

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

IT-04-83-A

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Date: 07 January 2009

THE PROSECUTOR

v.

RASIM DELIĆ

PUBLIC REDACTED VERSION

DEFENCE APPELLANT'S BRIEF

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Abbreviations

AOR	Area of responsibility
ARBiH	Army of Republic of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
E	Exhibit
EMD	El Mujahedin Detachment
ICI	Islamic Cultural Institute, Milan
IHL	International Humanitarian Law
OA	Operative Action
RBiH	Republic of Bosnia and Herzegovina
SVK	Supreme Command Staff/General Staff/Main Staff
SVB	Military Security Service
The Appellant	Rasim Delic
TJ	Trial Judgment
AJ	Appeal Judgment
3Corps	3 rd Corps
35Division	35 th Division

INTRODUCTION

1. On 14 October 2008, Counsel for Rasim Delić (“the Appellant”) filed his *Defence Notice of Appeal* against the Judgement of the Majority of Trial Chamber 1 *Prosecutor v. Rasim Delić* dated 15 September 2008. This brief is now filed pursuant to Rule 111 of the Rules of Procedure and Evidence (“the Rules”).
2. Unusually, the Appellant was convicted only by a majority. The Presiding Judge, Judge Moloto, did not agree with Judges Harhoff and Lattanzi and appended a powerful dissenting opinion.
3. The indictment against the Appellant charged him with violations of the laws or customs of war based solely on Article 7(3) of the Statute. As is well-established, that required the Prosecution to prove three elements beyond a reasonable doubt: (1) effective control, (2) “*knew or had reason to know*”, and (3) failure to prevent or punish the crimes.
4. The Majority¹ found the Appellant guilty of cruel treatment as a violation of the laws or customs of war pursuant to Article 3 of the Statute in relation to crimes committed by the *El Mujahed Detachment* (“EMD”) in Livade/Kamenica Camp in July/August 1995.

I. GROUND ONE: ERRORS OF FACT AND LAW IN RELATION TO EFFECTIVE CONTROL

5. The Trial Chamber dealt with the existence of a superior-subordinate relationship between the Appellant and the EMD at paragraphs 365 to 471 of the Judgement.² Having found that the EMD was responsible for crimes committed in Livade/Kamenica Camp in July/August 1995, the Chamber analysed a host of factors for the purposes of determining whether or not the Appellant had effective control over the EMD.
6. Those factors (i) to (xii) were set out at paragraph 368.

¹ For convenience, the Trial Chamber Majority shall be referred to herein simply as “*the Majority*”. In some cases, it is not always clear where the finding is that of the Chamber or the Majority.

² Unless otherwise indicated, all paragraph references herein are to the Judgment.

7. Having analysed those factors, the Majority found “*beyond reasonable doubt that Rasim Delić had effective control over the EMD in the period between July and December 1995*”³
8. Judge Moloto disagreed. He disagreed with the Majority’s findings, inferences and conclusions in respect of four issues: (i) improvement of command and EMD’s compliance with orders; (ii) reporting; (iii) links with foreign authorities; and (iv) investigative and punitive measures.⁴
9. Having reviewed the relevant factors, Judge Moloto concluded that the Majority had erred in finding the Appellant criminally responsible:
- “32. ... In my view, Rasim Delić did not have effective control over the EMD at any time from the time of his assumption of duties as the Commander of the Main Staff of the ABiH on 8 June 1993, until the EMD was disbanded in December 1995.*
- 33. Consequently, I would acquit Rasim Delić of all counts at this stage of the proceedings. ...”*
10. The Appellant respectfully agrees and commends the reasoning of Judge Moloto to the Appeals Chamber.

A. SUB-GROUND 1(A): ERROR OF FACT: NO REASONABLE TRIER OF FACT WOULD HAVE DRAWN THE CONCLUSION THAT THE APPELLANT HAD EFFECTIVE CONTROL OVER THE EMD ON THE BASIS OF THE FACTS FOUND BY IT

1. Introduction

11. Given the Chamber’s findings in relation to the indicators (i) to (xii) of effective control on which it relied,⁵ no reasonable trier of fact would have concluded that the Prosecution had proved beyond a reasonable doubt that the Appellant had effective control over the

³ TJ,para.471.

⁴ Judge Moloto’s Dissenting Opinion,para.2.

⁵ TJ,para368.

EMD between July and December 1995. It erred in fact in so finding, and that error of fact – a compound error of fact - resulted in a miscarriage of justice.

12. The Majority further erred in this regard by failing properly to assess and to give due weight to the multiple indicators of *a lack of, or absence of,* effective control on the evidence as found by them at paragraphs 368 to 458.

2. The Chamber's findings

13. In each of the subsequent sections, the relevant findings made by the Chamber will first be set out, and then the Majority's errors of fact – in each case, the failure to draw the only reasonable inference, namely that the Appellant did *not* have effective control over the EMD – will be exposed.

(i) “EMD compliance with ABiH orders in general”

14. With regard to the first indicator of effective control listed in paragraph 368 – “*EMD compliance with ABiH orders in general*” - the Chamber made a number of key factual findings.⁶
15. First, the Chamber found that “*the EMD and its members did not reliably execute all of the orders issued by the ABiH*”.⁷
16. Second, the Chamber found that the EMD had refused to hand over a captured VRS tank to the ARBiH 3Corps Tank Company and that the Tank Company crew did not dare to take the tank to the 3Corps, because the EMD members “*would search you out, find you, and kill you.*”⁸
17. Third, the Chamber found it proved that the EMD disobeyed the order of the 35Division commander, Fadil Hasanagic, to set up a camp at the 12th kilometre, and instead “*arbitrarily*” established a camp at the 13th kilometre.⁹ However, instead of interpreting

⁶ TJ, paras. 371-375.

⁷ TJ, para. 371.

⁸ TJ, para. 372.

⁹ TJ, para. 374.

the ARBiH commander's inability to order the EMD as an obvious indicator of a lack of effective control, the Majority saw his "acceptance" of the EMD's behaviour as proof that the EMD was under the effective control of the ARBiH!¹⁰ Such a conclusion was utterly unreasonable in light of the evidence.¹¹

18. Fourth, the Chamber found that EMD soldiers repeatedly refused to provide the 3Corps with accurate records of all EMD members despite repeated requests, and that the EMD members refused to make a statement that they joined the army units voluntarily.¹²
19. The evidence showed that the information on foreign members of the EMD, including their names, was kept secret even from Bosnians in the EMD. Their records were kept by Abu Isa, an Arab and a close relative of Sheik Shaban, the true leader of the EMD.¹³
20. The Majority found that "[t]he 3rd Corps forwarded to 'other institutions' the information in its possession concerning EMD members,"¹⁴ but it failed to record that the very witness on whom it relied for this proposition¹⁵ testified that this information was "useless."¹⁶ The lists were prepared by the EMD, and the 3Corps was unable to verify the information therein. Moreover, the information was often incorrect and/or insufficient.¹⁷
21. The Majority committed several errors in its interpretation of the evidence pertaining to EMD data.
22. First, there is no mention of information on the EMD in the pages of Haso Ribo's testimony which the Majority cites.¹⁸

¹⁰ In paragraph 462, the Majority adopted the same theory with respect to the EMD's failure to follow combat orders.

See paras.38,44 infra

¹¹ See Judge Moloto's Dissenting Opinion, paras.8-9.

¹² *TJ*, para.373.

¹³ **PW2**, 19/07/2007-T.888,

PW9, 17/04/2008-T.8637, commenting on **E1201** (Faxes sent by the EMD to ICI in Milan and telephone intercepts to ICI).

TJ, para.373.

See footnote 951.

¹⁴ **Hubo**, 17/03/2008-T.7644.

¹⁵ **Begovic**, 12/07/2007-T.475, commenting on **E78**-containing the Personal military file of Sinan Begovic, p.6; **Begovic**, 13/07/2007-T.525, commenting on **E67**-List of EMD members.

HasibAlic, 16/07/2007-T.628-629, commenting on **E67**.

Awad, 10/02/2008-T.226-227, commenting on **E663**-List of foreign EMD members, 07/05/1995.

Awad, 09/02/2008-T.175.

¹⁸ **Ribo**, 5/3/2008-T.7010-7011.

23. Similarly, in the part of the testimony of PW9 which the Majority cites in footnote 947¹⁹ to support the conclusion that the EMD forwarded to the 3Corps lists containing “along with dates of birth and nationalities, mostly nicknames,” PW9 stated specifically that “*They would take their passports, et cetera, but the information was not passed on to the 3rd Corps Command.*” Thus, PW9’s evidence was directly opposite to what the Majority concluded in paragraph 373.
24. Furthermore, the Majority failed to take into account incontrovertible evidence that the EMD did not obey ARBiH orders on re-subordination.²⁰ On 28 August 1993, the 3Corps ordered that the EMD be re-subordinated to the 306MB for joint actions.²¹ It has been marked on the face of the document that this order was “not carried out”. Witnesses confirmed this.²²
25. On 3 April 1994, the 3Corps ordered the re-subordination of the EMD to the 330th Light Brigade.²³ Only two days later, on 5 April 1994, the EMD was issued a new order re-subordinating it to OG-3-North.²⁴ On 9 April 1994, the EMD was re-subordinated to the 7MB.²⁵ Therefore, in only six days the EMD was issued three orders on subordination or re-subordination. It did not follow any of these orders.²⁶
26. The EMD never became part of OG-3-North nor was it ever re-subordinated to 7MB.²⁷ The EMD never accepted the 330th Brigade command and its commander, or the OG-3-North²⁸ and 7MB commands and their commanders.²⁹
27. Not only did the EMD refuse to accept the command of the above-mentioned units, but its relations with those units in the field bordered on *conflict*.³⁰

¹⁹ PW9,16/11/2007-T.5676-5677.

²⁰ The Majority mentioned in paragraph 363 that “some” such orders were not followed by the EMD and it referred in footnote 929 to a number of orders the EMD failed to follow, but it failed to elaborate on the evidence and to draw the proper conclusions from its findings. The evidence clearly shows that none of the orders on re-subordination were followed by the EMD.

²¹ E1137/E269-3Corps Order,28/08/1993.

²² Delalic,27/08/2007-T.1758-1759;HalimHusic,11/03/2008-T.7332.

²³ E845-3Corps Order,03/04/1994.

²⁴ E846-3Corps Order,05/04/1994.

²⁵ E848-3Corps Order,09/04/1994.

²⁶ PW9,16/11/2007-T.5703.

²⁷ PW9,16/11/2007-T.5702-5703.

²⁸ The Majority accepted this in para.432.

²⁹ Awad,10/02/2008-T.219-220,commenting on E1137.

28. The Majority failed to note that, although it was re-subordinated (*only on paper*) to the 35Division in March 1995,³¹ the EMD was merely active in its AOR, and it refused to carry out its orders.³²
29. Moreover, EMD members attacked, threatened,³³ and provoked ARBiH soldiers.³⁴ They belittled ARBiH members, negated the struggle of the ARBiH and refused to accept the legal representatives of the RBiH and ARBiH.³⁵ The Majority accepted these facts, yet it failed to draw the proper conclusions from them.³⁶
30. The Majority found that, in September 1995, the EMD forcibly seized war booty and abducted a Bosnian Serb detainee from a military police patrol of the 35Division.³⁷ Evidence further shows that, on 27 October 1995, the EMD did not allow the 35Division Commander and members of UNPROFOR to pass through the area of Donja Blizna. They insisted on the return of the convoy due to the fact that “their commander had not been informed.”³⁸
31. The Majority failed to take into account the fact that, in May 1995, the EMD did not allow parts of the 35Division “*timely seizing of certain regions, which exposed the units to the Serbian-Montenegrin artillery and caused losses...*”³⁹ During combat activities with ARBiH members in September 1995, the EMD disregarded safety warnings, which

³⁰ E847-330Light Brigade Official,08/10/1994,p.2.

E1019-7Muslim Brigade SVB Information on the EMD,01/10/1994,p.2.

³¹ E431-3Corps Order,31/03/1995;E1030-3Corps Order,31/03/1995;E396-3Corps Order,02/06/1995.

³² Imamovic,11/10/2007-T.4039-4042,commenting on E583-35Division SVB Report,30/08/1995.

Hajderhodzic,08/10/2007-T.3732-3733.

³³ E800-GSARBiH SVB document on the behaviour of EMD members,20/07/1995;E801-3Corps SVB Information on the behaviour of the “El Mudzahedin” Detachment members,15/07/1995.

³⁴ E938-35Division SVB Information,05/07/1995;E760-GSARBiH SVB document ‘Threats from EMD members to 328th Brigade soldiers,’10/07/1995.

³⁵ E774-3Corps SVB Information,01/07/1995.

³⁶ TJ,paras.433,434,436.

³⁷ TJ,para.435.

³⁸ E903-35Division SVB Official Note,27/10/1995,p.2.

³⁹ E489-2nd Manoeuvre Battalion Daily operative report, 28/05/1995.

had tragic consequences.⁴⁰ During combat activities in October 1995 they seized war booty from ARBiH units, under the threat of arms, and took it to their camp.⁴¹

32. The EMD placed members of the ARBiH and MUP in danger by refusing to follow established rules and regulations. On one such occasion, the EMD refused to allow access to its headquarters at Vatrostalna following the explosion of a car bomb. When members of the 3Corps Military Police were finally allowed to enter the barracks, they were told not to speak and were given only 10 minutes to conduct their investigation.⁴²
33. The Majority's conclusion was, therefore, against the weight of the evidence. There was overwhelming evidence that the EMD did not comply with ARBiH orders, and thus was not under the effective control of any ARBiH commanders.

(ii) *“Participation of the EMD in ABiH Combat Operations and its Compliance with ABiH Combat Orders”*

34. The Majority explicitly ruled that, *'the ABiH's ability to govern the EMD's participation and engagement in the armed conflict against the VRS lies at the core of the determination of Rasim Delic's command and effective control over the EMD.'*⁴³ In so ruling, the Majority misdirected itself substantially in law. In a case concerning crimes committed against POWs in the EMD's custody, co-operation and coordination between the ABiH and the EMD in combat (for the evidence showed no more than that), far from being the „*core determinant*“, is perhaps *the least* appropriate indicator of all the indicators considered by the Chamber on the issue of effective control. Allied armies fight together quite naturally. The key indicators to consider for the purposes of a case of mistreatment of detainees was, obviously, access to the EMD's premises and whether the EMD obeyed orders *other than combat orders*, in particular orders to transfer and to

⁴⁰ E1073-3Corps SVB Information,03/09/1995,

E490-35Division Analysis of the “Spring-95” offensive engineering support,03/06/1995,p.2.

⁴¹ E1084-35Division SVB Information ‘Summary of the knowledge on the El-Mudzahidin unit, 24/10/1995,p.2.

⁴² E1300.

⁴³ TJ,para.461.

- allow access to prisoners.⁴⁴ These indicators resoundingly showed a complete lack of effective control. In this regard, the Appellant respectfully adopts the reasoning in Judge Moloto's dissenting Opinion, in particular paragraphs 4-10 thereof.
35. Moreover, the Majority erred when it found that the ARBiH functioned in accordance with the “dialectical approach” to command and control,⁴⁵ and that this same approach applied to the EMD’s relationship with ARBiH units. Such a conclusion is based on misinterpretation of the testimony of military expert Paul Cornish, and other evidence which clearly showed that the system of command and control within the ARBiH was based on the principle of “unity of command.”⁴⁶ Within this system, subordination was clearly defined and, although there was a certain degree of dialogue between units, orders of superiors were expected to be followed without exception. Lower ARBiH units would submit their plans (based on the Directives) to their superiors for approval.⁴⁷ However, there was never any question as to whether those units would participate in combat, or whether or not they should follow the orders of their superiors.⁴⁸ The fact that the EMD adhered to what could be described as a “dialectical approach,” therefore, only shows that this unit was not under the effective control of the ARBiH.
36. This is clear from the Chamber’s own findings in relation to the EMD’s participation in ARBiH combat operations and its compliance with ARBiH combat orders,⁴⁹ which clearly show that the relationship between the EMD and ARBiH units was, at best, merely one of *cooperation*.
37. Moreover, the Majority either misinterpreted or completely failed to take into account other important evidence confirming this position.⁵⁰

⁴⁴ See paras.326-331 *infra*.

⁴⁵ *TJ*, para.379.

⁴⁶ The Chamber accepted this principle in para.141.

⁴⁷ **Jusic**, 17/09/2007-T.2500-2501, 18/09/2007-T.2553-2554.

⁴⁸ Regarding the principle of unity of command and functioning of the ARBiH system of command and control, see paras.164-181 *infra*.

⁴⁹ *TJ*, paras.376-402, 380-402, 431-436, 465-466.

⁵⁰ See **E1394**-A fax from the EMD to ICI Milan, 07/03/1995, p.4; **PW9**, 17/04/2008-T.8686, commenting on **E1394**; **E127**; [REDACTED]; **E676**; **E679**; **E682**; [REDACTED]; [REDACTED]; **E669**; **E681**-GSARBiH Hierarchical Chart of EMD, 28/11/1995, **E125**, **E1200**, **E1201**, **E1386**, **E1387**, **E1388**, **E1390**, **E1393**; **E1394**; **E1395**; **E1436**; **E1437**; **E1438**; **E1423**; **E1064**; **E583**; **E602**; **E127**-3Corps Information, 28/11/1993, p.1, **PW9**, 16/11/2007-T.5707-5708, commenting on

38. The Chamber found that the EMD “*made its participation in combat contingent on certain requirements*” and that “[w]hen it deemed that the preconditions were not met, the EMD would decline to take part in a given ABiH operation, or would postpone the time of its participation”.⁵¹ The Chamber referred to several instances in which the EMD refused to participate in combat with ARBiH units.⁵² However, instead of concluding from this that the EMD merely cooperated with the ARBiH units, the Majority chose to focus on the fact that the EMD would provide the superior command with “reasons” for its refusal to participate (weather conditions, lack of readiness, etc.), and that those reasons were “accepted” by the superior command.⁵³ The notion that it is consistent with effective control for a systematically insubordinate unit to give “reasons” for not following orders, is clearly flawed. In fact, giving such “reasons” was merely the EMD’s diplomatic way of eschewing any attempts to control it.
39. There was abundant testimony of the EMD’s attitude with respect to orders concerning combat actions.⁵⁴ The EMD’s military emir, Muatez, refused to permit the EMD to participate in the action at Pisana Jelika and Visoka Glava in the summer, 1994,⁵⁵ because he considered that the EMD was not ready at the time when its alleged superior command, OG-3-North, requested its participation.⁵⁶ The Majority accepted this fact in paragraph 388, yet it failed to draw the proper conclusions from it.

E127;E761,p.3.,[REDACTED];**Jusic**,18/09/2007-T.2632-2633;**Hasanagic**,25/09/2007-T.3026;**PW9**,16/11/2007-T.5704-5705,5769;**Zilkic**,09/11/2007-5370-5371;**Awad**,08/02/2008-T.64-65,75,09/02/2008-T.106,10/02/2008-T.251-252.

⁵¹ *TJ*,para.383,

See also TJ,para.382.

⁵² *TJ*,paras.388-390.

⁵³ *See also* Judge Moloto’s Dissenting Opinion,paras.8-10.

⁵⁴ **Awad**,10/02/2008-T.194-197,

Jusic,18/09/2007-T.2627,

PW9,17/04/2008-T.8690,commenting on **E1394**,

PW9,18/04/2008-T.8736-8737.

Ribo,05/03/2008-T.7038-7040,commenting on **E1029**-3Corps Preparatory Order for offensive combat operations,24/03/1995,

Ribo,05/03/2008-T.7047-7049,commenting on **E431**-3Corps Order for re-subordination of EMD to the 35Division,31/03/1995.

⁵⁵ **E837**-3Corps Decision for attack,20/08/1994.

PW9,17/04/2008-T.8652-8654,commenting on **E1386**.

⁵⁶ [REDACTED];**Awad**,10/02/2008-T.195.

40. Moreover, the Majority's finding that the EMD eventually "*took part in combat operations*" at Pisana Jelika "*and captured these features*"⁵⁷ in no way proves that they did so pursuant to ARBiH orders or at a time requested by ARBiH commands. Even if the EMD had carried out this action in accordance with the OG-3-North order, which is not the case,⁵⁸ the fact that it did not do so at the time requested in the order is, in itself, sufficient to show that the EMD was not under the ARBiH's effective control. As Judge Moloto observed, "*the practice of deviating from commanders' orders, whether justified or not, is contrary to and undermines the system of command and control.*"⁵⁹
41. The EMD also did not follow the 3Corps order regarding the action on Kajen Sopot in October 1994.⁶⁰
42. Moreover, the evidence showed that in 1994, when the EMD transferred from the Serici-Teslic front, it refused the 3Corps' order to attack features 726, 702, and 706. Instead, it carried out a "fake attack" as a way of deceiving the 3Corps Command.⁶¹ The EMD did not follow the instructions concerning the method and timing of the attack which had been planned for November 1994.⁶²
43. On 24 March 1995, the 3Corps ordered the EMD to prepare for combat activities on the Vlasic plateau with the 3 and 7Corps.⁶³ However, the EMD refused to participate in this action. Consequently, the 3Corps order was revoked.⁶⁴
44. The Majority concluded that the fact ARBiH commanders did not take any steps to sanction the EMD for its non-compliance with orders constituted an acceptance of such behaviour and an indicator of effective control.⁶⁵ This conclusion flies in the face of all

⁵⁷ *TJ*,para.388.

⁵⁸ **PW9**,15/11/2007-T.5598-5600, commenting on **E837**,
PW9,15/11/2007-T.5612-5613, commenting on **E839**-3Corps Order,03/10/1994,
Awad,08/02/2008-T.74.

⁵⁹ Para.10.

⁶⁰ **E839**.
 [REDACTED].

⁶¹ **Awad**,10/02/2008-T.191-192.

⁶² **Awad**,10/02/2008-T.191-192.

⁶³ **E1029**-3Corps Order,24/03/1995.

⁶⁴ **E395**-3Corps Order,revoking **E1029**.

Ribo,05/03/2008-T.7039,7047.

⁶⁵ *TJ*,para.462.

- the evidence. Rather, as Judge Moloto correctly noted, “*the ABiH commanders simply acquiesced in the situation because they could not impose their will on the EMD.*”⁶⁶
45. The relationship between the ARBiH and the EMD was clearly one of agreement and cooperation, rather than subordination. [REDACTED]⁶⁷, [REDACTED].⁶⁸
46. The Majority committed several errors in its analysis of the facts related to the EMD’s participation in combat and its compliance with ARBiH combat orders. First, the Majority’s finding that “*the EMD never took part in combat or carried out a military operation without the authorisation of the 3Corps or one of its subordinate units...*”⁶⁹ is incorrect. [REDACTED].⁷⁰
47. Awad, on whose testimony the Majority also relied for this finding, did not in fact testify that the EMD asked for authorization from the 3Corps before carrying out its operations. Rather, he spoke of “agreement” with ARBiH which preceded the actions.⁷¹ He further testified that the EMD did not seek to agree with the ARBiH out of obedience to its superiors, but because they considered a possible conflict with the ARBiH counterproductive.⁷² The Majority, therefore, completely misinterpreted the evidence of [REDACTED] and Awad.⁷³
48. The Majority found that “*ABiH soldiers, as well as entire units of the ABiH such as the 5th Manoeuvre Battalion of the 35th Division, were re-subordinated to the EMD and*

⁶⁶ Para.8.

⁶⁷ [REDACTED]

⁶⁸ [REDACTED]

See also **PW9**,16/11/2007-T.5695-5696,5747,[REDACTED]

Awad,10/02/2008-T.191,198,

Ribo,05/03/2008-T.7049-7050,

Hasanagic,28/09/2007-T.3286-3287,

HalimHusic,13/03/2008-T.7523,

Alija,16/10/2007-T.4156,commenting on **E606-3Corps Report on combat activities**,18/07/1995,

Sljuka,23/10/2007-T.4381,

[REDACTED].

⁶⁹ *TJ*,para.386.

⁷⁰ [REDACTED].

⁷¹ **Awad**,10/02/2008-T.252.

⁷² **Awad**,10/02/2008-T.192.

⁷³ [REDACTED],

[REDACTED].

Awad,10/02/2008-T.194-197,

[REDACTED].

participated in Operations Proljece II and Farz".⁷⁴ However, the Majority ignored evidence showing that the purpose of these orders was merely to establish cooperation between the EMD and ARBiH units *in the evacuation of wounded soldiers*. At no time was the EMD to assume control over ARBiH soldiers.⁷⁵ Moreover, the evidence was unequivocal that the orders re-subordinating ARBiH units to the EMD were never carried out in practice.⁷⁶

49. Therefore, the Majority's conclusion was clearly erroneous given that the evidence established beyond doubt that there existed nothing more than cooperation between the ARBiH units and the EMD.

(iii) "*EMD compliance with ABiH procedure concerning the handling of captured enemies*"

50. The Chamber found that the EMD did not comply with ARBiH procedures and orders concerning the handling of captured enemies.⁷⁷ It found it proved that in July and September 1995, the EMD failed to hand over POWs to the ARBiH military police company, which was in *direct defiance* of ARBiH orders containing instructions for the handling of prisoners of war. Its own findings, therefore, should have led it to conclude that the EMD was not under the ARBiH's effective control.

51. Moreover, the evidence established that the EMD did not forward or explain 3Corps orders concerning the Geneva Conventions to its members. [REDACTED].⁷⁸ What is more, it did not follow the 35Division order for the transfer of POWs from the combat zone.⁷⁹

⁷⁴ *TJ*, para.416.

⁷⁵ **Sehic**,5/11/2007-T.5088,5091,
Sehic,5/11/2007-T.5073-5075,commenting on **E699**.

⁷⁶ **Karahasanovic**,4/4/2008-T.8124.

⁷⁷ *TJ*, paras.403-405.

⁷⁸ [REDACTED].

⁷⁹ **E505**-35Division Order for Farz,25/08/1995,item14,
E455-35Division Daily combat report,21/07/1995.

52. In the context of a case involving precisely this issue – the handling, and serious, mistreatment of captured enemy soldiers by the EMD – the finding that the EMD did not cooperate at all in this regard, indeed blithely disobeyed orders, was of the greatest importance.

(iv) “*Access to EMD Premises and captured enemies*”

53. The Chamber found that the EMD did not allow ARBiH units access to its premises.⁸⁰

54. In paragraph 411, the Majority pointed out that, on two occasions, the 3Corps Commander, Mahmuljin, was allowed access to EMD headquarters at *Vatrostalna*, and that there were meetings between the EMD and the 35Division commander at EMD’s “place of deployment.” However, these rare instances when access was granted had nothing to do with POWs. Moreover, the EMD did not recognize the authority of any ARBiH commanders (including Mahmuljin) and they could not be ordered to let anyone in their camps if they did not wish to do so.⁸¹

(v) “*Recruitment of Locals by the EMD and replenishment with ABiH Soldiers*”

55. The Majority erred in fact occasioning a miscarriage of justice in finding that the ARBiH commands transferred soldiers to the EMD.⁸²

56. In paragraph 467, the Majority concluded that “*on several occasions during the EMD’s existence, even as late as 1995, when the ABiH concentrated its efforts to lift the Sarajevo siege and defeat the VRS, the 3rd Corps transferred local Bosnian Muslim soldiers to the Detachment.*” This conclusion was without any evidential foundation. On the contrary, it

⁸⁰ See paras.326-331 *infra*.

⁸¹ **Begovic**,13/07/2007-T.536-537:“*There were guards wherever we had a camp...Even if Rasim Delic had appeared, it would have been necessary for his entry to be authorised.*”

⁸² *TJ*,paras.185,412-414,467.

is clear from the evidence and the Chamber's own findings⁸³ that ARBiH commands were strictly opposed to local Bosnian soldiers' joining the EMD, and that they tried to prevent these transfers.⁸⁴

57. The Chamber accepted that “[i]n one instance, the Commander of the 3rd Corps ordered the EMD to return to the 328th Brigade soldiers that had joined the EMD's ranks,⁸⁵ and that in early 1995, it “ordered that the staffing of the EMD be limited and that further admittance of local and foreign fighters be suspended...”⁸⁶ It also found that “ABiH, in spite of some efforts, could not effectively prevent those moves because, as the evidence suggests, it shied away from conflict with the EMD”⁸⁷
58. However, the Majority failed correctly to consider the ARBiH's inability to prevent transfers of soldiers to the EMD as an indicator of a lack of control over this unit. The ARBiH ultimately accepted some transfers of soldiers to the EMD because it had no means of preventing them.⁸⁸ It reluctantly accepted a *fait accompli*.
59. The Majority simply chose to ignore this evidence, and reached a conclusion which was not open to it to reach on the evidence: “[t]he Majority is satisfied that the ABiH would not relinquish command and control over these soldiers to the EMD in those circumstances. In the Majority's view, these transfers of ABiH soldiers to the EMD have to be understood as reinforcement of an ABiH assault unit which was under its effective control...”⁸⁹ If this were true, ARBiH commands would not have treated those transfers as a violation of ARBiH rules which needed to be stopped and the transferred soldiers as deserters.⁹⁰

⁸³ *TJ*, paras.412-414 to which the Majority referred in para.467.

⁸⁴ The very order on the establishment of the EMD, **E273**, specifically provides for replenishment with foreigners only. *See* para.139 *infra*.

⁸⁵ *TJ*, para.413.

⁸⁶ *TJ*, par.414.

⁸⁷ *TJ*, para.413.

⁸⁸ **Begovic**, 13/07/2007-T.515-516,
See also Fusko, 23/07/2007-T.1140,
Delalic, 27/08/2007-T.1765.

⁸⁹ *TJ*, para.467.

With regard to the Trial Chamber's conclusion that the EMD was an assault unit, *See* paras.114-118 *infra*.

⁹⁰ *See* **E577**, p.2.

Imamovic, 11/10/2007-T.3979, commenting on **E577**,
E590, **E591**, **Hubo**, 17/03/2008-T.7667-7668, commenting on **E590**; **E942**, p.1,

60. The Majority further ignored the fact that, because the EMD could not resolve the issues related to the transfer of soldiers with ARBiH commands, they addressed President Izetbegovic directly.⁹¹
61. Finally, the Majority failed to consider the fact that all transfers of soldiers to the EMD were done in direct contravention of the Appellant's order of 14 July 1993.⁹²
62. E1164, E1165, and E1166, on which the Majority relied in paragraph 414, were entered into evidence through the Prosecution Bar Table Motion, and have not been commented upon, much less verified as accurate, by any witnesses.

(vi) “*Mutual ABiH Assistance between ABiH and EMD*”

63. The Chamber accepted that assistance rendered by the ARBiH to the EMD “*was sporadic and insufficient*”⁹³ and that this was due, in part, to the fact that “*the EMD was also financed through separate channels [from the ABiH]*”⁹⁴ Funding is crucial to effective control,⁹⁵ and “*sporadic and insufficient*” assistance can hardly be considered a manifestation of effective control.⁹⁶
64. The Majority also relied on evidence regarding the joint training of ARBiH units and the EMD to show “mutual assistance” between the two.⁹⁷
65. In assessing the significance of joint training, the Majority failed to consider ample evidence that during the training EMD members tried to impose their religious views and

⁹¹ **E1286, E1293, E680, E676; Husic**, 13/05/2008-T.7510-7512; [REDACTED].

⁹² **PW9**, 14/11/2007-T.5567-5568.

⁹³ *See also Hubo*, T.7671-7672, commenting on **E1167**.

⁹⁴ **E1337**, items 7 and 4.

⁹⁵ *TJ*, para.418.

⁹⁶ *TJ*, para.418.

⁹⁷ **Cornish**, 15/04/2008-T.8574.

See paras.99-101 infra.

TJ, para.421. The very fact the Majority used the words “mutual assistance” rather than superior-subordinate relationship is indicative of the fact that it was not open to them to find that the EMD was under the effective control of the ARBiH.

See also Awad, 9/2/2008-T.118-120, 241, 10/02/2008-T.259-260,

Shic, 05/11/2007-T.5083-5084,

Hasanagic, 24/09/2007-T.2949-2950, 2952-2953, 2960-2961, 2965-2966, **Zilkic**, 09/11/2007-T.5325-5328, 5361-5362.

ideology on ARBiH members, which involved “*insulting the state leadership and negating state and success of the BH Army*”.⁹⁸

66. The only reasonable inference to be drawn from the Chamber’s findings under this heading, therefore, again is that there was nothing more than mere cooperation between the EMD and ARBiH. The Majority erred in fact in not drawing that inference.

(vii) “*Procedure of Reporting followed by the EMD*”

67. The Chamber accepted that the EMD never submitted any written reports to its allegedly superior units in the ARBiH. This was a staggering fact, the implication of which the Majority failed entirely to consider. The finding negated its own conclusions.
68. The EMD did not submit written reports to the 3Corps, either to its security or intelligence organ.⁹⁹ The EMD also never submitted written or oral operative reports to the 35Division.¹⁰⁰
69. The evidence also showed that the 35Division never managed to establish any contacts with the EMD with regard to the issue of security, and that it never received a single report concerning security from the EMD.¹⁰¹
70. The Chamber further found that the EMD did not comply with 3Corps and 35Division orders to submit reports on ammunition and possessed equipment, nor did it comply with 35Division requests to submit a combat report on newly reached lines and a report on reconnaissance results.¹⁰² It also found that the EMD did not comply with a 35Division order to submit daily combat reports.¹⁰³

⁹⁸ **Zilkic**,09/11/2007-T.5360-5362,referring to **E798**,
See also **E592**-Daily Report of 3KSVB of 10/09/1995,
Zilkic,09/11/2007-T.5363,commenting on **E774**-3Corps SVB Information,01/07/1995,
E1253-SVK Security Administration Order,24/12/1993.

⁹⁹ *TJ*,para.425,
See also **Sivro** (3Corps Operations Centre member),01/10/2007-T.3367,
Mrkaljevic (Chief of the 3Corps Analysis Sector),10/10/2007-T.3935-3937,
Spahic (3Corps SVB member),09/11/2007-T.5290,commenting on **E777**-3Corps SVB Report,08/07/1995,
Halim Husic (3Corps Assistant for Morale),12/03/2008-T.7422,

¹⁰⁰ *TJ*,para.424.

¹⁰¹ **Imamovic**,11/10/2007-T.4045-4046.

¹⁰² *TJ*,para.426.

71. These findings clearly indicated that the EMD was not under the ARBiH's effective control.
72. The Majority attempted to explain away the EMD's failure to submit written reports by noting "*that the leadership of the EMD mainly consisted of foreigners who did not speak the local language, and who communicated with Bosnians through interpreters.*"¹⁰⁴ This explanation is completely unmeritorious, as Judge Moloto observed in his dissent:
- "16. The Majority's argument that oral reporting by the EMD was 'useful and practical' because of 'language differences' is, with full respect, without merit. The EMD's interpreter could write such reports if the EMD really wanted to submit written reports. Besides, there were many local Bosnian Muslim members of the EMD who could have fulfilled the task."*
73. The Majority's conclusion that the EMD's failure to submit written reports is, or might be, explained because of a language barrier also runs directly counter to the evidence and the Chamber's own findings in paragraph 412 and 415 of the Judgment that Bosnian Muslims were not only in the EMD, but even in leadership positions.
74. The Chamber itself acknowledged that the EMD *orally* communicated with the 3Corps Command at the time it was re-subordinated to the 35Division, to which it was supposed to submit reports.¹⁰⁵ This communication outside the chain of command clearly shows that the EMD simply did not respect the system of command and control within the ARBiH.

See also 485-35Division Order to EMD,08/05/1995,
Hasanagic,26/09/2007-T.3122,commenting on **E485**; **Hasanagic**,25/09/2007-T.3041,commenting on **E467**-35Division Order on deployment of troops,11/09/1995,**Ribo**,05/03/2008-T.7027-7028,commenting on **E1187**-3Corps Order,09/01/1995,
Hasanagic,27/09/2007-T.3141,commenting on **E488**, **Awad**,10/02/2008-T.221-222;
Hasanagic,27/09/2007-T.3154,commenting on **E442**.

¹⁰³ *TJ*,para.426.

Hasanagic,28/09/2007-T.3297.

Moreover, the Majority neglected the fact that the EMD sent combat reports abroad, to its real superiors.

See para.108 *infra*.

¹⁰⁴ *TJ*,paras.424,463.

¹⁰⁵ *TJ*,para.430.

75. The Majority's conclusions with regard to oral reporting run directly counter to the Chamber's findings in relation to the functioning of the ARBiH and the principle of "*unity of command*", which applied to reporting as well.¹⁰⁶
76. The Majority also found that "*the EMD's failure to comply with several orders to submit written reports to its ARBiH commanders was at least partly made up for by the EMD's oral communications, in particular in the meetings before, during and after combat.*"¹⁰⁷ This conclusion is erroneous.
77. The oral communications between the EMD and ARBiH units were rare¹⁰⁸ and they did not constitute reporting.¹⁰⁹
78. Therefore, the Majority erred in fact when it failed to see the EMD's refusal to submit reports to ARBiH commands as proof that the EMD was not under the ARBiH effective control.

(viii) "*EMD Relationship with ABiH Units and Soldiers*"

79. Under this heading, the Chamber made findings regarding the EMD's relationship with 3Corps Commander Mahmuljin. It found that Mahmuljin did not issue orders to the Detachment "*in the same manner as he did to brigade commanders*" and that the EMD received some orders directly from the 3Corps Command at the time it was still formally subordinated to the 35Division.¹¹⁰
80. The Majority relied on hearsay evidence that EMD members considered Mahmuljin as their "commander."¹¹¹ No witness testified to that effect. Awad, never said that Mahmuljin commanded the EMD.¹¹² To the contrary, he testified that the EMD

¹⁰⁶ *TJ*, para. 141.

¹⁰⁷ *TJ*, para. 463.

¹⁰⁸ Rather than "numerous" as stated by the Majority in para. 427.

¹⁰⁹ The system of command and control requires that each unit submit daily written combat reports. *See TJ*, paras. 141-144

¹¹⁰ *TJ*, para. 431.

¹¹¹ *TJ*, para. 431

¹¹² **Awad**, 10/02/2008-T.218.

commander, Abu Maali, never accepted Mahmuljin's authority.¹¹³ Moreover, even if some EMD members may have had more respect for Mahmuljin than for other ARBiH commanders, Mahmuljin's influence over this unit was very limited.¹¹⁴

81. Any reasonable trier of fact would infer from this that the EMD did not act in accordance with the ARBiH principles of command and control.

(ix) *“Relationship between the EMD and authorities outside the ABiH”*

82. The Chamber's analysis of the EMD's relationship with authorities outside the ARBiH (both foreign and domestic)¹¹⁵ is limited and leaves out a significant portion of the evidence. Even on the Chamber's limited analysis, on the basis of the facts as found by it, no reasonable trier of fact could find it proved beyond a reasonable doubt that the EMD was under the effective control of any person or unit in the ARBiH, much less under the effective control of the Appellant.

83. The Chamber found that the EMD had direct access to President Izetbegović and that it was he who *“discussed with the EMD plans for its disbandment in anticipation of the*

¹¹³ **Awad**,10/02/2008-T.216-217,
See also **E591**-3Corps SVB Request for a list of EMD members,22/04/1995,
E683-3Corps document 'Participation of Foreigners in the Army of RBiH',26/02/1994,
E1311-3Corps Order on the establishment of unit card files,18/07/1994,
E1187-3Corps Order for submission of data on ammunition quantity,09/01/1995,
E843-3Corps SVB Information on Vranduk,19/12/1995,
E761-Security Administration, Special Information No. 234,02/12/1993,
E1058-3Corps SVB Information 'The El Mujahedin Detachment-unsolved cases,'17/08/1995,
E583-35Division SVB Report,30/08/1995,p.20,
Jusic,18/09/2007-T.2631-2632,
Ribo,05/03/2008-T.7048.

¹¹⁴ **HalimHusic**,13/03/2008-T.7526,
Jusic,18/09/2007-T.2631-2632,
Ribo,05/03/2008-T.7048,
E591-3Corps SVB Request for a list of EMD members,22/04/1995,
E683-3Corps document 'Participation of Foreigners in the Army of RBiH',26/02/1994,
E1311-3Corps Order on the establishment of unit card files,18/07/1994,
E1187-3Corps Order for submission of data on ammunition quantity,09/01/1995,
E843-3Corps SVB Information on Vranduk,19/12/1995,
E761-Security Administration, Special Information No.234,02/12/1993,
E1058-3Corps SVB Information 'The El Mujahedin Detachment-unsolved cases,'17/08/1995,
E583-35Division SVB Report,30/08/1995,p.20.

¹¹⁵ *TJ*,paras.140,439-446.

Dayton Agreement".¹¹⁶ The evidence also showed that the EMD communicated with President Izetbegovic regarding other issues, including the exchange of captured EMD members.¹¹⁷ [REDACTED].¹¹⁸

84. President Izetbegović was the Appellant's superior and the fact that the EMD chose to address President Izetbegović directly, bypassing lower commanders, was a violation of the chain of command and speaks volumes about any notion that the Appellant had effective control over the EMD.
85. The Chamber also found that the EMD "*had relations with civilian and religious authorities in Zenica and Zavidovici and that it relied to some extent on these institutions for logistical and financial support*".¹¹⁹ However, instead of concluding that EMD's links with civilian and religious authorities raised a reasonable doubt that the ARBiH had effective control over the EMD, the Majority attempted to explain away these links by stating that "*other ABiH units also relied on civilian and religious authorities, in particular on a local level, for logistical and financial support*".¹²⁰ What the Majority failed to mention, however, is that those ARBiH units which relied on civilian and religious authorities were beyond ARBiH control precisely because of their links with civilian and religious representatives.¹²¹ One such unit was the *Asim Camdzic* company, which the Chamber discussed in paragraph 122 of the Judgment.

¹¹⁶ *TJ*, para.439. See paras.145-153 infra for more on the disbandment of the EMD.

¹¹⁷ **E1302**-EMD Bulletin sent to President Izetbegović,01/01/1995;[REDACTED].
E676-State Security Service, Official Note,23/10/1995;**E776**-3Corps SVB Information,03/07/1995.

¹¹⁸ [REDACTED].

¹¹⁹ *TJ*, para.441,

See also [REDACTED],

Ribo,04/03/2008-T:6989-6990,describing Zihnija Aganovic as an influential member of the SDA party, the President of the Travnik District, and a supporter of the Mujahedin;**E509**-3Corps SVB Information,12/08/1995;**E933**-3Corps SVB Information,10/05/1995,p.3.

E742-Special Information No.87,16/08/1995;**E1235**-3Corps SVB Information,06/03/1995;**E810**-35Division SVB Information,24/10/1995; [REDACTED].

¹²⁰ *TJ*, para.441.

¹²¹ See **E742**-Special Information No.87,16/08/1995; **E509**-3Corps SVB Information,12/08/1995,p.2,

Imamovic,15/10/2007-T.4062,commenting on **E509**;**E742**,p.2;**E810**- 35Division SVB Information,24/10/1995;**E1235**-3Corps SVB Information,06/03/1995,p.1; **E593**-35Division Information,19/07/1995; **Hajderhodzic**,08/10/2007-T.3777,commenting on **E509**; **Imamovic**,15/10/2007-T.4078,commenting on **E596**-35Division Official Note,17/08/1995.

86. The fact that the ARBiH could not control the EMD is perfectly illustrated by the Chamber's own finding that the 35 Division Commander had to ask the municipal authorities in Zavidovici for help regarding '*disorderly conduct by individual members of the El Mudzahidin unit*'".¹²² A superior military unit, exercising effective control, does not need to seek help from the civilian authorities to control a subordinate unit.
87. The Chief of the Zavidovici Municipality held a meeting with EMD representatives to discuss "*forthcoming activities*" immediately prior to the battle at Vozuca.¹²³
88. The Majority also failed to consider the significance of the fact that the EMD had a special programme for the enlightenment of Bosnian imams, which included around one hundred imams,¹²⁴ and that it had contacts with and support from senior clerics in that area.¹²⁵ EMD members also closely cooperated with the Travnik Mufti, Nusret Avdibegovic¹²⁶ and the Mufti of Zenica.¹²⁷
89. Moreover, the Majority should have taken into account the fact, as bearing on effective control, that the EMD had the support of individuals in the Government, the Ministry of Foreign Affairs,¹²⁸ and the Ministry of the Interior.¹²⁹
90. The evidence overwhelmingly showed that the Bosnian civilian, political and religious authorities exerted significant influence over the EMD.
91. The Majority erred when it failed to draw the proper conclusions from its own findings regarding the importance of foreign authorities when it comes to the effective control over the EMD.¹³⁰ In addition, the Majority failed to take into account other important evidence concerning the EMD's own political and religious goals and its political and military structure, as well as the fact that it was closely linked to foreign intelligence

¹²² *TJ*, para.441.

¹²³ **E679**.

¹²⁴ **E1386**-EMD fax sent abroad,13/11/1994,p.5,item4.

¹²⁵ [REDACTED], *See also E940*.

¹²⁶ **E676**-State Security Service, Official Note,23/10/1995; [REDACTED].

¹²⁷ **E1282**-Death certificate issued by the Zenica Mufti's office,23/08/1995;**Halim Husic**,12/03/2008-T.7414-7415,commenting on **E1282**.

¹²⁸ **E243**-3Corps SVB document on failure to deport foreign nationals,16/07/1994,p.1.

¹²⁹ [REDACTED];**E680**-Official Record of the State Security Service,23/10/1995; [REDACTED].

¹³⁰ *TJ*, paras.186-195,385,419,442-446,464,466.

services and terrorist organizations. These errors of fact occasioned a miscarriage of justice.

92. The Chamber found that, although “*the EMD formally had a structure that resembled that of other ABiH units, the evidence suggests that the Detachment functioned in quite a different manner from other ABiH units*”.¹³¹ The Chamber described the EMD hierarchy as consisting, *inter alia*, of an Emir who was responsible for overseeing all military and civilian matters, as well as a separate military commander who was in charge of combat operations.¹³²
93. The Chamber found that the “*supreme decision-making body*” within the EMD was the *shura*¹³³, a “*religious council*.”¹³⁴ The *shura* was “*the final authority within the EMD regarding all matters of importance*”.¹³⁵ According to the Chamber this body “*exercised quasi-judicial functions within the EMD and could decide to hand over an individual to the Bosnian authorities for trial...*”.¹³⁶
94. Given these findings regarding the EMD’s distinct and independent structure, with its *shura* being the “*final authority*” – not the ARBiH –, it was quite simply perverse for the Majority to conclude that the EMD was under the Appellant’s effective control.
95. The Majority further erred in failing to draw the only reasonable conclusion from the evidence relating to the EMD’s links with foreign centres. The Chamber accepted that Sheik Enver Shaban, head of the Islamic Cultural Institute (“ICI”) in Milan was the “*real Emir*” within the EMD, and that his authority was never challenged by the *shura*.¹³⁷ Moreover, the Chamber found that Shaban “*facilitated the recruitment of volunteers from Arab countries for the struggle in Bosnia and Herzegovina*” and that he issued binding rulings or *fatwas*.¹³⁸ The evidence showed that *Fatwas* were based on an Islamic rule or

¹³¹ *TJ*, para. 192.
¹³² *TJ*, para. 188.
¹³³ *TJ*, para. 385.
¹³⁴ *TJ*, para. 189.
¹³⁵ *TJ*, para. 189.
¹³⁶ *TJ*, para. 194.
¹³⁷ *TJ*, para. 190.
¹³⁸ *TJ*, para. 190.

prescription, were binding for all members of the EMD, and superseded any orders from any Bosnian authorities.¹³⁹

96. Although the Majority acknowledged that Sheikh Shaban was the *de facto* leader of the EMD¹⁴⁰, it failed to consider that he was a member of the European Shura which was intimately involved in the functioning of the Mujahedin in Bosnia and their efforts to spread the Dawa.¹⁴¹
97. The Majority failed to consider that the EMD was part of a political and religious community, the *Dzemat*, which was completely independent of the BiH authorities: “[t]he principal objective of this *Dzemat* was Dawa...missionary work, work on promoting Islamic values, principles and the like.”¹⁴²
98. The *Dzemat* had its own hierarchy and structure. It had a *shura*, an emir, and institutions “which it use[d] to further its own objectives.”¹⁴³ The mujahedin *Dzemat* in BiH had “a lot of members, all the members of El Mujahid Detachment plus a number of others who were not members of the Detachment”.¹⁴⁴ Members of the *Dzemat* who were not in the EMD were in charge of finance, collecting donations, funding, and general support for the work of the EMD.¹⁴⁵
99. The Chamber found that the EMD received logistical support from foreign sources such as the ICI in Milan and that it communicated with institutions outside of Bosnia and Herzegovina.¹⁴⁶ Moreover, it found that the **main** purpose of the EMD’s frequent written communications with foreign institutions outside Bosnia and Herzegovina “was to promote its cause and attract financial support”.¹⁴⁷ Even if this were true,¹⁴⁸ it would be sufficient to prove that the EMD was under the control of foreign institutions, since these

¹³⁹ PW9,15/11/2007-T.5661,5663.

¹⁴⁰ See also [REDACTED].

¹⁴¹ E1437-Meeting of the European Shura, Agenda, 24/04/1993, pp.2-3; E844-Interview with Sheik Shaban in ‘Ljiljan,’ 15/11/1995, in which he introduced himself as a missionary; E677; E325, p.5.

¹⁴² PW9,15/11/2007-T.5657.

¹⁴³ PW9,15/11/2007-T.5658.

¹⁴⁴ PW9,15/11/2007-T.5658-5659.

¹⁴⁵ *Id.*

¹⁴⁶ *TJ*, paras.442-446.

¹⁴⁷ *TJ*, para.464.

¹⁴⁸ See para.108 *infra*.

institutions were financing it. Effective control is inextricably linked with the question of financing. As the saying goes, “*he who pays the piper, calls the tune*”.¹⁴⁹

100. The Majority found¹⁵⁰ that the EMD explicitly stated in a fax sent abroad:¹⁵¹

“We are now one unit, we have our own body which is formally under the control of the [ARBiH], but the [ARBiH] cannot order us to engage in actions against our will.”

101. The Majority failed even to attempt to deal with this powerful evidence in respect of any alleged ability of ARBiH units to exercise effective control over the EMD. The Majority also mistakenly found that the fax was sent to “*unknown recipients*.” Yet, it is clearly stated in the first paragraph of E127 that the statement was addressed to Ebu Ahmed and Ebu D’Asir in Saudi Arabia.

102. The Chamber accepted that “[t]hroughout its existence, the EMD regularly communicated with entities outside Bosnia and Herzegovina, including the ICI in Milan.”¹⁵² In this context, the Majority should have noted the sharp contrast with the fact that the EMD *never* submitted reports to ARBiH units. This should have indicated to the Majority who the EMD’s political masters were and under whose effective control it was.

103. In this connection, the Chamber cited E1394, another document sent from the EMD to the ICI in Milan, as support for the conclusion that the EMD informed its benefactors of the progress achieved “*in missionary work*”.¹⁵³ However no mention was made of the fact that the exhibit’s author assured the recipient that the EMD did not consider itself part of the ARBiH and that it refused to participate in many military operations with the ARBiH.¹⁵⁴ The context of the exhibit had a relevance, therefore, which went far beyond “*missionary work*.” The Chamber also failed to consider several other documents that the EMD sent abroad, each of which clearly showed that the EMD was neither *de jure* nor *de*

¹⁴⁹ In the *Tadic* AJ, the Appeals Chamber emphasised the importance of financing in relation to effective control. See e.g. para. 151(ii) of that Judgement.

¹⁵⁰ *TJ*, para. 381.

¹⁵¹ **E127**.

¹⁵² *TJ*, para. 443.

¹⁵³ *TJ*, para. 443.

¹⁵⁴ **E1394**, p. 4.

facto part of ARBiH.¹⁵⁵ Nonetheless, even the Majority's limited interpretation of E1394 is sufficient to show that the EMD informed its true superiors abroad of its progress, and that it was under their control and not that of the ARBiH.

104. Furthermore, the Majority completely ignored the abundant evidence of the EMD's links with foreign intelligence services and terrorist organizations. There was clear evidence that certain EMD members were under the direct patronage of foreign intelligence services, and that they had significant ties with certain circles in the Republic of Croatia.¹⁵⁶
105. Ali Hamad testified of his own involvement with *Al-Qaeda* and his arrival in Bosnia.¹⁵⁷ He further described *Al-Qaeda*'s involvement in Bosnia thus:
- “So for instance, if Al-Qaeda would refuse that we take part in an attack, then we wouldn't take part in that attack even with the BiH army would request -- would request us....”*¹⁵⁸
106. Ali Hamad also spoke of a number of Mujahedin in Bosnia, including himself, who were tried by an “*Al-Qaeda court*”¹⁵⁹ – a powerful indicator of who in fact exercised effective control over the mujahedin. No reasonable trier of fact would consider that a makeshift army in Bosnia could exert effective control over members of *Al-Qaeda*, and other powerful, trans-national terrorist organisations.
107. Furthermore, the Majority misinterpreted and/or ignored important evidence showing the EMD's independence from the ARBiH. In paragraph 191, the Chamber found that the EMD “*had a flag of its own which consisted of white Arabic writing on a black background.*” This flag in no way resembled the flag(s) of ARBiH units. The Majority also found, however, that the “*Detachment used a stamp bearing the RBiH coat of*

¹⁵⁵ E1200, E1386, E1388, E1390, E1393, E1394, E1395.

¹⁵⁶ E127-3Corps Information on activities of foreigners from Arab countries within the 3Corps zone of responsibility, 28/11/1993; E939-3Corps SVB Proposal for introduction of POPO and TK telefax towards members of the “El Mujahid” detachment, 06/03/1995; [REDACTED]; [REDACTED]; Alihodzic, 30/11/2007-T.6497-6498, commenting on E939; E1427-Excerpt from Milan Court Judgment, 03/01/2006, pp.1, 24, 25; E1390-Excerpt from Milan Court Judgment, 01/01/2006, p.4; E1201-Faxes sent by the EMD to ICI in Milan and telephone intercepts to ICI, 27/02/1995.

¹⁵⁷ Ali Hamad, 09/07/2007-T.79.

¹⁵⁸ Ali Hamad, 08/09/2007-T.142.

¹⁵⁹ Ali Hamad, 08/09/2007-T.180.

arms”.¹⁶⁰ Aside from the fact that there is a very big difference, in terms of showing loyalties, between a stamp of the *RBiH*, i.e. of the *Republic of Bosnia and Herzegovina*, and a stamp of the *ARBiH*, i.e. of the *Army* (and hence it is highly significant if the one is used but not the other), the Majority, in so finding, in fact ignored abundant evidence that the EMD had its own distinct stamp, that it used the RBiH stamp only for the purposes of its Bosnian members, and that it did not use the ARBiH insignia.¹⁶¹

108. Finally, the Majority’s analysis of EMD’s reporting abroad reflects its selective approach to evidence, and it shows that in reaching its conclusion on this matter the Majority either ignored or misinterpreted a significant portion of the evidence. For example, in paragraph 444 the Majority merely states that some reports sent abroad by the EMD were “*on their face*” more concerned with military matters, but fails to comment on how this affected the ability of ARBiH units to exercise effective control over the EMD. The EMD sent regular combat reports *to its direct superiors abroad*.¹⁶²

(x) “*The Ability to Investigate and Punish EMD Members*”

109. The Chamber’s findings regarding the ability to investigate and punish EMD members in no way support the conclusion that the Appellant exercised effective control over the EMD.¹⁶³ This indicator is discussed in detail in paragraphs 332-372 below.

¹⁶⁰ *TJ*, paras.191,362.

¹⁶¹ **Awad**,08/02/2008-T.38-39;**E1386**-EMD Bulletin sent to ICI Milan,05/05/1992;**E1388**-Fax from EMD to ICI,12/04/1995;**E1395**-EMD Bulletin sent to ICI Milan,12/09/1995;**PW9**,16/11/2007-T.5746-5747;**E116**-Phtoboard of military insignia;**PW2**,19/07/2007-T.885-886,commenting on **E128**-Video of EMD flag;**E592**-3Corps SVB Daily Report,10/09/1995,p.3;**E774**-3Corps SVB Information,01/07/1995,p.2;**Imamovic**,15/10/2007-T.4059,commenting on **E575**-35Division SVB Daily Report,18/08/1995;**Hasanagic**,26/09/2007-T.3129;**Sehic**,05/11/2007-T.5087;**PW2**,19/07/2007-T.886,commenting on **E128**.

¹⁶² See **E935**, **E1201**, **E1386**, **E1387**, **E1388**, **E1394**, **E1395**, **E1427**.

¹⁶³ *TJ*, paras.447-453.

(xi) “*Appointments and Promotions of, and Awards to, EMD Members by the ABiH*”

110. It is clear from the Chamber’s findings under this heading¹⁶⁴ that it was the RBiH Presidency, and not the Appellant, who promoted EMD members on several occasions.¹⁶⁵ Moreover, as the Chamber found, the only reason why EMD members were given awards in 1995 was “*to induce them into leaving Bosnia and Herzegovina, as prescribed by the Dayton Agreement*”.¹⁶⁶
111. E570, which the Majority cites in footnote 1170, was produced by the ARBiH Supreme Command Staff (“SVK”)¹⁶⁷ Personnel Administration. The Appellant did not even see, let alone sign, E570¹⁶⁸
112. Moreover, the EMD did not follow orders concerning appointments and promotion to ranks.¹⁶⁹ [REDACTED],¹⁷⁰ a number of EMD members were appointed company commanders. However, the EMD did not accept the ranks and structure or the organization of ARBiH units. Instead, the EMD had combat groups led by emirs.¹⁷¹

¹⁶⁴ *TJ*, paras.454-456.

¹⁶⁵ See also **E1097**, Art.5 and 7. The Appellant’s authority was limited to the appointment of non-commissioned officers and officers with the rank lower than colonel. The Presidency appointed officers who held the rank of colonel and higher.

¹⁶⁶ *TJ*, para.456. It should be noted that **E570**, on which the Majority relies in para.455, and which it describes as “*the proposal of Rasim Delić*” for the promotion of EMD members, was not signed by Delić and the evidence was that he never even saw it: **Mrkaljevic**, 10/10/2007-T.3932-3933; **Loncaric**, 10/04/2008-T.8343-8344.

¹⁶⁷ The “*Main Staff*” of the ARBiH was formed on 25/06/1992, pursuant to an RBiH Presidency Order (**E156**). The ARBiH “*Main Staff*” was also referred to as “*Supreme Command Staff*” (“*Stab Vrhovne Komande*” or “*SVK*”), see **E16**-Decree with the force of law on the Amendment of the Decree with the force of law on Defence, Art.1.

On 24/10/1994, pursuant to RBiH Presidency Decision on the organizational chart of the ARBiH, the “*Main Staff/Supreme Command Staff*” was renamed the “*ARBiH General Staff*”, **E419**, p.2, Section III. For reasons of convenience, the Supreme Command Staff/Main Staff/General Staff will hereinafter be referred to as the “**SVK**”.

¹⁶⁸ **Loncaric**, 10/04/2008-T:8343-8344.

¹⁶⁹ **E571**-RBiH Presidency, Decision on Commissions and Promotions to Rank in the ARBiH, 05/08/1994, [REDACTED].

[REDACTED], [REDACTED],

[REDACTED],

Awad, 08/02/2008-T.57.

¹⁷⁰ [REDACTED].

¹⁷¹ **Alic Saban**, 16/07/2007-T.685.

Nonetheless, the Majority failed to take these facts into consideration when deciding on the existence of effective control.

(xii) “Disbandment of the EMD”

113. The Majority’s findings regarding the disbandment of the EMD are covered in paragraphs 145-153 below.

3. Additional facts found by the Majority

(a) *The Majority erred in its conclusion that the EMD was an assault unit within the ARBiH*

114. The Majority erred in fact occasioning a miscarriage of justice in finding that the EMD was an assault unit.¹⁷² That finding was important for the Majority’s other findings.

115. The Chamber’s findings that the EMD was an “*assault unit tasked with spearheading a particular attack and breaking through the enemy lines,*”¹⁷³ and that it was “*tasked with carrying out the most dangerous activities on the field*”¹⁷⁴ was unsupported by any evidence. The Chamber relied, *inter alia*, on Divjak’s evidence that: “*it was supposed to be an elite unit, to be used at such positions or locations at the front line that were in danger, that were under the most pressure by the opposing party.*”¹⁷⁵ However, Divjak said this with regard to the formation of the 7th Muslim Brigade, not the EMD.¹⁷⁶ The Chamber, therefore, completely misunderstood Divjak’s evidence. This was a patent – and significant – error of fact.

¹⁷² *TJ*, paras. 380, 465.

¹⁷³ *TJ*, para. 380.

¹⁷⁴ *TJ*, para. 465.

¹⁷⁵ **Divjak**, 11/09/5007-T.2149.

¹⁷⁶ **Divjak**, 09/11/2007-T.2147.

116. Furthermore, the witnesses on whose evidence the Chamber relied clearly stated that not only was the EMD not an assault unit of the ARBiH, but that its members were very unreliable and reluctant to take part in combat activities.¹⁷⁷
117. Action Vranduk was established in part because the EMD refused to participate in and avoided combat.¹⁷⁸
118. Finally, the Majority's finding that, as a "*specialized assault unit*," the EMD "*held a special position and enjoyed certain autonomy within the ABiH*"¹⁷⁹ was unsupported by the evidence. The EMD was treated differently from ARBiH units because it was an independent unit which merely cooperated with the ARBiH.¹⁸⁰ As Judge Moloto correctly found, "*the 'special treatment' given to the EMD was to induce cooperation which the ABiH was unable to get through the system of command and control and not because the EMD was a specialized assault unit.*"¹⁸¹

(b) *Vatrostalna Barracks*

119. The Majority erred in fact occasioning a miscarriage of justice in concluding that the ARBiH provided the EMD with the Vatrostalna barracks.¹⁸²

¹⁷⁷ **Ribo**,6/3/2008-T.7133,
See also Ribo,5/3/2008-T.7049-7050,
Jusic,19/09/2007-T.2627,2654,
Hasanagic,27/09/2007-T.3145-3146,
Imamovic,11/10/2007-T.4041-4042,
Alija,16/10/2007-T.4156.

¹⁷⁸ **E964**-GSARBIHSVB Proposal for the introduction of the OA Vranduk,13/05/1995,p.1,
PW13,06/12/2007-T.6656-6657,commenting on **E964**,
See also Jusic,19/09/2007-T.2654,
Hasanagic,27/09/2007-T.3145-3146,
Imamovic,11/10/2007-T.4041-4042,
Alija,16/10/2007-T.4156.

¹⁷⁹ *TJ*,para.465.

¹⁸⁰ *See paras.34-49 supra.*

¹⁸¹ Judge Moloto's Dissenting Opinion,para.25.

¹⁸² *TJ*,paras.180,420.

120. The Chamber's finding that "[s]oon after the establishment of the EMD in August 1993, its command moved from Poljanice into the Vatrostalna building in the Podbrezje neighbourhood of Zenica, **which had been assigned to it by the 3rd Corps**"¹⁸³ is incorrect for a number of reasons. First, the 3Corps order upon which the Trial Chamber relies (E836) was issued a year after the establishment of the EMD. Therefore, it is wrong to conclude that the EMD moved into the Vatrostalna building pursuant to an order of the 3Corps. Commenting on E386, PW9, on whose testimony the Trial Chamber relied, specifically stated:

*"Vatrostalna was the barracks of the El Mujahedin Detachment, but that was a barracks already from the time that I came to the detachment, from October 1993...That was the main barracks of the detachment from that time, so I don't really see the sense of this order."*¹⁸⁴

121. Other evidence on which the Chamber relied to show that the Vatrostalna building was assigned to the EMD by the 3Corps also negated its conclusion. There is no mention of the Vatrostalna building in paragraph 8 of E826¹⁸⁵ cited by the Chamber. Moreover, whilst Begovic stated that the EMD command was located in Vatrostalna, he never said it was assigned this building by the 3Corps.¹⁸⁶ The same is true of the testimony of PW2¹⁸⁷ and Hubo.¹⁸⁸ The Chamber also misinterpreted Awad's evidence. On pages 8 and 23 of his testimony referred to in paragraphs 180 and 420, Awad testified about the *Bilmiste barracks*, not the Vatrostalna building. On page 24, Awad stated that the EMD moved into a building in Podbrezje which "*belonged to the Vatrostalna company.*" Nowhere did he mention the 3Corps.

122. Furthermore, the documents on which the Chamber relied in paragraphs 180 and 420 provide no proof that the Vatrostalna building was assigned to the EMD by the 3Corps. It is clear from paragraph 10 of E770, the witness statement of Salih Spahic, that not only

¹⁸³ *TJ*, para. 180.

See also para. 420 which reads: "[t]he ABiH also provided the EMD with the *Vatrostalna* barracks."

¹⁸⁴ **PW9**, 15/11/2007-T.5591-5592.

¹⁸⁵ [REDACTED].

¹⁸⁶ **Begovic**, 11/07/2007-T.439-440.

¹⁸⁷ **PW2**, 19/07/2007-T.901.

¹⁸⁸ **Hubo**, 14/03/2008-T.7631.

did the 3Corps not assign the Vatrostalna building to the EMD, but members of its command were not even allowed access to this building by the EMD. The 3Corps order providing that the EMD shall hand over the Vatrostalna building to the 3Corps Military Police Battalion¹⁸⁹ was issued after the signing of the Dayton Accords and the disbandment of the EMD. The fact that the EMD turned over the building to the 3Corps, in whose AOR it operated, does not prove that the 3Corps gave the EMD this building in the first place. Nor is this evident from Awad's testimony on which the Chamber relied.¹⁹⁰ Moreover, E434, cited in footnote 1085, is a 35Division order to the EMD regarding the establishment of a camp at the 12th kilometre which the EMD failed to follow.¹⁹¹ This order has nothing to do with the EMD's occupation of the Vatrostalna building.

123. Finally, the Majority completely ignored the evidence showing that it was the Ministry of Defence, a civilian body, which requisitioned and gave buildings and other resources.¹⁹² This is evident from E1315¹⁹³ on which the Chamber mistakenly relied in paragraph 420. The document provides that a commission, comprised of representatives from the Zenica Municipal Assembly, the Zenica Section of the Defence Ministry, and the EMD, carried out an inspection of the Vatrostalna facility. No members of the 3Corps were involved.

(c) *Operation FARZ*

124. The Majority erred in fact occasioning a miscarriage of justice in finding that Operation Farz was conducted under the Appellant's overall command and control.¹⁹⁴

¹⁸⁹ **E1133**, referred to by the Trial Chamber in footnotes 465 and 1085.

¹⁹⁰ **Awad**, 09/02/2008-T.127, commenting on **E1133**.

¹⁹¹ **Hasanagic**, 26/09/2007-T.3102-3103, commenting on **E434**; *See also* TJ, para.374.

¹⁹² **E1310**-Decree on the criteria and standards for the assignments of citizens and material resources to the armed forces and for other defence needs, 26/10/1992. Art.59.

See also **Ribo**, 27/03/2008-T.6960; **Hubo**, 17/03/2008-T.7673

¹⁹³ Record on the inspection of facilities, 17/06/1995,

See also **Hubo**, 17/03/2008-T.7675-7679, commenting on **E1315**.

¹⁹⁴ TJ, para.468. The Majority also referred to its findings in paras.397-402. However, there is no mention of the Appellant's role in the command and control of Operation Farz in these paragraphs. What is more, the Majority accepts in para.397 that 2 and 3 Corps commanders planned Operations Uragan and Farz.

125. The Majority noted that “*different ABiH Corps participated in these operations and as a consequence, they needed coordination by the Main Staff and their direct superior, Rasim Delic.*”¹⁹⁵ Operation Farz was carried out by the 2 and 3 Corps. They coordinated their activities without any help from anyone in the SVK.¹⁹⁶
126. The only document which provided that the SVK coordinated and successfully orchestrated the operation is the report of the Administration for Morale dated 24 September 1995.¹⁹⁷ The veracity of this exhibit has been challenged by witness Halim Husic, 3Corps Assistant for Morale.¹⁹⁸ His testimony that the document does not reflect reality accords with the testimonies of four other witnesses: Delic, Jusic, Hasanagic and Ribo.¹⁹⁹
127. By officially approving the plan for Operation Farz, the Appellant approved the carrying out of the operation by the 3Corps, specifically by those units whose tasks were graphically depicted on the map of the Farz plan.²⁰⁰ The Majority itself found that no reference was made to the EMD on the map signed by the Appellant.²⁰¹

¹⁹⁵ Footnote 1195.

¹⁹⁶ **Ribo**, 5/3/2008-T.7055, 7059, 7061.
Jusic, 18/09/2007-T.2582-2583,
Jusic, 17/09/2007-T.2536-2537,
Delic, 21/09/2007-T.2865-2867,
E389, E403-Order of 2K Command of 01.09.1995.
Delic, commenting on **E403**, 20/09/2007-T.2748

¹⁹⁷ **E411**

¹⁹⁸ **Halim Husic**, 12/03/2007-T.7421

¹⁹⁹ **Delic**, 21/09/2007-T.2865-2867,
Jusic, 18/09/2007-T.2582-2583,
Jusic, 17/09/2007-T.2536-2537.

Ribo, 5/3/2008-T.7055, 7059.

²⁰⁰ **E380**

²⁰¹ *TJ*, para. 397.

(d) *Appellant's Acts and Orders*

128. The Majority erred in fact occasioning a miscarriage of justice in finding that the Appellant's orders and acts were sufficient to establish effective control beyond a reasonable doubt.²⁰²
129. The Majority further erred in fact occasioning a miscarriage of justice in this regard when it held that the establishment of the EMD was a *prima facie* indicator of effective control and in concluding that the EMD was *de jure* subordinated to the Appellant.²⁰³
130. It is clear from the evidence and the Majority's own findings²⁰⁴ that the Appellant's acts and orders concerning the EMD were not followed by the EMD, which did not recognize the authority of the ARBiH SVK and its commander.

(i) *Effective control and the issuing of orders*

131. The capacity to sign orders is indicative of some authority.²⁰⁵ In order to make a proper determination of the actual powers of control of a superior it is necessary to look to the substance of the documents signed and **whether there is evidence of them being complied with**. An order by the accused which is merely passed down the chain of command, or which implements the order of an accused's own superior, would not be relevant to establishing effective control insofar as the power being exercised is not that of the accused, but that of his own superior.²⁰⁶
132. In *Celebici* the Trial Chamber determined that orders signed by the accused did not demonstrate a hierarchy of control between him and his alleged subordinates, but instead established a state of intermediate implementation of his superior's orders. The signature

²⁰² *TJ*, paras. 175, 196-199, 457-458, 469.

²⁰³ *TJ*, paras. 360-364, 461.

²⁰⁴ *See* paras. 175, 196-199, 360-364, 457-458, 461, 469.

²⁰⁵ *Celebici*, *TJ* para. 672.

²⁰⁶ *See* I. Bantekas, "The Contemporary Law of Superior Responsibility," 93 *AJIL* 572, 583 (1999) ("orders which move down the chain of command cannot provide evidence of de facto control").

- by an accused on an order which is said to be relevant to establishing his effective control must give the order its force and validity.²⁰⁷
133. If the matter being ordered draws its force and authority from a source other than the decision and signature of the commander, that order may not be regarded as indicative of effective control on the part of the accused.²⁰⁸
134. Furthermore, the issuance of a single or a limited number of orders from the accused to the alleged subordinates would not yet be conclusive of a superior-subordinate relationship (even if those orders were all complied with). The Prosecution has to establish a *consistent pattern* of compliance with the orders of the accused on the part of the alleged perpetrators, on the basis of which the Trial Chamber could conclude that effective control existed.
135. Proof is required that the accused was not only able to issue orders *but that the orders were actually followed*.²⁰⁹ Pursuant to Article 7(3) the Prosecution must establish that the receiver acted because of the order and in compliance with it. It is the cumulative effect of evidence showing both subjugation to orders and respect for the authority of the accused that is necessary to convince the Trial Chamber of the existence of a superior-subordinate relationship.²¹⁰

(ii) ***The Appellant's acts and orders concerning EMD fall short of effective control***

136. In paragraphs 360-364 and 461, the Majority considered the formation of the EMD as a *prima facie* indicator of effective control and as proof that the EMD was *de jure* subordinated to the Appellant. Such a conclusion is erroneous for several reasons.²¹¹

²⁰⁷ *Celebici*, TJ paras.671-673.

²⁰⁸ *Celebici*, TJ paras.672-673.

²⁰⁹ *Blaskic*, AJ para.69; *Halilovic*, AJ para.207.

²¹⁰ *Prosecutor v. Nikolic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 Oct 1995, para.24.

²¹¹ The Majority erroneously found that the "Defence does not dispute the *de jure* subordination of the EMD as such..." This was indeed disputed by the Defence. *See* Defence Final Brief, paras.850-854.

137. First, the Majority ignored the fact that, although the Appellant signed the order for the formation of the EMD,²¹² in doing so he was merely implementing the decision of his superior, the RBiH Presidency and President Izetbegovic. The preamble to the Order clearly provides: “*Pursuant to the Decision of RBH Presidency...*”²¹³ Therefore, it is clear that the decision to form the EMD was not merely “*politically influenced by the RBiH Presidency,*”²¹⁴ it was made by the RBiH Presidency, in its capacity as the Supreme Command.²¹⁵ [REDACTED].²¹⁶
138. The Majority also ignored the evidence that the Presidency’s decision to form the EMD was made under serious pressure from the international community. Sometime in mid-May 1993, the international community, through General Morillon²¹⁷ and President of Croatia, Tudjman, insisted that all foreigners in BiH be placed under the control of ARBiH. [REDACTED].²¹⁸
139. The Majority also failed to take into account the fact that the Order of 13 August 1993 was never carried out properly, thus preventing the EMD from becoming even *de jure* subordinated to the Appellant. Local soldiers were admitted into the ranks of the EMD, even though the order specifically provided for replenishment with “foreigner volunteers”

²¹²

E273.

²¹³

E273.

²¹⁴

Para.361.

²¹⁵

The Majority’s failure to acknowledge the Presidency’s role in the formation of the EMD is irreconcilable with its findings in paragraphs 92-95. In paragraph 94 the Majority found that “the Presidency retained overall responsibility for organizational issues and the management of human resources.” See paras.162-163 *infra* for more on the role of the Presidency in the system of command and control.

²¹⁶

[REDACTED]

²¹⁷

UNPROFOR commander at the time.

²¹⁸

[REDACTED].

- only.²¹⁹ Moreover, the order required that a report on implementation be submitted no later than 5 September 1993. Such a report was never received by the SVK.²²⁰
140. The Majority ignored the fact that the real founders of the EMD and those who in fact exercised effective control over it,²²¹ had their own reasons for the formation of the EMD.²²²
141. Awad explained that they never considered they should accept the regular ARBiH chain of command. Rather, they wished to decide themselves which ARBiH commander they would trust.²²³ It is clear from the testimony of Awad that the document concerning the EMD's command structure at formation, which the EMD sent to the 3Corps,²²⁴ and the information regarding its members, did not reflect the real situation in this unit.²²⁵
142. In light of the above evidence, *given by the Prosecution's own witnesses*, no reasonable trier of fact would consider that the establishment of the EMD was a *prima facie* indicator of effective control and *de jure* subordination of the EMD to the Appellant. Therefore, the Majority erred, occasioning a miscarriage of justice, by reaching this conclusion.
143. In paragraph 175, the Majority found that the Appellant issued an authorization to Mahmuljin to negotiate with the Mujahedin with regard to the incorporation of a group of Mujahedin into the 3Corps.²²⁶ However, although the 3Corps 'Proposal for the formation

²¹⁹ E273,p.1.
 See also E577-35Division SVB document 'Transfer of members of the 328th Mountain Brigade and 4th Manoeuvre Battalion into the El Mujahedin Detachment,06/08/1995.
 E590-3Corps Order to EMD to return servicemen,09/08/1995.
 Hubo,17/03/2008-T.7667-7668,commenting on E590.
 HalimHusic,13/03/2008-T.7510-7512; [REDACTED].
 Imamovic,11/10/2007-T.3979,commenting on E577,
 E591-3Corps SVB Request for a list of EMD members,22/04/1995;
 PW9,16/11/2007-T.5681-5682,commenting on E591.
 Softic,28/08/2007-T.1856.

²²⁰ See paras.91-108 supra.

²²¹ E677-3Corps SVB Information,17/04/1995;
 [REDACTED];Halim Husic,11/03/2008-T.7305-7306;Begovic,12/07/2007-T.506;
 Awad,08/02/2008-T.37.

²²² Awad,10/02/2008-T.205.

²²³ Awad,08/02/2008-T.39-40.

²²⁴ Awad,09/02/2008-T.173,commenting on E67.

²²⁵ E271-GSARBiH Authorisation to Sakib Mahmuljin,23/07/1993.

²²⁶

of a detachment of foreign citizens²²⁷ refers to this authorization by document number, the authorization itself is of questionable authenticity.²²⁸ Moreover, it pertained specifically to negotiations with the Mujahedin from Zenica. Awad, who had first-hand experience of Mahmuljin's role in the negotiations with the mujahedin, specifically stated,

*“[t]here was never any mention of Rasim Delic giving any authorisation to him. At that meeting, it was stated that this person, Sakib Mahmuljin, had been sent by President Alija Izetbegovic.”*²²⁹

144. Loncaric confirmed that it was President Izetbegovic who decided on Mahmuljin's departure for Zenica.²³⁰
145. The Majority further ignored its own findings²³¹ regarding the disbandment of the EMD, when it found that the Appellant had effective control over this unit. It is clear from the Majority's findings that, although the Appellant signed the order for the EMD's disbandment, in so doing he was merely carrying out the decision of his superior, President Izetbegović.²³²

²²⁷

E272, 12/08/1993.

²²⁸

The Appellant's Chef de Cabinet, witness **Softic**, stated that he has never seen **E271**, and that the signature on the document is strange (28/08/2007, T.1814-1816). Softic further pointed out that the document does not bear his initials, and it should since such a document would have been prepared in the Appellant's Cabinet; that nothing on the face of the document suggests that it was either sent or received by anyone; that the contents of the Authorisation does not correspond to the writing style of a professional officer such as the Appellant (T.1857-1859), and that Mahmuljin was not a member of the 3Corps Command at the time (T.1867-1869).

²²⁹

Awad, 10/02/2008-T.218.

²³⁰

Loncaric, 10/04/2008-T.8315-8316.

²³¹

TJ, paras. 196-199, 457-458

²³²

TJ, para. 457,

See also paras. 79-81 supra.

See also **Loncaric**, 10/04/2008-T.8364, The preamble to **E824**, **E79**- GSARBiH document on Silver Shield Awards, 01/12/1995, **E817**-GSARBiH Order, 01/12/1995, [REDACTED], **E828**-GSARBiH document on Golden Lily Awards, 23/12/1995, **E829**-GSARBiH document on Silver Shield Awards, 23/12/1995, **E1134**-GSARBiH document on Commendations, 23/12/1995, **E1374**-GSARBiH Order, 20/02/1995, **Loncaric**, 10/04/2008-T.8364; **HalimHusic**, 12/03/2008-T.7428-7429, **Awad**, 09/02/2008-T.122.

146. The Majority also made reference to stimulative measures issued to EMD members by the Appellant “as an incentive to foreigners to leave”²³³. All of these documents²³⁴ were produced in the period 1-23 December 1995. This was the time of intensive preparations for the signing and implementation of the Dayton Accords.²³⁵ EMD members opposed disbandment and made statements to the effect that they would continue to fight the war.²³⁶ The SVB, which intercepted their telephone conversations, had information that they refused to hand over their weapons and would go on fighting.²³⁷ This was a dangerous situation, given the support that the Mujahedin enjoyed among the local population.²³⁸
147. The Majority further found that “*without the shura’s consent, the EMD would have continued fighting.*”²³⁹ Moreover, an intercepted fax, sent abroad by the EMD, provided that in the case of “*an escalation of a conflict with the Army, they are not to leave until a safe transfer to the next place is secured.*”²⁴⁰
148. In order to resolve the situation, the 3Corps Commander proposed a peaceful solution, accepted by President Izetbegovic, and which included awarding citations to EMD members, after which they would leave the country.²⁴¹
149. Politicians negotiated with the EMD.²⁴² Therefore, the orders for citations, although they were signed by the Appellant, were not based on his decision. Rather, they were the result of the *political* decision of President Izetbegovic.
150. [REDACTED],²⁴³ [REDACTED]. Awad recalled a meeting in December 1995 regarding disbandment, at which President Izetbegovic and the Appellant were present. EMD

²³³ *TJ*, para.198

E817, E827-829.

²³⁴ Including **E1134**-GSARBiH document on Commendations, 23/12/1995, **E1374**-GSARBiH Order, 20/02/1995, and **E79**-GSARBiH document on Silver Shield Awards, 01/12/1995.

²³⁵ **Loncaric**, 10/04/2008-T.8364; **HalimHusic**, 12/03/2008-T.7428-7429.

²³⁶ *Id.*

²³⁷ **Loncaric**, 10/04/2008-T.8364.

²³⁸ **HalimHusic**, 12/03/2008-T.7429.

²³⁹ *TJ*, para.198.

²⁴⁰ **E843**-3Corps SVB Information on Vranduk, 19/12/1995.

²⁴¹ **Loncaric**, 10/04/2008-T.8364.

²⁴² *Id.*

²⁴³ [REDACTED].

members tried to convince President Izetbegovic to change his position on the disbandment of the unit, but the Appellant reminded the President of RBiH's obligations under the Dayton Accords.²⁴⁴ It is evident that EMD representatives discussed their status with Izetbegovic and they expected a decision from him. The Appellant adhered to the position of the international community, and he wanted to see the implementation of the Dayton Accords.

151. Therefore, the Order for the disbandment of the EMD²⁴⁵ was not the Appellant's decision, but a political decision resulting from the Dayton Accords, accepted and signed by President Izetbegovic. Again, the Appellant's order flowed from the authority of his superior. This conclusion is imposed by the Majority's findings and by the overall evidence. Thus, the Majority erred when it concluded that the order on the disbandment of the EMD was an indicator of the Appellant's effective control over the EMD.
152. The Majority so concluded because the Appellant "ordered" the EMD's disbandment and disbandment then happened. The Majority thus fell into the simple *post hoc ergo propter hoc* fallacy. It is not because one event follows another in time that it happens *because* of the other event. The Majority ignored the fact that the EMD was only disbanded because the *Shura* accepted it, not because the Appellant ordered it. Yet again the evidence did not support a finding of effective control and the Chamber's own findings negated it.
153. The Appellant's presence at the farewell gathering, mentioned in paragraph 199, is also insufficient to prove that he exercised effective control over the EMD. PW9 explained that neither the visual nor audio component of the video clip reflected what happened.²⁴⁶
154. None of the Appellant's other acts and orders concerning the EMD, not specifically mentioned by the Majority was sufficient to prove the existence of effective control over the EMD. The Appellant's order of 12 January 1995 attempting to incorporate the EMD into the 3Corps represents yet another attempt to bring this unit within the chain of command.²⁴⁷ He subordinated it to the 3Corps which should have had a greater chance of

²⁴⁴ Awad,09/02/2008-T.122.

²⁴⁵ E824-GSARBiH Order for the disbandment of the EMD,12/12/1995.

²⁴⁶ PW9,15/11/2007-T.5580.

²⁴⁷ E165/E378-GS ARBiH Order on reorganization of ARBiH,12/01/1995.

- bringing the unit under control. However, this order was not effective since the EMD was never integrated into the 3Corps.
155. On 18 May 1995 the Appellant approved the ‘Realization for the Plan for OA Vranduk’. [REDACTED].²⁴⁸ It is clear from item 5 of this plan that the EMD was yet to be placed under control. [REDACTED].²⁴⁹ The entire document shows that the EMD was not under control.
156. Also, in paragraph 422, the Majority found that “[s]ome EMD members were granted permission by the ABiH, in one instance even personally by the Appellant, to travel abroad for medical treatment.” The Majority relied on E823 for this proposition, yet failed entirely to deal with the challenge made to the authenticity and reliability of this exhibit.²⁵⁰
157. [REDACTED].²⁵¹ The EMD Commander organized the issuing of travel documents to EMD members through the Travnik Mufti.²⁵²
158. The Majority’s conclusion in paragraph 422 that “[p]assports were also issued to members of the EMD on the instruction of the 3rd Corps” is incompatible with its findings in paragraph 114. There, the Majority found that “[s]ervice in the ABiH could be proved through a certificate issued by the commander of the unit of which the applicant was a member. **The Trial Chamber has been provided with evidence showing the functioning of this procedure in practice and instances of abuse where forged ABiH membership certificates were submitted.**”
159. There was no evidence of any contacts between the Appellant and the EMD from the formation of the EMD until its disbandment. Two officers [REDACTED] testified that they never saw any report or document which would indicate any connection between the Appellant and the EMD.²⁵³

²⁴⁸

[REDACTED].

²⁴⁹

[REDACTED].

²⁵⁰

Buljubasic impugned the authenticity of **E823**(14/11/2007-T.5530).

²⁵¹

[REDACTED].

²⁵²

E676-State Security Service, Official Note,23/10/1995,

[REDACTED].

²⁵³

Vuckovic,08/11/2007-T.5194,commenting on **E762**-SVB Administration Bulletin no.5,06/01/1994.

160. Moreover, the EMD did not even show respect towards the SVK or its Commander, let alone recognize it as its command.²⁵⁴ [REDACTED].²⁵⁵ The evidence unequivocally showed that neither the EMD nor its sponsors trusted communists²⁵⁶ and JNA officers. The Appellant had been both.

B. SUBGROUND 1(B): ERROR OF FACT: THE MAJORITY ERRED IN FACT OCCASIONING A MISCARRIAGE OF JUSTICE IN ITS ANALYSIS OF THE STRUCTURE AND FUNCTIONING OF THE ARBiH

161. The Majority erred in fact occasioning a miscarriage of justice in that it failed to draw proper inferences from its findings, and from the evidence, regarding the structure, functioning and role of the RBiH Presidency,²⁵⁷ Supreme Command Staff Command Post (“SVK KM”) Kakanj²⁵⁸ and the ARBiH chain of command.²⁵⁹ If it had not so erred, it would not have concluded that the Appellant exercised effective control over the EMD.

1. The Majority failed to draw the only reasonable inferences open to it from its findings and from the evidence regarding the structure, functioning and role of the RBiH Presidency

162. The Chamber found that “*the Presidency retained overall responsibility for organizational issues and the management of human resources*”.²⁶⁰ Yet the Majority failed to apply this conclusion regarding the Presidency’s role when it made its findings in relation to the formation of the EMD.

²⁵⁴ E592-3CorpsSVB Daily Report,10/09/1995,
E774-3CorpsSVB Information,01/07/1995,
E798-3CorosSVB Report,03/07/1995.

²⁵⁵ [REDACTED].

²⁵⁶ E127-3Corps Information,28/11/1993,
PW9,17/04/2008-T.8685;PW2,19/07/2007-T.884,commenting on E127.

²⁵⁷ TJ,paras.92-95.

²⁵⁸ TJ,paras.98,106-108,143-144,153-154.

²⁵⁹ TJ,paras.87,96,103-106,109-110,141-142,147-149,157-164,362-364,376-379,430.

²⁶⁰ TJ,para.94.

163. The Chamber erred in fact when it found that the “*command and control of the army remained the responsibility of the ‘senior officers of the units and institutions’*”.²⁶¹ The Chamber misinterpreted the evidence on which it relied in making this finding:²⁶²

- E9 clearly states in Article 8, that “*the Presidency of the Republic is the highest body of the command and control of the Army*”.²⁶³

2. The Majority failed to draw the only reasonable inferences open to it from its findings and from the evidence regarding the ARBiH chain of command and regarding the structure, functioning and role of the Supreme Command Staff Command Post Kakanj

164. The Chamber erred in fact in finding that “*all the Corps of the ABiH were directly subordinated to the Commander of the Main Staff*”.²⁶⁴ It misinterpreted the evidence on which it relied in reaching this conclusion:²⁶⁵

- The testimony of Sead Delić runs directly counter to its finding that “*the ABiH Corps were directly subordinated to the Commander of the Main Staff*”. Sead Delic clearly explained that it was the ARBiH Corps Commanders who were subordinated to the SVK Commander, and not the Corps, as units, as the Majority found. He further testified that the SVK Commander could issue orders only to the Corps Commanders, since they were his subordinates.²⁶⁶ Thus, the Appellant could not issue orders to Corps units, and thus not to the EMD (on the assumption that it was a Corps unit).

²⁶¹ *TJ*, para.94.

²⁶² **E9**-Decree with the force of a law on the Armed Forces of the RBiH; **Dedovic**-T.8201.

²⁶³ **E9**, p.2

See also **Delić**, 21/09/2007-T.2831; **Karavelic**, 26/03/2008-T.7865; **Dedović**, 08/04/2008-T.8201.; [REDACTED].

²⁶⁴ *TJ*, para.96.

²⁶⁵ **Delić**, T.2837-2838; **E419**-Decision on organisational chart of the ARBiH; 18 and 24 October 1994

²⁶⁶ **Delić**, 21/09/2007-T.2837-2838.

165. The Majority clearly confused the ARBiH *Corps Commander*, who was linked to the SVK Commander, with the ARBiH *Corps*, as units, which were linked to their commanders, i.e. the Corps Commanders.
166. Furthermore, the Majority failed to draw the proper inferences from its findings relating to the structure and functioning of the ARBiH²⁶⁷ and from the evidence with regard to the ARBiH chain of command.
167. The Chamber found that “*reporting within the ARBiH followed the principle of ‘unity of command and subordination’*”.²⁶⁸ The Majority failed, however, to apply this finding to its conclusions regarding the ARBiH chain of command.
168. The principle of unity of command was explained by a witness in the following way:
“This is the basic principle of the unity of command, where the commander issues commands and orders to his first subordinate, and then that subordinate issues further orders to his subordinates, and so on”.²⁶⁹
169. The Military Expert Paul Cornish testified that in detail about the principle of the unity of command. He explained that this principle ensures that there is only one person in command, deciding how the operation at whatever level is to be run.²⁷⁰
170. The commander could *not* interfere in the authority of the first subordinate commander in the sense of issuing a direct order to the unit which is under the command and control of his subordinate or to a lower-ranking subordinate.²⁷¹
171. Had the Majority applied the principle of unity of command, it could not have found that the Appellant had effective control over the EMD. Even if it could be said that the EMD was *de jure*, but not *de facto*, in the ARBiH chain of command at the time of the events in July 1995, that would have been because, on paper, it was re-subordinated to the 35Division.²⁷² That would mean that the EMD was supposed to be under the command and control of the 35Division commander (under the conditions that the EMD accepted

²⁶⁷ *TJ*, paras. 87, 96, 103-106, 109-110, 141-142, 147-149, 157-164, 362-364, 376-379, 430.

²⁶⁸ *TJ*, para. 141.

²⁶⁹ **Alija**, 16/10/2007-T.4181.

²⁷⁰ **Cornish**, 15/04/2008-T.8524-8525.

See also: **E22**-Decree on force of law on the armed forces in ARBiH, Art. 14; **Jusic**, 18/09/2007-T.2567.

²⁷¹ **Alija**, 16/10/2007-T.4180-4181; **Jusic**, 18/09/2007-T.2566; **Cornish**, 15/04/2008-T.8524-8525.

²⁷² **E431**-3Corps Order, 31/03/1995; **E1030**-3Corps Order, 31/03/1995; **E396**-3Corps Order, 02/06/1995.

- the chain of command, *which it did not*), who was in turn subordinated to the 3Corps Commander and not to the Appellant. In fact, the 35Division Commander was three levels lower in the ARBiH chain of command than the commander of the SVK.²⁷³
172. Consequently, the Appellant, as the SVK Commander, did not receive reports from any units lower than the Corps and thus he did not receive reports with regard to the EMD.²⁷⁴
173. Furthermore, the evidence unequivocally showed that the ARBiH chain of command had an additional level of command between the Corps and the SVK in Sarajevo, where the Appellant was based.²⁷⁵ That additional level was the Supreme Command Staff Command Post (“SVK KM”) in Kakanj.
174. The Chamber found that, “*Due to the ongoing communication problems in the besieged city, the major part of the Main Staff was relocated to Kakanj, which is about 40 kilometers from Sarajevo, on 2 January 1994*”.²⁷⁶ However, the Majority failed to consider how this affected the flow of information between the SVK in Sarajevo and units outside the city.
175. After the SVK KM Kakanj was established, the ARBiH Corps sent daily reports exclusively to SVK KM Kakanj.²⁷⁷ In such circumstances, SVK KM Kakanj dealt with issues related to combat activities and it was the Operation Centre in Kakanj²⁷⁸ which received reports from the field and not the SVK in Sarajevo.²⁷⁹

²⁷³ **Jusic**,18/09/2007-T.2580,

²⁷⁴ **E537**-Set of Situation reports at the BH theatre of war, sent from SVK KM Kakanj to Sarajevo(*inter alia*, the Appellant) for the period from 19/07/1995-30/07/1995.

*See also:***E374,E615,E616,E617,E618,E1407,E1408,E1411,E1412,E1413,E1414,E1417,E1419**

Berbic,14/09/2007-T.2414;**Alija**,16/10/2007-T.4218.

²⁷⁵ **Softic**,28/08/2007-T.1804-1805;**Alija**,16/10/2007-T.4186

²⁷⁶ *TJ*,para.98.

*See also:***E279**-Order of Rasim Delic to all Administrations,23/11/1993;**E280**-Order of the ARBiH Chief of Staff to the Chiefs of Administrations,02/01/1994.

Softic,28/08/2007-T.1805-1806,1873-1876;**Jusic**,18/09/2007-T.2545-2547;**Pesto**,02/10/2007-T.3428;**Alija**,15/10/2007-T.4116-4117,16/10/2007-T.4186-4187,4194

²⁷⁷ **E371**-Set of orders regarding sending of reports,27/12/1994, p.1

*See also:***Berbic**,14/09/2007-T.2397;**Alija**,16/10/2007-T.4216.

²⁷⁸ **E276**-Order for establishment and organization of Operations Center,29/06/1993;**E371**-Orders of the ARBiH Chief of Staff,27/09/1994

*See also:***Buljbasic**,T.5488;**Softic**,T.1848-1849;**Alija**,T.4116-4117;**Divjak**,T.2238-2239

²⁷⁹ **Softic**,28/08/2007-T.1877.

176. The Chamber found that the Operations Centre in Kakanj examined and selected the information contained in the reports and compiled them into one consolidated report which was then sent to the President of the Presidency and to the SVK Commander, i.e. to the Appellant.²⁸⁰ In the same paragraph, the Chamber found that only the information that was considered significant or relevant was included in the consolidated reports.
177. However, the Majority failed to consider that in such circumstances, the Appellant, as the SVK Commander, who was based in the besieged city of Sarajevo,²⁸¹ received only summarized information which did not include details about the lower units in the field, including the EMD.²⁸² The information which was available to SVK KM Kakanj was not available to the Appellant. The SVK Order from 27 December 1994 states that the Commander in Sarajevo would only be sent summary reports about *crucial changes on the front*.²⁸³
178. The Majority ignored the evidence which showed that, with the establishment of the SVK KM Kakanj, the nature of commanding over the ARBiH was changed. Although the Chamber found that it was the SVK KM Kakanj which received the combat reports from the Corps and that one of its main tasks was to “*daily monitor the military situation in the field*”²⁸⁴, it failed to conclude that, in such circumstances, the role of SVK Sarajevo and its commander, the Appellant, in commanding over the corps, was highly reduced and transferred to SVK KM Kakanj. Accordingly, the SVK KM Kakanj was the body which directly commanded and controlled the ARBiH Corps.²⁸⁵ Consequently, the Appellant’s role, as the SVK Commander, became one of a military-diplomatic nature, rather than

²⁸⁰ *TJ*, para. 143.

²⁸¹ **Softic**, 28/08/2007-T.1804-1805; **Alija**, 16/10/2007-T.4186.

²⁸² See footnote 275, *supra*

²⁸³ **E371**, p.2,

See also: **Berbic**, 14/09/2007-T.2398-2399; **Alija**, 16/10/2007-T.4217-4218.

²⁸⁴ *TJ*, paras 106-108.

²⁸⁵ **E419**-Decision on the organisation chart of the ARBiH, 24/10/1994: “***The Army Staff has been established within the General Staff, its primary task being to operatively command corps commands and independent units linked to the General Staff.***”

The term “*Army Staff*” was explained by witness **Jusic**, 18/09/2007-T.2548: “*the Staff of the Army is an operational Arm of the Supreme Command Staff, which is in charge of preparing, organising and monitoring the combat operations*”.

See also **Alija**, 16/10/2007-T.4194. This witness also confirmed that the “*Army Staff*” was based in Kakanj (T.4194), which was headed by Chief of the Staff (see **E419**, p.2, IV/2).

one of commanding and controlling ARBiH units in the field. The Appellant dealt mainly with issues of strategic importance of the ARBiH.²⁸⁶

179. The Majority appears not to have considered the evidence which showed that the Appellant visited SVK KM Kakanj only very rarely.²⁸⁷
180. The Chamber discussed the function and role of the ARBiH Chief of Staff at paragraphs 103-106, and accepted that the ARBiH Chief of Staff was, at the same time, a Deputy Commander of the SVK Commander (the Appellant). Moreover, in paragraph 105, the Chamber found that the ARBiH Chief of Staff, Enver Hadzihasanovic, who was based at SVK KM Kakanj, “*exercised command and control when the Commander is absent from the KM*”. Furthermore, the Chamber found that “*each of the Deputy Commanders was eligible to stand in for the commander in the latter’s absence*”.²⁸⁸
181. Although the Chamber found that the Chief of Staff – the Appellant’s Deputy Commander - exercised command and control in the absence of the SVK Commander,²⁸⁹ it did not consider the evidence which showed that this was carried out in practice.²⁹⁰

C. SUBGROUND 1(C): ERROR OF FACT: ALLEGED IMPROVEMENT IN THE ORGANISATION OF THE ARBiH

182. The Majority erred in fact occasioning a miscarriage of justice by finding that the ARBiH organization improved significantly in the period between 1993 and 1995, allowing the Appellant to exercise effective control over the EMD.²⁹¹
183. The Majority reached these conclusions without citing any evidence whatsoever.
184. Moreover, the conclusion flew in the face of the Chamber’s own findings.

²⁸⁶ **Dedovic**,08/04/2008-T.8198-8199,8213,8226;**Alija**,16/10/2007-T.4186.

²⁸⁷ **Alija**,16/10/2007-T.4143;**Softic**,28/08/2008-T.1877-1878;**Berbic**,14/09/2007-T.2392,**Dedovic**,08/04/2008-T.8195;**E1357**

²⁸⁸ *TJ*, para.104

²⁸⁹ *TJ*, para.105

²⁹⁰ **Berbic**,14/09/2007-T.2390-2392;**Alija**,17/10/2007-T.4242-4243.

See also: E1289 and E1290-Extraordinary reports sent from Chief of the Staff from KM Kakanj to the RBiH President,15/09/1995 and 16/09/1995;**E1292**-GSABiH Order, signed by Hadzihasanovic,«*for the commander*»,20/09/1995.

²⁹¹ *TJ*,paras.133-137,460.

185. First, the Chamber found that during 1993, the command and control system within the ARBiH did not function properly.²⁹²
186. The Army Staff²⁹³ Report on the situation regarding the reorganization of the ARBiH, dated 3 March 1995, showed that the command and control system was not functioning at all.²⁹⁴ The Chief of the Army Staff, who authored this document, concluded: “...*the RIK (system of control and command) at the corps-division-brigade level does not function and there are no developed mechanisms that make it possible for the RIK to function*”.²⁹⁵
187. The conclusions and tasks stemming from the meeting held between the core members of the General Staff²⁹⁶ and the Corps Commanders clearly shows that the problems related to the functioning of the command and control system continued to exist even in August 1995.²⁹⁷ According to this document, such problems pose “*immeasurably grave consequences for the system of command and control*”.²⁹⁸
188. Even as late as August 1995 - the reorganization of the ARBiH had not been completed.²⁹⁹ Alihodzic testified that this situation caused serious problems in the functioning of the command and control system in the ARBiH.³⁰⁰

(i) False and irregular reporting

189. The Majority ignored the evidence showing incorrect and false reporting. The SVK Warning dated 31 January 1994 for timely submission of reports, shows that there was a lack of truthful and timely reports within the ARBiH units which resulted in serious problems for command and control on several levels.³⁰¹ The false reporting continued

²⁹² *TJ*, paras. 134-137.

²⁹³ See footnote 285 supra with regard to the “Army Staff.”

²⁹⁴ **E1267**

²⁹⁵ **E1267**, p. 1.

²⁹⁶ See footnote 167 supra.

²⁹⁷ **E601**.

²⁹⁸ **E601**, p. 6.

²⁹⁹ **E601**, p. 10

³⁰⁰ See also: **E1270, E1286, E1293**, showing the overall situation in the ARBiH units in 1995.

³⁰¹ **Alihodzic**, 30/11/2007-T.6517

E614

right until August 1995.³⁰² This had obvious serious implications for a commander's ability to have an accurate picture of what was occurring on the ground.

190. There is evidence of bypassing the SVK and reporting directly to the RBiH Presidency.³⁰³

191. E601, "*Conclusions and tasks stemming from the meeting held between the core members of the General Staff and the corps commanders*", dated 1 August 1995, clearly identifies this problem – to the extent that it was necessary to require that further instances be reported:

*"Corps commanders are responsible for the establishment of a unified system of control and command, and every potential try of some commanders and their assistants to become independent and ready to express obedience to their second superiors instead to first superiors, should be urgently removed..."*³⁰⁴

(ii) Lack of trained personnel

192. The evidence was also unequivocal that the ARBiH, throughout the entire war (1992-1995), lacked trained personnel. In fact, most of the ARBiH officers who held high-ranking positions did not have *any* military training.³⁰⁵

193. Jusic testified that more than 95 per cent of the persons who held important positions and posts in the ARBiH were not trained or qualified for those positions. He also testified that the lack of trained personnel in the military commands, including the 3Corps, did not allow for a proper functioning that would be expected of a modern trained army until the end of the war in 1995.³⁰⁶

³⁰² **Pesto**,02/10/2007-T.3475;**Vuckovic**,08/11/2007-T.5199-5200,5204-5210.
See also **E601**;,...*There are false reports as well*“,p.9.

³⁰³ **E822**.The Report talks about the combat actions of the EMD in Vozuca area
See also:**Karavelic**,25/03/2008-T.7847-7848

³⁰⁴ **E601**,p.9.

³⁰⁵ **Jusic**,17/09/2007-T.2538-2540;**Husic**,23/10/2007-T.4437-4438; [REDACTED];**Sljuka**, 22/10/2007-T.4341-4342.

³⁰⁶ **Jusic**,17/09/2007-T.2540.

194. Even in August 1995, ARBiH officers, even SVK members, were not properly qualified for the positions they held:

*“Beginning with General Staff Administrations level, a necessary level of functional responsibility has not been established yet...It is necessary to examine the quality of personnel, the closest associates of commanders, especially those at General Staff and corps command level...”*³⁰⁷

(iii) De facto factors undermining the chain of command and exercise of effective control in the Area of Responsibility (“AOR”) of 35Division

195. All of the above mentioned problems were particularly pronounced in the AOR of the 35Division and one of its units, the 328Brigade.³⁰⁸ During 1994 and 1995, the influence of religious and civilian structures in this area was so significant that the executive board of the SDA³⁰⁹, which was not authorised to do so, requested that the command of ARBiH OG-Bosna remove its commander, Refik Lendo,³¹⁰ as well as the 35Division commander Hasanagic.³¹¹
196. The civilian authorities openly praised the successes of the EMD and the *Asim Camdzic* company,³¹² while they undermined the achievements of ARBiH units.³¹³
197. Hasanagic appealed to municipal officials to solve the problems with these units.³¹⁴

³⁰⁷ E601,p.8,p.11.

³⁰⁸ The area in which the incidents from the Indictment occurred

³⁰⁹ “Democratic Action Party”, the political party in power during the war in BiH.

³¹⁰ E742-Special Information No.87,16/08/1995

³¹¹ *Id.*

³¹² The *Asim Camdzic* unit functioned in accordance with religious rules, See **Zilkic**,09/11/2007-T.5372-5373; **Hasanagic**,28/09/2007-T.3312-3313

³¹³ E509-3Corps SVB Information,12/08/1995,p.2;

E742,p.2;E810-35Division SVB Information,24/10/1995;E1235 –3Corps SVB

Information,06/03/1995,p.1:“They are treated better than the other members of the Army of BH, because the SDA, the party president and the president of the municipality help them and meet their requirements. They are often their guests.”

See also:Imamovic,15/10/2007-T.4062 and Hajderhodzic,08/10/2007-T.3777 commenting on E509.

³¹⁴ E593-35Division Information,19/07/1995.

198. The 35Division became divided,³¹⁵ which directly undermined the system of command and control in its AOR.³¹⁶
199. On 10 August 1995, the 3Corps SVB again reported that the system of command and control was not functioning within the 328Brigade.³¹⁷
200. As a result of the close ties between the 328Brigade commander and the Mujahedin and their supporters,³¹⁸ information on events concerning the mujahedin was either not forwarded to superior units or was inaccurate.
201. Although the ARBiH was trying to undertake various measures to improve the command and control system, due to the different indicators, it failed. Consequently, the ARBiH command and control system did not improve either in 1994 or in 1995 in such manner which would allow the commanding officers in the ARBiH to exercise effective control over its units.

**D. SUB-GROUND 1(M): ERROR OF LAW: THE MAJORITY MISAPPLIED
THE BURDEN OF PROOF**

202. The Majority erred in law by misdirecting itself as to the burden of proof. The Majority effectively placed on the Appellant the burden of proving that he did *not* have effective control over the EMD. The error invalidated the decision. If it had not so erred, it would not have found that the Appellant had effective control over the EMD between July and December 1995.
203. The Majority directed itself that “*the possession of de jure authority constitutes prima facie a reasonable basis for assuming that an accused has effective control over his subordinates ...*”.³¹⁹ Applying that “*assumption*” – which sits uneasily with the

³¹⁵ **Imamovic**,15/10/2007-T.4079.

³¹⁶ **E578**-35Division SVB Review of the situation in 35Division,23/08/1995;**E778**-3Corps SVB Information,29/07.1995,p.3

³¹⁷ **E811**-3Corps SVB Information,p2.

³¹⁸ **E1384**-Agency for Investigation and Documentation Analysis,24/06/2002.

³¹⁹ *TJ*,para.369.

presumption of innocence - it went on to state that the EMD's *de jure* subordination to the Appellant:

"... is the first and a prima facie indicator of effective control over that Detachment by Rasim Delić".³²⁰

204. The Majority then effectively required the Defence to rebut the "assumption" of effective control, thereby shifting the burden of proof onto the Defence to raise a reasonable doubt.

205. This approach is evident from the "Conclusion of the Majority" section, where the Majority repeatedly states that the Defence has failed to raise a reasonable doubt – as if the burden were on the Defence to do so, rather than for the Prosecution to prove effective control beyond a reasonable doubt:

- *"... the reticent approach by the EMD in respect of some superior orders does not create a reasonable doubt as to the general ability of ABiH commanders to have their orders implemented. Consequently, this indicator militates in favour of effective control"*,³²¹
- *"... does not raise a reasonable doubt as to the ability of these commanders [ABiH Commanders] to exert command and control over the EMD for the purposes of the war effort"*³²²
- *"... this did not affect the chain of command and the effective control exercised by Rasim Delić over EMD and its members"*,³²³
- *"... the fact that the shura accepted the [EMD's] disbandment does not in any way affect the determination of [the Appellant's] effective control"*,³²⁴
- *"... the Majority adds [sic] little weight to the statements made by several witnesses that nothing could be done. These statements do not raise a reasonable doubt ..."*³²⁵

³²⁰ TJ,para.461

³²¹ TJ,para.462

³²² TJ,para.463.

³²³ TJ,para.464.

³²⁴ TJ,para.469.

³²⁵ TJ,para.470.

206. As Judge Moloto correctly recognised in his dissenting opinion, the Majority asked itself the wrong question, when it proceeded from an assumption of effective control and then queried whether the Defence had raised a reasonable doubt about the presumed effective control:

*“30. The Prosecution must prove **beyond reasonable doubt** that Rasim Delić exercised effective control over the relevant perpetrators within the EMD. In a case where this finding is based, as it is in casu, on circumstantial evidence, it is not sufficient that it is a reasonable conclusion available from that evidence. It must be the **only** reasonable conclusion available.*

*31. By the foregoing analysis, I provided examples of how circumstantial evidence is reasonably open to the conclusion that Rasim Delić did not have effective control. The Majority, instead, embarked, on several occasions, on an analysis of the evidence with a view to showing that such evidence did not exclude the existence of effective control by Rasim Delic over the EMD. However, it fails to show any positive evidence from which effective control, and notably the material ability to prevent and punish, may be reasonably inferred, let alone that it must be the **only** reasonable conclusion.”*

207. The Appellant respectfully adopts Judge Moloto’s reasoning and conclusion.

208. Had the Majority applied the correct legal standard, it would have found that the Appellant did not have effective control over the EMD in the relevant period and would have acquitted him of Count 2.

E. SUB-GROUND 1(N): ERROR OF LAW: DENIAL OF A FAIR TRIAL

209. The Majority erred in law invalidating the decision by convicting the Appellant on a basis not pleaded in the indictment regarding the alleged superior-subordinate relationship between the Appellant and the EMD.³²⁶

³²⁶ *TJ*, paras 357, 359.

210. It is unquestionably established in the Tribunal's case-law that an indictment must plead the facts underpinning the charges with sufficient detail so the accused is fully aware of the charges and can prepare an appropriate defence.³²⁷ In *Kupreškić et al.*, the Appeals Chamber found that the Trial Chamber had “erred in law” and “rendered the trial unfair”³²⁸ by convicting the accused on the basis of charges not clearly set out in the Indictment.
211. In this case, the basis upon which the Majority convicted the Appellant was not a basis pleaded in the Indictment.
212. The Prosecution, in the Amended Indictment against the Appellant, pleaded, as it is required by the law of the Tribunal to do,³²⁹ the material facts upon which it relied to establish the superior-subordinate relationship between the Appellant and the EMD. In relation to the charges of murder/cruel treatment committed by the EMD in July/August 1995, the material facts are pleaded at paragraphs 28-38 of the Indictment.
213. In particular, the Indictment makes it clear that the material facts underpinning the allegation that the Appellant exercised *de jure* and *de facto* command and control over the EMD consisted in the allegation that he was the main commander of the “ARBiH Operations to Liberate the Mount Ozren-Vozuća Pocket: 1995”:

*“The liberation of the Mount Ozren-Vozuca pocket from VRS forces was a prime objective of the ARBiH in 1994-1995, and the ARBiH Main Staff directed combat operations in the pocket.”*³³⁰

*“On 16 and 17 July 1995, Rasim Delic ordered the ARBiH 2nd and 3rd corps to conduct combat operations in the Mount Ozren-Vozuca pocket. The General Staff of the ARBiH was informed that the El Mujahed Detachment was ‘the main unit in charge of the coming assignment’ in the Mount Ozren-Vozuća pocket...”*³³¹

³²⁷ *Boškoski/ Tarčulovski*, IT-04-82-PT, Decision (form of the indictment), 01/11/05, para. 23.

³²⁸ *Kupreškić AJ*, para. 124.

³²⁹ *Blaškić AJ*, paras. 210, 220.

³³⁰ Indictment, para. 28.

³³¹ Indictment, para. 30.

*“On 11 October 1995, Rasim Delic ordered the cessation of combat activities in the Mount Ozren-Vozuca region and re-subordinated certain troops out of the region.”*³³²

214. The Indictment then went on to set out, at paragraphs 33-38, the crimes committed by the EMD, *arising out of combat operations in the Mount Ozren-Vozuca pocket*. Read individually as well as in the context of the Indictment as a whole, it was plain that the Prosecution’s allegation in respect of superior responsibility was that the Appellant exercised *de jure* and *de facto* control over the EMD by virtue of having, allegedly, ordered the EMD to conduct the combat operations in which the crimes occurred.
215. What was *not* pleaded in the Indictment was any allegation that the Appellant was the superior to the EMD *simply by virtue of being ‘top’ of the ABiH pyramid*.
216. The Prosecution was obliged – if it wished to present that case - to plead specifically that the Appellant was responsible even if he did not command the action in question, because he still exercised effective control over the perpetrators in some other way (for example, through his subordinates in the chain of command, or in some other way). The Prosecution had to do this because *de jure* power is not synonymous with effective control.
217. In this regard, the Appellant relies on the *Halilović Appeals Judgement*:
- “82. In light of this specificity, the Defence was entitled to understand that this was the only basis advanced by the Prosecution to demonstrate Halilović’s effective control over the perpetrators of the crimes. While other paragraphs in the Indictment refer to Halilović’s high rank in the ABiH and his role as Team Leader of the Inspection Team, these facts are not clearly presented or pleaded as alternative bases for a finding of effective control. In other words, the Prosecution did not clearly allege that, even if Halilović was not in command of Operation Neretva-93, he still had effective control over the troops in question by means of his position as Team Leader of the Inspection Team or of his high rank in the ABiH.”*

³³² Indictment, para.32.

85. [...] Moreover, the exercise of effective control by reason of Halilović's position as the most senior ranking officer in Herzegovina cannot be said to have been pleaded implicitly in this paragraph either, mainly because, for the purposes of criminal responsibility as a superior, de jure power is not synonymous with effective control. [...] It therefore cannot be said that pleading the exercise of both de jure and de facto power amounts to pleading effective control.

86. [...] If one is to consider these facts as a whole, a reasonable conclusion is that they plainly allege that Halilović had effective control over the units in question at the time of the relevant events by reason of his position as Commander of Operation Neretva-93. Accordingly, when read as a whole, the Indictment does not unambiguously plead that Halilović had effective control by means other than his alleged position as commander of Operation Neretva-93. Nor can it be said that Halilović's effective control by virtue of his position as the most senior ranking officer in Herzegovina or by virtue of his position as Team Leader of the Inspection Team are implicitly pleaded in the Indictment when read as a whole."

218. If one substitutes "Delić" for "Halilović", and "combat operations in the Mount Ozren-Vozuca region" for "Operation Neretva-93", the position is identical here. The Prosecution never alleged that the Appellant had effective control by means other than his alleged position as commander of the combat operations in the Mount Ozren-Vozuca region or that his effective control arose by virtue of his position as the most senior ranking officer in Bosnia and Herzegovina.
219. Accordingly, during both the pre-trial and trial phases, the Defence directed all its energies and expended all its efforts to creating a reasonable doubt that the Appellant did *not* order the combat operations in question.
220. At trial, the Prosecution failed completely to prove its allegation that the Appellant commanded operations in the Mount Ozren-Vozuca region. On the contrary, the evidence clearly showed that the Appellant did not order, direct or command it, nor did he order its

cessation. Moreover, the Appellant was not even in Bosnia and Herzegovina at the time of the action.

221. At the end of the trial, the Prosecution – no doubt realising it had failed to prove its allegations – attempted for the first time, *in its final brief*, to argue a different basis for liability, namely “*Rasim Delic was at the top of the hierarchy which included the Mujahedin*”.³³³ This was far too late to make this allegation as a matter of criminal pleading.
222. This basis of liability was obviously accepted by the Majority, even though it was only advanced after the trial had ended and when the Defence had no chance to contest it.
223. If the Prosecution had alleged in the Indictment that the Appellant’s criminal liability arose by virtue of being “*at the top of the hierarchy*”, then the Defence would have presented different evidence at trial. For example, the Defence would have called a military expert from the region of the former Yugoslavia or Bosnia and Herzegovina, familiar with the functioning of the ARBiH and its SVK, as well as an expert and witnesses who could further explain the importance of the strategic level of command in the ARBiH (the role of the SVK).
224. Having been convicted on the basis of allegations which were never made in the Indictment, but which were advanced for the first time post-trial, the Appellant suffered gross prejudice and an unfair trial.

II. GROUND TWO: THE MAJORITY ERRED IN FINDING BEYOND REASONABLE DOUBT THAT THE APPELLANT HAD REASON TO KNOW THAT MEMBERS OF THE EMD WERE ABOUT TO COMMIT OR HAD COMMITTED THE CRIME OF CRUEL TREATMENT AGAINST VRS SOLDIERS DETAINED BY THE EMD

³³³ *Prosecution Final Brief*, paras.47-51.

225. The Majority's conclusion that the Appellant had "*reason to know*" of the crimes was based on the following reasoning:³³⁴

- (i) Information reported in bulletins showed that members of the EMD had a propensity for violence and to commit crimes;
- (ii) That information was received by the Appellant;
- (iii) The Appellant ought to have been alerted by that information to the risk that similar offences against persons might recur in the future;
- (iv) The Appellant received information that VRS soldiers were held by the EMD;
- (v) This was "*alarming information*", considered in light of information reported in bulletins;
- (vi) In light of the receipt of this "*alarming information*", the Appellant ought to have "*immediate[ly] intervene[ed] to determine whether members of the EMD were about to commit crimes or had committed crimes in Livade and Kamenica in July and August 1995*";
- (vii) The Appellant did not immediately intervene;
- (viii) By failing to do so, the Appellant "*accepted the risk that crimes were about to be or had been committed by EMD members in July and August 1995*";
- (ix) Acceptance of the risk that crimes were about to be or had been committed entails individual criminal responsibility for the Appellant.

226. This reasoning contains several errors of law, fact and, indeed, of logic.

³³⁴ *TJ*, paras.512-513.

A. SUBGROUND 2(A): ERROR OF FACT: NO REASONABLE TRIER OF FACT WOULD HAVE FOUND THAT THE APPELLANT HAD REASON TO KNOW OF CRIMES

227. By virtue of the cumulative effect of the errors set out in sub-grounds 2(B), 2(C), 2(D), 2(E) and 2(F), the Majority erred in fact occasioning a miscarriage of justice in that no reasonable trier of fact could have found that the Prosecution had proved beyond reasonable doubt that the Appellant had reason to know that members of the EMD were about to commit or had committed the crime of cruel treatment against VRS soldiers detained by the EMD.³³⁵

B. SUBGROUND 2(B): ERROR OF FACT: CONVEYANCE OF PACKET COMMUNICATIONS TO THE APPELLANT

228. The Chamber erred in fact occasioning a miscarriage of justice when it found that, “*when [the Appellant] was travelling, the bulletins were generally sent to him by packet communication, including when he was at the KM Kakanj*”.³³⁶

229. The finding that bulletins were sent to the Appellant when travelling was of considerable significance as a building block to the Majority’s conclusion that the Appellant had received “*alarming information*” in Bulletin 137 putting him on notice of the fact that crimes were about to be committed (and, oddly, also for its finding that crimes *had been* committed).

230. There was, however, no evidence that the Appellant received bulletins when he was travelling *but when he was not at SVK KM Kakanj*.

231. The Chamber relied on the evidence set out in footnote 377 of the Judgement in making its finding.³³⁷ Yet the Chamber misinterpreted the evidence set out in that footnote.³³⁸

³³⁵ *TJ*, para. 513.

³³⁶ *TJ*, para. 146.

³³⁷ *TJ*, para. 146.

(i) “E706, Witness Statement of Džemal Vučković, 5 November 2007, para. 61”

232. Exhibit 706 is the consolidated statement of Vučković. After Vučković corrected the previously given statement and made some additions to it, his consolidated statement was admitted into evidence.³³⁹ Paragraph 61 was deleted from his statement.³⁴⁰

233. It was, therefore, plain error by the Chamber to rely on a non-existent paragraph of Vučković’s statement.

(ii) E377, Bulletins for the period from 19 January to 30 December 1995

234. This exhibit comprises a set of bulletins sent to SVK KM Kakanj, indicating that they should be forwarded to the Appellant for his information.

235. Yet there is no evidence, that any these bulletins were ever sent to the Appellant by packet communication. Documents which were sent via packet communications had a special format and remark that the document was encrypted.³⁴¹

236. None of the bulletins contained in E377 bore any such remark or indication that the document was encrypted or that it had been sent via the packet communication system.³⁴²

(iii) Testimony of witness Vuckovic, T.5132-5134

237. It is clear from the transcript of Vučković’s testimony, on which the Majority relied, that when he was shown E377, he impermissibly engaged in speculation as to how it was sent

³³⁸ E706,E377,Vuckovic-T.5132-5134

³³⁹ Vučković,07/11/2008-T.5511-5112.

³⁴⁰ E706,pp.12-13

³⁴¹ Delic,21/09/2007-T.2881-2884;Berbic,14/09/2007-T.2378-2379;Saric,22/11/2007-T.6001; [REDACTED];Imamovic,15/10/2007-T.4052-4053.

³⁴² Berbic,14/09/2007-T.2449-2450

from Sarajevo to SVK KM Kakanj. In fact, Vuckovic said that “*the document was either sent by - - - (translation missing) or through the packet communication system*”.³⁴³

238. Vučković did not confirm that E377 was sent via the packet communication system.
239. The Chamber’s error of fact occasioned a miscarriage of justice because the finding that bulletins were sent to the Appellant when he was travelling was the sole basis upon which the Majority could conclude that the Appellant received the information contained in Bulletin 137, which in turn was its sole basis for concluding that he had reason to know of the crimes.

C. SUB-GROUND 2(C): ERROR OF FACT: CONVEYANCE OF INFORMATION IN BULLETINS TO THE APPELLANT

240. The Majority concluded, at paragraph 480, that the bulletins, referred to above, “*were addressed to the Main Staff Commander for his special benefit*”.³⁴⁴ On that basis, and the fact that the bulletins were of a “*confidential nature*”,³⁴⁵ the Majority concluded that the information in the bulletins was “*routinely conveyed*” to the Appellant.³⁴⁶
241. First, it should be noted that the Majority’s conclusion that the information contained in the bulletins was routinely conveyed to the Appellant, *was not based on any evidence*.
242. The Majority plainly erred by failing properly to take into account the evidence regarding the specific circumstances in which the ARBiH SVK operated, and in particular the role and functioning of the SVK KM Kakanj.³⁴⁷
243. The evidence overwhelmingly showed that when the Appellant was not at SVK KM Kakanj, his Chief of Staff fully took over the exercise of authority.³⁴⁸

³⁴³ **Vučković**, 07/11/2007, T.5132-5133.

³⁴⁴ *TJ*, para.480.

³⁴⁵ *TJ*, para.480.

³⁴⁶ *TJ*, para.480.

³⁴⁷ *See* paras.173-181.

³⁴⁸ **E370**, p.1.

244. Berbic was the chief of the Military Security Service (“SVB”) at the SVK KM Kakanj and personally delivered the bulletins there. He explained that in the absence of the Appellant, he would deliver the bulletin to Chief of the Staff/Deputy Commander (Enver Hadzihasanovic).³⁴⁹
245. Moreover, Berbic was clear that he would not wait for the Appellant to appear at SVK KM Kakanj and process the bulletin.³⁵⁰
246. The Appellant stayed at SVK KM Kakanj only very rarely.³⁵¹ No documents were delivered to the Appellant while he was at the battlefield where combat activities were taking place nor while he was traveling.³⁵²
247. The Majority simply ignored this evidence.
248. Moreover, the Majority’s conclusion that information in bulletins was routinely conveyed to the Appellant conflicted with its own findings. In paragraph 154 the Chamber accepted that in the Appellant’s absence, the bulletins were handed over to Chief of the Staff /Deputy Commander/ or to the most senior officer at SVK KM Kakanj. However, the Majority overlooked this finding when it held that the information from the bulletins was routinely conveyed to the Appellant, because the bulletins were sent “*for his special benefit*”. Plainly the bulletins were not sent “*for his special benefit*” if they were received and dealt with by others in the Appellant’s absence.³⁵³
249. The only reasonable conclusion to be drawn from the evidence was that the information contained in the bulletins was *not* conveyed to the Appellant when he was travelling (i.e. when he was neither in Sarajevo nor in Kakanj), even when it was sent to SVK KM

³⁴⁹ **Beric**, 14/09/2007-T.2425.

³⁵⁰ **Beric**, 14/09/2007-T.2426, T.2372

³⁵¹ See paras.173-181 supra.

See also **Alija**, 16/10/2007-T.4143; **Softic**, 28/08/2008-T.1877-1878; **Beric**, 14/09/2007-T.2392; **Dedovic**, 08/04/2008-T.8195.

E1357-Video clip showing the Appellant in SVK KM Kakanj explaining that the SVK in Sarajevo communicates with the SVK KM Kakanj only rarely and through the papers

³⁵² **Dedovic**, 08/04/2008-T.8203-8204

³⁵³ **E619**, p.2;

See also **E419**-Decision on organisation chart of the Army of the RBiH, p.2, IV/2: “*the Army General Staff shall consist of: General Staff Commander, Office of the Commander, Deputy Commander of the Main Staff and his Office, Chief of the Army Staff, who is at the same time Deputy Commander...*”

Alija, 17/10/2007-T.4272; **Buljubasic**, 14/11/2007-T.5491.

Kakanj for his attention. At the very least, there was a reasonable doubt in that regard which should have been resolved in favour of the Appellant according to the Chamber's own endorsement of the principle *in dubio pro reo*.³⁵⁴

D. SUB-GROUND 2(D): ERROR OF FACT: AVAILABILITY OF BULLETIN 137 TO THE APPELLANT

250. In paragraph 481, the Majority stated as follows:

“Although the evidence shows that Rasim Delic was in Split on 22 July 1995 and that he visited the KM Kakanj only on 29 July 1995, the Majority is satisfied, in light of the very purpose for which these bulletins were sent, that the information contained in Bulletin 137 of 22 July 1995 was still ‘available’ to Rasim Delic when traveling on official mission”.

251. In cases based solely on command responsibility, moreover, there is a real danger that liability will be strict – in terms of the knowledge requirement – if the concept of information being “available” to the superior is so watered down that information is considered “available” even when the accused never receives it.³⁵⁵ “Available” does not, and cannot, mean “theoretically (but not actually) available”.

252. As a factual matter, using the word “available” in its ordinary English usage as meaning accessible to the person if he should wish to avail himself of the information, there was no evidence whatsoever to support the Majority's conclusion that “*the information contained in Bulletin 137 of 22 July 1995 was still ‘available’ to Rasim Delic when traveling on official mission*”.³⁵⁶

253. First, the Majority found that the Appellant was in Split, in Croatia, when Bulletin 137 of 22 July 1995 was issued.³⁵⁷ On 23 July 1995, this Bulletin was sent to SVK KM Kakanj to be forwarded to the SVK Commander for his information.³⁵⁸

³⁵⁴ TJ,para.24.

³⁵⁵ See paras.283-289 infra.

³⁵⁶ TJ,para.481

³⁵⁷ TJ,para.481

³⁵⁸ E377-Set of Security Administration Bulletins sent from Sarajevo to SVK KM Kakanj,p.87

254. Dedovic testified in detail about the Appellant's movements after 20 July 1995. He went to Split with the Appellant on 20 July 1995 to attend a conference between the delegations of ARBiH and Croatia concerning the preparation and adoption of the Split Declaration.³⁵⁹ The Appellant was in Split attending the conference on 22 and 23 July.³⁶⁰
255. The Majority overlooked a crucial part of Dedovic's evidence. Dedovic testified that the Appellant, immediately after the conference in Split on 22-23 July 1995, *went directly to Bosanska Krajina* (in the Bihac area – north-west Bosnia) where the ARBiH was in an extremely dire situation.³⁶¹ The Appellant *did not receive documents while he was at the battlefield where combat activities were taking place*.³⁶² The Appellant stayed in the Bihac area until the very end of July 1995 and in the meantime did not go either to Sarajevo or to Kakanj. In that period, the Appellant frequently went to Zagreb (Croatia) to negotiate with the Croatian Army.³⁶³
256. It was only at the end of July 1995 that the Appellant went to KM Kakanj and that he only spent several hours there attending a seminar.³⁶⁴ E601 – the “*Conclusions and tasks stemming from the meeting held between the core members of the General Staff of the R BiH and the ARBiH Corps Commanders held on 29 July 1995*”, shows that the issue of the prisoners held by the EMD in July 1995 was not mentioned at that meeting at all.
257. There was not a single piece of evidence before the Chamber to support the Majority's conclusion that the Appellant ever familiarized himself with the information contained in Bulletin 137.
258. The Majority's conclusion was not the only reasonable conclusion open to it on the evidence. A far more reasonable conclusion – consistent with the Appellant's innocence

³⁵⁹ Declaration on the implementation of the Washington Agreement.

³⁶⁰ See **Alija**,16/10/2007-T.4187-4188;**Dedovic**,08/04/2008-T.8206-8207

³⁶⁰ **Dedovic**,08/04/2008-T.8206-8207;**Alija**,16/10/2007-T.4187-4191;**E612**;**E1360**-SVK Press Centre information bulletin,23/07/1995.

³⁶¹ **E1273**-Article from newspaper „*Oslobodjenje*“-Heavy offensives at Zepa and Bihac,20/07/1995

³⁶¹ **E1281**-Daily Information Bulletin. ARBiH Press Center, R BiH State and Military Delegations Visit Bihac, 01/08/1995

³⁶² **Dedovic**,08/04/2008-T.8203-8204

³⁶³ **Dedovic**,08/04/2008-T.8208-8209

³⁶³ **E1361**-Daily Information Bulletin-Meeting between the Appellant and Cervenko,02/09/1995 – showing a continuous cooperation between the ARBiH and Croatian Army

³⁶⁴ **Dedovic**,09/04/2008-T.8270-8271

– is that Bulletin 137 was received and processed at SVK KM Kakanj by Chief of the Staff or by the highest ranking officer there, and that the information contained in the Bulletin was not available to the Appellant while traveling on official mission.

E. SUB-GROUND 2(E): ERROR OF FACT: AVAILABILITY OF INFORMATION THAT VRS SOLDIERS WERE CAPTURED BY THE EMD

259. The Majority erred in fact occasioning a miscarriage of justice when it found that the Appellant, as of 22 July 1995, had information available to him that a substantial number of VRS soldiers were captured by the EMD who did not allow “anyone” to access the detainees.³⁶⁵
260. The information about the capture of VRS soldiers, which could have reached the Appellant (*but did not*) was contained in Bulletin 137. There was no evidence the Appellant ever received that bulletin.³⁶⁶
261. Accordingly, the Majority erred in fact when it found that “*Rasim Delic as of 22 July 1995 had available information that a substantial number of VRS soldiers were captured by the EMD who did not allow “anyone” to access the detainees*”.³⁶⁷ Had it not so erred, it would not have concluded that the Appellant had reason to know of the crimes. The Chamber would then have acquitted the Appellant.

F. SUB-GROUND 2(F): ERROR OF FACT: “ALARMING INFORMATION”

262. The Majority erred in fact occasioning a miscarriage of justice when it concluded that the Appellant had reason to know that members of the EMD were about to commit or had committed the crime of cruel treatment against VRS detainees, on the basis that information reported in bulletins showed that members of the EMD had a propensity for

³⁶⁵ *TJ*, para. 482

³⁶⁶ *See* sub-ground 2(D).

³⁶⁷ *TJ*, para. 482.

- violence and for committing crimes, thereby qualifying Bulletin 137 as “*alarming information*”.³⁶⁸
263. No reasonable trier of fact would have concluded on the evidence (i) that the Appellant received information regarding the EMD’s record of misdemeanours and criminal offences and (ii) that any such information received by him was such as to qualify Bulletin 137 as “*sufficiently alarming to justify his immediate intervention to determine whether members of the EMD were about to commit or had committed crimes in Livade and Kamenica in July and August 1995*”.³⁶⁹
264. In paragraph 501 the Majority set out a (highly selective) list of the information contained in Bulletins sent to the Appellant in the period from August 1994 to July 1995. The following incidents committed by EMD members are mentioned: unspecified violent behaviour; causing displeasure among citizens and ARBIH members; (unspecified) violation of public law and order; abduction and the beating of Safet Sabic (a Muslim); physical abuse of young people; abduction and maltreatment of Jadranko Bosnjak (a Muslim); abduction, abuse and torture of a man in Travnik; threatening a Croat soldier.
265. In paragraph 506, the Majority agreed with the Defence that “*the aforementioned bulletins did not report the commission of war crimes by members of the EMD, but mainly misdemeanors and some ordinary crimes committed outside combat operations*” (emphasis added). It also accepted, in paragraph 500, that “*the information contained in the bulletins may not always have been accurate*”.
266. The only reasonable conclusions to reach, upon an analysis of the incidents mentioned in the bulletins on which the Majority relies in paragraph 501 are as follows:
- Most of the evidence relates to minor misdemeanours arising out of cultural differences between the EMD members and the local population;
 - The most serious incidents are violent behaviour³⁷⁰, violation of public law and order,³⁷¹ abduction and the abuse and torture of a man in Travnik³⁷²;

³⁶⁸ *TJ*, paras. 500-513.

³⁶⁹ *TJ*, para. 512.

³⁷⁰ **E721.**

³⁷¹ **E722.**

³⁷² **E733.**

- None of these incidents have anything to do with the EMD's behaviour during combat or towards captured combatants.
 - All of the incidents mentioned were **isolated** incidents which happened over a period of one year. The abduction, maltreatment and beatings, happened to three persons in the period of **one** year.
267. As isolated, and for the most part minor, incidents, it is not reasonable to conclude that the incidents are evidence of, much less provided notice of, a *propensity* on the part of the EMD to commit serious crimes, such as cruel treatment, against captured Serb soldiers.
268. As can be seen from the bulletins cited in paragraph 501, the incidents were committed only by *certain* EMD members,³⁷³ and as such cannot reasonably be considered to be evidence of the propensity of *all EMD members* – or even the majority of them - to commit crimes such as cruel treatment of prisoners of war.
269. Certain bulletins relied upon by the Majority to establish the EMD's violent propensities cannot be relied upon to establish *any* conduct on the part of the EMD, since it is not even clear that the persons in question were EMD members. Bulletin 211 dated 15th October 1994, for example, refers to incidents caused by "*persons of Arab descent*"; it is nowhere said that they were members of the EMD.³⁷⁴ The Chamber itself accepted that there were Arab fighters in Bosnia who were not members of the EMD.³⁷⁵
270. The Majority relied on E736, which in fact shows that unnamed EMD members were threatening soldiers from the 328Brigade of the ARBiH in general, particularly the non-Muslim members. This has nothing to do with the behaviour of EMD members towards the enemy in combat.
271. E736 contained "*raw information*" received from subordinate units.³⁷⁶ Alihodzic testified that rumour or hearsay would be included in the security reports which afterwards proved to be inaccurate.³⁷⁷

³⁷³ E721,E722,E724,E725,E727,E731,E733,E737,etc.

³⁷⁴ E723, p.4

³⁷⁵ TJ,para.168

³⁷⁶ Vuckovic,08/11/2007-T.5199-5202

See also Vuckovic,08/11/2007-T.5209-5210 commenting upon E764,328thBrigade SVB Report,07/07/1995;Alihodzic,30/11/2007-T.6486

272. The information contained in SVB bulletins was operative in nature; it was initial, tentative and unverified.³⁷⁸ The bulletins tendered into evidence on this issue speak on terms of their own lack of reliability.³⁷⁹
273. The information in the bulletins published by the SVB Administration could not be verified or confirmed.³⁸⁰ The 3Corps SVB and its Military Police, which was a source of information in most cases, could not even establish the identity of the perpetrators. It could not determine whether or not the perpetrators were members of the EMD.³⁸¹
274. The bulletins commonly contained information which was untrue,³⁸² hearsay,³⁸³ rumours and misinformation.³⁸⁴ Yet it was these bulletins which formed the basis for the Majority's crucial finding that the Appellant knew of the criminal propensity of the EMD. No reasonable trier of fact would have reached such a conclusion – with its grave consequences for a finding of guilt – on the basis of such weak, tenuous and inherently unreliable information, even on the assumption that the Appellant received and read all of the bulletins.
275. The Majority completely failed to consider the testimonies of several witnesses who were ideally placed to know about the activities of the EMD, and who testified to having no information of any propensity of the EMD to commit serious crimes, such as murder and cruel treatment of POWs. The 3Corps members and senior officers from the security

³⁷⁷ **Alihodzic**,30/11/2007-T.6483

³⁷⁸ **Spahic**,08/11/2007-T.5262-5264.

³⁷⁹ **E749;E753;E739;E740.**

³⁸⁰ **Spahic**,08/11/2007-T.5262-5264.

³⁸¹ **E1066**-Information of 3Corps 3rd MP Battalion sent to 3Corps SVB,28/08/95,
See also E1285,p.6,item5:“A discussion took place on incidents occurring in our area, involving persons from African and Asian countries, with arbitrary assumptions that they are members of the El Mujahid unit... This is necessary in order to remove the ‘stigma’ spread by malicious people that all persons coming from AA countries are members of the El Mujahid unit.”

E1200-EMD Bulletin sent abroad:“Also, relations and movements of Mujahids are conditioned by the thing that keeps legitimacy of Jihad and its special character, and the Detachment announced several times that it did not take responsibility for actions and offences of individuals or groups that did not belong to it.”

³⁸² **Alihodzic**,30/11/2007-T.6483.

³⁸³ **Spahic**,08/11/2007-T.5264

³⁸⁴ **E740**

- organ that received the information on these events testified that the reports which they received were mostly related to misdemeanours rather than serious criminal acts.³⁸⁵
276. Several 35Division officers, in whose AOR the EMD acted, were also ideally placed to receive information because they were responsible for the departments which received intelligence and security information. They confirmed that there was no information indicating that the EMD had a propensity to commit serious crimes, such as mistreating POWs.³⁸⁶
277. The Majority erred when it found that “*Rasim Delic was informed via Bulletins sent by the Security Administration of numerous instances of misconduct involving EMD members, some of which amounted to criminal offences*”.³⁸⁷ There is not a shred of evidence that the Appellant ever received the bulletins mentioning the incidents listed in paragraph 501.
278. For example, in paragraph 501, the Majority, *inter alia*, relied on E736 discussed in paragraphs 270-271 above. This bulletin was issued during the period from June to August 1995, when the Appellant was personally commanding the Sarajevo operation. During that period, therefore, the Appellant was constantly on the battlefield, since the operation took part outside the besieged city and the SVK command.³⁸⁸
279. Documents that were intended to reach the Appellant were received by Chief of the Staff /Deputy Commander/.³⁸⁹
280. Vuckovic, who prepared the bulletins relied on by the Majority in paragraph 501, never confirmed that the Appellant received any of the bulletins.³⁹⁰ He could only conclude that the Appellant had read the report if it was returned bearing the Appellant’s handwritten comments.³⁹¹
281. There are only two such documents bearing the Appellant’s handwritten comments.³⁹²

³⁸⁵ Spahic,08/11/2007-T.5264; [REDACTED];Husic,12/03/2008-T.7429-7430.

³⁸⁶ Imamovic,11/10/2007-T.4044;Hajderhodzic,09/10/2007-T.3854-3855.

³⁸⁷ TJ,para.501

³⁸⁸ Buljubasic,14/11/2007-T.5495;Karavelic,26/03/2007-T.7923;Dedovic,08/04/2007-T.8201-8206.

³⁸⁹ Dedovic,08/04/2008-T.8203-8204.

³⁹⁰ Vuckovic,07/11/2007-T.5173.

³⁹¹ Vuckovic,07/11/2007-T.5173.

³⁹² E963;E761

282. There are no other documents sent from the SVB to the Appellant which bear the latter's handwritten remarks. Notably, there are no Bulletins. Nevertheless, the Majority found that the Appellant received the bulletins listed in paragraph 501³⁹³, simply because they were addressed to him. This was a plain error of fact: a simplistic assessment reached in the face of the contradictory, exculpatory evidence.

G. SUB-GROUND 2(G): ERROR OF LAW: THE MAJORITY ERRED IN LAW IN RELATION TO HAD REASON TO KNOW

283. The Majority misdirected itself in law in relation to the *mens rea* for command responsibility. It directed itself that the test for whether the Appellant "*had reason to know*" of crimes by his subordinates was:

*"... whether he had information available 'that was sufficiently alarming to put him on notice of the risk that crimes might be committed by his subordinates.'"*³⁹⁴

284. For this proposition, the Chamber relies on the *Hadžihasanović Appeal Judgement* at paragraphs 27-28 and 30.³⁹⁵

285. It is, however, clear from the *Hadžihasanović Judgement* that the Appeals Chamber applied the "*alarming information*" test only where the information was *in the possession* of the accused:

*"... in order to demonstrate that a superior had the mens rea required under Article 7(3) of the Statute, it must be established whether, in the circumstances of the case, he possessed information sufficiently alarming to justify further inquiry."*³⁹⁶

286. Moreover, "*possession*" in this context plainly connotes *actual knowledge*. For information can only be "*alarming*" – particularly where, as here, the alarming nature of

³⁹³ See also [REDACTED]; *Vuckovic*, 07/11/2007-T.5176-5177
E721, E723, E724, E725, E727, E733, E963, E731, E732, E736, E740, E737, E738.

³⁹⁴ *TJ*, para.477.

See also para.479.

³⁹⁵ *TJ*, fn.1211.

³⁹⁶ *Hadžihasanović AJ*, para.28. See also para.30: "... the determination of whether, in the circumstances of a case, a superior possessed information ..."

the information depends on the accused's knowledge of other incidents – if it enters the accused's mind, that is if he knows about it. Only then can he be said to be put on notice by the "*alarming information*" so as to be under a duty to make further enquiries.

287. This is made plain in the *Krnojelac Appeal Judgement* where Krnojelac had actually witnessed the beating of a detainee.
288. It is self-evidently nonsensical to find that the Appellant should have considered information which never came into his possession as "*alarming information*".
289. This error if law invalidates the decision. If the Majority had not so erred, but had applied the correct "*possession*" test, it would have concluded, given the absence of any evidence that the Appellant ever had Bulletin 137 in his possession, that there was no basis for concluding that he had the requisite *mens rea*. He would then have been acquitted.

H. SUB-GROUND 2(H): MIXED ERROR OF FACT AND LAW: FAILURE TO CONDUCT AN ENQUIRY

290. The Appellant re-classifies this ground as purely an error of law invalidating the decision.
291. The Majority found that the bulletins "*ought to have alerted Rasim Delic to the risk that similar offences against persons* [Note – against the generic, "*persons*", not against Serbs or against detainees] *might recur in the future*".³⁹⁷ This finding is challenged above as erroneous. The Majority further erred, however, in then concluding that, "*in failing to conduct any enquiry, Rasim Delic accepted the risk that crimes were about to be or had been committed by EMD members in July and August 1995*".³⁹⁸ This proposition is self-evidently untenable. Acceptance of risk requires a subjective state of mind in where is knowledge of the risk and a deliberate decision to take that risk. The Majority, having made no clear finding that the Appellant ever read Bulletin 137 and ever knew that the EMD were detaining VRS soldiers, utterly lacked any evidential basis or factual foundation for imputing to the Appellant *acceptance of the risk* that crimes had occurred or would occur.

³⁹⁷ *TJ*, para.512.

³⁹⁸ *TJ*, para.512.

292. Indeed the fact that the Majority had to use the alternative formulation – “*were about to be or had been committed*” – shows that the Majority were unable to find that the Appellant had received the relevant information *before* the crimes occurred. If the Majority had so found, then it would not use the word, “or”, but would have instead used the word, “and”, i.e. that the Appellant had accepted both the risk that the crimes would be committed and that they had been committed. The Majority's self-evident uncertainties in its factual findings belies completely its claim to have found the Appellant's guilt proved beyond a reasonable doubt.
293. If the Chamber had not so erred, it would have acquitted the Appellant.

I. SUB-GROUND 2(J): ERROR OF LAW: NOTICE OF LESS SERIOUS OFFENCES

294. As demonstrated above, the information contained in the bulletins was not information that members of the EMD had committed *any* crimes against captured VRS soldiers, much less that they had committed the crime of cruel treatment – a very serious crime, criminalised at the ICTY by virtue of common Article 3 to the Geneva Conventions – against captured soldiers.
295. At most, the information in the bulletins would provide notice of unruliness and occasion violence on the part of the EMD – *but never in the context of cruel treatment as a war crime*.
296. In finding that this information provided the Appellant with sufficient notice of the crimes of cruel treatment,³⁹⁹ the Majority fell into error. It committed the error in law, identified in the *Krnjelac* Appeals Judgement of finding that actual or imputed

³⁹⁹ *TJ*, para. 513. It will not have escaped the Appeals Chamber's attention that the Majority opts for “*a holistic reading of the information reported in the bulletins ...*”, which is a clear indicator that the Majority is not basing itself, as it should, on the concrete information in the bulletins but on something much less substantial. The Chamber should also note the suspicious phrase in para. 514, “... *the Majority has to rely on the instances of violent behaviour ...*”. Why does the Majority “*have to rely*” on anything to determine guilt? If there is nothing substantial to rely on, the Majority does not “*have to*” rely on unsatisfactory indicators of guilt, but should instead acquit the defendant in accordance with the presumption of innocence! It is submitted that the words used by the Majority give away the poverty of its reasoning and of the evidential foundation for that reasoning.

knowledge of less serious offences is sufficient to permit the inference that the accused had notice of more serious offences. It is not.

297. As the Appeals Chamber stated in *Krnjelac*, that inference "is not admissible with regard to the principles governing individual criminal responsibility":

"... in order to determine whether an accused "had reason to know" that his subordinates had committed or were about to commit acts of torture, the court must ascertain whether he had sufficiently alarming information ... to alert him to the risk of acts of torture being committed, that is of beatings being inflicted not arbitrarily but for one of the prohibited purposes of torture. Thus, it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture."⁴⁰⁰

298. Information that the EMD were unruly and occasionally violent – *without the additional element that they were violent in combat and-or to prisoners of war* – cannot suffice, on the *Krnjelac* principle, to fix the Appellant with notice of crimes of cruel treatment perpetrated by the EMD against VRS detainees.

299. The Majority erred in law in so concluding and the error invalidated the Judgement.

III. GROUND THREE: THE MAJORITY ERRED IN FINDING BEYOND REASONABLE DOUBT THAT THE APPELLANT FAILED TO TAKE THE NECESSARY AND REASONABLE MEASURES TO PREVENT OR PUNISH THE CRIMES

300. The Majority erred in law invalidating the decision, or alternatively erred in fact occasioning a miscarriage of justice, when it concluded that it had been proved beyond reasonable doubt that the Appellant failed to take the necessary and reasonable measures

⁴⁰⁰ *Krnjelac*AJ,para.155.

to prevent and punish the crime of cruel treatment committed by members of the EMD against the VRS soldiers who were detained in Livade and the Kamenica Camp in July and August 1995.⁴⁰¹

A. SUB-GROUND 3(A): MIXED ERROR OF FACT AND LAW: APPELLANT’S MATERIAL ABILITY TO PREVENT OR PUNISH CRIMES

301. The Majority erred in law invalidating the decision and/or erred in fact occasioning a miscarriage of justice when it concluded that Delić had the material ability to prevent or punish the crimes of cruel treatment in July and August 1995.⁴⁰²

B. SUB-GROUND 3(B): MIXED ERROR OF LAW AND FACT: THE TRIAL CHAMBER MAJORITY ERRED IN RELATION TO “NECESSARY AND REASONABLE MEASURES”

302. The Majority dealt with the issue of “*necessary and reasonable measures*” very summarily – indeed scantily – at paragraphs 541-556. When it came to the critical issue of whether the Appellant failed to take the necessary and reasonable measures to prevent or punish the crimes, the Majority said almost nothing about what “*necessary and reasonable measures*” were available to the Appellant.
303. In fact, the Majority only suggested *two* measures which it stated the Appellant failed to take, namely:

Requesting “*the Security Administration to apply measures against the EMD*”,⁴⁰³

and

Taking “*any other steps within the institutional framework of the ABiH to impede the imminent commission of the crimes.*”⁴⁰⁴

⁴⁰¹ *TJ*, para. 556.

⁴⁰² *TJ*, paras. 470, 510, 538, 541, 548, 553.

⁴⁰³ *TJ*, paras. 548, 550.

304. No other measures were suggested by the Majority.
305. Both of the suggested “*measures*” are impermissibly vague. Indeed, since both of the suggested measures refer, in turn, to unspecified other “*measures*” and “*steps*”, the Majority avoided altogether stating any concrete steps which the Appellant could have taken and did not take.
306. First, no details whatsoever are provided of what “*other steps within the institutional framework of the ABiH to impede the imminent commission of the crimes*” the Majority had in mind – if indeed (which seems doubtful) it had any specific steps in mind.
307. As to requesting “*the Security Administration to apply measures against the EMD*”, the Majority did not state what measures it considered “*the Security Administration*” could reasonably have taken.
308. In fact, as the Majority was no doubt aware from the evidence, the only “*measure*” or “*step*” that the Appellant could, at least theoretically have taken which might have prevented the crimes or brought the perpetrators to justice, would have been to attack the EMD camp, as one would attack an enemy force. But if the use of force as against an enemy army is the only option open to a commander, he can hardly be said to have that unit under his effective control.
309. Under the circumstances, if use of force is what the Majority had in mind as a necessary and reasonable measure (it is unclear what the Majority had in mind), then it erred in law and in fact. Under the circumstances prevailing at the time (with the ABiH already fighting on two fronts against the VRS and HVO), it would be wholly unreasonable to expect the Appellant to launch an attack on the EMD to free the VRS prisoners, and thus open a third front against the EMD.
310. The Appellant relies on this regard on the following passage in the *Hadzihasanovic Appeals Judgement*, which relates to strikingly similar facts relating to the EMD:
- “230. *Regardless of whether the use of force was materially feasible or advisable to save the lives of the hostages, the above scenario reveals a situation in which the relationship between the El Mujahedin detachment and the 3rd Corps was not*

⁴⁰⁴ *TJ*, paras. 548, 550.

one of subordination. It was quite close to overt hostility since the only way to control the El Mujahedin detachment was to attack them as if they were a distinct enemy force. This scenario is at odds with the premise of the Trial Chamber that the El Mujahedin detachment was subordinated to the 3rd Corps. This conclusion further confirms that Hadžihasanović did not have effective control over the El Mujahedin detachment.”

311. Judge Moloto correctly identified the Majority’s error in his dissenting opinion:

“10. Given these circumstances, in my view, there was nothing the ABiH commanders could do. [...] It is clear that if a decision had been made to confront the EMD by force, the ABiH would have encountered resistance comparable to an enemy force, rather than a force which is under its control. Such a scenario can hardly be reconciled with the theory of “effective control” as set forth in the Tribunal’s jurisprudence.”

312. The Majority therefore erred in law invalidating the decision and/or erred in fact occasioning a miscarriage of justice by failing to specify any “*necessary and reasonable measures*”, which were feasible in all the circumstances and were within the Appellant’s power, to prevent or punish crimes committed by the EMD, and/or by considering that he should have resorted to the use of force to do so.

C. SUB-GROUND 3(C): ERROR OF FACT: NO REASONABLE TRIER OF FACT WOULD HAVE FOUND THAT THE APPELLANT FAILED TO TAKE THE NECESSARY AND REASONABLE MEASURES TO PREVENT OR PUNISH THE CRIMES

313. The Majority erred in fact occasioning a miscarriage of justice in that no reasonable trier of fact would have found that neither the Appellant nor anyone under his authority or command and control took the necessary and reasonable measures to prevent or punish

cruel treatment in Livade and the Kamenica camp by members of the EMD in July and August 1995.⁴⁰⁵

314. In paragraph 406 of the Judgment, the Majority found that the “*EMD did not allow other ARBIH units unqualified access to its premises*”. It also found in the same paragraph that “*the access was denied in particular when military police and security service wanted to conduct interviews with captives in the hands of the EMD or when conducting criminal investigations*”.
315. Furthermore, in paragraph 407, the Majority found that “*on one occasion, officers of the OG North who carried out a field inspection in August 1994 were denied access to facilities of the EMD*”. In paragraph 410, the Majority found that access to the EMD premises was again denied to the 35Division Security Officers in September 1995, who went to the Kamenica camp (EMD camp) to verify rumours that the EMD held a number of captured VRS soldiers. It also found that “*several witnesses testified that, in their view, nothing could be done to discipline the EMD since coercive measures would have entailed a violent conflict with the EMD*”.⁴⁰⁶
316. However, the Majority failed to apply these findings, when it concluded that “*rather than saying that nothing could be done to oppose undisciplined behaviour of EMD members, (...) nothing was done or even attempted to be done, in particular in connection with alleged violations of international humanitarian law during the detention of enemy soldiers and civilians by the EMD*”.⁴⁰⁷ This was a perverse conclusion to reach. The Majority never set out what steps it considered could have been taken. It is obvious that if nothing could be done, then nothing would be done. The Prosecution bore the burden of proving that the Appellant failed to take the necessary steps. The Majority, however, by perverse reasoning, effectively put the burden on the Appellant – who could do nothing – to prove that he did something! This was plain, reversible error. The Appellant adopts the reasoning of Judge Moloto at paragraph 27 of his Dissenting Opinion.

⁴⁰⁵ *TJ*, paras.406-411,447-453,460-462,468-471,511-512,526,542-551,552-555,557.

⁴⁰⁶ *TJ*, para.468

⁴⁰⁷ *TJ*, para.468

317. The evidence clearly showed that, throughout the entire period of war, the ARBIH and the Appellant were trying to put EMD under control and to impose measures against them, but they failed to succeed in the absence of effective control over the EMD.⁴⁰⁸ There are various complex factors explaining this failure:

(a) Identification problems

318. One of the important factors, which meant that the efforts of ARBIH officers to bring the EMD under control and impose measures against them failed, was the presence of different Arab groups and humanitarian organizations in Central Bosnia. The Majority failed to consider the evidence on this issue.

319. First, BiH State organs and its Army did not control RBiH borders.⁴⁰⁹ The foreigners came and left BiH as they wanted, without the BiH authorities having information about it, since they were not military conscripts in Bosnia itself. Therefore, they required no special approval to leave or to return to Bosnia.⁴¹⁰ [REDACTED].⁴¹¹ Accordingly, the ARBIH was not able to control which foreigners came to BiH, whether they joined the detachment or acted on their own.

320. [REDACTED].⁴¹² The evidence shows that the information concerning their identities was not available to the ARBIH.⁴¹³

321. Consequently, the ARBIH was unable to distinguish between EMD members and other foreign fighters.⁴¹⁴

⁴⁰⁸ *Regarding lack of effective control over the EMD, see Sub-ground 1*

⁴⁰⁹ [REDACTED]; **Begovic**, 12/07/2007-T.490

E192-HVO Order for blockade of borders between RBiH and Croatia, 14/01/1993

⁴¹⁰ **PW9**, 16/11/2007-T.5740-5741

⁴¹¹ [REDACTED].

⁴¹² [REDACTED].

⁴¹³ See paras.18-23 *infa*.

⁴¹⁴ See sub-ground 2(F).

See also: **Hajderhodzic**, 08/10/2007-T.3781-3782; **Sljuka**, 22/10/2007-T.4305

(b) The EMD did not accept the ARBIH system of subordination

322. Another factor which led to the impossibility of imposing measures against the EMD by the ARBIH was the fact that the EMD refused to be incorporated in the ARBIH chain of command and consequently refused to follow their superiors' orders or submit reports to its superiors.⁴¹⁵
323. In such circumstances the EMD refused to appoint any person who would liaise with the 3Corps and 35Division, especially in security or intelligence issues. In fact, the EMD refused to appoint any security or intelligence organs who would be in contact with the superior organs, receive instructions or report back.⁴¹⁶
324. Awad, an EMD member, who was listed as assistant commander for security in the list of EMD members sent to the 3Corps⁴¹⁷, testified that he never performed these duties in the practice.⁴¹⁸
325. The direct consequence of this was that the 3Corps could not penetrate the EMD and gather information about them, let alone take any measures against the EMD.⁴¹⁹

(c) The EMD did not allow ARBIH officers access to their camps

326. One of the crucial factors, which resulted in the ARBIH and the Appellant lacking any control over the EMD and being unable to impose any measures against the EMD was the EMD's negative attitude towards ARBIH officers. The evidence was unequivocal that the EMD was hostile towards the ARBIH officers. For example, the EMD did not allow ARBIH officers access to their camps, in order to collect information about them, to conduct investigations or to obtain any data about them.

⁴¹⁵ See paras.14-62 supra.

⁴¹⁶ **Sljuka**,22/10/2007-T.4301,T.4369;**Imamovic**,11/10/2007-T.4045-4046; **Hajderhodzic**,08/10/2007-T.3784-3785;**Husic**,23/10/2007-T.4446-4447.

⁴¹⁷ **E67**

⁴¹⁸ **Awad**, 09/02/2008-T.172-173

⁴¹⁹ **Sljuka**,22/10/2007-T.4370

See also:**Hubo**,14/03/2008-T.7624,T.7626-7629; [REDACTED].

327. The 17th Krajina Brigade Official Note from 25 October 1993 described the situation when EMD members arrested an ARBIH soldier, only because he was drunk.⁴²⁰ Officers of the ARBIH Mixed Artillery Division went to the EMD and requested custody of the soldier. The EMD were assured that proper legal procedures would be initiated against him if he violated military discipline. However, their offer was rejected by the EMD and the ARBIH officers were rudely thrown out of the EMD camp. The EMD did not even allow the ARBiH officers to see the soldier.⁴²¹
328. ARBIH officers who were members of the 3Corps Command and 35Division Command testified that they had no access to the EMD premises.
329. Ribo, Chief of the Educational and Operative Centre of the 3Corps Command, testified: “...we were simply not allowed access to their command or the area where they were”.⁴²²
330. Sljuka, the 35Division Security Officer, testified that on one occasion he tried, together with two military police men, to enter the EMD camp, but access was denied and one of the EMD members even pointed the rifle at their vehicle. Thus, they were refused entry to the camp and consequently they returned to Zavidovici.⁴²³
331. Begovic, an EMD member (emir of one of the EMD combat groups), who was in position to know that the EMD did not allow access to the ARBIH officers to its premises, was clear:
- “A...Even if Rasim Delic had appeared, it would have been necessary for his entry to be authorized”.*
- Q: If I’ve understood you correctly, regardless of the situation, if a member of the High Command wanted to enter and see something, regardless of that fact, it wouldn’t be possible without the emir’s authorisation?*

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E125

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E125

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Ribo,05/03/2008-T.7016-7017See also **Delalic**,27/08/2007-T.1765;**Hubo**,14/03/2008-T.7624;**E770**-Witness statement of Salih Spahic, para.10,pp.1-2

423

Sljuka,22/10/2007-T.4328

See also [REDACTED].

*A. No. Without the emir's authorisation, this would not have been possible.*⁴²⁴

332. Accordingly, it was not possible for ARBIH officers to gather any information about the EMD or to conduct investigations against EMD members. Sljuka's evidence was unequivocal:

*"...Whenever we sought something from them, then they would respond, "Oh, yes, of course, you will receive that," but there would be nothing following and you had no means to determine whether some things or matters were resolved or not...this was possible with...regular soldiers, but this could not be done with the El Mujahedin Detachment members".*⁴²⁵

333. Sljuka gave examples of the EMD breaching curfew orders and the rule prohibiting soldiers from carrying rifles. The 35Division was unable to do anything about it.⁴²⁶ The 35Division Commander appealed to the civilian authorities to solve the problems with the EMD, because the EMD was disturbing public law and order, and the Division Command was unable to control them or take any measures to stop them.⁴²⁷

334. The ARBiH SVB Services did not have the ability to investigate or solve any cases which related to the EMD, due to the lack of cooperation with this unit:

*"The 3rd Corps SVB has reported that, because the Command of the 'El Mujahed' detachment has refused to cooperate, it is unable to shed any light on a number of serious crimes and misdemeanours for which there are indications that they may have been perpetrated by members of the Detachment".*⁴²⁸

335. The EMD had its own disciplinary system which did not allow for any interference by ARBIH officers. E842, the "Shura Decision" from 23 October 1993 shows unequivocally

⁴²⁴ **Begovic**,13/07/2007-T.536-537.

⁴²⁵ **Sljuka**,22/10/2007-T.4370-4371

⁴²⁶ **Sljuka**,22/10/2007-T.4305

⁴²⁷ **E593**

⁴²⁸ *See also Imamovic*,15/10/2007-T.4067

E710. See also:E1058

that it was only the “Shura”⁴²⁹ who had the authority to deal with issues within the EMD.⁴³⁰

336. [REDACTED].⁴³¹ It was the Shura who pronounced disciplinary measures and acted as a kind of military tribunal.⁴³² [REDACTED].⁴³³

337. EMD members were even ready to use their weapons when 328th Brigade officers tried to prevent them from demolishing tombstones in the cemetery.⁴³⁴

338. [REDACTED].⁴³⁵

339. The Security Administration Bulletin from 14 December 1995 showed that the EMD did not allow the 3Corps Military Police Battalion to conduct an on-site investigation in their camp, with regard to the explosion which happened in the EMD camp:

*“The “El Mujahedin Detachment Command did not allow the on-site investigation team complete insight into this case, since any contacts with the members of the unit was banned... ”.*⁴³⁶

340. Furthermore, the EMD did not allow anyone access to the VRS prisoners.⁴³⁷

341. Neither the Appellant nor ARBIH had the ability to impose measures on the EMD. To find otherwise was to reach a conclusion without any support in the evidence.

(d) The Appellant’s attempts to put the EMD under control and to impose measures against them failed due to the lack of effective control

342. The Appellant, as the SVK Commander, undertook several measures attempting to put the EMD under control and to discipline them. The evidence flatly contradicted the

⁴²⁹ Regarding the “Shura” see paras.92-98, 147-152.

[REDACTED].

⁴³⁰ PW9,16/11/2007-T.5668.

See also Begovic,13/07/2007-T.537

⁴³¹ [REDACTED]

⁴³² PW9,16/11/2007-T.5668,T.5749;Hamad,09/09/2007-T.98-99

⁴³³ [REDACTED]

⁴³⁴ E934,3Corps Security Information,26/05/1995,p.2

⁴³⁵ [REDACTED].

⁴³⁶ E755,p.2

⁴³⁷ Alihodzic,30/11/2007-T.6433,T.6469-6470

See also paras.326-331 supra.

Majority's conclusion that "*nothing was done or even attempted to be done, in particular in connection with alleged violations of international humanitarian law during the detention of enemy soldiers and civilians by the EMD*".⁴³⁸

343. The only reasonable inference was that drawn by Judge Moloto, namely that the Appellant's attempts to discipline the EMD came to nothing precisely because he did not have effective control over the EMD.⁴³⁹
344. Nonetheless, the Appellant did everything in his power to implement the order of his superior, the RBiH President and ARBiH Supreme Commander, Izetbegovic, to place the EMD under control. He issued the order for the formation of the EMD and its subordination to the 3Corps, the largest formation in the area in which the mujahedin acted, which also had the best prospect of bringing them under control.⁴⁴⁰
345. On 14 July 1993, the Appellant issued the "Order on elimination of weaknesses displayed in mobilization and release of soldiers and MTS in the ARBiH war units," prohibiting direct admittance of recruits-volunteers to war units. He also ordered that the existing recruits-volunteers should immediately start settling their records with central card files in relevant defence secretariats.⁴⁴¹ However, the EMD never did so.⁴⁴²
346. Another attempt by the Appellant to impose measures against the EMD was on 28 August 1994, when he ordered the 3rd and 7th Corps Commanders to ensure that EMD members acted in accordance with the law.⁴⁴³ This order was also not implemented.⁴⁴⁴
347. A hand-written remark, written on the 3Corps SVB document of 20 November 1994 to the SVB Administration, stated that the SVK Commander (the Appellant) ordered on 23 November 1994 that the EMD be placed in the system of command and control or disbanded.⁴⁴⁵ It can be seen from this exhibit that the SVB Administration issued

⁴³⁸ *TJ*, para.468

⁴³⁹ Judge Moloto's Dissenting Opinion, para.27

⁴⁴⁰ See paras.136-144 supra.

⁴⁴¹ **E1337**, p.2

⁴⁴² See paras.18-23 supra.

⁴⁴³ **E692**-GS ARBiH order regarding behaviour of the foreign citizens in the AOR of 3 and 7Corps

See also: [REDACTED].

⁴⁴⁴ **Mujezinovic**, 23/11/2007-T.6112-6113

⁴⁴⁵ **E932**

instructions to SVB organs to this effect.⁴⁴⁶ The Appellant approved the operative action Vranduk.⁴⁴⁷

348. Various orders were issued to the EMD by the 3Corps Command, including those pertaining to the application of the Geneva Conventions. [REDACTED].⁴⁴⁸ However, the EMD command applied its own rules.⁴⁴⁹

(e) EMD members were not subject to criminal proceedings due to the lack of effective control over the EMD and inability to impose measures upon them

349. The Majority found that “*the foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behavior, although not for violations of international humanitarian law*”.⁴⁵⁰ In the same paragraph, it also found that “*this confirms that the superior commanders did have the material ability to prevent and/or punish crimes committed by the EMD*”. The Majority completely erred when reaching these conclusions and misinterpreted the evidence on which it relied.
350. First, the Majority’s conclusion from paragraph 470 that “*the foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behavior, although not for violations of international humanitarian law*” is in complete contradiction to its finding at paragraph 510 that “*... the criminal reports in evidence before the Trial Chamber show that proceedings were initiated only against those ARBIH members who did not form part of the EMD*”.
351. As Judge Moloto found, “*despite the fact that the ARBIH, on some occasions, took investigative steps against EMD members, all attempts to punish the EMD members for their criminal behaviour inevitably failed*”.⁴⁵¹ As Judge Moloto rightly observed, “*the*

⁴⁴⁶ [REDACTED].

⁴⁴⁷ See paras.117, 155 supra and 384, 386, 390, 391 infra.

⁴⁴⁸ [REDACTED].

⁴⁴⁹ See paras.50-52 supra.

⁴⁵⁰ *TJ*,para.470.

⁴⁵¹ Dissenting opinion of judge Moloto,para.27

- ARBIH was fearful of the EMD and could not take actions against it even when EMD members hindered other ARBIH units in their military action”*.⁴⁵²
352. When concluding that “*the foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behavior, although not for violations of international humanitarian law*”, the Majority relied on its findings from paragraphs 447-452:
353. In paragraph 447, the Majority found: “*In February 1994, two members of the EMD were arrested by a joint military-civilian force in the wake of the killing of Paul Goodall, a British humanitarian worker, near Zenica. Criminal proceedings were instituted against them before a civilian court but were never concluded because the suspects escaped from custody*”.
354. Thus, the Majority found that the criminal proceedings in the Goodall case were never concluded, because the suspects escaped from the custody. It is not clear on which basis the Majority concluded that “*this confirms that the superior commanders did have the material ability to prevent and/or punish crimes committed by the EMD*”. As Judge Moloto found, referring to the case of killing of Paul Goodall, “*the ARBIH had to be assisted by the civilian authority to conduct an investigation and arrest the perpetrators. Furthermore, the criminal proceedings were never completed*”.⁴⁵³
355. The evidence demonstrated that CSB Zenica, **the civilian police**, filed the criminal report with the Zenica public prosecutor's office against the alleged killers of Paul Goodall.⁴⁵⁴
356. However, as the Majority found,⁴⁵⁵ the evidence undoubtedly shows that after their arrest, the alleged perpetrators **were abducted** and escaped during the course of the proceedings.⁴⁵⁶
357. The EMD command did not permit its members to be subject to the jurisdiction of RBiH authorities. On 30 January 1994, Dr Abu Haris, the EMD Emir at the time, gave a statement in which he requested that the mujahedin arrested for the murder of Paul

⁴⁵² Dissenting opinion of judge Moloto, para.28

⁴⁵³ Dissenting opinion of judge Moloto, para.27

⁴⁵⁴ E659-GS ARBIH SVB Special Information, No.26,02/02/1994, p.2

⁴⁵⁵ TJ, para.448

⁴⁵⁶ [REDACTED]; Hadziselimovic, 27/11/2007-T.6197-6198

Goodall be released. He said: “*The authorised individuals in the Military Police and CSB will be held responsible in case of ill-treatment of brothers Mujahedins*”.⁴⁵⁷ Awad was clear that, had the Shura considered that its members were responsible, it would have taken measures.⁴⁵⁸

358. The Majority also relied on its finding from paragraph 449 – “*On 9 December 1993, The Appellant ordered a ‘clamp down on the illegal activities of the Guerilla Mujahedin and EMD’, but actual measures were taken only against the so-called Guerilla Group*”, when it concluded that the “*the foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behavior, although not for violations of international humanitarian law*”.⁴⁵⁹
359. The fact that the Appellant issued this order⁴⁶⁰ only represents another attempt made by the Appellant to impose measures upon the EMD. The Majority’s finding that the Order was not implemented only shows that neither the Appellant nor his subordinates had the material ability to impose measures against the EMD, rather than the converse.
360. Moreover, the Majority erred in its findings,⁴⁶¹ given that the evidence showed that the Appellant’s Order regarding the so-called Guerrilla Group⁴⁶² was also not implemented: As part of Operative Action Trebevic 3, the Appellant tried again to impose measures against the Guerrilla Group, by ordering the expulsion of the Turkish Gerila⁴⁶³ which, as the 3Corps had informed him, were causing problems in the Zenica area.⁴⁶⁴ However, because of the support ‘Arabs’ enjoyed with the civilian authorities,⁴⁶⁵ and in particular the Ministry of Foreign Affairs, the decision was not implemented. The ‘Arabs’ were simply moved to Sarajevo where they continued to live and work, despite the Appellant’s

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E1013

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Awad,10/02/2008-T.274

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TJ,para.470

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E690

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TJ,para.449

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E690

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[REDACTED]; [REDACTED]; **Vuckovic**,07/11/2007-T.5178-5180

⁴⁶⁴

E179-3Corps Report sent to SVK ARBIH,13/06/1993

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See pras.82-90 supra.

- order for their deportation. The Ministry of Foreign Affairs, as a Government body, did not carry out the deportation.⁴⁶⁶
361. When it concluded that the “*the foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behavior, although not for violations of international humanitarian law*”⁴⁶⁷, the Majority also relied on its finding from paragraph 450, in which it cited E934, the 3Corps SVB Report from 26 May 1995. As the Majority found, this Report concerned an incident in January 1995 in which members of the EMD allegedly demolished tombstones in the orthodox cemetery in Čurići.
362. It will first be noted that E934 states that the ARBIH 328th Mountain Brigade Officers tried to prevent the members of the EMD from demolishing the tombstones. But did not succeed because the Mujahedin “*were even ready to use their weapons if anybody was to attempt to stop them doing that job*”.⁴⁶⁸
363. E934 itself shows that the ARBIH officers did not have the ability to impose any measures upon the EMD. The Majority erred in fact, therefore, when it relied on this document.⁴⁶⁹.
364. The Majority also relied on its findings from paragraphs 451 and 452.⁴⁷⁰
365. In paragraph 451 the Majority found, that “*in July 1995, the 3rd Corps conducted an investigation concerning threats by EMD members against an ARBIH soldier of Croat ethnicity*”. In the same paragraph, the Majority also found that “*there is no evidence whether any further action was taken in this respect*”. To support these conclusions, the Majority cited E938 and E764.
366. **E938** is the ARBIH 35Division Security Sector Official Note from 05/07/1995. The document suggests that the ARBIH was not able to undertake any measures against the EMD member who caused this incident, since the document states that as a direct

⁴⁶⁶ E243-3K SVB Information sent to SVB GS ARBIH,16/07/1994

⁴⁶⁷ TJ,para.470

⁴⁶⁸ E934,p.2

⁴⁶⁹ TJ,para.470

⁴⁷⁰ TJ,para.470

- consequence of the EMD behaviour, the ARBIH 328Brigade was even forced to withdraw all non-Muslim members from the defence lines.⁴⁷¹
367. **E764** is a 3Corps SVB Statement of Reasons from 07/07/1995 which refers to the same incident as E938. It does not provide any evidence that measures were imposed upon the EMD. On the contrary, like E938, the exhibit shows that the behaviour of a certain EMD member had negative impacts on the combat readiness of the 328Brigade. Due to such behaviour of the EMD member, the Battalion Command had to withdraw the non-Muslim soldiers from the defence lines, which also jeopardized the security of the unit.⁴⁷²
368. Therefore, the Majority erred when it relied on its findings from paragraph 451, for its conclusion at paragraph 470.
369. With regard to paragraph 452, on which the Majority also relied for its finding at paragraph 470, the Majority found that “*in October 1995, one member of the EMD was subject to criminal proceedings for theft*”. To support this conclusion, the Majority relied on E880, 3Corps Military Police Battalion Daily Report from 7 October 1995, which mentions that a 3Corps Military Police Battalion instituted proceedings against one member of the EMD.⁴⁷³
370. However, as the Majority itself found in the same paragraph, there is no evidence that any measures were imposed upon this EMD member. Indeed, there was no evidence in that ARBIH officers *ever* succeeded in imposing disciplinary measures upon the EMD, despite their constant attempts to discipline EMD members.
371. Mujezinovic, Commander of the 3rd Battalion Military Police of the 3Corps, testified that on one occasion he sent a request to the EMD commander to take disciplinary measures against Emir Imamovic, an EMD member. However, the EMD commander did not follow the order and did not report back.⁴⁷⁴

⁴⁷¹ **E938**,p.1

⁴⁷² **E764**

⁴⁷³ **E880**,p.3

⁴⁷⁴ **Mujezinovic**,23/11/2007-T.6083-6084:“*A...he did not report back. He may have issued a disciplinary measure, but he never reported back on it, which leads me to conclude that there were no disciplinary measures imposed*”.

372. For the foregoing reasons, the Majority's conclusion that "*superior commanders did have the material ability to prevent and/or punish crimes committed by the EMD,*" was not open to it to reach on the evidence and was perverse.

(f) The Majority erred when it found that neither the Appellant nor anyone else acting under his command and control took any measures to prevent the future commission of cruel treatment in Livade and the Kamenica Camp by members of the EMD in July and August 1995

373. In paragraph 550, the Majority erred in fact when it found that "*neither Rasim Delic, nor anyone else acting under his command and control, took any measures to prevent the future commission of cruel treatment in Livade and the Kamenica Camp by members of the EMD in July and August 1995*". Had the Majority properly considered the evidence, it would not have reached such a conclusion.

374. The Majority itself found in paragraph 408, that the interviews with the prisoners, who were held by the EMD in July 1995, were conducted by the 35Division Security Officers "*with the approval of Abu Maali, who had authorised only (...) a short interview*". In the same paragraph the Majority found that the 35Division Security Officer, who was conducting the interview with the prisoners, left the EMD premises because "*of concern for his own safety after one of the EMD soldiers started threatening him*". It also found that the EMD did not allow access to the captives who were held by them in July 1995 and that "*the 3rd Corps reported that it intended to request approval to contact the prisoners (...) at (the EMD's) camp (...) from the commander of the EMD*".⁴⁷⁵

375. Furthermore, in paragraph 468, the Majority found that the EMD did not follow up on the ARBIH combat orders which stated that the "*enemy captives were to be gathered at ARBIH collection points*" and accordingly the EMD failed to hand over the prisoners from July and August 1995 to ARBIH. It also found that the ARBIH officers were denied

⁴⁷⁵ TJ,para.408

access to the prisoners held by the EMD.⁴⁷⁶ Moreover, in the same paragraph, the Majority found that despite the ARBIH orders stating that the enemy captives were to be gathered at ARBIH collection points, the EMD failed to hand over the detainees from July 1995.

376. Nevertheless, the Majority failed to apply these findings when it concluded that “*neither Rasim Delic, nor anyone else acting under his command and control, took any measures to prevent the future commission of cruel treatment in Livade and the Kamenica Camp by members of the EMD in July and August 1995*”.⁴⁷⁷
377. Contrary to the Majority’s conclusion,⁴⁷⁸ PW13 commented on a version of E858 which contains a handwritten remark.⁴⁷⁹ [REDACTED].⁴⁸⁰
378. The instruction was followed by an order issued by the Chief of SVB Administration Jasarevic.⁴⁸¹
379. As explained earlier, the EMD “only allowed a short interview with the prisoners”. The 3Corps Commander, allegedly superior to the EMD, had to ask for the “approval of Abu Maali to take over the prisoners”, instead of ordering the EMD to hand over the prisoners. [REDACTED].⁴⁸² All these facts show that the only reasonable inference was the ARBIH did not have the material ability to undertake any measures against the EMD. The Majority’s conclusion to the contrary was not open to it to reach on the evidence.⁴⁸³

(g) The Appellant did not fail to prevent or punish the crimes of cruel treatment committed by the EMD members in July and August 1995

380. In paragraphs 552 to 555 the Majority dealt with the Appellant’s “failure to punish the crimes of cruel treatment committed by the EMD members in July and August 1995”.

⁴⁷⁶ *TJ*, para. 468

⁴⁷⁷ *TJ*, para. 550

⁴⁷⁸ *TJ*, para. 550

⁴⁷⁹ E957-SVB3Corps Information about captured aggressor’s soldiers, 23/07/1995

⁴⁸⁰ [REDACTED].

⁴⁸¹ E594-GSARBIHSVB Instruction for informative interview with prisoners, 26/07/1995

⁴⁸² [REDACTED].

⁴⁸³ *TJ*, para. 470

381. The Majority found that the Appellant failed to take the necessary and reasonable measures to prevent and punish the crime of cruel treatment committed by members of the EMD against the VRS soldiers who were detained in Livade and Kamenica camp in July and August 1995.⁴⁸⁴ As Judge Moloto found, “*the Majority appears...to hinge its conclusion solely on what Rasim Delic could possibly do, failing, however, to demonstrate how he had, in reality, a material ability to punish the EMD*”.⁴⁸⁵
382. As explained earlier, the ARBIH did not have a material ability to impose any measures upon the EMD, including disciplinary or punishing measures. Even the “use of force” against the EMD as a last resort was impossible.
383. As early as June 1993 the Appellant ordered the 3Corps to disarm, disband and even expel the mujahedin.⁴⁸⁶ Karavelic said he was sure that the Appellant followed up on this order. However, he explained that it was not possible to carry out this order because the mujahedin were scattered in the different villages in Central Bosnia, that they had bases in different locations, and that they had the support of the local population:
“Any attempt that General Delic took on his own to disarm them would inevitably have led to loss of life among civilians. He did not have the right to do that without approval from the Supreme Command”.⁴⁸⁷
384. The Appellant’s initiative to disarm the mujahedin,⁴⁸⁸ as well as his efforts from June 1993 and OA Vranduk,⁴⁸⁹ were deemed unrealistic in Central Bosnia in the 3Corps area of responsibility.
385. [REDACTED].⁴⁹⁰
386. [REDACTED].⁴⁹¹

⁴⁸⁴ *TJ*, paras. 551, 555-557

⁴⁸⁵ Dissenting opinion of Judge Moloto, para. 29

⁴⁸⁶ **E163**-GS ARBIH Order regarding Gerila unit, 16/06/1993

⁴⁸⁷ **Karavelic**, 27/03/2008-T. 7990

⁴⁸⁸ **E163**; [REDACTED]; **E963**

⁴⁸⁹ It was foreseen that the EMD would be disbanded in case the operative action was not successful

Regarding operative action Vranduk, *see* paras. 117, 155, 384, 386 *supra* and 390-391 *infra*.

⁴⁹⁰ [REDACTED].

⁴⁹¹ [REDACTED].

387. Witnesses who were 3Corps members explained that they did not have information about the number of EMD members or their real strength. The EMD had the support, not only of the civilian population but of some civilian authorities and religious officials.⁴⁹² “...by virtue of the fact that there were Bosniaks among them and that they had started marrying under-age persons, and these marriages resulted in children, this entailed the possibility that the problem might deepen in this way”.⁴⁹³
388. A direct conflict with the EMD would have created an extremely difficult situation in Central Bosnia. Witnesses described that attacking the EMD would have opened a third front in Central Bosnia,⁴⁹⁴ i.e. one was against the Serbs, one against the HVO, and yet another against the EMD. There is no way that the ARBiH could have been expected to sustain a third front and thus risk losing all. Moreover, EMD members were well armed, unlike the ARBiH:
- “Otherwise, we had our own independent logistics, and we were own stronger than the corps as far as that is concerned.”*⁴⁹⁵
389. An attempt to arrest anyone from the EMD would have been very dangerous.⁴⁹⁶ It would not have been possible to use force against the EMD because, in such a situation, it would have created conflict amongst Muslims.⁴⁹⁷
390. Moreover, the evidence shows that even high ranking officers in the ARBiH, including some in the most responsible positions, had different views on the mujahedin. [REDACTED].⁴⁹⁸ [REDACTED],⁴⁹⁹ [REDACTED].
391. [REDACTED],⁵⁰⁰ [REDACTED].⁵⁰¹

⁴⁹² **Alihodzic**,30/11/2007-T.6508; [REDACTED].

⁴⁹³ **Alihodzic**,30/11/2007-T.6503-6504

⁴⁹⁴ **Fusko**,23/07/2007-T.1139;**Delalic**,27/08/2007-T.1762

⁴⁹⁵ **Awad**,10/02/2008-T.260;

See also **Fusko**,23/07/2007-T:1165-1166

⁴⁹⁶ **HalimHusic**,13/03/2008-T.7510-7512

⁴⁹⁷ [REDACTED].

HalimHusic,11/03/2008-T.7357-7359;**Jusic**,19/09/2007-T.2686-2687

⁴⁹⁸ [REDACTED].

⁴⁹⁹ [REDACTED].

⁵⁰⁰ [REDACTED].

⁵⁰¹ [REDACTED].

392. In light of this consideration, the use of force against EMD would not only be comparable to a clash with enemy forces, rather than a force under its effective control,⁵⁰² but it would also have widespread consequences for the ARBiH, which in 1995 was already fighting several enemies (VRS, HVO and Fikret Abdic's forces).
393. Hence, the evidence clearly demonstrated that the ARBiH did not have the material ability to impose any kind of measures against the EMD. However, the Majority completely failed to consider this evidence.
394. Moreover, in paragraph 137, the Majority accepted that the Appellant did not have a power to undertake any use of force, since it had first to be approved by the RBiH Presidency. The evidence is clear in this respect.
395. In fact, as found by the Majority⁵⁰³ only the RBiH Presidency had the authority to approve use of force against a unit which was an enemy belligerent. [REDACTED].⁵⁰⁴
396. The use of force had to be the appropriate measure in the specific situation with regard to the events which led to consideration of the use of force.
397. Karavelic explained that he had the absolute support of the Appellant for his proposal. He said “...and if commander general Delic demanded from the President countless times that that (use of force) should be approved and done, still it took five to six months...”.⁵⁰⁵
398. Specifically, when asked by the court about the possible use of force against the EMD by the Appellant, Karavelic said:

“I assure you as a human being, and as an officer, that he did. It's quite another matter whether he was in a position to, whether he received or could have received an approval from the president of the Presidency, Mr. Alija Izetbegovic to use force

⁵⁰² See Hadzihasanovic Appeals Judgment, para.229: “the military operation that the Trial Chamber expected the 3rd Corps to launch in order to rescue the hostages was not simply a type of police operation over a few reluctant subordinates. Rather, it would have amounted to a full-fledged armed attack against the camp where the EMD was based...In light of this consideration, the military operation that the Trial Chamber expected the 3rd Corps would in the appeals chamber view be comparable to that necessary to obtain the release the hostages from an enemy force rather than a force under its effective control”.

⁵⁰³ TJ, para.137

⁵⁰⁴ [REDACTED].

⁵⁰⁵ Karavelic, 27/03/2008-T.7979

*or something similar. Of his own accord, he did not have the right to do any such thing.”*⁵⁰⁶

399. Therefore, the Majority’s conclusion that “*Rasim Delic failed to take the necessary and reasonable measures to prevent and punish the crime of cruel treatment committed by members of the EMD against the VRS soldiers who were detained in Livade and the Kamenica Camp in July and August 1995*”⁵⁰⁷ was completely unfounded, and not open to it to reach on the evidence.⁵⁰⁸

D. SUB-GROUND 3(D): ERROR IN LAW: FAILURE TO PUNISH

400. The Majority erred in law invalidating the decision by finding that the Appellant’s imputed knowledge of Bulletin 137 “*was sufficient to trigger his duty to enquire with a view to punish after the crime of cruel treatment had actually been committed*”. The Majority thus erred in law by relying on the allegedly “*alarming information*” in Bulletin 137 to establish liability *both* for the failure to prevent and the failure to punish.⁵⁰⁹
401. Criminal liability for failure to prevent is separate and distinct from criminal liability for failure to punish.⁵¹⁰ As the *Orić* Trial Chamber noted:
- “*[T]he duty to prevent or punish does not provide the Accused with alternative and equally satisfying options but with two distinct sets of obligations.*”⁵¹¹
402. Given that failure to prevent and failure to punish comprise two distinct sets of obligations, it follows that a conviction for failure to prevent cannot *automatically entail* a conviction for failure to punish, or vice-versa.
403. The Majority erred in law in this regard. Having found that the information in Bulletin 137 constituted “*alarming information*” which put the Appellant on notice that crimes would be or had been committed by the EMD, it merged the two distinct heads of

⁵⁰⁶ **Karavelic**, 27/03/2008-T.7989

⁵⁰⁷ *TJ*, para. 556

⁵⁰⁸ Dissenting Opinion of Judge Moloto, para. 32

⁵⁰⁹ *TJ*, paras. 552-556.

⁵¹⁰ See *Aleksovski* Appeal Judgement, pars 72, 76; *Celebici* Appeal Judgement, at pars 192, 193, 198; *Blaskic* Trial Judgement, par 336; *Blaskic* Appeal Judgement, par 83; *Bagilishema* Trial Judgement, par 49.

⁵¹¹ *Orić* Rule 98bis Decision, T.8998.

liability and “*double-counted*” Bulletin 137 as providing notice both that crimes *had been committed* and that they *would be committed*.

404. It is well-established in the Tribunal’s case-law that “*double-counting*” is impermissible.⁵¹² Bulletin 137 was counted twice – as providing notice that crimes would be committed *and* that they had been committed:

*“Because Rasim Delić took no further action following his receipt of Bulletin 137, he did not obtain the information that 12 VRS soldiers detained in Livade and the Kamenica Camp in July and August 1995 were cruelly treated. The Majority finds that Rasim Delić’s imputed knowledge based on his receipt of Bulletin 137 was sufficient to trigger his duty to enquire with a view to punish after the crime of cruel treatment had actually been committed.”*⁵¹³

405. This reasoning is deeply flawed. The exact same information in Bulletin 137 cannot at one and the same time provide notice that crimes, *prospectively*, will be committed, and also, *retrospectively*, that they had been committed.
406. If the Majority had not so erred, it would have found the Appellant guilty in respect of failure to prevent *or* failure to punish, *but not both*. Although the Majority did not set out in the Disposition how the sentence of three years was apportioned, it is fair to assume – at least in the absence of any indication to the contrary – that the sentence was apportioned equally as between the two heads of liability. Accordingly, if the Majority had not so erred, the Appellant would have received a sentence of one and a half years’ imprisonment. If this ground of appeal is allowed, the Appellant requests that that sentence be substituted accordingly.

⁵¹² See *DeronjićAJ*, para.106.

⁵¹³ *TJ*, para.553.

IV. CONCLUSION

407. For the foregoing reasons, the Appellant respectfully requests the Appeals Chamber to allow his appeal, to quash his conviction on Count 2 of the Indictment and to substitute a Not Guilty verdict.

Dated this 07th day of January 2009

Handwritten signature in black ink, appearing to read "H. Vidović".

Vasvija Vidović and John Jones
Counsel and Co-Counsel for Rasim Delić

Word Count: 28 696