

**UNITED  
NATIONS**

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

Case No. IT-04-82-A  
Date: 16 April 2009

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**IN THE APPEALS CHAMBER**

**Before:** Judge Mehmet Güney, Presiding  
Judge Mohamed Shahabuddeen  
Judge Liu Daqun  
Judge Andrézia Vaz  
Judge Theodor Meron

**Acting Registrar:** Mr. John Hocking

**THE PROSECUTOR**

v.

**LJUBE BOŠKOSKI  
JOHAN TARČULOVSKI**

***PUBLIC***

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**NOTICE OF FILING OF PUBLIC REDACTED VERSION OF  
PROSECUTION RESPONSE TO JOHAN TARČULOVSKI'S  
APPEAL BRIEF**

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**The Office of the Prosecutor:**  
Mr. Paul Rogers

**Counsel for Johan Tarčulovski:**  
Mr. Alan M. Dershowitz  
Mr. Nathan Z. Dershowitz  
Mr. Antonio Apostolski  
Mr. Jordan Apostolski

**Counsel for Ljube Boškosi:**  
Ms. Edina Rešidović  
Mr. Guénaél Mettraux

**INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

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**v.**

**LJUBE BOŠKOSKI  
JOHAN TARČULOVSKI**

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PROSECUTION RESPONSE TO JOHAN TARČULOVSKI'S APPEAL BRIEF**

The Prosecution hereby files its public redacted version of the Prosecution Response to Johan Tarčulovski's Appeal Brief, filed confidentially on 9 April 2009.

Word Count: 38



Paul Rogers  
Appeals Counsel

Dated this 16<sup>th</sup> day of April 2009  
At The Hague, The Netherlands

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## I. OVERVIEW

1. Tarčulovski planned, organised and led an operation the predominant object of which was to indiscriminately attack and punish ethnic Albanians for the actions of the NLA.<sup>1</sup> The Chamber did not err in convicting Tarčulovski of murder, wanton destruction and cruel treatment, or in sentencing him to 12 years imprisonment.

2. Following an incident on 10 August 2001 in which FYROM forces suffered casualties at the hands of the NLA, Tarčulovski – who had no experience in criminal or anti-terrorist operations<sup>2</sup> – was put in charge of planning, organising and leading an operation in Ljuboten. Tarčulovski assembled and equipped a unit of at least 60-70 reserve policemen, and he arranged for fire support from the army for the operation. At about 8:00 a.m. on 12 August 2001, Tarčulovski and his unit entered Ljuboten, followed by a police patrol in a Hermelin APC, which assisted in the operation at Tarčulovski's request. Tarčulovski's unit proceeded along the village's main road, killing and beating ethnic Albanian villagers who were taking no active part in the hostilities – some of whom had literally waved a white flag of surrender – and, without any military necessity, setting fire to houses and property of Albanians.<sup>3</sup>

3. The Chamber found Tarčulovski guilty of planning, ordering and instigating the crimes committed in Ljuboten on 12 August 2001. The Chamber correctly identified and applied the relevant law, and carefully assessed the evidence presented, providing detailed reasoning for its findings. Tarčulovski fails to show that the Chamber committed any legal or factual error justifying the Appeals Chamber's intervention.

4. In essence, Tarčulovski's argument on appeal is that he was wrongly convicted for having planned and directed a legitimate self-defence action against "terrorists" operating in FYROM. This argument fails in law and on the facts.

5. Contrary to Tarčulovski's assertions concerning the Tribunal's jurisdiction and the application of IHL,<sup>4</sup> the question of whether the Ljuboten operation was in self-defence against "terrorists" is irrelevant. As there was an armed conflict in FYROM in August 2001, all parties were obliged to abide by applicable IHL (in particular

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<sup>1</sup> Judgement, para.572.

<sup>2</sup> Judgement, para.571.

<sup>3</sup> *See generally below* paras.36-68.

<sup>4</sup> Grounds 1 and 2 of Tarčulovski Brief.

Common Article 3 to the Geneva Conventions). The Tribunal has jurisdiction to prosecute persons for serious IHL violations, irrespective of the party or reason for which they claim to have acted. If Tarčulovski's argument were accepted, IHL would become meaningless and the Tribunal irrelevant. States officials and other individuals could evade their obligations under IHL and the Tribunal's jurisdiction simply by claiming that they were acting in defence of the State against "terrorists".<sup>5</sup>

6. Tarčulovski's argument also fails on the facts as the Chamber reasonably concluded that the Ljuboten operation was not solely or even substantially directed against the NLA or "terrorists", but that its primary objective was the commission of crimes against ethnic Albanians and their property. Tarčulovski's challenges to his conviction amount to little more than disagreement with the Chamber's evaluation of the evidence and its ultimate conclusions. Tarčulovski selectively seizes on certain portions of the evidence and advocates his own interpretation without showing that the Chamber's evaluation of the evidence was unreasonable. He also ignores critical factual findings and evidence that contradict his assertions. These arguments should be summarily dismissed as they fail to meet the standard for appellate review.<sup>6</sup>

7. Finally, the 12-year sentence imposed by the Chamber was justified in light of the gravity of Tarčulovski's criminal conduct. Tarčulovski shows no error in the Chamber's exercise of its sentencing discretion.<sup>7</sup>

8. In accordance with the Practice Direction on Appeals Requirements,<sup>8</sup> the Prosecution has limited its response to arguments made in Tarčulovski's Brief. The Prosecution has not responded to any of the new arguments raised in Tarčulovski's Amended Notice of Appeal that go beyond what is argued in his Brief. These arguments constitute an impermissible attempt to expand his appeal.

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<sup>5</sup> See generally below paras.13-35.

<sup>6</sup> See generally below paras.69-175.

<sup>7</sup> See below paras.176-181.

<sup>8</sup> Practice Direction on Appeals Requirements, para.5 ("The statements and the arguments must be set out and numbered in the same order as in the Appellant's Brief and shall be limited to arguments made in response to that brief").

## II. STANDARD OF APPELLATE REVIEW

9. As emphasised by the Appeals Chamber, appellate proceedings before the Tribunal are limited and corrective in nature.<sup>9</sup> On appeal, parties must restrict their arguments to errors on questions of law invalidating the trial chamber decision<sup>10</sup> and to errors of fact that have occasioned a miscarriage of justice.<sup>11</sup> A party alleging an error of law must identify it, present arguments in support of its claim and explain how the error invalidates the decision.<sup>12</sup> Not all errors of law merit judicial review: an alleged error of law that has no chance of changing the outcome of a decision may be rejected on that basis alone.<sup>13</sup>

10. As to errors of fact, the Appeals Chamber affords a significant margin of deference to a trial chamber. An appeal is not a trial *de novo*<sup>14</sup> and the Appeals Chamber does not operate as a second trial chamber.<sup>15</sup> Findings of fact are not lightly overturned, as “only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event.”<sup>16</sup> In relation to the assessment of witness credibility, a trial chamber “has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than [the Appeals Chamber] to assess the reliability and credibility of a witness.”<sup>17</sup> It is not unreasonable, in this respect, for a trial chamber to accept certain parts of a witness’s testimony and reject others.<sup>18</sup> As a result, in considering alleged errors of fact, the Appeals Chamber does not review the evidence to draw its own conclusions; instead it determines whether a reasonable trier of fact could have reached the verdict of guilt beyond a reasonable doubt.<sup>19</sup>

11. Moreover, “two reasonable triers of fact might reach different but equally reasonable findings.”<sup>20</sup> Mere disagreement with the trial chamber’s conclusions is insufficient. Only where the appellant demonstrates that the trial chamber convicted

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<sup>9</sup> *Krnojelac* AJ, para.5.

<sup>10</sup> Article 25(1)(a) of the Statute.

<sup>11</sup> Article 25(1)(b) of the Statute.

<sup>12</sup> *Brdanin* AJ, para.9.

<sup>13</sup> *Brdanin* AJ, para.9 (citing *Krnojelac* AJ, para.10).

<sup>14</sup> *Halilović* AJ, para.10; *Brdanin* AJ, para.15; *Blaškić* AJ, para.13.

<sup>15</sup> *Furundžija* AJ, para.40.

<sup>16</sup> *Krnojelac* AJ, para.11.

<sup>17</sup> *Furundžija* AJ, para.37.

<sup>18</sup> *Blagojević* AJ, para.82 (citing *Kupreškić* AJ, para.333).

<sup>19</sup> *Hadžihasanović* AJ, para.10; *Halilović* AJ, para.9; *Stakić* AJ, para.10.

<sup>20</sup> *Krnojelac* AJ, para.12; *Tadić* AJ, para.64.

on the basis of evidence that no reasonable trial chamber could have accepted or where the evaluation of the evidence was wholly erroneous can the Appeals Chamber overturn a conviction.<sup>21</sup>

12. The Appeals Chamber will presume that the trial chamber evaluated all of the evidence presented to it – even where it does not refer in its judgement to every witness or every piece of evidence on the trial record – so long as there is no indication that the trial chamber completely disregarded a particular piece of evidence.<sup>22</sup> In reaching findings, a trial chamber is not required to articulate each step of its reasoning.<sup>23</sup>

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<sup>21</sup> *Kupreškić* AJ, paras.30, 41.

<sup>22</sup> *Kvočka* AJ, para.23.

<sup>23</sup> *Čelebići* AJ, para.481.

### III. GROUND 1: THE TRIBUNAL HAS JURISDICTION OVER THIS CASE

13. Article 1 of the Statute provides the Tribunal with jurisdiction “to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” The Appeals Chamber has already ruled that the Tribunal has geographical and temporal jurisdiction over this case.<sup>24</sup> The only jurisdictional question left open by the Appeals Chamber was whether there was an armed conflict in FYROM in August 2001 triggering the application of IHL, a question that could only be decided after hearing and reviewing the evidence at trial.<sup>25</sup> After a careful assessment of the law and the evidence presented,<sup>26</sup> the Chamber answered this question and found that “in August 2001, at times material to the Indictment, there was a state of internal armed conflict in FYROM involving FYROM security forces, both army and police, and the NLA.”<sup>27</sup> Tarčulovski does not challenge this finding. He thus fails to show that the Tribunal does not have jurisdiction over him.

14. None of Tarčulovski’s arguments show that the Chamber erred in deciding it had jurisdiction to try him. First, whether or not the operation in Ljuboten was in self-defence against “terrorists” is irrelevant to the Tribunal’s jurisdiction. Second, the United Nations Security Council did not remove the FYROM situation from the Tribunal’s jurisdiction.

#### A. Whether or not the Ljuboten operation was in self-defence against “terrorists” is irrelevant to the Tribunal’s jurisdiction

15. Contrary to Tarčulovski’s assertions,<sup>28</sup> the Chamber did not have to determine whether or not the Ljuboten operation was in self-defence against “terrorists”<sup>29</sup> before asserting jurisdiction.

<sup>24</sup> *Boškoski Jurisdiction Decision*, para.10.

<sup>25</sup> *Boškoski Jurisdiction Decision*, para.13.

<sup>26</sup> *Judgement*, paras.175-291.

<sup>27</sup> *Judgement*, para.292.

<sup>28</sup> *Tarčulovski Brief*, paras.37-53.

<sup>29</sup> The Prosecution notes that Tarčulovski mischaracterises Chamber findings at paragraphs 43 and 46 of his Brief. First, the Chamber did not find at paragraph 229 that the NLA engaged in “terrorist activities” in killing soldiers. Second, the Chamber did not acknowledge that the operation on 12 August 2001 was intended to and in fact targeted terrorists hiding in Ljuboten and the houses in which they were being sheltered. To the contrary, the Chamber found that “the

16. The Tribunal has jurisdiction to prosecute persons alleged to be responsible for serious violations of IHL. Article 1 of the Statute does not make an exception for parties purporting to act in self-defence against “terrorists”. Nor did the Security Council intend such an exception in creating the Tribunal. Indeed, the Security Council repeatedly emphasised that 1) all parties to the conflicts in the former Yugoslavia were obliged to comply with IHL – irrespective of the precise reason for their resort to force;<sup>30</sup> and 2) persons responsible for serious violations of IHL – irrespective of the party for which they claim to be acting – would be brought to justice before the Tribunal.<sup>31</sup> Clearly, the Security Council wanted to put an end to violations of IHL by all parties.

17. The Appeals Chamber has already found that whether an operation was conducted in self-defence “is from a legal point of view irrelevant [...]. The issue at hand is whether the way the military action was carried out was criminal or not.”<sup>32</sup> Thus, notwithstanding that the FYROM police may have had legitimate reasons to conduct an operation in Ljuboten on 12 August 2001 because of a suspected terrorist or NLA presence,<sup>33</sup> this did not entitle FYROM forces to violate IHL nor did it deprive the Tribunal of jurisdiction to prosecute FYROM officials for serious IHL

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operation was not solely or substantially one of law enforcement or directed against the NLA or terrorists” and that the “predominant objective of this police operation was to retaliate against persons of Albanian ethnicity in the village for the actions of the NLA, which the village was thought to have harboured or supported, in killing ethnic Macedonian soldiers, most especially in respect of the land mine attack at Ljubotenski Bačila on 10 August 2001.” Judgement, paras.571-572.

<sup>30</sup> In particular, the Security Council emphasised that all parties to the FYROM conflict were required to “act with restraint and full respect of international humanitarian law and human rights.” S/RES/1345 (21 March 2001), para.7 (Exh.1D230 in the present case). *See also, e.g.*, S/RES/764 (13 July 1992), para.10; S/RES/771 (13 August 1992), para.1; S/RES/780 (6 October 1992), Preamble; S/RES/808 (22 February 1993), Preamble; S/RES/941 (23 September 1994), paras.1-2; S/RES/1019 (9 November 1995), para.1; S/RES/1034 (21 December 1995), para.1. This is in accordance with the basic principle that all parties to an armed conflict – even those acting in self-defence – are required to abide by applicable IHL. *See for instance* Preamble to API:

*Reaffirming* further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

*See also* Common Article 1 to the Geneva Conventions and Article 1 API.

<sup>31</sup> *See, e.g.*, S/RES/827 (25 May 1993), Preamble and para.2; S/RES/859 (24 August 1993), para.7; S/RES/913 (22 April 1994), Preamble; S/RES/941 (23 September 1994), para.2; S/RES/1034 (21 December 1995), para.1.

<sup>32</sup> *Martić* AJ, para.268 (citing *Kordić* AJ, para.812).

<sup>33</sup> Judgement, para.140.

violations. Nothing in Article 39 of the UN Charter supports Tarčulovski's assertions.<sup>34</sup>

18. Tarčulovski's arguments regarding the international law of self-defence fail on two levels. First, regardless of whether Article 51 of the UN Charter applies to internal armed conflicts,<sup>35</sup> neither the Prosecution nor the Chamber denied that a State has the right to resort to force against armed groups or "terrorists" operating on its territory.<sup>36</sup> However, the use of force must be done with full respect for applicable international law,<sup>37</sup> in this case applicable IHL since the conflict between FYROM and the "terrorists" had reached the level of an armed conflict. Second, even when a State uses force in self-defence pursuant to Article 51 of the UN Charter, it must abide by IHL.<sup>38</sup> Thus, the law of self-defence neither permitted FYROM officials to act in disregard of IHL nor immunized them from the jurisdiction of the Tribunal.

19. Similarly, Tarčulovski's invocation of FYROM's sovereignty does not legitimise breaches of applicable IHL nor does it prevent the Tribunal from exercising jurisdiction. The Tribunal was established by the Security Council pursuant to its powers under Chapter VII of the UN Charter, which supersedes any claim of State sovereignty.<sup>39</sup>

#### **B. The Security Council did not take the FYROM situation out of the Tribunal's jurisdiction**

20. The Security Council did not take the FYROM situation out of the Tribunal's jurisdiction. Although the Security Council took certain actions in relation to the situation in FYROM in 2001, it did not address or restrict the Tribunal's jurisdiction in relation to these events. To remove the FYROM situation from the Tribunal's

<sup>34</sup> *Contra* Tarčulovski Brief, para.44.

<sup>35</sup> The ICJ found that Article 51 of the Charter relates to the right of States to use force against other States in self-defence. *See Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion of 9 July 2004, ICJ ("ICJ Wall Case"), para.139. *Cf.* Separate opinion of Judge Higgins, para.33; Separate opinion of Judge Kooijmans, para.35.

<sup>36</sup> At paragraphs 50-51 of his Brief, Tarčulovski distorts the Prosecution's position. The Prosecution never argued that States have no right to respond to domestic terrorism. It only argued at trial that there was no NLA presence in Ljuboten and that even if FYROM authorities believed this were the case, it is clear that the operation was not directed at the NLA as villagers were indiscriminately beaten and killed: T.11001-11002.

<sup>37</sup> ICJ Wall Case, para.141.

<sup>38</sup> *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, ICJ ("ICJ Nuclear Weapons Case"), para.42; Draft articles on State Responsibility, with commentaries, Article 21, commentary para.3.

jurisdiction, the Security Council would have had to do so explicitly. The presidential statements and resolutions of the Security Council cited by Tarčulovski<sup>40</sup> do not show that the Security Council intended to exclude the FYROM situation from the Tribunal's jurisdiction.

21. These resolutions and statements were made to promote peace and stability in the region. They do not form a binding declaration as to whether the jurisdictional requirements under Article 1 of the Statute had been met. This jurisdictional assessment is to be made by the Judges of the Tribunal pursuant to the Statute and the case-law of the Tribunal.

22. Tarčulovski's allegations that the Security Council confirmed that the FYROM conflict was purely "domestic", "internal" or removed from the other conflicts that stemmed from the break-up of Yugoslavia are irrelevant and incorrect.<sup>41</sup> They are irrelevant because the Tribunal's jurisdiction under the Statute extends to prosecuting persons for serious violations of IHL "committed in the territory of the former Yugoslavia since 1991",<sup>42</sup> irrespective of whether the conflict was "domestic", "internal" or removed from other conflicts. They are incorrect because the Security Council found that the conflict at hand engulfed certain parts of FYROM and Serbia, and that it constituted "a threat to the security and stability of the wider region."<sup>43</sup>

23. Further, the Security Council itself emphasised that all parties to the FYROM conflict were required to "act with restraint and full respect for international humanitarian law and human rights."<sup>44</sup> This statement, read with the clear grant of jurisdiction in the Tribunal's Statute (temporal, geographical and subject matter) and the fact that the Security Council did not intervene after Boškoski and Tarčulovski were indicted by the Tribunal, confirms that the Security Council never intended to

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<sup>39</sup> Article 2(7) of the UN Charter.

<sup>40</sup> Tarčulovski Brief, paras.54-57.

<sup>41</sup> Tarčulovski Brief, para.58.

<sup>42</sup> Article 1 of the Statute. *See also* Article 8 of the Statute; *Boškoski* Jurisdiction Decision, para.10.

<sup>43</sup> Exh.1D230, S/RES/1345 (21 March 2001), para.1. *See also* Exh.1D230, Press release SC/7026 (7 March 2001), pp.1 and 9; Exh.1D343, Statement by the President of the Security Council S/PRST/2001/7\* (reissued 12 March 2001), p.1; Exh.1D346, S/RES/1371 (26 September 2001), p.1 (welcoming international efforts to prevent escalation and facilitate implementation of the Framework Agreement as "contributing to peace and stability in the region").

<sup>44</sup> Exh.1D230, S/RES/1345 (21 March 2001), para.7.

deprive the Tribunal of jurisdiction to try persons charged with serious violations of IHL in FYROM in August 2001.

24. Thus, nothing in the Security Council's actions deprives the Tribunal of jurisdiction over this case.

25. Ground 1 should be dismissed.

## IV. GROUND 2: FYROM FORCES HAD TO ABIDE BY COMMON ARTICLE 3

### A. Common Article 3 is applicable

26. Tarčulovski challenges his conviction by arguing that “there are no well-established ‘laws and customs of war’ that govern how a sovereign State should or may respond to an internal terrorist threat,”<sup>45</sup> and that therefore he could not be convicted under Article 3 of the Statute.<sup>46</sup> In particular, he suggests that there is uncertainty in the application of Common Article 3 where a State acts in self-defence to a terrorist threat.<sup>47</sup>

27. By its own terms, Common Article 3 binds all parties in non-international armed conflicts.<sup>48</sup> The Chamber applied<sup>49</sup> the Appeals Chamber’s well-established test,<sup>50</sup> and concluded that an internal armed conflict existed in FYROM at the relevant time.<sup>51</sup> Tarčulovski does not challenge this finding. Rather, he appears to accept it.<sup>52</sup> Having found an internal armed conflict existed, the Chamber then followed established case-law to find that violations of Common Article 3 fall within the scope of Article 3 of the Statute.<sup>53</sup>

28. Tarčulovski’s argument that the Chamber erred in applying Common Article 3 should therefore be rejected.<sup>54</sup>

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<sup>45</sup> Tarčulovski Brief, para.64.

<sup>46</sup> Tarčulovski Brief, paras.64, 66-88, particularly 73, 74, 78, 82, 85, 88.

<sup>47</sup> Tarčulovski Brief, paras.64, 66, 70-74.

<sup>48</sup> “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum [...]” *See also Case concerning military and paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986, ICJ (“ICJ Nicaragua Case”), para.218; *Tadić* Jurisdiction AD, para.102; *Čelebići* AJ, para.143 (all three recognizing that Common Article 3 contain rules which reflect “elementary considerations of humanity”, and that are applicable in all armed conflicts).

<sup>49</sup> Judgment, paras.175, 249, 291.

<sup>50</sup> *Tadić* Jurisdiction AD, para.70.

<sup>51</sup> Judgment, para.292.

<sup>52</sup> *See, e.g.*, Tarčulovski Brief, para.85.

<sup>53</sup> Judgment, para.299 (citing *Tadić* Jurisdiction AD, paras.129, 134; *Čelebići* AJ, paras.125, 174; *Kunarac* AJ, para.68).

<sup>54</sup> Tarčulovski Brief, paras.62-64, 66-74, 78, 80-88.

1. The issue of self-defence is misplaced

29. The Tribunal is not mandated to consider whether states have acted lawfully in self-defence; its mandate is to prosecute persons responsible for serious violations of IHL. Tarčulovski argues that the fact that an operation may have been conducted in self-defence against “terrorists” could have an impact on the applicable law or customs of war. His argument blurs the fundamental distinction between the rules that govern the conduct of hostilities (*jus in bello*) and the rules governing the right of a State to resort to force (*jus ad bellum*).

30. The inescapable consequence of Tarčulovski’s argument is that if a State is engaged in an internal armed conflict with a group which it labels as terrorist, the State is relieved of its obligation under IHL to distinguish between those taking an active part in the hostilities and those who are not. Accepting Tarčulovski’s argument would render IHL meaningless. States could evade their IHL obligations simply by using the “terrorist” label for all groups with whom they are engaged in armed conflict.

31. The Appeals Chamber has held that whether an attack is a legal act of self-defence is irrelevant under the Statute; the issue that requires determination is whether the military action was carried out in violation of applicable IHL.<sup>55</sup> As Tarčulovski recognises in his citation to Professors Beck and Arend,<sup>56</sup> self-defence actions against terrorism are not exempt from the humanitarian rules applicable to armed conflict. When a State engages in armed conflict, it is obligated to uphold applicable IHL “in all circumstances”, regardless of whether its resort to force was legal.<sup>57</sup> Thus, as the ICJ recently held, a State’s need to defend itself against threats, no matter how grave, does not justify its violations of IHL or international human rights law.<sup>58</sup>

32. FYROM’s right to use force in self-defence against terrorists and the alleged counter-terrorism objective of the operation are not relevant considerations in

<sup>55</sup> Martić AJ, para.268; Kordić AJ, para.812. See also Commentary on the Additional Protocols, para.1927.

<sup>56</sup> Tarčulovski Brief, para.81, citing Professors Beck and Arend, p.209.

<sup>57</sup> Article 1 of GCI, GCII, GCIII, GCIV, API; Preamble of API; ICJ Nuclear Weapons Case, paras.41-42; ICRC Commentary, paras.48 and 1927; *Tablada Case*, IACHR Report No. 55/97, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, paras.173-174; *Hostages Case*, pp.59-60; Draft Articles on State Responsibility, with commentaries, Article 21, commentary para.3.

<sup>58</sup> ICJ Wall Case, paras.132-138.

determining whether Tarčulovski's conduct was criminal under Common Article 3. Tarčulovski's arguments that the Chamber erred in not considering them<sup>59</sup> must fail.

33. In convicting Tarčulovski, the Chamber considered the elements required for convictions under Article 3 and found that they had been met.<sup>60</sup> In particular, the Chamber found that those who were murdered were not taking an active part in the hostilities.<sup>61</sup> Tarčulovski's arguments that the Chamber convicted him of murder simply because civilians died in an "anti-terrorist raid"<sup>62</sup> and that it erred in failing to consider whether the civilians had voluntarily acted as human shields<sup>63</sup> ignore the Chamber's findings and should be summarily dismissed.<sup>64</sup>

2. There is no evisceration of the right to address terrorism

34. Contrary to Tarčulovski's suggestions,<sup>65</sup> the fact that Common Article 3 applies to an operation conducted in self-defence does not "eviscerate" a State's right to "self-defence against terrorists." A State has the right to resort to force against armed groups operating on its territory but any operation must be conducted in full respect of applicable international law. Here, the existence of an armed conflict in FYROM in August 2001 triggered the application of Common Article 3 and prohibited FYROM forces from intentionally killing or beating persons who were taking no active part in the hostilities at the time.

**B. The Chamber was correct to exercise its jurisdiction over Tarčulovski**

35. Article 7(4) of the Statute provides that "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires." This provision reflects customary international law.<sup>66</sup> Tarčulovski's arguments that the Tribunal lacked jurisdiction over him and could not hold him individually criminally responsible

<sup>59</sup> Tarčulovski Brief, paras.76, 85-86.

<sup>60</sup> *See below* VII.

<sup>61</sup> Judgement, para.302; *see also below* VII.A.1.(b).

<sup>62</sup> Tarčulovski Brief, para.86.

<sup>63</sup> Tarčulovski Brief, para.79.

<sup>64</sup> *Brdanin* AJ, para.23.

<sup>65</sup> Tarčulovski Brief, paras.73, 80, 86-88.

<sup>66</sup> *See, e.g.*, Article 8 of the Charter of the Nürnberg Tribunal, affirmed in General Assembly Resolution 95 (I), 11 December 1946; Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/25274 (10 February 1993), Annex I, para.54.

because he was acting pursuant to orders should therefore be rejected.<sup>67</sup> So should his argument that “the low-level soldier who carried out the mission is not the proper subject of an international court’s jurisdiction.”<sup>68</sup> As explained further below, Tarčulovski was far from a mere “low-level soldier”; he was in charge and directed all stages of the operation in Ljuboten.<sup>69</sup>

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<sup>67</sup> Tarčulovski Brief, paras.89-92.

<sup>68</sup> Tarčulovski Brief, para.91.

<sup>69</sup> *See below V.*

## V. OVERVIEW FOR RESPONSE TO GROUNDS 3 TO 5

36. The Chamber concluded that Tarčulovski planned, ordered and instigated the murder of three individuals,<sup>70</sup> the wanton destruction of twelve properties,<sup>71</sup> and the cruel treatment of thirteen individuals at Adem Ametovski's house<sup>72</sup> and ten individuals at Braca's house.<sup>73</sup> Tarčulovski fails to show that no reasonable trial chamber could have reached these findings on the evidence.

37. Tarčulovski's allegations of factual and legal error essentially amount to little more than disagreement with the Chamber's evaluation of the evidence and its ultimate conclusions. Tarčulovski selectively seizes on certain portions of the evidence and advocates that his own, different interpretation should be favoured in place of the Chamber's very detailed and thorough evaluation of the evidence. Tarčulovski also ignores critical factual findings and evidence that contradict his claims. However, evaluation of evidence is the role of the trial chamber. So long as the trial chamber, as here, applies the correct legal standards to evaluate the evidence and renders factual findings that are reasonable and not wholly erroneous, its findings are not properly subject to reversal on appeal.

38. The Chamber evaluated the evidence presented at trial and made reasonable findings. It recognised the presumption of innocence guaranteed by Article 21(3) of the Statute and correctly placed the onus of establishing Tarčulovski's guilt beyond reasonable doubt on the Prosecution.<sup>74</sup> The Chamber received evidence from numerous witnesses and assessed their credibility and the weight to be attached to their testimony, disregarding certain parts of some testimony as unreliable.<sup>75</sup> It recognised that "[a]t times" it "rejected evidence despite the presence of consistent evidence" and at other times "accepted evidence notwithstanding the presence of contradicting or inconsistent evidence."<sup>76</sup> In each case, however, the Chamber made

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<sup>70</sup> Rami Jusufi, Sulejman Bajrami and Muharem Ramadani. Judgement, para.607.

<sup>71</sup> Houses or other property of Alim Duraki, Agim Jusufi, Qenan Jusufi, Sabit Jusufi, Xhevshet Jusufovski, Abdullah Lutfiu, Harun Rexhepi (Redžepi), Ismet Rexhepovski (Rexhepi, Redžepi), Nazim Murtezani, Qani Jashari, Afet Jashari and Ramush Jashari. Judgement, para.607.

<sup>72</sup> M012, Hamdi Ahmedovski, Adem Ametovski, Aziz Bajrami, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani, Muharem Ramadani, Osman Ramadani and Sulejman Bajrami. Judgement, para.607.

<sup>73</sup> M012, Hamdi Ahmedovski, Adem Ametovski, M017, Nevaip Bajrami, Vehbi Bajrami, Atulla Qaili, Beqir Ramadani, Ismail Ramadani and Osman Ramadani. Judgement, para.607.

<sup>74</sup> Judgement, para.9.

<sup>75</sup> See, e.g., Judgement, paras.11-18, 41, 46, 110, 114, 117, 121-122, 129-130, 538, 541, 548-549.

<sup>76</sup> Judgement, para.19.

clear that it “acted in light of all the relevant evidence and only after very careful scrutiny of the witness and the evidence.”<sup>77</sup> Due to Tarčulovski’s selective representation of the Chamber’s findings and the supporting evidence, the following detailed summary has been prepared to assist in understanding the Prosecution’s response to Tarčulovski’s Grounds 3 to 5.

#### **A. Tarčulovski planned, organised, and led the Ljuboten operation**

39. The operation on 12 August 2001 in Ljuboten was in response to a 10 August 2001 land mine incident: a FYROM army vehicle ran over a land mine approximately ten kilometres from Ljuboten, killing eight soldiers and injuring six others, many of whom were from the neighbouring and mainly ethnic Macedonian village of Ljubanci.<sup>78</sup> This incident caused “much unrest among the population of Macedonian ethnicity in the area, especially in the village of Ljubanci.”<sup>79</sup> Tarčulovski was from Ljubanci and a person “close to him” was killed in the land mine explosion.<sup>80</sup>

##### 1. The events of 10 August 2001

40. The evidence clearly demonstrated that Tarčulovski planned and led the Ljuboten operation. The initial preparations began in the afternoon of 10 August 2001 – the same day as the land mine incident – when Tarčulovski arrived at the Čair police station as did a group of 60-70 individuals wearing police reserve uniforms, including persons affiliated with the Kometa security agency and previously associated with Tarčulovski.<sup>81</sup> There, Tarčulovski met with the Head of OVR Čair, Ljube Krstevski, and secured transportation for the police reservists in the yard of the station to go to Ljubanci and then to the children’s holiday resort outside Ljubanci, where they were accommodated.<sup>82</sup> Bullet-proof vests and six radio units for use by the police reservists were issued to Tarčulovski.<sup>83</sup> He travelled with the group to Ljubanci and then to the former children’s holiday resort, which was used by the army.<sup>84</sup>

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<sup>77</sup> Judgement, para.19.

<sup>78</sup> Judgement, para.102.

<sup>79</sup> Judgement, para.105.

<sup>80</sup> Judgement, para.563.

<sup>81</sup> Judgement, paras.106-107, 109-110, 113, 538.

<sup>82</sup> Judgement, paras.107, 542.

<sup>83</sup> Judgement, para.107.

<sup>84</sup> Judgement, para.542.

41. On the evening of 10 August 2001, Tarčulovski participated in a joint planning meeting at the command post of the 3<sup>rd</sup> Guardist Battalion in Ljubanci.<sup>85</sup> Key army and police (Ministry of Interior) representatives in the area, including Major Despodov and Ljube Krstevski, attended the meeting.<sup>86</sup> Tarčulovski discussed with the participants a confidential operation to enter Ljuboten.<sup>87</sup> A witness stated that Tarčulovski planned the operation and a military report referred to the operation as “the action of Johan Tarčulovski.”<sup>88</sup>

42. Tarčulovski “undertook to arrange with the President [of FYROM] for an order pursuant to which Major Despodov’s [army] troops could provide fire support to the operation.”<sup>89</sup> A decision was taken to increase the number of police officers normally deployed at various checkpoints around Ljuboten, at the request of Tarčulovski.<sup>90</sup> The operation was originally to take place on the morning of 11 August 2001, but Tarčulovski postponed it for a day.<sup>91</sup>

## 2. The events of 11 August 2001

43. In the afternoon hours of 11 August 2001, Tarčulovski led police from the group in a reconnaissance of the village of Ljuboten.<sup>92</sup> At around 5:00 or 6:00 p.m., Tarčulovski returned to the command post of the 3<sup>rd</sup> Guardist Battalion in Ljubanci and inquired whether Major Despodov had received any orders in relation to the planned operation.<sup>93</sup> Major Despodov informed Tarčulovski that he had not and was adamant that, without an order, he would not take any action unless in defence of a direct attack.<sup>94</sup> Tarčulovski became angry and told Major Despodov that “the action would take place, with or without the assistance of Despodov’s troops,” indicating the authority exercised by Tarčulovski.<sup>95</sup>

44. Later in the evening of 11 August 2001, Tarčulovski had Major Despodov speak on the telephone to the President of FYROM.<sup>96</sup> From this conversation, Major

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<sup>85</sup> Judgement, paras.108, 113, 543.

<sup>86</sup> Judgement, paras.108, 113, 543.

<sup>87</sup> Judgement, paras.109-113, 543.

<sup>88</sup> Judgement, para.543.

<sup>89</sup> Judgement, para.543; *see also* paras.111-112.

<sup>90</sup> Judgement, paras.32, 111; fn.496. [REDACTED].

<sup>91</sup> Judgement, paras.113, 543.

<sup>92</sup> Judgement, paras.124, 544.

<sup>93</sup> Judgement, paras.125, 544.

<sup>94</sup> Judgement, para.125.

<sup>95</sup> Judgement, paras.125, 544.

<sup>96</sup> Judgement, para.130.

Despodov understood that he was to support the police operation led by Tarčulovski, “but only within the scope of his normal authority, unless General Sokol Mitrovski were to give some more specific order, which did not happen.”<sup>97</sup>

45. At some point after 10:00 p.m. on 11 August 2001, Tarčulovski again visited Major Despodov to make final arrangements for the operation.<sup>98</sup> A contemporaneous military report quotes Tarčulovski as saying “tomorrow at 0430 hours I will start the action,” indicating that Tarčulovski had full authority to decide when the operation was to commence.<sup>99</sup> Major Despodov reiterated that he would need orders to support the action.<sup>100</sup> Tarčulovski responded that “there would be orders from the President or ‘the persons around him.’”<sup>101</sup>

### 3. The events of 12 August 2001

46. On the morning of 12 August 2001, police checkpoints around Ljuboten were strengthened, as had been discussed during the 10 August 2001 joint planning meeting.<sup>102</sup> In addition, a team of five police officers in camouflage uniforms from Mirkovci police station were in the area of Ljubanci and Ljuboten in a police Hermelin APC.<sup>103</sup> This Hermelin APC patrol was provided for the operation by the Head of OVR Čair at Tarčulovski’s request.<sup>104</sup> It was used to transport considerable quantities of gasoline or incendiary materials during the operation.<sup>105</sup> By 8:00 a.m., the Hermelin APC patrol arrived at Stranište checkpoint.<sup>106</sup> At that time, using the code-name “Rudnik,” Tarčulovski radioed Stranište checkpoint to advise that “colleagues” were about to enter Ljuboten to conduct an action so that police at the checkpoint would not mistake these “colleagues” for terrorists and act against them.<sup>107</sup> Tarčulovski was with a large unit of at least 60-70 armed men positioned near the

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<sup>97</sup> Judgement, para.130.

<sup>98</sup> Judgement, para.131.

<sup>99</sup> Judgement, para.544; *see also* para.131.

<sup>100</sup> Judgement, para.131.

<sup>101</sup> Judgement, para.131.

<sup>102</sup> Judgement, paras.32-35.

<sup>103</sup> Judgement, para.36.

<sup>104</sup> Judgement, para.551.

<sup>105</sup> Judgement, para.566.

<sup>106</sup> Judgement, para.36.

<sup>107</sup> Judgement, para.36.

entrance to Ljuboten from Ljubanci, poised and ready to enter Ljuboten on foot.<sup>108</sup> He was in charge of this unit.<sup>109</sup>

47. The police patrol in the Hermelin APC left Stanište checkpoint and met Tarčulovski and his unit at the entrance to Ljuboten from Ljubanci.<sup>110</sup> Tarčulovski gave orders to the Hermelin police patrol, telling it to wait for a while as there could be mortar fire.<sup>111</sup> The driver of the Hermelin APC assumed Tarčulovski had received this information from the army.<sup>112</sup> Following this conversation and some opening mortar and other fire from army units, Tarčulovski led the police unit into Ljuboten.<sup>113</sup> Soon after, the Hermelin APC followed them.<sup>114</sup>

48. The police unit moved as one group along the main road in the village (the road to Raštak), following and assisted by the police patrol in the Hermelin APC.<sup>115</sup> Tarčulovski's unit and the Hermelin APC patrol were the only FYROM security forces in Ljuboten that day. The army did not enter Ljuboten.<sup>116</sup> Nor did separate special police units known as the "Lions" and the "Tigers."<sup>117</sup>

49. Tarčulovski and his unit stopped at the house of Elmaz Jusufi first.<sup>118</sup> Witnesses heard a loud explosion coming from right outside the house,<sup>119</sup> which explosion appears to have been used to force open the high metal gate from the street into the walled front yard of the house.<sup>120</sup> Rami Jusufi (Elmaz Jusufi's son) ran to the front door of the house and attempted to close it.<sup>121</sup> He was struck in the stomach by intensive shooting from outside the front of the house.<sup>122</sup> He was shot at close range while wearing civilian clothes – a white t-shirt and blue jeans.<sup>123</sup> He died from his bullet wounds less than an hour later.<sup>124</sup> Those who attacked Elmaz Jusufi's house and

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<sup>108</sup> Judgement, para.38.

<sup>109</sup> Judgement, para.38.

<sup>110</sup> Judgement, para.41.

<sup>111</sup> Judgement, para.41.

<sup>112</sup> Judgement, para.41.

<sup>113</sup> Judgement, paras.38, 41-42, 120.

<sup>114</sup> Judgement, para.42.

<sup>115</sup> Judgement, paras.36, 42, 59, 552.

<sup>116</sup> Judgement, para.31.

<sup>117</sup> Judgement, para.61.

<sup>118</sup> Judgement, para.43.

<sup>119</sup> Judgement, para.43.

<sup>120</sup> Judgement, fn.118.

<sup>121</sup> Judgement, para.43.

<sup>122</sup> Judgement, para.43.

<sup>123</sup> Judgement, paras.43, 309.

<sup>124</sup> Judgement, para.44.

killed Rami Jusufi were members of the police unit led by Tarčulovski.<sup>125</sup> The shooting was not a reaction to outgoing fire from any of the Jusufi homes on the morning of 12 August 2001.<sup>126</sup> Nothing in the evidence reasonably supported the conclusion that Rami Jusufi was anything other than an unarmed civilian not taking an active part in the hostilities at the time he was shot.<sup>127</sup>

50. The firing on Elmaz Jusufi's house was intense and indiscriminate. The house was struck with a barrage of bullets – the washing machine in the bathroom alone was hit by 12 bullets.<sup>128</sup> The attackers kicked the front door of the house but did not enter.<sup>129</sup> Strikingly for an action purportedly directed at searching and finding alleged terrorists, Tarčulovski's police did not search the house or attempt to interview anyone inside.<sup>130</sup> This failure would be all the more striking if outgoing fire had originated from the house, as alleged by Tarčulovski.<sup>131</sup>

51. Instead of searching the house before moving on, the police poured gasoline and set fire to Elmaz Jusufi's car and construction material stored in the front yard of his home.<sup>132</sup> The police then continued down the same road, setting houses on fire using gasoline.<sup>133</sup> The houses of Qenan Jusufi, Xhabir Jusufi, Sabit Jusufi, Nazmir Jusufi, Agim Jusufi, Xhevshet Jusufovski and Alim Duraki were set on fire and burned.<sup>134</sup> The unit also threw hand grenades into two unidentified houses.<sup>135</sup>

52. Next, Tarčulovski's police unit was seen in the Elezaj neighbourhood on the road to Raštak, following the Hermelin APC patrol.<sup>136</sup> There, police threw gasoline bottles at Harun Redžepi's house, setting it on fire, and also set alight the houses of Avdulla Redžepi, and Qamuran and Ismet Redžepi,<sup>137</sup> as well as Shabi Lutfiu's

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<sup>125</sup> Judgement, paras.60, 567.

<sup>126</sup> Judgement, para.310.

<sup>127</sup> Judgement, para.311.

<sup>128</sup> Judgement, para.43.

<sup>129</sup> Judgement, para.43.

<sup>130</sup> Judgement, para.567.

<sup>131</sup> See Judgement, para.310.

<sup>132</sup> Judgement, paras.43, 567.

<sup>133</sup> Judgement, para.45.

<sup>134</sup> Judgement, para.45.

<sup>135</sup> Judgement, para.45.

<sup>136</sup> Judgement, para.49.

<sup>137</sup> Paragraph 49 of the Judgement refers to Qamuran (Ćemuran) Redžepi's house, where his father – Ismet Redžepi – also lived. Later in the Judgement, the Chamber refers to Qamuran (Ćemuran) Redžepi residing in the house of Ismet Redžepi. Judgement, para.154. The Chamber's specific findings and conclusions on wanton destruction and Tarčulovski's guilt refer only to the destruction of Ismet Redžepi's house. Judgement, paras.374-375, 380, 577, 607. Given the Chamber's other references, however, it is clear that references to Qamuran

barn.<sup>138</sup> Across the road, members of the unit set fire to the houses of Mitat Lutfiu and Qamuran Lutfiu, as well as the nearby house of Nazim Murtezani.<sup>139</sup>

53. Tarčulovski's unit then proceeded to Adem Ametovski's house, firing shots at the basement window of the house.<sup>140</sup> Ten male Ljuboten residents who had sought shelter in the basement surrendered immediately, waiving a white cloth.<sup>141</sup> None of the men were armed or wearing NLA uniforms or insignia.<sup>142</sup> The police took their money, valuables and identification cards, and ordered them to lie down in the yard of Ametovski's house and pull their t-shirts over their heads.<sup>143</sup> The ten villagers were then beaten severely by members of Tarčulovski's unit.<sup>144</sup> Specific evidence accepted by the Chamber puts Tarčulovski at the scene of this crime at Ametovski's house.<sup>145</sup>

54. At the same time, some members of Tarčulovski's police unit entered the adjacent house of Zija Ameti, where a group of women and three men were sheltering.<sup>146</sup> The police took money and jewellery from the women and ordered the three men to join the group from Ametovski's basement.<sup>147</sup> The men were taken to the main gate of Ametovski's house and ordered to lie face down and to cover their heads with their t-shirts.<sup>148</sup> After questioning them and calling them terrorists, the police started "hitting the men with their weapons and fists as well as kicking them."<sup>149</sup> Many of them suffered serious injuries.<sup>150</sup>

55. Subsequently, one of the detained men – Aziz Bajrami – was shot and wounded by a police automatic rifle while talking to his son, Sulejman Bajrami, who was then hit or kicked in the head.<sup>151</sup> Sulejman Bajrami started to walk or run away but he was shot and killed by the police.<sup>152</sup> He was shot numerous times at close

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Redžepi's house and Ismet Redžepi's house refer to the same house, in which they both lived at the time.

<sup>138</sup> Judgement, para.49.

<sup>139</sup> Judgement, para.49.

<sup>140</sup> Judgement, paras.51, 60.

<sup>141</sup> Judgement, paras.50-51.

<sup>142</sup> Judgement, para.51.

<sup>143</sup> Judgement, para.52.

<sup>144</sup> Judgement, para.52.

<sup>145</sup> Judgement, para.553.

<sup>146</sup> Judgement, para.53.

<sup>147</sup> Judgement, para.53.

<sup>148</sup> Judgement, para.54.

<sup>149</sup> Judgement, para.54.

<sup>150</sup> Judgement, para.54.

<sup>151</sup> Judgement, para.55.

<sup>152</sup> Judgement, para.55.

range, including while lying on the side of the road.<sup>153</sup> While escape may have been on Bajrami's mind, "this was manifestly hopeless."<sup>154</sup> "He was among a very large group of well armed police. He was unarmed, and he alone sought to move. He had nowhere to go but along the road, in full view."<sup>155</sup> The hopelessness of Bajrami's position "was obvious to the police."<sup>156</sup> Rather than stop Bajrami immediately, as they could have done, the police let him walk or run a while before "deliberately and repeatedly" shooting him.<sup>157</sup> There was no evidentiary basis "for any conclusion other than that, at the time he was killed, Sulejman Bajrami was an unarmed civilian taking no active part in the hostilities."<sup>158</sup>

56. Escorted by four to six members of Tarčulovski's unit, ten of the detained men were then taken on foot to the police checkpoint at Braca's house, also known as the Chinese Wall, located between Ljuboten and Ljubanci, at the entrance to Ljuboten.<sup>159</sup> Many were violently mistreated along the way.<sup>160</sup> Two elderly detained men – Muharem Ramadani and Aziz Bajrami – had been ordered to stay behind at Ametovski's house.<sup>161</sup> The police shot Muharem Ramadani at the gate of Ametovski's house.<sup>162</sup> Ramadani was in civilian clothes and he was shot at close range.<sup>163</sup> The police then followed the Hermelin APC patrol, continuing on to Qani Jashari's house.<sup>164</sup>

57. Five men in Qani Jashari's house heard shouting outside the house and decided to leave, exiting through a back window and running across an open field headed towards the woods.<sup>165</sup> At about the same time, the police started shooting at Qani Jashari's house.<sup>166</sup> A policeman was heard screaming that they could not destroy the house as the walls were made of stone.<sup>167</sup> The Hermelin APC then went up to

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<sup>153</sup> Judgement, paras.55, 319.

<sup>154</sup> Judgement, para.318.

<sup>155</sup> Judgement, para.318.

<sup>156</sup> Judgement, para.319.

<sup>157</sup> Judgement, paras.319, 320.

<sup>158</sup> Judgement, para.320.

<sup>159</sup> Judgement, paras.34, 56.

<sup>160</sup> Judgement, para.56.

<sup>161</sup> Judgement, para.57.

<sup>162</sup> Judgement, paras.57, 325.

<sup>163</sup> Judgement, paras.321-323.

<sup>164</sup> Judgement, paras.62, 66.

<sup>165</sup> Judgement, para.66.

<sup>166</sup> Judgement, para.67.

<sup>167</sup> Judgement, para.67.

Qani Jashari's house, followed by the police, and entered Qani Jashari's compound.<sup>168</sup> There was constant shooting and a store of grass caught fire.<sup>169</sup>

58. Meanwhile, the five men running through the field towards the woods came under fire from army positions in Malestina, as well as from Tarčulovski's unit in the Jashari compound and from the Hermelin APC patrol.<sup>170</sup> One of the fleeing men managed to escape unhurt; another was wounded but also managed to make it to the woods.<sup>171</sup> The remaining three men were killed.<sup>172</sup> Evidence indicated that members of Tarčulovski's unit later found a Thompson sub-machine gun and two Kalashnikov rifles near their bodies.<sup>173</sup> After being shown the weapons, Tarčulovski gave them to the driver of the Hermelin APC patrol,<sup>174</sup> overruling a suggestion that an "inspection" should be conducted, stating it was unnecessary as they were in a "state of war."<sup>175</sup>

59. The Chamber could not conclude from the evidence whether the three men killed in the field were killed by the police or the army.<sup>176</sup> In addition, the Chamber could not find beyond reasonable doubt that the three men were taking no active part in hostilities at the time they were shot.<sup>177</sup> No conviction for murder was entered with respect to these deaths.<sup>178</sup>

60. Before leaving the Jashari compound, and after the five men had fled from Qani Jashari's house into the open field,<sup>179</sup> members of Tarčulovski's police unit threw three or four gasoline bottles from the Hermelin APC in the direction of Qani Jashari's house.<sup>180</sup> Two other Jashari houses on the opposite side of the road, belonging to Afet Jashari and Ramush Jashari, were also set on fire.<sup>181</sup> The driver of the Hermelin APC patrol then drove to the Chinese Wall checkpoint with the weapons recovered and one member of the police unit who had accidentally injured himself.<sup>182</sup>

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<sup>168</sup> Judgement, para.67.  
<sup>169</sup> Judgement, para.67.  
<sup>170</sup> Judgement, para.68.  
<sup>171</sup> Judgement, para.68.  
<sup>172</sup> Judgement, para.68.  
<sup>173</sup> Judgement, para.69.  
<sup>174</sup> Judgement, para.69.  
<sup>175</sup> Judgement, para.69.  
<sup>176</sup> Judgement, para.343.  
<sup>177</sup> Judgement, para.345.  
<sup>178</sup> Judgement, para.348.  
<sup>179</sup> Judgement, para.378.  
<sup>180</sup> Judgement, para.68.  
<sup>181</sup> Judgement, paras.68, 379.  
<sup>182</sup> Judgement, para.69.

Other members of the APC Hermelin patrol headed to the Chinese Wall on foot.<sup>183</sup> Tarčulovski's police unit (or at least some of its members) also returned through the main village road to the Chinese Wall/Braca's House checkpoint upon completion of the operation.<sup>184</sup>

61. In the afternoon of 12 August 2001, the detained Ljuboten villagers from Ametovski's house arrived at Braca's house, where they were again ordered to lie face down on the ground and were beaten severely by the police who escorted them there.<sup>185</sup> Some of the men lost consciousness.<sup>186</sup> These men were subsequently loaded onto a truck guarded by two armed police and transported to Mirkovci police station.<sup>187</sup>

62. Tarčulovski maintained telephone contact on 11 and 12 August 2001 with army personnel who had a key active role in supporting the police operation.<sup>188</sup> One such person, Lieutenant Jurišić, understood Tarčulovski's role in the operation as "leader of the group of police officers."<sup>189</sup> Tarčulovski's communication with army personnel further demonstrates the planning and coordination required for his operation, particularly with respect to limited shelling by the army before Tarčulovski and his police unit entered Ljuboten.<sup>190</sup>

## **B. The purpose of the operation was to commit the crimes**

63. The Ljuboten operation was a retaliatory action the predominant object of which was to indiscriminately attack and punish ethnic Albanians in Ljuboten for the actions of the NLA and to "serve as a warning to persons of Albanian ethnicity of the consequences of support in the village for the NLA."<sup>191</sup>

64. The Ljuboten operation had none of the expected features of an anti-terrorist action. Its unlawful purpose is illustrated first by the choice of Tarčulovski as leader. At the time of the operation, Tarčulovski was a police officer acting as an Escort Inspector in the President of FYROM's Security Unit.<sup>192</sup> His normal responsibility

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<sup>183</sup> Judgement, para.69.

<sup>184</sup> Judgement, para.73.

<sup>185</sup> Judgement, paras.70, 74.

<sup>186</sup> Judgement, para.74.

<sup>187</sup> Judgement, para.75.

<sup>188</sup> Judgement, paras.548-550.

<sup>189</sup> Judgement, para.548.

<sup>190</sup> Judgement, para.550.

<sup>191</sup> Judgement, para.572.

<sup>192</sup> Judgement, paras.4, 537.

was to provide security for the wife of the President.<sup>193</sup> He had no experience in criminal or terrorist investigation and his position and normal duties did not include leading alleged anti-terrorist operations.<sup>194</sup> He was chosen to lead the operation despite the fact that (and perhaps because) someone “close to him” died during the 10 August 2001 land mine incident.<sup>195</sup> The police unit Tarčulovski led into Ljuboten on the morning of 12 August 2001 included police reservists who were members of the Kometa private security agency and who had been previously affiliated with Tarčulovski.<sup>196</sup> Others were volunteers, some of which had even been convicted of criminal offences.<sup>197</sup> None were experienced in criminal or terrorist investigation.<sup>198</sup>

65. All told, in a village of 3000 people,<sup>199</sup> the police only searched the houses and people in one compound (Ametovski’s)<sup>200</sup> and did not stray from the main road. No systematic search took place to detect terrorists and/or their infrastructure. Instead, the police shot villagers at random, burned their homes without provocation, took away their valuables and subjected villagers who had literally waved a white flag of surrender to severe beatings while detained.<sup>201</sup> One policeman even carved a cross with a knife on the back of a villager.<sup>202</sup> The police encountered no resistance throughout its journey, with the exception of possible (though not proven) shooting from the Jashari family houses.<sup>203</sup> Not one police member was killed during the operation and the only police injury was accidental and self-inflicted.<sup>204</sup> Apart from the events in the area of the Jashari houses, there was no evidence that the actions of the police unit were in self-defence or in the course of action against armed opponents.<sup>205</sup> Nor was there a foundation for a reasonable doubt that this may have been the case.<sup>206</sup> Plainly, the victims of murder and beatings were taking no active

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<sup>193</sup> Judgement, para.537.

<sup>194</sup> Judgement, para.571.

<sup>195</sup> Judgement, paras.541, 563.

<sup>196</sup> Judgement, paras.107, 497, 542.

<sup>197</sup> Judgement, paras.117-118.

<sup>198</sup> Judgement, para.571.

<sup>199</sup> Judgement, para.30.

<sup>200</sup> Judgement, para.51.

<sup>201</sup> Judgement, paras.43-57, 567-571.

<sup>202</sup> Judgement, paras.54, 591.

<sup>203</sup> Judgement, paras.171-172.

<sup>204</sup> Judgement, para.69.

<sup>205</sup> Judgement, para.172.

<sup>206</sup> Judgement, para.172.

part in the hostilities when they were killed and beaten, and the action was not one of legitimate law enforcement.<sup>207</sup>

### C. Conclusion

66. The evidence demonstrates that Tarčulovski selected the police involved in the operation<sup>208</sup> and participated in the 10 August 2001 joint planning meeting with key members of the army and police.<sup>209</sup> He secured transportation and accommodation for police participating in the action and ensured they were provided with bullet-proof vests and radio units.<sup>210</sup> A witness stated that Tarčulovski planned the operation and a contemporaneous military report confirmed that the operation was “the action of Johan Tarčulovski.”<sup>211</sup> When Major Despodov initially refused to provide military fire support for the operation, Tarčulovski undertook to arrange for an order from FYROM’s President and arranged for Major Despodov to speak to the President directly by telephone.<sup>212</sup> He further made clear to Major Despodov that the operation would take place with or without his assistance.<sup>213</sup>

67. Tarčulovski led the reconnaissance mission the day before the operation.<sup>214</sup> He also decided when the action would begin<sup>215</sup> and secured the assistance of the Hermelin APC patrol,<sup>216</sup> directing its actions throughout the day.<sup>217</sup> He contacted Stranište checkpoint before commencing the operation to advise that his unit was about to enter Ljuboten and maintained telephone contact with key army personnel supporting the operation on 11 and 12 August 2001, which personnel clearly understood Tarčulovski’s role as leader of the operation.<sup>218</sup> Tarčulovski was also present with the police unit throughout the operation in Ljuboten.<sup>219</sup>

68. The totality of this evidence convinced the Chamber that Tarčulovski planned, led and directed all stages of the Ljuboten operation on 10, 11, and 12 August 2001,

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<sup>207</sup> Judgement, paras.302-303, 571-573.

<sup>208</sup> Judgement, para.538.

<sup>209</sup> Judgement, paras.108, 113, 543.

<sup>210</sup> Judgement, paras.107, 542.

<sup>211</sup> Judgement, para.543.

<sup>212</sup> Judgement, paras.111-112, 130, 543.

<sup>213</sup> Judgement, paras.125, 544.

<sup>214</sup> Judgement, paras.124, 544.

<sup>215</sup> Judgement, paras.131, 544.

<sup>216</sup> Judgement, para.551.

<sup>217</sup> Judgement, paras.41, 69.

<sup>218</sup> Judgement, paras.36, 548-550.

<sup>219</sup> Judgement, para.564.

and thus planned, ordered and instigated the crimes. He exercised effective leadership and control of police in the village on 12 August 2001.<sup>220</sup> They acted at his direction.<sup>221</sup> The crimes that took place along the main road of the village were not secondary, peripheral or accidental parts of the operation – they were the operation itself. The Chamber’s conclusion that Tarčulovski planned, ordered and instigated the crimes was a reasonable one.

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<sup>220</sup> Judgement, para.574.

<sup>221</sup> Judgement, para.560.

## VI. GROUND 3: THE TRIAL CHAMBER PROPERLY FOUND THAT TARČULOVSKI PLANNED, ORDERED AND INSTIGATED THE CRIMES

69. The Chamber properly found that Tarčulovski planned, ordered and instigated the crimes.<sup>222</sup> Tarčulovski's arguments in Ground 3<sup>223</sup> fail to show that the Chamber erred in law or in fact in reaching this conclusion.

70. Several of Tarčulovski's arguments should be summarily dismissed because they misrepresent or ignore relevant findings of the Chamber. One recurrent misrepresentation is that the Chamber erred in convicting him for having planned, instigated or ordered a legitimate police operation.<sup>224</sup> This ignores and misrepresents the Chamber's findings that the predominant object of the operation was the commission of the crimes.<sup>225</sup>

71. The Prosecution will respond separately to Tarčulovski's submissions on planning,<sup>226</sup> instigating<sup>227</sup> and ordering,<sup>228</sup> as well as to his argument that an order should explicitly require the commission of a crime to result in criminal liability.<sup>229</sup>

### A. Tarčulovski planned the crimes

#### (i) The crimes were planned

72. There was a plan to commit the crimes. The Chamber properly concluded that the crimes were the predominant object of the police operation planned and organised as a direct response to the land mine incident on 10 August 2001.<sup>230</sup> It observed that "what was done by the group of police in the village [...] provides a significant and reliable guide to what was intended as the object of the operation."<sup>231</sup> The Chamber then analysed the circumstances of the commission of the crimes and the way in which the operation was organised and carried out to conclude that the crimes were

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<sup>222</sup> Judgement, para.577.

<sup>223</sup> Tarčulovski Brief, paras.93-136.

<sup>224</sup> Tarčulovski Brief, paras.98-108, 123-127, 129.

<sup>225</sup> Judgement, paras.572-573.

<sup>226</sup> *Below* Section A.

<sup>227</sup> *Below* Section B.

<sup>228</sup> *Below* Section C.

<sup>229</sup> *Below* Section D.

<sup>230</sup> Judgement, paras.563, 572-573. *See above* V.A.

<sup>231</sup> Judgement, para.565.

the predominant object of the operation.<sup>232</sup> Tarčulovski's argument that the Chamber erred in finding that the crimes must have been planned simply because they took place<sup>233</sup> should be summarily dismissed because it misrepresents the Chamber's findings and reasoning.<sup>234</sup> The Chamber was fully entitled to draw the inference it did on the basis of its careful analysis of the facts and circumstances surrounding the commission of the crimes.<sup>235</sup>

73. Contrary to Tarčulovski's arguments,<sup>236</sup> there is no contradiction between the Chamber's conclusion as to the predominant object of the operation and some of its other factual findings. First, the Chamber did not find that "three of seven persons killed that day *were likely* terrorists";<sup>237</sup> it found there was "a reasonable doubt whether these three men were taking an active part in the armed hostilities."<sup>238</sup> In any case, even if these three men were shot while taking active part in the hostilities, this would not undermine the finding that the predominant objective of the operation was to indiscriminately retaliate against persons of Albanian ethnicity for the NLA's actions.<sup>239</sup> As the Chamber observed, the predominant object of the operation did not exclude that in some cases Tarčulovski may have been told of some possible NLA affiliation and that this encouraged actions against the victims or their properties and families.<sup>240</sup>

74. Second, Tarčulovski's argument that the circumstances of Sulejman Bajrami's murder somehow undermine the Chamber's finding as to the existence of a plan<sup>241</sup> should be summarily dismissed because it misrepresents the Chamber's findings<sup>242</sup> and is contrary to common sense.<sup>243</sup> The Chamber found that Sulejman Bajrami, an unarmed civilian taking no active part in the hostilities at the time, was allowed to move away from the group of detained men, then repeatedly and deliberately shot with the intention of his death serving as an example. Even if his actions may have been seen as an attempt to escape, the attempt was not regarded by the police as

<sup>232</sup> Judgement, paras.563-573. *See also above* V.B.

<sup>233</sup> Tarčulovski Brief, paras.97, 109-110.

<sup>234</sup> *Martić* AJ, para.18.

<sup>235</sup> *Galić* AJ, para.171.

<sup>236</sup> Tarčulovski Brief, paras.98-101.

<sup>237</sup> Tarčulovski Brief, para.98 (emphasis added).

<sup>238</sup> Judgement, para.345.

<sup>239</sup> Judgement, paras.571-572.

<sup>240</sup> Judgement, para.572.

<sup>241</sup> Tarčulovski Brief, para.98.

<sup>242</sup> *Martić* AJ, para.18. *See also above* V.A.3. and *below* VII.A.1(b)(ii), VII.A.4.

<sup>243</sup> *Brdanin* AJ, paras.26, 30.

posing any real risk.<sup>244</sup> Nothing in these findings undermines the conclusion that the predominant object of the operation was to commit the crimes.

75. Third, the Chamber was entitled to reject the Defence's evidence that the Ametovski and Jusufi houses were used by "terrorists".<sup>245</sup> The Chamber assessed the evidence in its totality and concluded that there was no outgoing fire from the Jusufi houses.<sup>246</sup> The Chamber also found that none of the men at Ametovski's house were armed or wearing NLA uniforms or insignia, and that no arms, ammunition, explosives, uniforms, or other military equipment were located at Ametovski's house.<sup>247</sup> Tarčulovski fails to show that the Chamber erred in its assessment of the evidence.<sup>248</sup>

76. Finally, the Chamber considered the alternative inference that what occurred was not planned<sup>249</sup> and found that the pattern of conduct in Ljuboten that day displaced the possibility that the crimes occurred by mistake, confusion or accident.<sup>250</sup>

77. Tarčulovski fails to show any error in the Chamber's conclusion that there was a plan to commit the crimes.

(ii) Tarčulovski planned the crimes

78. The Chamber's conclusion that Tarčulovski personally planned the operation is founded on several factual findings based on the evidence, including that of M052.<sup>251</sup> Tarčulovski's arguments that the Chamber based its conclusion on the sole finding that he was present at the 10 August meeting<sup>252</sup> where no crime was discussed<sup>253</sup> and on the sole basis of the testimony of an unreliable witness<sup>254</sup> are unfounded and should be dismissed.

79. First, the Chamber found that Tarčulovski planned the crimes not only based on his presence at the 10 August meeting, but on a careful analysis of his role in the

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<sup>244</sup> Judgement, para.320.

<sup>245</sup> *Contra* Tarčulovski Brief, para.99.

<sup>246</sup> Judgement, para.146.

<sup>247</sup> Judgement, para.51. *See also above* V.A. and *below* VII.

<sup>248</sup> *See also below* VIII.

<sup>249</sup> Tarčulovski Brief, paras.100, 101.

<sup>250</sup> Judgement, para.573.

<sup>251</sup> Judgement, paras.41, 107, 111-113, 124-125, 541-545, 548-551, 560. *See also above* V.

<sup>252</sup> Tarčulovski Brief, para.102.

<sup>253</sup> Tarčulovski Brief, paras.103, 107-108.

<sup>254</sup> Tarčulovski Brief, paras.104-106.

entire operation between 10 and 12 August.<sup>255</sup> Tarčulovski ignores these findings. This argument should be summarily dismissed.<sup>256</sup>

80. Second, as far as the 10 August meeting is concerned, the Chamber properly found that it was a “joint planning meeting”.<sup>257</sup> M052’s testimony is not the only evidence the Chamber relied on to reach this conclusion. Other evidence shows that the purpose of the meeting was to further plan the operation.<sup>258</sup> Even with no direct evidence that crimes were explicitly discussed at the 10 August meeting, the Chamber was entitled to conclude on the basis of the entirety of the evidence that the predominant object of the operation planned at the meeting was to commit crimes.<sup>259</sup>

81. Finally, the Chamber was further entitled to rely on M052’s testimony to conclude that Tarčulovski planned the operation.<sup>260</sup> Tarčulovski’s argument to the contrary<sup>261</sup> should be summarily dismissed because he merely seeks to substitute his own evaluation of the evidence for that of the Chamber.<sup>262</sup>

(iii) Tarčulovski led the police in the village

82. Tarčulovski’s argument that he was wrongly convicted because he was not with the group of police who moved through the village<sup>263</sup> should be summarily dismissed<sup>264</sup> because it misrepresents the Chamber’s findings and ignores other relevant factual findings on his role in the operation.<sup>265</sup> Further, Tarčulovski merely seeks to substitute his evaluation of M037’s testimony for that of the Chamber.<sup>266</sup>

83. First, the Chamber did not rely only on M037’s evidence to support the conclusion that Tarčulovski led the police who moved through the village.<sup>267</sup> Second, the Chamber was entitled to interpret M037’s evidence as it did<sup>268</sup> and to find that

<sup>255</sup> See above V. *Contra* Tarčulovski Brief, para.102.

<sup>256</sup> *Martić* AJ, para.18.

<sup>257</sup> Judgement, para.113.

<sup>258</sup> Judgement, paras.108-112.

<sup>259</sup> See above V.B. *Contra* Tarčulovski Brief, paras.103, 107-108.

<sup>260</sup> See also below V.B.2.

<sup>261</sup> Tarčulovski Brief, paras.104-106.

<sup>262</sup> *Martić* AJ, para.19.

<sup>263</sup> Tarčulovski Brief, paras.109-116.

<sup>264</sup> *Brdanin* AJ, paras.23, 26.

<sup>265</sup> See above V.A. and below VII.A.1.(a).

<sup>266</sup> *Martić*, AJ, para.19.

<sup>267</sup> See, e.g., Judgement, paras.131 (Exhs.P302, P303, P304), 555 (M037), 556-560 (Exhs.P379.01, P379.02). See also above V.A. and below VII.A.1.(a). *Contra* Tarčulovski Brief, para.111.

<sup>268</sup> See also below VIII.B.2. *Contra* Tarčulovski Brief, para.114.

Tarčulovski entered the village at about 8:00 a.m.<sup>269</sup> leading the police unit. It was also entitled to conclude that the Hermelin APC entered the village soon after Tarčulovski's unit and to reject M037's testimony that the Hermelin APC waited for more than an hour before entering the village.<sup>270</sup> It is not an error for the Chamber to accept parts of a witness' testimony, but to reject others.<sup>271</sup> M037's testimony in this regard was contradicted by Elmaz Jusufi's testimony that soon after the police unit left his house, which occurred about 10 minutes after 8:00 a.m.,<sup>272</sup> the Hermelin APC arrived.<sup>273</sup> Tarčulovski's mere reinterpretation of the evidence<sup>274</sup> fails to show that the Chamber's conclusion was unreasonable.

84. Tarčulovski's further submission that M037's testimony "refutes any finding that Tarčulovski was present at the Ametovski house when the crimes occurred"<sup>275</sup> is untenable. [REDACTED].<sup>276</sup> This is not contradicted<sup>277</sup> [REDACTED].<sup>278</sup> The Chamber reasonably concluded that Tarčulovski was with the group of police that mistreated the ten residents at the Ametovski house.<sup>279</sup> This conclusion is corroborated by Tarčulovski's own statement.<sup>280</sup>

85. Finally, the Chamber did not engage in circular reasoning by finding, as Tarčulovski suggests, that the commission of the crimes demonstrated that he intended them.<sup>281</sup> Instead the Chamber properly found that:

*The circumstances that have been discussed and, in particular, the presence of Johan Tarčulovski as the leader of the police when the acts of murder, cruel treatment and wanton destruction were committed during the operation demonstrates, in the Chamber's finding, that acts of murder, cruel treatment and wanton destruction were intended by Johan Tarčulovski at the times relevant*

<sup>269</sup> Judgement, para.41 and fn.108.

<sup>270</sup> Judgement, para.42 and fn.117.

<sup>271</sup> *Blagojević* AJ, para.82 (citing *Kupreškić* AJ, para.333).

<sup>272</sup> Judgement, para.44.

<sup>273</sup> Judgement, para.47.

<sup>274</sup> Tarčulovski Brief, para.114.

<sup>275</sup> Tarčulovski Brief, para.115.

<sup>276</sup> [REDACTED].

<sup>277</sup> *Contra* Tarčulovski Brief, unreferenced para.115.

<sup>278</sup> [REDACTED]. *See also* Judgement, paras.69, 554.

<sup>279</sup> Judgement, para.553. *See also* fn.200.

<sup>280</sup> Exh.P379.02 (quoted at Judgement, para.557):

[...] Tarčulovski replied that he had been in Ljuboten with a large group of men, more than a hundred, and that he had known all of them [...] In the course of the action in Ljuboten, they entered two houses from which fire was coming and took into custody 10 persons who were later taken over by the regular police, which was at the entrance of the village.

<sup>281</sup> Tarčulovski Brief, paras.109-110.

respectively to ordering, planning and instigating, or, alternatively, that the commission of crimes of this nature were foreseen, at these times, to be a substantial likelihood of the execution of the operation.<sup>282</sup>

86. The Chamber was fully entitled to reach this conclusion based on its analysis of the circumstances in which the crimes took place<sup>283</sup> and the role Tarčulovski played in them.<sup>284</sup> Tarčulovski has failed to explain why no reasonable trial chamber could have reached this conclusion.

### **B. Tarčulovski instigated the crimes**

87. Tarčulovski personally led and directed the operation,<sup>285</sup> and he was in charge of it at all stages.<sup>286</sup> He was responsible for its preparation. He led the police as they moved through the village.<sup>287</sup> The Chamber was entitled to conclude that he instigated the crimes.

88. Tarčulovski's arguments either misrepresent the factual findings of the Chamber<sup>288</sup> or amount to mere undeveloped assertions.<sup>289</sup> They should be summarily dismissed.<sup>290</sup> The Chamber properly set out its reasoning. It first discussed the law<sup>291</sup> and analysed Tarčulovski's role in the commission of the crimes.<sup>292</sup> It then concluded that his actions at both the preparatory and executory phases incited the reserve police and substantially contributed to the commission of the crimes.<sup>293</sup> Finally, it assessed Tarčulovski's *mens rea* and concluded that he intended the crimes or at least was aware of the substantial likelihood that the crimes would be committed as a result of his actions.<sup>294</sup> Tarčulovski fails to show why no reasonable trial chamber could have drawn these conclusions.

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<sup>282</sup> Judgement, para.576 (emphasis added).

<sup>283</sup> Judgement, paras.561-575. *See also above* V.

<sup>284</sup> Judgement, paras.537-560. *See also above* V.

<sup>285</sup> Judgement, para.574.

<sup>286</sup> Judgement, para.560.

<sup>287</sup> Judgement, para.555.

<sup>288</sup> Tarčulovski Brief, para.118.

<sup>289</sup> Tarčulovski Brief, paras.119-120.

<sup>290</sup> *Martić* AJ, para.18; *Galić* AJ, para.297.

<sup>291</sup> Judgement, para.399.

<sup>292</sup> Judgement, paras.537-575.

<sup>293</sup> Judgement, paras.577 (fn.2052), 594.

<sup>294</sup> Judgement, para.576.

### C. Tarčulovski ordered the crimes

89. In light of Tarčulovski's role in the operation,<sup>295</sup> and the organised manner in which the operation took place,<sup>296</sup> the Chamber was entitled to conclude that Tarčulovski ordered the crimes or that, in the alternative, he ordered acts with the awareness of the substantial likelihood that crimes would be committed.

90. Contrary to Tarčulovski's submission,<sup>297</sup> the Chamber did not need to identify positive evidence of a specific order to a specific perpetrator to convict him. An order need not be given in writing or in any particular form.<sup>298</sup> It need not be explicit<sup>299</sup> or given directly to the person committing the offence.<sup>300</sup>

91. The existence of an order may be proven through circumstantial evidence:

Proof of all forms of criminal responsibility can be given by direct or circumstantial evidence. For instance, "ordering" [...] may be inferred from a variety of factors, such as the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of operations, the *modus operandi* of similar acts, the officers and staff involved, the location of the superior at the time and the knowledge of that officer of criminal acts committed under his command.<sup>301</sup>

92. Given the circumstances in which the crimes took place, the way in which the operation was conducted<sup>302</sup> and Tarčulovski's role as the person in charge,<sup>303</sup> the only reasonable conclusion that the Chamber could have reached is that Tarčulovski ordered the crimes.

93. It is not necessary to prove, as Tarčulovski seems to imply, that the crime would not have been perpetrated without his involvement.<sup>304</sup> In fact, the case-law cited by Tarčulovski makes clear that this is not required. What must be established is

<sup>295</sup> Judgement, paras.555, 560, 574. *See also, generally*, paras.537-560.

<sup>296</sup> *See above V.*

<sup>297</sup> Tarčulovski Brief, paras.123, 125-126.

<sup>298</sup> Judgement, para.400. *See also Kamuhanda AJ*, para.76 (citing *Kordić TJ*, para.388); *Blaškić TJ*, para.281; *Limaj TJ*, para.515.

<sup>299</sup> *Blaškić TJ*, para.281.

<sup>300</sup> *Brdanin TJ*, para.270; *Blaškić TJ*, para.282.

<sup>301</sup> *Galić TJ*, para.171 (footnotes omitted), *confirmed in Galić AJ*, paras.170-171. *See also Kamuhanda AJ*, para.76; *Seromba AJ*, para.201; *Strugar TJ* para.331; *Limaj TJ*, para.515; *Blaškić TJ*, para.281.

<sup>302</sup> *See above V.*

<sup>303</sup> Judgement, paras.537-560. *See above V.*

that the accused's acts substantially contributed to the commission of the crimes.<sup>305</sup> Here the Chamber reasonably found that Tarčulovski's conduct substantially contributed to the commission of the crimes.<sup>306</sup>

94. Tarčulovski's further argument that he did not have authority over the physical perpetrators<sup>307</sup> should be summarily dismissed because it merely asserts that the Chamber failed to interpret evidence in a particular manner without any further explanation.<sup>308</sup> The Chamber properly found that he had *de facto* authority over the perpetrators and "exercised effective leadership and control of the police in the village. The actions of the police in the village were at his direction."<sup>309</sup> Tarčulovski fails to show why this finding is one no reasonable trial chamber could have reached. To the extent Tarčulovski suggests that even if he had authority over the police, he had no authority to order the crimes,<sup>310</sup> this argument should be summarily dismissed because it is contrary to common sense.<sup>311</sup> Police superiors generally do not have legal authority to order their subordinates to commit crimes. The point is that Tarčulovski in fact controlled all actions of the police during the operation.

95. Finally, the Chamber's finding that Tarčulovski was not the person who originated the operation<sup>312</sup> does not contradict its finding that Tarčulovski was the person in charge of the operation.<sup>313</sup> The fact that the operation may have originated at the higher levels of the FYROM government is immaterial to Tarčulovski's conviction. Contrary to Tarčulovski's suggestion,<sup>314</sup> "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility."<sup>315</sup>

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<sup>304</sup> Tarčulovski Brief, para.122 (referring to *Strugar* TJ, para.332).

<sup>305</sup> *Strugar* TJ, para.332 (referring to *Kordić* TJ, para.387; *Kvočka* TJ, para.252; *Naletilić* TJ, para.60). See also *Nahimana* AJ, para.492.

<sup>306</sup> Judgement, para.577 and fn.2052.

<sup>307</sup> Tarčulovski Brief, para.124.

<sup>308</sup> *Martić* AJ, para.19

<sup>309</sup> Judgement, para.574.

<sup>310</sup> Tarčulovski Brief, para.124.

<sup>311</sup> *Brdanin* AJ, para.30.

<sup>312</sup> Judgement, para.594.

<sup>313</sup> Judgement, paras.564, 574.

<sup>314</sup> Tarčulovski Brief, paras.125, 128.

<sup>315</sup> Art. 7(4) of the Statute.

#### **D. The order (plan or instigation) need not be explicitly to commit crimes**

96. Tarčulovski submits that the Chamber improperly expanded the *actus reus* for the modes of liability of ordering, planning and instigating. He argues that the *actus reus* of these modes of liability is the planning, instigating or ordering of conduct that constitutes a crime, and that the *actus reus* is not satisfied if what is planned, instigated or ordered is a legal operation. He avers that the Chamber erred in convicting him for planning, instigating and ordering a legitimate operation – and not the crimes – only because the operation resulted in the commission of crimes and because he had the awareness of the substantial likelihood that the crimes would occur.<sup>316</sup> This argument fails for two reasons.

97. First, the Chamber found that the operation did not have a legitimate goal. Its predominant object was the commission of the crimes.<sup>317</sup> Ordering, planning or instigating an operation primarily designed to commit crimes<sup>318</sup> is the same as ordering, planning or instigating the crimes themselves. Tarčulovski's submissions are based on a misinterpretation of the Chamber's findings and should be summarily dismissed.<sup>319</sup>

98. Second, the Chamber properly discussed<sup>320</sup> and applied<sup>321</sup> the law on planning, instigating and ordering: the plan, instigation or order need not be explicitly to commit crimes.<sup>322</sup> It is sufficient for the accused to plan, instigate or order an act or omission with the awareness of the substantial likelihood that it will result in a crime.<sup>323</sup> Tarčulovski's restrictive reading of the *Blaškić* and *Kordić* Appeal Judgements<sup>324</sup> cannot be accepted. Although the discussion in these judgements is mainly in terms of the *mens rea* requirement for ordering, planning and instigating, these judgements also address the *actus reus* of these modes of liability. Indeed, the Appeals Chamber stated:

<sup>316</sup> Tarčulovski Brief, paras.127, 129. *See also* paras.100, 124-126.

<sup>317</sup> Judgement, paras.572-573. *See above* V.B.

<sup>318</sup> Judgement, paras.572-573.

<sup>319</sup> *Martić* AJ, para.18.

<sup>320</sup> Judgement, paras.398-400.

<sup>321</sup> Judgement, paras.562-579.

<sup>322</sup> *Contra* Tarčulovski Brief, paras.127-130.

<sup>323</sup> *Nahimana* AJ, paras.479-481; *Karera* AJ, para.211; *Blaškić* AJ, para.42; *Kordić* AJ, paras.30-32. *See also* *Milutinović* TJ, Vol.1, fns.84, 88, 94.

<sup>324</sup> Tarčulovski Brief, paras.129-130.

The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law [...] [I]t appears that under the Trial Chamber's standard, *any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur.* The Appeals Chamber considers that an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.

The Appeals Chamber therefore holds that a person who orders *an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order*, has the requisite *mens rea* for establishing liability under Article 7(1) pursuant to ordering.<sup>325</sup>

These excerpts demonstrate the Appeals Chamber's recognition that the order, plan or instigation need not be explicitly to commit crimes. In fact, the *Blaškić* Appeal Judgement explicitly rejects an argument similar to that raised by Tarčulovski:

The Appeals Chamber notes that there has been nothing controversial in the finding of the Trial Chamber that the attack ordered by the Appellant on Donja Večeriska was a legitimate military action. The question is whether, in ordering the attack, the Appellant was aware of a substantial likelihood that crimes would be committed during or after the attack on the village. The argument of the Appellant that there was no evidence showing that he ordered the destruction of civilian property does not by itself affect the finding of guilt reached by the Trial Chamber.<sup>326</sup>

99. The Appeals Chamber has confirmed in later judgements that a person can be held responsible when ordering "another person *to commit an offence*" or when ordering "*an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.*"<sup>327</sup> The important point for the *actus reus* of planning, instigating and ordering is that the accused's acts must have substantially contributed to the commission of the crime.<sup>328</sup> Here, the Chamber reasonably found that Tarčulovski's acts had substantially contributed to the commission of the crimes,<sup>329</sup> and that he had the required *mens rea*.<sup>330</sup>

<sup>325</sup> *Blaškić* AJ, paras.41-42 (emphasis added). See also *Kordić* AJ, paras.30-32.

<sup>326</sup> *Blaškić* AJ, para.471. See also, e.g., *Martić* AJ, para.261.

<sup>327</sup> *Nahimana* AJ, para.481 (emphasis added). See also *Karera* AJ, para.211.

<sup>328</sup> *Kordić* AJ, paras.26-27; *Nahimana* AJ, para.492.

<sup>329</sup> Judgement, para.577, fn.2052.

<sup>330</sup> Judgement, para.576. Tarčulovski's argument that the Chamber erred in failing to find that "the risk of crimes being committed under the circumstances was unjustifiable or unreasonable" (*Tarčulovski* Brief, para.133) should be summarily dismissed as this is not a relevant *mens rea*

100. Contrary to Tarčulovski's assertion,<sup>331</sup> there is no violation of the principle of *nullum crimen sine lege* in applying the *Blaškić* and *Kordić* holdings to this case. The principle of *nullum crimen sine lege*

does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.<sup>332</sup>

101. The *Blaškić* and *Kordić* Appeal Judgements did not expand the *actus reus* for ordering, planning or instigating, but merely interpreted this element. This was done after a careful examination of the approaches of national systems and of other international precedents.<sup>333</sup> Tarčulovski fails to provide any cogent reasons<sup>334</sup> why the *Blaškić* and *Kordić* precedents should not be followed. His argument regarding the *nullum crimen sine lege* principle<sup>335</sup> should be dismissed.<sup>336</sup>

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requirement for ordering, instigating or planning. See *Nahimana* AJ, paras.479-481; *Karera* AJ, para.211; *Blaškić* AJ, para.42; *Kordić* AJ, paras.30-32. Paragraph 38 of the *Blaškić* AJ (cited by Tarčulovski) simply summarises the position of common law jurisdictions on the *mens rea* of recklessness.

<sup>331</sup> Tarčulovski Brief, paras.134-135.

<sup>332</sup> *Aleksovski* AJ, para.127. See also, e.g., *Krajišnik* AJ, para.670; *Ntagerura* AJ, para.127; *Čelebići* AJ, para. 173.

<sup>333</sup> See in particular *Blaškić* AJ, paras.33-41.

<sup>334</sup> *Aleksovski* AJ, para.107.

<sup>335</sup> Tarčulovski Brief, paras.134-135.

<sup>336</sup> See also *Krajišnik* AJ, Separate Opinion of Judge Shahabuddeen, para.13:

The Statute, a brief document, uses concepts without embroidery. It prescribes modes of liability but has not furnished details that may be required to decide whether those modes of liability have been satisfied in a particular case. It is easy to see that details may be required in deciding whether an accused has been engaged in planning, instigating, ordering or committing a prescribed crime, or aiding and abetting in the planning, preparation or execution of it – modes of liability prescribed by Article 7(1) of the Statute. The Statute is to be taken as authorising the Tribunal to interpret these modes of liability and to say what concrete actions will constitute them.

## VII. GROUND 4: THE CHAMBER PROPERLY CONVICTED TARČULOVSKI OF MURDER, WANTON DESTRUCTION AND CRUEL TREATMENT

### A. The Chamber properly convicted Tarčulovski for the murders of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani

102. The Chamber properly found Tarčulovski guilty of the murders of Rami Jusufi, Sulejman Bajrami and Muharem Ramadani. This sub-ground should be dismissed.

#### 1. The Chamber did not have to make findings as to the precise identity of the physical perpetrators of the murders

103. Contrary to Tarčulovski's assertion,<sup>337</sup> the Chamber did not have to make findings as to the precise identity of the police officers who committed the three murders. First, the Chamber properly found that there was only one group of police in Ljuboten, led by Tarčulovski throughout the operation.<sup>338</sup> Second – assuming *arguendo* Tarčulovski is correct that it was necessary to establish the *mens rea* of the physical perpetrators to convict him for ordering, instigating and planning the murders<sup>339</sup> – the police officers who committed the murders clearly had the *mens rea* for this offence.<sup>340</sup>

<sup>337</sup> Tarčulovski Brief, paras.138-142 (general), 144-147, 151-152 and 154 (murder of Rami Jusufi), 155-156 and 160 (murder of Sulejman Bajrami), 161-163 (murder of Muharem Ramadani). *See also* paras.181-182 (Ground 5A).

<sup>338</sup> *See below* Section VII.A.1.(a).

<sup>339</sup> It does not appear that this is the correct standard. Tarčulovski was found to have ordered, planned and instigated the crimes committed during the police operation. The Chamber found that Tarčulovski intended the murders, cruel treatments and wanton destruction or was aware of the substantial likelihood that they would be committed in the execution of the operation (Judgement, para.576). Implicit in this is that Tarčulovski had the direct or indirect intent for these crimes, *i.e.*, he had the full *mens rea* for these crimes (which are not specific intent crimes). In these circumstances, the physical perpetrator's intent to commit the crimes is irrelevant. *See Blaškić* TJ, para.282 (finding that "what is important is the commander's *mens rea*, not that of the subordinate executing the order"). To hold otherwise could allow persons ordering, planning or instigating criminal conduct to escape liability when the physical perpetrator carried out the *actus reus* of the crime but did not have the required *mens rea*, for instance because he lacked information, was an innocent agent or was otherwise used to commit a crime. An analogy can also be found in the Tribunal's case-law on joint criminal enterprise. When a JCE member uses non-JCE members as tools to commit the crimes, it is irrelevant whether those non-JCE members had the *mens rea* for the crimes. *See Brđanin* AJ, paras.362, 410-413, 430; *Martić* AJ, paras.168-172. Similarly, when the ICTR Appeals Chamber found that Sylvestre Gacumbitsi, Emmanuel Ndinabahizi and Athanase Seromba had committed genocide and extermination despite the fact that the killings had been carried out by others, it

(a) The Chamber properly found there was only one group of police, led by Tarčulovski

104. The Chamber found that the police, led by Tarčulovski, moved as one group along the main road through the village on 12 August 2001 and committed crimes, starting with the shooting at the Jusufi home.<sup>341</sup>

105. Tarčulovski seeks to obscure these clear findings by alleging that there were different groups of police involved. He complains the Chamber failed to identify which group committed each of the crimes, and suggests his presence among the groups that committed crimes is pure conjecture.<sup>342</sup> However, the “groups” identified by Tarčulovski are in fact one and the same. There was only one police unit, led by Tarčulovski, taking part in the operation.

106. Contrary to Tarčulovski’s assertions,<sup>343</sup> the fact that different witnesses provided different estimates as to the size of the group does not show that there were several groups of police in Ljuboten that day.<sup>344</sup> The Chamber properly analysed the testimony as to the size of the group. The Chamber explained in detail its reasoning on this issue<sup>345</sup> and Tarčulovski fails to show that the Chamber was unreasonable.

107. Where Tarčulovski refers to a “second team”,<sup>346</sup> it is the same group of police led by Tarčulovski. The Chamber found that Tarčulovski’s unit entered Ljuboten at about 8:00 a.m. and fired shots from the vicinity of the Orthodox Church.<sup>347</sup>

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did not even need to assess whether the physical perpetrators of the killings themselves had the *mens rea* for genocide or extermination. See *Gacumbitsi* AJ, paras.59-61; *Ndindabahizi* AJ, para.123; *Seromba* AJ, paras.161, 171-182.

The approach taken in the *Milutinović* TJ with respect to the forms of liability of ordering, instigating, planning or committing pursuant to a JCE is also instructive. The *Milutinović* Chamber found that the *mens rea* for the crime itself can be with the physical perpetrator, but also with the “intermediary perpetrator” (*i.e.*, “a person involved in the crime who is between the physical perpetrator and the accused in the chain of command”: *Milutinović* TJ, Vol.1, para.69) or the accused (when the accused is not the physical perpetrator). This analysis is separate from the “mental element” and the “physical element” of the form of responsibility of the accused (planning, instigating, ordering or committing pursuant to a JCE), which must be established. *Milutinović* TJ, Vol.1, paras.138, 156-160, 162(e), 167, 181, 206.

<sup>340</sup> See below Section VII.A.1.(b).

<sup>341</sup> Judgement, paras.555, 560, 564. See also Overview of response to Grounds 3-5 for a fuller discussion on this.

<sup>342</sup> Tarčulovski Brief, paras.144-148, 155-157, 160-161, 163.

<sup>343</sup> Tarčulovski Brief, paras.144, 156.

<sup>344</sup> Tarčulovski Brief, paras.144, 156.

<sup>345</sup> Judgement, paras.38, 59, 112-113, 120, 566.

<sup>346</sup> Tarčulovski Brief, para.144.

108. The “third team” he mentions<sup>348</sup> were the police in the Hermelin APC, which entered the village shortly after Tarčulovski and, at his direction, joined up with him and his police who were on foot, and supported them throughout the operation.<sup>349</sup>

109. The “fourth group”<sup>350</sup> were 4-6 policemen from Tarčulovski’s unit who, after the events at Ametovski’s house, escorted 10 detained villagers to the police checkpoint at Braca’s house.<sup>351</sup>

110. As for the so-called “fifth and sixth” groups,<sup>352</sup> the Chamber simply noted that some witnesses testified that members of the “Lions” and “Tigers” special units might have been among the group of policemen that entered Ljuboten on 12 August 2001, but it was not convinced that this fact had been established.<sup>353</sup> Regardless, these “groups” were not separate entities operating in Ljuboten that day. To the extent any “Lions” or “Tigers” were there, they operated as members of Tarčulovski’s unit.

111. Thus, the Chamber reasonably found that there was only one group of police led by Tarčulovski and that they committed the murders while progressing through Ljuboten.<sup>354</sup> Tarčulovski fails to show any error in the Chamber’s findings.

(b) The physical perpetrators of the murders had the required *mens rea*

112. Assuming *arguendo* that it was necessary to establish the *mens rea* of the physical perpetrators to convict Tarčulovski for ordering, planning and instigating the murders,<sup>355</sup> it is clear that the police officers who killed Rami Jusufi, Sulejman Bajrami and Muharem Ramadani had the required *mens rea* for murder under Common Article 3. Tarčulovski’s argument that the Chamber did not make findings as to the precise identity of the physical perpetrators of the three murders and as to whether these perpetrators knew about the status of their victims<sup>356</sup> fails for two reasons. First, contrary to Tarčulovski’s assertions,<sup>357</sup> the question is not whether the

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<sup>347</sup> Judgement, para.42.

<sup>348</sup> Tarčulovski Brief, para.145.

<sup>349</sup> Judgement, paras.41-42.

<sup>350</sup> Tarčulovski Brief, para.146.

<sup>351</sup> Judgement, para.56.

<sup>352</sup> Tarčulovski Brief, para.146.

<sup>353</sup> Judgement, paras.58, 61.

<sup>354</sup> Judgement, paras.552, 555, 564-565.

<sup>355</sup> See above fn.339.

<sup>356</sup> Tarčulovski Brief, paras.138-142 (general), 152 and 154 (murder of Rami Jusufi), 160 (murder of Sulejman Bajrami). See also paras.181-182.

<sup>357</sup> Tarčulovski Brief, paras.138-142.

perpetrators could have believed that the victims belonged to the NLA, but whether they were aware of the factual circumstances establishing that the victims were taking no active part in the hostilities at the time they were killed.<sup>358</sup> Second, the police who committed the murders were clearly aware of the facts establishing that their victims were taking no active part in the hostilities at the time they were killed.<sup>359</sup>

(i) Applicable law

113. Common Article 3 to the Geneva Conventions prohibits murder of “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. It is irrelevant whether the murder victims were members of the NLA; the relevant question is whether they were taking an active part in the hostilities at the time they were killed.

114. The next question is whether the status of the victim is an element of the *mens rea* for murder. The Appeals Chamber’s current case-law does not explicitly mention the victim’s status as an element of the *mens rea* to be established for Common Article 3 offences.<sup>360</sup> The Appeals Chamber has identified the following elements to prove murder under Common Article 3: 1) death of the victim as a result of an act of the accused or perpetrator, 2) intent to cause death or serious bodily harm which the perpetrator should reasonably have known might lead to death, and 3) victim was not taking an active part in the hostilities at the time of the offence.<sup>361</sup>

115. To the extent that the principle of individual guilt requires “that fundamental characteristics of a war crime be mirrored in the perpetrator’s mind”,<sup>362</sup> the *mens rea* for murder under Common Article 3 must include not only the “intent to cause death or serious bodily harm which the perpetrator should reasonably have known might

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<sup>358</sup> Below Section (i).

<sup>359</sup> Below Section (ii).

<sup>360</sup> At trial, the Prosecution nevertheless argued that the perpetrators of the murders and beatings for which Tarčulovski was found liable knew or should have known that their victims were taking no active part in the hostilities at the time of the offences: *see* Prosecution Final Brief, paras.93, 103, 126; Closing Arguments, T.11049.

<sup>361</sup> *Čelebići* AJ, para.423; *Kordić* AJ, para.37; *Kvočka* AJ, para.261. The Appeals Chamber has defined the elements of cruel treatment under Common Article 3 as 1) an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, and 2) committed against a person taking no active part in the hostilities. *Čelebići* AJ, para.424; *Blaškić* AJ, para.595.

<sup>362</sup> *Naletilić* AJ, para.118.

lead to death” but also a second element related to the requirement that the victim was taking no active part in the hostilities at the time of the offence.<sup>363</sup>

116. This second element of the *mens rea* is the awareness of (or reckless indifference<sup>364</sup> as to) the factual circumstances establishing that the victim was taking no active part in the hostilities at the time of the crime; it is not necessary to prove knowledge of this legal status.<sup>365</sup> This requirement is equivalent to a requirement that the person knew or should have known that the victim was taking no active part in the hostilities at the time.<sup>366</sup>

117. When the accused is charged with ordering, planning or instigating Common Article 3 offences, it is not necessary to establish that he himself was aware of the factual circumstances showing that the specific victims were taking no active part in the hostilities. The mental element for ordering, planning or instigating such offences is the direct intent or awareness of the substantial likelihood that the criminal conduct (such as killing, cruel treatment and torture) will be carried out against persons taking no active part in the hostilities.<sup>367</sup>

<sup>363</sup> As concluded by some trial chambers: *see, e.g., Milutinović* TJ, Vol.1, para.134; *Martić* TJ, para.47; *Krajišnik* TJ, para.847; *Halilović* TJ, para.36. *See also Galić* TJ, para.55 (noting, in relation to the crime of attacks against civilians, that “the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant”). The Prosecution also notes that, according to the Elements of Crimes of the ICC, the *mens rea* for the crimes of murder and cruel treatment in internal armed conflicts (Articles 8(2)(c)(i) of the ICC Statute) includes awareness of the factual circumstances that establish that the victim was taking no active part in the hostilities. ICC Statute Elements of Crimes, Articles 8(2)(c)(i)-1 (3<sup>rd</sup> element) and Articles 8(2)(c)(i)-3 (3<sup>rd</sup> element).

<sup>364</sup> The Appeals Chamber has found that wilful blindness or reckless indifference as to the existence of a fact is sufficient to entail liability. *See, e.g., Prosecutor v. Zlatko Aleksovski*, Case No.IT-95-14/1-AR77, App.Ch., Judgment on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001, paras.45-54. *See also Galić* AJ, para.140.

<sup>365</sup> *See by analogy Naletilić* AJ, para.119 (internal references omitted):

This aspect of the *mens rea* requirement for Article 2 crimes does not require that a perpetrator correctly subsume facts known to him during the commission of the crime into a particular legal characterization. This is the task of the judge (*iura novit curia*). The perpetrator only needs to be aware of factual circumstances on which the judge finally determines the existence of the armed conflict and the international (or internal) character thereof. It is a general principle of criminal law that the correct legal classification of a conduct by the perpetrator is not required. The principle of individual guilt, however, demands sufficient awareness of *factual* circumstances establishing the armed conflict and its (international or internal) character.

*See also* ICC Statute Elements of Crimes, Articles 8(2)(c)(i)-1 (3<sup>rd</sup> element) and Articles 8(2)(c)(i)-3 (3<sup>rd</sup> element).

<sup>366</sup> This was the requirement identified in *Martić* TJ, para.47; *Krajišnik* TJ, para.847; *Halilović* TJ, para.36. *See also Milutinović* TJ, Vol.1, para.134 (“the perpetrator of the crime must have known or should have been aware that the victim was taking no active part in the hostilities”).

<sup>367</sup> *See Nahimana* AJ, paras.479-481; *Karera* AJ, para.211; *Blaškić* AJ, para.42; *Kordić* AJ, paras.30-32.

(ii) The physical perpetrators had the required *mens rea*

118. The Chamber's findings show that the physical perpetrators of the murders were aware of the factual circumstances establishing that their victims were taking no active part in the hostilities at the time of the offences. Alternatively, the only reasonable conclusion on the facts established in this case is that these perpetrators were aware of the factual circumstances establishing the legal status of their victims.

119. With respect to the first murder, the Chamber found that Rami Jusufi was unarmed, in civilian clothes, shot at close range, and that "there was no resistance."<sup>368</sup> The Chamber also found that the police did not even enter the house to search it or interview anyone inside.<sup>369</sup> The evidence relied on by Tarčulovski at trial to advance the claim that Rami Jusufi was an NLA member – a UBK document dated 8 April 2002 whose authors and sources were unknown – was not credible.<sup>370</sup> This document could not possibly have led the perpetrators of his murder to believe he was taking an active part in the hostilities because it did not exist on 12 August 2001. There was no evidence in the record to support the claim that there was an NLA checkpoint in front of Rami Jusufi's house and other evidence contradicted this allegation.<sup>371</sup> As a result, the actual perpetrators of Rami Jusufi's murder could not reasonably have concluded that he was taking an active part in the hostilities at the time they shot him.

120. In an attempt to raise doubt as to the *mens rea* of Jusufi's killers, Tarčulovski contends that there was no evidence that the physical perpetrators of the murder saw what Jusufi was wearing or knew that he was unarmed.<sup>372</sup> However, the Chamber found that Jusufi was shot from a short distance at the entrance of the house, at the moment he tried to close the front door.<sup>373</sup> His killers – irrespective of their precise position at the time – must have seen that he was wearing civilian clothes and that he was unarmed, or were recklessly indifferent to these facts. This and the circumstances

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<sup>368</sup> Judgement, para.312.

<sup>369</sup> Judgement, paras.43, 567.

<sup>370</sup> Judgement, para.310.

<sup>371</sup> Judgement, para.310.

<sup>372</sup> Tarčulovski Brief, paras.152-154.

<sup>373</sup> Judgement, paras.43, 307-308. Tarčulovski's argument that there was no support for finding Jusufi was shot at close range (Tarčulovski Brief, para.153) should be summarily dismissed as it ignores the evidence discussed by the Chamber. *See* Judgement, paras.43 (in particular fn.120), 307-308.

detailed above show that the persons who killed Jusufi were aware of the facts establishing that he was taking no active part in the hostilities at the time.

121. Similarly, before his murder, Sulejman Bajrami was detained and severely beaten by members of Tarčulovski's unit at Ametovski's house.<sup>374</sup> After having been "hit or kicked badly in the head," Bajrami "commenced to walk or run away."<sup>375</sup> He was then shot several times by the police. Evidence of numerous spent casings found near his body and "gouge marks" in the centre of the bloodstain on the pavement were consistent with his having been shot while lying on the road.<sup>376</sup> The Chamber found that while escape may have been on Bajrami's mind, "this was manifestly hopeless."<sup>377</sup> "He was among a very large group of well armed police. He was unarmed, and he alone sought to move. He had nowhere to go but along the road, in full view."<sup>378</sup> The Chamber further found that the hopelessness of Bajrami's position "was obvious to the police" and that his conduct "did not present a real threat of escape."<sup>379</sup> Rather than stop Bajrami immediately, as the police could have done, they let Bajrami walk or run awhile before "deliberately and repeatedly" shooting him.<sup>380</sup> The evidence confirmed that Bajrami was shot "at very close range."<sup>381</sup> There was no evidentiary basis "for any conclusion other than that, at the time he was killed, Sulejman Bajrami was an unarmed civilian taking no active part in the hostilities."<sup>382</sup> Given the circumstances, there can be no doubt that the police who killed Bajrami were aware of the facts establishing that he was not taking an active part in the hostilities at the time he was killed.<sup>383</sup>

122. The same is true for the murder of Muharem Ramadani. He was also a member of the group of detained, unarmed, and beaten men at Ametovski's house.<sup>384</sup> Indeed, Ramadani was the person who had waived the white cloth of surrender when the police approached Ametovski's house and shot at the basement window.<sup>385</sup> When the rest of the men were ordered to walk to Braca's house, the two elderly men in the

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<sup>374</sup> Judgement, para.55.  
<sup>375</sup> Judgement, para.55.  
<sup>376</sup> Judgement, para.317.  
<sup>377</sup> Judgement, para.318.  
<sup>378</sup> Judgement, para.318.  
<sup>379</sup> Judgement, para.319.  
<sup>380</sup> Judgement, paras.319-320.  
<sup>381</sup> Judgement, para.319.  
<sup>382</sup> Judgement, para.320.  
<sup>383</sup> *Contra* Tarčulovski Brief, paras.159-160.  
<sup>384</sup> Judgement, para.321.  
<sup>385</sup> Judgement, para.324.

group – Muharem Ramadani and Aziz Bajrami – were ordered to stay behind at Ametovski's house.<sup>386</sup> The evidence indicated that Ramadani was in civilian clothes and shot at close range at the gate of Ametovski's house.<sup>387</sup> The Chamber further found that Ramadani was shot by one or more members of the police while in their custody.<sup>388</sup> Even assuming *arguendo* that Ramadani had been a member of the NLA – an assertion rejected by the Chamber – it is clear that he was *hors de combat* at the time he was killed given that he was unarmed and in the custody of armed police.<sup>389</sup> No reasonable person could have concluded otherwise.

123. The unidentified police officers who committed the murders were thus clearly aware of the facts establishing that the victims were taking no active part in the hostilities at the time.

2. Tarčulovski had the required *mens rea*

124. The Chamber reasonably found that Tarčulovski had the required *mens rea* to be convicted for the murders.<sup>390</sup> Tarčulovski's argument that there is no finding that he knew about the status of the murder victims<sup>391</sup> fails because it ignores that he was convicted for ordering, planning and instigating the murders. To sustain a conviction for ordering, planning and instigating, it was sufficient to find that Tarčulovski had direct intent or was aware of the substantial likelihood that the crime of murder under Common Article 3 (that is, the killing of a person taking no active part in the hostilities, with the relevant *mens rea*<sup>392</sup>) would be committed in the execution of his order/plan or as a result of his instigation.<sup>393</sup> This is what the Chamber found.<sup>394</sup> In any case, it is clear that Tarčulovski was in fact aware of the factual circumstances establishing the murder victims' legal status as he was with the police when they committed the murders.<sup>395</sup>

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<sup>386</sup> Judgement, paras.57, 321.

<sup>387</sup> Judgement, paras.321-323.

<sup>388</sup> Judgement, para.325.

<sup>389</sup> Judgement, paras.326-328.

<sup>390</sup> Judgement, para.576.

<sup>391</sup> Tarčulovski Brief, paras.142, 152.

<sup>392</sup> See above Section VII.A.1.(b)(i).

<sup>393</sup> See above para.117.

<sup>394</sup> Judgement, para.576.

<sup>395</sup> See above V.A and VII.A.1.(a).

3. The Chamber properly convicted Tarčulovski for the murder of Rami Jusufi

125. The Chamber reasonably found on the totality of the evidence that Rami Jusufi was taking no active part in the hostilities when he was shot and killed.<sup>396</sup> None of the arguments raised by Tarčulovski<sup>397</sup> show that the Chamber committed an error. In particular, the issue to be decided by the Chamber was not whether Rami Jusufi was a member of the NLA, but rather whether he was taking an active part in the hostilities at the time he was shot.

126. The Chamber considered all the evidence cited by Tarčulovski when it found that Jusufi was in fact a civilian.<sup>398</sup> Tarčulovski fails to show that this finding was unreasonable or how this could have any impact on the verdict, as it was not a finding the Chamber was required to make.<sup>399</sup> Moreover, contrary to Tarčulovski's assertion,<sup>400</sup> the Chamber was entitled to rely on the statement of Fatmir Kamberi to conclude that Jusufi was not a member of the NLA.<sup>401</sup> As explained elsewhere, the Chamber did not err in accepting part of the testimony of Ljuboten residents.<sup>402</sup>

127. The Chamber was free to accept some, but reject other parts of a witness's testimony.<sup>403</sup> The Chamber gave detailed reasons for disregarding Grozdanovski and M2D-008's evidence on alleged outgoing fire from the Jusufi house, although it accepted other parts of their testimony for other findings.<sup>404</sup> Tarčulovski fails to show an error by the Chamber in this regard.

128. Tarčulovski claims finally that the Chamber wrongly rejected evidence from M037,<sup>405</sup> but fails to show how the Chamber's assessment of this evidence was unreasonable. [REDACTED].<sup>406</sup> The Chamber was entitled to disregard this unconfirmed second-hand information. The Chamber also explained why it could not

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<sup>396</sup> Judgement, para.311.

<sup>397</sup> Tarčulovski Brief, paras.148-150.

<sup>398</sup> Judgement, para.311.

<sup>399</sup> The Chamber was only required to find that Jusufi was taking no active part in the hostilities when he was killed. It was not required to find that he was a civilian.

<sup>400</sup> Tarčulovski Brief, para.149.

<sup>401</sup> Judgement, para.310.

<sup>402</sup> See below VIII.B.

<sup>403</sup> See above II.

<sup>404</sup> Judgement, paras.145-146. *Contra* Tarčulovski Brief, para.149.

<sup>405</sup> Tarčulovski Brief, para.150.

<sup>406</sup> [REDACTED].

accept M037's testimony as to the time he entered Ljuboten.<sup>407</sup> Tarčulovski fails to show any error in this reasoning.

4. The Chamber properly convicted Tarčulovski for the murder of Sulejman Bajrami

(a) Tarčulovski's involvement in this murder was proven beyond reasonable doubt

129. The Chamber reasonably found that Tarčulovski led the police through Ljuboten as they committed crimes.<sup>408</sup> Further, the Chamber accepted specific evidence from M037 that Tarčulovski was in front of Adem Ametovski's house<sup>409</sup> with policemen who held and mistreated ten residents who had previously sheltered in the basement of that same house, which policemen later shot Sulejman Bajrami.<sup>410</sup> Tarčulovski fails to show that no reasonable trial chamber could have accepted M037's evidence as to Tarčulovski's presence.<sup>411</sup> This evidence was also corroborated by Tarčulovski's own statement.<sup>412</sup>

(b) The Chamber reasonably concluded that Bajrami was an unarmed civilian taking no active part in the hostilities

130. The Chamber reasonably concluded that Bajrami was an unarmed civilian taking no active part in the hostilities at the time he was killed.<sup>413</sup> Tarčulovski claims that the Chamber's findings concerning this incident are solely based on evidence from villagers whom the Chamber otherwise did not deem reliable.<sup>414</sup> This is insufficient to show that the Chamber's finding was unreasonable. The Chamber relied upon multiple sources of evidence concerning the murder of Sulejman Bajrami including evidence from villagers who were detained and beaten with the victim at Ametovski's house,<sup>415</sup> as well as a detailed OSCE report and the evidence of Henry

<sup>407</sup> Judgement, paras.41-42.

<sup>408</sup> Judgement, paras.552, 555, 560, 564-565. *See also above* V. for a fuller discussion on this.

<sup>409</sup> Judgement, para.553 (referring to fn.200).

<sup>410</sup> Judgement, paras.50-61.

<sup>411</sup> *Contra* Tarčulovski Brief, para.157. *See also below* VIII.B.2.

<sup>412</sup> Exh.P379.02 (quoted at Judgement, para.557).

<sup>413</sup> Judgement, para.320.

<sup>414</sup> Tarčulovski Brief, paras.158-159.

<sup>415</sup> Judgement, paras.315-316, [REDACTED]; [REDACTED]; Vehbi Bajrami, Exh.P247.1, p.3.

Bolton.<sup>416</sup> This evidence was consistent with Bajrami having been shot while lying on the road.<sup>417</sup> Tarčulovski fails to identify any error committed by the Chamber.

131. Contrary to Tarčulovski's assertions,<sup>418</sup> the Judgement does not reveal a "dearth of evidence" as to the circumstances of Sulejman Bajrami's death. The Chamber carefully considered all the evidence and Tarčulovski's arguments at trial<sup>419</sup> and reasonably concluded that even if Sulejman Bajrami may have been trying to escape, his desperate attempt could not have been regarded as a serious threat. The large group of heavily armed police had other means to prevent Bajrami's escape, other than allowing him to leave the scene and then shooting him numerous times at close range.<sup>420</sup> Tarčulovski fails to show an error in the Chamber's finding.

##### 5. The Chamber properly convicted Tarčulovski for the murder of Muharem Ramadani

132. The Chamber reasonably concluded that Muharem Ramadani was killed by the police unit led by Tarčulovski on 12 August 2001.<sup>421</sup> The Chamber had evidence which placed Ramadani in the custody of armed police at Ametovski's house,<sup>422</sup> and further evidence about his dead body later being found at the entrance of that same house.<sup>423</sup> The only reasonable inference from the circumstances was that Ramadani's death was caused by police who shot him in front of the house, as found by the Chamber.<sup>424</sup> No error has been shown.

133. The Chamber correctly rejected the suggestion in an OSCE report that the deaths of Muharem Ramadani and Sulejman Bajrami might have occurred during an anti-terrorist operation,<sup>425</sup> and explained its reasons for doing so.<sup>426</sup> Tarčulovski fails to show that this assessment was unreasonable. In fact, the report itself expresses the OSCE's "particular concern regarding the circumstances of the deaths of the two men

<sup>416</sup> Judgement, para.317, referring to Exh.1D24, p.2; Henry Bolton, T.1808-1809. *See also* Exhs.P238, pp.2-3; P239; P240; P241; P185; [REDACTED].

<sup>417</sup> Judgement, para.317.

<sup>418</sup> Tarčulovski Brief, para.158.

<sup>419</sup> Tarčulovski Final Trial Brief, paras.260-264.

<sup>420</sup> Judgement, paras.317-319.

<sup>421</sup> Judgement, paras.325, 553. On Tarčulovski's presence at the time of the murder, *see above* V and VII.A.1(a).

<sup>422</sup> Judgement, para.325; [REDACTED].

<sup>423</sup> Judgement, paras.57, 323; [REDACTED].

<sup>424</sup> Judgement, paras.57, 321-328. *Contra* Tarčulovski Brief, para.161.

<sup>425</sup> Judgement, para.324. *Contra* Tarčulovski Brief, para.163.

<sup>426</sup> Judgement, para.324.

found within the town,”<sup>427</sup> that is, Sulejman Bajrami and Muharem Ramadani. Tarčulovski fails to show any error committed by the Chamber.

## **B. The Chamber properly convicted Tarčulovski for the crime of wanton destruction**

134. The Chamber correctly found that Tarčulovski planned, ordered and instigated the crime of wanton destruction.<sup>428</sup> Tarčulovski’s challenges to the Chamber’s finding that the destruction was not justified by military necessity and to his liability for these crimes<sup>429</sup> are without merit.

### 1. Tarčulovski’s arguments contesting the finding that the houses were destroyed without military necessity should be summarily dismissed

135. Tarčulovski’s arguments contesting the Chamber’s finding that the houses were destroyed without military necessity do not meet the standards for appellate submissions and should be summarily dismissed.<sup>430</sup> Tarčulovski repeats arguments made at trial without specifying any error in the Judgement or simply asserts his own interpretation of the evidence as the sole support for challenging the findings without explaining why no reasonable trial chamber could have reached the same conclusion.<sup>431</sup> “Mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.”<sup>432</sup> Elsewhere, he relies on a selective representation of the evidence, taking facts and conclusions out of context and often omitting to refer to relevant findings of the Chamber.<sup>433</sup> Such arguments should also be summarily dismissed.<sup>434</sup>

136. Tarčulovski makes four main complaints. First, he claims that the Chamber disregarded evidence that the destroyed houses were targeted because they harboured NLA terrorists<sup>435</sup> and that the attack was properly justified by military necessity.<sup>436</sup>

<sup>427</sup> Exh.1D24, p.2. This concern was reiterated by Henry Bolton at trial. See T.1691-1692, 1808-1809 (cited in Judgement, paras.317, 323).

<sup>428</sup> Judgement, paras.380, 577.

<sup>429</sup> Tarčulovski Brief, paras.164-176.

<sup>430</sup> See *Brdanin* AJ, paras.19-31.

<sup>431</sup> Tarčulovski Brief, paras.165, 172-174.

<sup>432</sup> *Martić* AJ, para.19. See also *Brdanin* AJ, para.24, and *above* II.

<sup>433</sup> Tarčulovski Brief, paras.166-171, 175.

<sup>434</sup> *Brdanin* AJ, para.23 (summary dismissal category 2).

<sup>435</sup> Tarčulovski Brief, para.165. Tarčulovski’s argument regarding the “wholesale rejection” of military and police statements is addressed below VIII.B.1.

The Chamber considered this claim and concluded (i) that none of the houses were used for military purposes at the time of their destruction; and (ii) that their destruction did not offer a military advantage to the police who set them on fire.<sup>437</sup> Tarčulovski simply puts forth his own preferred interpretation of the evidence, highlighting three pieces of evidence (Grozdanovski's military report and testimony, and Bolton's testimony) allegedly improperly disregarded by the Chamber.<sup>438</sup> The Chamber considered this evidence.<sup>439</sup> Tarčulovski fails to show that the Chamber's conclusion is one no reasonable trier of fact could have made.

137. Second, he claims the Chamber did not point to any evidence showing beyond a reasonable doubt that the houses were set on fire by the police and, further, overlooked evidence that the damage could have resulted from actors other than the police, accidentally, or on a different date.<sup>440</sup> This argument ignores the substantial evidence cited by the Chamber to support its conclusion.<sup>441</sup> It also ignores the Chamber's clear consideration of evidence regarding storage of flammable agricultural materials<sup>442</sup> and army fire on 10 and 12 August 2001<sup>443</sup> and, further, misrepresents the significance of the Chamber's finding that some houses in Ljuboten sustained damage on 16 or 17 August 2001. This finding led the Chamber to acquit Tarčulovski with respect to the destruction of the houses of Muhamer Rashiti and Isni Fazliev in the absence of specific evidence that these houses were damaged on 12 August 2001.<sup>444</sup> For the other houses listed in the Indictment, the evidence established that they were destroyed by Tarčulovski's police unit on 12 August 2001.<sup>445</sup>

138. Third, Tarčulovski claims that the Chamber relied on statements from witnesses, "almost none" of whom personally saw how the houses were destroyed.<sup>446</sup>

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<sup>436</sup> Tarčulovski Brief, para.172.

<sup>437</sup> Judgement, paras.364, 369, 375, 378-380.

<sup>438</sup> Tarčulovski Brief, paras.172-174.

<sup>439</sup> Judgement, paras.145-146, 149.

<sup>440</sup> Tarčulovski Brief, paras.166-167, 169-171, 175.

<sup>441</sup> Judgement, paras.31, 33-36, 38-39, 41-42, 45, 48-49, 60, 68, 361-362, 552, 571 and evidence cited therein.

<sup>442</sup> Judgement, para.361.

<sup>443</sup> See, e.g., Judgement, paras.371, 375, 377, 379.

<sup>444</sup> Judgement, para.370.

<sup>445</sup> Tarčulovski cites to no evidence for his assertion that some of the damage may have occurred from "NLA members themselves." Tarčulovski Brief, para.171. Mere assertions unsupported by any evidence should be summarily dismissed. *Martić* AJ, para.20.

<sup>446</sup> Tarčulovski Brief, para.168.

In selectively citing only three exhibits to support this broad assertion, Tarčulovski ignores other evidence, including eyewitness accounts, the Chamber relied on.<sup>447</sup> He also misrepresents the content and significance of the three exhibits he cites for his assertion. One of the cited exhibits includes an eyewitness account of how a house was set on fire.<sup>448</sup> The other two exhibits support the Chamber's conclusion that the relevant houses were burned down on 12 August 2001 and not some other date,<sup>449</sup> as Tarčulovski speculates.<sup>450</sup>

139. Finally, Tarčulovski claims that the Chamber improperly failed to credit M037's witness testimony, portions of which were relied on for other findings. He claims M037 never saw any security members carrying gasoline or setting fires.<sup>451</sup> However, M037's testimony is contradicted by the statements of other witnesses, as well as circumstantial evidence.<sup>452</sup> Moreover, it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.<sup>453</sup>

## 2. The Chamber properly found Tarčulovski guilty of wanton destruction

140. Tarčulovski was found guilty of planning, ordering, and instigating wanton destruction in Ljuboten. The *actus reus* for these modes of liability is constituted by acts which substantially contributed to the criminal conduct of others.<sup>454</sup> The *mens rea* for these three modes of liability are similar. Each involves either an intent to provoke

<sup>447</sup> See, e.g., Exh.P8.1, paras.26-27 (eyewitness account of police burning houses of Qenan Jusufi, Sabit Jusufi, Agim Jusufi, and others); [REDACTED] and [REDACTED]; M092, T.1299 (confirming that the Hermelin APC was outside Qani Jashari's house when it was burning); [REDACTED]; Exh.P266, para.9 (eyewitness account of Lutfiu houses burning on 12 August 2001); Exh.P432, paras.10-11 (eyewitness account of police walking behind Hermelin APC and uniformed men going to Harun Redžepi's house and setting it on fire; witness statement also recounts hearing a sound similar to gas being released from gas cylinders before seeing the houses of Avdulla Redžepi and Ćemuran Redžepi starting to burn); M088, T.1191-1193 and Exhs.P208, P210 (confirming smoke coming from the area of Jusufi homes on the morning of 12 August 2001); Nikolce Grozdanovski, T.10420, 10494, Exh.2D88 (eyewitness testimony about watching the police advance through Ljuboten behind a Hermelin APC and indicating police firing in direction of Jusufi houses on 12 August 2001); Judgement, fns.130-131 and evidence cited therein (regarding burning of various houses on 12 August 2001).

<sup>448</sup> Exh.P372, para.8 (eyewitness account from Ćemuran Redžepi of how his house, which is also Ismet Redžepi's house, caught on fire); see also Ćemuran Redžepi, T.3525-3527; T.3555 (stating that he did not see or hear any shell falling on his house before it was set on fire – countering any suggestion that the fire was caused by army shelling, rather than Tarčulovski's police unit).

<sup>449</sup> See Exh.P426, para.20; Exh.P219.1, para.4; see also Fatmir Kamberi, T.4555-4556, Exh.P427; Mamut Ismaili, T.1344-1345, Exh.P222.

<sup>450</sup> Tarčulovski Brief, para.167.

<sup>451</sup> Tarčulovski Brief, para.166.

<sup>452</sup> See above fn.447.

<sup>453</sup> Karera AJ, para.88; Blagojević AJ, para.82; Ntagerura AJ para.214; Kamuhanda AJ, para.248; Ntakirutimana AJ, para.215; Kupreškić AJ, para.333.

or bring about the crime, or an awareness of the substantial likelihood that the crime will be committed in the execution of the plan/order or as a result of the instigation.<sup>455</sup> Contrary to his suggestion,<sup>456</sup> evidence of Tarčulovski's physical presence when each of the fires occurred is unnecessary, as it is not an element of any of the three modes of liability.<sup>457</sup> In any event, the Chamber found that Tarčulovski was present throughout and personally led the operation, findings which have not been shown to be unreasonable.<sup>458</sup>

141. The Chamber's conclusion that Tarčulovski planned, ordered and instigated the wanton destruction of the relevant houses on 12 August 2001 was supported by the evidence.<sup>459</sup>

### **C. The Chamber properly convicted Tarčulovski for cruel treatment**

142. Tarčulovski does not challenge any of the evidence relied on by the Chamber to conclude that the relevant individuals suffered cruel treatment at the hands of the direct perpetrators. Instead, he challenges only the Chamber's conclusion that he was responsible for the cruel treatment. His argument is based on the false premise that the Prosecution "had to prove beyond reasonable doubt that Tarčulovski was present when the mistreatment occurred *and* that the persons conducting the abuse were under his control or that he previously ordered such mistreatment take place."<sup>460</sup> Tarčulovski also wrongly states that the Chamber acquitted him of the mistreatment of Atulla Qaili.<sup>461</sup> In fact, the Chamber found him guilty of the cruel treatment of Qaili at Ametovski's house and Braca's house,<sup>462</sup> but not guilty with respect to his murder because his death was the result of later mistreatment at Mirkovci police station. This mistreatment occurred at the hands of police not under the authority or direction of Tarčulovski.<sup>463</sup>

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<sup>454</sup> *Nahimana* AJ, para.492.

<sup>455</sup> Judgement, paras.398-400.

<sup>456</sup> Tarčulovski Brief, para.176.

<sup>457</sup> Judgement, paras.398-400.

<sup>458</sup> Judgement, paras.555, 564-565.

<sup>459</sup> *See above* V and VI.

<sup>460</sup> Tarčulovski Brief, para.177 (emphasis added).

<sup>461</sup> Tarčulovski Brief, para.177.

<sup>462</sup> Judgement, para.607.

<sup>463</sup> Judgement, para.575.

143. None of the modes of liability Tarčulovski was convicted under require his presence when the mistreatment occurred.<sup>464</sup> Nonetheless, the Chamber found that Tarčulovski “personally led the police operation on 12 August, and was with the group of police as they moved through the village from the Ljubanci side, essentially along the main road to the outskirts of the village on its far side, from where the road continues to Raštak”<sup>465</sup> and that the crimes committed by the police occurred in his presence.<sup>466</sup> The evidence, accepted by the Chamber, showed that Tarčulovski was present at Braca’s house on the afternoon of 12 August 2001 after the conclusion of the Ljuboten operation<sup>467</sup> and at Ametovski’s house when the cruel treatment there occurred.<sup>468</sup> Indeed, Tarčulovski’s own statements confirm that he was present throughout the Ljuboten action, including when ten men were detained at Ametovski’s house.<sup>469</sup>

144. The Chamber found that the police who mistreated the detainees at the Ametovski and Braca houses were under Tarčulovski’s control and that their actions were at his direction.<sup>470</sup>

145. Finally, the presence of Tarčulovski’s superior Boškoski at Braca’s house is irrelevant<sup>471</sup> to Tarčulovski’s conviction for having planned, ordered and instigated the crimes. This allegation should be summarily dismissed.

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<sup>464</sup> See above para.140.

<sup>465</sup> Judgement, para.564.

<sup>466</sup> Judgement, para.565; see also Judgement, para.555 (finding that Tarčulovski “led the police as they moved through the village on 12 August”).

<sup>467</sup> See, e.g., [REDACTED].

<sup>468</sup> Judgement, para.553 and fn.200 and sources cited therein.

<sup>469</sup> See Judgement, paras.556-557 (quoting Exhs.P379.01, P379.02).

<sup>470</sup> Judgement, para.574. The men who mistreated the detainees at Braca’s house were members of the same police unit led by Tarčulovski in Ljuboten earlier in the day. Judgement, paras.73-74, 428, 558, 570, 574.

<sup>471</sup> *Contra* Tarčulovski Brief, para.179.

## VIII. GROUND 5: THE CHAMBER PROPERLY APPLIED THE BURDEN OF PROOF AND THE PRINCIPLE OF *IN DUBIO PRO REO*

### A. The Chamber applied the correct standards in evaluating the evidence

#### 1. The Chamber applied the correct standard in evaluating the status of the victims

146. The Chamber properly recalled, with respect to the murder and cruel treatment charges,<sup>472</sup> that “[a]s Common Article 3 protects persons taking no active part in the hostilities, it must be established that the victims of the alleged violation were not taking an active part in the hostilities at the time the crime was committed.”<sup>473</sup> It then proceeded to determine whether the murder and beating victims were taking an active part in the hostilities at the time of the offences.<sup>474</sup>

147. Tarčulovski asserts that the Chamber applied the wrong standard in evaluating the evidence because it only required the Prosecution to prove that the victim was not actively involved in the hostilities, and not also that the perpetrator of the offence could not have believed otherwise.<sup>475</sup> This argument has been addressed above with respect to the murders for which Tarčulovski was convicted.<sup>476</sup> Irrespective of whether the *mens rea* of the physical perpetrators is a legal requirement to Tarčulovski’s liability for ordering, planning and instigating these crimes,<sup>477</sup> in this case the physical perpetrators of the murders were clearly aware of the factual circumstances establishing that their victims were taking no active part in the hostilities at the time of the offences.<sup>478</sup>

148. With respect to cruel treatment at Ametovski’s house and Braca’s house, the Chamber found that “the crimes of cruel treatment were perpetrated on the victims

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<sup>472</sup> Tarčulovski’s argument does not apply to the wanton destruction charge. “Wanton destruction of cities, towns or villages, or devastation not justified by military necessity” is specifically listed as a war crime within the jurisdiction of the Tribunal under Article 3 of the Statute. Unlike the war crimes of murder and cruel treatment, wanton destruction’s inclusion within Article 3 of the Statute does not derive from Common Article 3 to the Geneva Conventions. Thus, the Common Article 3 requirement that victims take no active part in the hostilities does not apply.

<sup>473</sup> Judgement, para.301.

<sup>474</sup> See, in respect of the offences for which Tarčulovski has been found liable, Judgement, paras.302-303, 310-312, 318-320, 326-328, 383-388.

<sup>475</sup> Tarčulovski Brief, para.181 (referring to *Halilović* TJ, para.36).

<sup>476</sup> See above VII.A.1.(b).

<sup>477</sup> See above fn.339.

<sup>478</sup> See above VII.A.1.(b)(ii).

while they were unarmed and in some form of detention.”<sup>479</sup> Indeed, before being subjected to severe beatings, these men had surrendered to the men in Tarčulovski’s unit, waiving a white cloth through the basement window of Ametovski’s house – a clear sign of surrender.<sup>480</sup> None of the men were armed and none of them wore NLA uniform or insignia.<sup>481</sup> Before beating the men, the police took money, valuables and identification cards from them.<sup>482</sup> Only after ordering the men to lie down in the yard of Ametovski’s house with their t-shirts pulled over their heads did the police start to beat the men severely.<sup>483</sup> At Braca’s house, the men were under armed guard and their vision remained impeded by t-shirts covering their heads.<sup>484</sup> They were ordered to lie on the ground face-down.<sup>485</sup> Only then did the police again beat them severely, “hitting and jumping on them.”<sup>486</sup> Under these circumstances, there can be no doubt that the physical perpetrators of the cruel treatment were aware of the facts establishing that their victims were taking no active part in the hostilities at the time they were beaten.

2. The Chamber did not violate the principle of *in dubio pro reo*

149. The Chamber correctly found that the predominant purpose of the police operation in Ljuboten was to indiscriminately attack ethnic Albanians and the property of ethnic Albanians.<sup>487</sup> Contrary to Tarčulovski’s assertion,<sup>488</sup> the Chamber’s conclusion was not arbitrary. It was based on the totality of the evidence, both direct and circumstantial, presented at trial.<sup>489</sup> The fact that the Chamber noted that there was “some evidence” to suggest that the object of the operation was law enforcement<sup>490</sup> does not render the Chamber’s conclusion arbitrary or in violation of the principle of *in dubio pro reo*.

150. The Chamber took this evidence into account in reaching its conclusion. It did not find that indiscriminately attacking ethnic Albanians and their property was the

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<sup>479</sup> Judgement, para.303; *see also* Judgement, paras.383-391.

<sup>480</sup> Judgement, para.51.

<sup>481</sup> Judgement, para.51.

<sup>482</sup> Judgement, para.52.

<sup>483</sup> Judgement, para.52.

<sup>484</sup> Judgement, paras.70, 72.

<sup>485</sup> Judgement, para.74.

<sup>486</sup> Judgement, para.74.

<sup>487</sup> Judgement, para.572.

<sup>488</sup> Tarčulovski Brief, para.183.

<sup>489</sup> *See above* V. and VI.A.; *see also* Judgement, paras.571-573.

<sup>490</sup> Judgement, para.571.

only purpose of the operation. The entirety of the evidence, however, did not allow for the conclusion that law enforcement was the primary purpose of the operation.<sup>491</sup> Thus, the fact that some evidence suggested a law enforcement purpose does not mean that the Chamber was required to credit this evidence above all else and acquit Tarčulovski. As the Chamber emphasised, “the mere admission of evidence in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it.”<sup>492</sup> Here, the totality of the evidence allowed only one reasonable conclusion – that the main purpose (though not necessarily the only purpose) of the operation was to indiscriminately attack ethnic Albanians and their property. As the Chamber recognised, the principle of *in dubio pro reo* only applies where more than one inference is *reasonably* open on the facts.<sup>493</sup> Any evidence suggesting that law enforcement was the only or primary purpose of the operation was clearly outweighed by other evidence in the record.<sup>494</sup>

151. Nor did the Chamber reach its conclusion on the purpose of the operation by drawing an impermissible negative inference against Tarčulovski based on his failure to testify or present evidence.<sup>495</sup> In fact, notwithstanding that no evidence suggested that Tarčulovski had been told of some possible NLA affiliations of members of Ljuboten households which might have encouraged action against that person or his home, the Chamber did not exclude that possibility.<sup>496</sup> Instead, the Chamber acknowledged that “*even if* this was a factor influencing some of the actions of the police, it offered no justification or excuse in law for the actions of the police except in three cases specifically identified in the Chamber’s consideration of the charges of murder [that is, the killings of Xhelal Bajrami, Bajram Jashari, and Kadri Jashari].”<sup>497</sup>

152. Finally, Tarčulovski’s assertion that the Chamber improperly shifted the burden of proof<sup>498</sup> should be summarily dismissed. The fact that the Chamber noted that evidence concerning Tarčulovski may have been somewhat limited due to the

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<sup>491</sup> Judgement, paras.571-573.

<sup>492</sup> Judgement, para.10.

<sup>493</sup> Judgement, para.9.

<sup>494</sup> Judgement, para.571-572.

<sup>495</sup> Tarčulovski Brief, paras.184-186.

<sup>496</sup> Judgement, para.572.

<sup>497</sup> Judgement, para.572 (emphasis added).

<sup>498</sup> Tarčulovski Brief, para.22.

police's deliberate attempts to avoid identification<sup>499</sup> does not mean that the evidence was insufficient to find Tarčulovski guilty beyond reasonable doubt.

## **B. The Chamber carefully assessed the testimonies**

### 1. The Chamber did not reject entire categories of witnesses as inherently biased and unreliable

153. Contrary to Tarčulovski's assertions,<sup>500</sup> the Chamber did not dismiss entire categories of witnesses as inherently biased and unreliable; rather, it explained in detail why it treated certain parts of their evidence with particular caution.<sup>501</sup> The Chamber stated that it had not been able to accept the evidence of Ljuboten residents "as fully convincing in *some* respect" and explained why.<sup>502</sup> Similarly, the Chamber concluded that, for a number of reasons, it was not able to accept *some* of the evidence of military, police and MoI witnesses as truthful or reliable.<sup>503</sup> Tarčulovski fails to show an error in the Chamber's approach.

154. The Chamber did not make it impossible for Tarčulovski to defend himself against the allegations.<sup>504</sup> Tarčulovski was able to present evidence as to the alleged military necessity for the operation in Ljuboten, evidence that was fully considered by the Chamber<sup>505</sup> which found that there were NLA fighters present in Ljuboten at the time of 10-12 August.<sup>506</sup> The Chamber was nevertheless convinced of Tarčulovski's guilt. In particular, the Chamber correctly rejected Tarčulovski's suggestion that, due to NLA presence in Ljuboten, all acts committed during the police operation on 12 August 2001 qualified as legal combat activity. Tarčulovski fails to demonstrate that the Chamber erred in its conclusions.

### 2. The Chamber was entitled to accept only parts of some testimony

155. A trial chamber is entitled to accept only parts of a witness's testimony.<sup>507</sup> Here, the Chamber provided detailed and reasonable explanations as to why it only

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<sup>499</sup> Judgement, para.547.

<sup>500</sup> Tarčulovski Brief, paras.187-190.

<sup>501</sup> Judgement, paras.11-17.

<sup>502</sup> Judgement, para.11 (emphasis added).

<sup>503</sup> Judgement, paras.12-17.

<sup>504</sup> *Contra* Tarčulovski Brief, para.190.

<sup>505</sup> Judgement, paras.132-172.

<sup>506</sup> Judgement, para.140.

<sup>507</sup> *Karera* AJ, para.88; *Blagojević* AJ, para.82; *Ntagerura* AJ para.214; *Kamuhanda* AJ, para.248; *Ntakirutimana* AJ, para.215; *Kupreškić* AJ, para.333.

credited parts of the testimony of some witnesses. This is illustrated by its approach to the testimony of M037 and M052. The Chamber explained in detail why it relied on certain parts of these witnesses' evidence while rejecting others.<sup>508</sup> Tarčulovski does not identify specific parts of M037 or M052's testimony that support his case and were rejected by the Chamber, much less show that the Chamber acted unreasonably in doing so.<sup>509</sup> Tarčulovski argues that the Chamber proceeded "unfairly and in a flagrantly result-oriented fashion"<sup>510</sup> and makes sweeping assertions about the Chamber's assessment of the testimony of Ljuboten residents and of military/police witnesses, but fails to explain how the Chamber acted in a way no reasonable trial chamber could have acted when accepting or rejecting parts of this testimony.

3. The Chamber correctly found that the Ljuboten operation was not primarily aimed at the NLA

156. Contrary to Tarčulovski's assertion,<sup>511</sup> there is no contradiction between the findings that 1) the conflict between the NLA and FYROM forces amounted to an internal armed conflict, and 2) the Ljuboten operation was not substantially directed against the NLA. The mere fact that there was an armed conflict between the NLA and FYROM forces does not necessarily mean that the Ljuboten operation was substantially directed against the NLA. As explained above,<sup>512</sup> the Chamber reasonably found that:

the predominant objective of this police operation was to retaliate against persons of Albanian ethnicity in the village for the actions of the NLA, which the village was thought to have harboured or supported, in killing ethnic Macedonian soldiers, most especially in respect of the land mine attack at Ljubotenski Bačila on 10 August 2001.<sup>513</sup>

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<sup>508</sup> See Judgement, paras.12-17, 30, 35-37, 41 (fn.108), 42 (fn.117), 56, 59 (fn.200), 61, 69-71, 73, 75, 82, 116-118, 121-122, 136, 138, 147, 153-155, 162, 212, 419, 422-428, 438-439, 462, 474, 481-485, 488, 539, 543-545, 548, 551, 553-554.

<sup>509</sup> See Tarčulovski Brief, paras.192-193.

<sup>510</sup> Tarčulovski Brief, para.191.

<sup>511</sup> Tarčulovski Brief, para.194.

<sup>512</sup> See above V.B., VI. and VII.

<sup>513</sup> Judgement, para.572.

4. The Chamber did not violate the *in dubio pro reo* principle

157. The Chamber did not violate the *in dubio pro reo* principle. Where a reasonable inference in favour of Tarčulovski was available on the basis of the evidence accepted by the Chamber, he was acquitted for the respective incident.<sup>514</sup>

158. Contrary to Tarčulovski's assertions,<sup>515</sup> the fact that the Chamber noted that there was conflicting evidence as to possible NLA target positions in Ljuboten does not mean that the Chamber erred in convicting him. In particular:

- In paragraph 154 the Chamber concluded that if there had been outgoing fire against army positions from a house close to the Ljuboten Mosque on 12 August 2001, the army would have answered the fire and hit the target or its vicinity. Tarčulovski fails to show any error in the Chamber's reasonable finding that the absence of such army shelling casts doubt on the reliability of army witnesses' testimony about outgoing fire.
- Tarčulovski also fails to demonstrate how the Chamber erred in paragraphs 161 and 171 in leaving open the possibility of outgoing fire against army or police positions from the Jashari houses on the morning of 12 August 2001. Paragraphs 376-379 of the Judgement show that the Chamber addressed this point, concluding that at the time the police were setting fire to these houses any military necessity to act against these buildings had ceased to exist, as possible NLA fighters had fled the houses.<sup>516</sup>
- In paragraph 166, the Chamber concluded that the paraffin glove tests carried out by the police on 12 and 13 August 2001 on a group of Ljuboten residents was an unreliable way to find out if these individuals had been handling firearms prior to their arrest. Tarčulovski does not demonstrate an error by the Chamber, which relied on expert witnesses and police evidence for this finding.<sup>517</sup>
- The Chamber reasonably concluded in paragraph 169 that it was unable to accept military witnesses' testimony that the army shelling of Ljuboten on 12 August 2001 was a coincidence and not coordinated with the police operation.

<sup>514</sup> See, e.g., Judgement, paras.342-345, 348.

<sup>515</sup> Tarčulovski Brief, para.195 and fn.265 (fn.283 of the confidential version of this brief).

<sup>516</sup> See also above VII.B.1.

<sup>517</sup> Judgement, para.166, referring to Zlatko Jočovski, T.2293-2294; Simon Eichner, T.4456, 4490; [REDACTED].

Tarčulovski fails to show how no reasonable Chamber could have reached this conclusion.

159. Equally, Tarčulovski's further examples of an alleged violation of the *in dubio pro reo* principle<sup>518</sup> fail to demonstrate any error by the Chamber. In particular:

- Under his points a) and d), Tarčulovski ignores that the Chamber relied on a long list of indicia established by the evidence to conclude that the predominant object of the operation was to indiscriminately attack ethnic Albanians and their property.<sup>519</sup>
- As to point b), the Chamber could reasonably rely on M037's evidence, placing Tarčulovski at Ametovski's house when the Albanian men were held there by armed police, among them Sulejman Bajrami who was killed shortly after.<sup>520</sup> Tarčulovski further ignores that the Chamber also relied on other evidence showing that he led the police throughout the operation.<sup>521</sup>
- With respect to points c) and f), the Chamber did not rely on Tarčulovski's mere presence at the meeting on 10 August 2001 in Ljubanci but on a larger body of evidence to conclude that he was the planner of the police operation on 12 August.<sup>522</sup> The Chamber found that the operation was ordered by unknown persons in the higher echelons of the Macedonian government, but that this did not preclude Tarčulovski from being the responsible leader on the ground.<sup>523</sup> The execution of a criminal order does not shield Tarčulovski from criminal responsibility.<sup>524</sup> The fact that he carried out the order of others is reflected in the sentencing part of the Judgement.<sup>525</sup> Tarčulovski fails to show how his challenge could have an impact and further fails to point to any error committed by the Chamber.
- As to point e), this issue was raised at trial and evidence to this effect was rejected by the Chamber.<sup>526</sup> As elaborated elsewhere,<sup>527</sup> the Chamber reasonably found

<sup>518</sup> Tarčulovski Brief, para.197, lit.a-f.

<sup>519</sup> Judgement, paras.571-573.

<sup>520</sup> Judgement, para.553, citing M037, T.786 (private session); *see also* VII.A.4.(a).

<sup>521</sup> *See above* V., VI.A.(iii) and VII.A.1.(a).

<sup>522</sup> Judgement, paras.540-550. *See also above* V., VI.A.

<sup>523</sup> Judgement, paras.113-114, 594.

<sup>524</sup> Article 7(4) of the ICTY Statute.

<sup>525</sup> Judgement, para.594.

<sup>526</sup> Judgement, paras.41-42.

<sup>527</sup> *See above* V.A.3., VII.A.1.(a).

that Tarčulovski was with the police when Rami Jusufi was killed. Tarčulovski fails to show an error in the Chamber's finding, and fails to identify the evidence he relies on for his assertions.

160. Tarčulovski fails to show any error by the Chamber regarding the application of the *in dubio pro reo* principle.

## IX. GROUND 6: THE CHAMBER CORRECTLY ADMITTED AND WEIGHED TARČULOVSKI'S STATEMENTS

161. The Chamber properly exercised its discretion when it admitted and weighed three documents<sup>528</sup> containing or reporting statements Tarčulovski made in 2003 to a commission established by the FYROM Minister of the Interior to investigate the events in Ljuboten ("Statements" and "Commission"). Tarčulovski's challenges to the Chamber's admission and assessment of the Statements<sup>529</sup> should be dismissed.

### A. The Chamber properly admitted the Statements

162. The Chamber provided detailed reasons to explain its decision to admit the Statements.<sup>530</sup> Tarčulovski fails to address these reasons and to show how the Chamber abused its discretion. Further, Tarčulovski's arguments about the spirit of the Statute and the general principles of law<sup>531</sup> are raised for the first time on appeal, and should be rejected on the basis of waiver.<sup>532</sup>

163. In deciding to admit the Statements, the Chamber correctly identified and applied the relevant law relating to the admission of out-of-court statements. In particular, the Chamber [REDACTED].<sup>533</sup>

164. Contrary to Tarčulovski's apparent suggestion,<sup>534</sup> there is no incongruity in the fact that [REDACTED] the Chamber found the documents sufficiently reliable to be admitted whereas in the Judgement it "proceeded to reject virtually all of what the statements said."<sup>535</sup> As the Appeals Chamber explained, "*prima facie* proof of reliability on the basis of sufficient indicia is enough at the admissibility stage."<sup>536</sup> In this case, the Chamber determined that the Statements were sufficiently reliable to be

<sup>528</sup> "Official Note" bearing the date of 3 March 2003 (Exh.P379.01); "Minutes" of 12 November 2003 (Exh.P379.02); "Information" of 25 November 2003 (Exh.P379.04).

<sup>529</sup> Tarčulovski Brief, paras.199-224.

<sup>530</sup> [REDACTED].

<sup>531</sup> Tarčulovski Brief, paras.210-215.

<sup>532</sup> *See, e.g., Krajišnik* AJ, para.654; *Blaškić* AJ, para.222; *Čelebići* AJ, para.640; *Furundžija* AJ, para.174; *Tadić* AJ, para.55.

<sup>533</sup> [REDACTED]. *See also Aleksovski* Decision on Admissibility of Evidence, paras.15-16; *Halilović* AD, paras.14-15.

<sup>534</sup> Tarčulovski Brief, paras.207-209.

<sup>535</sup> Tarčulovski Brief, para.208.

<sup>536</sup> *Popović* AD, para.22. *See also Čelebići* AD, para.20; *Rutaganda* AJ, para.33, fn.63; *Nyiramasuhuko* AD, para.7; *Karemera* Decision on Admission, para.4.

admitted [REDACTED]<sup>537</sup> and [REDACTED].<sup>538</sup> But in admitting the Statements, the Chamber did not make any finding as to whether they reflected what really happened on 12 August 2001 in Ljuboten. As the Chamber properly emphasized:

[REDACTED].<sup>539</sup>

The Chamber was entitled to decide in the Judgement that the Statements did not represent an accurate account of what really happened in Ljuboten on 12 August 2001.

165. Further, the admission of the Statements is not inconsistent with “the spirit of the Statute and the general principles of law.”<sup>540</sup> Contrary to Tarčulovski’s arguments,<sup>541</sup> there is nothing inconsistent with the spirit of the Statute or the general principles of law in admitting a statement that was made *freely, voluntarily and in full knowledge of the right to remain silent*, [REDACTED].<sup>542</sup> In fact, the Appeals Chamber has already rejected similar arguments:

The Appeals Chamber does not find that fairness or the “spirit of the Statute and general principles of law” require that the admissibility of an accused’s prior statements turn on whether he has agreed to testify or consented to the admission. The Appellant’s argument to the contrary rests implicitly on the right of an accused against self-incrimination. An accused has the right to refuse to give statements incriminating himself prior to trial, and he had the right to refuse to testify at trial. But where the accused has freely and voluntarily made statements prior to trial, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements from being introduced, provided he was informed about his right to remain silent before giving this statement; there is, however, a presumption that he knows about this right if he is assisted by counsel. Nor does the Appellant point to any provision of the Rules or rules of customary international law that specifically imposes such a restriction on the admission of an accused’s prior statements. The Appeals Chamber therefore concludes that no such rules exists.<sup>543</sup>

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<sup>537</sup> [REDACTED].

<sup>538</sup> [REDACTED].

<sup>539</sup> [REDACTED]. This is in accordance with established case-law. *See, e.g., Čelebići AD*, para.20; *Rutaganda AJ*, fn.63; *Nyiramasuhuko AD*, para.7; *Popović AD*, para.22.

<sup>540</sup> Rule 89(B).

<sup>541</sup> *See Tarčulovski Brief*, paras.210-215.

<sup>542</sup> [REDACTED].

<sup>543</sup> *Halilović AD*, para.15 (internal reference omitted).

166. Tarčulovski's reference to FYROM law is also unhelpful.<sup>544</sup> Rule 89(A) specifically provides that the Tribunal is not bound by national rules of evidence.<sup>545</sup> Further, the mere fact that the Statements may have been inadmissible before FYROM courts is insufficient to show the existence of a general principle of law. In order to constitute a general principle of law, the principle must exist in the principal legal systems of the world.<sup>546</sup> In fact, out-of-court statements by an accused are admissible in multiple domestic jurisdictions. In common law jurisdictions, out-of-court statements can often be admitted as an exception to the hearsay rule.<sup>547</sup> In France, out-of-court statements are admissible at the discretion of the judge.<sup>548</sup>

167. The Chamber therefore acted reasonably in admitting the evidence. Tarčulovski fails to show any error in the Chamber's exercise of discretion.

## **B. The Chamber properly weighed the Statements**

168. The Chamber weighed the Statements reasonably. Tarčulovski's arguments to the contrary should be rejected.<sup>549</sup>

169. The weight of evidence is determined at the close of the case having regard to the evidence as a whole.<sup>550</sup> As noted above, the admission of a document into evidence does not, in itself, mean that the information it contains will be accepted as

<sup>544</sup> Tarčulovski Brief, para.214.

<sup>545</sup> In particular, evidence that would be inadmissible under domestic law is not, *a priori*, inadmissible in the proceedings before the Tribunal. *See Aleksovski* Decision on Admissibility of Evidence, para.19; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, T.Ch., Judgement on Allegations of Contempt, 17 December 2008, para.14; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, T.Ch., Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence, 27 November 2008, paras.13-17; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, T.Ch., Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, paras.53-54; *Orić* Order on Evidence Guidelines, para.8.

<sup>546</sup> *See, e.g.*, A. Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003), pp.135-136; C. Bassiouni, "A Functional Approach to General Principles of International Law", *Michigan Journal of International Law*, Vol. 11, (1990), 770-771.

<sup>547</sup> Sections 81 and 82 of the Evidence Act of 1995 (Australia); Section 76 of the Police and Criminal Evidence Act of 1984, Sections 114 and 118 of the Criminal Justice Act of 2003 (United Kingdom); *R. v. C.(B.)*, (1993) 62 O.A.C. 13, para.12 (Canada); Section 3(1) of the Law of Evidence Amendment Act No. 45 of 1988 and Section 219A of the Criminal Procedure Act 51 of 1977 (South Africa).

<sup>548</sup> Article 427 of the French *Code de procédure pénale*.

<sup>549</sup> Tarčulovski Brief, paras.216-224.

<sup>550</sup> *See, e.g.*, *Čelebići* AD, para.20; *Rutaganda* AJ, fn.63; *Nyiramasuhuko* AD, para.7; *Prosecutor v. Tharcisse Muvunyi*, Case No ICTR-2000-55A-T, T.Ch., Decision on the Prosecution's motion to admit documents tendered during the cross-examination of Defence Witness Augustin Ndingilyimana, 28 February 2006, para.12; *Orić* Order on Evidence Guidelines, para.10; *Brdanin* Order, para.13; *Simić* Reasons for Decision, para.12.

accurate. A decision to admit a document is without prejudice to the value or weight that the trial chamber will ultimately accord it.<sup>551</sup>

170. Tarčulovski argues that the Chamber erred when it admitted the Statements [REDACTED] and in ultimately rejecting them.<sup>552</sup> As explained above, these findings were made in relation to whether the Statements were sufficiently reliable to be admitted and not in relation to the truth or accuracy of their contents.<sup>553</sup>

171. In weighing the Statements against the evidence as a whole the Chamber found them to be broadly unpersuasive because they omitted material information.<sup>554</sup> It therefore rejected the version of the events Tarčulovski provided to the Commission recorded in the Statements.<sup>555</sup>

172. The Appeals Chamber should reject Tarčulovski's argument that the Chamber assigned probative value to the aspects of the Statements that it found to be deficient or untrue.<sup>556</sup> The Chamber only referred to the deficiencies in Tarčulovski's account to the Commission to explain why it was not ultimately persuaded by it.<sup>557</sup>

173. Tarčulovski's arguments regarding the violation of his right to remain silent also lack merit.<sup>558</sup> The Chamber did not make adverse findings against Tarčulovski because he had not provided the Commission with information regarding the identities of the persons who took part in the Ljuboten operation. The Chamber merely considered this failure in deciding not to attribute weight to the account contained in the Statements, which was reasonable.<sup>559</sup>

174. The Appeals Chamber should also reject Tarčulovski's argument that the Chamber relied heavily on the Statements to convict him.<sup>560</sup> The Chamber relied on the Statements only as corroboration of evidence that Tarčulovski personally selected

<sup>551</sup> See, e.g., *Čelebići* AD, paras.20, 23; *Rutaganda* AJ, fn.63; *Nyiramasuhuko* AD, para.7; *Popović* AD, para.22; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No.IT-02-60-T, T.Ch., Decision on the admission into evidence of intercept-related materials, 18 December 2003, para.14; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No IT-98-34-T, T.Ch., Decision on the admission of exhibits tendered during the rejoinder case, 23 October 2002, p.2; *Brdanin* Order, para.18.

<sup>552</sup> Tarčulovski Brief, paras.207-209, 217.

<sup>553</sup> See above IX.A.

<sup>554</sup> Judgement, paras.556-559.

<sup>555</sup> Judgement, paras.556-559.

<sup>556</sup> Tarčulovski Brief, paras.209, 218-222.

<sup>557</sup> Judgement, paras.556-559.

<sup>558</sup> Tarčulovski Brief, paras.219-220.

<sup>559</sup> Judgement, para.557.

<sup>560</sup> Tarčulovski Brief, paras.223-224.

the police reserve volunteers and was with them in the village throughout the operation.<sup>561</sup>

175. Tarčulovski's arguments regarding the Chamber's evaluation of the Statements should therefore be rejected.

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<sup>561</sup> Judgement, paras.538 (fn.2000), 558.

## X. GROUND 7: THE CHAMBER CORRECTLY EXERCISED ITS SENTENCING DISCRETION

176. The Chamber committed no discernible error in the exercise of its discretion as to sentence. Tarčulovski's 12-year sentence was justified in light of the gravity of his criminal conduct.

177. Contrary to Tarčulovski's assertions,<sup>562</sup> the Chamber took into account that he was carrying out the orders of a person or persons who were senior to him, and it stated that he was not to be sentenced as the person who originated the police operation in Ljuboten.<sup>563</sup> It is irrelevant that the Chamber considered this factor under "gravity of the offence" rather than under "mitigating circumstances".

178. The Chamber also properly considered the general practice in the courts of FYROM.<sup>564</sup> Tarčulovski's arguments in this respect<sup>565</sup> fail to show any error warranting intervention of the Appeals Chamber. The Chamber was not bound by FYROM practice on sentencing but only had to take it into account.<sup>566</sup> Tarčulovski does not show that the Chamber's alleged error in assessing FYROM practice had any impact on the sentence.

179. In any case, the Chamber did not make any error in its approach to this issue. First, and contrary to Tarčulovski's allegation,<sup>567</sup> the Chamber did not make a finding as to what his minimum sentence would have been in FYROM, but simply noted that Article 404 of the FYROM Criminal Code prescribed a sentence of at least ten years for violations of the rules of international law.<sup>568</sup> Second, neither at trial nor in his Appeal Brief did Tarčulovski attempt to show that Article 40 of the FYROM Criminal Code – which permits more lenient punishment than prescribed by law when "especially extenuating circumstances exist"<sup>569</sup> – would have been applicable to his case. In fact, Tarčulovski did not even refer to this exceptional provision at trial. The Chamber did not have to refer to all provisions of FYROM law that could

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<sup>562</sup> Tarčulovski Brief, para.227.

<sup>563</sup> Judgement, para.594.

<sup>564</sup> Judgement, paras.602-603.

<sup>565</sup> Tarčulovski Brief, para.226.

<sup>566</sup> *Jokić* AJ, para.38; *D. Nikolić* SAJ, para.69; *Kordić* AJ, para.1085; *Čelebići* AJ, paras.813, 816.

<sup>567</sup> Tarčulovski Brief, para.226.

<sup>568</sup> By contrast, the Chamber specifically found that the maximum sentence for such a case would have been 15 years or life imprisonment: Judgement, para.603.

<sup>569</sup> Exh.P81, p.23 (emphasis added).

theoretically apply, irrespective of the facts at hand. In light of the absence of “especially extenuating circumstances” in this case, the fact that the Chamber did not expressly refer to Article 40 of the FYROM Criminal Code does not constitute an error.

180. Finally, the fact that other persons responsible for crimes committed during the FYROM conflict may have escaped punishment does not diminish Tarčulovski’s criminal responsibility nor does it constitute a personal mitigating circumstance. The Chamber did not have to take into account FYROM’s grant of amnesty to persons on both sides of the FYROM-NLA conflict.<sup>570</sup> This was not a factor to be considered under Article 24 of the Statute or Rule 101, nor was it otherwise relevant.

181. Tarčulovski thus fails to show that the Chamber erred in sentencing him. Further, he has not shown any error in his convictions which would justify a reduction of his sentence. The 12-year sentence should be maintained.

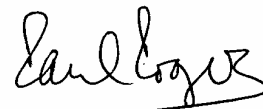
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<sup>570</sup> *Contra* Tarčulovski Brief, para.228.

## XI. CONCLUSION

182. For all the reasons given above the Appeals Chamber should dismiss Tarčulovski's appeal.

Word Count: 23,229



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Paul Rogers  
Appeals Counsel

Dated this 9th day of April 2009  
At The Hague, The Netherlands

## Prosecution's Glossary

*Pleadings, Orders, Decisions etc from Prosecutor v. Boškosi & Tarčulovski,*  
Case No. IT-04-82

Abbreviation used in Prosecution Response	Full citation
<i>Boškosi</i> Jurisdiction Decision	<i>Prosecutor v. Ljube Boškosi &amp; Johan Tarčulovski</i> , Case No. IT-04-82-AR72.1, App.Ch., Decision on interlocutory appeal on jurisdiction, 22 July 2005
Chamber	Trial Chamber in <i>Prosecutor v. Boškosi &amp; Tarčulovski</i> , Case No. IT-04-82-T
[REDACTED]	[REDACTED]
Indictment	<i>Prosecutor v. Ljube Boškosi and Johan Tarčulovski</i> , Case No. IT-04-82-PT, Second Amended Indictment, 4 April 2006
Judgement	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-T, T.Ch., Judgement, 10 July 2008
Tarčulovski Brief	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-A, Brief of Johan Tarčulovski (public), 12 January 2009
Tarčulovski Brief (confidential)	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-A, Brief of Johan Tarčulovski (confidential), dated 9 January 2009 and filed on 12 January 2009
Tarčulovski Amended Notice of Appeal	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-A, Tarčulovski Amended Notice of Appeal, 2 April 2009
Prosecution Final Brief	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-T, Prosecution's Final Brief, 24 April 2008, public redacted version filed on 29 May 2008
Tarčulovski Final Trial Brief	<i>Prosecutor v. Ljube Boškosi, Johan Tarčulovski</i> , Case No. IT-04-82-A, Tarčulovski Defence Final Brief (confidential), dated 24 April 2008

**ICTY authorities**

<b>Abbreviation used in Response</b>	<b>Full citation</b>
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000
<i>Aleksovski</i> Decision on Admissibility of Evidence	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-AR73, App.Ch., Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T.Ch., Judgement, 3 March 2000
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević &amp; Dragan Jokić</i> , Case No. IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Brdanin</i> AJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brdanin</i> Order	<i>Prosecutor v. Radoslav Brdanin &amp; Miomir Talić</i> , Order on the Standards Governing the Admission of Evidence, Case No. IT-99-36-T, T.Ch., 15 February 2002
<i>Brdanin</i> TJ	<i>Prosecutor v. Radoslav Brdanin</i> , Case No. IT-99-36-T, T.Ch., Judgement, 1 September 2004
<i>Čelebići</i> AD	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić &amp; Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-AR73.2, App.Ch., Decision on Application of Defendant Zeljnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić &amp; Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>D.Nikolić</i> SAJ	<i>Prosecutor v. Dragan Nikolić</i> , Case No. IT-94-02-A, App.Ch. Judgement on Sentencing Appeal, 4 February 2005
<i>Furundžija</i> AJ	<i>Prosecutor v. Anto Furundžija</i> , Case No. IT-95-17/1-A, App.Ch., Judgement, 21 July 2000
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006

<i>Galić</i> TJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-T, T.Ch., Judgement, 5 December 2003
<i>Hadžihasanović</i> AJ	<i>Prosecutor v. Enver Hadžihasanovic &amp; Amir Kubura</i> , Case No. IT-01-47-A, App.Ch. Judgement, 22 April 2008
<i>Halilović</i> AD	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-AR73.2, App.Ch., Decision on Interlocutory Appeal Concerning Admission of Record of Interview from the Bar Table, 19 August 2005
<i>Halilović</i> AJ	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-A, App.Ch., Judgement, 16 October 2007
<i>Halilović</i> TJ	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-T, T.Ch., Judgement, 16 November 2005
<i>Jokić</i> AJ	<i>Prosecutor v. Miodrag Jokić</i> , Case No. IT-01-42/1-A, App.Ch., Judgement on Sentencing Appeal, 30 August 2005
<i>Kordić</i> AJ	<i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-A, App.Ch., Judgement, 17 December 2004
<i>Kordić</i> TJ	<i>Prosecutor v. Dario Kordić &amp; Mario Čerkez</i> , Case No. IT-95-14/2-T, T.Ch., Judgement, 26 February 2001
<i>Krajišnik</i> AJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-A, App.Ch., Judgement, 17 March 2009
<i>Krajišnik</i> TJ	<i>Prosecutor v. Momčilo Krajišnik</i> , Case No. IT-00-39-T, T.Ch., Judgement, 27 September 2006
<i>Krnojelac</i> AJ	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Kunarac</i> AJ	<i>Prosecutor v. Dragoljub Kunarac, Radomir Kovač &amp; Zoran Vuković</i> , Cases Nos. IT-96-23 & IT-96-23/1-A, App.Ch., Judgement, 12 June 2002
<i>Kupreškić</i> AJ	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović &amp; Vladimir Šantić</i> , Case No. IT-95-16-A, App.Ch., Judgement, 23 October 2001
<i>Kvočka</i> AJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić &amp; Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
<i>Kvočka</i> TJ	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić &amp; Dragoljub Prcać</i> , Case No. IT-98-30/1-T, T.Ch., Judgement, 2 November 2001

<i>Limaj</i> TJ	<i>Prosecutor v. Fatmir Limaj, Haradin Bala &amp; Isak Musliu</i> , Case No. IT-03-66-T, T.Ch., Judgement, 30 November 2005
<i>Martić</i> AJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Martić</i> TJ	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-T, T.Ch., Judgement, 12 June 2007
<i>Milutinović</i> TJ	<i>Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić</i> , Case No. IT-05-87-T, T.Ch., Judgement, 26 February 2009
<i>Naletilić</i> AJ	<i>Prosecutor v. Mladen Naletilić &amp; Vinko Martinović</i> , Case No. IT-98-34-A, App.Ch., Judgement, 3 May 2006
<i>Naletilić</i> TJ	<i>Prosecutor v. Mladen Naletilić &amp; Vinko Martinović</i> , Case No. IT-98-34-T, T.Ch., Judgement, 31 March 2003
<i>Orić</i> Order on Evidence Guidelines	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, T.Ch.II, Order concerning guidelines on evidence and conduct of parties during trial proceedings, 21 October 2004
<i>Popović</i> AD	<i>Prosecutor v. Vujadin Popović et al.</i> , Case No. IT-05-88-Ar73.2, App.Ch., Decision on joint defence interlocutory appeal concerning the status of Richard Butler as an expert witness, 30 January 2008
<i>Simić</i> Reasons for Decision	<i>Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić</i> , Case No. IT-95-9-T, T.Ch., Reasons for Decision on Admission of “Variant A&B” Document, 22 May 2002
<i>Stakić</i> AJ	<i>Prosecutor v. Milomir Stakić</i> , Case No. IT-97-24-A, App.Ch. Judgement, 22 March 2006
<i>Strugar</i> TJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, T.Ch., Judgement, 31 January 2005
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić a/k/a “Dule”</i> , Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999
<i>Tadić</i> Jurisdiction AD	<i>Prosecutor v. Duško Tadić a/k/a “Dule”</i> , Case No. IT-94-1-AR72, App.Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

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<b>Abbreviation used in Response</b>	<b>Full citation</b>
<i>Gacumbitsi</i> AJ	<i>Prosecutor v. Sylvestre Gacumbitsi</i> , Case No. ICTR-2001-64-A, App.Ch., Judgement, 7 July 2006
<i>Kamuhanda</i> AJ	<i>Prosecutor v. Jean de Dieu Kamuhanda</i> , Case No. ICTR-99-54A-A, App.Ch., Judgement, 19 September 2005
<i>Karemera</i> Decision on Admission	<i>Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera</i> , Case No. ICTR-98-44-T, T.Ch., Decision on Admission of UNAMIR Documents, 21 November 2006
<i>Karera</i> AJ	<i>François Karera v. The Prosecutor</i> , Case No. ICTR-01-74-A, App.Ch., Judgement, 2 February 2009
<i>Nahimana</i> AJ	<i>Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza &amp; Hassan Ngeze</i> , Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007
<i>Ndindabahizi</i> AJ	<i>Prosecutor v. Emmanuel Ndindabahizi</i> , Case No. ICTR-01-71-A, App.Ch., Judgement, 16 January 2007
<i>Ntagerura</i> AJ	<i>Prosecutor v. André Ntagerura, Emmanuel Bagambiki &amp; Samuel Imanishimwe</i> , Case No. ICTR-99-46-A, App.Ch., Judgement and Sentence, 7 July 2006
<i>Ntakirutimana</i> AJ	<i>Prosecutor v. Elizaphan Ntakirutimana &amp; Gérard Ntakirutimana</i> , Cases Nos. ICTR-96-10-A and ICTR-96-17-A, App.Ch., Judgement, 13 December 2004
<i>Ntakirutimana</i> TJ	<i>Prosecutor v. Elizaphan Ntakirutimana &amp; Gérard Ntakirutimana</i> , Cases Nos. ICTR-96-10 & ICTR-96-17-T, T.Ch., Judgement and Sentence, 21 February 2003
<i>Nyiramasuhuko</i> AD	<i>Pauline Nyiramasuhuko v. Prosecutor</i> , Case No. ICTR-98-42-AR73.2, App.Ch., Decision on Pauline Nyiramasuhuko's Appeal on the admissibility of evidence, 4 October 2004
<i>Rutaganda</i> AJ	<i>Prosecutor v. Georges Anderson Nderubumwe Rutaganda</i> , Case No. ICTR-96-3-A, App.Ch., Judgement, 26 May 2003
<i>Seromba</i> AJ	<i>Prosecutor v. Athanase Seromba</i> , Case No. ICTR-2001-66-T, App.Ch., Judgement, 12 March 2008

**Judgements and Decisions Relating to Crimes Committed During WWII**

<b>Abbreviation used in Response</b>	<b>Full citation</b>
<i>Hostages Case</i>	<i>The Trial of Wilhelm List and Others</i> , United States Military Tribunal (1948), U.N. War Crimes Commission, Law Reports of the Trials of War Criminals, Vol. VIII, p.34

**Judgements and opinions of other international courts and institutions**

<b>Abbreviation used in Response</b>	<b>Full citation</b>
ICJ Nicaragua Case	<i>Case concerning military and paramilitary activities in and against Nicaragua</i> , Judgment of 27 June 1986, ICJ
ICJ Nuclear Weapons Case	<i>Legality of the threat or use of nuclear weapons</i> , Advisory Opinion of 8 July 1996, ICJ
ICJ Wall Case	<i>Legal consequences of the construction of a wall in the occupied Palestinian territory</i> , Advisory Opinion of 9 July 2004, ICJ

**General Sources**

<b>Abbreviation used in Response</b>	<b>Full citation</b>
API	Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
APC	Armoured Personnel Carrier
Draft articles on State Responsibility, with commentaries	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the ILC on the work of its fifty-third session, in 2001, submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), and also appearing in the <i>Yearbook of the International Law Commission, 2001</i> , vol. II, Part Two.
GCI	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949

GCH	Second Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
GCHH	Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949
GCHV	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949
ICRC Commentary	ICRC, Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949, ICRC, Martinus Nijhoff (1987)

***Other Abbreviations***

<b>Abbreviation used in Response</b>	<b>Full citation</b>
Art.	Article
Exh.	Exhibit
Exhs.	Exhibits
fn.	Footnote
fns.	Footnotes
FYROM	Former Yugoslav Republic of Macedonia
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
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 Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	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

IHL	International Humanitarian Law
JCE	Joint Criminal Enterprise
Lions	Rapid Intervention Police Battalion of the FYROM Ministry of Interior
MoI	Ministry of Interior
NLA	National Liberation Army
OSCE	Organisation for Security and Cooperation in Europe
OVR	Oddelenie za Vnatrešni Raboti, Department for Internal Affairs
para.	paragraph
paras.	paragraphs
p.	page
pp.	pages
Practice Direction on Appeals Requirements	Practice Direction on Formal Requirements for Appeals from Judgement (IT-201) Rev.1, 7 March 2002
ICCSt	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (1998)
Rules	Rules of Procedure and Evidence
Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
T.	Trial Transcript
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
UBK	Security and Counterintelligence Division of the Macedonian Ministry of Interior
UN	United Nations