UNITED NATIONS

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

Case No.: IT-95-14/1-T

Date: 25 June 1999

Original: French

THE TRIAL CHAMBER

Before: **Judge Almiro Simões Rodrigues, Presiding**
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia

Registrar: **Mr. Jean-Jacques Heintz, Deputy Registrar**

Decision of: **25 June 1999**

THE PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Anura Meddegoda

Counsel for the Accused:

Mr. Srdan Joka

I. INTRODUCTION

1. The trial of Zlatko Aleksovski ("the accused") before Trial Chamber I *bis* of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal" or "the International Tribunal"), commenced on 6 January 1998 and came to a close on 23 March 1999.

2. The accused, born in 1960, was a citizen of the former Yugoslavia residing in Bosnia and Herzegovina at the time of the crimes alleged in the indictment. He is charged with three individual counts of inhuman treatment, willfully causing great suffering or serious injury to body or health and outrages upon the personal dignity, in respect of acts alleged to have been committed between 1 January and 31 May 1993 in the La{va Valley area in Bosnia and Herzegovina.[1]

A. The International Tribunal

3. The proceedings of the International Tribunal are governed by its Statute as amended ("the Statute"),[2] adopted by the Security Council of the United Nations on 25 May 1993 following a report by the Secretary-General of the United Nations,[3] and by the Rules of Procedure and Evidence of the International Tribunal as amended ("the Rules"), adopted by the Judges of the International Tribunal on 11 February 1994.[4] Under the Statute, the International Tribunal has "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".[5] Articles 2 through 5 of the Statute confer upon the International Tribunal jurisdiction

[1] Indictment against Kordi} and others, 10 November 1995, para. 37.
[2] U.N. Doc. S/RES/827 (1993). On 13 May 1998, the Statute was amended to allow the establishment of a third Trial Chamber in order to enable the large number of accused awaiting trial to be tried without delay, U.N. Doc. S/RES/1166 (1998).
[3] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704 (hereafter "Report of the Secretary-General").
[4] The Rules have been successively amended on a number of occasions. The Rules referred to in this Judgement are those in force at the time of the relevant motion, order or decision in accordance with Sub-rule 6(D), which reads: "An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case."
[5] Article 1 of the Statute.

over grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide; and crimes against humanity.

B. The indictment

4. The indictment against the accused was issued on 2 November 1995. In addition to the accused, it covered Dario Kordi}, Tihomir Bla{ki}, Mario ^erkez, Pero Skopljak and Ivi}a Santi}. The last two individuals were released after the indictment against them had been withdrawn. The trials of Tihomir Bla{ki}, on one hand, and of Dario Kordi} and Mario ^erkez on the other, were separated and the accused was tried alone on the basis of the initial indictment.

5. Paragraphs 1, 7, 20 through 22 of the indictment identify the accused and set out the background and context in which the alleged crimes are said to have been committed. The specific charges against the accused are based upon the factual allegations set out in paragraph 31 of the indictment, which reads:

> From January 1993 until at least the end of May 1993, the accused accepted hundreds of detained Bosnian Muslims civilians from the HVO or their agents into his custody at the detention facilities in Kaonik. The detainees were from a widespread area, including, but not exclusive to, Vitez and Busova~a municipalities. Many of the detainees under his control were subjected to inhumane treatment, including, but not limited to, excessive and cruel interrogation, physical and psychological harm, forced labour (digging trenches), in hazardous circumstances, being used as human shields and some were murdered or otherwise killed.

In relation to these alleged acts the indictment charges the accused with the unlawful treatment of Bosnian Muslim detainees by –

> "individually, and in concert with others, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful treatment of Bosnian Muslim detainees in the La{va Valley area of the Republic of Bosnia and Herzegovina and, or in the alternative, knew, or had reason to know, that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measurers to prevent such acts or to punish the perpetrators thereof."

By these acts and omissions, the accused is alleged to have committed:

> Count 8: a GRAVE BREACH as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3) of the Statute of the Tribunal;

Count 9: a GRAVE BREACH as recognised by Articles 2 (c) (willfully causing great suffering or serious injury to body or health), 7(1) and 7(3) of the Statute of the Tribunal;

Count 10: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon the personal dignity) as recognised by Articles 3, 7(1) and 7(3) of the Statute of the Tribunal.

C. Procedural background

6. The indictment against the accused and then co-accused Dario Kordi}, Tihomir Bla{ki}, Mario ^erkez, Ivan [anti} and Pero Skopljak was confirmed on 10 November 1995 by Judge Gabrielle Kirk McDonald and arrest warrants were issued. [6]

7. The accused was arrested on 8 June 1996 in the territory of Republic of Croatia by the Croatian police acting pursuant to an arrest warrant issued by the Tribunal. After having spent ten months and twenty days in detention in the Republic of Croatia, the accused was transferred to The Hague in The Netherlands, on 28 April 1997. On the same day, the President of the Tribunal assigned the case to Trial Chamber I comprising Judge Claude Jorda, presiding, Judge Fouad Riad and Judge Haopei Li. On 25 June 1997, Judge Mohamed Shahabuddeen replaced Judge Haopei Li.[7]

8. The initial appearance of the accused, pursuant to Rule 62 of the Rules, was held on 29 April 1997 before Trial Chamber I. Mr. Goran Mikuli~i}, a member of the bar of Zagreb (Republic of Croatia) was assigned as counsel for the accused by the Registrar of the Tribunal, on grounds of indigence pursuant to Rule 45 and the Directive on the Assignment of Counsel as amended.[8] The accused entered a plea of not guilty to all three counts of the indictment and was remanded into custody pending trial.

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[6] The indictment was amended against co-accused Tihomir Bla{ki} on 22 Nov. 1996 and 23 May 1997 and that against co-accused Dario Kordi} and Mario ^erkez on 30 Sept. 1998. The case against the former proceeded under Case No.: IT-95-14 ("the *Bla{ki}* case") and the case against the two latter proceeded under Case No.: IT-95-14/2. The indictment was withdrawn against the two remaining co-accused Ivan Santi} and Pero Skopljak on 19 Dec. 1997. The trial of the accused was severed from that of the trial of the other co-accused by a decision of Trial Chamber I on 25 Sept. 1997.

[7] Order of the President Assigning a Judge to the Trial Chamber, Case No.: IT-95-14/1-PT, 25 June 1997.

[8] At his request, Mr. Mikuli~i} was released from the assignment as of 29 March 1999.

9. On 25 September 1997, the Trial Chamber rendered four different decisions. One decision concerned a partly confidential order for the protection of victims and witnesses whereby the Defence was ordered not to disclose to the public or to the media the identity of witnesses whose names appeared in a confidential annex.[9] A second decision dismissed a Defence challenge to the form of the indictment[10] and a third decision granted a Defence request for the separation of trials.[11] Lastly, the Trial Chamber granted a motion by the Prosecution relating to the taking of depositions.[12]

10. On 20 November 1997 the President of the Tribunal assigned the case to Trial Chamber I *bis* comprising Judge Almiro Simões Rodrigues, presiding, Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia (hereafter "the Trial Chamber").[13] The Trial Chamber remained as thus constituted throughout the rest of the preliminary proceedings and the trial.

11. The trial of the accused began on 6 January 1998. By this time, Mr. Sr|an Joka had been assigned by the Registrar as co-counsel for the defence.[14] The Prosecution team was led by Mr. Grant Niemann, assisted by Mr. Anura Meddegoda and Mr. Michele Marchesiello. The presentation of the Prosecution case-in-chief lasted 23 sitting days from 6 January to 22 September 1998, during which time 36 witnesses testified before the Trial Chamber and 138 Prosecution exhibits were admitted into evidence.

12. On 23 January 1998, the Trial Chamber issued its first decision relating to the provisional release of the accused. It held that the Defence motion was admissible even though the trial of the accused had begun, thereby rejecting the argument of the Prosecution that Rule 65 only applied before the commencement of trial. The Trial Chamber, however, dismissed the motion on its merits.[15]

13. The Defence case-in-chief, which lasted over 15 sitting days, commenced on 20 May 1998 and closed on 27 August 1998. During this time the Defence called 23 witnesses and 37 Defence exhibits were admitted into evidence.

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[9] Order for the Protection of Victims and Witnesses, Case No.: IT-95-14/1-PT, 25 Sept. 1997.
[10] Decision of Trial Chamber I on the Defence Motion of 19 June 1997 in Respect of Defects in the Form of the indictment, Case No.: IT-95-14/1-PT, 25 Sept. 1997.
[11] Decision of Trial Chamber I in Respect of the Motion of 19 June 1997 Requesting Separation of Trials, Case No.: IT-95-14/1-PT, 25 Sept. 1997.
[12] Decision on the Motion of the Prosecutor for the Taking of Depositions, Case No.: IT-95-14/1-PT, 25 Sept. 1997.
[13] Order of the President, Case No.: IT-95-14/1-PT, 20 Nov. 1997.
[14] With the departure of Mr. Mikuli~i}, Mr. Joka was the sole counsel to the accused.
[15] Decision Denying a Request for Provisional Release, Case No.: IT-95-14/1-T, 23 Jan. 1998.

14. On 22 September 1998, the Prosecution presented two witnesses in rebuttal. On 19 and 20 October, the Defence called three witnesses in rejoinder who were also called to give evidence to be taken into account for sentencing.

15. As the trial was drawing to a close, the Trial Chamber on 19 October 1998, rendered an oral decision following a Defence motion. In the oral ruling, the Trial Chamber admitted as further Defence evidence the testimony of Admiral Domazet, who had appeared as an expert witness in the *Bla{ki}* case[16], including the video-recording of the testimony and related exhibits. The ruling was later confirmed in a written decision issued on 22 October 1998.[17] On the same day as the oral ruling, the Prosecution filed a confidential motion seeking leave of the Trial Chamber to admit further Prosecution evidence in rebuttal, in the form of the transcript of the testimony of a protected witness, who had also given evidence in the *Bla{ki}* case. This motion was denied by the Trial Chamber on 3 November 1998.[18] Following a Prosecution application for leave to appeal against the two decisions, and following a decision by the Trial Chamber on 17 November 1998 staying the proceedings pending the final determination of the appeal,[19] the Appeals Chamber, by a majority of four to one, refused the appeal in regard to the first decision of 22 October 1998 and allowed the appeal pertaining to the second decision of 3 November 1998.[20] In consequence, the transcript of the testimony of Admiral Domazet, including the video-recording of the testimony and related exhibits,[21] and the transcript of the testimony of the protected witness[22] were eventually admitted into evidence.[23]

16. Subsequent to a motion hearing during which the accused addressed the Trial Chamber, a second decision pertaining to a request for the provisional release of the accused was rendered on 2 December 1998. In its oral decision, the Trial Chamber dismissed the

[16] French provisional transcript of trial proceedings (hereinafter "FPT"), p. 2789.
[17] Decision Granting Leave for the Admission of Evidence, Case No.: IT-95-14/1-T, 22 Oct. 1998.
[18] Decision Rejecting a Request for Leave to Admit a Witness Testimony into Evidence, Case No.: IT-95-14/1-T, 3 Nov. 1998.
[19] FPT p. 2949-2950. The Prosecution requested the proceedings to be stayed in an application of 11 Nov. 1998.
[20] Decision on Application of the Prosecution for leave to Appeal: (1) the Trial Chamber's Decision to Admit Further Defence Evidence; and (2) the Trial Chamber's Decision to Deny the Prosecutor's Motion to Admit Further Evidence in Reply, Case No.: IT-95-14/1-AR73, 18 Dec. 1998; Order Regarding the Prosecution's Application for Leave to Appeal Filed on 6 November 1998, Case No.: IT-95-14/1-AR73, 4 Feb. 1999; Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No.: IT-95-14/1-AR73, 16 Feb. 1999; and Dissenting Opinion of Judge Patrick Robinson, Case No.: IT-95-14-AR73, 16 Feb. 1999.
[21] Exhibit D-35A to D35D/31.
[22] Witness X in the present case. Exhibit P139.

motion on the ground that the Defence had failed to prove the four cumulative conditions laid down in Sub-rule 65(B).[24]

17. Following alleged disclosure of confidential information relating to the identity of a Prosecution witness, the Trial Chamber initiated contempt proceedings, which resulted in a finding of contempt of the Tribunal on 11 December 1998.[25]

18. Eventually, further to a decision by Trial Chamber I,[26] the Trial Chamber on 8 February 1999 rendered an opinion relating to a request by the former co-accused Dario Kordi} and Mario ^erkez for access to non-public materials in the La{va Valley and related cases.[27]

19. After the presentation of the parties' closing arguments on 22 and 23 March 1999, the hearing was closed and judgement was reserved to a later date.

D. General factual background

20. This trial is primarily concerned with events taking place in Kaonik prison in the La{va Valley area, which stretches mainly over the municipalities of Travnik, Vitez and Busova~a in the region of central Bosnia, over a limited period of five months during the first half of 1993. In order to place these events in their proper context, the Trial Chamber deems it necessary to set out the following general factual background.

21. The Socialist Federal Republic of Yugoslavia ("the SFRY"), comprising six republics and two autonomous regions, disintegrated in the early 1990's and four of the republics declared their independence, which was challenged militarily by the federal government and the Yugoslav national army, the Yugoslav People's Army (hereafter "the JNA"). The Republic of Croatia declared its independence on 25 June 1991 and was subsequently

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[23] Decision on the Prosecutor's Request that the *Bla{ki}* Trial Chamber Permit an Amendment of Certain Protective Measures, 9 Feb. 1999; Order Regarding the Admissibility of Certain Documents as Evidence, 19 Feb. 1999; and Decision Regarding the Admission of Certain Documents as Evidence, 5 March 1999.
[24] FPT pp. 3082 to 3083.
[25] Finding of Contempt of the Tribunal, Case No.: IT-95-14/1, 11 Dec. 1998. The decision is currently under appeal.
[26] Decision on the Motion of the Accused for Access to Non-Public Materials in the La{va Valley and Related Cases, The Prosecutor v. Kordi} and ^erkez, Case No.: IT-95-14/2-PT, 12 Nov. 1998.
[27] Opinion Further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordi} and Mario ^erkez dated 12 November 1998, Case No.: IT-95-14/1-T, 8 Feb. 1999.

recognised as an independent state by the European Community and the United States.[28] On 6 March 1992, the Republic of Bosnia and Herzegovina declared its independence and soon thereafter the European Community and the United States recognised the statehood the Socialist Republic of Bosnia and Herzegovina (hereafter "Bosnia and Herzegovina").[29] The two states were both admitted as members of the United Nations by a decision of the General Assembly on 22 May 1992.

22. Meanwhile, in Bosnia and Herzegovina, which subsequent to elections held in November 1990 was governed by a coalition government consisting of the Muslim "Party of Democratic Action" (hereafter "the SDA"), the "Croatian Democratic Union" (hereafter "the HDZ") and the "Serbian Democratic Party" (hereafter "the SDS"), tension was rising. The co-operation between the three main parties was becoming exceedingly difficult with the SDA and the HDZ favouring an independent Bosnia and Herzegovina whereas the SDS was supporting the idea of maintaining within the Yugoslavian framework. At the same time, a separate Serb political structure was in the making by way of establishing a number of "Serbian Autonomous Regions" (hereafter "the SAOs") in areas predominantly inhabited by Bosnian Serbs. On 9 January 1992, the "Republic of the Serbian People of Bosnia and Herzegovina" was proclaimed (hereafter "the SRBH").[30] In May that same year, this self-proclaimed republic formed its own army under the command of General Ratko Mladi} (hereafter "the VRS"), which coincided with the announcement of the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereafter "the FRY") to withdraw all JNA personnel, who were not citizens of Bosnia and Herzegovina, from that territory.[31] Similarly, "the Croat people in Bosnia and Herzegovina, faced with the oncoming danger and aware of its historical responsibility to defend the Croatian ethnic and historical areas and interests, through its legally elected government representatives" founded the "Croatian Community of Herceg-Bosna" (hereafter "the HZ-HB") in November 1991.[32] The following year on 8 April, its military force the "Croatian Defence Council" (hereafter "the HVO") was formed.[33]

23. During the ensuing armed hostilities, which erupted on the territory of the newly independent Bosnia and Herzegovina, the Bosnian Serbs were generally opposed in unison

[28] The Republic of Croatia (hereafter "Croatia") was recognised as an independent State by the European Community on 15 January 1992 and by the United States on 7 April 1992.
[29] Bosnia and Herzegovina was recognised by the European Community on 6 April 1992 and by the United States and Croatia on 7 April 1992.
[30] This entity later became known as Republika Srpska.
[31] Exhibit P122.
[32] Exhibit P126A.
[33] FPT p. 1564.

by the Bosnian Croats and the Bosnian Muslims, with the military units of the Bosnian Croats, the HVO, being formally under the direction of the army of Bosnia and Herzegovina (hereafter "the BH army") and the central government in Sarajevo.[34] In reality, as far as the La{va Valley region was concerned, it would appear that for the most part the BH army was responsible for holding the front lines in areas where the Bosnian Muslim population prevailed and the HVO was equally responsible for holding the front lines in areas with a predominantly Bosnian Croat population.[35] However, the co-operation between the HVO and the BH army was gradually breaking down and clashes between the two forces were reported during the fall of 1992.[36] Towards the end of January 1993, there was an outbreak of open hostilities between the HVO and BH army and Bosnian Muslim men were rounded up by the HVO in the town of Busova~a, as well as in surrounding villages, around 24 January 1993. Approximately four hundred of these men were taken to be detained at the nearby detention facility at Kaonik (hereafter "Kaonik compound") for about two weeks. Around two and a half months later, in the beginning of April that same year, the HVO took over the local municipality building in Travnik and the flag of the HZ-HB was raised on that building.[37] An upsurge of clashes between the HVO and the BH army followed. Soon thereafter, in the middle of April, another rounding up of Bosnian Muslim men by the Bosnian Croat forces took place, which resulted in the detention of at least one hundred men at Kaonik compound for about a month.

24. The complex of buildings, of which Kaonik compound forms a part, was prior to the war used by the JNA, mainly for the storage of ammunition. It is located beside the La{va River approximately three kilometres north of the town of Bu{ova}a. At the time relevant to the indictment, it consisted of a number of warehouses, approximately thirty-five metres long and eighteen to twenty metres wide, and various smaller buildings. What is referred to in this Judgement as "Kaonik prison" relates to two of the warehouses in this compound, one of which had been turned into a purpose-built prison with cells on both sides of a corridor

[34] FPT pp. 1612 and 1702. On 21 July 1992 an agreement was signed in Zagreb between the President of the Croatia, Dr. Franjo Tudjman, and the President of the Presidency of Bosnia and Herzegovina, Mr. Alija Izetbegovi}, according to which "[t]he armed component of the Croatian Defence Council is a constituent part of the united armed forces of the Republic of Bosnia and Herzegovina. The Croatian Defence Council will have its representatives in the joint command of the armed forces of Bosnia and Herzegovina." See Exhibit D-7, Article 6 of the "Agreement on Friendship and Co-operation Between the Republic of Bosnia and Herzegovina and The Republic of Croatia".
[35] FPT pp. 1167 and 1612.
[36] FPT p. 1624.
[37] FPT p. 1589.

(hereafter "the first warehouse").[38] The first warehouse, which also housed the office of the accused, was provided with electricity, heating and running water. In contrast, the other warehouse was completely bare and had no electricity or running water (hereafter "the second warehouse").[39] In regard to the smaller buildings, at least one situated close to the main entrance of the compound was used to accommodate HVO soldiers and members of the Military Police.[40]

E. Main arguments of the parties

1. The Prosecution

25. The Prosecution's main factual allegations and legal arguments may be set out as follows.

(a) Factual allegations

26. It is the case of the Prosecution that the alleged acts were committed between January and May 1993, during which time an international armed conflict existed between the armed forces of Bosnia and Herzegovina on the one hand and the military units of the Bosnian Croats, the HVO, and the army of Croatia (hereafter "the HV") on the other hand.

27. It is alleged that the accused was the commander of Kaonik prison, which was used by the HVO to unlawfully detain persons of Muslim ethnicity in order to use them as "bargaining chips" for some future exchange and as a method to "ethnically cleanse" the area.[41] While in detention under the command of the accused, many of the detainees were repeatedly subjected to murder, beatings, psychological abuse, intimidation and theft of personal property. The detainees were also subjected to unacceptably poor conditions within Kaonik prison. They were kept under unsanitary conditions in cramped or overcrowded facilities with inadequate heating, light, ventilation and sleeping facilities. They were provided with insufficient food and water as well as inadequate medical treatment and they

[38] Annex B.
[39] Annex C.
[40] Annex A.
[41] Prosecution's opening statement and closing arguments, FPT pp. 19-20 and 3088.

were prevented from performing religious rites. Further, the detainees were forced to dig trenches for the HVO at various locations at or near front lines between the HVO and the BH army, thereby being subjected to death, injury and mental and physical harm. The detainees were also being used as human shields at diverse locations in the La{va Valley area in order to ensure the surrender of the villages whose inhabitants were predominantly Muslim.

(b) Legal arguments

28. The Prosecution argues that the alleged acts took place in the context of an international armed conflict and that the victims of these acts were "protected persons" under the III and IV Geneva Conventions of 1949. Thus, it is submitted that the alleged acts constitute grave breaches of the Geneva Conventions of 1949 in the form of crimes of inhuman treatment and willfully causing great suffering or serious injury to body or health as recognised by Articles 2(b) and 2(c) of the Statute respectively. In addition, the Prosecution contends that in the event that the Trial Chamber finds that the armed conflict was internal in nature, the alleged acts still fall within the scope of the Geneva Conventions as customary international humanitarian law extends their application also to internal armed conflicts.[42]

29. Moreover, it is argued that the alleged facts constitute a violation of the laws or customs of war as recognised by Article 3 of the Statute. In this respect, the Prosecution submits that Article 3 of the Statute extends to all violations of international humanitarian law not covered by Article 2, 4 or 5 of the Statute. Thus, it is argued that outrages upon personal dignity, which is prohibited by Article 3 common to the four Geneva Conventions of 1949 (hereafter "Common Article 3"), falls within the ambit of this article.[43]

30. The Prosecution argues that the accused be held criminally responsible pursuant to Article 7(1) of the Statute by his direct or constructive participation in the above-mentioned acts.[44] Moreover, the Prosecution contends that the accused is criminally responsible on the ground of his position as a superior to the perpetrators of the alleged crimes pursuant to Article 7(3) of the Statute. In this regard, the Prosecution emphasises that individuals in

[42] Prosecution's closing arguments, FPT p. 3095.
[43] The Prosecutor's Closing Brief (hereafter "Prosecution's closing brief"), paras. 50 and 51.
[44] Prosecution's Closing Brief, paras. 66-79.

positions of authority may be held criminally responsible on the basis of their *de facto* as well as *de jure* position as superiors.[45]

2. The Defence

31. The principal submissions of the Defence in response to the Prosecution's main arguments may be set out as follows.

32. The Defence does not dispute that an armed conflict existed in the La{va Valley area in the first half of 1993 between the HVO and the BH army. The Defence, however, denies the involvement of the HV in that conflict. It, therefore, disagrees with the contention that the conflict correctly may be characterised as international in nature and that the victims of the alleged acts may be considered as protected persons under the Geneva Conventions of 1949.[46] It, further, disagrees with the Prosecution's submission that these conventions on the basis of customary international humanitarian law, extend to internal armed conflicts.[47]

33. The Defence does not dispute that a large number of men of Muslim ethnicity were interned at Kaonik prison, subsequent to having been taken there by HVO soldiers and members of the Military Police.[48] It, however, is argued that the internment of these men was permissible under international law and that, in any event, the accused may not be held responsible for their internment.[49] The Defence rejects the Prosecution's contention that the internees, within Kaonik prison, were subjected to acts which properly may be characterised as grave breaches of the Geneva Conventions of 1949 or as a violation of the laws or customs of war. In regard to the conditions within Kaonik prison, it is conceded that they were poor. The Defence, however, submits that these conditions were in accordance with what was objectively possible at the time. In respect of alleged criminal acts that took place outside Kaonik facilities, the Defence generally denies that responsibility for any such acts may be attributed to the accused. It does not dispute that some of the internees were subjected to

[45] Prosecution's closing arguments, FPT p. 3117.
[46] Final Trial Brief Submissions by the Defence (hereinafter "Defence's closing brief"), p. 38.
[47] Defence's closing arguments, FPT p. 3216.
[48] In its closing arguments, the Defence requested that the terms "internee" and "internment" be used instead of "detainee" and "detention", since it is the contention of the Defence that there is a difference in law between the two expressions, FPT p. 3220. For the purpose of setting out the principle submissions of the Defence, the Trial Chamber adheres to this preference of the Defence without passing on whether there actually exists a difference in law between the two expressions.
[49] Defence's closing arguments, FPT pp. 3240-3241, and closing brief, p. 57.

forced labour such as trench-digging for the HVO and that some of them, while trench-digging, were occasionally mistreated by HVO. The Defence also concedes that on one such instance, two internees were actually killed.[50] It contends however that to subject the internees to forced labour was not in violation of international law.[51] In relation to the allegations pertaining to some internees being used as human shields, the Defence does not dispute the factual allegations that some of them were taken to various locations around the La{va Valley area. It contests however that those persons were actually used as human shields.[52]

34. As to the alleged individual criminal responsibility of the accused based on his direct participation, the Defence denies that the accused has participated in any criminal acts. Regarding the alleged responsibility as a superior to the perpetrators of such acts, the Defence, as previously mentioned, does not contest that the accused was the commander of Kaonik prison during the time relevant to the indictment. However, it is submitted that the accused in this capacity was responsible only for the administrative aspects of running the prison and that he, as a civilian, did not have any authority or control over the prison guards, who were either HVO soldiers or members of the Military Police.[53]

F. The evidence presented

35. The Prosecution called 33 former detainees, 17 of whom were incarcerated in January 1993 (hereinafter "the first period") and 17 in April 1993 (hereinafter "the second period").[54]

36. Two witnesses were arrested in the wake of the two waves of arrests of Bosnian Muslims under conditions different from those of the other witnesses: one (Witness Dautovi}) was arrested in Gu~a Gora on 18 May 1993 for cigarette-smuggling and released on 19 June 1993; the other (Witness T) was arrested while attempting to leave Bosnia to return to his native country. The Trial Chamber deems that it cannot consider the abuse which the two witnesses claim to have suffered during their detention in Kaonik. Two reasons preclude consideration of Witness T's testimony from the perspective of the mistreatment to which he was subjected. For one, the indictment relates only to Bosnian Muslims which this witness, a

[50] Defence's closing brief, p. 24.
[51] Defence's closing brief, p. 51-56, and closing arguments, FPT p. 3243.
[52] Defence's closing brief, pp. 24 -27 and 60.
[53] Defence's closing brief, p. 15 and 46, and closing arguments, FPT pp. 3229-3230.

foreign national, is not. Further, he remained in detention at Kaonik compound from 25 May to 16 August 1993, i.e. during a period almost wholly outside that covered by the indictment. As to Witness Dautovi}, he lacks credibility because of the circumstances under which he was arrested and because of the inconsistencies in his testimony.

37. Two ECMM liaison officers, Charles McLeod and Torbjorn Junhov, and a Western journalist, Daniel Damon,[55] also testified before this Trial Chamber. Witness Junhov claims to have visited the prison for an hour on 1 April 1993. Witness McLeod visited the prison on 10 May 1993 and says that he spent an hour or two there.[56] Witness Damon visited the prison on 14 May 1993 for forty minutes. Several days after his visit, Witness McLeod drafted a report which was admitted as evidence.[57] On the day of Witness Damon's visit, no Bosnian civilians were being detained there. The prisoners he was able to meet during his visit were Muslim mercenaries whom the inhabitants of the region usually referred to as *Mujahedin*.

38. The Defence called 26 witnesses,[58] amongst whom were, *inter alia*, members of the medical team from the Busova~a medical centre, people working at Kaonik prison at the time of the alleged acts and the civilian and military authorities of the region.

39. Furthermore, the Trial Chamber considered all of the exhibits submitted by the Prosecution and the Defence admitted into evidence at trial, in particular, the documents and photographs of Kaonik compound and several maps of the region.

40. After having reviewed all the evidence and the written submissions and presentations by the Prosecution and the Defence, the Trial Chamber notes that, in general, the debate over the accused's possible guilt in this case is two-fold in nature. In effect, the Prosecutor relies in part on the same facts in support of the three alleged offences. The allegations of inhuman treatment (Article 2(b)), are based not only on the detention conditions in Kaonik compound (unsanitary conditions, inadequate space and heating, inadequate medical care and nutrition, mistreatment) but also on the treatment meted out to the detainees at trench-digging locations (forced labour, mistreatment, inadequate food) and the fact that they were used as human shields. In support of her charge of willfully causing great suffering or serious injury to body or health under Article 2(c) of the Statute, the Prosecutor relies not only on mistreatment

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[54] One of the witnesses (Witness L.) was detained during both periods.
[55] Journalist working for "Sky News".
[56] Witness McLeod, FPT p.134.
[57] Following an objection by the Defence based on hearsay evidence (FPT pp.116-118).

inside the Kaonik compound but also on suffering and injury to body or health resulting from mistreatment or hazardous circumstances in which prisoners were forced to dig trenches. In respect of outrages against personal dignity as recognised by Common Article 3 of the Geneva Conventions, the Prosecutor invokes unlawful detention, appalling detention conditions, beatings within the confines of the Kaonik compound, theft of prisoners' personal property, forced trench-digging, use of detainees as human shields and, more generally, refers to the elements of breaches under Article 2 of the Statute. The facts submitted by the Prosecutor in support of the three charges therefore relate to events taking place both inside and outside the Kaonik compound. At the same time, the question at issue is whether the accused can be held criminally responsible under either Article 7(1) or 7(3) of the Statute.

41. This is why, in order to reach its conclusions, the Trial Chamber will present its interpretation of the law which is applicable to the facts in question by clearly indicating to what extent the accused may be held criminally responsible before it goes on to review whether, and to what extent, the alleged crimes were committed and may be ascribed to the accused.

II. APPLICABLE LAW

A. Articles 2 and 3 of the Statute

1. General requirements

42. The substantive jurisdiction of the Tribunal is limited to applying international humanitarian law. The charges against the accused have been brought under Articles 2 and 3 of the Statute. These two Articles do not apply unless the alleged offences were committed in the context of an armed conflict and with a sufficient nexus between the alleged offence and this armed conflict.

[58] Three witnesses appeared twice.

(a) Existence of an armed conflict

43. In the Tadi} Decision, the Appeals Chamber, after having noted the protean nature of armed conflict, defined it to be "a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[59] It further maintained that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities",[60] consequently, it held that:

> [I]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[61]

44. In the present case, it is not in dispute that an armed conflict existed between the armed forces of the Muslim community of Bosnia and Herzegovina and the military units of the Bosnian Croats, comprising the HVO and the Bosnian Croat Military Police. The Defence indeed concedes that an armed conflict existed in Central Bosnia, specifically in the Busova~a municipality, in the first half of 1993 -- being the relevant period of the indictment against the accused -- between Bosnian Muslims and Bosnian Croats.[62]

(b) Sufficient nexus between the alleged acts of the accused and the armed conflict

45. Not all unlawful acts occurring during an armed conflict are subject to international humanitarian law. Only those acts sufficiently connected with the waging of hostilities are subject to the application of this law. The Trial Chamber will determine whether such a connection exists between the acts allegedly perpetrated by the accused and the armed conflict. It is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue.

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[59] *Prosecutor v. Tadi}*, Case No. IT-94-1-AR72, Appeals Chamber Decision on Jurisdiction, Oct. 2, 1995, paras. 67 and 70 .
[60] *Ibid.*
[61] *Ibid.*
[62] Defence's closing brief, p. 38.

2. Article 2

46. The Trial Chamber was unable to agree on the applicability of Article 2 of the Statute in this case.[63] The majority[64] concluded that the Muslims held at the Kaonik prison between January 1993 and the end of May 1993 were not "protected persons" within the meaning of Article 4 of the Fourth Geneva Convention. The Trial Chamber has therefore decided that there is no value in examining whether the criminal allegations made by the Prosecutor represent the serious offences set out in the Fourth Geneva Convention. The legal consequence of this is that the accused will be found not guilty on the two counts on which he was charged under Article 2 of the Statute.

3. Article 3

47. Article 3 of the Statute is entitled "[v]iolations of the laws or customs of war" and provides:

> "[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
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> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property."

48. The enumerated offences under Article 3 of the Statute intend to regulate the conduct of hostilities and reproduce provisions found in the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land ("the Hague Convention IV"). As noted by the

[63] Attached is a dissenting Opinion of Judge Rodrigues regarding the applicability of Article 2 of the Statute in the present case.
[64] Attached is a joint Opinion of Judges Vohrah and Nieto-Navia regarding the applicability of Article 2.

Appeals Chamber in the Tadi} Decision, [65] it is clear from the text of Article 3 that the list is meant to be illustrative and not exhaustive.[66] In the particular instance, the indictment charges the accused with a violation of the laws or customs of war for "outrages upon personal dignity", under Articles 3, 7(1) and 7(3) of the Statute. The prohibition on outrages upon personal dignity is found in sub-paragraph (1)(c) of Article 3 common to the four Geneva Conventions ("common Article 3") which stipulates that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are, and shall remain, prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees, which are recognised as indispensable by civilised peoples.

49. A reading of paragraph (1) of common Article 3 reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on "race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria". Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of mistreatment that are without question incompatible with humane treatment. The Commentary to Geneva Convention IV explains that the delegations to the Diplomatic Conference of 1949 sought to adopt wording that allowed for flexibility, but, at the same time, was sufficiently precise without going into too much detail. For "the more specific and complete a list tries to be, the more restrictive it

[65] In its discussion of the legal ingredients of a crime pursuant to Article 3 of the Statute, the Trial Chamber is guided by the Tadi} Decision, at para. 94 in particular.

becomes".[67] Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation,[68] the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.[69]

50. The International Court of Justice held, in the *Nicaragua* case, that common Article 3, though conventional in origin, has crystallised into customary international law and sets out the mandatory minimum rules applicable in armed conflicts of any kind, constituting as they are "elementary considerations of humanity".[70]

51. The general proscription in common Article 3 is against inhuman treatment. It is instructive to take account of the elements of the offence proposed by the International Committee of the Red Cross ("the ICRC") to the Preparatory Commission for the International Criminal Court to assist the latter in its efforts to elaborate the elements of the crimes under paragraph 2 (a) of Article 8 of the Rome Statute of the International Criminal Court, being the statutory provision recognising the grave breaches regime of the Geneva Conventions.[71] After analysing the results of its extensive research into the 'sources of law',[72] the ICRC determined that the material element of inhuman treatment is satisfied when the act or omission of the perpetrator caused serious physical or mental suffering or injury upon the

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[66] *Tadi}* Decision, para. 87.
[67] Commentary to Geneva Convention IV, p. 25-26.
[68] The language used could not be more clear: "the following acts are and shall remain prohibited at any time and in any place whatsoever …"
[69] At the Diplomatic Conference of 1949, a considerable number of delegations were opposed to the unqualified application of the Convention to internal armed conflicts. The regime of individual protection under the Convention was meant to apply to international armed conflicts. Many delegations feared that if the Convention were extended to apply to internal armed conflicts, individual protection would come at the expense of the equally legitimate survival of the State, for rebels or common brigands would be accorded recognition as belligerents, and possibly even a certain degree of legal recognition. The French delegation proposed the solution that eventually broke the deadlock: in cases of civil war, it is the principles of the Convention that should be applicable. This proposal sought to limit the provisions in the Convention which applied to internal armed conflicts. Thus the carefully-developed rules of the Convention would not apply. The drafting task was given to the Working Group to cull those provisions of the Convention that were to be equally applicable to internal armed conflicts. Among the three proposals put to the Joint Committee, the text finally adopted obtained a clear majority after much debate.
[70] *Corfu Channel* case, *Merits*, *I.C.J. Reports 1949*, p. 22, cited in the *Nicaragua* case, *I.C.J. Reports 1986,* p.114.
[71] PCNICC/1999/WGEC/INF.1, 19 February 1999. Under the Rome Statute, the elements are intended to assist the Court in the interpretation and application of the substantive Articles.
[72] International humanitarian law and human rights law instruments and the relevant case law comprising a review of cases from the Leipzig Trials, post World War II trials, including the Nuremberg and Tokyo trials as

person or constituted a serious attack on human dignity. As for the mental element, the ICRC noted that it is satisfied when the perpetrator acted wilfully.

52. In the ^e*libi}i* Judgement, the Trial Chamber found that:

> inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain and ordinary meaning of the term inhuman treatment in the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Convention fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment."[73]

53. It is also instructive to recount the general definition of the term "inhuman treatment" propounded by the ECHR, which to date is the only human rights monitoring body that defined the term: "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (ECHR). The assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc".[74] The test offered by this definition is the level of suffering endured by the victim.

54. An outrage upon personal dignity within Article 3 of the Statute is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*.[75] It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality. It can be said that the entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle. Protection of the individual

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well as national case law, and decisions from the International Tribunal for the Former-Yugoslavia and the International Criminal Tribunal for Rwanda.

[73] ^elebi}i Judgement, para. 543.

[74] ECHR, *Ireland v. United Kingdom*, Publications of the European Court of Human Rights, Series A: Judgements and Decisions, vol. 26, 1978, p. 14.

[75] It can be noted, however, that the ECHR held that "with respect to a person deprived of freedom, any use of force, which is not rendered strictly necessary due to the behaviour of that person, affects human dignity and constitutes, in principle, a violation of the right protected by article 3." /unofficial translation/ ECHR, *Ribitsch v. Austria*, Reports of Judgements and Decisions, Series A, vol. 336, para. 38; *Tekin v. Turkey*, *ibid*. at para. 52-53.

from inhuman treatment certainly is a basic principle referred to in the Universal Declaration of Human Rights of 1948[76] (Article 5), and also finds expression in prohibitions contained in regional[77] and international[78] human rights instruments, culminating in the General Assembly's adoption by consensus of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1984. In addition, guarantees against torture, cruel and other inhuman treatment are found in the constitutions and legislation of most countries.[79]

55. To determine the elements of the offence of outrages upon personal dignity within Article 3 of the Statute, the Trial Chamber must look at which acts constitute the *actus reus* (the act or omission) of the offence and what is the requisite degree of *mens rea* (necessary intent). The four Geneva Conventions themselves do not expound on these questions; however, the Commentaries prove to be more helpful by providing that "outrages upon personal dignity refer to acts which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them."[80]

56. An outrage upon personal dignity is an act which is animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim. It is not necessary for the act to directly harm the physical or mental well-being of the victim. It is enough that the act causes real and lasting suffering to the individual arising from the humiliation or ridicule. The degree of suffering which the victim endures will obviously depend on his/her temperament. Sensitive individuals tend to be more prone to perceive their treatment by others to be humiliating and, in addition, they tend to suffer from the effects thereof more grievously. On the other hand, the perpetrator would be hard-pressed to cause serious distress to individuals with nonchalant dispositions because such persons are not as preoccupied with their treatment by others and, even should they find that treatment to be humiliating, they tend to be able to cope better by shrugging it off. Thus, the same act by a perpetrator may cause intense suffering to the former, but inconsequential discomfort to the latter. This difference in result is occasioned by the subjective element. In the prosecution of an accused for a criminal offence, the subjective

[76] United Nations General Assembly Resolution 217 A (III) (1948) of 10 December 1948.
[77] American Declaration of the Rights and Duties of Man (Article XXV); African Charter on Human and Peoples' Rights (Article 5); European Convention on Human Rights (Article 3); Inter-American Convention on Human Rights (Article 5).
[78] International Covenant on Civil and Political Rights (Article 7).
[79] Report by the Special Rapporteur, Mr. P. Kooijmans, E/CN.4/1986/15, 19 February 1986, paras. 97-98.
[80] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 3047.

element must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim. Consequently, an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged. As for the requisite degree of *mens rea*, the Commentary indicates that the accused must have committed the act with the intent to humiliate or ridicule the victim. The ICRC, in proposing the mental element for the offence of "inhuman treatment" accepted a lower degree of *mens rea*, requiring the perpetrator to act wilfully. Recklessness cannot suffice; the perpetrator must have acted deliberately or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.

57. Indeed, the seriousness of an act and its consequences may arise either from the nature of the act *per se*[81] or from the repetition of an act or from a combination of different acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed. In other words, the determination to be made on the allegations presented by the victims or expressed by the Prosecution largely rest with the analysis of the facts of the case.

B. Article 7

1. Article 7(1)

58. Article 7(1) of the Statute states:

> [A] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute shall be individually responsible for the crime.

59. Without prejudice to the conclusions of the Trial Chamber in respect of the accused's responsibility and in view of the allegations of the Prosecutor and the evidence adduced at trial, it should be noted from the outset that the accused was held responsible under Article 7(1) not for the crimes that he allegedly committed himself but for those committed by others which he is said to have personally ordered, instigated or otherwise aided and abetted. The

[81] For example: being subject to torture; being used as a human shield.

Trial Chamber will therefore limits its analysis to those circumstances under which an individual may incur responsibility within the meaning of Article 7(1) of the Statute for having contributed to the perpetration of the crime without, however, having himself committed the unlawful act.

60. This question was already the subject of in-depth debate in several cases heard before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda *inter alia* in the *Tadi}*[82], *^elebi}i*[83], *Furund`ija*[84] and *Akayesu*[85] cases. On the basis of the analysis of post-Second World War trials and international instruments, these cases have already made it possible to set out the rules of existing customary international law on the subject. The Trial Chamber therefore sees no point in making the same analysis and will rely on the two essential elements which entail responsibility within the meaning of Article 7(1) as unanimously established in all the other cases.

61. The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that lend encouragement or support"[86] constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had an "substantial effect"[87] on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate".[88] If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.

62. The forms of participation recognised as sufficient in customary international law are not limited to physical assistance provided while the unlawful act is being committed. The Trial Chamber seized of the *Tadi}* case noted that "the fact that participation in the commission of the crime does not require an actual physical presence or physical assistance

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[82] *The Prosecutor v. Du{ko Tadi},* IT-94-1-T (hereinafter *Tadi}*), Judgement of Trial Chamber II, 7 May 1999, paras. 670-692, pp. 261-273.
[83] *The Prosecutor v. @ejnil Delali}, Zdravko Muci} alias "Pavo", Hasim Deli} and Esad Land`o alias "Zenga",* IT-96-21-T (hereinafter *^elebi}i*), Judgement of Trial Chamber II, 16 November 1998.
[84] *The Prosecutor v. Anto Furund`ija,* IT-95-17/1-T (hereinafter *Furund`ija*), Judgement of Trial Chamber II, 10 December 1998.
[85] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (hereinafter *Akayesu*), 2 September 1998.
[86] *Tadi},* para. 689, p. 269.
[87] *Tadi}*, para. 689, p. 269.
[88] *Tadi}*, para. 674, p. 261.

appears to have been well accepted at the Nürnberg war crimes trial".[89] Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime. For that reason, as stated by the Trial Chamber seized of the *Tadi}* case, "the act contributing to the commission and the act of commission itself can be geographically and temporally distanced".[90]

63. Such participation need not be manifested through physical assistance. Moral support or encouragement expressed in words or even by the mere presence at the site of the crime have at times been considered sufficient to conclude that the accused participated.[91]

64. Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*. The Prosecutor refers to the classical example of the accomplice keeping watch while his associates commit a crime.[92] Trial Chamber considered, in the *Tadi}* case, that the presence of the accused when crimes were committed by a group was sufficient to entail his responsibility if he had previously played an active role in similar acts committed by the same group and had not expressly spoken out against the conduct of the group.[93] In the *Akayesu* case, the Trial Chamber of the International Criminal Tribunal for Rwanda held that the accused had abetted acts of sexual violence merely by his having been present near the premises where the crime occurred. The Trial Chamber based its conclusions on the fact that the accused had previously provided verbal encouragement for the commission of similar acts and that his position as mayor conferred on him such authority that his silence in the face of crimes being committed nearby could be interpreted by the perpetrators of the rapes only as a signal of official tolerance for sexual violence.[94] In the *Furund`ija* case, the accused was convicted of rape because he continued his interrogation while the person being interrogated was subjected to sexual

[89] *Tadi}*, para. 679, p.264.
[90] *Tadi},* para. 687, p. 268.
[91] For a detailed analysis of the case-law, see *inter alia*, *Furund`ija*, paras. 200-215, pp. 77-82.
[92] Prosecutor's Closing Brief, para. 68, p. 29.
[93] *Tadi}*, para. 690, p. 269.
[94] *Akayesu*, para. 693, p. 277.

violence. The Trial Chamber found that "the presence of the accused and the continued interrogation aided and abetted the crimes committed by the Accused B".[95]

65. As these cases show, an individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. It must be noted in fact that the aforementioned cases did not establish an individual's responsibility on this basis alone. Admittedly, the presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some circumstances, be interpreted as approval of that conduct. The aforementioned cases moreover took into account the accused's prior or concomitant behaviour or statements in order to interpret his presence as an act of abetting. Moreover, it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or even decisive effect on promoting its commission. The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement. An individual's authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1) of the Statute. Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances. The Trial Chamber will thus assess the impact of the accused's alleged presence at the place where the crimes were committed when it discusses the legal characterisation of the facts.

2. Article 7(3)

66. In addition to individual criminal responsibility based on the accused's direct participation in the three crimes alleged, the Prosecutor considers that the accused incurs responsibility, cumulatively or alternatively, for not having prevented or punished the crimes committed by his subordinates.[96]

[95] *Furund`ija*, para. 274, p. 103.
[96] Indictment, para. 37.

67. The doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the Statute but for his failure to act. A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.[97]

68. The responsibility for failure to act, sometimes known as "indirect superior responsibility" is provided for in Article 7(3) of the Statute:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

69. Article 7 makes clear that superior responsibility may be invoked if three concurrent elements are proved:

(i) a superior-subordinate relationship between the person against whom the claim is directed and the perpetrators of the offence;

(ii) the superior knew or had reason to know that a crime was about to be committed or had been committed;

(iii) the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.

70. The three constituent elements which are evident from the wording of Article 7(3) clearly draw from Article 86, paragraph 2, of Additional Protocol I[98] and Article 6 of the Draft Code of the International Law Commission of 1996.[99] They are repeated in article 28 of the Rome Statute of the International Criminal Court.[100]

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[97] Prosecutor's Closing Brief, para. 80, p. 34.
[98] See in particular the commentary of the Additional Protocol, para. 3543, p. 1037 which states three similar criteria.
[99] Draft articles of the ILC, official document of the General Assembly, 51st session, UN DOC. A/51/10 (1996) (hereinafter "ILC draft articles").
[100] Article 28:
1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

71. The three constituent elements, as already shown in the ^*elebi}i*[101] case, are also those used by the Prosecutor[102] and the Defence.[103] However, the Prosecution and Defence diverge in their interpretation of the content of each of the constituent elements. This will be discussed in more detail in the following sections. It seems appropriate however to begin by spelling out the nature of this legal principle before the content of the elements is determined.

72. As the Defence noted in its Final Trial Brief Submissions,[104] superior responsibility covered in Article 7(3) of the Statute must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation. As regards this point, the Trial Chamber agrees with the International Law Commission which specifies that "an individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act".[105] This was also the position taken by the Trial Chamber in the ^*elebi}i* case.[106] Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.

(a) That military commander either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[101] ^*elebi}i*, para. 346, p. 128.

[102] After having used very different prerequisites in her Closing Brief (p. 40), the Prosecutor chose the three constituent elements established in the ^*elebi}i* case in her closing argument, FPT p. 3117.

[103] Final Trial Brief Submissions by the Defence, pp. 48-49.

[104] Final Trial Brief Submissions by the Defence, p. 47. "there is no concept for the imputed criminal liability for other people's conduct that would prevent or would be able to foresee unlawful conduct that the law expects to be prevented."

[105] ILC draft articles, p. 36.

[106] ^*elebi}i*, para. 334, p. 122: the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act.

(a) The superior-subordinate relationship

73. The Prosecution holds that customary international law does not confine itself to holding superiors responsible only in respect of the military authorities but that such responsibility applies also to the civilian authorities whenever they exercise control over the perpetrators of the unlawful acts. In the opinion of the Prosecutor, the decisive criterion for determining that someone is a superior is to be found not in the status or formal authority of the person against whom the claim is directed but in the "degree of control"[107] in fact or law exercised over the perpetrators of the crime. The Prosecutor maintains that *de facto* authority is sufficient to conclude that the individual was a superior and states that "individuals, whether in civilian or military structures, can incur criminal responsibility on the basis of the *de facto* as well as their *de jure* positions as superiors".[108] In respect of the required "degree of control", the Prosecution uses several criteria to determine that a person is a superior. It first defines the powers of the superior as "the power to prevent and punish the crimes of persons who are, in fact, under their control"[109] although it also specifies that the power to punish does not involve only the direct punitive action taken but must be viewed more broadly.[110] Elsewhere, the Prosecution put forth a much more flexible criterion. Referring to the case *USA v. Pohl*[111], it asserts that "power of influence" is a "sufficient basis for the imposition of command responsibility".[112]

74. The Defence concedes that the doctrine of superior responsibility may apply in some cases to civilian authorities but asserts that such application is limited to civilians in very high positions such as ministers, governors or mayors. Accordingly, the Defence claims that Article 86 of Additional Protocol I applies only to military commanders or highly ranked persons in the political hierarchy of the community.[113] The Defence appears to restrict the possibility of a civilian superior's responsibility only to those cases mentioned in Article 7(2) of the Statute and justifies this distinction by the fact the civilians and military persons would not be subject to the same legal regime. The members of the armed forces would be subject to national military law or to international law of armed conflicts whereas civilians would be subject only to internal criminal law.[114] In addition, the Defence does not acknowledge that

[107] Closing brief, para. 93, p. 36.
[108] Closing arguments, FPT p. 3117.
[109] Closing arguments, FPT p. 3117.
[110] Closing arguments, FPT p. 3118.
[111] *United States v. Oswald Pohl et al*, LAW REPORTS, Vol. V., p. 598.
[112] Closing argument, FPT p. 3118.
[113] Final Trial Brief Submission by the Defence, p. 50.
[114] Final Trial Brief Submission by the Defence, p. 61.

de facto authority is sufficient to establish that a person is a superior. Like the Prosecution, it accepts the idea of "control"[115] which it defines differently and considers that an individual can have control over his subordinates only if "the commander is in the formal and actual position of having the authority over the subordinate persons" and if "authority is the result of his or her function in the military or civil or political hierarchy".[116] The Defence thus holds that there would be superior responsibility only if the individual against whom the claim was directed was able both to control the execution of the orders given and to sanction individuals if the order was not carried out.[117] The Defence adds that "the power" to draft reports to the appropriate authorities does not constitute a power to sanction.[118] The Defence claims that the precedent set by the case *USA v. Pohl* which was cited by the Prosecutor does not apply in the present case because that case dealt with acts which occurred in an international armed conflict whereas, it submits, this conflict was internal. It also claims that the facts alleged involved prisoners whose legal status was different from that of the Muslims detained in Kaonik facilities.[119]

75. The Trial Chamber does not share this view. The generic term "superior" in Article 7(3) of the Statute can be interpreted only to mean that superior responsibility is not limited to military commanders but may apply to the civilian authorities as well. The International Law Commission thus explains that "the reference to 'superiors' is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates."[120] This interpretation, which corresponds to the wording of the Statute, was also the one chosen for the final report of the Commission of Experts[121] and is in line with customary international law as the Trial Chamber in the *^elebi}i* case already noted[122].

76. Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and

[115] Final Trial Brief Submission by the Defence, p. 63.
[116] Defence Closing Brief, p. 49.
[117] Final arguments, FPT p. 3231.
[118] Final arguments, FPT p. 3236.
[119] Final arguments, FPT p. 3219.
[120] ILC draft articles, Article 6, p. 37.
[121] Final report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), UN. Doc. S/1994/674 (27 May 1994), para. 57, p. 16: "Political leaders and public officials have also been held liable under this doctrine in certain circumstances".

competence, to exercise control. As the Trial Chamber already noted in the *^elebi}i* case, "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for superior responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure,* position as a commander".[123]

77. The level of control required to establish that the person against whom command authority is attributed has however been the subject of differing interpretations. The majority position taken in trials after the Second World War was that a superior-subordinate relationship was necessary to entail superior responsibility. In the *Toyoda* case, the level of control required was defined as "the actual authority over the offenders to issue orders to them not to commit illegal acts and to punish offenders".[124] The *Pohl* case did not clearly establish the accused's responsibility only on the basis of his power to exert influence. Pohl, director of a company and *Waffen SS* officer, who used concentration camp prisoners, was held responsible for the mistreatment meted out to the prisoners not only because of the influence he could exercise over the organisation of the camp and the manner in which the prisoners were treated but also, it seems, because of his position as a *Waffen SS* officer. The Trial Chamber does acknowledge, however, that some cases appear to have adopted the less restrictive criterion of the mere power to influence. The Tokyo Tribunal held that the power of the accused staff officer Akira Muto was sufficient to entail his responsibility as a superior.[125] The Minister of Foreign Affairs Koki Hirota was found responsible for not have "insisted" to the Government that measures be taken.[126] In the *Roechling*[127] case also, mere *de facto* influence was judged sufficient to establish that the accused was duty-bound to take measures to ensure that the mistreatment of prisoners was stopped.

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[122] *^elebi}i*, para. 356, p. 131.
[123] *^elebi}i*, para. 370, pp. 136-137.
[124] *United States v. Soemu Toyoda, Official transcript of record of trial, pp. 5005-5006.*
[125] Official transcripts of the Tokyo trials, pp. 49820-49821.
[126] *Tokyo War Crimes Trial, The International Military Tribunal for the Far East, Judgement, Official Transcript*, Annex A-6, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), "The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result".
[127] Government Commission at the General Military Government Tribunal in the French Occupation Zone in Germany v. Herman Roechling et al., indictment and judgement of the General Military Government Tribunal in the French Occupation Zone in Germany, *Law Reports, Vol. XIV, p. 1075, para. 1092.*

78. This approach is appealing but raises the question of the nature of the powers in fact and in law which an accused's functions confer on him. Hierarchical power constitutes the very foundation of responsibility under the terms of Article 7(3) of the Statute. In order to entail his responsibility under Article 7(3), whatever his status, the accused must first have superior authority. In this respect, the International Law Commission's conclusion that civilian authorities are superiors if they exercise a degree of control with respect to their subordinates similar to that of a military person in an analogous command position[128] is a particularly relevant analytical aid. In the opinion of the Trial Chamber, a civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof. A civilian's sanctioning power must however be interpreted broadly. It should be stated that the doctrine of superior responsibility was originally intended only for the military authorities. Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities. The Trial Chamber therefore considers that the superior's ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

(b) <u>The superior knew or had reason to know that a crime was about to be committed or had been committed</u>

79. The Prosecutor takes the view that "a commander's knowledge that a violation of international humanitarian law had been committed or was going to be committed may be actual or imputed".[129] A superior could thus not claim that he did not know a crime was about to be committed or had been committed if he deliberately remained ignorant about a

[128] ILC draft articles, p. 37.
[129] Prosecutor Closing Brief, para. 124, p. 45.

matter. He would likewise be presumed to have had knowledge of offences whenever they are "widespread, notorious and occur over a long period".[130]

80. Conversely, the Trial Chamber in the ^*elebi}i* case held that it was not possible to conclude that this presumption was an established principle of customary law at the relevant time. For that reason, "in the absence of direct evidence of the superior's knowledge of the offences committed by subordinates, such knowledge cannot be presumed".[131] Admittedly, as regards "indirect" responsibility, the Trial Chamber is reluctant to consider that a "presumption" of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed.

(c) Necessary and reasonable measures

81. The Commentary on Additional Protocol I[132] and the International Law Commission's Draft Articles[133] limit the notion of "necessary and reasonable measures" to the measures which the superior can actually take. This was the position taken in the ^*elebi}i* case: "[...] a superior should be held responsible for failing to take such measures that are within his material possibility".[134] Such a material possibility must not be considered abstractly but must be evaluated on a case by case basis depending on the circumstances.

[130] Prosecutor's Closing Brief, para. 124, p. 46.
[131] ^*elebi}i*, para. 386. p. 143.
[132] Commentary of Additional Protocol I, para. 3548, p. 1039.
[133] ILC Draft Articles, p. 56 (French).
[134] ^elebi}i, para. 395, p. 147.

III. LEGAL EVALUATION OF THE FACTS

82. Before establishing the facts alleged, it is important to assess whether they can be ascribed to the accused for reason of his position or behaviour. Accordingly, the Trial Chamber will first examine whether and to what extent the accused can be held responsible for the charges against him. The Trial Chamber will then consider the evidence tendered in support of the acts alleged to have been committed by the accused.

A. The accused's responsibility

83. As noted above, the Prosecutor considers that the accused must be held responsible for the acts committed, not only within, but also outside, Kaonik prison. The Trial Chamber deems it necessary to distinguish both situations and will therefore successively examine the responsibility of the accused, on the basis of Articles 7 (1) and 7 (3) of the Statute, for the acts committed within the prison, and for the acts committed outside the prison.

1. The accused's responsibility for acts committed in the prison

(a) The accused's responsibility pursuant to Article 7(1)

(i) The submissions of the parties

84. The Prosecution attributes responsibility to the accused under Article 7(1) on account of the bad conditions of detention (lack of medical care, hygiene and food) and of his involvement in the mistreatment and the cruel and abusive interrogations some detainees were subjected to.

85. The Defence contends that the Prosecutor has failed to submit evidence establishing the accused's responsibility.

(ii) The Trial Chamber's findings

86. The Trial Chamber considers it established beyond reasonable doubt that the accused was responsible for the detention conditions. The evidence at trial clearly demonstrated that it was his duty, as prison warden, to see to the conditions as regards hygiene[135] and the health and welfare of detainees.[136]

87. Several witnesses testified about the insults, threats, thefts and assaults[137] detainees suffered in the presence of the accused during body searches on 15 and 16 April 1993.[138] The Trial Chamber does not consider it proved that the accused ordered the crimes to be committed; it is however convinced that he aided and abetted in the commission of these acts. In his capacity as prison warden he was clearly in charge of organising the body-searches of detainees and of supervising them. By being present during the mistreatment, and yet not objecting to it notwithstanding its systematic nature and the authority he had over its perpetrators, the accused was necessarily aware that such tacit approval would be construed as a sign of his support and encouragement. He thus contributed substantially to the mistreatment. Accordingly, the accused must be held responsible for aiding and abetting under Article 7(1) in the physical and mental abuse which detainees were subjected to during the body searches on 15 and 16 April 1993.

88. Several witnesses[139] spoke of the accused's participation in the physical violence they suffered during their detention.[140] The testimony of Witnesses L is consistent with that of Witness M. According to them, the abuse they received during their detention was initiated by the accused who led the guards to their cell to beat them.[141] Some of the accused's comments repeated at trial by the victims went to show that the accused intended to mistreat these detainees and that he had given the guards orders to that effect on several occasions. The accused had even been present on occasion and ordered the guards to go on beating them when they stopped.[142] The Trial Chamber is satisfied beyond reasonable doubt that the accused ordered or instigated and abetted the mistreatment of these witnesses. It is also similarly satisfied that the recurring brutality the two detainees were subsequently subjected to in the absence of the accused was aided and abetted by him. Abuse of this kind was frequent

[135] Witness Percinli}, FPT p. 2047.
[136] Witness Osmancevi}, FPT p. 457; Witness Bili}; Witness Ivancevi}. Cf. *infra* para. 101.
[137] See in particular the statements by Witnesses E (FPT p. 578) and Osmancevi} (FPT p. 445) relating that a detainee was hit during the search.
[138] For more details about these crimes, see the draft about the conditions of detention.
[139] Witnesses Dautovi}, T, L, M, E.
[140] For the reasons set out above, the testimony of witnesses T and Dautovi} will only be given an indicative value.
[141] Witness M, FPT p. 1248.

and was committed day and night near the accused's office so that the accused could hardly not have not been aware of it. Yet he did not oppose or repress it, as his position required. On the contrary, his silence could only be taken as a sign of his approval, given that he participated actively in the initial abuse of these two detainees; the accused could hardly have been unaware that his silence would amount to encouragement to the perpetrators. This silence evinces a culpable intent of aiding and abetting such acts as contemplated in Article 7(1).

89. Finally, the Trial Chamber notes that the only interrogations carried out by the accused were the ones that took place after a detainee had escaped.[143] They were ordered by the accused. The mistreatments which occurred during them, if proved, may incur the accused's responsibility pursuant to Article 7(1).

(b) The accused's responsibility pursuant to Article 7(3)

(i) The accused's status as superior in the prison

a. The submissions of the parties

90. The Prosecution considers it proved beyond any reasonable doubt that the accused was the superior within the confines of the Kaonik facilities, as it believes the trial established very clearly that the accused was the warden of Kaonik prison. The Prosecutor acknowledges that the issue of the military or civilian status of the accused was not elucidated during the trial, and gives two reasons therefor. The Prosecution indicated first that it was very difficult to ascertain the formal status of the authorities exercising power in the former Yugoslavia at the time of the alleged crimes on account of the collapse of the earlier control and command system.[144] But the Prosecution argues in particular that there is no need to ascertain it to prove the accused's superior authority in the prison. In its view, the evidence went to show that the accused clearly "operated within a structure of command and discipline, and he was clearly part of the HVO structure",[145] which sufficed to establish his standing as a superior, since the trial had proved that he exercised his function as warden of Kaonik prison

[142] Witness L, FPT p. 1211.
[143] Witnesses E and H.
[144] Closing arguments, FPT p. 3117.
[145] Closing brief, para. 88, p. 34.

pursuant to HVO orders, and that he had effective authority over the guards and HVO soldiers inside the compound. The Prosecutor draws attention to the fact that Croatian soldiers punished for disciplinary infringements were detained in Kaonik prison on HVO orders, and that it was members of the military police or HVO soldiers who arrested and transferred to Kaonik facilities the Muslims of central Bosnia. It was again at the order of HVO commanders at the front that the accused dispatched prisoners to dig trenches. A document signed by the accused and admitted into evidence at trial moreover bears the HVO's stamp,[146] which "gave documents the official sign of authority and approval" by the HVO.[147] The Prosecution argues finally that the accused's responsibilities within this chain of command related to the running of the prison, in which regard he had effective authority and control over the guards and the HVO soldiers. A number of elements submitted at trial, in particular the testimony of the secretary, Bla`enka Vujica, in the Prosecution's view, had in fact substantiated that the guards acted under the accused's orders.

91. The Defence urges on the contrary that the accused could not have been the guards' superior. In its view, the testimony rather showed that the guards were members of the military police. On the basis of the military hierarchy, only the military police commander had the power to give them orders and punish them for the commission of offences. The fact was, the Defence went on to say, that the Prosecution's witnesses had shown that the accused was neither a military police commander nor a member of any military unit.[148] On the contrary, the Defence stresses that the accused was referred to by the witnesses as a civilian and concluded that as such he could not have been part of the military chain of command nor had, therefore, any authority over the guards or the HVO soldiers. The Defence claims further that if the accused sometimes filed reports to the judicial authorities relating to offences committed by these soldiers, he did so pursuant not to any powers he had as a superior but because of the civic duty imposed on all citizens living in the territory of the former Yugoslavia.[149] According to the Defence, as prison warden the accused had solely administrative duties which in themselves could not attribute responsibility to him under Article 7(3).

[146] Exhibit D-21B.
[147] Closing brief, para. 83, p. 33.
[148] Final Defence submissions, p. 46.
[149] Closing arguments, FPT p. 3221.

b. The Trial Chamber's findings

92. The Trial Chamber notes that in putting forward its arguments the Prosecutor made no distinction between the authority the accused might have had as a superior over prison guards and that over HVO soldiers. Admittedly, many prosecution witnesses could not tell the difference between HVO soldiers and prison guards. But the Trial Chamber can hardly assess the hierarchical relationships of soldiers belonging to different units and *a priori* exercising different functions altogether. The Trial Chamber would therefore first have to review the status and functions of the accused and then examine in turn any hierarchical relationship the accused had with prison guards and the HVO soldiers alleged to have committed the said crimes.

i. The accused, prison commander (or warden)

93. There is no doubt that the accused was the prison warden. This is proved first by the accused's own declarations to individuals who appeared at trial as witnesses for the Prosecution[150] or for the Defence.[151] Although no official written appointment was submitted at trial, the evidence went to show that the accused had been officially appointed to the position and recognised as such by the relevant authorities. Witness Percinli}, who was the president of the Travnik military tribunal at the time of the events, said for instance that he had been informed of the accused's appointment to the post of warden of the Kaonik prison by, he believes, the Ministry of Justice of the community of Herceg-Bosna located at Mostar.[152] It is further attested to by the list of prisoners entered into evidence as exhibit P7[153] at the foot of which the accused's name appears with the reference "the warden of the district military prison".[154] An order transmitted by the president of the Travnik military tribunal also referred to the accused as "the warden of the district military prison".[155]

94. According to the Defence, "... from 29 January 1993 to the end of May 1993 the accused was nominally performing the function of a warden of the detention facility at

[150] See for instance the testimony of Witnesses E, FPT p. 587; B, FPT pp. 492 and 512; Osmancevi}, FPT p. 457; H, FPT p. 757; R, FPT p. 1392 and S, FPT p. 140.
[151] See for instance the testimony of Witnesses Vujica, FPT p. 2324 and DA, FPT pp. 2891-2894.
[152] FPT p. 2007.
[153] Exhibit admitted during Witness McLeod's testimony.
[154] FPT p. 150.
[155] Witness Percinli}, FPT p. 2050; Exhibit D-21A.

Kaonik".[156] Of the 15 detainees arrested on 25 January who appeared in court, eight said the accused had been present right from the first day of their detention.[157] Witnesses A and Hadjarevi} said they had seen him two or three days after their arrival.[158] The other witnesses did not give any date when they encountered the accused for the first time. The secretary at K. The other witnesses did not give any date when they encountered the accused for the first time. The secretary at Kaonik prison, Bla`enka Vujica, the defence witness, said that she had met the accuse right upon returning to the prison in late January 1993. The Trial Chamber has no difficulty in finding without any doubt that the accused held the position of prison warden as from 25 January 1993 until at least 31 May 1993.

95. The Kaonik prison was a military prison under the jurisdiction of the Travnik military tribunal. This was extensively corroborated during the trial, in particular by the defence witnesses, [159] and indeed was not challenged by the Defence.[160] As prison warden, the accused was responsible for all of the detainees. Three categories of prisoners were detained there during the period covered by the indictment.[161]

96. In this prison were held, at the order of the Travnik military tribunal, HVO soldiers who had been sentenced or were waiting to be tried by it. Established in late 1992 following the break-up of the Army of Bosnia-Herzegovina into a Croatian force (HVO) and a Muslim force,[162] the Travnik military tribunal's mandate was to judge offences committed by "members of the HVO armed forces".[163] Pursuant to a decree by the government of Bosnia-Herzegovina, the president of the Tribunal was to supervise the detention of prisoners, by ensuring in particular good sanitary conditions in the prison, and by verifying that those sentenced were held there.[164] So for this category of prisoners the Kaonik prison was under the authority and control of the Travnik military tribunal.

97. Kaonik prison also held HVO soldiers being punished by their commanders for infringements of discipline. A commander who decided to subject one of his soldiers to imprisonment had to transmit this order to the military police, to his superior, and to the

[156] Final Defence submissions, p. 14.
[157] Witnesses W; B, FPT p. 492; Novali}, FPT p. 391; F, FPT pp. 684-685; N, FPT p. 1301; O, FPT p. 1336; R, FPT p. 1392 and S, FPT p. 1407.
[158] Witness A, FPT p. 415; Witness Hajdarevi}, FPT p. 327.
[159] Witness Percinli}, FPT p. 2003 and Witness Vujica, FPT p. 2322.
[160] Final Defence submissions, p. 17
[161] Witness Percinli}, FPT p. 2085.
[162] Witness Percinli}, FPT p. 2036.
[163] Witness Percinli}, FPT p. 2001.
[164] Witness Percinli}, FPT p. 2004.

commander of the military police.[165] It was thus at the order of HVO commanders that those soldiers were detained at Kaonik.

98. The detention of the Muslims of central Bosnia, which is the subject of the allegations against the accused, was also decided on by the HVO. The accused himself stated that the decision to detain or release Muslims was taken by the HVO in Busova~a and Vitez.[166] The victims too were unanimous in saying they had been arrested and transferred to Kaonik by the military police or HVO soldiers.

99. The witnesses called by the Defence made it possible to establish clearly that the prison's personnel belonged to the military police.[167] The Trial Chamber thus notes that the deputy warden of Kaonik prison,[168] the secretary of the accused, the head of the guards, and the guards themselves, were military policemen. According to the president of the Travnik tribunal, "the guards were by and large in uniform, almost all of them. They were military police members, so they were members of military units, and they had their appropriate uniforms with appropriate insignia".[169] Older people who had been appointed by the Busova~a Croatian Defence Council[170] and made up the Domobran unit reinforced the guard shifts during the second period of detention, when the number of guards had been reduced because some of them left for the front.

100. Many defence witnesses affirmed that the accused was a civilian[171] and had been appointed to his position by the Ministry of Justice. Several prosecution witnesses noted however that the accused wore a camouflage uniform[172] and had himself referred to as "commander".[173] Admittedly, these facts are not enough to establish that the accused was in the military. Witnesses had in fact explained that at the time civilians were frequently seen wearing military clothing, which was of better quality and more widely available than civilian

[165] Witness Juri}, FPT p. 2452; Witness Vujica, FPT p. 3116.
[166] Comments by the accused related by Witness McLeod, FPT pp. 105-109.
[167] See in particular the testimony of Bla`enka Vujica, FPT p. 2323; Jerkovi}, FPT p. 2094; Percinli} FPT p. 2020.
[168] Witness Jerkovi}, FPT p. 2152; information corroborated by Witness Hajdarevi}, FPT p. 380; and by Witness N, FPT pp. 1506 and 1304.
[169] Witness Percinli}, FPT. 2020; statements corroborated by Witness Jerkovi}, FPT p. 2130.
[170] Witness Batini}, FPT p. 2181.
[171] Witness Vujica, FPT p. 2324; Witness Percinli}, FPT p. 2021; Witness Jerkovi}, FPT p. 2116; Witness Anto Juri}, FPT p. 2456.
[172] Witnesses McLeod, FPT p. 148; O, FPT p. 1336; Q; S; U; Bahtija Sivo, FPT p. 231; M, FPT p. 1242; I, FPT p. 840; Garanovi}. Some witnesses explained that the accused was not always wearing a uniform, but sometimes wore civilian clothing (Witness H, FPT p. 757).
[173] Witnesses H; Garanovi}, FPT p. 811; Meho Sivro, FPT p. 870.

clothing.[174] The Trial Chamber considers however that some of the evidence submitted at trial tended to substantiate that the accused was a member of the military police. Witness Jerkovi}[175], who was head of the guards of the Kaonik prison during the first period of detention, worked at the Zenica prison before being transferred to Kaonik, like the accused. The witness explained that he had volunteered to join the Croatian armed forces when war broke out between Serbs and Bosnians in 1992 and that he then became a member of the military police. At the time, one of the prison's sections had been converted into a military prison for the detention of Serbian prisoners of war. This witness was of the view that this military section then passed under the authority of the Ministry of Defence while the rest of the prison, which was civilian, remained under the authority of the Ministry of Justice. It was in the military section that Anto Jerkovi} did guard duty after joining the military police. The witness added that only the guards who had volunteered to join the army had been transferred to the military section of Zenica prison. The fact was that a person well acquainted with the developments of Zenica prison at the time, a defence witness, explained before the Trial Chamber that the accused had himself been transferred to the military section of the prison in 1992 after having been called up to join the military police forces when war broke out.[176]

101. Much evidence moreover showed that the accused acted *de facto* as warden. The accused laid down the prison's rules of operation. He was the only one who received the representatives of the ICRC and of the European Monitoring Mission (ECMM), and he signed the receipts of materials supplied by humanitarian organisations, as attested to by exhibit D 27.[177] He gave orders for the transfer of prisoners without which the transfer of a detainee from Kaonik to another prison could not be effected.[178] His secretary testified to having drawn up the list of detainees under his instructions.[179] The accused moreover had to see to good conditions of hygiene[180] and to the health and welfare of all the detainees. For instance, Witness Osmancevi} reported what the accused told detainees as follows:

[174] Witness McLeod, FPT p. 134; Witness Jerkovi}. Witness Percinli}, FPT p. 2020, did however explain that the civilians who combined civilian and military clothing were mainly refugees who had fled without having the time to take all their clothes.
[175] FPT p. 2126.
[176] Witness DA, FPT p. 2883. "When the war broke out, he was summoned and he joined, or rather was included in the reserve police force, alongside the regular police force".
[177] Witness Vujica, FPT p. 2339, l. 5-6 and pp. 3012-3013 (Exhibit D-27).
[178] Exhibits 21-B and 21-C, Witness Percinli}, FPT p. 2010.
[179] Witness Vujica, FPT p. 2357.
[180] Witness Percinli}, FPT p. 2047.

"I am the camp warden; if anyone needs a doctor, he has to say so".[181] The evidence furthermore showed that the staff of the Busova~a medical centre came to Kaonik prison only at the request of the accused and that it was also he who got in touch with the medical centre before bringing sick or injured detainees there.[182]

102. Conversely, it was not established that the accused exercised the slightest role in the decision to detain or release prisoners. While talking to Witness McLeod, the accused explained that all the Muslims arrested were the responsibility of the HVO of Busova~a and Vitez, pointing out moreover that the HVO was not professional in carrying out its tasks. He explained that the release of prisoners was decided by the HVO soldiers.[183] Witness Junhov explained that prisoner exchanges were negotiated "at the top" with the military and political leaders of the Croatian and Muslim parties, and does not recall seeing the accused at any such meeting.[184] Conflicting testimony was presented as regards what role the accused played in connection with prisoner exchanges. The discharge documents seem to have been signed by detainees in the office[185] or in the presence of the accused.[186] The accused was usually present at prisoner exchanges but it seems he was not the authority empowered to sign the release documents.[187] According to Witness Bahtija Sivro, who was released on 14 May, the accused was in no way involved in such exchanges and probably was not even informed of them.[188] Witness M explained that he was released on 19 June because the accused had opposed his being released during the previous exchange on 16 May.[189] According to this same witness, the accused again initially refused a prisoner's release during the 19 June exchange. He then had a conversation with an ICRC representative and the prisoner was finally released.[190] These refusals may however have been warranted on the basis of the military status of the prisoners concerned. Witness M, a BH army soldier, was released at the same time as other Muslim soldiers incarcerated at Kaonik prison. They were exchanged for

[181] Witness Osmancevi}, FPT p. 457.
[182] Witness Bili}; Witness Ivancevi}.
[183] Following a discussion, the accused agreed to ask the military police which prisoners might be considered civilians and accordingly released (FPT pp. 105-109). The release of a detainee by the accused at the behest of Witness McLeod (FPT p. 111) does not constitute a sufficient element to establish that the accused held any power whatsoever in the release of prisoners. This release is in fact an isolated case which took place outside the framework of the exchanges in the course of which most Muslim detainees were released.
[184] Witness Junhov, FPT pp. 964-967.
[185] Witness Zlotrg, FPT p. 906.
[186] Witness Surkovi}, FPT p. 938; Witness Kaknjo, FPT p. 191.
[187] Witness Kaknjo, relating the release of 60 elderly persons, indicated that the accused was present but did not sign the documents for that release.
[188] FPT p. 238.
[189] FPT p. 1273.
[190] FPT p. 1283.

Croatian soldiers on 19 June 1993, whereas the 16 May 1993 exchange seems to have involved solely civilians. As to HVO soldiers held pursuant to the order of the Travnik military tribunal or of HVO commanders, they could be released only pursuant to orders from these two authorities. The Trial Chamber therefore considers that the evidence merely established that the accused had at most an executing role in this regard.

ii. The accused's authority over the prison guards

103. The Trial Chamber rejects the Defence argument that the guards, as members of the military police, answered for their acts solely to the commander of the military police. Even if the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police, it cannot be deduced therefrom that he had no authority over the guards. For the reasons set forth above[191], The Trial Chamber considers that anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations.

104. The Trial Chamber finds first of all that the accused had the power to give the guards orders. The testimony of the secretary Bla`enka Vujica, in particular, clearly demonstrated that the guards acted pursuant to the accused's orders. This witness, who was called by the Defence, specified in particular that, "the shift commanders were not allowed to make instructions of their own. They had to receive instructions from the warden".[192] The accused passed on his orders and instructions in particular through a bulletin board located in the hall at the entrance to the first warehouse.[193] Several witnesses of the second period said that the guards addressed the accused by calling him "commander"[194] or that the accused had introduced himself as such to the detainees.[195] Other witnesses heard the accused give the guards orders[196] or hand them papers in the hallway.[197] Two witnesses furthermore stated

[191] See *supra* II, B, 2.
[192] FPT p. 2357.
[193] Witness Jerkovi}, FPT p. 2132.
[194] Witnesses H; Garanovi}, FPT p. 811; Meho Sivro, p. 870.
[195] See Notes 150 and 151 above.
[196] Witness Hajdarevi}, FPT p. 327.
[197] Witness F, FPT p. 717.

they had been hit by guards at the accused's order.[198] Witness E in particular explained that the accused was present when the witness was hit, and that he indicated to the guards to go on or let off hitting "giving signs with his eyes and his head".[199]

105. The evidence moreover showed that the accused could initiate disciplinary or criminal proceedings against guards who committed abuses. This would take the form of the accused reporting to the military police commander and the president of the Travnik military tribunal, who were competent to take the necessary measures.[200] The secretary related on this score that the accused usually had daily contact with the military police commander[201] and the president of the Travnik military tribunal[202], and that it was normal procedure for the accused to report any crimes committed by the guards to the district military tribunal.[203]

106. The issue whether the guards came concurrently under another authority, such as the military police commander, in no way detracts from the fact that the accused was their superior within the confines of Kaonik prison, since it has been proved, as regards the activities within the prison, that the guards obeyed the accused's instructions and were answerable to him for their acts. Accordingly, the Trial Chamber considers that, on the basis of the evidence tendered at trial, it was established that the accused was the superior of prison guards within the meaning of Article 7(3) of the Statute for all matters relating to their duties in connection with the organisation and functioning of Kaonik prison.

iii. The accused's authority over the HVO soldiers in the prison

107. In his capacity as prison warden, the accused had effective authority over the soldiers imprisoned in Kaonik prison for disciplinary punishment or on the orders of the Travnik military tribunal. The evidence tendered at trial did not establish clearly whether the HVO soldiers who committed crimes within Kaonik prison were soldiers imprisoned there, soldiers housed in the building located at the compound entrance, or soldiers entering the compound in violation of the rules.

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[198] Witness E, Witness H.
[199] FPT p. 595.
[200] Witness Vujica, FPT pp. 2334-2335 and 2363; Anto Jerkovi}, FPT p. 2135.
[201] Witness Vujica, FPT p. 2333.
[202] Witness Vujica, FPT p. 2333.
[203] Witness Vujica, FPT p. 2363.

108. The authority of the accused as regards access inside the prison is also uncertain. The accused did not have the authority to issue entrance permits to representatives of international bodies and journalists, who had to seek authorisation from the Busova~a police[204] or the HVO authorities.[205] In respect of HVO soldiers however several witnesses called by the Defence explained that they could not enter the compound without the accused's prior authorisation. Witness Anto Juri}, an HVO battalion leader, for instance, explained that he had to establish his identity and give the reasons for his visit to the guards at the compound entrance. The guards would then consult the accused, who would either grant or refuse access to the compound. According to the head of the guards though this procedure related solely to soldiers who presented themselves at the compound entrance without an entrance permit. The witness stated nonetheless that this control was sometimes ineffective because some of the soldiers, who were armed, would force their way into the compound without the guards being able to do anything.[206]

109. No evidence establishing that the accused could give orders to these soldiers was produced. Two former inmates[207] said they saw the accused instigate or encourage HVO soldiers to hit them. These two witnesses however also said they were unable to distinguish between HVO soldiers and prison guards and their testimony, with reference to "soldiers" notwithstanding, would seem rather to implicate prison guards.[208] In addition, their testimony raises the issue of the direct involvement of the accused and does not provide a basis for concluding that there was a hierarchical relationship between these soldiers and the accused.[209]

110. The accused did however have the power to initiate disciplinary or criminal proceedings against them, according to the same procedure as outlined above with respect to guards.[210] Witness Jerkovi} though did refer to threats made to the accused by soldiers he named in the reports he wrote. The witness added that "it was a time of war, everybody was carrying weapons, and, you know, anything could happen".[211]

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[204] Witness McLeod; Witness Junhov, FPT p. 952.
[205] Journalist Daniel Damon explained having been authorised by Dario Kordi}, FPT p. 1133.
[206] Witness Jerkovi}, FPT p. 2118.
[207] Witnesses L and M.
[208] These witnesses accused in particular one Goran Medugorac and one Anto Caki}, who were referred to as guards by other witnesses.
[209] See *supra* developments concerning the accused's responsibility pursuant to Article 7(1), III, A, 1, a) pp. 36ff.
[210] Witness Jerkovi}, FPT p. 2118.
[211] Witness Jerkovi}, FPT p. 2136.

111. The evidence tendered at trial did not therefore make it possible to establish that the accused was a superior vis-à-vis HVO soldiers.

(ii) The accused knew or had reason to know that crimes were committed

a. The submissions of the parties

112. According to the Prosecution, on the basis of much evidence it was established beyond all doubt that "the accused was fully aware"[212] that the detainees were brutalised within the prison compound. Being on the spot practically all the time, the accused, according to the Prosecutor, was necessarily aware of the lack of medical care, the lack of blankets and heating, and the crammed conditions the detainees had to bear.[213] The Prosecutor drew attention to the evidence of Witness M,[214] to whom the accused said when he was released: "If you return, you won't get out alive".[215] The accused also told the detainee, when he was being examined by a doctor, "Tell the truth. Tell her there was a dance down there".[216] The Prosecutor also referred to the evidence of Witness Dautovi}, who had asked the accused for an end to the ill-treatment, and also that of Witness W who stated that the accused had taken him to the medical centre but had not followed the doctor's recommendations.

113. The Defence for its part submits that the Prosecutor has not proved that the crimes were actually committed and reiterated that the accused could not be the guards' superior.[217]

[212] Closing brief, p. 46.
[213] Closing arguments, FPT pp. 3122-3123.
[214] Closing brief, para. 126, p. 46, and para. 130, p. 47.
[215] FPT p. 1284.
[216] FPT p. 1267; cited in Prosecutor's closing brief, para. 130, p. 47.
[217] Final Defence submissions, pp. 18-19.

b. The Trial Chamber's findings

114. The Trial Chamber notes first that the accused lived inside the prison for at least the first period of detention.[218] He must therefore have been aware of the repeated ill-treatment detainees were subjected to. The accused himself admitted in the course of his conversation with Witness McLeod that some guards whose brothers had been killed at the front tended to take revenge on the detainees.[219] This was further attested to by Witness I's account of having been beaten one evening by an HVO soldier and summoned the following day by the accused for questioning about the cause of his injuries. Five witnesses[220] moreover stated that the accused had witnessed their being abused first-hand, or even encouraged it. Given his training and previous experience at Zenica prison, the accused could not have been unacquainted with the rules relative to the treatment of prisoners and conditions of detention. He had also admitted having knowledge of the Geneva Conventions and their contents.[221] The Trial Chamber therefore finds on the basis of the evidence tendered at trial that the accused knew that crimes were being committed in Kaonik prison.

(iii) Measures taken by the accused

a. The submissions of the parties

115. The Prosecution claims that the accused took no measures to improve the fate of detainees. He could have ordered guards not to beat detainees and informed them of their obligations towards prisoners pursuant to the Geneva Conventions.[222] He could have drawn up a report about guards who committed crimes. He could have desisted from setting a bad example himself when he took part in the assaults, and could have reported to international observers or else have helped some prisoners by prescribing medical treatment at home. Finally, he could have resigned.[223] In the Prosecution's view, through his omissions the accused displayed "an illegal disregard for the [guards'] behaviour and a malicious contempt for the welfare of the detainees at Kaonik".[224]

[218] Witness Jerkovi}, FPT p. 2131.
[219] Witness McLeod, FPT p. 134.
[220] Witness L, Witness M, Witness T, Witness Dautovi}, Witness E, FPT p. 578.
[221] Witness McLeod, FPT p. 104.
[222] Witness McLeod, FPT p. 104.
[223] Closing arguments, FPT p. 3121.
[224] Closing brief para.136, p. 55.

116. The Defence argued that the accused took all measures it was possible for him to take vis-à-vis the perpetrators of violations, as the accused could only inform the military officials through reports of the offences committed by soldiers in the compound, which he did. The Defence made particular reference to Exhibits D 22 and D 25 as proof that the accused had actually done so.[225]

b. The Trial Chamber's findings

117. Despite the authority he had, the accused took no measures to prevent the crimes committed. Nor did the accused use everything in his power to attempt to punish the guards responsible for them. None of the reports transmitted to the military police commander or to the president of the Travnik military tribunal[226] dealt with the assaults committed by guards or HVO soldiers within Kaonik prison. The secretary specified before the Trial Chamber that she had never drawn up a report exposing any crimes by guards.[227] Further, the president of the military tribunal said that the detention unit and the military tribunal could have contacted at any time by telephone or fax or by using military equipment, even when communications were cut off at the time of the events in January 1993.[228] This means that the accused was always able to take measures against guards guilty of crimes. Far from ordering guards to cease the assaults, the accused sometimes even took part in them, as attested to by Witnesses L and M.[229]

[225] *Ibid*, p.64.
[226] Exhibit D-25 is relative to a report by the accused concerning the unauthorised entry of a member of the military police into the compound complex; Exhibit D-22 is relative to a report notifying the Travnik military tribunal that two detainees had been killed outside of the prison.
[227] Witness Vujica, FPT p. 2364.
[228] Witness Percinli}, FPT p. 2005.
[229] As seen previously, the testimony by Witnesses T and Dautovi} was not taken into consideration. For further details concerning these testimonies see *infra* III, B.

(iv) Conclusions of the Trial Chamber with regard to the responsibility of the accused pursuant to Article 7(3)

118. It is apparent from the above that the accused clearly exercised superior authority over the prison guards, that he knew that crimes were being committed, and that he did not take the necessary and reasonable measures to prevent or punish such crimes. As a result the accused must be held responsible, pursuant to Article 7(3) of the Statute, for the crimes committed by the guards inside the prison.

119. The Trial Chamber notes however that the evidence did not provide a basis for the conclusion that the accused had superior authority over the HVO soldiers entering the prison. The Trial Chamber accordingly finds that the accused cannot be held responsible under Article 7(3) of the Statute for acts perpetrated by these HVO soldiers inside the prison.

2. The accused's responsibility for acts committed outside the prison

(a) The accused's responsibility under Article 7(1)

(i) The submissions of the parties

120. The Prosecutor alleges that the accused "was also directly involved in sending prisoners off to dig trenches near the front lines"[230] and in using some detainees as human shields. The direct involvement of the accused was proved, so the Prosecutor submits, by his frequent presence when groups of prisoners were sent out on trench-digging missions. The Prosecutor moreover accuses him of having contributed to the unlawful detention of Muslims at Kaonik prison, as evidenced by his capacity to delay or even deny the release of certain prisoners.[231]

121. Besides contesting the very existence of the crimes alleged by the Prosecution, the Defence contends that no involvement on the part of the accused was proved. It notes in particular that the Prosecution provided no document indicating that the accused had been empowered with any military or civilian authority, or that he had participated at any meeting

[230] Prosecutor's closing brief, para. 78, p. 31.
[231] Prosecutor's closing brief, para. 117, p. 44.

or negotiation where major political or military decisions were taken.[232] In addition, the Defence observes that no prosecution witness, who at the time of the events was in a position of responsibility in a local military, political or administrative body, testified to having seen the accused take part in meetings where decisions were taken in relation to authority or to military or administrative issues or any other matters.[233] The Defence therefore submits that the accused's involvement in the alleged crimes was not proved.

(ii) The Trial Chamber's findings

122. Evidence of two instances where detainees were used as human shields was produced.[234] The detainees who were taken to the villages of Skradno and Strane testified that they were called out by Deputy Commander Marko Krili},[235] and tied together by HVO soldiers.[236] One of these detainees added that the accused was present.[237] Witness Novali}, who had been sent to the village of Strane to negotiate with its inhabitants the surrender of the village, explained that first a guard and then the accused had offered him the opportunity to leave the second warehouse he was held in and to take the cell of his choice as a reward for the mission he had performed. The witness added that the accused had however stated that he disapproved of using the detainees as human shields.[238] The detainees who were taken to the village of Merdani explained that they had been selected at random by HVO soldiers.[239] One of them said that the accused had been present.[240] On the basis of the evidence tendered, it is established therefore that the accused knew what was happening. The issue is whether the accused, by not seeking to prevent this practice despite his background and his responsibility toward detainees as prison warden, could be held responsible for these acts under Article 7(1).

[232] Final Defence submissions, para. 1.3c, p. 15.
[233] Final Defence submissions, p. 15.
[234] An initial group of 13 persons was taken to the village of Skradno and then to Strane (Witnesses N, O, Q, S); another group was taken the following day to the village of Merdani (Witnesses P, R).
[235] Witness N, FPT p. 1304; Witness S.
[236] Witness S, FPT p. 1409.
[237] Witness O, FPT p. 1336.
[238] Witness Novali}, FPT p. 397.
[239] Witness P, FPT p. 1360; Witness R, FPT pp. 1391-1392.
[240] Witness R, FPT p. 1392.

123. As regards the use of detainees to dig trenches, the evidence showed that the decision to do so was taken by the brigade commanders in Busova~a and Vitez.[241] The detainees were taken to the trench site and then back to Kaonik prison by HVO or military police soldiers,[242] who were distinct from the prison guards.[243] It is therefore apparent that the accused neither ordered nor planned the trench-digging.

124. His role in the implementation of these assignments remains unclear. Conflicting testimony was heard concerning the drawing up of the list of prisoners picked for trench-digging missions. The secretary of the accused was the only one to affirm that these lists were drawn up by the accused, in agreement with the "inspector".[244] She explained subsequently however that drafting these lists was routine work which did not require the accused's involvement.[245] Witness Jerkovi} for his part explained that the guards selected the detainees by running down the list of prisoners and ignoring those sick or injured.[246] While some prosecution witnesses said that the dispatch of detainees to the trench site was well organised,[247] others reported that HVO soldiers sometimes entered cells and picked out detainees at random without the guards or the accused being involved.[248]

125. The Trial Chamber notes however that the accused was sometimes present when the prisoners were picked out. Several witnesses did moreover state that he was practically always present when prisoners returned to make sure they were all there.[249] It bears recalling that the accused, as prison warden, was in charge of the prisoners' welfare and consequently could and even should have taken measures to try to stop them from working in dangerous circumstances.

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[241] Witness McLeod, reporting what Aleksovski said, FPT p. 107; Witness Raji} (secretary of the Travnik defence department), FPT p. 2479; Witness Juri} (HVO commander), FPT pp. 2446-2447; Witness Lukin ("Domobrani" prison guard).
[242] Witnesses Stipo Juri} and Lukin said that HVO soldiers were in charge of transporting detainees; Witnesses Juri} and Vujica, FPT p. 2358, explained that these orders were executed by soldiers of the military police.
[243] Many former inmates said they could not distinguish between HVO soldiers and prison guards, and therefore could not describe the status of the guards accurately. However, they all said that the guards were persons distinct from the soldiers who took them to and guarded them at the trench site. See for example the statements by Witnesses G, FPT p. 744; E , FPT p. 577; A, FPT p. 438; B, FPT p. 515 or W, FPT pp. 2776-2777.
[244] Witness Vujica, FPT p. 2358. According to Witness Kaknjo the person called "inspector" was named @arko Petrovi}, FPT p. 189.
[245] *Ibid*.
[246] Witness Jerkovi}, FPT p. 2109.
[247] Witness F, FPT p. 699.
[248] Witness I, FPT p.842. Witness Osmancevi} said that the accused was never present when the list of prisoners sent off on trench-digging missions was drawn up, FPT pp. 457-458. Witness H explained that a commander of the locality of Bare came and got 30 men for trench-digging. He picked them out himself, without any apparent involvement by the accused, FPT p. 757.
[249] Witness Osmancevi}, FPT pp. 457-458.

126. According to the Defence however the accused did not object to these practices because they were based on a legal obligation. Every citizen of Bosnia had the obligation, by virtue of a law of that State, not only to perform military service but also to do work in the event of imminent danger.[250] It was on the basis of this law that the detainees were sent off to dig trenches.

127. Irrespective of the fact that it is doubtful that this law would have obliged citizens of Bosnia to dig trenches near the front lines, this legislation in any event could not apply to detainees of Kaonik prison. The incarceration of Muslims was related to the armed conflict in the region, and the Muslim detainees were therefore entitled to the protection provided by international humanitarian law, which, in this regard, proscribes work by detainees in hazardous conditions. Some might argue that the moral element essential for the perpetrator of a violation to be held liable was lacking in this specific instance. The accused did not oppose the practice because he was convinced it was based on a legal obligation he could not ignore.[251]

128. This argument does not stand up upon a review of the facts. The accused admitted having been informed by the ICRC that it was in contravention of the Geneva Conventions. He said he had been to see the Busova~a commander[252] with a representative of the ICRC who tried in vain to have these practices stopped. The accused added that he approved of these practices because the detainees were the only people available to do these jobs.[253] All this went to show that the accused knew not only that detainees were being sent off to dig trenches, but also that this practice was unlawful. Further, the detainees were very often used for this purpose and the accused, as he was usually present when the prisoners returned, could not have been unaware of the extremely difficult conditions and the repeated abuse prisoners were subjected to at the trench site the marks of which were clearly visible on them. Whether the fact that the accused, given his authority as prison warden, did not try to prevent this practice gives rise to culpability under Article 7(1) of the Statute has to be considered.

129. The absence of any reaction on the part of the accused is not in itself enough to establish that he approved and encouraged the use of detainees as human shields or for trench-

[250] Witness Raji}, FPT p. 2464.
[251] Final Defence submissions, pp. 51-2.
[252] Witness McLeod, FPT p. 107.
[253] Witness McLeod, FPT p. 107.

digging. As seen earlier,[254] the presence of an accused having a certain level of authority is not in itself enough to prove any intentional participation He cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes. However, the Trial Chamber notes that the accused in fact sometimes took part in designating the detainees to be sent off to dig trenches and made sure they returned. The accused's involvement in selecting detainees admittedly was not systematic, nor was his active participation essential for carrying out these acts. But this is not required for him to be held responsible pursuant to Article 7(1). Actually, all that is involved is ascertaining whether through his acts or omissions the accused contributed significantly to the commission of the crimes. The Trial Chamber notes the recurring nature of these crimes and considers moreover that the accused contributed substantially to the practice being pursued by not ordering the guards over whom he had authority to deny entrance to HVO soldiers coming to get detainees and by participating, be it on an on-and-off basis, in picking out detainees. Likewise, by his attitude towards Witness Novali} and his passive presence when the detainees were taken away to serve as human shields, he manifested his approval of this practice and contributed substantially to the commission of the crime. Consequently the Trial Chamber finds the accused responsible under Article 7(1) for having aided and abetted in the use of detainees as human shields and for trench-digging.

130. It was not proved, however, that the accused participated directly in the mistreatment meted out to the prisoners there. Nor was such mistreatment claimed by the Prosecutor. The accused cannot therefore incur responsibility under Article 7(1) for the mistreatment suffered by the detainees outside the Kaonik compound.

(b) The responsibility of the accused under Article 7(3)

(i) The submissions of the parties

131. The Prosecutor argues that in his capacity as commander of Kaonik prison, the accused "bore responsibility for the offences committed against the detainees during the relevant time period described in the indictment",[255] including those committed outside the compound. In the Prosecutor's view, the accused should be held responsible, under Article 7(3), for the use of detainees as human shields and for digging trenches near the front line, as

[254] See developments on Article 7(1), II, B, 1, pp. 23ff.

well as for the mistreatment of the prisoners there. The Prosecutor gives a number of instances which, she states, proved the accused's authority in those matters. For example, as to the use of detainees for trench-digging, the Prosecution observes that the list of designated prisoners was in the accused's office, that the accused was often present when detainees were called out for or returned from the trenches,[256] and that he could have exempted some prisoners from going to dig trenches.[257]

132. The Defence urges conversely that any incidents outside the Kaonik compound "can in no way be attributed to the responsibility of command of Mr. Aleksovski".[258] It was not demonstrated that the accused had any command authority whatsoever over HVO soldiers which would have enabled him to prevent the perpetration of the acts or to punish the perpetrators thereof. As to the use of detainees as human shields, the Defence added that it had not been established that the accused knew what the HVO soldiers' intentions were when they tied up the detainees and took them outside Kaonik compound.

[255] Closing brief, para. 99, p. 39
[256] Closing brief, para. 111, p. 42.
[257] Closing brief, para. 113, p. 43.
[258] Closing brief, p. 76.

(ii) The Trial Chamber's findings

133. The Trial Chamber cannot subscribe to the Prosecutor's argument that, as the warden of the prison, the accused should be held responsible for all the crimes committed against detainees during the period covered by the indictment. As seen previously, the accused's superior responsibility could be incurred only if, *inter alia*, it was proved that he had effective power over the perpetrators of the crimes. The fact that he was the warden of the prison does not in and of itself prove that he had any such power over the HVO soldiers implicated in the alleged acts.

134. The Trial Chamber would begin by noting that the powers the accused was vested with did not extend beyond the confines of the Kaonik compound. In particular, no evidence has been tendered which established that the accused had authority over the HVO soldiers or members of the military police who took away and guarded the Muslim detainees at the trench sites, nor over those who used detainees as human shields.

135. On the contrary, and as was seen earlier, it was pursuant to orders from HVO commanders at the front that detainees were sent to dig trenches,[259] as the Prosecutor herself recognises in her closing brief.[260] The evidence showed that detainees were taken on trench-digging missions by HVO or military police soldiers, who were distinct from the prison guards,[261] and who acted under the orders of the commanders of military units in the field.[262] Contrary to what the indictment alleges,[263] it was not proved that the accused's authorisation was required for detainees to be taken away as human shields or for trench-digging. The only authority the accused had was the ability to object to certain prisoners being sent off on health grounds.[264] But this does not prove that the accused had sufficient authority to give orders to and punish the soldiers who took along and guarded the prisoners used as human shields and for trench-digging.

136. This notwithstanding, the accused did not complain to the competent authorities about these practices even though he had the means to send them reports. Taking up the arguments

[259] See, for instance, testimony of witnesses Stipo Juri}, Lukin, Vujica, or that of prosecution witness Zlotrg.
[260] Closing brief, para. 84, p. 33.
[261] Cf. note 242.
[262] Witness McLeod, relating what Aleksovski said, FPT p. 107; testimony of Mr. Raji}, FPT p. 2479; Witness Anto Juri} (head of battalion), FPT pp. 2446-2447; Witness Lukin.
[263] Indictment, para. 51.

of the Defence, the law of Bosnia imposed an obligation on the accused, as a citizen of that State, to do so.[265] This omission would therefore be enough for him to be held responsible in domestic law.

137. However, the accused can incur responsibility under Article 7(3) only if it has been proved that he had the standing of a superior over the perpetrators of the crimes. As has been referred to earlier, the ability to initiate sanctions against the perpetrators of unlawful acts is not sufficient to establish the position of the accused as a superior. The Trial Chamber finds that there is no evidence which would allow the conclusion to be drawn that the accused had effective control over the HVO soldiers and the military police who perpetrated the crimes mentioned here. In particular, it has not been established that the accused could give them orders. Therefore, the Trial Chamber holds that the accused is not responsible within the meaning of Article 7(3) for the mistreatment suffered by the detainees outside the compound.

3. General conclusions on the accused's responsibility

138. The Trial Chamber therefore considers that the accused is responsible under Articles 7(1) and 7(3) for the physical detention conditions and the mistreatment to which the prisoners were subjected within the Kaonik compound.[266] The Trial Chamber also holds that the accused aided and abetted in the use of the detainees as human shields or trench-diggers and therefore incurs responsibility under Article 7(1). However, the Trial Chamber finds that the accused cannot be held responsible for the mistreatment the prisoners suffered outside the compound. Consequently, the Trial Chamber will therefore limit its examination to the alleged acts that occurred within the compound.

B. The Kaonik prison: facts and discussion

139. The Trial Chamber will first present the arguments of the parties, describe the Kaonik compound and the conditions of the arrested Bosnian Muslims, and determine the number of Muslims detained as well as the duration of their detention. It will thereafter successively

[264] Witness Jerkovi}, FPT p. 2109.
[265] Closing arguments, FPT p. 3221.

analyse the allegations relating to the conditions of detention (inadequate space and heating, inadequate sanitary facilities, inability to practise Muslim rites, insufficient food and medical care) and those relating to the mistreatment suffered within the compound.

1. Submissions of the parties

(a) The Prosecution

140. The Prosecutor submits that the conditions of detention at Kaonik prison were "deplorable".[267] Specifically, she refers to inadequate space and heating, insufficient hygiene, medical care and nutrition. She further contends that beatings were meted out regularly and systematically inside Kaonik prison and charges the accused with having participated, aided and abetted in the commission of those acts or having failed to punish the perpetrators thereof despite the power with which he was vested at the time.

(b) The Defence

141. The Defence acknowledges that the detention conditions were "bad"[268] but not bad enough for them to be characterised as grave breaches of international humanitarian law. The Defence argues that conditions were, in fact, neither better nor worse than those prevailing in the area at the time. The accused had to contend with the massive influx of detainees into a facility not initially designed for that purpose because only one of the Kaonik compound buildings had been converted into a military prison in December 1992. Such a facility was obviously inappropriate for the detention of several hundred people. The Defence also draws attention to the fact that the guards received the same food as the detainees and argues that the accused did everything in his power to improve the detention conditions.[269]

142. As regards mistreatment of detainees inside Kaonik, the Defence contends that the Prosecutor failed to prove her case. Whereas many witnesses stated that they had seen or heard beatings, not many claimed that they themselves were beaten. Among those claiming

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[266] As examined in chapter "B. Kaonik prison: facts and discussion", par. 139.
[267] Prosecutor's Closing Brief, para. 57, p. 23.
[268] Final Trial Brief Submissions by the Defence, p. 57

to have seen or heard beatings, most were unable to name the victims or perpetrators. Furthermore, no medical certificates were produced in support of the alleged mistreatment. Some witnesses even admitted that they were never subjected to mistreatment during their stay there. The Defence also claims that some witnesses had been "manipulated and instructed by the AID secret police controlled by the Bosnian Muslims"[270] but, in support of this claim, the Defence offers only the fact that the statements of the witnesses were taken at the Zenica police premises during the indictment phase. While conceding that abuse had indeed occurred, the Defence argues that it was not so great as to constitute a grave breach under Article 2(c) of the Statute.

2. Kaonik compound

143. Testimony at trial demonstrated that Kaonik prison compound accommodated former barracks of the Yugoslav People's Army (JNA) which were used primarily for the storage of weapons.

144. At the entrance to the compound was a house with dormitories, a kitchen and offices on the upper floor.[271] All the facilities date back to the time of the Yugoslav People's Army. Although not part of the Kaonik prison itself, some of the activities relating to the prison took place in this house. The prisoners' meals were prepared in the building's kitchen. The secretary Bla`enka Vujica testified that she worked in one of the offices before being transferred to the actual prison facility at the time of the first wave of arrests in January 1993. Individuals connected with the HVO were apparently housed in the dormitories at the time relevant to the indictment, even though their status could not be determined precisely. Witness Bla`enka Vujica stated that the building was occupied by the military police. Her assertion is consistent with the fact that she was recruited by the military police and initially worked in that building. However, a former detainee stated that, in his opinion, the soldiers at the compound entrance were HVO army personnel.[272] Two other former detainees[273] thought that the "intervention platoon", defined by them as a military unit reporting to the HVO, was

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[269] Final Trial Brief Submissions by the Defence, p. 57.
[270] Final Trial Brief Submissions by the Defence, p. 25.
[271] Annex A.
[272] Witness H., FPT pp. 787 and 789.
[273] Fuad Kaknjo, FPT p. 194; Witness M, FPT p.1278.

housed there. There can be no doubt that the entrance to Kaonik compound was under military police control.[274]

145. Several other buildings were located within the compound. It seems that supplies of mines and other JNA weapons were still being stored there. The secretary explained that they were not allowed to approach those areas, which were considered dangerous.

146. Kaonik prison itself consisted of two warehouses about one hundred metres from the entrance to the compound.[275] The events related in evidence by former detainees took place for the most part at the two premises.

147. One of the warehouses had been converted into a prison by partition walls arranged so as to form cells on both sides of a central corridor (hereinafter "the first warehouse").[276] This building, which was about 30 metres long,[277] had sixteen cells, the guards' office and the accused's office which he shared with his secretary Bla`enka Vujica. His office was to the left of the front door while the guards' was to the right. At the end of the corridor were a table where some prisoners partook of their meals and a stove used for heating. In the guards' office was a television set which could be seen by the prisoners seated at the table for their meals.[278] The cells had metal doors, most of which locked from the outside with a type of latch.[279] Initially, that is, in December 1992, the facility was used as a military prison to detain individuals incarcerated on the orders of the district military tribunal in Travnik. Military personnel serving sentences for breaches of discipline were also held there. [280] The prison is still in operation and functions under conditions very similar to those at the time.[281]

148. Next to the building was a 30 to 35 metre-long and 18 to 20 metre-wide warehouse[282] which had not been converted and had neither electricity or running water (hereinafter "the second warehouse").[283]

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[274] Witnesses Vujica, H., Daniel Damon.
[275] Defence Final Brief, p. 55; Witness Kaknjo, FPT p. 186.
[276] Annex B.
[277] Witness Surkovi}, FPT p. 932.
[278] Witness Zlotrg, FPT p. 903.
[279] Witness Jerkovi}, FPT p. 2119.
[280] Witness Vujica, FPT p. 2322; Witness Jerkovi}, FPT pp. 2096 and 2113.
[281] Witness Vujica.
[282] Witness I, FPT p. 851. Witness F referred to a 70 by 25 metre warehouse in the middle of the compound. He was however the only one to testify that he was incarcerated there.
[283] Annex C.

3. Arrests of Muslim civilians

149. The first detention period lasted 15 days, from 25 January to 8 February 1993, the date the Bosnian Muslims were exchanged in the presence of ICRC representatives[284] for about 30 Croatian prisoners from Kacuni.[285] According to the information given by the accused to Witness McLeod, Kaonik prison held about 400 Muslims during that period.[286]

150. A second wave of arrests occurred from about 14-20 April 1993. Some Muslims were taken straightaway to Kaonik prison whereas others were first detained at the Vitez cultural centre.[287] In particular, such was the case of 13 Muslims living in Vitez who were arrested in mid-April and then transferred to Kaonik prison in early May.[288]

151. The Bosnian Muslims taken during the second wave of arrests were detained for a period of one to two months.[289] A first prisoner exchange took place on 16 May 1993 in the presence of United Nations military observers and a second one was organised by the ICRC on 19 June 1993 during which the last Muslim detainees (except for Witness T) were released.[290] According to Witness E, the detainees were considered to be soldiers, which, in his opinion, was why they were not released on 16 May but were exchanged on 19 June 1993 for Croatian soldiers held prisoner in Zenica.[291] The Trial Chamber notes that of the six witnesses who stated that they were released on that day, five introduced themselves as BH army soldiers.[292]

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[284] Witness Vujica, FPT p. 2342.
[285] Witness D, FPT p. 668.
[286] Witness McLeod, FPT p. 104. Information confirmed by Witness L who explained that about 400 people were released on 8 February 1993.
[287] The witnesses also used the term "Vitez cinema".
[288] See the testimony of Bahtija Sivro, FPT p. 225. These individuals had in common the fact that they all held important positions in the political, social and economic life of the Vitez municipality. Some were physicians, others engineers, and still others members of the SDA, the Party of Democratic Action (This was the case *inter alia* of two witnesses who appeared before the Trial Chamber: Fuad Kaknjo and Bahtija Sivro) defined by witness McLeod as the political organisation underpinning the Army of Bosnia and Herzegovina, FPT p. 89. The Prosecutor's evidence, however, demonstrates that the charges brought against the accused concern only detainees at Kaonik. The Trial Chamber will therefore confine its analysis to the acts which occurred within Kaonik prison.
[289] Witness Osmancevi} was detained for two months and six days, FPT p. 469. Witness I said that he was released on 26 or 27 April 1993 along with five other detainees, that is for a much shorter time (approximately 12 days), FPT p.851. It appears that they were drivers for the Red Cross and were released the day after the visit by the Red Cross.
[290] Six witnesses heard during the trial were released on that date: Witnesses E, M, Dautovi}, Osman~evi}, H and L.
[291] Witness E, FPT p. 596.
[292] Witness Dautovi}'s status is not very clear.

152. The number of Muslims detained during that period cannot be ascertained with certainty. Testimony produced at trial was not always consistent. Some witnesses spoke of 200 to 300 people, others of about 100 to 200.[293] When recounting the statements of the accused on 10 May 1993, Witness McLeod indicated that 107 Muslim prisoners were detained on 16 April 1993, 109 on 6 May 1993 and 79 on 10 May 1993.[294]

153. All the detainees were Muslims and most were civilians. Some presented themselves as soldiers, members of their municipal territorial defence at the time of their arrest. Their task was to go on patrol to protect their villages. Most said that they had neither uniforms nor weapons.[295] Two witnesses[296] presented themselves as members of the Army of Bosnia and Herzegovina and were arrested while on patrol.[297] Most, however, were arrested by HVO soldiers while they were at home and unable to defend themselves. The Defence itself acknowledges that the detainees were Muslim civilians.[298] Aside from a young teenage boy detained in Kaonik,[299] all the Muslims were adult men 18 to 60 years of age.[300] The elderly and ill seem were released shortly after their arrest. During the first detention period, 60 people were released in the presence of the accused as soon as they arrived.[301] During the second period, after having spent a month in detention, the elderly and ill were transferred to the village of Skradno and put under a type of house arrest.[302] The accused gave them the choice of two destinations: Busova~a or Skradno, two municipalities under HVO control. He suggested however that they go to Skradno and not flee because a prisoner exchange would soon be organised. The ICRC was responsible for providing supplies to the prisoners in Skradno.

[293] Witness Osman~evi}, FPT p. 449.
[294] FPT p. 105.
[295] Witness Osman~evi}, FPT p. 442.
[296] Witnesses L and M.
[297] Witness M, FPT p. 1234.
[298] Final Trial Brief Submission by the Defence, pp. 53 and 72.
[299] Witness D, FPT p. 556; Witness F, FPT p. 682.
[300] In his testimony witness McLeod stated that the civilian detainees were men about 20 to 40 years of age, FPT p. 141.
[301] Witness B, FPT pp. 596-597; Witness W, FPT p. 3565; Witness Hajdarevi}, FPT pp. 362-397.
[302] Witness M, FPT p. 1272; Witness J; Witness H.

4. The detention conditions

(a) Inadequate space and heating

(i) Inside the first warehouse

154. Most of the cells were less than 10 square metres[303] without lighting or windows facing out. A grate above each cell let in light from the corridor. The floor was concrete. Boards with straw mattresses were used as beds. The cells were so crowded that not everyone could lie down. During each of the periods several witnesses indicated that as many as 10 to 40[304] of them were jammed into a cell. Witness Junhov, the European observer who visited a cell where *Mujahedin* were being held, testified that there was only one bed for five detainees. Other witnesses, however, stated that they were two to a cell for some time. This, for instance, was the case for Witnesses L and M,[305] T and Dautovi},[306] and for Witness Garanovi}. Others were apparently transferred to larger cells as soon as that became possible.[307]

155. Many witnesses, in particular those detained during the first period, complained about the inadequate heating. According to the majority of the witnesses, the single source of heat was a stove in the corridor. Only Witness C said that the heating pipes were above the doors of the cells. The heat came in through the grates over the doors. Many witnesses complained about the lack of blankets. Several detainees of the first period however apparently were able to use old JNA uniforms they found in the cells to protect themselves from the cold.[308]

(ii) Inside the second warehouse

156. Most of the first period witnesses said that 300 to 400 people were crammed into the "second warehouse".[309] On the first night, they had to sleep crouched on the concrete floor.

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[303] Most of the witnesses described the cells as being 2 or 3 x 3 metres. Some witnesses, however, said that their cells were considerably larger. Witnesses Zlotrg and V spoke of 12m² cells. Witness Surkovi} said that he was held in cell no. 13 which, according to him, was 15-16 square metres.
[304] Only one witness spoke of 40 people, Witness V, FPT p. 2707. In general, the number given by the witnesses usually varied from about 10 to 25-30. According to Witness McLeod there were between four to ten Bosnian Muslims per cell, FPT, p. 145.
[305] Witness M, FPT. p. 1243.
[306] Witness T said that he had been held in cell 4. Dautovi} said that he had been held in cell 3.
[307] Witness Surkovi}, FPT p. 935.
[308] Witness C, FPT pp. 546-547.
[309] Witness R, FPT p. 1391.

Wooden pallets used to transport building materials were brought in the day after the detainees had arrived so that they could lie down on them. The number of pallets, however, fell far short of the number needed to accommodate all the detainees. Many former detainees complained about the inadequate supply of blankets[310] and the lack of heating which made the detention conditions particularly difficult during that winter month. A fire was lit at the back of the warehouse a few days after the detainees arrived. Most of the witnesses said that they had spent one to two nights in the second warehouse.[311]

157. The detainees who arrived in April 1993 were housed in this empty unheated warehouse. On the night of 15 - 16 April, 80 to 100 people slept in the warehouse.[312] Some of them testified that they had to sleep crouched on the concrete floor for about six days.[313] About thirty pallets were then brought in and a stove set up. Another detainee stated that a fire was sometimes lit.[314] There were not enough pallets for all the detainees.[315] A single blanket had to be shared by two prisoners. Some time between 15 and 20 May, 18 Muslims were still being detained in the second warehouse.[316] According to one of the witnesses, less food was given to the prisoners than in the first warehouse.[317]

158. The evidence clearly demonstrated that the premises were not appropriate for the number of detainees. The Trial Chamber finds that the inadequate space and heating which made the detention particularly difficult has been established.

(b) Sanitary conditions

159. All the witnesses, including those testifying for the Defence, agreed that the detention conditions were poor. The first warehouse had only one sink and two toilets in the corridor, one toilet for the staff and the other for the detainees. The detainees had to knock on the cell

[310] There was only one blanket for two detainees. Some detainees even claimed that there was only one for three to four prisoners (testimony of Witness B.).
[311] Witness R, FPT p. 1391.
[312] Witness Bahtija Sivro, FPT p. 870.
[313] Witness Osman~evi}.
[314] Witness I, FPT p. 852.
[315] Witness M, FPT pp. 1464-1465.
[316] Witness E, FPT p. 586; Witness Osmancevi}, FPT p. 461.
[317] Witness Osman~evi}, FPT p. 478.

door and ask the guards to let them go to the toilet.[318] Sanitary facilities were obviously insufficient for the number of detainees and five-litre metal containers were placed inside the cells to remedy the situation. Cleaning products was provided by the army or the ICRC but in insufficient quantities[319] to keep whatever sanitary facilities there were clean.

160. The conditions in the second warehouse were worse. At first, there were neither toilets nor places to wash. The detainees were either taken into the first warehouse or given pails by the guards.[320] A latrine was then dug outside the warehouse.[321]

161. Witness Junhov who visited the prison at a time when no Bosnian Muslims were being detained inspected a cell with five *Mujahedin*. According to him, the premises and prisoners were very dirty and the cells smelled very bad. The prisoners explained to him that they had not washed for a month. This was corroborated by the testimony of Witness Damon who visited the prison on 14 May 1993.[322] Several witnesses[323] also testified before the Trial Chamber that they had been unable to wash throughout their detention. Conversely, Witness McLeod noted during his visit on 10 May 1993 that most of the detainees were relatively clean and in good health.[324]

162. A first period witness[325] said that the accused took in the detainees when they arrived and apologised for not being able to provide them with better detention conditions. In order to improve the sanitary conditions, the accused did take certain measures: on two occasions, in February and April, he asked the Busova~a medical centre to come to fumigate the premises and to exterminate rats.[326] The centre's physician gave the accused advice about sanitary measures.[327] No epidemics or illnesses resulting from inadequate sanitary conditions were noted among the detainees.

[318] Witness L, FPT p. 1218.
[319] Witness Vujica, FPT p. 2348.
[320] Witness E.
[321] Witness H, FPT p. 765.
[322] Witness Daniel Damon characterised the detention conditions at Kaonik as "inhumane" even though he did say that they were not the worst he had seen, FPT p. 1135.
[323] Witnesses D; E, FPT p. 590; M, FPT p. 1282; H. and Dautovi}.
[324] FPT p. 141.
[325] Witness Novali}, FPT p. 401.
[326] Witness Stapi}, FPT p. 1912; Witness Ivan~evi}, FPT p. 2015; Witness Vidovi}, FPT p. 1992.
[327] Witness Stapi}, FPT p. 1907.

163. Kaonik prison is still being used today and, according to the prison secretary, the present conditions are similar to those prevailing at the relevant time. A bathroom, two toilets and lighting in the cells are the only improvements made since then. The secretary testified that in early 1998, an international commission inspected the prison and found that the detention conditions there were satisfactory.[328]

164. The sanitary conditions could have been considered reasonable for a number of detainees proportional to its prison capacity. However, they were highly unsatisfactory in view of the number of individuals detained throughout the period covered by the indictment.

(c) Performance of religious rites

165. The Prosecutor alleges that "hygiene was non-existent, which prevented the Muslim prisoners from performing their religious rites".[329]

166. The evidence demonstrated that the performance of Muslim religious rites was not prohibited inside Kaonik prison.[330] The only condition imposed was that the rites be performed in silence. Witness Jerkovi}, the head of the guards during the first detention period, even testified that a *hodja*, that is, a Muslim cleric, came to the Kaonik compound from Busova~a to conduct religious services and brought biscuits for the prisoners. This information, however, was contradicted by a Prosecution witness for the second period.[331]

167. The detainees who complained about not being able to perform their religious rites spoke rather of inadequate hygiene, the difficulty in obtaining water and the fatigue caused by working in the trenches.[332]

168. In sum, it was not established that the difficulties encountered by the detainees in respect of the observance of religious rites resulted from any deliberate policy of the accused or of the men placed under his authority. In this respect, the Trial Chamber notes that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, though not directly applicable, stipulates in Article 93 that "[i]nternees shall enjoy complete latitude in the

[328] Witness Vujica, FPT pp. 2349-2350.
[329] Prosecutor's Closing Brief, para. 29, p. 14.
[330] Witnesses G and Hajdarevi}.
[331] Witness M, FPT p. 1287.
[332] Witness G.

exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities". In the present case, the practice of religion was not prohibited and most of the victims stated that they were able to practise their religion despite the difficult conditions. The Trial Chamber would thus reject the Prosecutor's allegation on this point.

(d) Food

169. The same type of food was provided during both periods. Meals usually consisted of two pieces of bread, a plate of bean soup for two prisoners,[333] and some tinned fish. Some detainees stated that they had to wait for one[334] or even two[335] days after their arrival before being fed. One witness said that there was hardly enough food to ensure survival. Another witness[336] stated that the two hundred prisoners crammed into the warehouse had only 15 to 20 minutes to eat which meant that not all the detainees had time to get food. Even though most of the former detainees acknowledged that they usually did receive three meals a day, they also said that the meals were so poor that one former detainee claimed to have lost 36 kilos. [337] Another said that he lost 40 to 42 kilos.[338]

170. When the detainees wanted water, they had to knock on their cell doors and wait for a guard to open them.[339] The second warehouse had no running water and only one pail was made available to the prisoners. Witness Jerkovi} stated that the water supply was sometimes cut off because the pipes had frozen. In those cases, plastic containers were used to draw water from a well located near the prison facilities.

171. Some of the witnesses detained in the first warehouse during both periods,[340] stated that the prisoners ate at the table at the end of the corridor.[341] The detainees ate there in small groups, cell by cell.[342] One witness even said that the food was "not bad".[343]

[333] Witness B, FPT p. 507.
[334] Witness Meho Sivro, FPT p. 872.
[335] Witness Osman~evi}, FPT p. 449.
[336] Witness I, FPT p. 852.
[337] Witness Zlotrg, FPT p. 907.
[338] Witness E, FPT p. 589.
[339] Testimony of witnesses Damon, FPT p. 1135, B and Zlotrg.
[340] Witness G for the first period, Witness Osman~evi} for the second period.
[341] Witnesses Osman~evi}, FPT p. 465; Garanovi}, FPT p. 815; Surkovi}, FPT p. 932; G, FPT p. 733.
[342] Witness Zlotrg.

172. The Defence witnesses all stated that the food served to the detainees was the same as that given to the guards and the HVO soldiers. This information was corroborated by the testimony of former detainees.[344] The food provided by an HVO barracks in Draga[345] was prepared in the house at the main entrance.[346] The HVO brought the food from Draga to Kaonik. The Busova~a medical centre staff also received the same food. The Defence witnesses added that they were all given the same amount of food and that when food was scarce everyone received only two meals a day.[347] The accused had occasion on 10 May 1993 to tell Witness McLeod that food shortage was one of the prison's main problems.[348] However, during his visit on 14 May 1993, Witness Damon noted that the detainees did not seem to be starving.

173. The testimony does not show serious food shortage in Kaonik prison. The detainees were fed and the relative lack of food was the result of shortages caused by the war and affected everyone, detainees and non-detainees alike. The testimony moreover in no way demonstrates a desire to starve the detainees or to differentiate the detainees from prison staff.

(e) Medical care

174. It is clear that Kaonik compound did not have an infirmary[349] which is why the detainees had to be taken to the Busova~a medical centre for treatment. Whereas some detainees said that, despite their requests,[350] they had received no medical treatment for the consequences of mistreatment or chronic illnesses, others stated that they had been taken to the Busova~a medical centre when they so requested or when they returned wounded from the trenches.[351]

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[343] Witness T, FPT p. 1467.
[344] Witnesses Zlotrg, FPT p. 914; Osman~evi}, FPT p. 478.
[345] The barracks was the HVO brigade headquarters for the Busova~a region.
[346] Witness Vujica and Witness A, FPT p. 416. The house in question corresponds to Building A in the annex.
[347] Witness Jerkovi} stated that there was a food shortage for about twenty days and that during that time detainees received only two meals a day, FPT p. 2120.
[348] Witness McLeod, FPT p. 106.
[349] Witness Bili}. Only Witness Dautovi} mentioned an infirmary within the prison, FPT p. 258.
[350] Witnesses M and E.
[351] Witnesses I, FPT pp. 845-846.

175. In general, witness testimony is somewhat inconsistent. The European observers, Junhov and McLeod, reported that the prisoners had complained about the lack of medical care. One witness testified that after he had been taken to the centre by one of the guards, the accused called the physician to tell him not to treat the prisoners and then reprimanded the guards for having wasted fuel by taking them to the centre.[352] Another prisoner whose nose was broken during a beating[353] stated that he received no medical care whatsoever.[354] Witness W testified that he had been taken to the Busova~a medical centre by one of the guards after the accused refused to do so.[355]

176. Other witnesses however said that the accused himself took them to the centre.[356] One witness said that as soon as he had arrived in Kaonik prison, the accused's deputy, Marko Krili}, removed his handcuffs and took him to the Busova~a medical centre to have the wounds caused by blows from the HVO soldiers dressed. [357]

177. It seems that the detainees could not automatically be taken to the medical centre because of fuel shortages. In addition, the prison did not have an official vehicle. The accused usually drove his own car to take the prisoners there. According to the secretary's testimony, a Fiat and a Lada should have been available for this purpose but were often out of service.[358]

178. There was also divergent testimony in respect of the treatment received at the Busova~a medical centre. The former detainees explained that they were always accompanied by a guard or by the accused so that they did not dare tell the physician about the mistreatment they had suffered. Conversely, Busova~a medical centre staff testified that the prisoners were always given privacy when speaking with the physicians. The medical centre recommended that some detainees suffering from chronic illnesses be sent home. This was not done but some of those detainees were transferred to more comfortable and better heated cells.[359]

[352] Witness B.
[353] The beatings took place in the presence of the accused.
[354] Witness E, FPT p. 696.
[355] FPT p. 2758.
[356] *Inter alia* Witness Dautovi}.
[357] Witness L, FPT p. 1200.
[358] Witness Vujica, FPT p. 2337.
[359] Witness W, FPT p. 2578.

179. The detainees taken to the Busova~a medical centre were not bound and the guards did not necessarily watch over them.[360] Witness M, for instance, said that he and two other prisoners were taken to the centre by the accused.[361] While the accused and a prisoner were in the physician's examining room, the other two prisoners waited outside without any guard.

180. The Busova~a medical centre staff also said that the treatment conditions at that time were appalling. In 1992, the centre was hit by a JNA shell which destroyed part of the building[362] and damaged some of the water pipes[363]. According to the centre's staff, there was no operating room and even providing first aid was difficult.[364] Those who needed surgery had to be transported to the hospital in Zenica which could be dangerous because of the hostilities in the area.

181. In respect of treatment at Kaonik prison, a former detainee said that the accused gave a pill for dysentery to a detainee who had asked for help.[365] Another witness said that his request for treatment had been granted.[366] Some of the detainees said that they had been treated by a physician at the prison itself, on their first arrival[367] or when they returned from the trenches. During the first period, for example, a physician came to the compound to dress the wounds of those prisoners who had been beaten by the HVO soldiers on the return trip from Kula to Kaonik prison.[368] The Busova~a medical centre physician asserted that he had travelled to Kaonik prison on four or five occasions to provide treatment or to check the sanitary conditions.[369] He stated that the accused made several requests to the centre to organise medical check-ups.[370] Another witness said that the day after his arrival in Kaonik prison after a night spent in the second warehouse, he was transferred by the accused to a better heated cell as he had complained of medical problems because of an operation a few

[360] Defence witnesses.
[361] Witness M, FPT p. 1293.
[362] Witness Stapi}, physician at the Busova~a medical centre, FPT p. 1901; Witness Stapi}, FPT p. 1935.
[363] Witness Cosi}, FPT p. 1969 and Witness Stapi}.
[364] Witness Cosi}, FPT p. 1968.
[365] Witness F, FPT p. 717.
[366] Witness Garanovi}, FPT pp. 810-812.
[367] Witness Surkovi}, FPT p. 935.
[368] Witness A, FPT p. 429.
[369] Witness Stapi}, FPT p. 1908.
[370] Witness Stapi}, FPT p. 1902.

months earlier. The witness remained in that cell throughout his 31-day detention.[371] Another witness said that he was examined by a physician soon after his arrival in the compound.[372]

182. The testimony demonstrates that, in general, the detainees did receive treatment. Although it would probably be considered insufficient in ordinary times, the detainees' general conditions do not appear to have been so bad that they demonstrate a deliberate resolve to cause the persons concerned great suffering or serious injury to body or health. The testimony also demonstrates that the accused usually did whatever was in his power to ensure that the detainees received the necessary medical care or, at the very least, treatment available at the closest medical centre. In the result, the Trial Chamber finds the accused not culpable on this ground.

5. Mistreatment

183. The evidence at trial raises the issue of both psychological and physical abuse suffered by the detainees.

(a) Psychological abuse

(i) Abuse suffered by the Muslims on their arrival at Kaonik prison

a. First detention period

184. In the first period, searches lasted only about ten minutes during which the detainees had to keep their arms raised. With the exception of Witness C,[373] none of the detainees claimed to have been robbed during the search. Most of the witnesses stated that the purpose of the search was merely to check the detainees' identity documents and to confiscate any weapons or metal objects.[374] One of the witnesses testified that the accused had received the detainees and assuaged them by saying that they would not have to remain in detention for

[371] Witness Garanovi}, FPT pp. 811-813.
[372] Witness Surkovi}, FPT p. 935.
[373] Witness C, FPT p. 531.
[374] Witness D, FPT p. 553 (the witness acknowledges that nothing was taken from him); Witness O, FPT p. 1335; Witness Q, FPT p. 1382.

very long.[375] The first period detainees did not suffer any psychological abuse during the search.

b. Second detention period

185. In the second period, the detainees arrested and transferred to Kaonik prison on 15 and 16 April 1993 had to stand in the second warehouse facing the wall with their arms raised for two hours while they were being searched. Witness H stated that one guard conducting the search threatened to kill those prisoners with military papers on them.[376] Out of fear, some of them swallowed their identity papers. According to another witness, soldiers in charge of the search threatened to kill anyone who had not emptied out his pockets fast enough.[377] One detainee was struck several times in front of the accused because he did not raise his arms as fast as he had been told.[378] Other witnesses testified that they were continuously called "balija", a derogatory term, by the guards and soldiers.[379] Witness M. said that when they arrived, the prisoners were mistreated by a guard in the presence of the accused who failed to intervene.[380] The guard ordered the prisoners to turn around, to look straight ahead and then to face left so that he could aim his weapon at their faces. According to another witness, guards or soldiers (the witness was not specific) drew an imaginary line inside the second warehouse and threatened to kill any detainee who crossed it.[381]

186. Seven witness reported thefts during the search while the accused was present. According to Witness L, the thefts were committed on orders from the accused.[382] Witnesses Osmancevi},[383] E,[384] I,[385] J,[386] L,[387] Garanovi}[388] and Meho Sivro[389] explained that the guards ordered the detainees to empty their pockets and that their belongings were seized. Some

[375] Witness Novali}, FPT p. 391.
[376] FPT p. 756.
[377] Witness Bahtija Sivro, FPT p. 869.
[378] Witnesses E, FPT p. 578; Osmancevi}, FPT p. 445.
[379] Witnesses J, FPT p. 994; Osmancevi}, FPT p. 445.
[380] Witness M, FPT 1242.
[381] Witness Garanovi}, FPT p. 809.
[382] Witness L, FPT p. 1210.
[383] Witness Osmancevi}, FPT p. 448.
[384] Witness E, FPT p. 577.
[385] Witness I, FPT p. 854.
[386] Witness J, FPT p. 994.
[387] Witness L, FPT p. 1210.
[388] Witness Garanovi}, FPT pp. 807-808.
[389] FPT p. 869.

witnesses even said that they were robbed of their clothes and shoes.[390] Witness McLeod noted that the Muslim detainees did not have any personal property.[391] One witness testified however that one of his colleagues who was arrested at the same time as he gave the guards about ten thousand marks he had on him but the money was returned to him when he was released.[392]

(ii) Abuse during detention

187. Many witnesses of both detention periods reported psychological abuse by HVO soldiers who could enter the cells at night and demand money from the prisoners.[393] The soldiers would come into the cells at night to beat[394] and insult the detainees and to demand money.[395] One witness explained that the fear of being robbed or beaten by the HVO soldiers was one of the most difficult ordeals that had to be endured.[396] Witnesses B, C and O said that they heard "beatings" being administered at night. Two of them[397] stated that the mistreatment was the work of HVO soldiers. Witness C particularly noted that the guards behaved properly with the detainees but were unable to stop the groups of drunken soldiers from entering the cells to mistreat and insult the prisoners.[398] Witness L also stated that the crimes were committed by soldiers under the influence of alcohol.[399] Witness F testified that HVO soldiers took several men outside the second warehouse and robbed them of their belongings.[400] According to Witness Garanovi} who was detained during the second period, recordings of songs and screams of people being beaten were played at night over a loudspeaker near the second warehouse thus preventing the detainees from sleeping.[401] Witnesses Kaknjo,[402] Zlotrg,[403] E[404] and H[405] also testified that they heard screams and the sound of blows during the night.

[390] Witness I, FPT p. 854; Witness L, FPT p. 1210.
[391] Witness McLeod, FPT p. 145.
[392] Witness I, FPT p. 155.
[393] Witnesses A, C, F, G and L.
[394] Witness Osmancevi}, FPT pp. 468 and 498-499.
[395] Witnesses C, FPT p. 544; Garanovi}, FPT p. 982; B, FPT p. 498; F, FPT p. 685; G, FPT p. 740.
[396] Witness Kaknjo, FPT p. 182.
[397] Witness B; Witness C, FPT p. 544.
[398] Witness C, FPT p. 544.
[399] Witness L, FPT p. 1231.
[400] Witness F, FPT p. 685.
[401] Witness Garanovi}, FPT pp. 1000 and 1017.
[402] Witness Kaknjo, FPT p. 182.
[403] Witness Zlotrg, FPT p. 906.

188. According to Witnesses F and G, HVO soldiers and, in particular, a man called "Marelja", would regularly come into the compound and rob the prisoners at night.[406] Like the detainees who arrived in mid-April, some of the 13 dignitaries from Vitez who had been transferred to Kaonik in early May 1993 reported thefts committed by HVO soldiers at night.[407] One witness, however, said that all the prisoners' belongings, including their money, watches, wedding rings and sometimes even clothes and shoes, were confiscated by HVO soldiers at the trenches.[408]

189. According to one of the witnesses, the accused condemned such practices.[409] Another witness testified that when he asked that his belongings be returned to him, the accused expressed great surprise and anger on learning that HVO soldiers were coming into the cells and mistreating the prisoners.[410]

190. The searching of some detainees accompanied by threats, the noise and screams relayed over the loudspeaker and the nocturnal visits of the soldiers to the cells clearly constituted serious psychological abuse of the detainees.

(b) Physical Abuse

191. Among the 17 individuals detained during the first period who testified before the Trial Chamber, two witnesses[411] said that they had been mistreated during their detention, eight[412] said nothing about any mistreatment inside the Kaonik prison, whilst seven said that they had never been mistreated. Of these seven witnesses, four[413] asserted that they neither saw nor heard any mistreatment inside Kaonik prison. Three[414] said that they had heard beatings but had not seen anything.

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[404] Witness E, FPT p. 587.
[405] Witness H, FPT p. 770.
[406] Witness G, FPT p. 740; Witness F, FPT p. 722.
[407] Witnesses U; V, FPT p. 2707.
[408] Witnesses A; W.
[409] Witness Garanovi}, FPT p. 827.
[410] Witness Surkovi}.
[411] Witnesses W and F.
[412] Witnesses Hajdarevi}, Novali}, A, N, P, R, S and L. The testimony of Witness L. focused primarily on the second period during which he too was detained.
[413] Witnesses D, G, V, Q, FPT p. 1386.
[414] Witnesses O, C and B.

192. Of the 17 individuals detained during the second period who testified before the Trial Chamber, eight witnesses[415] declared that they had been mistreated during their detention including three[416] who were mistreated during interrogation. Seven of them reported that the accused participated in the mistreatment, and two claimed that the accused's participation occurred during interrogations. Four[417] other witnesses said nothing about mistreatment, five[418] said that they themselves had seen or heard beatings during their detention but were not beaten themselves.

193. Witness McLeod said that he had observed no traces of blows or mistreatment having been perpetrated on the prisoners. He even noted in the report he drafted several days after his visit to the prison that "in every cell at least one prisoner made a point of making a short statement to the effect that all the prisoners were being well treated and had no complaints about their conditions".[419] Witness McLeod did add however that he found that this "looked like a slightly strained and rehearsed performance".[420] In addition, the accused implicitly acknowledged that mistreatment had occurred when he explained to Witness McLeod that some of the guards had lost family members at the front and had come to take revenge at Kaonik prison.[421]

194. In considering the allegations of physical abuse, a distinction must be drawn between the abuse of detainees for which the accused has been charged with abetting or directly participating in and the abuse ascribed to HVO soldiers or uncovered without a specific perpetrator being identified. Testimony about abuse meted out during interrogations will be considered in the section on allegations of cruel and excessive interrogations.[422]

(i) Mistreatment involving the personal participation of the accused

195. Four witnesses who testified about mistreatment mentioned the accused's participation. All this testimony relates to the second detention period.

[415] Witnesses Dautovi}, L, M, T, Kaknjo, E, H.
[416] Witnesses Kaknjo, E and H.
[417] Witnesses Kavazovi}, Surkovi}, Meho Sivro and J.
[418] Witnesses Garanovi}, Bahtija Sivro, U and Osmancevi}.
[419] Witness McLeod, FPT p. 112.
[420] Witness McLeod, FPT p. 119.
[421] Witness McLeod, FPT pp. 133-134.
[422] See *infra*, para 205ff.

196. Witnesses L and M held in cell No. 6 testified that they were regularly beaten while in detention. Their testimonies tally. Both said that, from the very first night, they were repeatedly punched by various soldiers, including a man named Anto ^aki}.[423] Witness M. was punched so hard that he bled. He was beaten by a "soldier" with a truncheon.[424] The beating Witness L received lasted longer. Both were beaten several days later at the request of the accused. The accused seemed to have a personal grudge against them because they were from his village. According to their evidence, the accused came into their cell one night with five or six "HVO soldiers"[425] and declared: "these are the men from the place where I come from".[426] He left and then two "soldiers", named @arko and Miro, beat the two witnesses. Both "soldiers" returned twice to beat them again. The accused came the second time and asked one of them why he had stopped. The result was that the soldier began beating again. A little later, another "soldier" named Goran Medugorac came into their cell and beat them yet again.[427] According to Witness M., the accused said in the corridor that there would be a "party" in cell 6 that night. He also said that, on another occasion, one of the guards bringing in the meals threw the food in their faces and began to beat them so violently that Witness M. fainted. This witness said that he was sometimes beaten four to six times a day by, among others, Anto ^aki}, Goran Medugorac and Zoran Mi~i}. He said that he saw traces of blood in his urine and that he is still suffering today from back and chest pain as a result.[428] No medical certificate was produced in support of those assertions. Witness L explained that Anto ^aki} ordered the witness to stand at attention and returned every fifteen minutes to make sure that he was still standing.[429] Although both witnesses said that the perpetrators of the abuse were "soldiers", the testimony of other detainees made it possible to establish that the individuals implicated in mistreating them were prison guards.

197. Witnesses T and Dautovi} also said that they were victims of violent abuse repeatedly meted out throughout their detention. However, for the aforementioned reasons,[430] the Trial Chamber deems that their testimony cannot be taken into consideration.

[423] According to Witness A, FPT p. 451, Anto ^aki} was a guard.
[424] Witness M, FPT p. 1249.
[425] Neither witness was able to differentiate clearly between the guards and the HVO soldiers.
[426] Witness M, FPT p. 1248.
[427] Witness L, FPT p. 1210. On the basis of other testimony, it seems that Goran Medugorac was a guard.
[428] Witness M, FPT p. 1252.
[429] Witness L, FPT p. 1212.
[430] See *supra*, para. 36.

(ii) Mistreatment by HVO soldiers

198. Two cases of mistreatment by HVO soldiers were reported during the first detention period. Witness W said that on arrival the prisoners were continuously beaten by HVO soldiers from one to five in the morning.[431] This testimony was not however corroborated. Witness F said that he was beaten by HVO soldiers in the corridor every night, in particular, by a soldier nicknamed "Marelja". The witness testified that the prison guards would watch the beatings but do nothing to stop them.[432]

199. Two cases of mistreatment by the HVO soldiers during the second period were reported. Witness I said that one day a "soldier" came into his cell and punched him in the eye. He was left with a bruise which took two months to fade away. The witness explained that the accused summoned him to his office to speak about the incident. He told the accused that an HVO soldier had beaten him; he did not know whether any measures had subsequently been taken against the soldier.[433] Witness U said that he saw two men answering to the names Senad and Alen being beaten and robbed by HVO soldiers.[434]

(iii) Mistreatment at the hands of perpetrators not specifically indicated

200. Several witnesses testified about mistreatment inside Kaonik prison without however indicating precisely who the perpetrators were. Some heard beatings but said that they had not seen anything. Many of the witnesses also said that they could not differentiate between the HVO soldiers and the guards themselves. The testimony does not make it possible to ascertain who was responsible for those acts.

201. Witness Garanovi}[435] said that two prisoners detained with him in the same cell were beaten while he was not there. Consequently, one of them allegedly suffered serious spinal injuries. Witness F said that, on the first evening, the prisoners detained in the second warehouse who went out to get water or who were authorised to go the toilet returned with

[431] Witness W, FPT p. 2705
[432] Witness F, FPT p. 691.
[433] Witness I, FPT p. 848.
[434] Witness U, FPT p. 1478.
[435] Witness detained during the second period.

signs of having been beaten.[436] Witness B also testified that the prisoners detained in the second warehouse were beaten on a regular basis.[437]

202. Some of the witnesses detained in the second period[438] said that several detainees of foreign nationality called *Mujahedin* were treated more harshly than the others. Witness M heard about a dozen "Arabs" detained at Kaonik prison[439] and saw one of them one day leaving the toilet. According to the witness, the group was exchanged in mid-May in the presence of United Nations military observers.[440] However, no other eyewitness testimony about that mistreatment was offered other than the testimony of Witness Dautovi} who was apparently considered to be a *Mujahedin* by the prison guards. Witness Junhov visited cells occupied by *Mujahedin* but did not observe any signs of assault on them. He explained that they had complained about the lack of medical care and inadequate sanitary conditions but not about mistreatment.

203. Many witnesses said that they had heard the screams of people being beaten but most acknowledged that they had not observed anything.[441] As stated above, Witness Garanovi} thought that the screams came from a loudspeaker. This was meant to have a psychological effect on the prisoners.

204. The Trial Chamber considers that the limited uncorroborated testimony in respect of the first detention period did not demonstrate that significant physical and psychological abuse occurred during that time. The Trial Chamber holds that only a few cases of mistreatment by out of control HVO soldiers were proved. Testimony of acts of violence during the second detention period, however, was heard much more frequently and the witnesses corroborated one another. In the opinion of the Trial Chamber, the assertion that Muslims detained during the second period were subjected to serious psychological and physical mistreatment has been proved.

[436] Witnesses F, FPT p. 685; Osmancevi}, FPT p. 449.
[437] Witness B, FPT p. 506.
[438] Witnesses M and E, FPT pp. 586-587.
[439] Witness M, FPT p. 1276.
[440] Testimony confirmed by witness Junhov, according to whom the "Mujahedin" were released a week before 16 May.
[441] Witness O for the first detention period; Witnesses H., Zlotrg, Kaknjo, FPT p.182, and Garanovi} for the second period.

(c) Cruel and excessive interrogation

205. Several witnesses confirmed that they had been interrogated during their detention in Kaonik prison but most said that they were not subjected to mistreatment while being interrogated. [442] Those interrogations were usually conducted by a military police member named @arko Petrovi} who was sometimes accompanied by Marko Krili}.[443] The purpose was to find out whether the detainees had any weapons. The interrogations usually lasted five to ten minutes during which they were told that they were being held for security reasons. @arko Petrovi} did not conduct any interrogations inside the two buildings which constituted Kaonik prison itself but in another building right at the compound entrance. [444] Two witnesses said that they had been mistreated during interrogation. One of them might implicate the accused in the acts. Two witnesses also implicated the accused directly in the interrogations conducted within the prison after one of the prisoners had escaped.

(i) Interrogations in which the accused is not implicated

206. Witness F said that he had been taken to the building at the main entrance together with a very young detainee for an "informative interview".[445] Both were put into a room. The young man was taken out first and beaten for 15 minutes. Then came Witness F's turn to be taken to a room on the upper floor where there were some chairs and a ping-pong table. The interrogation was allegedly conducted by @arko Petrovi} and @eljko Katava who were wearing camouflage uniforms with the HVO insignia. After each of his answers, he was beaten by three men in camouflage uniforms with the HVO insignia. A soldier then came in and punched him so hard that he broke his jaw. No medical certificate was produced. According to the witness, the interrogation lasted three and a half hours.

(ii) Interrogations in which the accused is implicated

207. Witness Kaknjo said that he was interrogated twice by @arko Petrovi}. The first interrogation took place outside Kaonik prison in a Busova~a insurance company building.

[442] Witness D, FPT p. 556; [urkovi}; Bahtija Sivro.
[443] Witness D, FPT p. 555.
[444] Annex A.
[445] FPT pp. 692-693.

The second interrogation was held in Kaonik prison and was very short. @arko Petrovi} merely read back to him what he had said during his first interrogation. There was no mistreatment in the course of the interrogation itself. @arko Petrovi} told him that he was not satisfied with his answers and then took him to the building at the main entrance where he was detained in a room. @arko Petrovi} ordered the guard not to give the key to any of the soldiers. The guard obeyed the order but the one who relieved him gave the key to a soldier nicknamed Svabo. According to the witness, Svabo was a member of the intervention platoon. He took the detainee to the room with the ping-pong table and beat him there, mostly around the eyes and in the kidney area. Svabo then received a telephone call and answered: "Director, everything is fine here".[446] The next day, the witness was taken back to the prison by Petrovi} who explained to him that he, Petrovi}, had no control over the people who had beaten him during the night. Another witness[447] declared that Kaknjo was the one beaten most severely while he was in detention. That episode was the only mistreatment Witness Kaknjo suffered during his detention at Kaonik prison.

208. The only thing which would justify the assumption that the accused participated in the interrogation are the words the witness heard when Svabo was on the telephone. The Trial Chamber does not consider that the words uttered by Svabo on the telephone are sufficient to establish beyond a reasonable doubt that the accused was in any way involved.

209. Two witnesses[448] said that they had been interrogated in the presence or at the request of the accused. The interrogations were conducted after one of the detainees had escaped. The brother of the fugitive[449] and the three detainees present at the time of the escape were interrogated and all were put into solitary confinement cells. The first one said that he had been interrogated by the accused in his office before being brought back to his cell where he was beaten by three "guards", Miro Mari}, D`emo and Goran Medugorac. According to the witness, D`emo was wearing civilian clothing whereas the two others were in camouflage uniforms. He was punched, mainly in the face and stomach. The accused, escorted by the three "guards", then came into his cell and asked him the same questions about the circumstances surrounding the escape. Since the witness did not answer them, the accused left the cell and the three guards resumed the beating. Witness E[450] testified that D`emo beat

[446] Witness Kaknjo, FPT pp. 188 and 197.
[447] Witnesses Surkovi}, FPT p. 918; Bahtija Sivro and Zlotrg, FPT p. 914, confirmed that witness Kaknjo was beaten and had bruises all over.
[448] Witnesses E and H. Their testimony is corroborated by that of Witness Osmancevi}, FPT p.467.
[449] Witness H.
[450] Witness E, FPT pp. 592-595.

him with a truncheon and that another guard punched him in front of the accused, who nodded to them as a sign to continue. He suffered a broken nose. According to the witness, the same treatment was meted out to the other detainees.[451] The four prisoners were left in the solitary confinement cells for a while. They were given something to eat and then transferred to another cell.

210. The only interrogations in which the accused was clearly implicated were those conducted after a detainee had escaped. However serious it may be, this incident must be seen as an isolated case which does not demonstrate a systematic resolve to mistreat the prisoners.

IV. CONCLUSIONS ON THE LAW AND THE FACTS

211. After a careful consideration of the facts and the law, the Trial Chamber has reached the following conclusions.

212. As regards the detention, the day-to-day conditions within Kaonik prison were very poor and this fact has not been challenged by the Defence. That finding must however be assessed in the light of the circumstances prevailing at the time and the principles which should govern detention.

213. The circumstances were, first, the armed conflict between the Bosnian Croats and the Bosnian Muslims at that time, more specifically between the HVO and the BH army. The conflict occurred within a relatively small geographic area, known as Kaonik in the La{va Valley. The valley is relatively narrow. The European observer, Witness McLeod, noted that the front line was less than two kilometres from the prison[452] and that communications, in particular by road, were difficult, and at times even totally cut off. In those conditions both the water and food supply and the provision of medicines and treatment were difficult to organise, if indeed possible at all.

[451] Witness E., FPT p. 593.
[452] See also witness K, FPT p. 1186.

214. It is against that background that compliance, or non-compliance with principles which should govern detention must be assessed. It is important, in that connection, to verify whether the alleged poor standards there were the result of a deliberate intent, whether they were the product of intentional discrimination and whether they resulted from negligence or failure of the person in charge of the prison to act. The Trial Chamber would like to assert that the mere existence of a state of armed conflict would not be enough to obviate responsibility. Conversely, the mere finding of deplorable conditions would not be sufficient to lead to a finding of culpable intention.

215. In this case, the Trial Chamber notes that it has not been established from the statements of witnesses that there was an intention to discriminate. Although Witness McLeod noted that the detainees were treated differently depending on whether they were Croats or Muslims,[453] the discrimination does not, however, appear to have been systematic. Very few Croats were detained and several witnesses testified that they had been robbed of their personal property at the trenches which implies that they were not robbed at Kaonik prison itself. Admittedly, with a few rare exceptions,[454] Croatian detainees and Muslim detainees were separated although that was wholly understandable in view of the conflict. Moreover, the Croatian detainees were military personnel imprisoned for having committed ordinary criminal offences or breaches of military discipline, whereas the latter category consisted essentially of civilians.[455]

216. Furthermore, for the reasons set out above, the accused could not challenge the arrival *en masse* of hundreds of Muslim detainees. Even if he had disagreed with the imprisonment of these detainees, the only recourse available to the accused would have been to report the situation to the judicial authorities[456] or to resign. In either case, the situation would have remained unchanged or would have worsened for the detainees themselves, if only because of the loss of one of the rare persons, possibly even the only person, who had had professional detention experience before the conflict.

217. In any event, the submissions made during oral arguments show that not only did all the detainees receive the same food but also that the detainees and the guards received the

[453] According to the witness, the Muslim detainees were held four to ten in a cell and did not have personal property whereas the Croats were only two to a cell and did have personal property, FPT p. 145.
[454] Witness Garanovi} explained that he shared his cell with two Croatian soldiers serving a disciplinary sentence, FPT pp. 812-813.
[455] The lawfulness or otherwise of their detention is a separate question.
[456] It should be noted that in this case these were military judicial authorities.

same food and rations. Admittedly, it would seem that the detainees had a limited time in which to eat, but that situation is not exceptional for collective meals.

218. It did not emerge in the proceedings that there was discrimination as regards the sanitary conditions and access to medical treatment. Neutral witnesses gave evidence that the detention areas were relatively satisfactory, and many former detainees stated that they had been able to see a physician during their detention, some not in the presence of a guard. Admittedly, there were instances when the physician recommended that a detainee be treated at home but the detainee was not released. For the reasons set out above, the Trial Chamber cannot find the accused culpable for that state of affairs.

219. Although the detention conditions were harsh because of inadequate space and heating, it must be noted that the accused seems to have taken all the steps available to him: distribution of blankets, occupation of the cells emptied of Croatian soldiers held there, and changing cells to improve conditions because of the state of health of some of the detainees. In that regard, it seems particularly clear that the accused did not *a priori* have the intent to cause harm. The overpopulation and the inadequate resources were the result of circumstances beyond his control: evidence given in the oral proceedings showed that, generally speaking, the detention conditions improved when the prison became less crowded.

220. Finally, an examination of the evidence relating to religious practice revealed no prohibition and no culpable restriction. Admittedly, there was no prayer area and it was difficult for those detainees wishing to wash before performing their rituals to do so. However, given the prevailing circumstances, the absence of any physical restriction and the benefit of services of a *hodja* (a Muslim cleric), deserve favourable mention.

221. In the final analysis, the Trial Chamber notes that the detention conditions at Kaonik prison were undoubtedly poor and clearly did not meet international human rights requirements. The Prosecution has not proved beyond a reasonable doubt that the accused did not take the measures incumbent upon and available to him, or, conversely, that he deliberately ordered or allowed these poor detention conditions to arise. The abuses of these human rights do not in the circumstances constitute a grave violation of international humanitarian law which the Tribunal was set up to safeguard.

222. The situation is different with regard to mistreatment meted out to detainees, be it physical or psychological violence.

223. Granted, no medical certificates were produced although the seriousness of the injuries suffered, as described by witnesses, meant that they could have been drawn up even several months after the events.[457] Precedents have however established that evidence of such violence suffered may be given by other means, and the Trial Chamber considers in this regard that the cumulative testimony was consistent enough and the number of witnesses sufficient, at least as far as the second period was concerned, to be satisfied beyond reasonable doubt that acts of violence were committed.

224. The evidence relating to screams played over the loud-speaker, the nature of the blows inflicted on some of the credible witnesses, the accused's presence when was violence done to detainees, and the state in which some of the detainees returned from digging trenches, goes to establish that the accused was perfectly aware of the traumas suffered by the detainees. The question however is whether these traumas were severe enough to constitute an offence within the meaning of the Statute.

225. The evidence given by witnesses at the hearing shows that the scale of the violence increased over time, and that its peak coincided with the time during the second period when the conflict between Muslims and Bosnian Croats was at its worst in the region. The intensity of the violence may be the result of its very nature or the fact that it kept recurring or both given the context in which it occurred.

226. The Trial Chamber notes that psychological violence included a direct threat (holders of military identity papers were threatened with death) or was repetitive (men entering cells at night, screams played over a loudspeaker). It is appropriate to add to this the uncertainty weighing on the minds of the detainees as to whether they would be dispatched to dig trenches, and, more generally as to whether they would be released.

227. The assessment of incidents of physical violence cannot be made without considering the context in which they occurred. In that connection, two conflicting points are at issue in the case in point, i.e. the precariousness of the detainees' situation and the existence of an armed conflict. The unquestionable consequence of the armed conflict for Kaonik prison was that, although it may not have led to uncertainty about the chain of command, it did at least

[457] This is particularly so for the case of post traumatic stress described by one of the witnesses, or for those who suffered fractures.

promote the coexistence of groups of men, soldiers and guards coming under different commands. The Trial Chamber notes in that regard that the Prosecution did not establish whether the accused was a civilian or a soldier. Conversely, the detainees were in a particularly precarious and weakened position, and the accused was well aware of this. In its written submissions, the Defence referred moreover to the case of persons of Japanese origin whom the United States Government decided to intern in camps during the Second World War. The argument regarding requests for compensation made by some of these former prisoners which are known to have proved, *inter alia*, the traumatic nature of such an experience. The Trial Chamber categorically rejects the idea that the existence of such situations justifies recourse to force as described by the former Kaonik prison detainees. Furthermore, the Trial Chamber considers that the commission of violent offences against vulnerable,[458] helpless persons or those placed in a situation of inferiority[459] constitutes an aggravating circumstance which, in this case, excludes the excuse which might derive from a situation of conflict which had itself led to unrest.

228. In sum, the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace. The Trial Chamber considers that the existence of an armed conflict does not render it tolerable and that it constitutes a grave violation of the principles of international humanitarian law arising from the Geneva Conventions. For the reasons set out above, the violence in question constitutes an outrage upon personal dignity and, in particular, degrading or humiliating treatment within the meaning of Common Article 3 of the Conventions and therefore constitutes a violation of the laws or customs of war within the meaning of Article 3 of the Statute for which the accused must be held responsible under Articles 7(1) and 7(3) of the Tribunal's Statute.

229. Likewise and as seen above, the use of detainees as human shields or trench-diggers constitutes an outrage upon personal dignity protected by Article 3 of the Statute for which the accused must be held guilty under Article 7(1), that is, for aiding and abetting.

[458] On this point at least, national laws often have specific provisions, for example those relating to violence against a handicapped person.
[459] Same observation as above, with reference to laws prohibiting violence committed over persons in a situation of inferiority or by a person in a position of authority.

V. SENTENCING

230. The accused, Zlatko Aleksovski, has been found guilty on Count 10, a Violation of the Laws or Customs of War (outrages upon personal dignity). Pursuant to this finding of guilt, the Trial Chamber will now proceed to sentence him.

A. The accused

231. The accused was born in 1960 in the town of Pakrac in the former Yugoslavia. He speaks of himself as being of Croat "ethnic" origin. He grew up in the town of Zenica in the central part of the then republic of Bosnia and Herzegovina where he also received his secondary education. The accused holds a university degree in sociology from the University of Sarajevo, and from 1987 until 1992 he worked in the reformatory services of the Zenica prison as a prison officer responsible for the well-fare and rehabilitation of approximately fifty prisoners. He is married and has two young children.

B. Submissions of the parties

232. Both the Prosecution and the Defence made submissions regarding sentence. The Prosecution submits generally that "[t]he sentence of the accused should reflect the magnitude of the horrendous crimes that occurred in and around the Kaonik compound, and the suffering caused by the accused"[460] and that "the repeated malice exhibited by Mr. Aleksovski serves as an aggravating factor that should increase his sentence, even for acts of violence committed by subordinates in which he had no direct participation at all".[461] According to the Prosecution, there are no mitigating circumstances in this case and it recommends that a sentence of ten years' imprisonment be imposed.[462]

233. The Defence called two witnesses, Witness DA and Witness DB, both of whom the Trial Chamber finds to be well acquainted with the accused and his personality traits. Witness DA, who knew the accused in a professional capacity for a considerable period of time, testified, *inter alia*, to the diligence and dedication with which the accused discharged his

[460] Prosecution closing brief, para. 184.
[461] Prosecution's closing arguments FPT p. 3132.

duties while employed by the reformatory services of the Zenica prison as well as to the accused's ability to maintain good working relations with his colleagues and with the prisoners for whom he was responsible.[463] Witness DB, who is a long-term personal friend of the accused, testified to the accused's good character and general friendliness towards all individuals and also as to the loyalty and great friendship of the accused over many years. Moreover, both of these witnesses, who are of a different "ethnic origin" from that of the accused, emphasised that they had never witnessed or experienced any discriminatory behaviour on the ground of ethnicity or religion on the part of the accused. Apart from this evidence, the Defence afforded no other submissions in mitigation of sentencing.

C. Sentencing guidelines

234. In determining the appropriate sentence for the accused, the Trial Chamber is to be guided by the Statute and the Rules. The relevant Articles of the Statute provide as follows:

> Article 23
>
> Judgement
>
> 1. The Trial Chamber shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. [...]
>
> Article 24
>
> Penalties
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. [...]

The relevant Rules relating to the determination of sentence are reflected in 101. [464]

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[462] Prosecution's closing arguments, FPT p. 3133.
[463] Due to a confidentiality issue, the Trial Chamber does not specify here why it deems the witness credible.
[464] Rule 101 reads:

> (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.

D. Considerations of the Trial Chamber

235. The Trial Chamber finds that behaviour of the accused during the relevant period of the indictment does not demonstrate "repeated malice" as alleged by the Prosecution. Indeed, as previously noted, the acts for which the accused is tried took place during two distinct periods and it could be argued that, being the director of Kaonik prison, the accused should have drawn from the experience from the first time-period in order to avoid repetition of criminal behaviour in the second. The Trial Chamber notes, however, that the events in the second time-period took place while the conflict between the Bosnian Croats and the Bosnian Muslims had reached a peak. Although not an excuse, this circumstance may serve as a basis for concluding the repetition of reprehensible acts less as a demonstration of malicious intention than as a factor of appreciation of the exact role of the accused and the scope of his liability.

236. The Trial Chamber has taken into consideration the evidence given by the Defence as to the good character of the accused, including the absence of any prior discriminatory behaviour, and the fact that the accused has no previous convictions of any kind. In this judgement, the Trial Chamber has found that the accused's direct participation in the

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> (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as :
>
> > (i) any aggravating circumstances;
> >
> > (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
> >
> > (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
> >
> > (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
>
> (C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.
>
> (D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

commission of acts of violence was relatively limited. The Trial Chamber recalls that, initially, the accused was indicted together with, amongst others, a senior military and political Bosnian Croat official, Dario Kordi}, and the Bosnian Croat Commander of the Operative Zone of Central Bosnia, Tihomir Bla{ki}. It is obvious from the reading of the indictment that the accused had a secondary role in the totality of the crimes alleged in the then common indictment. The evidence presented during trial shows that the accused most probably accepted the position as the director of Kaonik prison as a professional promotion: it does not demonstrate that the accused intended to engage in a discriminatory policy against the Muslims in Central Bosnia.

237. In other words, the accused's guilt resides in his knowing participation in, or acceptance of, violence contrary to international humanitarian law committed in a much broader frame. The accused was not instrumental in the commission of the crimes committed against Bosnian Muslim civilians in the La{va Valley. He was merely a tool.

238. In addition, evidence was adduced which clearly shows that the accused actively did make attempts to improve conditions in the compound and that he on several occasions personally transported detainees from Kaonik prison to medical facilities in the nearby town of Bu{ova}a. The Trial Chamber has also taken note that the accused is married and has two young children.

239. Article 24 of the Statute provides that the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and that it should take into account such factors as the gravity of the offences and the individual circumstances of the convicted person.

240. Article 41(1) of the SFRY Penal Code, setting out the factors to be considered in determining sentence, reads:

> [T]he court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator.

241. The Trial Chamber also notes Chapter XVI of the SFRY Penal Code, entitled "Criminal Offence Against Humanity and International Law", which in Article 142 enumerates certain criminal acts committed in violation of international law in time of war, armed conflict or occupation, including killing, torture and inhumane treatment of the civilian population, causing great suffering or serious bodily injury to body and health, unlawful forced transfer, use of measures of intimidation and terror, and the unlawful taking of persons to concentration camps and for other unlawful confinement. It provides further that all of those crimes shall be punished by no less that five years' strict imprisonment or by the death penalty.

242. The Trial Chamber, however, considers that the Statute charges it with an obligation only to have recourse to the general practice regarding prison sentences of the Courts in former Yugoslavia, which implies that such practice may be used merely as a guide. In the view of the Trial Chamber, the more important factor to bear in mind in the present case is the gravity of the criminal acts of which the accused has been found guilty and in the context of his individual circumstances.

243. Finally, the Trial Chamber has to take into consideration the practice of the Tribunal, i.e., the nature of the indictments confirmed and the scope of the crimes encompassed therein, the particulars of the accused persons, the previous findings of guilt and the sentences imposed. The Trial Chamber is strongly of the view that, in order to implement the Tribunal's mandate, it is crucial to establish a gradation of sentences, depending mainly on the magnitude of the crimes committed and the extent of the liability of the accused.

E. Conclusions

244. For all the foregoing reasons, the accused is sentenced to two and a half years' imprisonment.

245. This sentence was pronounced in open session on 7 May 1999 and, given that the accused was entitled to credit for a longer period of time than that of the sentence imposed, the Trial Chamber ordered his immediate release, notwithstanding appeal.

VI. DISPOSITION

FOR THE FOREGOING REASONS, having considered all the evidence along with the arguments of the parties, the Trial Chamber finds and imposes sentence, with respect to the accused, Zlatko Aleksovski, as follows:

Count 8: NOT GUILTY of a Grave Breach (inhuman treatment**)**

Count 9: NOT GUILTY of a Grave Breach **(**willfully causing great suffering or serious injury to body or health**)**

Count 10: GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity).

For outrages upon personal dignity as a Violation of the Laws or Customs of War, the Trial Chamber sentences the accused, Zlatko Aleksovski, to two and a half years' imprisonment,

STATES that the sentence was pronounced on 7 May 1999 and that, as a result, the immediate release of the accused was ordered on the same date.

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

_____

Almiro Simões Rodrigues,

Presiding

_____ _____

Lal Chand Vohrah Rafael Nieto-Navia

Dated this twenty-fifth day of June 1999

At The Hague

The Netherlands

[**Seal of the Tribunal**]

Judge Rodrigues, presiding, appends a dissenting Opinion on the application of Article 2 of the Statute to the facts of the case.

Judges Vohrah and Nieto-Navia append a joint Opinion on the same issue.