

Practical Experience in an *Ad Hoc* Criminal Tribunal

Stephen M. Sayers
Hunton & Williams LLP



Introduction



Central Europe

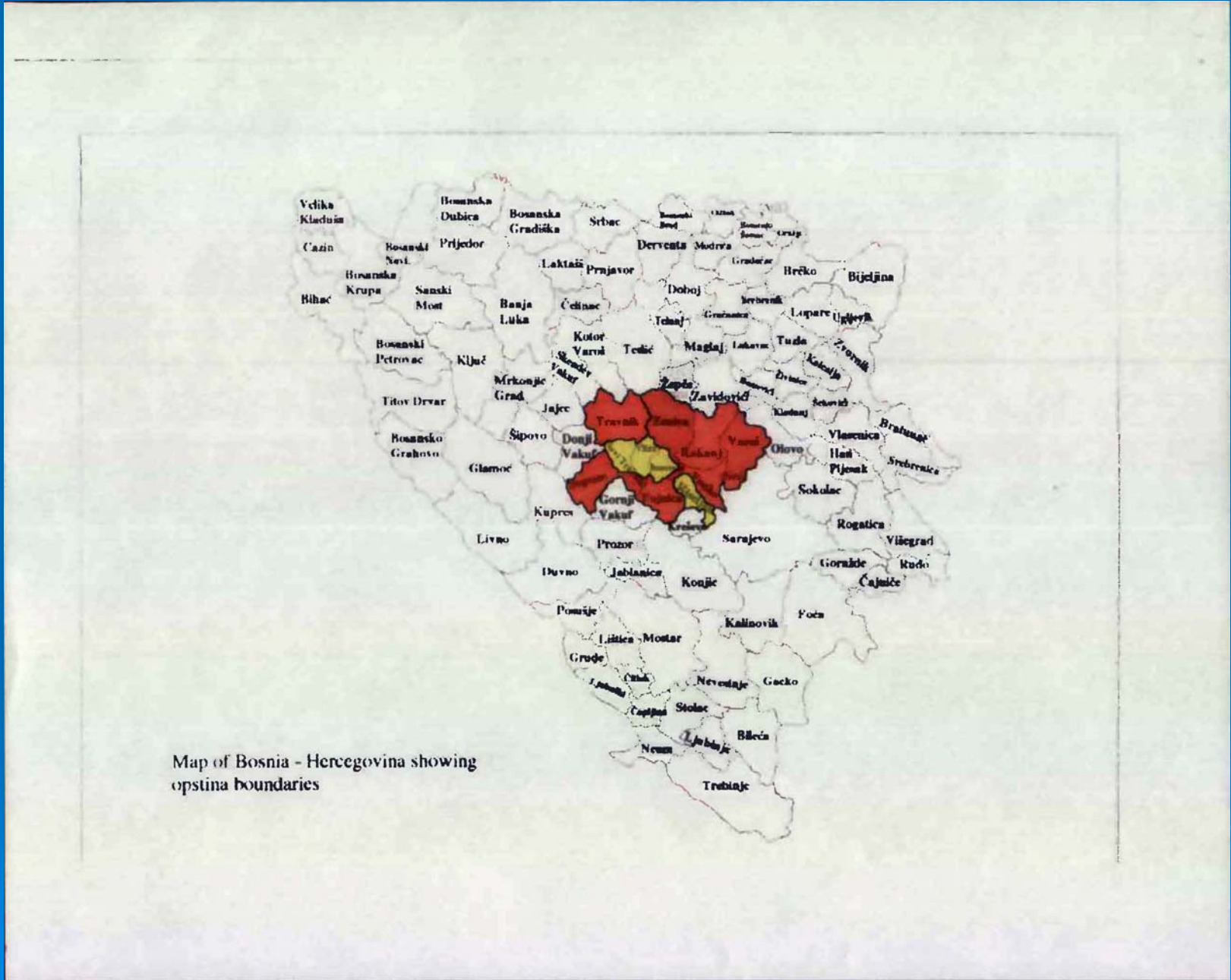




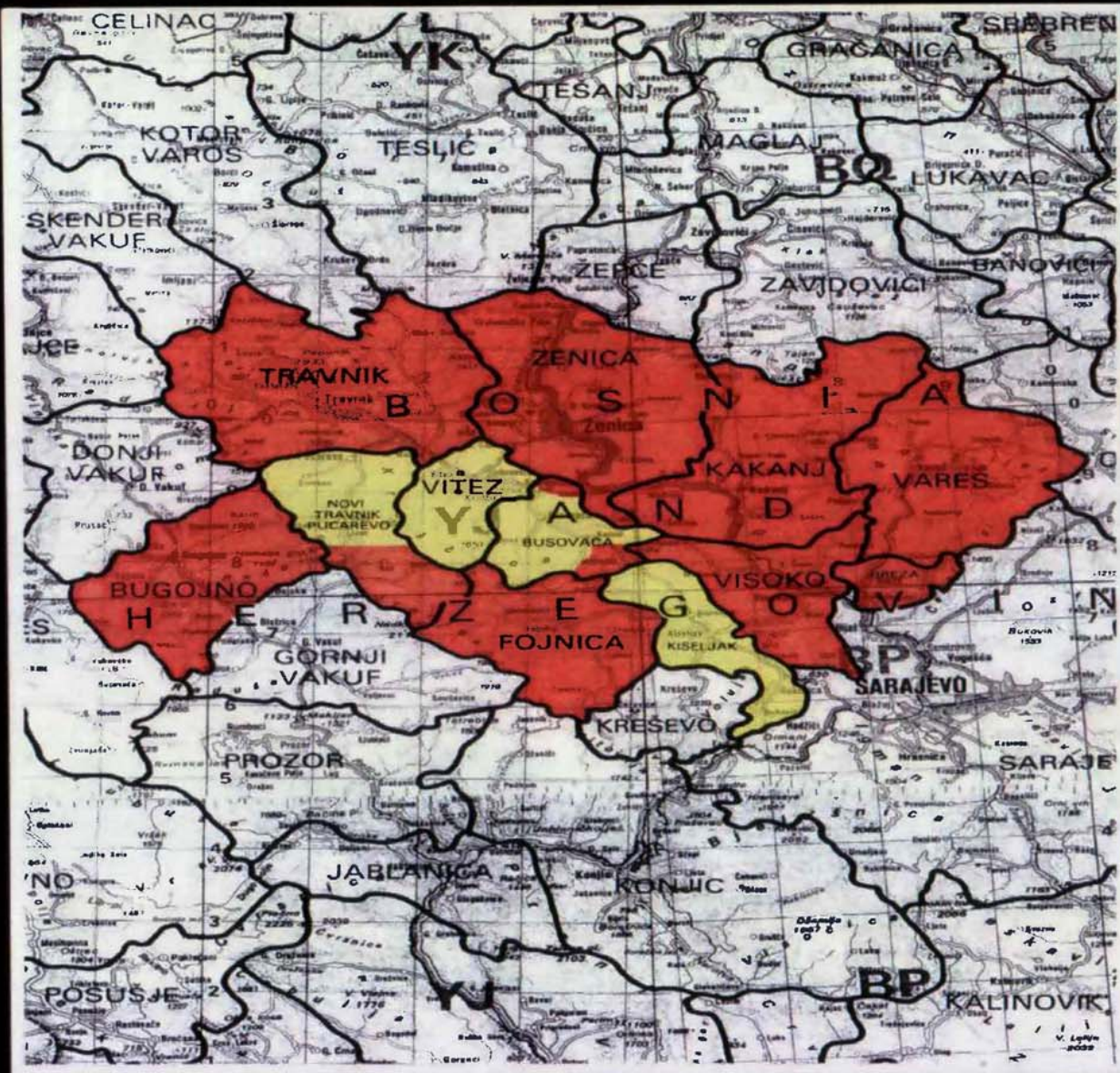
802733AI (R02548) 1-01

CENTRAL BALKAN REGION





Map of Bosnia - Hercegovina showing
opstina boundaries



International Tribunals as Mixtures of the Civil Law and Common Law Systems

- Sources of International Criminal Law?
 - Treaties
 - Statutes
 - Conventions

The International Criminal Tribunal for the Former Yugoslavia

- *Ad Hoc* Tribunal
- Set up in 1993 by U.N. Security Council
 - Security Council Resolution 827, May 25, 1993
- *Not* Set up Pursuant to a Treaty
 - Unlike ICC
 - Treaty of Rome 1998: 60 ratifications July 1, 2002.
 - U.S.A. *not* currently a signatory
- Statute of ICTY
 - 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."

Structure of Tribunal

- 3 Trial Chambers
- 1 Appeals Chamber
- Main Sources of Law:
 - Statute of the ICTY, May 25, 1993
 - Rules of Procedure and Evidence
 - ?

The "Lašva Valley Cases"

- Furundžija
- Kupreškić
- Aleksovski
- Blaškić

Scope of Kordić Case

- This was the fifth of the "Lašva Valley" cases.
- An attempt to establish "command responsibility" for a prominent political figure
- 44-Count indictment
 - Meandered over 22 pages
 - Individual murder case: January 20, 1992.
 - Murder of 100-+ civilians in village of Ahmici: April 16, 1993
 - Murder of 35-+ civilians in village of Stupni do, October 23, 1993
 - Alleged war crimes, in multiple separate locations in over 40 municipalities, towns or villages, over a period stretching from 1991 to 1994.

Investigation and Preparation of Indictment

- Done by OTP
- 1 Judge of Trial Chamber reviews and confirms
- Different in ICC
 - Rome Statute of ICC
 - Arts. 60 and 61
 - Confirmation of Charges Before Trial
 - Separate Hearing

Right to A Fair Trial

- **Art 20:** Trial Chambers must ensure that a trial is "fair and expeditious."
- Proceedings must be conducted in accordance with the Rules of Procedure and Evidence
 - "With full respect for the rights of the accused and due regard for the protection of victims and witnesses."
 - VWU
 - Public hearings "unless the Trial Chamber decides to close proceedings in accordance with its rules of procedure and evidence."

International Criminal Offenses

- Article 2: Grave Breaches of the Geneva Conventions of 1949
- Article 3: Violations of the Laws or Customs of War
- Article 4: Genocide
- Article 5: Crimes Against Humanity
- What are the elements of the offenses?
 - Compare with separate volume published by ICC in 2002.
 - 43 pp.
 - ICC Statute Art. 9.

Modes of Liability Under ICTY Statute

- Article 7: Individual Criminal Responsibility
- Art. 7(1): "Person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5...."
 - "shall be individually responsible...."
- Art. 7(3): Fact that any of acts referred to in Arts. 2-5 were 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."
- JCE
 - The "darling of the Prosecution."

Obligations of Prosecution

- Investigate
- Prepare Indictment
- Rule 66: Disclosure
- Rule 68: Disclosure of Exculpatory Evidence
 - Any evidence that may:
 - suggest innocence
 - mitigate guilt
 - affect credibility of Prosecution evidence.

Rights of Defense/Accused

Article 21:

- All persons "shall be equal" before ICTY
- "Fair and public hearing"
- "Minimum guarantees:"
 1. "To be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him."
 2. "adequate time and facilities for the preparation of his defence."
 3. To "communicate with counsel of his own choosing."
 4. Trial "without undue delay."
 5. To be tried in his presence in person or through legal assistance of his own choosing.
 6. To have legal counsel assigned and paid "if he does not have sufficient means to pay...."
 7. To examine or have examined the witnesses against him.
 8. To compel attendance of witnesses and have them examined.
 9. Free assistance of interpreter.
 10. Not to be compelled to testify against himself or to confess guilt.
- Compare with ECHR, Art. 6
ICCPR, Art. 6

Procedure

- Rules of Procedure and Evidence
 - 164 Rules
 - Amended 48 times since 1994
- Principle of "Orality"
- Hearsay
 - *Tadić* decision, 1995
- Appeals
 - Prosecution can appeal
 - New evidence can be admitted

Evidence

- Rules 89-98
- Primary Rule: Rule 89(C)
 - "A Chamber may admit any relevant evidence which it deems to have probative value."
 - May exclude if probative value substantially outweighed "by the need to ensure a fair trial."
- New Rule: 92 *bis*
 - "Admission of Written Statements and Transcripts in Lieu of Oral Testimony."
 - Reversal of burden of proof?
 - Rule 92 *bis* (A)(ii)(b)
 - Compare with ICC Statute Art. 67(1)(i)
- Rule 92 *quater* – "Unavailable persons."
- Rule 98: Power of Trial Chamber to order production of additional evidence.

Authentication of Exhibits in International Criminal Tribunal for the Former Yugoslavia

- Rule 89(E): "A Chamber may request verification of the authenticity of evidence obtained out of court."

Prosecution Exhibit Z610.1

- Handwritten by at least 5 people
- 2 pages missing
- Central Bosnia Operative Zone "War Diary"

Prosecution's Authenticating Witness: Marko Prelec

1. Prosecution Appeal Brief:

- "Prelec testified for the Prosecution to the authenticity of the document."
p. 245 ¶ 10.20
- "Prelec testified in court for the purposes of authenticating the documents obtained by the prosecution."
p. 248, ¶ 10.28
- Prelec testified on Nov. 21, 2000
 - Prosecution case-in-chief rested on March 10, 2000
 - Kordić defense rested on July 24, 2000.

Prosecution's Authenticating Witness: Marko Prelec (cont'd)

2. Prelec Testimony:

- Did not know who wrote any of the entries on Ex. Z610.1.
- Did not know when Ex. Z610.1 was written.
- Did not know who had access to Exhibit Z610.1 for 6½ years.
- Did not know if Exhibit Z610.1 had been altered or not, and admitted other documents in HVO Military Archive had been altered.
- Admitted Prosecution got priority in receiving copies in May or June of 2000 [while Kordić case-in-chief was still proceeding], and did not know reason for delay in giving document to Kordić defense.

Other Prosecution Witness Who Gave Testimony About Ex. Z610.1

- No questions asked by Prosecution of any witness except Prelec.
 - None of authors
 - Col. Blaškić not summoned.
- Witness "AT": The entries in Ex. Z610.1 for April 15 & 16, 1993 were false.

Decision on Prosecutor's Submissions Concerning "Zagreb Exhibits" and Presidential Transcripts – December 1, 2000

"44. The copy [sic] War Diary (exhibit 610.1) is admitted as an important document, contemporaneously made."

- "It carries its own authenticity, being written in several hands and having every sign of being what it purports to be, i.e., the log of the duty officer of the Operative Zone made at the time by an officer who would have little opportunity or reason to fabricate an entry unless instructed to do so."
- "It bears a certification on the last page, signed and stamped by Colonel Blaskic, that it was a notebook containing 96 pages, of which two were missing."
- "The Trial Chamber is under a duty to try and ascertain the truth and to deprive itself of this document would put that duty at risk."

Prosecutor v. Kordić
ICTY Case No. IT-95-14/2-T

Exhibit Z610.1 "Signature Page"

51

DA OVA TEKA IMA
96 (DEVEDESET ŠEST) LISTOVA
OZNAČENIH OD REDNOG BROJA
11700 (96),
TRKOT I OVJERAVA

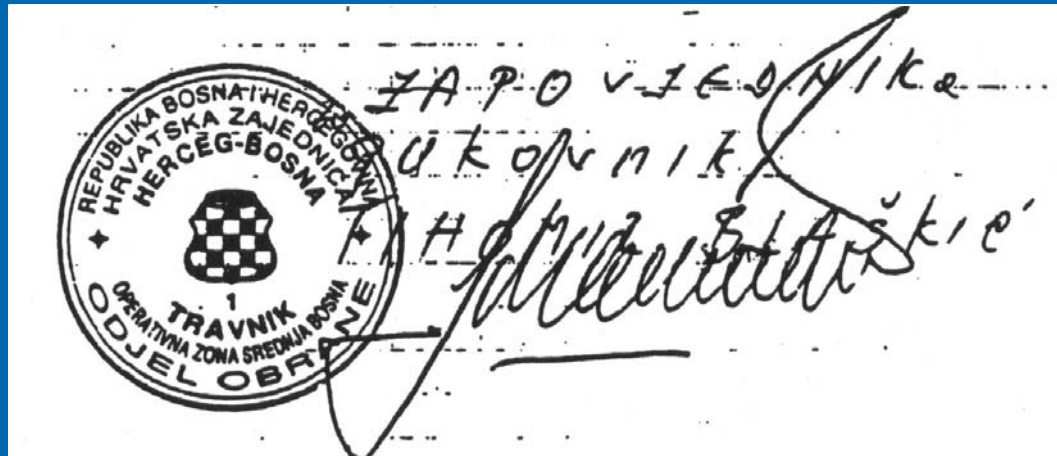
REPUBLIKA BOSNA I HERCEGOVINA
HERCEGOVINA
TRAVNIK
ODJEL OBSTANE

ZAPOVJEDNIK
UKOPNIK
H. M. Blažić

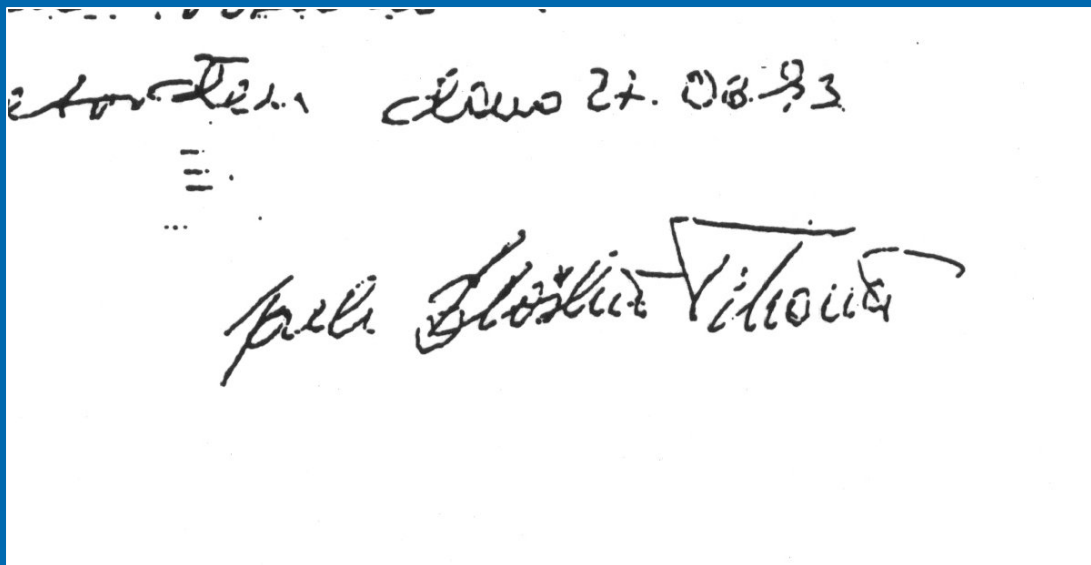
P.S. Nadstupa stran 62. 63 koji su
vrijeme polubane napravo jesu
odgovara trenutno rodu a
karakterističan je istovremeno dan 21. 08. 93

pre. Stjepan Vitošić

-- "signed and stamped by Colonel Blaškić...."



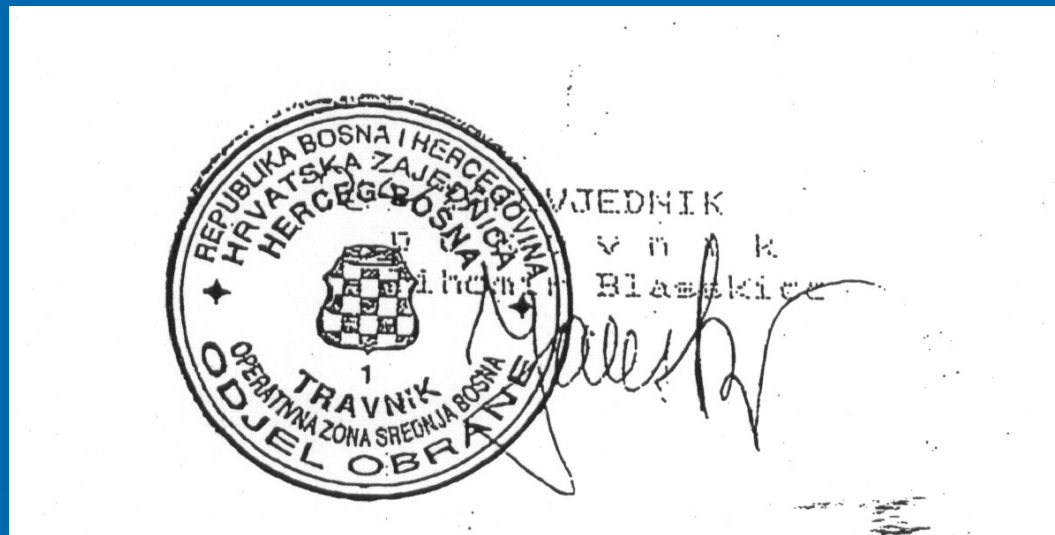
-- Example of a Prosecution Exhibit Said by
Prosecution to be signed by Colonel Blaškić:



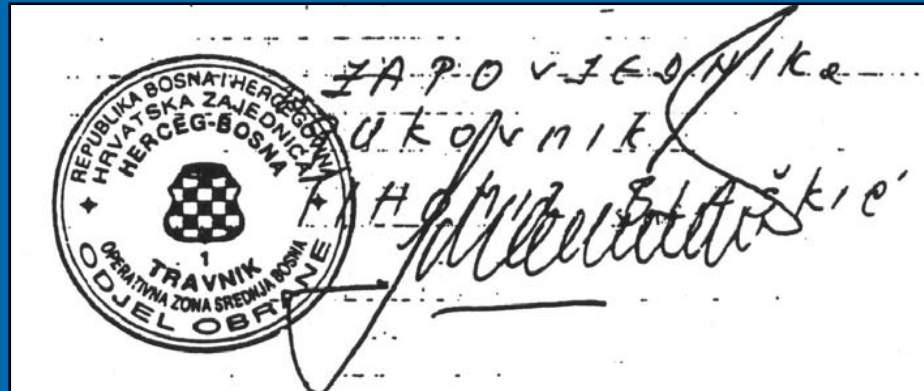
A photograph of a handwritten note on white paper. The text is written in cursive and includes a date and a signature. The date is "27. 08. 93". Below the date, there are three horizontal lines, possibly representing a signature or a separator. The signature is "puli Blaškić Vitošić".

27. 08. 93
...
puli Blaškić Vitošić

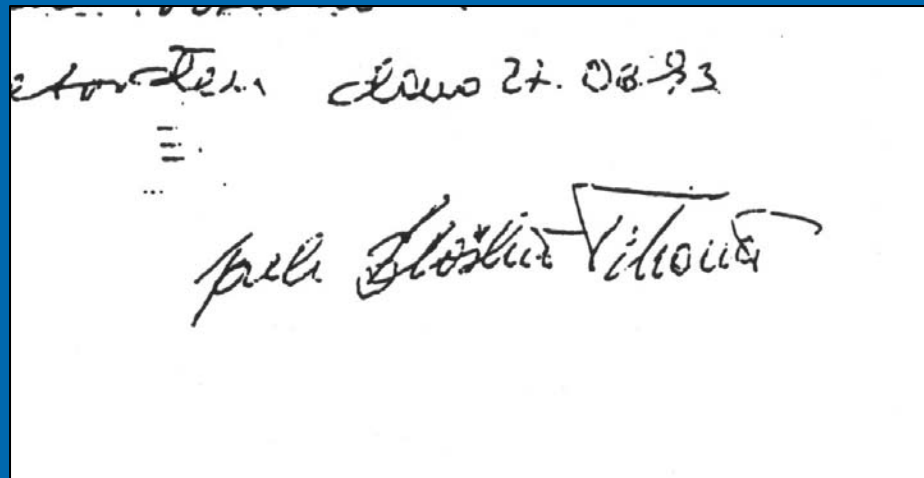
-- Example of Colonel Blaškić's Signature Stipulated as Authentic by Prosecution and Kordić:



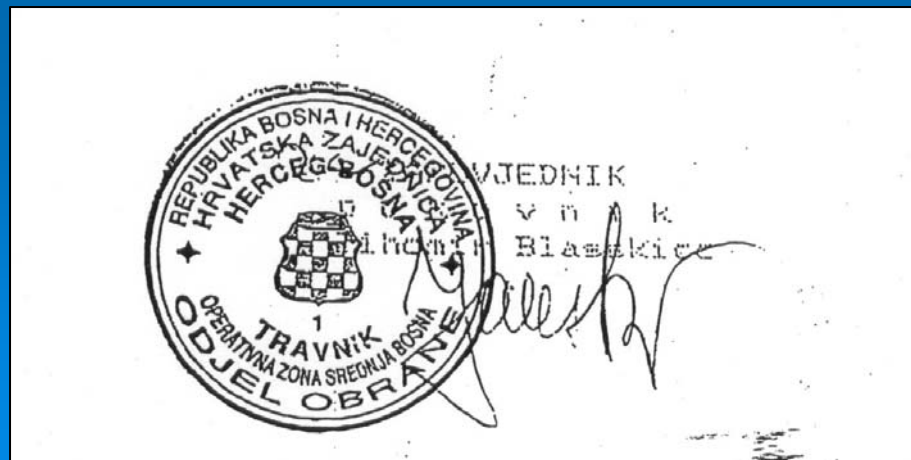
1.



2.



3.



- "[T]he Prosecution is unable to confirm that the signature on the document belongs to Colonel Blaškić."

*12 May 2003 Response to The Motions to Admit
Additional Evidence Filed by Mario Čerkez
On 7 April 2003 and 9 April 2003, ¶ 3.32.*