

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

CASE NO: IT-03-68-A

IN THE APPEALS CHAMBER

Before: The Appeals Chamber
Registrar: Mr. Hans Holthuis
Date filed: 5 October 2006

THE PROSECUTOR

v.

NASER ORIĆ

DEFENCE NOTICE OF APPEAL

The Office of the Prosecutor

Ms. Christine Dahl

Counsel for the Appellant

Ms. Vasvija Vidović

Mr. John Jones

IT-03-68-A

5 October 2006

I. INTRODUCTION

1. The Defence of Naser Orić ("the Appellant") files this *Notice of Appeal* pursuant to the Appeals Chamber's *Decision on Prosecution's Motion for an Order Striking Defence Notice of Appeal and Requiring Refiling* rendered on 3 October 2006 ("the Appeals Chamber's Decision").

II. THE JUDGEMENT UNDER APPEAL¹

2. The Judgement appealed is the Trial Chamber's *Judgement* in the Orić case dated 30 June 2006 ("Judgement").

III. THE SPECIFIC PROVISION OF THE RULES PURSUANT TO WHICH THE NOTICE IS FILED²

3. This Notice is filed pursuant to Rule 108 of the Rules of Procedure and Evidence.

IV. THE GROUNDS OF APPEAL³

4. The Defence's Grounds of Appeal are as follows.

A. GROUND ONE: THE CHAMBER MADE FINDINGS OF FACT WHICH WERE UNSUPPORTED AND/OR UNSUSTAINABLE ON THE EVIDENCE

1. Sub-Ground 1(A): No Reasonable Trial Chamber Would Have Found That The Appellant Had Effective Control Over The Srebrenica Military Police subsequent to 27 November 1992

(a) Alleged error on a question of law invalidating the decision

5. The Chamber erred in law in not directing itself at all to the question of whether the alleged effective control of the Appellant over the Srebrenica Military Police subsequent to 27 November 1992 was *too remote* for responsibility to arise under Article 7(3) of the Statute. If the Chamber had properly directed itself in law to this question, then it would have found that the alleged link was too remote to meet the test of effective control. The error of law invalidates the decision.

¹ Practice Direction On Formal Requirements For Appeals From Judgement (IT/201), 7 March 2002, Article 1(a).

² Practice Direction On Formal Requirements For Appeals From Judgement (IT/201), 7 March 2002, Article 1(b).

³ Practice Direction On Formal Requirements For Appeals From Judgement (IT/201), 7 March 2002, Article 1(c).

(b) Alleged error of fact which has occasioned a miscarriage of justice

6. The Chamber committed a clear error of fact in finding that the Appellant had effective control over the Srebrenica Military Police subsequent to 27 November 1992. No reasonable trial chamber would have so concluded on the evidence.
7. The error of fact occasioned a miscarriage of justice. If the Chamber had not erroneously found that the Appellant had effective control over the Military Police, then it would not have found that he had effective control over the perpetrators of the crimes in Counts 1 and 2. The Appellant would then have been acquitted.

(c) Identification of the finding or ruling challenged in the Judgement

8. The finding challenged is at paragraph 532 (page 180) of the *Judgement*:

"[...] the Trial Chamber is satisfied beyond reasonable doubt that subsequent to 27 November 1992, a superior-subordinate relationship for the purposes of Article 7(3) of the Statute existed between the Accused and the Srebrenica military police"

(d) The Precise Relief Sought

9. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

2. Sub-Ground 1(B): No Reasonable Trial Chamber Would Have Found That The Guards At The Two Places Of Detention – The "SUP" And "The Building" - Were Military Policemen

(a) Alleged error of fact which has occasioned a miscarriage of justice

10. The Chamber made a factual error when it found that the guards at the two places of detention – the "SUP" and the "Building" – were members of the Military Police. No reasonable trial chamber would have made that finding on the evidence.
11. The error of fact occasioned a miscarriage of justice. If the Chamber had not erred but had correctly concluded that the guards at both locations were *Civilian* policemen, then it would not have found that the Military Police were

responsible for murder and cruel treatment of Serb detainees, and it would not have convicted the Appellant of murder and cruel treatment on that basis.

(b) Identification of the finding or ruling challenged in the Judgement

12. The finding challenged is at paragraph 488 (page 166) of the *Judgement*:

“The Trial Chamber thus finds that between 24 September 1992 and 20 March 1992, the Srebrenica military police detained the Serb individuals identified in the Indictment at both the Srebrenica Police Station and the Building, where they were cruelly treated and some of them were killed.”

(c) The Precise Relief Sought

13. The precise relief sought is a quashing of the Appellant’s convictions on Counts 1 and 2 of the Indictment.

3. Sub-Ground 1(C): The Trial Chamber Failed To Consider Properly, Or At All, The Significance Of The Evidence Relating To Nurija Jusufović, Civilian Policemen, Dealing With Detainees At The SUP

(a) Alleged error of fact which has occasioned a miscarriage of justice

14. The Chamber erred in fact by not properly considering the exculpatory evidence relating to Nurija Jusufović. This evidence showed that Civilian Police, rather than Military Police, detained the Serb individuals mentioned in the Indictment. If the Chamber had not so erred, but had properly assessed this body of exculpatory evidence, it would not have concluded that the Military Police detained Serb individuals. It would then have acquitted the Appellant. Thus the error of fact occasioned a miscarriage of justice.

(b) Identification of the finding or ruling challenged in the Judgement

15. Since the Chamber’s error relates to an *omission* to consider evidence, there is not a specific paragraph to which reference may be made.
16. The Chamber’s error resulted, however, in the Chamber’s challenged finding at paragraph 496 (pages 168-169) of the *Judgement*:

“The only conclusion to draw from this evidence is that the Srebrenica military police, through its commanders, i.e., Mirzet Halilović and Atif Krdžić respectively, are responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building.”

(c) **The Precise Relief Sought**

17. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

4. **Sub-Ground 1(D): The Trial Chamber Failed To Consider Properly, Or At All, The Significance Of The Evidence Relating To Elvir Džojić, "Zeke", Civilian Policemen, Dealing With Detainees At The SUP**

(a) **Alleged error of fact which has occasioned a miscarriage of justice**

18. The Chamber erred in fact by not considering properly the exculpatory evidence relating to Elvir Džojić. This evidence showed that Civilian Police, rather than Military Police, detained the Serb individuals mentioned in the Indictment. If the Chamber had not so erred, but had properly assessed this body of exculpatory evidence, it would not have concluded that the Military Police detained Serb individuals. It would then have acquitted the Appellant. Thus the error of fact occasioned a miscarriage of justice.

(b) **Identification of the finding or ruling challenged in the Judgement**

19. Since the Chamber's error relates to an *omission* to consider evidence, there is not a specific paragraph to which reference may be made.
20. The Chamber's error resulted, however, in the Chamber's challenged finding at paragraph 496 (pages 168-169) of the *Judgement*:

"The only conclusion to draw from this evidence is that the Srebrenica military police, through its commanders, i.e., Mirzet Halilović and Atif Krdžić respectively, are responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building."

(c) **The Precise Relief Sought**

21. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

5. **Sub-Ground 1(E): The Chamber Erred In Finding that members of the Military Police were Responsible For Murder/Cruel Treatment**

(a) **Alleged error on a question of law invalidating the decision**

22. The Chamber erred in law in its attribution of responsibility to the Military Police for the acts or omissions of others which resulted in the death and

mistreatment of Serb detainees. The Chamber misapplied the law of command responsibility as recognised in Article 7(3) of the Statute of the Tribunal. The error of law invalidates the decision.

23. Application of the proper legal tests results in the conclusion that the Military Police are not responsible for the murder and cruel treatment of Serb detainees and thus that the Appellant should have been acquitted.

(b) Alleged error of fact which has occasioned a miscarriage of justice

24. The Chamber made an error of fact in concluding that the Prosecution had proved beyond a reasonable doubt that members of the Military Police performed any acts or omissions with the requisite *mens rea* such as to make them responsible for murder and cruel treatment of Serb detainees. This error of fact occasioned a miscarriage of justice. If the Chamber had not so erred, it would have acquitted the Appellant of responsibility for failing to prevent murder and cruel treatment through the acts and omissions of the Military Police.

(c) Identification of the finding or ruling challenged in the Judgement

25. The challenged finding is at paragraph 496 (pages 168-169) of the *Judgement*:

"[...] the Srebrenica military police, thorough its commanders, i.e., Mirzet Halilović and Atif Krdžić respectively, are responsible for the acts and omissions by the guards at the Srebrenica Police Station and at the Building."

(d) The Precise Relief Sought

26. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

6. Sub-Ground 1(F): The Chamber Erred In finding that the Appellant had Actual and Imputed Knowledge of the commission of crimes

(a) Alleged error on a question of law invalidating the decision

27. The Trial Chamber erred in law by failing properly to apply to the facts the law of actual and imputed knowledge in the doctrine of command responsibility. The nature of the information allegedly received by the Appellant was insufficient in law to amount to actual or imputed knowledge.

As a result of this error of law, the Chamber wrongly concluded that the Appellant had knowledge of the murder and cruel treatment of certain Serb detainees and imputed knowledge of the murder and cruel treatment of other Serb detainees.

28. Application of the correct legal standards would have led the Chamber to conclude that the Appellant neither knew nor had reason to know that his alleged subordinates were about to commit murder and cruel treatment or had done so. The Chamber would then have acquitted the Appellant. The error of law invalidates the decision.

(b) Alleged error of fact which has occasioned a miscarriage of justice

29. The Chamber erred in fact by concluding that the Appellant knew of murder and cruel treatment committed at the SUP in September and October 1992 and that he had reason to know of murder and cruel treatment committed at the SUP and at the Building between December 1992 and March 1993. The evidence was insufficient to support these conclusions. No reasonable trial chamber would have reached the conclusions reached by the Chamber.

30. The error of fact occasioned a miscarriage of justice. If the Chamber had not so erred, it would have acquitted the Appellant.

(c) Identification of the finding or ruling challenged in the Judgement

31. The challenged findings are at paragraphs 533-560 (pages 181-189) of the *Judgement*.

(d) The Precise Relief Sought

32. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

7. Sub-Ground 1(G): The Chamber erred in fact by finding that Atif Krdžić Knew Of Crimes Committed By The Military Police

(a) Alleged error of fact which has occasioned a miscarriage of justice

33. The Chamber erred in fact in finding that Atif Krdžić, Military Police Commander, was aware of the murder and cruel treatment of Serb detainees.

No reasonable trial chamber would have so found given the complete absence of evidence to support that conclusion.

34. If the Chamber had correctly evaluated the evidence, it would not have found that Krdžić was aware of the murder and cruel treatment of Serb detainees. This error of fact, combined with the error of fact in finding that the Appellant had effective control over the Military Police (paragraph 532 (page 180), *Judgement*), resulted in the Appellant's wrongful conviction. The error of fact occasioned a miscarriage of justice.

(b) Identification of the finding or ruling challenged in the Judgement

35. The challenged finding is at paragraph 496 (page 169) of the *Judgement*:

"[...] The Trial Chamber has no hesitation in concluding that there is no reason why Atif Krdžić, the head of the Srebrenica military police after 22 November 1992, should not have become aware of the crimes committed, except for wilful blindness."

(c) The Precise Relief Sought

36. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

8. Sub-Ground 1(H): The Chamber erred in fact by finding that Osman Osmanović and Ramiz Bećirović were directly involved with the Srebrenica Military Police and with the Serb detainees after 27 November 1992

(a) Alleged error of fact which has occasioned a miscarriage of justice

37. The Chamber committed an error of fact in finding that "*[...] subsequent to 27 November 1992, Osman Osmanović and Ramiz Bećirović exercised effective control over the Srebrenica military police and indirectly involved themselves in matters relating to the detention of Serb detainees through the role assigned to Hamed Salihović*" (Paragraph 527 (page 178), *Judgement*). No reasonable trial chamber would reach such a conclusion on the evidence.
38. The error of fact occasioned a miscarriage of justice. The Chamber's finding was critical to the Appellant's conviction, since the Chamber used that finding to link the Appellant to the Military Police and thus to the mistreatment of Serb detainees (paragraph 529 (pages 179-180), *Judgement*).

(b) Identification of the finding or ruling challenged in the Judgement

39. As stated above, the challenged findings are at paragraph 527 (page 178) and paragraph 529 (page 179) of the *Judgement*.

(c) The Precise Relief Sought

40. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

9. Sub-Ground 1(I): The Chamber erred in fact in finding that Hamed Salihović gave instructions to the Military Police and that he interrogated detainees

(a) Alleged error of fact which has occasioned a miscarriage of justice

41. The Chamber committed an error of fact in finding that Hamed Salihović gave instructions to the Military Police and that he interrogated detainees. No reasonable trial chamber would have reached these conclusions on the evidence.
42. The error of fact occasioned a miscarriage of justice. If the Chamber had not so erred, it would not have linked the detention of Serbs to the Military Police, and through the Military Police to the Appellant. It would then have acquitted the Appellant.

(b) Identification of the finding or ruling challenged in the Judgement

43. The challenged findings are at paragraph 512 (page 173), paragraph 515 (page 174), and paragraph 517 (pages 174-175) of the *Judgement*.

(c) The Precise Relief Sought

44. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

B. GROUND TWO: THE CHAMBER FAILED TO MAKE PROPER CREDIBILITY FINDINGS

1. Sub-Ground 2(A): The Chamber failed to make credibility findings in relation to the evidence that the Appellant had no effective control over the Military Police and that the War Presidency was responsible for Serb detainees

(a) Alleged error of fact which has occasioned a miscarriage of justice

45. The Chamber committed factual errors in not properly evaluating the credibility of witnesses who gave evidence that the Appellant did not have effective control over the Military Police and that the War Presidency was responsible for Serb detainees. If the Chamber had not so erred, it would have found the witnesses credible and would have concluded that the Appellant did not have effective control over the Military Police and that he was not responsible for Serb detainees.

46. These errors of fact occasioned a miscarriage of justice.

(b) Alleged error on a question of law invalidating the decision

47. The Chamber erred in law by not making proper credibility findings in relation to witnesses who gave evidence that the Appellant did not have effective control over the Military Police and that the War Presidency was responsible for Serb detainees.

48. The error of law invalidates the decision. Application of the correct legal test in assessing witness credibility would have led the Chamber to find those witnesses credible and to conclude that the Appellant had no effective control over the Military Police and that the War Presidency was responsible for detainees.

(c) Identification of the finding or ruling challenged in the Judgement

49. The findings challenged are as follows.

50. The Defence challenges the finding set out at paragraph 532 (page 180) of the *Judgement*:

"[...] the Trial Chamber is satisfied beyond reasonable doubt that subsequent to 27 November 1992, a superior-subordinate relationship for the purposes of Article 7(3) of the Statute existed between the Accused and the Srebrenica military police"

51. The Defence challenges as errors of fact the findings set out at paragraphs 181-184 (pages 66-67) of the *Judgement* (that a decision to establish the Military Police was taken at a meeting of the TO Staff on 1 July 1992, at which the War Presidency was also inaugurated) and at paragraph 182 (pages 66-67) of the *Judgement* (that at the meeting on 1 July 1992, Mirzet Halilović was appointed MP commander and that "On 22 November 1992, during a meeting of the Srebrenica Armed Forces Staff in which at least one Srebrenica War Presidency member was present, Mirzet Halilović was replaced by Atif Krdžić.")

(d) The Precise Relief Sought

52. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

2. Sub-Ground 2(B): The Chamber erred in law by failing to consider the Defence's Credibility Challenges to Slavoljub Žikić And Nedeljko Radić

(a) Alleged error of fact which has occasioned a miscarriage of justice

53. The Chamber committed an error of fact by failing to take any account of the discrepancies between the evidence of Slavoljub Žikić and Nedeljko Radić, and the significance of those discrepancies in undermining the Prosecution's case that the Appellant was present in the SUP. The Appellant's convictions rested squarely on the notion that he had visited the SUP and seen the condition of the detainees, thereby providing him with the requisite notice under Article 7(3). If the Chamber had not so erred, the Appellant would have been acquitted. The Chamber's error occasioned a miscarriage of justice.

(b) Identification of the finding or ruling challenged in the Judgement

54. The findings challenged are those set out at paragraphs 541-543 (pages 183-184) and 550 (page 186) of the *Judgement*.

(c) The Precise Relief sought

55. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

C. GROUND THREE: THE CHAMBER ERRED IN LAW BY PLACING THE BURDEN ON THE DEFENCE OF PROVING MATTERS IN DISPUTE

(a) Alleged error on a question of law invalidating the decision

56. The Chamber erred in law by placing the burden of proof on the Defence on matters which were crucial to the Appellant's conviction. The Chamber *de facto* placed the burden on the Defence of proving: that Prosecution exhibits were not authentic and/or reliable; that the Srebrenica War Presidency established the Military Police; that the Military Police were not responsible for the detention facilities; and that the War Presidency had jurisdiction over the Military Police.
57. The misapplication of the burden of proof on these matters constituted an error law invalidating the decision.

(b) Identification of the finding or ruling challenged in the Judgement

58. The challenged findings are at paragraphs 35 (page 13), 36 (page 13), 38 (page 14), 202 (page 72), 484 (page 165), 485 (page 165), 511 (pages 172-173) and 540 (page 183) of the *Judgement*.

(c) The Precise Relief sought

59. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

D. GROUND FOUR: THE CHAMBER APPLIED THE WRONG LEGAL AND EVIDENTIARY STANDARD WITH REGARD TO THE CRIME OF MURDER

(a) Alleged error on a question of law invalidating the decision

60. The Trial Chamber erred in law by applying the wrong legal and evidentiary standard to the question of proof that the alleged victims in the Indictment had been murdered. The error of law invalidates the decision.

61. Application of the correct legal and evidentiary standard leads to the conclusion that there was a reasonable doubt that each of the alleged murder victims had been murdered. If the correct standard had been applied, the Appellant would have been acquitted of Count 1 of the Indictment.

(b) Identification of the finding or ruling challenged in the Judgement

62. The challenged findings are that each of the alleged murder victims were murdered, which are set out at paragraphs 383-384 (page 141), 395 (page 144), 399-400 (page 145), 405 (page 146) and 411 (page 148) of the *Judgement*.

(c) The Precise Relief sought

63. The precise relief sought is a quashing of the Appellant's convictions on Count 1 of the Indictment.

E. GROUND FIVE: THE TRIAL CHAMBER APPLIED A THEORY OF COMMAND RESPONSIBILITY WHICH IS NOT IN THE STATUTE AND WHICH IT DID NOT DEMONSTRATE HAD ANY SUPPORT IN STATE PRACTICE AND OPINIO JURIS

1. Sub-ground 5(A): The Chamber erred in law by holding that the appellant was criminally responsible for failure to prevent his subordinates from failing to prevent third parties from committing crimes

(a) Alleged error on a question of law invalidating the decision

64. The Trial Chamber erred in law by holding that the Appellant was criminally responsible for failure to prevent his subordinates from failing to prevent third parties from committing crimes. This is not a form of liability recognised under international criminal law. The error of law invalidates the Decision.

(b) Identification of the finding or ruling challenged in the Judgement

65. The finding challenged is at paragraphs 489-490 (pages 166-167) and 496 (pages 168-169) of the *Judgement*.

(c) The Precise Relief sought

66. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

2. **Sub-Ground 5(B): The Chamber erred in law by holding that the Appellant was criminally responsible when his subordinates were not direct perpetrators but where they allegedly aided and abetted non-subordinates to commit crimes**

(a) **Alleged error on a question of law invalidating the decision**

67. The Chamber erred in law by misapplying the law of command responsibility under Article 7(3) of the Statute and erroneously finding that an accused may be criminally liable where his subordinates aided and abetted non-subordinates to commit crimes. There is no basis for this form of liability in the Statute or in international criminal law. The error invalidates the decision.

(b) **Identification of the finding or ruling challenged in the Judgement**

68. The finding challenged is at paragraphs 295-306 (pages 107-111) of the *Judgement*.

(c) **The Precise Relief sought**

69. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

2. **Sub-ground 5(c): The Chamber erred in law by holding that the appellant may be criminally responsible for crimes when the direct perpetrators are unknown and the group or category to which they belong is unknown**

(a) **Alleged error on a question of law invalidating the decision**

70. The Chamber erred in law in holding that an accused may be criminally responsible for crimes under Article 7(3) of the Statute when the direct perpetrators are unknown and the group or category to which they belong is unknown. The error of law invalidates the decision.

71. Proper application of the law leads to the conclusion that the Appellant cannot be held responsible as a commander when the direct perpetrators and the group or category to which they belong are unknown.

(b) **Identification of the finding or ruling challenged in the Judgement**

72. The finding challenged is at paragraph 496 (pages 168-169) of the *Judgement*.

(c) The Precise Relief sought

73. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

F. GROUND SIX: THE TRIAL CHAMBER ERRED IN LAW BY APPLYING A THEORY OF COMMAND RESPONSIBILITY OF WHICH THE DEFENCE HAD NO NOTICE IN THE INDICTMENT AND AGAINST WHICH, ACCORDINGLY, IT DID NOT DEFEND AT TRIAL

(a) Alleged error on a question of law invalidating the decision

74. The Trial Chamber erred by applying a theory of command responsibility to convict the Appellant, on the basis that his subordinates aided and abetted non-subordinates to commit murder and cruel treatment, or that they culpably omitted to prevent those crimes. The Indictment provided the Defence with no notice that this would be the Prosecution's case at trial. The Indictment nowhere mentions "*aiding and abetting*" or Article 7(1) of the Statute in the context of the charges of murder and cruel treatment. Nor does the Indictment specify in sufficient detail the alleged conduct constituting "*culpable omissions*" on the part of the Appellant's subordinates.
75. The Chamber's error of law deprived the Defence of the opportunity to respond to a case of which it had notice, and thus deprived the Appellant of a fair trial. The Chamber's error of law invalidated the decision.

(b) Identification of the finding or ruling challenged in the Judgement

76. The findings challenged are at paragraphs 295-306 (pages 107-111) of the *Judgement*, and in particular paragraph 306 (page 111) thereof:

"Fourth, the Trial Chamber finds that the criminal responsibility of subordinates of the Accused under Article 7(1) of the Statute, by virtue of omission, is sufficiently indicated in the Indictment and in the Prosecution Pre-Trial Brief."

(c) The Precise Relief sought

77. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

G. GROUND SEVEN: THE CHAMBER ERRED IN LAW BY CONVICTING THE APPELLANT ON THE BASIS OF A THEORY OF CULPABLE OMISSIONS OF HIS SUBORDINATES WHICH AMOUNTED TO STRICT LIABILITY

(a) Alleged error on a question of law invalidating the decision

78. The Trial Chamber erred in law by convicting the Appellant under Article 7(3) of the Statute without requiring proof of the requisite *mens rea* with respect to the Appellant's alleged subordinates. The Chamber wrongly applied a strict liability test, according to which the Appellant's alleged subordinates were responsible for any mistreatment of Serb detainees without any proof of intentional *mens rea* on the part of those individual subordinates.
79. The Chamber therefore misapplied the law of command responsibility and the basic principle that in a criminal trial the Prosecution must prove *mens rea* beyond a reasonable doubt. The error of law invalidates the decision. If the Chamber had applied the correct test, it would not have found it proved beyond a reasonable doubt that the Appellant's subordinates possessed the requisite *mens rea* to be guilty of murder and cruel treatment by virtue of their culpable omissions.

(b) Identification of the finding or ruling challenged in the Judgement

80. The findings challenged are at paragraphs 304 (page 110) and 305 (pages 110-111) of the *Judgement*.

(c) The Precise Relief sought

81. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

H. GROUND EIGHT: THE CHAMBER ERRED IN LAW BY MISLEADING THE DEFENCE THAT IT DID NOT FIND A PROSECUTION WITNESS AT ALL CREDIBLE AND THEN RELYING CRITICALLY ON HIS EVIDENCE IN ITS JUDGEMENT ON INCRIMINATING MATTERS, WHILE IGNORING HIS EVIDENCE ON EXCULPATORY MATTERS

(a) Alleged error on a question of law invalidating the decision

82. The Trial Chamber erred in law by fundamentally compromising the fairness of the Appellant's trial in its conduct in relation to a Prosecution witness,

Bećir Bogilović. The Chamber misled the Defence into believing that it did not find the witness at all credible, which resulted in the Defence taking the tactical decision not to seek further to impeach the witness during the Prosecution and Defence case. The Chamber then relied on Bogilović's evidence on key matters in its *Judgement*. The Chamber ignored, however, Bogilović's evidence on exculpatory matters, in particular his evidence that the War Presidency exercised *direct command* over the Military Police, which was crucial, exculpatory evidence.

83. This constituted an error of law by the Trial Chamber invalidating the decision.

(b) Identification of the finding or ruling challenged in the Judgement

84. The findings challenged in the *Judgement* are those which the Chamber reached on the basis of Bogilović's evidence, namely that that the Military Police were based on the ground floor of the SUP (paragraphs 185 (page 67), 359 (page 135) and 483 (pages 164-165)); that the Military Police was operational as early as August 1992 (paragraph 181 (page 66)); that the Military Police Commander, Atif Krdžić, was appointed at a meeting of the Srebrenica Armed Forces Staff (paragraph 182 (pages 66-67)); that it was not the Civilian Police who confined Serbs between April 1992 and March 1993 (paragraph 483 (pages 164-165)); that, prior to 14 October 1992, Mirzet Halilović formally answered to "the army" (paragraph 500 (page 170)); and that it was only Mirzet Halilović, as opposed to the entire Srebrenica military police, who was placed under Bogilović's command (paragraph 505 (page 171) of the *Judgement*).

(c) The Precise Relief sought

85. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

I. GROUND NINE: THE CHAMBER ERRED IN LAW BY MISLEADING THE DEFENCE REGARDING ITS "FINDINGS" ISSUED AT THE CLOSE OF THE PROSECUTION CASE

(a) Alleged error on a question of law invalidating the decision

86. The Appellant was denied a fair trial because the Chamber gave notice to the Defence that it did not need to bring evidence in certain areas and then convicted the Appellant due to the absence of evidence in those areas.

87. This constituted an error of law by the Chamber invalidating the decision.

(b) Identification of the finding or ruling challenged in the Judgement

88. The findings challenged are at paragraphs 551-559 (page 186-189) and 570 (page 192) of the *Judgement*.

(c) The Precise Relief sought

89. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

J. GROUND TEN: ERRORS OF FACT AND LAW IN ITS APPROACH TO THE ASSESSMENT OF DOCUMENTARY EVIDENCE

(a) Alleged error on a question of law invalidating the decision

90. The Chamber applied the wrong legal standard to the question of whether the Prosecution had proved the authenticity and reliability of its exhibits beyond a reasonable doubt. Moreover, it erred in law by confusing the two separate questions of whether a document is authentic and the question of whether the document's contents are true.

91. If the Chamber had applied the correct legal tests it would have excluded from evidence or placed very little weight on Prosecution exhibits which had not been authenticated or confirmed as reliable by any witness. The error of law invalidates the Decision.

(b) Alleged error of fact which has occasioned a miscarriage of justice

92. The Chamber committed errors of fact in its evaluation of the documentary evidence. It systematically misconstrued and misunderstood the significance of both Prosecution and Defence exhibits. If it had properly evaluated the

documentary evidence, it would not have concluded that the Appellant was responsible for mistreatment of Serb detainees and it would then have acquitted the Appellant. The Chamber's errors of fact occasioned a miscarriage of justice.

(c) Identification of the finding or ruling challenged in the Judgement

93. The findings challenged in the *Judgement* are as follows.

- (i) In relation to Prosecution exhibit, **P84**: paragraphs 234 (page 82), 486 (page 166), 507-508 (page 172), 516-519 (pages 174-175), 525 (page 178) and 554 (page 187);
- (ii) In relation to **P458/P561**: paragraphs 28 (pages 10-11), 402 (pages 145-146), 485 (page 165) and 512 (page 173);
- (iii) In relation to exhibits **P598/P598.1**: paragraphs 57-58 (pages 21-22);
- (iv) In relation to documents from the "**Sokolac collection**": paragraphs 40 (page 15) and 517 (pages 174-175), and footnotes 646, 647, 648, 649, 1207, 1430, 1456, 1457 and 1458;
- (v) In relation to **P255**, paragraph 556 (pages 187-188); and
- (vi) In relation to **exhibits which no witness had authenticated or confirmed as accurate**: paragraphs 35 (page 13), 38 (page 14), 42 (page 16) and 512 (page 173)

(d) The Precise Relief sought

94. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

K. GROUND ELEVEN: THE CHAMBER ERRED IN LAW BY REACHING IRRATIONAL CONCLUSIONS

(a) Alleged error on a question of law invalidating the decision

95. The Chamber erred in law by reaching *self-contradictory* conclusions which no reasonable trial chamber would reach.

96. The Trial Chamber contradicted itself by finding that the Military Police was the body which detained Serbs at the SUP, on the basis that both the Military Police and detained Serbs were situated on the *ground floor of the SUP*, while at the same time finding that Serbs were detained *on the first floor of the SUP* (paragraphs 483 and 484 (pages 164-165), *Judgement*).
97. The Chamber contradicted itself by finding that the Commission dealing with the exchange of Serb detainees both existed and did not exist (paragraphs 234 (pages 83-84) and 520 (page 176) of the *Judgement*).
98. The Chamber contradicted itself by finding that the situation in Srebrenica was uniquely chaotic and appalling (paragraph 108-116 (pages 38-40), *Judgement*), while drawing inferences as if the situation had been one of complete normality (paragraph 529 (pages 179-180), *Judgement*).
99. The Chamber contradicted itself by, on the one hand, acknowledging that Zulfo Tursunović was "*a fiercely independent local leader, often unwilling to accept superiority*" (paragraph 165 (pages 58-59), *Judgement*) and recognizing that there was no evidence that Zulfo Tursunović ever shared his knowledge of mistreatment of Serbs with the Appellant (paragraph 548 (page 185), *Judgement*), and yet finding "*not credible the Accused's affirmation that he was unaware that Serbs were being detained at the Building*" because "*Zulfo Tursunović, his deputy, frequently visited the detainees there.*" (paragraph 554 (page 187), *Judgement*).
100. The Chamber contradicted itself by admitting that, "*No conclusive evidence has been adduced which would shed light on the internal structure of the Srebrenica military police. In addition, there are different accounts as to whom this body reported and who effectively controlled the Srebrenica military police at any given time between August 1992 and its dissolution in April 1993*" (paragraph 498 (pages 169-170), *Judgement* (emphasis added)), while at the same time finding it proved beyond a reasonable doubt that the Appellant had effective control over the Military Police after 27 November 1992 (paragraph 532, *Judgement*).
101. These errors of law invalidated the decision. Every one of them, individually, was irrational and led to the Appellant being convicted on an irrational basis.

(b) Identification of the finding or ruling challenged in the Judgement

102. The findings challenged in the *Judgement* are identified in the preceding paragraphs.

(c) The Precise Relief sought

103. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

L. GROUND TWELVE: THE CHAMBER ERRED IN LAW BY SYSTEMATICALLY DRAWING INFERENCES IN THE LIGHT MOST DAMAGING TO THE ACCUSED

104. In its *Notice of Appeal* filed on 31 July 2006, the Defence submitted that "*the Chamber consistently evaluated, and drew inferences, in the most damaging way to the Accused.*" (paragraphs 160-163, *Notice of Appeal*).

105. The Defence maintains that the Chamber erred in law by failing to apply the presumption of innocence and the principle, *in dubio pro reo*. Whenever two conclusions were reasonably open on the evidence, the Chamber drew the inference which was least favourable to the Accused.

106. The Defence considers, on reflection, however, that this Ground of Appeal overlaps with other Grounds, in particular Ground Three. The Defence will not, therefore, maintain this ground as a separate Ground of Appeal. In the interests of consistency with the numbering of the grounds in the earlier Notice – and to avoid any confusion - the Defence will nonetheless keep the numbering of the other Grounds as they were in the first Notice of Appeal.

M. GROUND THIRTEEN: ERRORS OF LAW AND FACT IN ADMITTING AND MISCONSTRUING THE APPELLANT'S ALLEGED RECORD OF INTERVIEW

(a) Alleged error on a question of law invalidating the decision

107. The Chamber erred in law by admitting into evidence "*what appears to be a suspect interview of the Accused*" (paragraph 52 (page 19), *Judgement*) (P328 and P329). The Chamber applied the wrong legal tests to the admission into evidence of an alleged suspect interview. If the Chamber had applied the correct legal standard, it would have excluded the alleged record of interview from evidence.

108. Having admitted the alleged record of interview into evidence, the Chamber further erred in law by *de facto* treating it as being equivalent to sworn witness testimony. Moreover, it only accepted as credible allegedly incriminating statements by the Appellant; any exculpatory statements were labelled as not credible (paragraph 554 (page 187): “*The Trial Chamber does not find credible the Accused’s affirmation that he was unaware that Serbs were being detained at the Building.*”)

109. These errors of law invalidated the decision. If the Chamber had not so erred, the Appellant would have been acquitted of both counts.

(b) Alleged error of fact which has occasioned a miscarriage of justice

110. The Chamber committed errors of fact in misunderstanding what was stated in the alleged record of interview and misconstruing what was said in the alleged record of interview in the context of other evidence in the case. The conviction of the Appellant greatly relied on what the Appellant allegedly said in his interview. One sentence in the alleged interview is the centrepiece of the Appellant’s conviction. If the Chamber had not committed these errors of fact, the Appellant would have been acquitted. The errors of fact occasioned a miscarriage of justice.

(c) Identification of the finding or ruling challenged in the Judgement

111. The findings challenged in the *Judgement* are as follows: paragraphs 52-56 (pages 20-21), 234 (page 82), 482 (page 164), 497 (page 169), 514 (page 174), 520 (page 176), 536 (page 182) and 550-559 (pages 186-189).

(d) An identification of any other order, decision or ruling challenged in the Judgement, with specific reference to the date of its filing

112. The Defence also challenges the Trial Chamber’s *Decision on Defence Motion to Exclude Interview of the Accused pursuant to Rules 89(D) and 95*, 7 February 2006, on the grounds that it was an error of law invalidating the *Judgement* for the Chamber not to have excluded the alleged record of interview from evidence. The Trial Chamber also erred in law by refusing to certify its *Decision* of 7 February 2006 in its *Decision on urgent defence request for certification of the Trial Chamber’s decision on defence motion to*

exclude interview of the accused pursuant to rules 89(D) and 95, dated 13 February 2006.

113. The Chamber reaffirmed and thus adopted its errors of law in relation to the alleged record of interview at paragraphs 54-56 (pages 20-21) of the *Judgement*.

(e) The Precise Relief Sought

114. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

N. GROUND FOURTEEN: THE CHAMBER ERRED IN LAW AND IN FACT IN FINDING THAT THE APPELLANT HAD FAILED TO PREVENT MURDER AND CRUEL TREATMENT

(a) Alleged error on a question of law invalidating the decision

115. The Chamber erred in law by applying the wrong legal and evidentiary standard to the question of the Appellant's alleged failure to prevent murder and cruel treatment. The Chamber essentially did not require the Prosecution to prove that the Appellant had failed to prevent murder and cruel treatment but simply *assumed* that he failed to do so because murder and cruel treatment had occurred. This was a blatant error of law.
116. This error of law invalidated the decision.

(b) Alleged error of fact which has occasioned a miscarriage of justice

117. No reasonable trial chamber would have considered that the Prosecution had proved beyond a reasonable doubt that the Appellant had failed to prevent murder and cruel treatment. A reasonable trial chamber would, therefore, have acquitted the Appellant.
118. The Chamber's error of fact was compounded by the fact that the "*X material*" had been withheld from the Appellant; material which suggested that the Appellant *had* taken steps to promote the welfare of detainees. This material was withheld from the Defence and the Appellant was thus convicted without having the means to defend himself. The decision regarding the X material is challenged in Ground 15.
119. The Chamber's errors of fact occasioned a miscarriage of justice.

(c) Identification of the finding or ruling challenged in the Judgement

120. The findings challenged in the *Judgement* are as follows: paragraphs 557-559 (pages 188-189) and 565-572 (pages 191-193).

(d) The Precise Relief sought

121. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

O. GROUND FIFTEEN: THE CHAMBER ERRED IN LAW BY FAILING ADEQUATELY TO DEAL WITH THE PROSECUTION'S REPEATED, SERIOUS BREACHES OF ITS DISCLOSURE OBLIGATIONS

(a) Alleged error on a question of law invalidating the decision

122. The Chamber erred in law by failing to consider that the Appellant's right to a fair trial was breached by the Prosecution's repeated and extremely serious breaches of disclosure at every stage of the trial and to adopt appropriate sanctions to prevent further recurrence of those breaches.
123. The Chamber erred by not ordering disclosure of the "*X material*" to the Defence or, alternatively, taking it into account as negating the suggestion that Appellant did nothing to prevent mistreatment of detained Serbs.
124. The Chamber erred in law by failing to draw inferences favourable to the Appellant where there had been breaches by the Prosecution of its obligations under Rules 66 and 68 of the Rules of Procedure and Evidence.
125. These errors of law invalidated the decision.

(b) Identification of the finding or ruling challenged in the Judgement

126. The findings challenged are paragraphs 72-77 (pages 26-28) of the *Judgement*.

(c) An identification of any other order, decision or ruling challenged

127. Under this ground of appeal, the Defence also challenges the Trial Chamber's *Confidential Decision on Prosecutor's Confidential and Ex Parte Motion Pursuant to Rules 66(C) and 68(iv) for exempting specific material from disclosure* rendered on 15 December 2004.

(d) **The Precise Relief sought**

128. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

P. GROUND SIXTEEN: THE CHAMBER ERRED IN LAW BY CONDUCTING THE TRIAL WITH CONSPICUOUS PROCEDURAL UNFAIRNESS TO THE APPELLANT

(a) **Alleged error on a question of law invalidating the decision**

129. The Chamber erred in law by conducting the trial with conspicuous unfairness to the Appellant.

130. The Chamber erred in law by using a witness's prior statements effectively to "cross-examine" him, because the Chamber was dissatisfied with the extent of his exculpatory evidence and his apparent failure to "come up to proof" with the incriminating evidence which he was expected to give on the basis of his prior statements. This procedure was in breach of the Tribunal's procedure, breached the agreement pursuant to which the Defence had agreed that the Chamber should have sight of a witness's prior statements and, most importantly, meant that justice was visibly seen not to be done. The Presiding Judge appeared concerned to ensure that the anticipated incriminating evidence to be given by the witness appeared on the record. This was a clear violation of the Appellant's right to be tried by a tribunal with no appearance of partiality.

Reference: 23 February 2005, T. 5410-5411.

131. The Chamber erred in law by failing to deal adequately with the procedural unfairness which resulted to the Appellant from the Prosecution seeking, after the event, to impeach its own witnesses and to fail to put its case to Defence witnesses, as required by the Rules, in particular Rule 90(H)(ii) of the Rules.

Reference: Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party failing to put its case to witnesses pursuant to Rule 90(H)(ii)", dated 17 January 2006

132. The Chamber erred in law by appearing to wish to intimidate Defence counsel when both counsel legitimately, and as part of their professional duty to their client and to the court, objected to improper questions put to Suad Smajlović in cross-examination by the Prosecution. The Presiding Judge visibly lost his

temper and made hyperbolic and threatening remarks to both Counsel. As a result of this outburst, the Chamber failed properly to evaluate the evidence of Suad Smajlović, which related directly to allegations of effective control over the Military Police by the Appellant, which are central to the case.

Reference: 9 December 2005, T.14720-14729.

133. The Chamber erred in law in seeking to curtail the Defence case to less than the minimum necessary for a fair trial and to force the Defence into calling witnesses before the Appeals Chamber had an opportunity to consider the Defence's appeal.

Reference: Pre-Defence Conference, 1 July 2005, T.9061-9065.

134. The Chamber erred in law, and misapplied the rules of procedure, by not allowing the Defence to re-examine on new areas of testimony which had arisen during Prosecution re-examination of a witness.

Reference: 12 May 2005. T.8219.

135. The Chamber erred in law by attempting to limit Defence cross-examination of Prosecution expert, Dr. Gow, on relevant and probative matters

Reference: 24 November 2004, T. 1948.

136. The Chamber erred in law by misquoting a witness's evidence back to the witness and then putting leading questions to the witness on the basis of the misquoted testimony.

Reference: 9 February 2005, T. 4905.

137. The Chamber erred in law by suggesting to a Prosecution witness an explanation for discrepancies in his statement, thereby helping the witness to avoid impeachment of his credibility.

Reference: 13 December 2004, T. 3063.

138. The Chamber attempted to shed doubt on the reliability of a prior inconsistent statement made by a Prosecution witness by focusing on a typing error and a declaration at the end of the statement.

Reference: 26 January 2005, T. 4164-4165 and T. 4169-4170.

139. The Chamber erred in law by misquoting the evidence as to when a witness sustained injuries.

Reference: 4 February 2005, T.4642-4642.

140. The Chamber erred in law by asking a witness leading questions in order to attempt to establish the existence of the Srebrenica Territorial Defence.

Reference: 14 February 2005, T. 5032-5033.

141. The Chamber erred in law by encouraging witnesses to speculate.

Reference: 23 February 2005, T. 5475.

142. The Chamber erred in law by misquoting the witness's evidence back to him in order to attempt to show a discrepancy in relation to the Appellant's knowledge of events in Potočari or the wider Srebrenica area

Reference: 7 September 2005, T. 10553-10554.

143. The Chamber erred in law by suggesting abstract concepts of independent groups cooperating in order to establish a command structure despite clear evidence from the witness that groups were independent.

Reference: 14 October 2005, T. 12469.

144. These errors of law constituted procedural unfairness to the Appellant and their cumulative effect was such as to deprive the Appellant of the right to a fair trial. These errors of law invalidated the decision.

(b) Identification of the finding or ruling challenged in the Judgement

145. These incidents occurred during the trial and are consequently not referred to in the *Judgement*. The finding challenged is at paragraph 782 of the *Judgement*.

(c) Identification of any other order, decision or ruling challenged, with specific reference to the date of its filing and/or transcript page

146. For ease of reference, the relevant references have been set out above in relation to each error of law.

(d) **The Precise Relief sought**

147. The precise relief sought is a quashing of the Appellant's convictions on Counts 1 and 2 of the Indictment.

V. **WHETHER MISCARRIAGES OF JUSTICE OCCURRED WITH RESPECT TO EACH INDIVIDUAL ERROR OR CUMULATIVELY**

148. In the *Appeals Chamber's Decision*, the Chamber stated:

"CONSIDERING further, regarding errors of fact, that it is not clear whether the Defence alleges that a miscarriage of justice has occurred with respect to each individual error and/or cumulatively."

149. The Defence, therefore, wishes to clarify that it alleges that a miscarriage of justice has occurred with respect to each individual error of fact.

VI. **CONCLUSION**

150. The Defence will, therefore, request the Appeals Chamber to allow the appeal and to quash the Appellant's convictions.

Dated this 5th day of October 2006



Vasvija Vidović and John Jones
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