, the HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR ŠANTI], vandalised the home and then burned it to the ground.

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35. By the foregoing acts, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed the following crimes:

Counts 16 and 17
(Murder of Musafer Pu{}ul)

Count 16: By killing or aiding and abetting the killing of Musafer Pu{}ul, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 17: By killing or aiding and abetting the killing of Musafer Pu{}ul, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 18 and 19
(Inhumane Acts and Cruel Treatment)

Count 18: By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

Count 19: By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

Date:

Signed:
Graham T. Blewitt
Deputy Prosecutor

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