

**UNITED
NATIONS**

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

Case No. IT-04-83-A
Date: 17 February 2009

IN THE APPEALS CHAMBER

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

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**NOTICE OF FILING OF PUBLIC REDACTED VERSION OF
PROSECUTION RESPONSE BRIEF**

The Office of the Prosecutor:

Ms. Michelle Jarvis

Counsel for Rasim Delić:

Ms. Vasvija Vidović
Mr. John Jones

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Michelle Jarvis
Appeals Counsel

Dated this 17th day of February 2009
At The Hague, The Netherlands

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I. OVERVIEW

1. Over a period of more than a month during July and August 1995, VRS prisoners were cruelly treated by members of the notoriously violent *El Mujahed* Detachment (“EMD”) in Livade and in the Kamenica Camp in Bosnia and Herzegovina. The prisoners were beaten with pipes, bound in excruciating positions for hours and subjected to electric shocks.¹ EMD members also terrorized their captives by, among other things, forcing them to kiss the bloody severed head of a fellow prisoner² and forcing them to imitate animals.³

2. The Majority correctly concluded that Rasim Delić, Commander of the Main Staff of the Army of the Republic of Bosnia and Herzegovina (“ARBiH”),⁴ was responsible under Article 7(3) for this cruel treatment. Delić was the highest level military commander in the hierarchy having command and control over the EMD. Despite having alarming information in his possession alerting him to the risk of the cruel treatment, he failed to act.

3. Delić had personally authorized the EMD’s creation and subordination to the ARBiH, thereby paving the way for EMD members to lawfully participate in the hostilities.⁵ When the crimes were committed in July and August 1995, the EMD had been *de jure* subordinated to the ARBiH for almost two years. During this time, the ARBiH’s control over the unit had solidified. The EMD regularly complied with the orders issued by Delić and other ARBiH commanders, to the point where they were entrusted with leading roles in crucial combat operations in July and September 1995.⁶ Delić promoted and gave awards to EMD members and ultimately disbanded the unit.⁷

4. Overall, the evidence shows that Delić treated the EMD as a unit under his effective control and that the EMD behaved as a unit under his effective control. In appealing the Majority’s findings, Delić essentially argues that a commander who

¹ Judgement, paras.252, 257-258, 267, 273.

² Judgement, para.261.

³ Judgement, para.269.

⁴ Throughout this brief, the term “ARBiH” is used, rather than “ABiH” as “ARBiH” was the term agreed upon by the parties as correct during the trial.

⁵ *Below*, para.24.

⁶ *Below*, para.23.

⁷ *Below*, paras.21.

occupies a position of superiority in a hierarchal structure that clearly bestows concrete powers of control, both *de jure* and in practice, can escape liability because the subordinates in question have problematic behavioural traits.⁸

5. The EMD's propensity for violence and lawlessness is one of the cornerstones for Delić's conviction. Delić knew that EMD members had a history of violent criminal behaviour. During 1994 and 1995 he received a steady stream of information – sent for his special benefit – alerting him to EMD members' ever increasing criminality. Just one day after the capture of the VRS prisoners in July 1995, he was notified that the EMD had taken the prisoners and was refusing to allow access.⁹ The urgency of this situation required that Delić take immediate steps to control the risk of crimes. He failed to act and the cruel treatment continued unabated for one month. No member of the EMD was ever held accountable.

6. Delić's failure to act stands in sharp contrast to his willingness to crack down on EMD misconduct when it was in the ARBiH's interests to do so.¹⁰ Why did Delić fail to control his EMD subordinates and address their IHL violations? The answer is military expediency. The ARBiH frankly admitted on another occasion that it did not take "energetic measures" against EMD misconduct so as to maintain good relations and ensure the EMD's successful participation in combat operations.¹¹

7. Delić now comes before the Appeals Chamber and asks to be excused for the breach of his command duties that left the VRS prisoners at the mercy of their EMD captors. He repeats arguments from trial without specifying any error in the Judgement and asserts his own interpretation of the evidence.¹² Elsewhere, he relies on a selective representation of the evidence, taking facts and conclusions out of context and often omitting to refer to relevant findings of the Chamber.¹³ Further, contrary to Delić's suggestion, Judge Moloto dissented only with respect to Delić's effective control over the EMD.¹⁴ The Chamber was unanimous in finding that Delić

⁸ Below, paras.37-40.

⁹ Below, paras.121.

¹⁰ Below, paras.21, 199.

¹¹ Below, para.39, 243.

¹² Contrast *Krnjelac* AJ, para.25.

¹³ Practice Direction on Appeals Requirements, para.4.

¹⁴ In accordance with this, only those findings contained within paragraphs 459-471 of the Judgement are referred to herein as those of the Majority.

had notice of the EMD's crimes and that he failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrators.¹⁵

8. The Chamber carefully sifted through all the evidence from the 11-month trial, including nearly 80 witnesses and almost 1400 exhibits.¹⁶ The Majority was satisfied of his guilt and, for the reasons given throughout this brief,¹⁷ Delić establishes no error in its reasoning.

II. SUMMARY DISMISSAL FOR FAILURE TO MEET APPEALS REQUIREMENTS

9. The deficiencies in Delić's Brief meriting summary dismissal are set forth below. While the Prosecution has responded to some of these arguments in the remainder of the brief, such responses should not be construed as a waiver of the Prosecution's contention that these arguments should be summarily dismissed.

A. Challenges to factual findings on which a conviction does not rely¹⁸

10. Delić's arguments warranting summary dismissal under this category are:

- Alleging error in relation to a "see also" reference in footnote 951 of the Judgement;¹⁹
- Relying on events concerning Ali Hamad, who did not serve in the EMD;²⁰
- Challenging Exhibit 411, which the Majority did not cite in support of its finding that Delić co-ordinated and commanded Operation *Farz*;²¹

¹⁵ Dissenting Opinion, para.33.

¹⁶ Judgement, para.22, Annex B, paras.14-17.

¹⁷ To the extent required, the Prosecution seeks leave to deviate from para.5 of the Practice Direction on Appeals Requirements. This permits dealing with cross-cutting arguments more efficiently and enables the Prosecution to present the order of argument in the most logical manner.

¹⁸ *Martić* AJ, paras.16-17; *Brdanin* AJ, para.22.

¹⁹ Delić Brief, para.22.

²⁰ Delić Brief, paras.105-106. *See* Hamad, T.158 (open session).

²¹ *Compare* Delić Brief, para.126 *with* Judgement, para.468, fn.1195. *See also* Judgement, para.397, fn.1019.

- Referring to problems identifying foreign fighters entering the RBiH;²²
- Arguing that measures taken against the so-called Guerrilla Group were not implemented;²³ and
- Attacking the Majority's rationale as to why the EMD reported orally rather than in writing.²⁴

B. Arguments that fail to identify the challenged factual findings, that misstate the factual findings or the evidence or that ignore other relevant factual findings²⁵

11. Delić's arguments warranting summary dismissal under this category are:

- Challenging the Majority's finding that the ARBiH 3rd Corps transferred local Bosnian soldiers to the EMD²⁶ but ignoring other relevant findings in the Judgement;²⁷
- Challenging the Chamber's finding that the EMD was an assault unit spearheading ARBiH attacks but ignoring the evidence upon which the Chamber relied;²⁸
- Arguing about the role of the Presidency without specifying the Chamber's findings he seeks to impugn or how the Chamber misapplied its conclusion relating to the formation of the EMD;²⁹
- Arguing that the Chamber ignored evidence that "passports, *et cetera*" were *not* provided by the EMD³⁰ when the Chamber did not mention passports in the relevant finding;³¹

²² See Delić Brief, paras.319-320.

²³ Delić Brief, paras.358-360.

²⁴ Delić Brief, paras.72-73, referring to Judgement, paras.424, 463.

²⁵ *Martic* AJ, para.18; *Brdanin* AJ, para.23; Practice Direction on Appeals Requirements, para.4(b)(ii).

²⁶ Delić Brief, para.56, referring to Judgement, para.467.

²⁷ Judgement, paras.184, fn.476, paras.185, 412-414.

²⁸ Delić Brief, para.115; Judgement, para.238, fns.617-618, para.380, fn.964, para.394, fn.1005.

²⁹ Delić Brief, para.162.

- Challenging the Chamber's finding on information sharing between the ARBiH and EMD³² without challenging evidence on which it is based³³ and citing other evidence that actually supports the finding;³⁴
- Arguing that the Majority erred in concluding that his command and control over the ARBiH improved over time but ignoring the Chamber's findings supporting this conclusion³⁵ and misstating the evidence;³⁶ and
- Objecting to the authenticity of Exhibit 823, without specifying why and ignoring the Chamber's rejection of the contrary evidence that he cites.³⁷

12. Delić fails to substantiate his assertion that a number of other pieces of evidence were either misinterpreted or ignored.³⁸ Most of the evidence he cites was expressly referred to in the Judgement and, in any event, the Chamber is presumed to have considered all relevant evidence unless it is clearly shown that it did not.³⁹

C. Mere assertions that the Chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner⁴⁰

13. Delić frequently cites findings on effective control and simply argues that the Majority should have interpreted the evidence more favourably to him.⁴¹ For example, he selectively refers to parts of the Judgement on mutual assistance and joint training

³⁰ Delić Brief, para.23.

³¹ Judgement, para.373.

³² See Delić Brief, paras.18-23.

³³ See Judgement, para.373, fn.952 referring to Hubo, T.7720-7721 (open session), [REDACTED].

³⁴ Exh.78 (not confidential); PW-9, T.5676-5677 (open session).

³⁵ Delić Brief, para.183. See e.g. Judgement, paras.133-137.

³⁶ Below paras.104-109.

³⁷ Exh.823 (not confidential). Compare Delić Brief, para.156, fn.250 with Judgement, para.422, fn.1089.

³⁸ Delić Brief, para.37, fn.50.

³⁹ *Brdanin* AJ, para.11; *Kvočka* AJ, para.23. See Judgement, para.22.

⁴⁰ *Martić* AJ, para.19; *Strugar* AJ, para.21; *Brdanin* AJ, para.24.

⁴¹ Delić Brief, paras.15-17, 24-26, 29-30, 35, 38, 39-44, 50, 53-54, 56-60, 63-66, 67-68, 70, 72-76, 83, 85-86, 91-93, 95-96, 99-100, 102-103, 107-108, 110, 118, 145-147, 151, 153, 158.

between the ARBiH and the EMD and asserts that the Majority should have interpreted this evidence in his favour.⁴²

D. Arguments that are contrary to common sense, clearly irrelevant or that lend support to the challenged finding⁴³

14. Delić's arguments warranting summary dismissal under this category are:

- Calling two findings "incompatible" without explaining any inconsistency;⁴⁴
- Referring to the fact that the civilian police filed a criminal report,⁴⁵ but failing to acknowledge that the Chamber took that evidence into account;⁴⁶
- Challenging the authenticity of Exhibit 271 but admitting that other evidence in the record supports its authenticity;⁴⁷ and
- Taking issue with three exhibits referred to in the Judgement but not articulating any error committed by the Chamber.⁴⁸

E. Trial submissions repeated with no showing of error⁴⁹

15. Large parts of Delić's Brief restate his trial submissions without sufficiently explaining why the Chamber erred in rejecting them. The first column of Appendix A refers to relevant paragraphs in Delić's Brief where he repeats trial submissions without showing any error. The second column indicates corresponding paragraphs of Delić's Closing Brief which are identically reproduced or closely followed in his appeal brief. The fourth column indicates the paragraphs of the Judgement dealing with these submissions.

⁴² Delić Brief, paras.63-66; *see also* Judgement, paras.416-422.

⁴³ *Brdanin* AJ, paras.26, 30.

⁴⁴ Delić Brief, para.158.

⁴⁵ *See* Delić Brief, para.355; Delić Closing Brief, para.486, fn.994.

⁴⁶ *See* Judgement, para.495.

⁴⁷ Delić Brief, para.143, referring to Exh.272 (not confidential).

⁴⁸ Delić Brief, para.62, citing Judgement, para.414.

⁴⁹ *Kupreškić* AJ, para.26. *See also* *Halilović* AJ, para.12; *Galić* AJ, paras.10, 303; *Blagojević* AJ, para.10; *Brdanin* AJ, para.16; *Simić* AJ, para.12; *Gacumbitsi* AJ, para.9.

F. Arguments falling outside Delić's Notice of Appeal⁵⁰

16. The Appeals Chamber should not consider argument with respect to paragraph 514 of the Judgement⁵¹ as it is outside Delić's Notice of Appeal.⁵²

III. GROUND 1: THE MAJORITY CORRECTLY FOUND THAT DELIĆ HAD EFFECTIVE CONTROL OVER THE EMD

A. Overview of the Majority's reasoning concerning Delić's effective control over the EMD

17. The Majority found that Delić was in a superior-subordinate relationship with the EMD by at least July and August 1995, when the EMD cruelly treated the VRS prisoners in Livade and in the Kamenica Camp.

18. A superior-subordinate relationship exists when an accused exercises, through his or her senior position in a formal or informal hierarchy, effective control over the perpetrator, in the sense of a material ability to prevent crimes or punish the perpetrators.⁵³ Effective control is an evidentiary rather than a legal matter.⁵⁴ The Chamber examined a series of indicators to determine whether or not effective control had been established, including:

- The *de jure* subordination of the EMD to the ARBiH;
- Delić's role in personally creating and disbanding the unit;
- The EMD's regular and repeated compliance with ARBiH orders regarding combat and other subjects; and
- The ARBiH's ability to investigate and punish EMD members.

19. The Majority's conclusions concerning these indicators were supported by substantial evidence in the record. The Majority's careful review of the trial record revealed the following as of July and August 1995.

⁵⁰ See *Akayesu* AJ, para.228; *Galić* AJ, para.78; *Simba* AJ, para.338.

⁵¹ Delić Brief, fn.399, para.296.

⁵² Delić's Notice of Appeal, para.39.

20. First, Delić was the Commander of the ARBiH Main Staff and, as such, he was the most senior officer in the ARBiH.⁵⁵ All of the ARBiH soldiers, including every member of the EMD, were thus subordinated to him and his command. As Tribunal case law makes clear, such *de jure* authority is “*prima facie* a reasonable basis for assuming that an accused has effective control over his subordinates.”⁵⁶

21. Next, Delić in fact exercised his *de jure* authority, by repeatedly issuing orders relating to the EMD that were implemented. Displaying the ultimate form of authority, Delić authorized the creation and disbandment of the unit.⁵⁷ He subordinated and re-subordinated the EMD to the 3rd Corps Command on multiple occasions.⁵⁸ Recognizing both the need to oversee the EMD and his authority to do so, Delić authorized Operation *Vranduk*, a counter-intelligence operation aimed at documenting and curbing “subversive and other counter-constitutional and illegal activities” by EMD members.⁵⁹ Delić issued other documents affecting EMD members, including awards, promotions and a travel authorization,⁶⁰ further demonstrating his authority over the unit. Of note, all of these orders by Delić regarding the EMD or its members were implemented.

22. Not only did the EMD comply with Delić’s orders, but EMD members also regularly complied with orders issued by other ARBiH commanders. The ARBiH repeatedly issued combat orders that the EMD followed.⁶¹ The EMD also complied with other types of orders, including redeployment,⁶² re-subordination,⁶³ movement,⁶⁴ and planning.⁶⁵ EMD compliance with ARBiH orders was not perfect,⁶⁶ but the

⁵³ Halilović AJ, para.59.

⁵⁴ Strugar AJ, para.254.

⁵⁵ Judgement, paras.96, 99-101.

⁵⁶ Hadžihasanović AJ, paras.21, 189. *See also* Orić AJ, para.91; Čelebići AJ, para.197.

⁵⁷ Judgement, paras.177, 197. Officially, the order to disband the EMD came from the 3rd Corps, but this order was executed in response to an order by Delić, only two days earlier, that the 3rd Corps should dissolve the unit. Judgement, para.197.

⁵⁸ Judgement, paras.119, fn.299 (citing Exhs.165 (not confidential) and 378 (not confidential), in which Delić subordinated the EMD to the 3rd Corps on 12 January 1995, *see* p.3), 177, 461.

⁵⁹ Judgement, para.526 (internal quotation marks omitted). *See also* paras.450, 522.

⁶⁰ Judgement, paras.422, 455.

⁶¹ Judgement, paras.388, 394, 396, 398, 402.

⁶² Judgement, paras.389, 392.

⁶³ Judgement, paras.363, 392.

⁶⁴ Judgement, paras.398, 399.

⁶⁵ Judgement, para.433.

⁶⁶ Judgment, para.461, fn.1183.

relevant standard is effective control – not absolute compliance.⁶⁷ The EMD's repeated and regular compliance with ARBiH orders, especially during combat, demonstrated such control. A superior's ability to issue orders that are followed is a critical indicator of effective control.⁶⁸

23. The significant number of orders issued by ARBiH commanders to the EMD further demonstrates the reasonableness of the Majority's finding that Delić effectively controlled the EMD as of July 1995. As highlighted by the Majority, ARBiH commanders issued at least two dozen orders to the EMD during 1994 and 1995, with most of these dating from July and August 1995 or a few months before or after.⁶⁹ Many of these orders involved combat operations that were of the highest priority to the ARBiH and in which the EMD was entrusted with a leading or critical role.⁷⁰ During these same critical combat operations, the ARBiH also temporarily re-subordinated ARBiH soldiers and entire units to the EMD,⁷¹ and even permanently transferred soldiers to the EMD.⁷²

24. It would have been illogical for ARBiH commanders to engage in such transfers and re-subordinations, or to issue so many orders, if there was no expectation that the EMD would submit to the army's command and control.⁷³ Instead, such a continuous stream reveals that the ARBiH expected that its orders to the EMD would be followed, as indeed they were. Further, the ARBiH's continued use of the EMD in combat operations reflects the ARBiH's understanding that the EMD was under its effective control. Under IHL, a party to the conflict cannot legally

⁶⁷ *Strugar* AJ, paras.257-258. *See below*, paras.37-40.

⁶⁸ *Hadžihasanović* AJ, para.199; *Halilović* AJ, para.207; *Blaškić* AJ, para.69; *Hadžihasanović* TJ, para.83; *Brđanin* TJ, para.281; *Kordić* TJ, para.421.

⁶⁹ Judgement, para.461, fn.1183. Orders issued after August 1995 are still relevant for purposes of determining Delić's effective control over the unit as of July and August 1995. *See Strugar* TJ, para.406 (examining an order issued a month and a half after the crime in question).

⁷⁰ In January 1995, the ARBiH Supreme Command set the capture of the Vozuća pocket in central Bosnia as one of the two primary objectives for the coming year. Judgement, para.86. Throughout the remainder of 1995, the EMD participated in combat, at the direction of ARBiH commanders, aimed at capturing this pocket in which the EMD either spearheaded attacks or played other critical roles. Judgement, paras.238, 285, 380, 391-402.

⁷¹ Judgement, paras.400, 416.

⁷² Judgement, paras.185, 413-414, 467.

⁷³ *See* Judgement, para.467.

engage forces in the hostilities unless those forces are under its responsible command.⁷⁴

25. ARBiH commanders also had the obligation to ensure that EMD members complied with the RBiH criminal and military codes and, when they did not, the ARBiH took steps to punish such conduct. EMD members were arrested for the crime of murder by a joint military-civilian force⁷⁵ and were investigated by the ARBiH for other crimes such as torture, theft, vandalism and threats.⁷⁶

26. Finally, from June 1993, Delić laboured to improve the ARBiH system of command and control and to remove obstacles to its functioning. The ability of Delić and other ARBiH commanders to effectuate orders and discipline with respect to EMD members by July 1995 represented the culmination of Delić's efforts in that regard.⁷⁷

27. In sum, there was substantial evidence to support the Majority's well-reasoned determination that Delić exercised effective control over the EMD as of July 1995.

B. Delić's challenges regarding effective control lack merit

28. Because effective control is an evidentiary issue and not a legal matter,⁷⁸ Delić is obligated to demonstrate that the Majority's conclusion concerning his effective control over the EMD is one that no reasonable finder of fact could have reached.⁷⁹ Delić has failed to do so.

⁷⁴ *E.g.*, Gasser, p.53 ("Only when a state assumes responsibility for their behaviour may such a group (militia, volunteer corps) and its members take part in hostilities."), p.54 ("Those not belonging to the armed forces of one of the parties engaged in conflict are not entitled to take part in military operations. If they nevertheless use force they are acting illegally.") *See also* API, Article 43(1); Hague Regulations, Article 1. *See further*, Judgement, para.174 (noting that one of the reasons why the Mujahedin asked to be subordinated to the ARBiH was so that they could lawfully participate in the fighting).

⁷⁵ Judgement, paras.448, 495.

⁷⁶ Judgement, paras.450-452, 507.

⁷⁷ Judgement, paras.133-137, 460.

⁷⁸ *Strugar* AJ, para.254.

⁷⁹ *Martić* AJ, para.11.

1. General Responses to Delić's arguments

(a) The indicators of effective control are much stronger in this case than in *Hadžihasanović*

29. Contrary to Delić's suggestion,⁸⁰ the present case is far removed from the *Hadžihasanović* case, in which the Appeals Chamber overturned the Trial Chamber's finding that Enver Hadžihasanović (Commander of the ARBiH 3rd Corps) had effective control over the EMD in October 1993.

30. There is a gap of almost two years between the crimes in the two cases (October 1993 vs. July and August 1995). Consistent with the *Hadžihasanović* Appeal Judgement, the Chamber in this case found that command and control over the EMD's predecessors in 1993 was lacking. However, the Majority was satisfied that the ARBiH established control over the unit by at least July 1995.⁸¹

31. Many of the effective control indicators that evinced a lack of control in the *Hadžihasanović* case demonstrate the opposite when applied to this case. For example, in *Hadžihasanović*, during the relevant time period, the ARBiH issued only two orders to the EMD and only one was followed.⁸² Significantly, the order that was disobeyed came from Hadžihasanović himself.⁸³ By contrast, in this case ARBiH commanders issued at least two dozen orders to the EMD during 1994 and 1995, many of which fell within or near July and August 1995.⁸⁴ The EMD largely complied with these orders and, in particular, abided by ARBiH orders relating to high-priority combat operations.⁸⁵ Delić also authorized a number of orders relating to the EMD (involving creation, subordination, monitoring, and disbandment) that were implemented.⁸⁶

32. Likewise, in *Hadžihasanović*, there was little communication and contact between the EMD and the ARBiH, and the ARBiH had no information as to the

⁸⁰ Delić Brief, paras.310, 392, fn.502.

⁸¹ Judgement, paras.341-351, 461.

⁸² *Hadžihasanović* AJ, paras.199-200. The EMD did comply with a third order issued by the ARBiH soon thereafter, but the Appeals Chamber found this order of limited value due to Hadžihasanović having left his position of authority a month prior. *Hadžihasanović* AJ, para.199.

⁸³ *Hadžihasanović* AJ, para.199.

⁸⁴ Judgement, para.461, fn.1183.

⁸⁵ *Above*, paras.23.

⁸⁶ *Above*, paras.21.

identity of the unit's members.⁸⁷ In contrast, contact between the EMD and the ARBiH in the present case was regular and frequent,⁸⁸ and information as to EMD members' identities was made available to the 3rd Corps.⁸⁹ Finally, in *Hadžihasanović*, there was no evidence of EMD members ever being investigated or prosecuted as a result of ARBiH measures.⁹⁰ In this case, the ARBiH took measures, including investigating and arresting numerous EMD members for various crimes, and even monitored the entire unit for subversive and illegal activities pursuant to Operation *Vranduk*.⁹¹

33. It is true that, in both cases, the EMD held prisoners at its camp contrary to the wishes of ARBiH commanders. However, the unit's noncompliance in the *Hadžihasanović* case is distinguishable. The EMD disobeyed a direct order from an ARBiH commander to release the prisoners;⁹² the same commander threatened twice to attack the EMD facility if the prisoners were not released, to no effect;⁹³ and the only measure available to the ARBiH to obtain the prisoners' release was to launch a "full-fledged armed attack" against the EMD.⁹⁴

34. In the present case, there was no failure by the EMD to comply with any express orders to release the prisoners in July and August 1995, nor were there any threats of violence directed against the unit. Instead, the EMD eventually turned over these prisoners to the military police as per the ARBiH's orders, albeit in an untimely manner.⁹⁵ Moreover, as discussed more fully below, Delić and ARBiH commanders had several options available to secure the prisoners' release. A "full-fledged armed attack" was not the only alternative.⁹⁶

⁸⁷ *Hadžihasanović* AJ, para.211.

⁸⁸ *Below*, paras.67-68.

⁸⁹ *Judgement*, para.373.

⁹⁰ *Hadžihasanović* AJ, paras.218-219.

⁹¹ *Judgement*, paras.448, 450-452, 507, 526.

⁹² *Hadžihasanović* AJ, para.224.

⁹³ *Hadžihasanović* AJ, para.224.

⁹⁴ *Hadžihasanović* AJ, para.229. *See also* para.227.

⁹⁵ *Judgement*, para.270.

⁹⁶ *Below*, paras.207-210.

(b) Judge Moloto's dissent does not provide a basis for reversal

35. Delić's heavy reliance on Judge Moloto's Dissenting Opinion is misplaced.⁹⁷ A dissenting opinion by a member of a Trial Chamber does not provide a sufficient basis for overturning a majority's factual findings. It merely demonstrates that reasonable minds disagree as to what the evidence revealed, which is not sufficient for reversal.⁹⁸ The fact of a dissent in this case is unremarkable.⁹⁹

36. As for the specifics of Judge Moloto's dissent, his particular objections are dealt with elsewhere, as Delić has incorporated virtually all of them. What is significant for present purposes is what is missing from his opinion. The dissent does not address or rebut the significant factual findings as to Delić's *de jure* authority over the EMD, and his regular exercise of this authority to issue orders regarding the EMD that were followed.¹⁰⁰ Nor does Judge Moloto acknowledge the well-established rule that effective control may exist despite the existence of some acts of noncompliance or indiscipline.¹⁰¹

2. Specific responses to Delić's arguments(a) Subground 1(A)(2)(i): Proof of effective control – not absolute compliance – is required

37. Delić suggests that the EMD's failure to comply with some ARBiH orders demonstrates the ARBiH's lack of control over the unit.¹⁰² However, acts of noncompliance or insubordination by one's subordinates do not preclude a finding of a superior-subordinate relationship.¹⁰³

38. This tenet is drawn directly from the *Strugar* case, in which the Appeals Chamber examined whether "evidence of prior instances of indiscipline and of non-

⁹⁷ Delić Brief, paras.8-10, 34, 40, 44, 72, 118, 206-207, 311, 316, 343, 351, 354, 381.

⁹⁸ *Tadić* AJ, para.64; *Strugar* AJ, Separate Opinion of Judge Shahabuddeen, para.28; *Galić* AJ, Separate and Partially Dissenting Opinion of Judge Meron, para.11.

⁹⁹ *Prlić* Interlocutory AD, para.27. *See also Galić* AJ, p.185 (disposition) (upholding *Galić*'s conviction and imposing a life sentence, notwithstanding *Galić* TJ, Separate and Partially Dissenting Opinion of Judge Nieto-Navia.)

¹⁰⁰ *Above*, paras.20-21.

¹⁰¹ *Strugar* AJ, paras.257-258.

¹⁰² Delić Brief, paras.14-33. *See also below* para.63-70 (addressing Delić's mischaracterisation of the EMD's scope and degree of noncompliance).

¹⁰³ *Strugar* AJ, paras.257-258.

compliance with orders”¹⁰⁴ undermined the Trial Chamber’s finding that Strugar (Commander of the JNA Second Operational Group) exercised effective control over his subordinates when they shelled the Old Town of Dubrovnik on 6 December 1991. Specifically, Strugar’s troops had failed to comply in October and November 1991 with repeated orders not to shell Dubrovnik or the Old Town.¹⁰⁵ They also engaged throughout October to December 1991 in various acts of arson, looting, unauthorised firing, drinking, and refusal to carry out orders.¹⁰⁶ The Appeals Chamber found that this evidence, rather than evincing a lack of effective control, revealed that Strugar chose not to act with respect to such noncompliance – Strugar was aware of his troops’ insubordination but did nothing in response.¹⁰⁷ “[W]here it was important to [Strugar], his orders were actually followed.”¹⁰⁸

39. The parallels with the present case are striking. Like Strugar’s subordinates, the EMD disobeyed some ARBiH orders¹⁰⁹ and displayed a lack of discipline through interference and harassment of other ARBiH soldiers.¹¹⁰ ARBiH commanders were aware of the EMD’s noncompliance and disciplinary problems, yet never took meaningful steps in response. Why? The answer is military expediency. The ARBiH needed the EMD as its elite unit to spearhead upcoming operations. As noted by the Chamber,¹¹¹ an ARBiH security report from 30 August 1995 stated:

no energetic measures have been taken [with respect to EMD incidents] so that the relations with this unit would not be spoiled and that *combat operations would be carried out as successfully as possible*.¹¹²

The timing of this admission is telling. It occurred just prior to the start of Operations *Farz* and *Uragan* in September 1995, in which the EMD played a critical role in fulfilling one of the ARBiH’s top military objectives – the capture of the Vozuća

¹⁰⁴ Strugar AJ, para.257.

¹⁰⁵ Strugar AJ, paras.257, 305.

¹⁰⁶ Strugar AJ, para.257.

¹⁰⁷ Strugar AJ, para.258.

¹⁰⁸ Strugar AJ, para.259.

¹⁰⁹ Judgement, para.461, fn.1183.

¹¹⁰ Judgement, paras.434-436.

¹¹¹ Judgement, para.449, fn.1159.

pocket.¹¹³ As discussed elsewhere, ARBiH commanders had every expectation prior to the start of these operations that the EMD would follow relevant orders, and it did.¹¹⁴

40. Thus, the present case is not about the ARBiH merely benefiting from the EMD in combat.¹¹⁵ This case is about Delić prioritising the EMD's compliance with combat and other orders over the unit's misconduct and his consequent failure to take appropriate measures to prevent crimes or to punish his EMD subordinates.¹¹⁶

(b) Subgrounds 1(A)(2)(ii), (ix): Neither the EMD's handling of prisoners nor financial support are the key effective control indicators

41. The *Strugar* case further invalidates Delić's argument that a key indicator of effective control is whether the subordinate obeys orders relating to the particular activity underlying the crimes, which in this case would be prisoner care and access.¹¹⁷ As already noted, in October and November 1991, Strugar's troops disobeyed prior instructions not to shell the Old Town of Dubrovnik.¹¹⁸ Under Delić's logic, Strugar would therefore have to be acquitted of responsibility for any subsequent shelling by his troops. Instead, Strugar was convicted under Article 7(3) for his troops' shelling of the Old Town on 6 December 1991, thereby demonstrating that any insubordination with respect to the activity in question does not preclude a finding of effective control.

42. Delić also ignores the Tribunal's other relevant precedents. Chambers have examined a wide range of effective control indicators to determine whether a superior

¹¹² Exh.583 (not confidential), p.20 (emphasis added). The report further stated that the EMD's "presence in the zone of responsibility [...] instils security and self-confidence into soldiers of the 328th [Brigade]."

¹¹³ Judgement, paras.86, 397-402.

¹¹⁴ *Above*, para.22-24. Thus, the assertion in Exh.583 (not confidential), p.20, that the EMD "has operated independently and has not respected the RiK /control and command/ system" must be viewed sceptically, especially when the same report acknowledges that the EMD "has completed all the assigned military tasks."

¹¹⁵ See *Hadžihasanović* AJ, para.213.

¹¹⁶ See *Hadžihasanović* AJ, para.259.

¹¹⁷ Delić Brief, paras.34, 52. See *below*, paras.65, 224-225 (dealing with Delić's factual inaccuracies with respect to the EMD's handling of prisoners).

¹¹⁸ *Strugar* AJ, paras.257, 305.

had a general ability to prevent or punish, without imposing the particularity requirement Delić formulates.¹¹⁹

43. Delić is also wrong to assert that financing alone is sufficient to demonstrate effective control.¹²⁰ Delić cites no cases in support of this proposition. The Tribunal has made clear that effective control is not based on any single indicator. “[W]hether a given form of authority possessed by a superior amounts to an indicator of effective control depends on the circumstances of the case.”¹²¹ Here, there is no evidence that those who supported the EMD financially exerted control over the unit, let alone used such control to undermine the ARBiH’s authority over the EMD. Moreover, the EMD received logistical support from the ARBiH as well,¹²² further undercutting Delić’s thesis.

(c) Subground 1(A)(2)(ix): Effective control is not negated by political, religious or financial connections with external parties

44. Delić misinterprets the significance of the EMD’s relationship with outside authorities who provided money and other support.¹²³ As the Chamber found, the EMD had contact with Alija Izetbegović, President of the RBiH Presidency, as well as with local civilian and religious authorities. The unit received support stemming from these contacts, including financing, logistics and personnel.¹²⁴ The EMD also communicated with foreign institutions, primarily “to promote its cause and attract financial support.”¹²⁵

45. Given that the relationship between the EMD and these authorities entailed primarily support and communication, at most these authorities exerted mere influence over the EMD,¹²⁶ which is insufficient to demonstrate control over the unit.¹²⁷ There is no evidence that they substantially interfered with Delić’s effective control over the unit when it came to military matters. The conflict Delić suggests is

¹¹⁹ *Hadžihasanović* AJ, paras.198-230; *Halilovic* AJ, paras.203-216; *Hadžihasanović* TJ, para.83; *Strugar* TJ, paras.392-413; *Kordić* TJ, paras.418-424.

¹²⁰ Delić Brief, para.99.

¹²¹ *Strugar* AJ, para.254.

¹²² Judgement, paras.418-419.

¹²³ Delić Brief, paras.82-108.

¹²⁴ Judgement, paras.439-441. Such contacts with local authorities, and resulting financial and logistical support, were not uncommon for ARBiH units. Judgement, paras.441-442.

¹²⁵ Judgement, para.464.

¹²⁶ *Čelebići* AJ, paras.253-254.

based on theory rather than fact. For example, Delić focuses on Sheik Enver Shaban who, as head of the Islamic Cultural Institute in Milan and a member of the EMD leadership, “could issue binding rulings (*fatwat*).”¹²⁸ However, there are no examples of Shaban issuing such rulings to the unit that conflicted with ARBiH authority. The only ruling issued by Shaban related to EMD members’ participation in post-war Bosnian elections,¹²⁹ which is irrelevant to the issue of effective control in this case.

46. In a similar vein, Delić fails to demonstrate that the EMD’s distinct internal structure, including a *shura* (the EMD’s religious council¹³⁰), ruptured the superior-subordinate relationship between the ARBiH and the EMD.¹³¹ The only instances in which the question of the *shura*’s authority vis-à-vis the ARBiH’s might have arisen was engaging in combat or disbanding the unit. However, there is no evidence of any actual conflict between the views of the *shura* and the ARBiH commanders, including Delić.¹³²

47. Not only were there no conflicts between outside authorities and the ARBiH, but some of these authorities worked in tandem with ARBiH commanders, including Delić, to achieve the army’s objectives with respect to the EMD. For example, while Izetbegović may have met directly with EMD representatives, he often did so in the presence of Delić or other ARBiH commanders.¹³³ He even provided support for the EMD’s disbandment.¹³⁴

48. The ARBiH also worked in concert with local authorities to address EMD misconduct.¹³⁵ Contrary to Delić’s suggestion,¹³⁶ this does not show a lack of effective control on the army’s part. In other cases, the ARBiH took steps independently to address EMD crimes or misconduct.¹³⁷ Its significance is rather that ARBiH commanders had multiple paths open to them when dealing with EMD

¹²⁷ Čelebići AJ, para.266; Kordić TJ, para.415.

¹²⁸ Judgement, para.190. See also Delić Brief, para.95.

¹²⁹ PW-9, T.5662-5663 (open session), cited in Judgement, para.190, fn.500.

¹³⁰ Judgement, para.189.

¹³¹ Delić Brief, paras.92-94.

¹³² Judgement, paras.189, 197-198, 385, 458.

¹³³ Judgement, paras.197, 401, 439, 457.

¹³⁴ Judgement, para.457.

¹³⁵ Judgement, paras.441, 526.

¹³⁶ Delić Brief, para.86.

¹³⁷ Judgement, paras.450-452, 507.

disciplinary problems, further demonstrating their material ability to punish members of the unit.

(d) Subground 1(A)(2)(ii): The Majority correctly found that the relationship between the EMD and the ARBiH was subordination and not co-operation

49. Delić is wrong to assert that the relationship between the ARBiH and the EMD as of July 1995 was mere co-operation.¹³⁸ Rather, the evidence strongly supported the Majority's finding that the EMD was subordinated to the ARBiH and well integrated into the army's command and control structure.

50. If the relationship between the ARBiH and the EMD in 1995 had been merely co-operative, one would not expect to find that the EMD had been formally subordinated to the ARBiH. Indeed, the EMD had become part of the ARBiH's military structure at the request of EMD members themselves.¹³⁹ One of the reasons behind the EMD's request for subordination was to ensure that the EMD could participate in combat lawfully as part of the armed forces of the ARBiH.¹⁴⁰ Similarly, if the relationship was one of mere co-operation, one would expect to see instances where the EMD participated in combat without any ARBiH orders. These were the very circumstances that led the Chamber to find there was no relationship of effective control – only co-operation – between the Mujahedin and the ARBiH in June 1993.¹⁴¹

51. By July 1995, there were a plethora of orders issued by ARBiH commanders to the EMD that were implemented¹⁴² and the EMD participated in combat only at the express command of the ARBiH.¹⁴³ The EMD had been formally incorporated into the ARBiH as a unit for almost two years,¹⁴⁴ during which time the unit had been successfully resubordinated to various ARBiH commands,¹⁴⁵ had received tactical and logistical support¹⁴⁶ and had provided or received military training pursuant to

¹³⁸ Delić Brief, paras.36, 45, 49.

¹³⁹ Judgement, para.174.

¹⁴⁰ Judgement, para.174.

¹⁴¹ Judgement, paras.343-351.

¹⁴² *Above*, paras.22-24.

¹⁴³ Judgement, paras.386, 465.

¹⁴⁴ Judgement, para.177.

¹⁴⁵ Judgement, paras.363, 387.

¹⁴⁶ Judgement, paras.417-418.

ARBiH orders.¹⁴⁷ The Majority's finding that the relationship between the ARBiH and the EMD was one of subordination was reasonable.

52. Delić challenges this conclusion by arguing that the dialectical approach used by ARBiH commanders with EMD personnel suggests co-operation.¹⁴⁸ In fact, the Chamber found that the dialectical approach was commonly used in the ARBiH. Once high-level commanders set strategic goals and objectives for combat, subordinate units would propose specific combat actions that were assessed and modified by their superior units through an interchange of views. Ultimately, the final decision was taken by the superior unit.¹⁴⁹ Delić's own military expert, Paul Cornish, spoke approvingly of this dialectical approach.¹⁵⁰ It was therefore not surprising that ARBiH commanders relied on this procedure with the EMD. Specifically, the EMD's superiors would set the priorities and the unit would determine the details of its actions.¹⁵¹

53. While the EMD did sometimes make its participation in combat dependent on certain requirements,¹⁵² this was consistent with the dialogue envisioned between a superior and subordinate in a dialectical military structure.¹⁵³ It was also in line with the EMD's position as an elite assault unit spearheading ARBiH attacks, thereby requiring a certain degree of autonomy.¹⁵⁴ This autonomy had strict limits, though: the EMD "never engaged independently in any combat action without express authorization from its superior ARBiH commanders."¹⁵⁵ Contrary to any suggestion by Delić,¹⁵⁶ the two witnesses that the Chamber cited in support of this finding¹⁵⁷ both testified to this effect.¹⁵⁸

54. Even the EMD's rare refusals to fight were within the dialectical framework. The EMD would provide to its ARBiH superiors reasoned explanations for its failure to participate in combat, usually that the unit or battlefield conditions were not

¹⁴⁷ Judgement, para.421.

¹⁴⁸ Delić Brief, paras.35-36.

¹⁴⁹ Judgement, para.377.

¹⁵⁰ Judgement, para.379.

¹⁵¹ Judgement, para.382.

¹⁵² Judgement, para.383.

¹⁵³ Judgement, para.465.

¹⁵⁴ Judgement, paras.238, 380, 382, 394, 465.

¹⁵⁵ Judgement, para.465. *See also* para.386.

¹⁵⁶ Delić Brief, paras.46-47.

¹⁵⁷ Judgement, para.386, fn.980.

ready.¹⁵⁹ Thus, rather than being the arbitrary whims of a tight-lipped unit, these refusals were the product of careful consideration, which the EMD shared with ARBiH commanders. The fact that these combat operations occurred later indicates that the commanders recognised the validity of the EMD's objections.¹⁶⁰ Moreover, these refusals, scarce as they were, ended at the latest by March 1995, such that the EMD complied with combat orders throughout spring and summer 1995,¹⁶¹ encompassing the relevant time period for effective control.

55. Delić's reliance on certain resubordination orders to challenge the Majority's findings on subordination is similarly without merit. Delić is wrong when he claims that resubordination of ARBiH units to the EMD during Operations *Proljece II* and *Farz* was for the sole purpose of evacuating wounded soldiers.¹⁶² Instead, as the Chamber found, these units were resubordinated for offensive combat purposes as well.¹⁶³ Moreover, contrary to Delić's assertion,¹⁶⁴ the Majority did take into account the fact that some resubordination orders involving the EMD were not implemented. The Chamber found that these instances were outweighed by other instances when the EMD had been successfully resubordinated and had participated in combat on that basis.¹⁶⁵ Delić's assertions that "orders re-subordinating ARBiH units to the EMD were never carried out in practice,"¹⁶⁶ or that "none of the orders on re-subordination were followed by the EMD"¹⁶⁷ are incorrect.

¹⁵⁸ Awad, T.190-191, 252 (open session); PW-9 [REDACTED], T.8743-8744.

¹⁵⁹ Judgement, paras.388-390.

¹⁶⁰ Judgement, para.462.

¹⁶¹ Judgement, para.462; Dissenting Opinion, para.5.

¹⁶² Delić Brief, para.48.

¹⁶³ Judgement, para.416.

¹⁶⁴ Delić Brief, paras.24-26.

¹⁶⁵ Judgement, para.363.

¹⁶⁶ Delić Brief, para.48.

¹⁶⁷ Delić Brief, para.24, fn.20 (emphasis in original).

(e) Subgrounds 1(A)(2)(xi), 1(A)(3)(d): The Majority correctly found that Delić issued orders regarding the EMD that were followed

56. Delić erroneously suggests that he lacked the ability to issue binding orders regarding the EMD.¹⁶⁸ On multiple occasions, Delić personally signed orders relating to the EMD that were implemented successfully.¹⁶⁹

57. Delić further suggests that, as Commander of the Main Staff and the senior-most military leader in the ARBiH – a force of at least 180,000¹⁷⁰ – he was similarly situated to Zejnil Delalić, who was not a member of the military and who served in 1992 as co-ordinator between the Konjic War Presidency and the local defence forces, which totalled at most 4,500.¹⁷¹ The comparison is inapposite. Moreover, the *Čelebići* Trial Chamber specifically found that Delalić's role was so limited that his signature on an order did not confer upon it any validity.¹⁷² In contrast, the Chamber, rejecting precisely the same argument,¹⁷³ found that when, for example, Delić issued the order to create the EMD, he did so within his capacity and competence as Commander of the ARBiH Main Staff.¹⁷⁴ Given the other instances unconnected with the EMD in which Delić exercised his authority,¹⁷⁵ the Chamber's conclusion as to Delić's capacity was a reasonable one.

58. Second, Delić challenges the Majority's reliance on his orders creating and disbanding the EMD and granting awards to EMD members, by arguing that he did so only at the direction of his superior, Izetbegović and the RBiH Presidency.¹⁷⁶ The simple answer is that, given his aforementioned capacity and competence, Delić "incur[red] responsibility for *all* actions taken in his official capacity, even if they were politically influenced by the RBiH Presidency, of which he was himself a member."¹⁷⁷ Delić's submission ignores the fact that he was a member of the

¹⁶⁸ Delić Brief, paras.131-133.

¹⁶⁹ *Above*, para.21.

¹⁷⁰ Judgement, paras.115, 118; Karavelić, T.7959 (open session) (noting the ARBiH 1st Corps consisted of at least 70,000 soldiers).

¹⁷¹ *Čelebići* TJ, paras.136, 659-665.

¹⁷² *Čelebići* TJ, paras.672-673.

¹⁷³ Judgement, para.360.

¹⁷⁴ Judgement, para.361.

¹⁷⁵ Judgement, paras.87, fn.202, 105, 130, fn.328, 136-137, 150, 397.

¹⁷⁶ Delić Brief, paras.137-138, 145, 149, 151.

¹⁷⁷ Judgement, para.361 (emphasis added).

Presidency. He also ignores the fact that, while the Presidency exercised overall authority over the military,¹⁷⁸ in practice “command and control of the army remained the responsibility of the [ARBiH] senior officers[, with] the Presidency retain[ing] overall responsibility for organisational issues and the management of human resources.”¹⁷⁹ Regarding the latter category, the evidence suggests that the Presidency followed the lead of Delić, its only military representative. In 1994, when the Presidency promoted various ARBiH soldiers (including some EMD members) on the basis of Delić’s recommendation,¹⁸⁰ it accepted Delić’s lengthy proposed list of promotions in its entirety, without any additions or subtractions,¹⁸¹ thereby displaying its deference to Delić’s judgement.

59. Third, Delić asks the Appeals Chamber to ignore the fact that the EMD was created and disbanded only after Delić personally signed orders to that effect.¹⁸² Delić fails to undermine the Chamber’s well-supported findings that he repeatedly involved himself in the formation and disbandment of the EMD in other ways, including:

- Agreeing at a meeting of the ARBiH Main Staff to the possible formation of an ARBiH unit comprising foreign fighters in central Bosnia;¹⁸³
- Authorizing in writing negotiations with the “Mujahedin unit from Zenica” as to inclusion of the unit within the ARBiH;¹⁸⁴
- Meeting with EMD representatives to discuss dissolution of the unit;¹⁸⁵ and
- Attending a farewell function for the EMD hosted by the ARBiH.¹⁸⁶

¹⁷⁸ Judgement, para.92.

¹⁷⁹ Judgement, para.94.

¹⁸⁰ Judgement, para.455.

¹⁸¹ *Compare* Exh.570 (not confidential) *with* Exh.571 (not confidential).

¹⁸² Delić Brief, para.152.

¹⁸³ Judgement, para.173.

¹⁸⁴ Judgement, para.175.

¹⁸⁵ Judgement, para.197.

¹⁸⁶ Judgement, para.199.

60. Delić complains about the lack of contacts, physical or otherwise, between himself and the EMD apart from these extensive connections.¹⁸⁷ Such further contacts are unnecessary because control over one's subordinates may be exercised through intermediaries rather than directly.¹⁸⁸ Nor is it required for purposes of effective control that a commander be present in the area in which the crimes are committed.¹⁸⁹

61. Finally, Delić asserts that the RBiH Presidency promoted EMD members¹⁹⁰ but omits the fact that he was a member of the RBiH Presidency during the relevant time period.¹⁹¹ Similarly, his argument that he did not see or sign the proposal for promoting various ARBiH soldiers, including some EMD members,¹⁹² ignores that this document was issued on his behalf and thus he incurs responsibility for this action.¹⁹³

(f) Subground 1(A)(2)(x): The Majority correctly analysed the ARBiH's ability to investigate and punish EMD members

62. The Prosecution has addressed this argument below at paragraphs 204, 234-248.

(g) Delić mischaracterises the degree and scope of EMD noncompliance

63. As explained below, Delić repeatedly mischaracterizes or misidentifies various actions by the EMD as demonstrating the unit's noncompliance with ARBiH orders. Viewed in its totality, the evidence shows that any instances of imperfect EMD compliance are outweighed by other evidence demonstrating the ARBiH's effective control over the EMD.

¹⁸⁷ Delić Brief, para.159.

¹⁸⁸ *Below* para.90.

¹⁸⁹ *Brima* TJ, para.1684.

¹⁹⁰ Delić Brief, para.110.

¹⁹¹ Judgement, para.94.

¹⁹² Delić Brief, para.111.

¹⁹³ Judgement, para.361. Other documents were also issued on his behalf. Judgement, paras.280, 455.

(i) Subground 1(A)(2)(iii)-(iv): The EMD handed over prisoners and did allow some access to its camp

64. The Majority correctly concluded that Delić had effective control despite the EMD's noncompliance with the procedures for hand-over of prisoners.¹⁹⁴ Delić merely suggests a different conclusion on the evidence to that of the Majority without addressing its reasoning, let alone showing any error.

65. As Delić acknowledges,¹⁹⁵ the Majority considered the evidence concerning the EMD's non-compliance with the ARBiH orders to hand over the VRS prisoners,¹⁹⁶ including evidence that the EMD did not follow the 35th Division order for the transfer of POWs captured during Operation *Farz*.¹⁹⁷ Delić's argument that this evidence necessarily negated effective control¹⁹⁸ was rejected by the Majority when it dismissed the evidence that nothing could be done to oppose the behaviour of the EMD.¹⁹⁹ Rather, despite Delić's material ability to do so, nothing was done or even attempted to assume control over the prisoners.²⁰⁰ Delić further ignores the fact that the EMD turned over some prisoners promptly²⁰¹ and eventually turned over others although only after some delay and after subjecting them to cruel treatment.²⁰²

66. The Prosecution has addressed Delić's argument regarding access to prisoners and the EMD camp below at paragraphs 221-228.

(ii) Subground 1(A)(2)(vii): The EMD's oral reporting compensated for its lack of written reports

67. Delić overstates the case concerning the EMD's non-compliance with reporting requirements.²⁰³ There is little dispute that the EMD did not submit written reports as required.²⁰⁴ However, the EMD frequently submitted oral reports to its ARBiH superiors to keep them up to date, thereby compensating for the absence of

¹⁹⁴ Judgement, paras.468-470.

¹⁹⁵ Delić Brief, para.50.

¹⁹⁶ Judgement, paras.468, 403-405, 238-250, 255-256, 264, 283-284.

¹⁹⁷ Judgement, paras.404, 285-287. *See* Delić Brief, para.52.

¹⁹⁸ Delić Brief, para.50.

¹⁹⁹ Judgement, para.468.

²⁰⁰ Judgement, paras.468-470.

²⁰¹ Judgement, para.403.

²⁰² Judgement, paras.270, 312, 318, 403, 405, 468, fn.1197.

²⁰³ Delić Brief, paras.67-78.

written reports.²⁰⁵ In 1994 and 1995, EMD and ARBiH senior officers participated in several meetings in preparation for or in the aftermath of combat operations.²⁰⁶ During operations, the EMD provided frequent updates orally as to the progress of combat activities.²⁰⁷ Delić is therefore wrong to suggest that the EMD “never submitted reports to ARBiH units,”²⁰⁸ did not engage in oral reporting, and communicated orally with ARBiH units only on rare occasions.²⁰⁹

68. Delić is correct²¹⁰ that, during the time the EMD was subordinated to the 35th Division, it bypassed the 35th Division for reporting purposes and reported directly to the 3rd Corps.²¹¹ Delić ignores, though, that the EMD’s reporting to the 3rd Corps Command was isolated, was consistent with the Command’s direct orders to the unit, and did not prevent the unit from communicating with the 35th Division at the same time. Specifically, reporting from the EMD to the 3rd Corps occurred on only one day, 10 September 1995, during Operation *Farz*. On that same day, the Commander of the 35th Division, Fadil Hasanagić, met with EMD commanders at the 35th Division’s IKM.²¹² Moreover, “in the fall of 1995, at the time when the EMD was still formally subordinated to the 35th Division, the Detachment received some orders directly from the 3rd Corps Command.”²¹³ The Commander of the 35th Division also met with EMD representatives several other times during this same period.²¹⁴

²⁰⁴ Judgement, paras.423-426. The EMD was not alone in doing so; other units within the 35th Division also failed to comply with reporting requirements. Judgement, para.148.

²⁰⁵ Judgement, paras.399, fn.1023, 427-430, 463. Oral communication was not unheard of during the war in Bosnia. For example, the *Galić* Trial Chamber found that within the Sarajevo Romanija Corps (“SRK”), “orders were usually given in an oral form, the communication system of the SRK being good.” *Galić* TJ, para.660.

²⁰⁶ Judgement, paras.427-430.

²⁰⁷ Judgement, paras.399, fn.1023, 430. On 10 September 1995, the EMD reported four times to the 3rd Corps Command in the space of two hours. Exh.394 (not confidential), pp.4-6 (items 21, 25, 29, 35), cited in Judgement, para.430, fn.1114.

²⁰⁸ Delić Brief, para.102 (emphasis in original).

²⁰⁹ Delić Brief, para.77.

²¹⁰ Delić Brief, para.74.

²¹¹ Judgement, para.430.

²¹² Judgement, para.430. Hasanagić also had a brief encounter with members of the EMD on the afternoon of that same day, but did not speak with them. Hasanagić, T.3046-3049 (open session), cited in Judgement, para.430, fn.1112.

²¹³ Judgement, para.431.

²¹⁴ Judgement, paras.429-430.

(iii) Subground 1(A)(2)(i): Information as to EMD members' identities was available

69. Delić incorrectly asserts that the EMD kept information secret about its foreign fighters.²¹⁵ As the Chamber found, while the EMD did not provide all requested information on its members to the 3rd Corps, it did provide pertinent information, including dates of birth and nationalities.²¹⁶ Moreover, the 3rd Corps did compile information on a number of EMD members including their full names,²¹⁷ suggesting that information sharing between the EMD and the 3rd Corps did eventually occur.

(iv) Subground 1(A)(2)(v): The ARBiH supported transfers of soldiers to the EMD

70. Delić focuses extensively on the EMD's alleged non-compliance with ARBiH transfer procedures and staffing orders²¹⁸ without acknowledging that the ARBiH's views on this matter shifted during the unit's existence. So, while the 3rd Corps command did attempt at times to limit the EMD's size, it also repeatedly issued orders throughout 1994 and 1995 transferring soldiers to the unit.²¹⁹ Such changes in position by its superior unit undercut the significance of any EMD noncompliance with prior staffing orders. Moreover, the willingness of ARBiH commanders to transfer such a high number of soldiers to the EMD – approximately 86²²⁰ – further supports the Majority's conclusion that the ARBiH would not relinquish control over so many of its members if it believed the EMD was not subordinated.²²¹

(v) Subground 1(A)(2)(i): Delić overemphasizes certain other acts of noncompliance

71. The failure of EMD members to register with the Municipal Defence Secretariats and to make statements that they joined the ARBiH voluntarily²²² do not

²¹⁵ Delić Brief, paras.19-23.

²¹⁶ Judgement, para.373.

²¹⁷ Judgement, para.373; [REDACTED].

²¹⁸ Delić Brief, paras.55-62.

²¹⁹ Judgement, paras.185, 413-414.

²²⁰ Exhs.1145-1152 (not confidential), 1156-1157 (not confidential), 1164-1167 (not confidential), 1169 (not confidential), cited in Judgement, paras.413 fn.1064, 414 fn.1066.

²²¹ Judgement, para.467. *See also above*, para.47 (addressing Delić's reliance (Delić Brief, para.60) on meetings between the EMD and Izetbegović to undermine the ARBiH's effective control).

militate against the numerous acts of EMD compliance, including combat operations and resubordination.²²³ A similarly overstated act of defiance²²⁴ is the EMD's decision to set up its camp 13 kilometres from Zavidovići, rather than 12 kilometres as ordered by Fadil Hasanagić, the Commander of the 35th Division.²²⁵ Delić has not cited any evidence that this one-kilometre gap in location had any negative or significant impact on ARBiH operations.

(h) Subgrounds 1(A)(2)(viii), 1(A)(3)(b)-(c): The Majority did not err with respect to the “miscellaneous” findings challenged by Delić

72. Delić challenges miscellaneous findings by the Chamber, without establishing error.

73. Delić's claim that the 3rd Corps Commander Sakib Mahmuljin had “very limited” influence over the EMD²²⁶ is contradicted by the Chamber's finding that the EMD complied with a number of Mahmuljin's orders, including:

- his order to attack Pišana Jelika and Visoka Glava features;²²⁷
- his “recommendation” after Operation *Prolijeće* regarding the direction of attack;²²⁸
- his order for the unit to deploy to Livade;²²⁹
- his resubordination of the unit to the 35th Division;²³⁰ and
- his order to disband the unit (which was based on Delić's order to him).²³¹

²²² Judgement, para.373. *See also* Delić Brief, paras.18, 345.

²²³ *Above*, paras.22-24.

²²⁴ Delić Brief, para.17.

²²⁵ Judgement, para.374.

²²⁶ Delić Brief, para.80.

²²⁷ Judgement, para.388.

²²⁸ Judgement, para.395.

²²⁹ Judgement, para.389.

²³⁰ Judgement, para.363.

²³¹ Judgement, para.458. While it is true that the EMD did not comply with one of Mahmuljin's combat orders such that he annulled it a few days later (Judgement, para.390), the EMD provided a reasoned explanation for its opposition to the order. *See above*, paras.52-54. Furthermore, this example

74. Similarly, Delić's assertion that the EMD "refused to carry out [the] orders"²³² of the 35th Division, to which it was subordinated during 1995,²³³ is incorrect. The EMD repeatedly complied with a number of orders from the 35th Division, including spearheading an attack during Operation *Proljeće*,²³⁴ launching an attack during Operation *Proljeće II*,²³⁵ and various combat activities during Operation *Farz*.²³⁶

75. Delić's challenge²³⁷ to the Majority's finding that he and the Main Staff co-ordinated Operation *Farz* and that it was conducted under his "overall command and control"²³⁸ is without merit. Delić does not dispute that he signed off on the operation, thereby demonstrating his authority.²³⁹

76. Contrary to Delić's argument, there is evidence to support the Chamber's finding that the ARBiH assigned the *Vatrostalna* building in Zenica to the EMD for its headquarters soon after the unit's creation.²⁴⁰

(i) Sub-ground 1(B): The Majority correctly analysed the structure and functioning of the ARBiH

77. Delić fails to establish that the Majority erred in its analysis of "the structure and functioning of the ARBiH."²⁴¹ None of his three arguments – concerning the role of the Presidency, the functioning of the ARBiH chain of command and the functioning of the KM Kakanj – disclose a reversible error. Delić's arguments fail to consider other relevant factual findings and are contrary to established jurisprudence.

of insubordination does not preclude a finding that Mahmuljin, or the 3rd Corps Command, still exercised effective control over the unit, given the EMD's compliance with his other orders. *See above*, para.37-40.

²³² Delić Brief, para.28.

²³³ Judgement, para.363.

²³⁴ Judgement, para.394.

²³⁵ Judgement, para.396.

²³⁶ Judgement, paras.397-399, 402.

²³⁷ Delić Brief, paras.124-127.

²³⁸ Judgement, para.468.

²³⁹ Judgement, para.397, fn.1019. *See also* Delić Brief, para.127.

²⁴⁰ Delić Brief, paras.119-123; Judgement, para.420; Awad, T.23-24, 127-128 (open session). *See also* Exhs.836 (not confidential), 1133 (not confidential).

²⁴¹ Delić Brief, para.161.

(i) The Chamber properly concluded Delić formed the EMD notwithstanding the role of the RBiH Presidency

78. Delić seems to suggest that the Majority was wrong to find that his conduct in forming the EMD was a factor relevant to establishing his effective control over the EMD.²⁴² This assertion is apparently based on the notion that the Presidency of the RBiH was the highest body of command and control and that it alone had responsibility for organisational and human resource issues. This argument ignores evidence showing the EMD came into existence and operated under the ARBiH's authority for over two years following Delić's order.

79. First, for all practical purposes, the EMD began to function as part of the ARBiH following Delić's order for its creation. In concluding that the EMD "came into existence as a unit of the ABiH 3rd Corps by virtue" of Delić's order of 13 August 1993,²⁴³ the Chamber found that, after Delić's order establishing the unit, the EMD was assigned a military unit number and used a stamp with the "RBiH coat of arms."²⁴⁴ Further, the EMD engaged in combat as an ARBiH unit as early as September 1993.²⁴⁵

80. Second, the Chamber considered Delić's argument that his authority to form the EMD "flowed from the decision and authority of his superior, the President and the ABiH Supreme Commander, Izetbegović."²⁴⁶ The Chamber found that this did not undermine the conclusion that Delić created the EMD or that he exerted effective control over the unit. The Chamber noted that Delić was a member of the RBiH Presidency,²⁴⁷ implying that any attempt to divorce Delić's authority from that of the Presidency on this matter is artificial. The Chamber also found that the Presidency's role in this decision was one of "political influence."²⁴⁸

81. Third, the Chamber cites the same language that Delić now relies on from Article 8 of Exhibit 9, which shows that it was aware of this evidence and took it into

²⁴² Delić Brief, paras.162-163.

²⁴³ Judgement, para.361.

²⁴⁴ Judgement, para.362.

²⁴⁵ Judgement, para.363.

²⁴⁶ Judgement, para.360.

²⁴⁷ Judgement, para.361.

²⁴⁸ Judgement, para.361.

account in reaching its conclusions.²⁴⁹ The fact that the Presidency was at the apex of the hierarchical chain of command did not exclude a finding that Delić also exercised effective control over the EMD. The doctrine of superior responsibility is sufficiently elastic to apply to more than one superior in the chain-of-command “or governmental hierarchy if the necessary criteria are met.”²⁵⁰

82. Fourth, Delić fails to explain how the Presidency’s responsibility for organisational and human resource matters contradicts its findings relating to the formation of the EMD. As the Chamber’s analysis illustrates, it was alive to the interplay between the authority of the ARBiH Main Staff and the Presidency.²⁵¹ It nevertheless concluded that Delić acted in “his capacity and within his competence as the ABiH Main Staff Commander as appointed by the RBiH Presidency.”²⁵²

83. The Chamber’s finding with regard to the formation of the EMD is also consistent with its other findings relating to both the Presidency and the Main Staff. The Presidency’s role was well defined and limited to more global, political decisions regarding the creation of top-level structures and ranks. For example, the Presidency:

- Established, on 8 April 1992, the RBiH TO Staff;²⁵³
- Issued a decision, on 8 June 1993, on the restructuring of the ARBiH Supreme Command Headquarters, establishing the post of Commander of the Main Staff and appointing Delić to that position;²⁵⁴
- Made a decision authorizing the creation of the 3rd Corps;²⁵⁵ and
- Could accept new positions, promotions and ranks on the proposal of the Commander of the Main Staff.²⁵⁶

²⁴⁹ Judgement, para.92 (“The RBiH Presidency exercised overall control as the Supreme Command of the Armed Forces.”)

²⁵⁰ *Strugar* TJ, para.365. See also *Naletilić* TJ, para. 69; *Aleksovski* TJ, para.106; *Blaškić* TJ, para. 303; *Krnjelac* TJ, para. 93.

²⁵¹ Judgement, paras.360-364.

²⁵² Judgement, para.361.

²⁵³ Judgement, para.80.

²⁵⁴ Judgement, paras.5, 99-102.

²⁵⁵ Judgement, para.117.

²⁵⁶ Judgement, para.94.

84. As to the Main Staff, the Chamber found that it was the organisation more involved in the day-to-day conduct of the war effort, which it directed *via* various administrations. For example, the Chamber found that the Main Staff and its administrations “oversaw the work of their counterpart services in the Corps and subordinate units”²⁵⁷ and conducted the “daily monitoring of the military situation in the field.”²⁵⁸

85. Given these findings – and the evidence which shows that the EMD came into being as a unit physically as well as organisationally at the stroke of Delić’s pen on 13 August 1993 – the Chamber’s finding that the EMD was formed as a unit following Delić’s order was reasonable.

(ii) Delić’s command and control flowed through the ARBiH chain of command to lower-level units

86. The Chamber found that Delić exercised command and control over the ARBiH as Commander of the Main Staff *via* the chain of command. Nothing in the evidence supports Delić’s apparent contention that his ability to command subordinates was limited to those under his *direct* subordination.²⁵⁹ Such a contention is contrary to both the evidence and the jurisprudence of this and other international tribunals.

87. First, Delić’s capacity to exercise effective control was not limited to those units and commanders directly subordinate to him. Even if Delić did not, as a matter of operational procedure, issue orders directly to the lower level units, he had the capacity to issue an order to his subordinate commanders, which would then be passed down the chain of command to be implemented by the relevant units. The end result is the same: Delić had the power to issue binding orders to the units in question. The principle of unity of command does not undermine this basic fact.

88. For example, Kadir Jusić, Chief of Staff of the ARBiH 3rd Corps, testified that, though Delić’s subordinates were responsible for planning Operation *Farz*, the operation could not have proceeded but for Delić’s final approval.²⁶⁰ Without this, the

²⁵⁷ Judgement, para.97.

²⁵⁸ Judgement, para.108.

²⁵⁹ Delić Brief, paras.164-173,

²⁶⁰ Jusić, T.2501 (open session), relied on in Judgement, fn.1019.

EMD would not have taken the operation's key military objective (Paljenik)²⁶¹ and the ARBiH would not have captured the "several hundreds of square kilometers"²⁶² of territory it captured during Operation *Farz* and related actions.

89. This understanding of command and effective control is consistent with Delić's own words that Operations *Farz* and *Uragan* "kept being performed under my immediate supervision" even though he was then in Malaysia.²⁶³ This is so, Delić explained, "because the system of command and control functions although one is not physically present at the site because I was in continuous contact and secured that all that kept functioning [...]."²⁶⁴

90. Second, implicit in Delić's argument is the mistaken assumption that superior responsibility only arises where the superior is in direct and immediate control of the subordinates in question. Delić cites no cogent reasons for departing from the Appeals Chamber's established case-law that a direct and immediate relationship of subordination is not required for the purposes of an Article 7(3) conviction.²⁶⁵

91. Third, Delić's assertion that he did not receive reports with regard to the EMD is inaccurate.²⁶⁶ While he may not have received reports directly from the EMD commander – nor would this be expected according to the chain of command – he certainly received relevant information about developments regarding the EMD. For example, the Chamber found that Delić received numerous reports, *via* Security Administration Bulletins, of EMD misconduct, including reports of beatings, thefts and kidnappings.²⁶⁷

(iii) The existence of KM Kakanj does not undermine the Majority's findings on effective control

92. Delić was well informed and actively engaged in command activities in 1994 and 1995. This supports the Majority's finding that he exercised command and effective control over the EMD, even after the establishment of KM Kakanj in 1994.

²⁶¹ Judgement, para.398.

²⁶² Exh.1194 (not confidential), p.10.

²⁶³ Judgement, para.519. *See also* Exh.622 (not confidential); Alija, T.4268 (open session).

²⁶⁴ Judgement, para.519.

²⁶⁵ *E.g. Orić* AJ, para.20; *Nahimana* AJ, para.785; *Čelebići* AJ, para.251.

²⁶⁶ Delić Brief, para.172.

²⁶⁷ Judgement, para.501.

Contrary to Delić's argument,²⁶⁸ the Chamber found that he received information, including reports about lower-level units such as the EMD²⁶⁹ even when he was away from Sarajevo. The evidence further shows that Delić frequently left the Main Staff command in Sarajevo to inspect units outside Sarajevo, at least after the completion of a tunnel beneath the Sarajevo airport in summer 1993, shortly after Delić assumed command.²⁷⁰ This contradicts Delić's contention that he was so cut off from his units and information about them that his role in 1995 was reduced to one of a "military-diplomatic" nature.²⁷¹

93. The Chamber's findings regarding communications *via* KM Kakanj show that it considered how the establishment of this post affected Delić's ability to command and effectively control subordinate units. The findings show that Delić benefited from an established and sophisticated reporting system that provided him highly-analysed combat, intelligence and security information whether he was in Sarajevo or out in the field inspecting units.

94. For example, the Chamber found that, though the Corps Commanders sent daily combat reports to the Operations Centre in Kakanj, they also sent "consolidated reports" containing "information that was considered relevant or significant" to both the President of the Presidency and to the Commander of the Main Staff.²⁷² The Chamber also found that, independently of the establishment of KM Kakanj,²⁷³ Delić received daily bulletins from the Security Administration. These bulletins, which were distributed based on strict protocols to a specific list of high-level figures, included information about units in the field, including the criminal behaviour of the EMD.²⁷⁴

95. Beyond what he was reading in the reports, the Chamber found that Delić also took steps to bolster any perceived inadequacies in the quality of the information he received, including touring subordinate units "whenever he could" and seeking reports "directly from the Corps."²⁷⁵

²⁶⁸ Delić Brief, para.172.

²⁶⁹ Judgement, para.501.

²⁷⁰ Jusić, T.2645 (open session); Divjak, T.2310 (open session).

²⁷¹ Delić Brief, para.178.

²⁷² Judgement, para.143.

²⁷³ Judgement, para.98.

²⁷⁴ *Below*, paras.123-128.

²⁷⁵ Judgement, para.150.

96. Finally, Delić's attempt to paint his role as one of a "military-diplomatic" nature, rather than one of command and control, is contrary to the overwhelming evidence on the record.²⁷⁶ For example, the Chamber found that Delić signed the map authorizing Operation *Farz*²⁷⁷ and heard evidence that, without Delić's signature, the operation would not have been launched.²⁷⁸ Delić's argument is also contradictory to his own contention, shortly after *Farz* had ended, that the operation was "being performed under my immediate supervision."²⁷⁹ Further, the Chamber heard evidence that in June, July and August 1995, Delić was "constantly at forward command posts [...] touring [...] the corps units in order to establish the best possible co-ordination among units during combat actions [...]" relating to lifting the siege of Sarajevo²⁸⁰ and that his role in that action was "to plan and lead or control the action."²⁸¹

97. Delić cites testimony that he would "often" meet with "accredited military attaches in Bosnia" as well as "representatives of international organisations" like the Red Cross²⁸² and that he "often participated in the talks that were held in [Sarajevo], at the airport."²⁸³ Nothing in these selective citations suggests that such meetings so monopolized Delić's time that he could no longer exercise command over an ARBiH structure he was constitutionally authorized and obligated to control. Further, other testimony from one of these same witnesses, Ismet Dedović, supports the Majority's finding that Delić continued to exercise command and effective control.²⁸⁴

(j) Sub-ground 1(C): The Majority correctly analysed the improvements in the organisation of the ARBiH

98. Contrary to Delić's argument, the Majority's conclusion that the functioning of the ARBiH improved over time is supported by ample evidence on the record. Delić seeks to impugn the Majority's concluding paragraph on the basis that it was

²⁷⁶ Delić Brief, para.178.

²⁷⁷ Judgement, para.397.

²⁷⁸ Jusić, T.2501 (open session), relied on in Judgement, fn.1019.

²⁷⁹ Judgement, para.519.

²⁸⁰ Dedović, T.8202 (open session).

²⁸¹ Dedović, T.8201 (open session).

²⁸² Dedović, T.8198 (open session), relied on in Judgement, fn.217.

²⁸³ Alija, T.4186 (open session).

²⁸⁴ *Above*, para.96.

unreferenced,²⁸⁵ but fails to address the findings elsewhere in the Judgement – and the evidence underlying them – that supported the Majority’s conclusion.

99. The Majority found that “the structure, organization as well as command and control within the ABiH improved significantly from the time when Rasim Delić was appointed as Commander of the Main Staff on 8 June 1993 until the EMD was disbanded in December 1995.”²⁸⁶ Specifically, the Majority found, the evidence showed improvement over time in:

- the “general functioning of the [ARBiH] regarding the planning and preparation of combat operations” partly as a result of “Rasim Delić’s continuous efforts to ameliorate the system of command and control between the Main Staff and the commanders in the field”; and
- the “loyalty difficulties originally incurred by Rasim Delić in relation with some [ARBiH] units.”²⁸⁷

100. The Majority’s conclusion is supported by a number of specific findings made by the Chamber throughout the Judgement. For example:

- Over time, Delić was able to “win over” the senior officers who initially objected to his appointment as Commander of the Main Staff on the basis that he had not been a member of the Patriotic League.²⁸⁸
- Delić authorized several operations “to remove obstacles to the functioning of the [ARBiH] system of command and control,”²⁸⁹ including the armed crackdown on two “disobedient units within the encircled city of Sarajevo,” the 9th [Motorised] Brigade and the 10th Mountain Brigade.²⁹⁰
- Structural changes were implemented, including the creation, in March 1995, of the permanent 35th Division from the temporary formation *OG Bosna*,²⁹¹ the integration of the Operations Centre into the Operative Planning

²⁸⁵ Delić Brief, paras.186, 187, 200.

²⁸⁶ Judgement, para.460.

²⁸⁷ Judgement, para.460.

²⁸⁸ Judgement, para.135.

²⁸⁹ Judgement, para.137.

²⁹⁰ Judgement, para.136.

Administration in 1994²⁹² and the relocation of the Supreme Command Staff to KM Kakanj. This was done, in Delić's own words, to "improve its functioning and responsibility, its place and role in waging armed combat and in commanding and controlling the BH Army units."²⁹³

101. Other evidence supports the Majority's conclusion. Both Kadir Jusić, Chief of Staff of the 3rd Corps, and Jovan Divjak, Deputy Commander of the ARBiH, testified that command and control improved after the first half of 1993 when Delić was able to leave Sarajevo *via* the tunnel to visit units in the field.²⁹⁴ Vahid Karavelić, 1st Corps Commander, agreed that the ARBiH "certainly" did improve over time and was "a more disciplined and better army in 1995 than it was in 1993."²⁹⁵

102. The Chamber also made a number of findings that showed Delić's ability to command and effectively control the EMD solidified over time. It found, for example, that Delić formed the unit after requests had been made to either send the foreign citizens back to their countries of origin or organise them into a unit within the ARBiH so that they could be better controlled.²⁹⁶ Though the unit initially refused to participate in two combat operations in 1994²⁹⁷ and one in early 1995,²⁹⁸ the Chamber found, the unit played key roles in the ARBiH combat operations *Proljeće I* in May 1995²⁹⁹, *Proljeće II* in July 1995³⁰⁰ and *Farz* in September 1995.³⁰¹ A report from the 35th Division to the 3rd Corps regarding *Proljeće II* specifically attributed the success of that operation to, among other things, "the element of surprise, the efficient system of command and control" over the participating ARBiH units, including the EMD.³⁰²

103. None of Delić's arguments undermine the Majority's conclusion. First, Delić's arguments ignore the Chamber's findings in paragraphs 128-140 of the Judgement. These show that the Chamber explicitly considered the "great deal of evidence [...]"

²⁹¹ Judgement, para.119

²⁹² Judgement, para.107.

²⁹³ Exh.281 (not confidential), relied on in Judgement, paras.106-107, fns.255-258.

²⁹⁴ Jusić, T.2645 (open session); Divjak, T.2310 (open session).

²⁹⁵ Karavelić, T.7967 (open session).

²⁹⁶ Judgement, para.173.

²⁹⁷ Judgement, paras.388-389.

²⁹⁸ Judgement, para.390.

²⁹⁹ Judgement, para.394.

³⁰⁰ Judgement, para.396.

³⁰¹ Judgement, paras.397-402.

³⁰² Exh.459 (not confidential), p.4.

concerning problems faced by the ABiH from the moment of its inception”³⁰³ before concluding that command and control improved in the ARBiH over time.

104. Second, Delić’s arguments rely on misplaced and selective citations to the record. For example, Delić argues that the alleged “incorrect and false reporting” in the ARBiH in 1994 and 1995 had “obvious” implications on the system of command and control, but he fails to elaborate. He cites Exhibit 601 repeatedly³⁰⁴ to support various arguments related to command and control, but ignores the general conclusion at the beginning of that document:

Command and control in R BiH Army units and commands was stabilized in preparation and combat operations of units and commands. In 1994 and 1995 units of R BiH Army achieved significant results in liberating territories under occupation.³⁰⁵

105. Delić’s selective quotation of the language in Exhibit 1267, dated 3 March 1995, is similarly misplaced.³⁰⁶ Delić quotes a portion of the overview of this report from Chief of Staff General Enver Hadžihasanović – which makes generalised conclusions – but ignores more specific evidence about the situation in the 3rd Corps. In a report dated just eight days earlier, Hadžihasanović concluded that command and control at both the 3rd Corps and 35th Division were “already functioning according to the new system.”³⁰⁷

106. In any event, it was reasonable for the Majority to infer that any problems had been remedied by July 1995, when the EMD complied with a 35th Division order “to launch an attack in the Podsjelovo area.”³⁰⁸

107. Similar errors pervade Delić’s reliance on Exhibit 742 for the proposition that local authorities exerted meddlesome influence on the 35th Division.³⁰⁹ Delić ignores language in that same exhibit indicating clearly that the 35th Division commanders

³⁰³ Judgement, para.128.

³⁰⁴ See Delić Brief, fns.297, 298, 299, 302, 304, 307.

³⁰⁵ Exh.601 (not confidential), pp.2-3

³⁰⁶ Delić Brief, para.186.

³⁰⁷ Exh.1265 (not confidential), pp.1-2, relied on in Judgement, para.119, fn.299.

³⁰⁸ Judgement, para.396.

³⁰⁹ Delić Brief, paras.195-201.

refused demands of these local authorities to send them reports, citing a fidelity to the system of ARBiH command and control.³¹⁰

108. Delić's reliance on Exhibit 1384 is also misplaced.³¹¹ He cites that document for the proposition that "[a]s a result of the close ties between the 328 Brigade [sic] and the Mujahedin and their supporters, information on events concerning the mujahedin was either not forwarded to superior units or was inaccurate." Delić fails to explain how any information in Exhibit 1384, a 2002 report about the criminal activities of members of the "Zubjer's Group" has any relevance. The Chamber found that this group and the EMD were different units.³¹²

109. More generally, Delić fails to explain how the factors he cites in paragraphs 195-201 of his Brief had any impact on either the ability of the 35th Division to exercise command and effective control over its subordinate units or the Majority's finding that Delić exercised command and effective control over the EMD. Ultimately, Delić fails to show that the Majority completely disregarded his favoured evidence, or that the conclusions drawn by the Majority were those that no reasonable fact finder could have made.

(k) Sub-ground 1(M): The Majority correctly applied the burden of proof

110. Contrary to Delić's assertion,³¹³ the Majority properly articulated the burden of proof and then correctly applied it to the evidence.

111. The Chamber acknowledged that the burden lies on the Prosecution to prove effective control.³¹⁴ Delić challenges the Chamber's reference to *de jure* subordination as a *prima facie* indicator of effective control,³¹⁵ but he fails to acknowledge that this approach adheres to Appeals Chamber case-law and does not reverse the burden of proof.³¹⁶ The Chamber specifically quoted language from the

³¹⁰ Exh.742 (not confidential), p.2.

³¹¹ Delić Brief, para.200.

³¹² Judgement, paras.168, 286, 292, 436.

³¹³ Delić Brief, paras.202-208.

³¹⁴ Judgement, paras.60, 369. *See also* Judgement, para.23 (referring generally to the fact that the Prosecution bears the burden of proving each and every element of the offences charged beyond reasonable doubt).

³¹⁵ Delić Brief, paras.203-204.

³¹⁶ *Hadžihasanović* AJ, para.21.

Hadžihasanović Appeal Judgement, confirming that “the possession of *de jure* authority constitutes *prima facie* a reasonable basis for assuming that an accused has effective control over his subordinates. [...T]he burden of proving beyond reasonable doubt that the accused had effective control over his subordinates ultimately rests with the Prosecution.”³¹⁷ The point is that proof of *de jure* subordination may be a reasonable basis for inferring effective control beyond a reasonable doubt, when viewed against the evidentiary record as a whole.

112. Having set out the correct legal standard, the Majority then proceeded to correctly weigh the totality of the evidence for and against a finding of effective control over the EMD.³¹⁸ In addition to 33 pages of discussion under the heading “Effective control over the EMD”, the Majority explicitly stated that its finding on effective control was based on “all the relevant evidence heard during the trial and evaluated both in isolation and collectively.”³¹⁹ Contrary to Delić’s assertion,³²⁰ there was a substantial amount of positive evidence proving effective control and the Majority’s finding was reasonable.³²¹

113. To support his argument, Delić relies on a statement in Judge Moloto’s Dissenting Opinion that the Majority “fails to show any positive evidence” for its finding.³²² However, this assertion reflects Judge Moloto’s own interpretation of the evidence that the Majority found sufficient to establish effective control. The fact that the Majority interpreted or weighed the evidence differently than Judge Moloto does not show that it reversed the burden of proof or convicted in the absence of positive evidence. Judge Moloto implicitly acknowledged that the Majority did point to evidence that positively supported its finding of effective control, including:

- “the EMD’s compliance with the tactical parts of combat orders;”³²³
- “that the EMD provided oral briefings to its superior commanders before, during and after combat operations, ‘just as any other ABiH unit;”³²⁴ and

³¹⁷ Judgement, para.369, citing *Hadžihasanović* AJ, para.21, referring to *Čelebići* AJ, para.197.

³¹⁸ Judgement, paras.460-471.

³¹⁹ Judgement, para.471, pp.110-143.

³²⁰ Delić Brief, para.206.

³²¹ *Above*, paras.20-26.

- “the role of the EMD as a specialised unit.”³²⁵

114. The Majority also properly addressed evidence allegedly inconsistent with a finding of effective control. Delić’s assertion that the Majority thus placed the onus on the Defence to disprove the case misconstrues the Majority’s analysis and relies on partial quotations taken out of context.³²⁶ For example, Delić objects to paragraph 462 of the Judgement,³²⁷ but omits to mention the preceding two paragraphs of the Judgement, which show that the “indicator” referred to by the Majority was the participation of the EMD in ARBiH combat operations and its compliance with ARBiH combat orders, and not just its “reticent approach” in respect of some orders.³²⁸

115. Similarly, Delić objects to the Majority’s statement that the non-compliance of the EMD with respect to some orders for written reports did not create a reasonable doubt as to his effective control over that unit.³²⁹ However, he ignores the preceding sentence of the Judgement, which states “the EMD’s failure to comply with several orders to submit *written* reports to its ABiH commanders was at least partly made up for by the EMD’s *oral* communications, in particular in the meetings before, during and after combat.”³³⁰ These and the other passages Delić contests show that the Majority correctly assessed whether evidence appearing to run counter to a finding of effective control created a reasonable doubt when viewed against the totality of the evidence on this issue.³³¹

(I) Sub-ground 1(N): Delić had notice of the case against him

116. Contrary to Delić’s argument,³³² the Prosecution clearly pleaded in the Indictment that Delić’s position of superior authority was based on his position at the

³²² Dissenting Opinion, para.31, referred to in Delić Brief, para.206.

³²³ Dissenting Opinion, para.4.

³²⁴ Dissenting Opinion, para.14 (footnote omitted).

³²⁵ Dissenting Opinion, para.20.

³²⁶ Delić Brief, para.206.

³²⁷ Delić Brief, para.205, referring to Judgement, para.462.

³²⁸ Judgement, para.462. *See also*, paras.460, 461.

³²⁹ Delić Brief, para.205, referring to Judgement, para.463.

³³⁰ Judgement, para.463.

³³¹ Delić Brief, para.205, referring to Judgement, paras.464, 469, 470.

³³² Delić Brief, paras.209-224.

top of the ARBiH military hierarchy to which the EMD was subordinated.³³³ The Indictment stated as follows:

Position of Accused/Superior Responsibility

15. As Commander of the Main Staff of the ARBiH, Rasim Delić was the most senior officer of the ARBiH, subordinate only to the Presidency/President of Bosnia Herzegovina. As such he had overall authority and responsibility for the functioning of the ARBiH. Rasim Delić was responsible for planning and directing all ARBiH operations and for monitoring the activities of all subordinate officers and units to ensure that his orders were implemented. He exercised command and control through the ARBiH Main Staff, Supreme Command Staff and, during 1995, the General Staff.

...

17. At all times relevant to this Indictment, the following units were under the subordination of the ARBiH corps, which were subordinate formations under the command and effective control of the Accused Rasim Delić:

...

(i) El Mujahed Detachment (3rd Corps).³³⁴

117. In addition, under the heading “Article 7(3) of the Statute of the Tribunal”, the Indictment explicitly referred back to the above-cited paragraphs.³³⁵ Similar information was reiterated in the Prosecution’s Pre-Trial Brief and the Prosecution’s Closing Brief.³³⁶

³³³ Indictment, paras.15-20.

³³⁴ Indictment, paras.15-17.

³³⁵ Indictment, para.19.

³³⁶ Prosecution Pre-Trial Brief, paras.15.1-15.5, 16.1-16.3, 17, 18.1-18.4, 19.1-19.12, 20.1-20.11; Prosecution Closing Brief, pp.23-41.

118. Delić's reliance on paragraphs 28-38 of the Indictment is misplaced.³³⁷ These paragraphs simply set out additional facts relating to Delić's role in the Vozuća combat operations. Bearing in mind that an indictment "is to be read as a whole, not as a series of paragraphs existing in isolation,"³³⁸ paragraphs 28-38 cannot sensibly be understood as rendering inapplicable the clear pleading under the heading "Position of Accused/Superior Responsibility."

119. Delić's claim that the Prosecution first alleged effective control on this basis in its Closing Brief is incorrect.³³⁹ Throughout the trial, Delić defended himself against the allegation that his superior-subordinate relationship with the EMD was based on his position in the ARBiH command hierarchy. This is shown by, among other things, his Pre-Trial Brief and his Closing Brief.³⁴⁰ Delić's Closing Brief, filed on the same day as the Prosecution's Final Brief, contains the heading "Prosecution's theory: 'de jure commanding power by reason of position in a military structure'; (the Commander of the Main Staff/General Staff)," which explicitly refers to the paragraphs in the Indictment outlining this allegation.³⁴¹

120. Delić's reliance on the *Halilović* Appeal Judgement is also misplaced.³⁴² The Indictment in *Halilović* alleged that "Halilović was the Commander of the Operation and as such the troops involved in the 'NERETVA-93' Operation were under his command and control."³⁴³ By contrast, the Indictment in this case clearly stated that Delić's superior-subordinate relationship with the EMD was based on his position in the ARBiH hierarchy.³⁴⁴ Whereas the Trial Chamber in *Halilović* proceeded on the basis that the superior-subordinate relationship was alleged due to his command of Operation 'NERETVA-93',³⁴⁵ the Chamber in the current case proceeded on the basis that the superior-subordinate relationship was alleged due to Delić's position in the ARBiH hierarchy, as set out in the Indictment.³⁴⁶

³³⁷ Delić Brief, para.212.

³³⁸ *Halilović* AJ, para.86, citing *Hadžihasanović* TJ, para.266.

³³⁹ Delić Brief, para.221.

³⁴⁰ Delić Pre-Trial Brief, paras.140-145, 184-195; Delić Closing Brief, pp.231-317, in particular para.850.

³⁴¹ Delić Closing Brief, para.850 (citing Indictment, paras.15, 17).

³⁴² Delić Brief, paras.217-218.

³⁴³ *Halilović* Indictment, para.4. *See also* paras.1, 3, 31, 38, 39.

³⁴⁴ Indictment, paras.15-20.

³⁴⁵ *Halilović* TJ, paras.68-69, 82-88, 111.

³⁴⁶ *E.g.* Judgement, para.357.

IV. GROUND 2: THE CHAMBER CORRECTLY FOUND THAT DELIĆ HAD REASON TO KNOW OF HIS SUBORDINATES' CRIMES

A. Overview of the Chamber's reasoning concerning Delić's reason to know of his subordinates' crimes

121. The Chamber found that Delić had reason to know of the cruel treatment in Livade and in the Kamenica Camp in July-August 1995 based on his receipt of:

- the information contained in Bulletin 137, indicating that the EMD had captured approximately 40 VRS prisoners, including two doctors and one nurse, and did not allow anyone access to them;³⁴⁷ and
- the information in 14 other bulletins describing the frequent occurrence of misconduct and criminal offences by EMD members, including physical abuse, beatings, torture, abduction, threats of death and destruction of property, desecration of religious sites, and harassment³⁴⁸ – three of these bulletins were from the first half of July 1995, merely days before the capture of VRS prisoners on 21 July 1995.³⁴⁹

122. The Chamber concluded that Delić received the information in the bulletins, including Bulletin 137, based on the sensitive content of the bulletins, along with clear evidence regarding the frequency and purpose of these bulletins and the procedure in place for their compilation and distribution.³⁵⁰

123. In particular, the security organs of all ARBiH Corps sent security reports to the Security Administration of the Main Staff in Sarajevo.³⁵¹ These reports were “registered in a log-book and distributed to the different departments of the Security

³⁴⁷ Judgement, paras.475 (citing to Exh.582 (not confidential), Bulletin of the General Staff Security Administration, 22 July 1995), 512-513.

³⁴⁸ Judgement, paras.501, 505, 513.

³⁴⁹ Judgement, para.501 (referring to Exhs.736 (not confidential), 737 (not confidential), 738 (not confidential)).

³⁵⁰ Judgement, paras.145-146, 151-152, 475, 479-481, 500-501, 505, 512-513.

³⁵¹ Judgement, para.145.

Administration.”³⁵² They formed the basis for bulletins that were submitted by the Security Administration to Delić “on a daily basis, unless there was nothing relevant to report.”³⁵³ The bulletins were short bullet-point documents, filtering through and summarising only “the important information” received from the security organs of the ARBiH Corps in the preceding 24 hours to a select group of high-ranking recipients.³⁵⁴ These bulletins served as a means through which Delić “was kept apprised of all relevant developments in the [ARBiH] and the theatre of war.”³⁵⁵ The Chamber found that they were “a critical tool” for keeping Delić up to date.³⁵⁶

124. The bulletins “were distributed according to a standard procedure.”³⁵⁷ After the Chief of the Security Administration gave his final approval, “the bulletins were stamped on each page and put in a sealed envelope.”³⁵⁸ They were then sent to only five high-ranking officials: the President of the Presidency; the Main Staff Commander (Delić); the Vice President; and the Chiefs of the Department for Counter-Intelligence Matters and the Independent Section for Staff and Security Matters.³⁵⁹ The bulletins contained sensitive information and had to be returned to the Security Administration.³⁶⁰ One copy was archived and the others were destroyed.³⁶¹ When returned, the bulletins “frequently included Rasim Delić’s comments or suggestions.”³⁶²

125. When Delić was in Sarajevo, the Security Administration sent the bulletins to him by courier.³⁶³ Documents sent to Delić by the Security Administration were subject to even stricter handling requirements than other documents. Delić’s Chef de Cabinet received such documents from the Security Administration in sealed envelopes, which he was not authorised to open, and handed them to Delić personally, or to his secretary in case he was absent.³⁶⁴ By contrast, other documents sent to Delić

³⁵² Judgement, para.145.

³⁵³ Judgement, para.145.

³⁵⁴ Exh.706 (not confidential), paras.33, 41 (cited, *inter alia*, in footnotes supporting Judgement, paras.145-146). *See also* Judgement, fn.373.

³⁵⁵ Judgement, para.479.

³⁵⁶ Judgement, para.500.

³⁵⁷ Judgement, para.146.

³⁵⁸ Judgement, para.146.

³⁵⁹ Judgement, para.146; Exh.376 (not confidential).

³⁶⁰ Judgement, paras.146, 480.

³⁶¹ Judgement, para.547, citing Exh.706 (not confidential), pp.7-8.

³⁶² Judgement, para.146.

³⁶³ Judgement, para.151.

³⁶⁴ Judgement, para.152.

were generally opened and assessed for importance by his Chef de Cabinet, who would then make a summary and brief Delić on the content “when the Commander had time.”³⁶⁵

126. When Delić was outside Sarajevo, the Security Administration generally sent bulletins to him by packet communication (an encrypted electronic communication system), including when he was at KM Kakanj.³⁶⁶ The officers at KM Kakanj usually knew where Delić was, so dispatches were still sent to him there even though he was at KM Kakanj only rarely.³⁶⁷ There was a practice in place to ensure that the information in the bulletins was conveyed to Delić.³⁶⁸

127. Exhibit 377 is a set of cover letters from the period 19 January to 30 December 1995 sent by the Security Administration to KM Kakanj, enclosing Security Administration bulletins.³⁶⁹ One such cover letter indicates that on 22 July 1995, the Security Administration sent Bulletin 137 to Šaćir Arnautović at KM Kakanj with the specific order to forward the Bulletin to Delić for his information.³⁷⁰ It is clear, therefore, that bulletins – including Bulletin 137 – were addressed to the Main Staff Commander “for his special benefit.”³⁷¹ Other cover letters indicate that the Security Administration kept track of bulletins to ensure that Delić received the information contained within them.³⁷²

128. Given these distribution procedures and the purpose, content, sensitivity, and confidentiality of bulletins from the Security Administration, the Chamber reasonably

³⁶⁵ Judgement, para.151 (internal quotation marks omitted).

³⁶⁶ Judgement, para.146.

³⁶⁷ Judgement, para.153.

³⁶⁸ See Judgement, fn.398, referring to Exhs.365-368 (not confidential) (bulletins addressed personally to Berbić from Jusuf Jašarević; Berbić was instructed by the latter to forward them to Rasim Delić). See also Judgement, para.281, referring to Exh.377 (Bulletins of the Chief of Security Administration, 19 January-30 December 1995, p. 87) and finding that “The cover note of Bulletin 137 was addressed to Colonel Arnautović with the instruction ‘You are required to forward the Bulletin to the [Main Staff] Commander, Army General Rasim Delić, for his information.’” See also Exh.377 (not confidential), p.57 (forwarding bulletins 168 and 169 to KM Kakanj and ordering that Refik Česko brief Delić on their contents “in the same manner that has been practiced during Colonel ARNAUTOVIĆ’s visit to Army General Staff Kakanj Command Post. We shall continue with the same practice because we believe it is the safest way of sending special, SVB/Military Security Service/ Administration materiel when the Commander is not in Sarajevo.”)

³⁶⁹ See generally Exh.377 (not confidential). The cover letters tasked various individuals with forwarding the attached bulletins to Delić or with briefing him on their content.

³⁷⁰ See Exh.377, p.87 (not confidential). See also Judgement, para.475.

³⁷¹ Judgement, para.480.

³⁷² See Exh.377(not confidential), pp.3, 15, 20, 27, 39, 68, 69, 104, 105 (noting that certain bulletins had been forwarded to Delić or that he had been briefed on their content).

concluded that the information contained in the bulletins “was routinely conveyed to Rasim Delić.”³⁷³ In light of “the very purpose for which these bulletins were sent,” the Chamber was also satisfied that the information in Bulletin 137 remained available to Delić, even though he was travelling on official mission to Split on 22 July 1995 and did not visit KM Kakanj until 29 July 1995.³⁷⁴

129. The information contained in Bulletin 137 was not alone sufficiently alarming to put Delić on notice of the crimes committed in Livade and in the Kamenica Camp.³⁷⁵ The Chamber found, however, that prior to 21 July 1995, Delić was informed *via* bulletins sent by the Security Administration over the preceding eleven months of numerous instances of shocking and violent misconduct involving EMD members, some of which amounted to criminal offences.³⁷⁶ Specifically, the bulletins reported that:

- In August 1994, EMD members behaved “violently,” spilling drinks and dispersing girls from public places, carrying weapons when not on duty, and “constantly threaten[ing] Roman-Catholic Church priests from the Guča Gora monastery.”³⁷⁷ They also “often violated public law and order” by, *inter alia*, “shoot[ing] from firearms in the town” and threatening children gathered at the Croatian Centre in Zenica with having their throats cut;³⁷⁸
- In October 1994, an EMD member “beat up a little girl because she was wearing a skirt” in Krpeljica;³⁷⁹
- On 19 December 1994, EMD members abducted Safet Šabić, his wife and son from their home in Travnik at gunpoint, and subsequently stripped and beat Šabić;³⁸⁰
- On 11 February 1995, EMD members physically abused a young couple strolling in Zenica because they were “out so late having fun;”³⁸¹

³⁷³ Judgement, para.480.

³⁷⁴ Judgement, para.481.

³⁷⁵ Judgement, para.483.

³⁷⁶ Judgement, para.501.

³⁷⁷ Exh.721, p.2 (not confidential) (referred to in Judgement, fn.1254).

³⁷⁸ Exh.722, p.3 (not confidential) (referred to in Judgement, fn.1254).

³⁷⁹ Exh.723, p.4 (not confidential) (referred to in Judgement, fn.1254).

³⁸⁰ Exh.724, p.3 (not confidential) (referred to in Judgement, para.501).

- On 4 March 1995, EMD members abducted Jasranko Bošnjak, a war invalid, and badly mistreated him rendering him unconscious;³⁸²
- On 21 March 1995, EMD members abducted a man from Travnik, tortured and physically abused him, accusing him of stealing cattle;³⁸³
- On 15 April 1995, EMD members were accused of “unacceptable activities,” including imposing the Sharia lifestyle, abducting a young Bosnian girl and physically mistreating young people in the streets;³⁸⁴
- On 15 May 1995, EMD members carrying an automatic rifle and two axes violently desecrated 21 tombstones and freshly-dug graves at the Catholic cemetery in Ovnak;³⁸⁵
- On 3 July 1995, EMD members visited soldiers of the 328th Brigade during the operations in the Vozuća area and threatened especially the Croatian and Serbian soldiers by telling a Croat soldier they would slaughter all Croats and Serbs;³⁸⁶
- On 11 July 1995, armed EMD members threatened to blow up the house of a video shop owner, as well as the owner himself,³⁸⁷ and
- On the night of 16/17 July 1995, armed EMD members harassed girls on Savići-Krivaja road, forcibly taking them towards Paljenik and forcing them to cut their hair.³⁸⁸

130. The Chamber held that “the number of incidents attributed in the above bulletins to EMD members – whether correctly or not – called for further enquiry by the part of Rasim Delić, in particular to mitigate the risk with a view to preventing the

³⁸¹ Exh.725, p.4 (not confidential) (referred to in Judgement, para.501).

³⁸² Exh.727, p.3 (not confidential) (referred to in Judgement, para.501). This bulletin further notes the “ever increasing number of incidents caused by” EMD members and suggests action by “higher competent organs.” Exh.727, p.3 (not confidential).

³⁸³ Exh.733, pp.3-4 (not confidential) (referred to in Judgement, para.501).

³⁸⁴ Exh.963, pp.1-2 (not confidential) (referred to in Judgement, para.501).

³⁸⁵ Exh.731, p.4 and Exh.732, p.5 (not confidential) (referred to in Judgement, para.501).

³⁸⁶ Exh.736, p.7 (not confidential) (referred to in Judgement, para.501); *see also* Exh.740, p.3 (not confidential) (referring to physical assault by EMD members against members of the 328th Brigade).

³⁸⁷ Exh.737, pp.2-3 (not confidential) (referred to in Judgement, para.501). The Judgement refers to this incident as taking place on 15 July 1995, which is instead the date of the bulletin.

³⁸⁸ Exh.738, p.2 (not confidential) (referred to in Judgement, para.501). The Judgement refers to this incident as taking place on 19 July 1995, which is instead the date of the bulletin.

commission of war crimes by EMD members.”³⁸⁹ Indeed, “the frequent occurrence of misdemeanours and criminal offences by members of the EMD was a matter which ought to have alerted Rasim Delić to the risk that similar offences against persons might recur in the future.”³⁹⁰ This risk of recurring crimes “became all the more tangible” when Delić “received the information that the EMD held VRS captives and that the [ARBiH] was not allowed to have access to them. He was also informed that two doctors and one nurse were detained by the EMD, whereas according to international humanitarian law, their detention could only be justified in so far as the state of health, the spiritual needs and the number of prisoners of war require.”³⁹¹

131. Thus, the EMD members’ record of violent, threatening misconduct and criminal offences rendered the report on the capture of enemy troops in Bulletin 137 “sufficiently alarming to justify [Delić’s] immediate intervention to determine whether members of the EMD were about to commit or had committed crimes in Livade and in the Kamenica Camp in July and August 1995.”³⁹² As a result, the Chamber found beyond reasonable doubt that Delić, “when he received the information that VRS soldiers were held by the EMD, had reason to know that members of the EMD were about to commit or had committed the crime of cruel treatment against these detainees.”³⁹³

B. Delić’s challenges regarding notice lack merit

1. General Response to Delić’s argument: Bulletin 137 was not the sole evidentiary basis for the Chamber’s notice findings

132. Contrary to the implication in Delić’s argument,³⁹⁴ Bulletin 137 was not the sole basis for the Chamber’s conclusion that Delić had information available that was sufficiently alarming to put him on notice of the risk that crimes might be committed by his subordinates.³⁹⁵ The Chamber reached this conclusion based on both Bulletin

³⁸⁹ Judgement, para.511 (internal footnote omitted).

³⁹⁰ Judgement, para.512.

³⁹¹ Judgement, para.512 (internal quotation marks omitted).

³⁹² Judgement, para.512.

³⁹³ Judgement, para.513.

³⁹⁴ Delić Brief, para.229.

³⁹⁵ Judgement, paras.477, 513.

137 and the information in various other bulletins regarding the EMD members' record of violent and criminal behaviour.³⁹⁶

133. The Chamber's notice findings must also be understood in the context of the entire trial record. The evidence adduced confirmed that the foreign Mujahedin in general, and members of the EMD in particular, were notorious for their violent behaviour and disregard of IHL.

134. The problems caused by the Mujahedin and their disregard of IHL confronted Delić from virtually the moment he took over command. On 13 June 1993, the 3rd Corps Commander raised with Delić and Chief of Staff Sefer Halilović concerns about "volunteers from foreign countries" who "have been acting outside the usual context and lawful methods of combat." The Corps Commander asked for a solution, expressing concern that he did not want to be held responsible for the consequences of the foreigners' actions.³⁹⁷ Then, on 18 June 1993, Delić attended a meeting where the problem of "soldiers from foreign countries" was discussed and concerns were raised that they exhibited "conduct that was not befitting that of members of the Army of Bosnia and Herzegovina."³⁹⁸

135. The violent reputation of the Mujahedin was well known even to enemy Serb forces. One of the Serb prisoners cruelly treated in Livade and in the Kamenica Camp described his fear upon being captured by the EMD in July 1995:

We were well aware of the reputation of the Mujahedins, and I was sure that they would kill us both, if not immediately, then later after being badly tortured.³⁹⁹

136. The steady stream of information in the bulletins about the EMD members' criminal and abusive behaviour was entirely consistent with their violent reputation and Delić's knowledge of the general problems associated with their participation in the conflict. The information in Bulletin 137 that the EMD had captured Serb

³⁹⁶ Judgement, para.512.

³⁹⁷ Exh.179 (not confidential). *See also* Judgement, para.172.

³⁹⁸ Judgement, para.173; Divjak, T.2179 (open session) (describing how the foreign fighters used violence to get their supplies). *See further*, Judgement, paras.175, 449 and Exh.690 (not confidential).

³⁹⁹ Sikanić, Exh.927 (not confidential), Rule 92*bis* statement, 00911498-00911499.

prisoners and was denying access crystallised the generalised risk of crimes into an emergency situation requiring Delić's immediate action.

2. Specific Responses to Delić's arguments

(a) Subground 2(A): No separate argument because it relies on errors in sub-grounds 2(B)-2(F)

(b) Subground 2(B): The Chamber correctly found that information was generally sent to Delić via packet communications

137. Delić contends the Chamber erred in concluding that when Delić was travelling, "bulletins were generally sent to him by packet communication, including when he was at the KM Kakanj."⁴⁰⁰ None of his three challenges to the Chamber's analysis establish reversible error.

(i) Exhibit 706 supports the Chamber's finding that the bulletins were sent to Delić

138. The Chamber's citation to paragraph 61 of the Rule 92*ter* Statement of Džemal Vučković (Exhibit 706) to support its finding that bulletins were generally sent to Delić by packet communication when he was travelling was a clerical error and did not result in a miscarriage of justice.

139. Delić is correct that Exhibit 706 is a corrected version of a previous witness statement made by Vučković in September 2006⁴⁰¹ and that this corrected version no longer includes a paragraph 61.⁴⁰² However, contrary to Delić's suggestion,⁴⁰³ the Chamber did not mistakenly rely on paragraph 61 of the 2006 version, which was not entered into evidence. The correct paragraph reference is paragraph 56 of Exhibit 706, which supports the Chamber's finding on Delić's receipt of bulletins by packet communication when travelling:⁴⁰⁴

To your question about how Rasim DELIĆ was updated when he

⁴⁰⁰ Judgement, para.146; Delić Brief, para.228.

⁴⁰¹ Vučković, T.5111-5112 (open session).

⁴⁰² See Exh.706 (containing no paragraph numbered "61" and two paragraphs numbered "63") (not confidential).

⁴⁰³ Delić Brief, para.232.

⁴⁰⁴ Exh.706, para.56 (not confidential).

travelled, I only know that [*sic*] received information *via* packet communication system; copies of documents were also sent by courier. Rasim DELIĆ probably also had a satellite telephone.

140. Given that this evidence was in the record – within the very same exhibit referred to in the Judgement, just five paragraphs earlier⁴⁰⁵ – the Chamber’s mistaken reference to paragraph 61 of Exhibit 706 did not result in a “grossly unfair outcome”⁴⁰⁶ warranting intervention.

(ii) Exhibit 377 supports the Chamber’s finding that the bulletins were sent to Delić

141. Delić’s assertion that there is “no evidence” that any of the bulletin cover letters in Exhibit 377 were sent to him by packet communication⁴⁰⁷ is inaccurate. Enver Berbić, whose testimony Delić cites for his assertion,⁴⁰⁸ testified that the documents comprising Exhibit 377 are “original” versions that remained in Sarajevo, other versions of which were then “sent to Kakanj *via* cryptographic protection.”⁴⁰⁹ He further clarified that the handwritten note on each of the Exhibit 377 cover pages, states the date and time the document was sent and constitutes the “standard notation if a document is being sent by packet communication.”⁴¹⁰ Džemal Vučković’s trial testimony and witness statement similarly confirm that cover letters and bulletins were sent to KM Kakanj by packet communication.⁴¹¹ Vučković’s testimony is particularly significant because his initials appear on the majority of the Exhibit 377 cover letters.⁴¹²

142. Moreover, the testimony Delić cites to support his contention that documents sent by packet communication had a “special format”⁴¹³ does not contradict the

⁴⁰⁵ *Blaškić* AJ, para.13 (holding that on appeal, Appeals Chamber can consider, *inter alia*, “evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote”).

⁴⁰⁶ *Kvočka* AJ, para.18 (internal quotation marks omitted).

⁴⁰⁷ Delić Brief, para.235.

⁴⁰⁸ Delić Brief, fn.341.

⁴⁰⁹ Berbić, T.2429 (open session).

⁴¹⁰ Berbić, T.2429 (open session).

⁴¹¹ *See* Vučković, T.5132-5133 (open session) (stating that page 64 of Exh.377 was used as a way to send Bulletin 161 through Arnautović to Delić “and this was obviously sent by – or through the packet communication system. In other words, electronically”); Exh.706, para.56 (not confidential).

⁴¹² *See generally* Exh.377(not confidential); Vučković, T.5132 (open session).

⁴¹³ Delić Brief, para.235, fn.341.

evidence that the Exhibit 377 cover letters were sent to KM Kakanj by packet communication. In general, it supports such evidence.

143. Sead Delić's cited testimony,⁴¹⁴ while not addressing Exhibit 377, confirms that Exhibit 375 was sent by packet communication.⁴¹⁵ His explanation of the procedure for sending documents by packet communication and the format of the documents within Exhibit 375 support the conclusion that the Exhibit 377 cover letters were sent to KM Kakanj by packet communication.

144. In particular, Sead Delić confirmed that a document sent *via* packet communication goes through more than one version – beginning with a stamped and signed original that is subsequently converted into a text-only “original” for electronic transmission.⁴¹⁶ This text-only version includes a heading above a horizontal line that, *inter alia*, indicates that encryption was used, as well as a “received by” line.⁴¹⁷ It is this text-only version that Sead Delić spoke of when agreeing with the Defence's assertion that this type of heading is expected on a document sent by packet communication.⁴¹⁸ Exhibit 375, however, also contains a stamped and signed original, which resembles the documents in Exhibit 377 and, like them, contains a handwritten note in the lower left corner indicating the date and time the document was sent *via* packet communication.⁴¹⁹ The reasonable inference is that the cover letters in Exhibit 377 are the originals that were then converted into text-only documents and sent to KM Kakanj.

145. The portion of Berbić's testimony that Delić cites⁴²⁰ simply confirms that there are several ways to ascertain that a document was sent *via* packet communication. For example, the document could be “registered with the receiver” or “noted down in the protocol forms.” Berbić did not testify that these are the only ways to check the status of a document.⁴²¹ Further, Berbić confirmed that the documents in

⁴¹⁴ Sead Delić, T.2881-2884 (open session) (cited in Delić Brief, fn.341).

⁴¹⁵ Sead Delić, T.2881 (open session).

⁴¹⁶ Sead Delić, T.2882-2883 (open session).

⁴¹⁷ Sead Delić, T.2883 (open session).

⁴¹⁸ Sead Delić, T.2884 (open session).

⁴¹⁹ See Exh.375 (not confidential) at D000-2231 (BCS version); D000-2236 (English translation); Sead Delić, T.2882 (open session).

⁴²⁰ Berbić, T.2378-2379 (open session) (cited in Delić Brief, fn.341).

⁴²¹ Berbić, T.2379 (open session).

Exhibit 377 are not the text-only received versions of documents sent by packet communication, but rather the signed and stamped originals.⁴²²

146. Edin Sarić's cited testimony⁴²³ relates to [REDACTED]:

[REDACTED].⁴²⁴

Reliance on Sarić's testimony to support assertions regarding the "special format"⁴²⁵ of documents sent by packet communications is thus misplaced.

147. [REDACTED]⁴²⁶ [REDACTED].⁴²⁷ [REDACTED]. The same is true of Fadil Imamović's cited testimony⁴²⁸ relating to Exhibit 577, which also contains a "received" stamp.⁴²⁹ Imamović's testimony confirms that the original versions of documents sent through electronic encryption can look different from the versions received on the other end.⁴³⁰

(iii) Vučković's testimony supports the Chamber's finding that the bulletins were sent to Delić

148. The Chamber correctly relied on Vučković's testimony. Contrary to Delić's suggestion, Vučković did not state that one of the documents in Exhibit 377 "was either sent by --- (translation missing) or through the packet communication system."⁴³¹ Vučković stated that page 64 of Exhibit 377 "was obviously sent by – or through the packet communication system. In other words, electronically."⁴³²

149. This testimony clearly supports the Chamber's conclusion that documents were generally sent to Delić at KM Kakanj *via* packet communication.

⁴²² Delić Brief, fn. 342; Berbić, T.2449-2450 (open session).

⁴²³ Sarić, T.6001 (cited in Delić Brief, fn.341) (open session).

⁴²⁴ [REDACTED].

⁴²⁵ Delić Brief, para.235.

⁴²⁶ [REDACTED].

⁴²⁷ [REDACTED].

⁴²⁸ Imamović, T.4052-4053 (open session) (cited in Delić Brief, fn.341).

⁴²⁹ Imamović, T.4051 (open session).

⁴³⁰ Imamović, T.4053 (open session).

⁴³¹ Delić Brief, para.237 (purportedly quoting Vučković, T.5132-5133) (emphasis in original).

⁴³² Vučković, T.5132-5133 (open session).

(c) Subground 2(C): The Chamber correctly found that information in the bulletins was conveyed to Delić

(i) There was a strong evidentiary basis for the Chamber's conclusion

150. Contrary to Delić's assertion,⁴³³ the Chamber's conclusion that Delić routinely received information contained in the bulletins has a strong evidentiary foundation. Delić assumes that findings of fact cannot be based on circumstantial evidence. The Appeals Chamber has repeatedly stated otherwise and has made clear that, regardless of whether evidence is direct or circumstantial, the same "reasonableness" standard of appellate review applies.⁴³⁴

151. Here, the Chamber relied on detailed evidence about the sophisticated system for conveying the bulletins to conclude that Delić received them. The Chamber rigorously evaluated the testimony and exhibits before it, finding that:

- the bulletins "were distributed according to a standard procedure"⁴³⁵ and sent to only five of the most senior members of the RBiH Government and the ARBiH, including Delić;⁴³⁶
- the bulletins "were placed in a sealed envelope and sent on a daily basis by the Security Administration to Rasim Delić personally";⁴³⁷ and
- the bulletins "contained sensitive information and had to be returned to the Chief of the Security Administration."⁴³⁸

152. Relying on Vučković's Rule 92ter Statement, his testimony, and Exhibit 377, the Chamber concluded that when Delić was travelling, "the bulletins were generally sent to him by packet communication, including when he was at the KM Kakanj."⁴³⁹ The officers at KM Kakanj usually knew where Delić was.⁴⁴⁰ The Chamber also

⁴³³ Delić Brief, para.241.

⁴³⁴ E.g., *Brdanin* AJ, para.13; *Galić* AJ, para.9; see also Judgement, para.28 (correctly recognizing that convictions may properly rest on circumstantial evidence).

⁴³⁵ Judgement, para.146.

⁴³⁶ Judgement, para.146, citing Exh.376 (not confidential). *Above*, para.124.

⁴³⁷ Judgement, para.480.

⁴³⁸ Judgement, para.480 (citing Judgement paras.146, 152).

⁴³⁹ Judgement, para.146.

⁴⁴⁰ Judgement, para.153.

found that Delić frequently returned the bulletins with his own handwritten comments and suggestions, demonstrating he in fact received them.⁴⁴¹ The cover letters in Exhibit 377 were sent in succession to KM Kakanj over a period of time showing that the distribution system functioned effectively. This compels the inference that the information in bulletins sent to KM Kakanj reached Delić.

153. Taking all the findings and evidence together, the Chamber reasonably concluded that the information contained in the bulletins was “routinely conveyed” to Delić.⁴⁴² This conclusion was based on both direct and circumstantial evidence. It is inaccurate to claim, as Delić does, that it was based on no evidence.

(ii) The Chamber considered evidence about the operating circumstances of the ARBiH and the functioning of KM Kakanj

154. Contrary to Delić’s allegation,⁴⁴³ the Chamber considered evidence regarding the ARBiH’s operating circumstances and the functioning of KM Kakanj. The Chamber cited and discussed the same evidence Delić now relies on to argue that his Chief of Staff took over in his absence.⁴⁴⁴ The Chamber also considered Berbić’s testimony, which Delić cites, regarding his handling of the bulletins he received at KM Kakanj.⁴⁴⁵ It also discussed other evidence regarding the transmission of information:

- when Delić was at KM Kakanj (noting he was there only rarely);
- when Delić visited a specific corps; and
- when the Chef de Cabinet was unable to reach Delić.⁴⁴⁶

The Chamber further considered evidence on the “flow of information” along the ARBiH chain of command, the problem of distorted reports received from subordinate units and the unreliability of some information arriving from the field.⁴⁴⁷

⁴⁴¹ Judgement, para.146.

⁴⁴² Judgement, para.480.

⁴⁴³ Delić Brief, paras.242-247.

⁴⁴⁴ Delić Brief, para.243 (citing Exh.370, p.1) (not confidential); Judgement, paras.148-150.

⁴⁴⁵ Delić Brief, para.244-245; Judgement, para.154.

⁴⁴⁶ Judgement, paras.153-154.

⁴⁴⁷ Judgement, paras.148-150.

155. While the Chamber may not have specifically discussed the portion of Dedović's testimony that Delić cites,⁴⁴⁸ it "duly considered and [gave] appropriate weight to *all* the evidence adduced at trial, even if not expressly referred to in the Judgement."⁴⁴⁹ The Appeals Chamber presumes "that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence."⁴⁵⁰ There is no such indication here and Delić fails to substantiate his assertion that the Chamber "simply ignored this evidence."⁴⁵¹

(iii) The Chamber's conclusion that information in bulletins was routinely conveyed to Delić is consistent with its factual findings

156. The Chamber's conclusion that information in bulletins was routinely conveyed to Delić did not conflict with its other findings.⁴⁵² Even if the Chamber found that, in Delić's absence, Berbić handed bulletins "to the Chief of Staff of the Main Staff, or otherwise, to the most senior administration officer present,"⁴⁵³ this does not contradict the conclusion that the information in the bulletins was routinely conveyed to Delić.⁴⁵⁴ That Berbić may have physically handed the bulletins to others in Delić's absence does not mean the information within them was not subsequently communicated to Delić or otherwise available to him. Given the purpose of the bulletins, their strictly confidential nature and limited distribution, together with the fact that they were sent for Delić's special benefit, such a conclusion is reasonable, particularly given other evidence that Delić received information while travelling.⁴⁵⁵

(d) Subground 2(D): The Chamber correctly found that Bulletin 137 was available to Delić

157. Delić misinterprets the Chamber's finding regarding the availability of Bulletin 137 when he was travelling on official mission. The Chamber did not find

⁴⁴⁸ Dedović, T.8203-8204 (open session) (cited, *inter alia*, in Delić Brief, fn.352). The irrelevance of this testimony to the Chamber's finding that Delić routinely received the information contained in the bulletins is addressed fully *below* para.160.

⁴⁴⁹ Judgement, para.22 (emphasis in original).

⁴⁵⁰ *Kvočka* AJ, para.23 (internal footnotes omitted).

⁴⁵¹ Delić Brief, para.247.

⁴⁵² *Contrast* Delić Brief, para.248.

⁴⁵³ Judgement, para.154.

⁴⁵⁴ *Contrast* Delić Brief, para.248.

⁴⁵⁵ Judgement, paras.138, 146, 153.

that Bulletin 137 was “*theoretically* (but not actually) *available*” to Delić.⁴⁵⁶ It carefully assessed the circumstances under which the bulletins were created and distributed to conclude that the information contained within the bulletins, including Bulletin 137, was actually available to Delić, even when travelling on official mission.

158. This point is reinforced by comparing the Chamber’s approach to open-source documents to determine whether Delić had notice of the September 1995 Kesten and Kamenica crimes. The Chamber noted that two October 1995 articles published in ARBiH publications contained references to “Chetnik officers” captured by the EMD and that, as open-source documents, the articles were “in principle” accessible to Delić.⁴⁵⁷ However, the Chamber held that

*unlike the bulletins which were provided specifically to Rasim Delić and which contained sensitive information, there is no evidence on the distribution or circulation of [the two ARBiH newspapers], whether Rasim Delić was ever provided with a copy, and whether the information contained therein was brought to his attention.*⁴⁵⁸

For these reasons, the Chamber could not “infer[] that the *information* contained in an open source document was ‘available’ to Rasim Delić” and stressed that “the flow of information must strictly be assessed on a case-by-case basis.”⁴⁵⁹

159. The Chamber strictly assessed the flow of information in the bulletins and concluded that “*the information contained in Bulletin 137*” was still available to Delić when travelling on official mission.⁴⁶⁰

160. Nothing in Dedović’s testimony⁴⁶¹ contradicts this. Dedović claimed that Delić did not receive documents in the field and that such documents would be received by the Chief of Staff.⁴⁶² However, when asked by Judge Harhoff whether the

⁴⁵⁶ Delić Brief, para.251.

⁴⁵⁷ Judgement, para.530.

⁴⁵⁸ Judgement, para.530 (emphasis added).

⁴⁵⁹ Judgement, para.530 (emphasis in original). *See also* Judgement, paras.502-503 (in the absence of bulletins conveying to Delić information about incidents described in particular reports of the 1st and 3rd Corps, the Chamber found that knowledge of the incidents could not be imputed to him).

⁴⁶⁰ Judgement, para.481 (emphasis added).

⁴⁶¹ Delić Brief, paras.254-255. *See also* Delić Brief, paras.246, 249.

⁴⁶² Dedović, T.8203-8204 (open session).

Chief of Staff would then relay the information to Delić, Dedović stated he did not know one way or the other.⁴⁶³ At any rate, the Chamber considered evidence suggesting that in Delić's absence the bulletins were delivered to the Chief of Staff and nevertheless concluded that the information contained therein was routinely conveyed to Delić.⁴⁶⁴

161. Finally, Delić's argument that there was no evidence he "familiarized himself" with the information in Bulletin 137 is misplaced.⁴⁶⁵ As discussed previously, there was circumstantial evidence to this effect, which the Chamber considered.⁴⁶⁶ Based on this evidence, it was reasonable to infer that Delić actually acquainted himself with the information in Bulletin 137. However, it was unnecessary for the Chamber to make such a finding because actual familiarization is not the legal standard. Having information addressed to Delić for his special benefit was legally sufficient.⁴⁶⁷

(e) Subground 2(E): The Chamber correctly found that Delić had information available to him about VRS prisoners

162. Sub-ground 2(E) repeats Delić's argument in Sub-ground 2(D), since the Chamber's finding that Delić had information available to him regarding the VRS prisoners is based on Bulletin 137.⁴⁶⁸ The response to Sub-ground 2(D) is incorporated by reference.

(f) Subground 2(F): The Chamber correctly found that Delić had available to him "alarming information"

(i) The Chamber correctly found that Delić was informed *via* the bulletins of EMD members' history of violent and criminal behaviour

163. Delić again argues that the Chamber erred in concluding he was informed *via* bulletins of EMD members' history of violent and criminal behaviour.⁴⁶⁹ The

⁴⁶³ Dedović, T.8204 (open session).

⁴⁶⁴ Judgement, para.480. *See also* Judgement, para.281, referring to Exh.377 (not confidential); Exh.377, p.57 (not confidential).

⁴⁶⁵ Delić Brief, para.257.

⁴⁶⁶ *Above*, paras.123-128.

⁴⁶⁷ *Below*, para.175.

⁴⁶⁸ *See* Delić Brief, para.260, fn.366 (cross-referencing argument contained in Sub-ground 2(D)).

⁴⁶⁹ Delić Brief, paras.263, 277-282.

Prosecution incorporates by reference its response to Sub-grounds 2(B), 2(C), and 2(D).

(ii) The information in the bulletins regarding EMD members' history of violent and criminal behaviour rendered the information in Bulletin 137 sufficiently alarming

a. Delić mischaracterises the content of the bulletins

164. In an attempt to minimise the significance of the bulletins describing the violent criminal propensity of EMD members,⁴⁷⁰ Delić mischaracterises their content. First, he suggests that certain bulletins refer to “unspecified” violent behaviour and violations of public law and order.⁴⁷¹ While the language in the Judgement describes one of these bulletins in general terms,⁴⁷² the bulletins themselves contain specific descriptions of the violent conduct.⁴⁷³

165. The bulletins recount a disturbing pattern of violent behaviour by EMD members, for the most part against individuals taking no active part in hostilities. In a span of eleven months, Delić was informed *via* bulletins of:⁴⁷⁴

- violent threats made by EMD members against civilians, including women, Roman Catholic priests, Croatian children, and a video-shop owner;⁴⁷⁵
- physical beatings by EMD members of children and young couples in the streets;⁴⁷⁶
- violent abductions and beatings by EMD members of a war invalid, young girls, and others;⁴⁷⁷

⁴⁷⁰ Judgement, para.501.

⁴⁷¹ Delić Brief, para.264.

⁴⁷² See Judgement, para.501(i).

⁴⁷³ Above, para.129.

⁴⁷⁴ Judgement, para.501.

⁴⁷⁵ Exh.721, p.2; Exh.722, p.3; Exh.737, pp.2-3 (all not confidential).

⁴⁷⁶ Exh.723, p.4; Exh.725, p.4; Exh.963, pp.1-2 (all not confidential).

⁴⁷⁷ Exh.727, p.3; Exh.963, pp.1-2; Exh.733, pp.3-4; Exh.738, p.2 (all not confidential).

- the violent desecration of tombs in a Catholic cemetery by EMD members;⁴⁷⁸ and
- threats of slaughter of all Croats and Serbs made by EMD members to soldiers in the 328th Brigade, as well as the physical assault of such soldiers.⁴⁷⁹

These bulletins often noted the increasing number of violent and disturbing incidents perpetrated by EMD members and regularly referred to such behaviour as “frequent,” “routine” and occurring “often.”⁴⁸⁰ Delić recognised the recurrent pattern of violent behaviour when, after receiving information that EMD members harassed young people in the streets and destroyed an orthodox cemetery, he returned the bulletin to the Security Administration with the handwritten note: “Proposal to finally resolve this!”⁴⁸¹

166. Contrary to Delić’s suggestion,⁴⁸² these were not rare, minor or isolated incidents. Delić was informed – through a steady stream of bulletins in a short time period – of the frequent, regular occurrence of serious and violent misconduct by EMD members.⁴⁸³

167. Delić also mischaracterises Bulletin 211’s content.⁴⁸⁴ The Chamber relied on Bulletin 211 for its description of a beating of a little girl by an EMD member because she was wearing a skirt.⁴⁸⁵ The Chamber does not rely on the more general reference in Bulletin 211 to misconduct by “persons of Arab descent.”⁴⁸⁶

b. Delić’s attempt to qualify the importance of the bulletins fails

168. Delić argues that because some incidents described in the bulletins involved the mistreatment of local Muslims or ARBiH members, such information could not

⁴⁷⁸ Exh.731, p.4 (not confidential).

⁴⁷⁹ Exh.736, p.7; Exh.740, p.3 (all not confidential).

⁴⁸⁰ Exh.727, p.3; Exh.722, p.3; Exh.963, p.2; Exh.725, p.4; Exh.736, p.7; Exh.738, p.2 (all not confidential).

⁴⁸¹ Judgement, para.546; Exh.963, p.1 (not confidential).

⁴⁸² Delić Brief, paras.266-267.

⁴⁸³ Judgement, paras.501, 505, 509.

⁴⁸⁴ Delić Brief, para.269.

⁴⁸⁵ Judgement, fn.1254 (citing Bulletin 211 for its reference to EMD members “who beat a girl who was wearing a skirt in Krpeljčić”).

render the capture of VRS soldiers by the EMD alarming.⁴⁸⁷ If anything, the opposite is true. EMD members' willingness to violently mistreat adherents of their own faith and other ARBiH members must have signalled to Delić that EMD members would have few qualms about mistreating captured enemy personnel. Likewise, the fact that the behaviour described in the bulletins was committed by certain EMD members does not reduce its value in assessing the criminal propensity of EMD members generally.⁴⁸⁸

169. The salient point is that the bulletins informed Delić of a troubling frequency of violent misconduct by EMD members. These were not unusual, isolated incidents perpetrated by a few rogue elements. The bulletins recount frequent, regular, and usually violent misconduct by EMD members. Against this backdrop, the imprisonment of VRS soldiers by EMD members was sufficiently alarming to require further inquiry and immediate follow up by Delić.

170. Moreover, the Chamber's comment that the bulletins "did not report the commission of war crimes by members of the EMD"⁴⁸⁹ does not lessen their relevance in assessing the EMD's propensity to commit the crimes at issue.⁴⁹⁰ The bulletins' significance is the underlying violent and abusive conduct reported, not the formal legal label placed on such conduct.⁴⁹¹ The question is not whether EMD members had committed war crimes before; it is whether Delić had alarming information putting him on notice that they might commit war crimes against the VRS prisoners in the future. Given that Delić was informed of frequent instances of violent mistreatment against Croat and Serb members of the ARBiH, as well as against persons taking no active part in the hostilities, including women and children, Delić had notice of the risk that EMD members might mistreat the VRS prisoners.⁴⁹²

⁴⁸⁶ Exh.723, p.4 (not confidential).

⁴⁸⁷ Delić Brief, paras.264, 270.

⁴⁸⁸ *Contrast* Delić Brief, para.268.

⁴⁸⁹ Judgement, para.506.

⁴⁹⁰ *Contrast* Delić Brief, para.265.

⁴⁹¹ *Above*, para.188-190.

⁴⁹² In addition, it is not clear that Delić or the Chamber are correct in suggesting that the misconduct described in the bulletins did not constitute war crimes. So long as it was closely related to the hostilities, EMD members' mistreatment of persons taking no active part in the hostilities may well have amounted to war crimes. *See* Judgement, para.41. However, the Chamber was right to conclude that, for the purpose of determining Delić's inquiry notice, it did not matter what legal label was placed on the reported misconduct.

c. The bulletins were a critical tool for keeping Delić up to date

171. Delić attempts to further minimise the significance of the bulletins by claiming they were unreliable and contained unverified and tentative “raw information.”⁴⁹³ This characterisation ignores the rigorous filtering and summarisation process that information in the bulletins went through, whereby only the most important information received from ARBiH security organs was included in them.⁴⁹⁴ It also ignores the Chamber’s finding that “[a]lthough the information contained in the bulletins may not always have been accurate, they were a critical tool through which Rasim Delić was kept up to date of relevant developments.”⁴⁹⁵

172. The fact that these bulletins were prepared for only five of the most senior government and army officials⁴⁹⁶ reveals the significance and importance of the information in them. These were not documents to be read lightly and ignored. They were documents containing sensitive information for Delić, the President, the Vice-President, and two others – documents that were so important all copies had to be returned in a sealed envelope to the Security Administration.⁴⁹⁷

173. Delić essentially argues that all EMD misconduct reported in the bulletins would have to be fully investigated and confirmed before Delić was required to act on the information regarding the capture of VRS personnel by the EMD. Inquiry notice does not require a commander to have knowledge of a certainty or even a substantial likelihood that criminal acts will occur; it requires proof that the superior had notice of alarming information signalling the risk that crimes might occur requiring follow up.⁴⁹⁸ The combined information in the bulletins, including Bulletin 137, meets this standard.

174. The bulletins sent to Delić reported “numerous instances of misconduct involving EMD members, some of which amounted to criminal offences.”⁴⁹⁹ The Chamber rightly gave this evidence significant weight in determining the information available to Delić. The Chamber’s analysis is not undermined by the witness

⁴⁹³ Delić Brief, paras.271-274.

⁴⁹⁴ *Above*, paras.123-128.

⁴⁹⁵ Judgement, para.500. *See also* Judgement, para.479.

⁴⁹⁶ *Above*, para.124.

⁴⁹⁷ *Above*, para.124.

⁴⁹⁸ *Strugar* AJ, para.304.

⁴⁹⁹ Judgement, para.501.

testimony Delić cites suggesting other ARBiH officials were unaware of the EMD's criminal propensity.⁵⁰⁰ Further, the fact that the Chamber did not specifically refer to the cited portions of witness testimony⁵⁰¹ does not mean it failed to consider it.⁵⁰²

(g) Subground 2(G): The Chamber correctly applied the “had reason to know” standard for superior responsibility

175. Contrary to Delić's argument,⁵⁰³ the Chamber applied the correct “had reason to know” standard for superior responsibility.⁵⁰⁴ Actual familiarisation with the sufficiently alarming information is not the relevant legal standard. As the Appeals Chamber in *Čelebići* established, the alarming information “only needs to have been provided or available to the superior, or [...] ‘in the possession of’ [the superior]. It is not required that he actually acquainted himself with the information.”⁵⁰⁵ This is settled law.⁵⁰⁶ Delić advances no cogent reasons to depart from it.⁵⁰⁷

176. The rationale behind holding superiors responsible based on alarming information in their possession, even if they have not acquainted themselves with it, is twofold. First, while superiors need not acquire information about their subordinates, they are expected to stay abreast of information that is provided to them. For this reason, a commander cannot “absolve himself from responsibility by pleading ignorance of reports addressed to him, or by invoking temporary absence as an excuse.”⁵⁰⁸ World War II case-law underscores this principle:

Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears

⁵⁰⁰ Delić Brief, paras.275-276.

⁵⁰¹ Delić Brief, fns.[REDACTED]-386.

⁵⁰² *Kvočka* AJ, para.23.

⁵⁰³ Delić Brief, paras.286-289.

⁵⁰⁴ Judgement, paras.63, 65, 66, 477, 479. *See also* Judgement, paras.545, 553.

⁵⁰⁵ *Čelebići* AJ, para.239. *See also* Judgement, paras.66, 479 – which Delić challenges – citing this passage. *See further* *Čelebići* AJ, para.238.

⁵⁰⁶ *E.g. Blaškić* AJ, para.62, cited in Judgement, para.65 (noting that the *Čelebići* Appeal Judgement has settled the issue of the interpretation of the standard of “had reason to know.”)

⁵⁰⁷ *Aleksovski* AJ, para.107.

⁵⁰⁸ ICRC Commentary, para.3545.

on their face, constitutes a dereliction of duty which he cannot use in his own behalf.⁵⁰⁹

177. Secondly, it is virtually impossible to prove whether a superior actually read a document in his possession. It is reasonable in these circumstances to infer that superiors have knowledge of the contents of documents specifically addressed to them for their benefit. As the Chamber found,⁵¹⁰ citing the *Hostage* case, “an army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit.”⁵¹¹ Moreover, if the standard required proof that superiors acquainted themselves with the information, wilfully blind commanders could escape criminal responsibility. Consequently, courts handling superior responsibility cases “may in suitable instances have regarded means of knowledge [as where a document is in the superior’s possession] as being the same as knowledge itself.”⁵¹² Commentary on World War II case-law emphasizes that

whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained.⁵¹³

178. In sum, when alarming information is in their possession, superiors are not entitled to do nothing and wait until they have actual knowledge of the commission of crimes by subordinates.⁵¹⁴ The “had reason to know” standard puts the onus on the superior to intervene early to take the necessary and reasonable measures to exert control. This is the most effective formula for ultimately preventing crimes during armed conflict.⁵¹⁵

⁵⁰⁹ *Hostage* case, p.1271.

⁵¹⁰ Judgement, para.479.

⁵¹¹ *Hostage* case, p.1260. This principle was adopted in the *High Command* case as a correct statement of the law: “Want of the knowledge of the contents of reports made to him (i.e., to the commanding general) is not a defense. Reports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.” *High Command* case, pp.602-603, citing *Hostage* case p.1271.

⁵¹² UNWCC Law Reports, p.94, cited in *Čelebići* AJ, para.229.

⁵¹³ UNWCC Law Reports, pp.94-95, citing 39 *Am. Jur.*, pp.236-237, sec.12.

⁵¹⁴ Judgement, para.66, citing *Strugar* AJ, para.416.

⁵¹⁵ Prosecution Brief, para.20. *See also* ICRC Commentary, para.3550: “[At the level of the troops] everything depends on commanders, and without their conscientious supervision, general legal requirements [to respect IHL] are unlikely to be effective.”

179. The Chamber correctly applied this reasoning.⁵¹⁶ In assessing the availability to Delić of alarming information, it was careful to assess the flow of information “strictly” in the circumstances of Delić’s case, taking into account his specific situation at the time in question.⁵¹⁷

180. Nothing in the passages of the *Hadžihasanović* Appeal Judgement cited by the Chamber⁵¹⁸ departs from the “had reason to know” standard established in the *Čelebići* Appeal Judgement.⁵¹⁹

181. The *Krnjelac* Appeal Judgement does not stand for the proposition that alarming information must be in the accused’s actual knowledge to satisfy the “had reason to know” standard.⁵²⁰ In that case, the accused was put on notice that subsequent crimes might be carried out as a result of witnessing a beating. However, this does not demonstrate that, as a matter of law, the accused needs to have actual knowledge of “alarming information.”⁵²¹

(h) Sub-ground 2(H): The Chamber’s “acceptance of the risk” standard did not invalidate the decision

182. The Chamber did not err in law invalidating the decision⁵²² when it concluded that Delić accepted the risk that crimes were about to be or had been committed.⁵²³ This surplus finding does not invalidate the Chamber’s conclusion that Delić had the required *mens rea* for Article 7(3) responsibility.

183. According to Delić, the conclusion that he accepted the risk of the crimes in Livade and in the Kamenica Camp required the Chamber to find that he actually acquainted himself with the information in Bulletin 137.⁵²⁴ As explained above, the Chamber did not need to make this finding because actual familiarisation is not the legal standard.

⁵¹⁶ Judgement, paras.66, 479, 500.

⁵¹⁷ Judgement, para.530, citing *Čelebići* AJ, para.239. *See also above*, paras.158-159.

⁵¹⁸ Judgement, para. 477, citing *Hadžihasanović* AJ, paras.27-28, 30.

⁵¹⁹ *Contrast* Delić Brief, paras.285-286. *See also Strugar* AJ, paras.297-298 (identical to *Hadžihasanović* AJ, paras.27-28).

⁵²⁰ *Contrast* Delić Brief, para.287.

⁵²¹ *Krnjelac* AJ, para.169. There were additional factors which, in combination with witnessing the beating, put Krnjelac on notice: *see Krnjelac* AJ, para.171.

⁵²² *Contrast* Delić Brief, para.293.

⁵²³ Judgement, para.512.

⁵²⁴ Delić Brief, para.291.

184. The Chamber also did not need to find that Delić accepted the risk of crimes. The Appeals Chamber has found that “sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out [or have already been carried out] by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute.”⁵²⁵

185. The Chamber correctly applied this law when it found that, as a result of the sufficiently alarming information in his possession justifying further inquiry, Delić had the *mens rea* required for Article 7(3) responsibility.⁵²⁶ For the purposes of Delić’s Article 7(3) responsibility, therefore, the Chamber did not need to make the additional finding that Delić accepted the risk that crimes were about to be or had been committed.⁵²⁷ However, the Chamber’s surplus finding does not invalidate its conclusion that Delić “had reason to know that members of the EMD were about to commit or had committed the crime of cruel treatment against these detainees.”⁵²⁸

186. Delić further argues that the Chamber could not determine whether he received the alarming information prior to the commission of the crimes because it stated that Delić accepted the risk that crimes were about to be *or* had been committed.⁵²⁹ This language simply reflects the fact that the Majority convicted Delić for failing to both prevent the crimes and to punish the perpetrators based on the alarming information he possessed. It does not suggest Delić did not have the information until after the crimes occurred. The Chamber clearly found Delić had notice as of 22 July 1995.⁵³⁰

(i) Sub-ground 2(I): Withdrawn⁵³¹

(j) Sub-ground 2(J): The Chamber correctly applied principles concerning specificity of notice

187. Delić wrongly argues that the information in the bulletins did not put Delić on notice of “[war] crimes of cruel treatment perpetrated by the EMD against VRS

⁵²⁵ *Strugar* AJ, para.304.

⁵²⁶ Judgement, paras.63, 66, 477, 483, 492, 497, 511.

⁵²⁷ Judgement, paras.505, 512.

⁵²⁸ Judgement, para.513.

⁵²⁹ Judgement, para.512; Delić Brief, para.292 (emphasis added).

⁵³⁰ Judgement, para.482.

⁵³¹ Memorandum Regarding Defence Appellant’s Brief, 29 December 2008, para.2.

detainees.”⁵³² Implicit in Delić’s reasoning is the notion that the superior must have reason to know of a specific crime, particularised by factors such as: (i) the category of victim (captured combatants), and (ii) the legal characterisation of the crime (a war crime – committed “during combat”).⁵³³

188. However, Appeals Chamber case-law confirms that Article 7(3) does not require notice of specific details of crimes committed or about to be committed. General information putting the superior on notice of possible unlawful acts by his subordinates is sufficient to trigger the superior’s duty to act.⁵³⁴ This could include information on his troops’ “violent or unstable character” or their drinking. Similarly, the ICRC Commentary to Article 86 of API lists as factors putting a superior on notice that crimes are about to be or have been committed matters such as troops’ lack of instruction on the Geneva Conventions and the absence of express instructions relating to the treatment of prisoners of war.⁵³⁵

189. Contrary to Delić’s submissions,⁵³⁶ the *Krnojelac* Appeal Judgement does not stand for the proposition that notice of specific details of the crimes is required. In that case, the Appeals Chamber confirmed the holding in *Čelebići* discussed above, interpreting it to mean that “the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed.”⁵³⁷ The *Krnojelac* Appeals Chamber required that a superior have notice of the risk of the acts underpinning the particular crime in question. So, for example, a superior would not be on notice of the crime of torture without having sufficiently alarming information about the risk of beatings inflicted for one of the prohibited purposes of torture.⁵³⁸ This interpretation was confirmed by the *Hadžihasanović* Appeals Chamber, which found that a superior’s failure to punish a particular crime is relevant to determining whether a superior possessed information sufficiently alarming to put him on notice of the risk that *similar crimes* might subsequently be carried out.⁵³⁹

⁵³² Delić Brief, para.298. *See also* Delić Brief, paras.294-299.

⁵³³ Delić Brief, paras.295, 298.

⁵³⁴ *Čelebići* AJ, para.238 (citing ICRC Commentary, para.3545). *See also* *Hadžihasanović* AJ, para.28; *Bagilishema* AJ, para.42; *see also* Judgement, para.66.

⁵³⁵ ICRC Commentary, para.3545.

⁵³⁶ Delić Brief, paras.296-298.

⁵³⁷ *Krnojelac* AJ, para.155.

⁵³⁸ *Krnojelac* AJ, para.155.

⁵³⁹ *Hadžihasanović* AJ, para.30.

190. In finding that the information putting Delić on notice of cruel treatment was insufficient to put him on notice of murder, the Chamber followed the *Krnjelac* and *Hadžihasanović* approach.⁵⁴⁰ The relevant issue is the factual circumstances of the underlying conduct, not the legal label placed on it.⁵⁴¹

191. Delić's approach to specificity of notice renders superior responsibility virtually meaningless. To relieve superiors of their obligation to take the necessary and reasonable measures to prevent or punish their subordinates' crimes unless they have exact information about those crimes or are certain of their commission runs counter to the notion of responsible command underpinning superior responsibility.⁵⁴²

192. Besides, the only reason Delić lacked "actual knowledge" of the specific crimes of his subordinates was because he failed to act in the face of alarming information in his possession.⁵⁴³ Even before Delić had information available to him that the EMD denied access to VRS prisoners, Delić had received a constant stream of reports showing EMD members' record of violent and criminal conduct, which called for further enquiry.⁵⁴⁴ Delić did not follow up on the information in Bulletin 137, or instruct anyone else to do so.⁵⁴⁵

193. Delić's argument that the Chamber's reference to a "holistic reading of the information reported in the bulletins"⁵⁴⁶ shows that it based its findings on insubstantial proof lacks merit.⁵⁴⁷ The Chamber merely referred to the concrete information in the bulletins taken as a whole.⁵⁴⁸

⁵⁴⁰ Judgement, paras.514-515. The Chamber also considered whether the killing of Paul Goodall meant Delić had reason to know that "similar crimes" would be committed in the future: Judgement, para.496.

⁵⁴¹ *Nahimana* AJ, para.840. *See also Naletilić* AJ, para.119 and fn.257.

⁵⁴² *Hadžihasanović* Superior Responsibility AD, para.16.

⁵⁴³ Prosecution Reply, para.12.

⁵⁴⁴ Judgement, paras.482, 501, 511.

⁵⁴⁵ Judgement, paras.512, 553.

⁵⁴⁶ Judgement, para.513.

⁵⁴⁷ Delić Brief, fn.399.

⁵⁴⁸ Except to state that it also misconstrues the Judgement, the Prosecution does not respond to the second argument in footnote 399 of Delić's Brief. *See above*, para.16.

V. GROUND 3: THE CHAMBER CORRECTLY FOUND THAT DELIĆ FAILED TO PREVENT AND PUNISH HIS SUBORDINATES' CRIMES

A. Overview of the Chamber's reasoning concerning Delić's failure to take measures to prevent and punish his subordinates' crimes

194. The Chamber found that Delić failed to take the necessary and reasonable measures to prevent and punish the cruel treatment of VRS prisoners by EMD members in Livade and in the Kamenica Camp in July and August 1995.⁵⁴⁹

1. Delić took no adequate steps to prevent the cruel treatment of the prisoners in Livade and in the Kamenica Camp

195. Delić's duty to prevent was triggered when Bulletin 137 became available to him on 22 July 1995⁵⁵⁰ and continued until the last act of cruel treatment was committed on 24 August 1995.⁵⁵¹ Despite being on notice of the risk that his EMD subordinates might cruelly treat the VRS prisoners, there was no evidence that Delić reacted in any way to this alarming information. In particular, there was no evidence that he, or anyone else acting under his command and control, attempted to inquire further about the fate of the VRS prisoners, ordered the EMD to hand them over or "took any other steps within the institutional framework of the ABiH to impede the imminent commission of the crimes."⁵⁵² Even allowing for the possibility that Delić reacted in some way to the alarming information, he certainly failed to take adequate steps to safeguard the prisoners.⁵⁵³

196. The determination of what constitutes "necessary and reasonable measures" is a matter of evidence, not law and is assessed on a case-by-case basis.⁵⁵⁴ Necessary

⁵⁴⁹ Judgement, para.556.

⁵⁵⁰ Judgement, paras.475, 481-482, 513, 542, 545.

⁵⁵¹ Judgement, para.545.

⁵⁵² Judgement, paras.512, 545, 548, 550.

⁵⁵³ Judgement, para.548. *See also* Judgement, para.544 (finding that Delić's general efforts to disseminate IHL were insufficient to discharge his duty to prevent the cruel treatment).

⁵⁵⁴ Judgement, para.76 citing *Hadžihasanović* AJ, para. 33; *Halilović* AJ, paras.63-64; *Blaškić* AJ, paras.72, 417; *Čelebići* TJ, para.394.

and reasonable measures may thus vary from case to case⁵⁵⁵ and depend on the superior's material ability to act in a specific situation.⁵⁵⁶

197. As the most senior ARBiH military commander, Delić had available to him an array of measures to control the EMD and to protect the VRS prisoners. Given his position as the most senior commander in the ARBiH military hierarchy, he had at his disposal the entire institutional framework of the army, including the Security Administration.⁵⁵⁷

198. As the Chamber specifically noted, Delić failed to order the Security Administration to apply measures against the EMD to ensure the safety of the prisoners.⁵⁵⁸ The Security Administration, which formed part of the Main Staff, was specifically responsible for, among other things, ensuring the security of enemy prisoners.⁵⁵⁹

199. Delić had used the Security Administration previously to address EMD-related problems. In particular, Delić authorised Operation *Vranduk* in which the Security Administration was ordered to oversee measures to “document and curb subversive and other counter-constitutional and illegal activities of a number of members of the ‘El-Mujahedin’ Detachment and their ties.”⁵⁶⁰ [REDACTED].⁵⁶¹ If all else proved ineffective, the EMD was to be disbanded.⁵⁶² Delić's use of the Security Administration to react strongly to the perceived subversive activities of EMD members stands in contrast to his inaction in the face of the alarming information about the VRS prisoners in the hands of the EMD.

200. The Chamber also noted that Delić failed to take any other steps within the framework of the ARBiH to prevent the commission of cruel treatment.⁵⁶³ By the time the crimes were committed in Livade and in the Kamenica Camp, Delić was in a “consolidated position” of command within the ARBiH which enabled him to enforce

⁵⁵⁵ *Blaškić* AJ, para.72, referring to *Aleksovski* AJ, paras.73-74; *Čelebići* AJ, para.206.

⁵⁵⁶ *Strugar* TJ, paras.372-374, 378; Judgement, para.76.

⁵⁵⁷ Judgement, para.110. The Security Administration supervised security organs of all units subordinated to the Main Staff. The Chief of Security Administration reported to Delić as Main Staff Commander.

⁵⁵⁸ Judgement, para.548.

⁵⁵⁹ Judgement, paras.109-110.

⁵⁶⁰ Judgement, paras.526, 522.

⁵⁶¹ [REDACTED].

⁵⁶² Judgement, para.526.

decisions upon his subordinates, including the EMD.⁵⁶⁴ Accordingly, Delić could have:

- ordered the EMD to release the prisoners;⁵⁶⁵
- ordered ARBiH officers to make further attempts to visit the detainees, and facilitated such attempts;⁵⁶⁶
- asked for reports and ordered further information gathering on the condition of the VRS prisoners when he met with the Corps Commanders at the KM Kakanj on 29 July 1995;⁵⁶⁷
- issued orders to investigate and clamp down on EMD members for their actions;⁵⁶⁸
- ordered 3rd Corps Commander Sakib Mahmuljin, who enjoyed the trust and respect of the EMD, to intervene;⁵⁶⁹
- disbanded (or threatened to disband) the EMD unless they complied with his orders to release the prisoners.⁵⁷⁰

201. Delić failed to take any of these steps and the Majority correctly held him accountable for his omissions.

⁵⁶³ Judgement, para.548.

⁵⁶⁴ Judgement, para.460.

⁵⁶⁵ Judgement, para.460 (Delić's power to issue orders to his subordinates).

⁵⁶⁶ Judgement, para.468, fn.1200. *See also* Judgement, paras.408, 409.

⁵⁶⁷ Judgement, paras.549-550. *See also* para.512.

⁵⁶⁸ *See* Judgement, para.449, fn.1159 (noting that, on 9 December 1994, Delić ordered the 3rd Corps command to "clamp down on illegal activities of the Guerilla Mujahedin and the EMD." While actual measures were taken against the Guerilla, no energetic steps were taken against the EMD in order not to spoil the relations with the EMD.) *See further* Judgement, paras.447-453 (noting that, in other cases, investigations were indeed conducted with a view to taking punitive measures against members of the EMD).

⁵⁶⁹ Judgement, para.470, fn.1203.

⁵⁷⁰ Judgement, para.469 (noting that Delić ultimately disbanded the EMD in December 1995). *See also* para.363.

2. Delić took no steps to punish his subordinates

202. The Chamber found that Delić failed to punish the cruel treatment committed by EMD members against VRS soldiers in Livade and in the Kamenica Camp in July and August 1995.⁵⁷¹

203. A superior's duty to punish includes at least an obligation to investigate possible crimes, to establish the facts and, if the superior has no power to sanction, to report them to the competent authorities.⁵⁷² The relevant consideration is what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.⁵⁷³

204. Delić had the material ability to investigate, take punitive measures and to initiate criminal proceedings against EMD members. There were other instances where Delić or other members of the ARBiH had initiated such action.⁵⁷⁴ For example:

- Two EMD members were arrested by a joint military-civilian force and criminal proceedings were instituted following the murder of Paul Goodall;⁵⁷⁵
- The Military Security Service filed a report on EMD members following an assault on a peacekeeper, leading to criminal proceedings being instituted;⁵⁷⁶
- The 3rd Military Police Battalion of the 3rd Corps instituted criminal proceedings against one EMD member for theft;⁵⁷⁷
- The 3rd Corps conducted an investigation concerning threats issued by EMD members against a Croat ARBiH soldier;⁵⁷⁸

⁵⁷¹ Judgement, para.555.

⁵⁷² *Strugar* TJ, para.376.

⁵⁷³ Judgement, para.76; *Strugar* TJ, para.378.

⁵⁷⁴ Judgement, paras.470, 447-453.

⁵⁷⁵ Judgement, para.448. The proceedings were not concluded because the suspects escaped from custody.

⁵⁷⁶ Judgement, para.452. The evidence is unclear as to who the crimes were reported to, what the result was and whether this occurred during or after the war. *See also* Šljuka, T.4318-4319, 4321-4324 (open session).

⁵⁷⁷ Judgement, para.452, fn.1164 (citing Exh.880 (not confidential)). The outcome of those proceedings is unknown.

- Delić authorized Operation *Vranduk*⁵⁷⁹ which, among other things, aimed at investigating three “registered crimes” where EMD members were suspects, as well as creating a list of crimes and other illegal activities by EMD members,⁵⁸⁰ and
- The Security Service of the 35th Division registered cases of EMD misconduct demonstrating that it considered those matters to fall within its competence. No energetic measures were taken in order not to spoil relations with the EMD.⁵⁸¹

205. By contrast, despite Delić’s ability to do so, no EMD member was investigated let alone referred for disciplinary or criminal proceedings with respect to the cruel treatment of the VRS prisoners.⁵⁸²

206. Delić failed to act on Bulletin 137 – and failed to make further inquiries to find out whether in fact the prisoners were being cruelly treated. As the Chamber noted, his failure to inquire and therefore to find out that the crimes had occurred cannot relieve him of his duty to punish the perpetrators.⁵⁸³ Delić had reason to know that the risk of cruel treatment had materialised into a reality and he should have followed up and punished the perpetrators. The Majority correctly held him responsible for his failure to do so.

B. General Response to Delić’s arguments: the use of force against the EMD was not the only possible measure to prevent the crimes

207. Delić’s arguments in Ground 3 rely heavily on his assertion that the use of force was his only option for preventing the EMD’s crimes.⁵⁸⁴ However, the Chamber’s analysis on necessary and reasonable measures is not premised on the

⁵⁷⁸ Judgement, para.451. There is no evidence of further action.

⁵⁷⁹ Judgement, para.526, fn.1294 [REDACTED]; Exh.964 (not confidential).

⁵⁸⁰ Exh.1035 (not confidential).

⁵⁸¹ Exh.583 (not confidential) cited in Judgement fn.1159.

⁵⁸² Judgement, para.554.

⁵⁸³ Judgement, paras.552-553.

⁵⁸⁴ Delić Brief, paras.308-312, 382-399.

assumption that Delić should have used force against the EMD. Delić tries to create a parallel with the *Hadžihasanović* case where none exists.⁵⁸⁵

208. In this case, the use of force against the EMD was not the only measure available to Delić to stop the crimes.⁵⁸⁶ The Chamber specifically found that Delić could have used the Security Administration or taken other steps within the institutional framework of the ARBiH to secure the prisoners.⁵⁸⁷ The use of force was not considered by the Chamber as a possible measure, let alone the only one.

209. The Chamber discussed witness testimony that taking measures against the EMD would necessarily entail conflict and found that such assertions were contradicted by the facts. As the Majority noted:

[s]everal 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, but this position is not borne out by facts adduced in the evidence. Rather than saying that nothing *could be done* to oppose undisciplined behavior of EMD members, the Majority finds that nothing *was* done or even *attempted* to be done, in particular in connection with the alleged violations of international humanitarian law during the detention of enemy soldiers and civilians by the EMD.⁵⁸⁸

210. The Chamber reinforced this conclusion by noting that criminal proceedings were instituted against foreign EMD members “in some instances of illegal behaviour, although not for violations of international humanitarian law.” This fact disproved the witness testimony that nothing could be done to discipline the EMD.⁵⁸⁹

⁵⁸⁵ See also above, paras.29-34.

⁵⁸⁶ Judgement, para.470.

⁵⁸⁷ Above, paras.198-199.

⁵⁸⁸ Judgement, para.468.

⁵⁸⁹ Judgement, paras.309, 470. See also above, para.204.

C. Specific Responses to Delić's arguments

1. Subground 3(A): The Chamber correctly concluded that Delić had the material ability to prevent and punish

211. Delić offers no argument in support of this subground.

2. Subground 3(B): The Chamber sufficiently specified the necessary and reasonable measures that Delić failed to take to prevent and punish

212. Contrary to Delić's assertion,⁵⁹⁰ a holistic reading of the Judgement confirms that the Chamber sufficiently specified the measures he failed to take. The Chamber was not required to provide any further reasoning.⁵⁹¹

213. As Delić acknowledges, the Chamber specifically stated that he failed to:

- request the Security Administration to apply measures against the EMD; and
- take any other steps within the institutional framework of the ARBiH to impede the imminent commission of crimes.⁵⁹²

214. The Chamber's findings throughout the Judgement detail the types of preventative measures that could have been taken within these two general categories. For example, as noted above, Delić could have ordered the EMD to release the prisoners and he could have ordered his subordinates to collect more information about the condition of the prisoners. If all else failed, Delić could have disbanded (or threatened to disband) the EMD.⁵⁹³

215. The Chamber's findings concerning the types of measures at Delić's disposal are consistent with existing case-law. According to these precedents, measures to prevent crimes may include steps such as issuing orders to stop or prohibit crimes and securing the implementation of such orders.⁵⁹⁴ They may also include protesting

⁵⁹⁰ Delić Brief, paras.303-305 (referring to Judgement, paras.548, 550).

⁵⁹¹ See *Nahimana AJ*, para.792.

⁵⁹² Judgement, para.548. See Delić Brief, para.302.

⁵⁹³ *Above*, paras.198-200.

⁵⁹⁴ Judgement, paras.73, 76, 542.

against the criminal action, insisting before a superior authority that immediate action be taken⁵⁹⁵ and, ultimately, resigning.⁵⁹⁶ Delić failed to do any of these things.⁵⁹⁷

216. Delić fails to advance any argument to support his general assertion that the Chamber's findings on failure to punish were insufficient.⁵⁹⁸ The Chamber found that Delić was under a duty:

- to take active steps to ensure that the perpetrators of the crimes were brought to justice;⁵⁹⁹
- to take an important step in the disciplinary process;⁶⁰⁰ and
- to exercise all measures possible under the circumstances, including at least investigation of possible crimes and reporting them to the competent authorities.⁶⁰¹

Delić failed to take any of these measures⁶⁰² and as a result no EMD members were subject to disciplinary or criminal proceedings or even referred to the relevant authorities for such proceedings.⁶⁰³

3. Subground 3(C): Delić failed to take the necessary and reasonable measures to prevent and punish

217. Delić does not demonstrate error in the Chamber's conclusion that he failed to take the necessary and reasonable measures to prevent the cruel treatment of the Serb prisoners in Livade and in the Kamenica Camp or to punish his responsible EMD subordinates.⁶⁰⁴ Delić effectively re-argues his case on effective control, without showing any error by the Majority.

⁵⁹⁵ Judgement, para.73.

⁵⁹⁶ *E.g. Strugar* TJ, paras.376 fn.1099, 445.

⁵⁹⁷ *Above*, para.195-201.

⁵⁹⁸ Delić Brief, paras.302, 312.

⁵⁹⁹ Judgement, paras.74-75, citing the *High Command* Case, p.623.

⁶⁰⁰ Judgement, paras.74-75, citing the *High Command* Case, p.623.

⁶⁰¹ Judgement, paras.74-75.

⁶⁰² Judgement, para.553.

⁶⁰³ Judgement, para.554.

⁶⁰⁴ Judgement, paras.459-471 (effective control) and paras.542-556 (failure to prevent and punish).

(a) Subground 3(C)(a): The alleged identification problems concerning EMD members are irrelevant to Delić's ability to prevent and punish the crimes

218. Contrary to Delić's argument,⁶⁰⁵ the Chamber considered the presence of foreign fighters in the units.⁶⁰⁶ Furthermore, Delić is incorrect when he states that the ARBiH did not have any information about the identities of the EMD members.⁶⁰⁷ Even assuming that membership of the EMD was somewhat fluid, this does not undermine the extensive evidence showing that, among other things, Delić could issue binding orders to the EMD, discipline its members, subject them to criminal proceedings and, ultimately, disband the unit.⁶⁰⁸ Delić fails to establish that the identification problems he alleges have any impact on the Chamber's findings.

(b) Subground 3(C)(b): The EMD was within Delić's command and control during July and August 1995

219. Delić's assertion that the EMD refusal to be incorporated into the ARBiH chain of command and its non-compliance with certain orders negated his effective control have been dealt with in the response to Ground 1. The Chamber considered and rejected both of these assertions.

220. Further, the Majority considered in detail the evidence about the "procedure of reporting" followed by the EMD, including Delić's argument⁶⁰⁹ that the assistant commander of security for the EMD existed only on paper.⁶¹⁰ The Majority found that this did not undermine Delić's effective control and Delić has not shown any error in these findings.⁶¹¹

⁶⁰⁵ Delić Brief, para.318.

⁶⁰⁶ *E.g.* Judgement, paras.173-179.

⁶⁰⁷ Judgement, para.373. *Above* para.69.

⁶⁰⁸ *Above*, paras.21, 204.

⁶⁰⁹ Delić Brief, para.324.

⁶¹⁰ Judgement, paras.424-425.

⁶¹¹ Judgement, paras.461-463, 468, fn.1183.

(c) Subground 3(C)(c): Delić had the material ability to prevent crimes notwithstanding the EMD's resistance to allowing some lower-level officers access to their camps

221. Delić's arguments concerning the difficulties that lower-level ARBiH officers faced obtaining access to EMD camps⁶¹² only serve to underscore the importance of Delić intervening to protect the prisoners. If Delić's subordinate officers had previously encountered difficulty securing compliance from the EMD, it was all the more critical that Delić should bring to bear on the situation the full weight of his authority as the highest ranking commander in the ARBiH military structure, to which the EMD was subordinated. Delić hides behind his suggestion that lower level officers were personally fearful of the EMD and therefore reluctant to persist in their efforts to obtain access. However, he fails to explain why he should thereby be relieved of using the considerable powers at his disposal, including ordering the Security Administration to follow up, issuing orders for the release of the prisoners, and ultimately disbanding (or at least threatening to disband) the EMD, to bring the situation under control.⁶¹³

222. The Chamber considered the evidence that, on occasion, access to EMD premises was denied and that there was some conflict between EMD members and the ARBiH. The Majority correctly concluded that this did not mean that Delić lacked effective control.⁶¹⁴ Rather, the Majority was satisfied that "nothing was done or even attempted to be done" to resolve the situation.⁶¹⁵ As the evidence revealed, on another occasion, the ARBiH consciously chose not to take measures against the EMD so as not to jeopardise their combat performance.⁶¹⁶

223. Contrary to Delić's arguments, the EMD did not always refuse the ARBiH access to its facilities. For example:

⁶¹² Delić Brief, paras.314-316, 326, 327.

⁶¹³ *Above*, para.200.

⁶¹⁴ Judgement, paras.459-471, 542-555.

⁶¹⁵ *Above*, para.209.

⁶¹⁶ Exh.583, p.20 (not confidential) cited in Judgement, para.449, fn.1159 (Report by the security organ of the 35th Division, explaining the absence of follow up to other misconduct by EMD members).

- The 3rd Military Police Battalion of the 3rd Corps twice took prisoners out of the Kamenica Camp: on 24 August 1995 and on 29 September 1995;⁶¹⁷
- Mahmuljin, the 3rd Corps commander, had previously visited the EMD HQ at *Vatrostalna*⁶¹⁸ and generally enjoyed a good relationship with the EMD;⁶¹⁹ and
- Meetings with ARBiH personnel were held at the EMD's place of deployment and ARBiH soldiers took part in prayers at the Kamenica Camp.⁶²⁰

224. Consistent with this, ARBiH personnel were permitted to see the VRS prisoners. As Delić acknowledges elsewhere in his Brief,⁶²¹ 35th Division security officers conducted short interviews with the VRS prisoners.⁶²² Further, a report dated 25 July 1995 by the 3rd Corps to the Main Staff Security Administration contained further details of interviews with the VRS soldiers.⁶²³

225. However, no adequate effort was made to ensure the safety of the prisoners. The Majority specifically noted that the ARBiH officers who were initially denied or given only limited access to the prisoners did not make any further attempts to seek access “for example, by requesting from their superiors a written order or an oral intervention with a view to providing access.”⁶²⁴

226. Delić's example regarding the investigation of an explosion in the EMD facilities⁶²⁵ does not support his argument regarding denial of access. The evidence shows that the Military Security Service conducted an on-site investigation at the EMD facility but did not have a “complete insight.” The report Delić relies on also states that further measures “shedding light on this case” were being taken.⁶²⁶ This

⁶¹⁷ Judgement, paras.270, 283, 312. *Contrast* Delić Brief, para.54.

⁶¹⁸ Judgement, para.411.

⁶¹⁹ *Above*, para.73.

⁶²⁰ Judgement, para.411.

⁶²¹ Delić Brief, para.374.

⁶²² Delić Brief, paras.374, 379. *See* Judgement, paras.274, 275, 408.

⁶²³ Judgement, para.282.

⁶²⁴ Judgement, fn.1200.

⁶²⁵ Delić Brief, para.339.

⁶²⁶ Exh.755, p.2 (not confidential).

supports rather than undermines the Chamber's conclusion that investigations were possible and further action could be taken.

227. The allegation cited by Delić that even he might need authorisation to enter the camp⁶²⁷ has no impact on the Chamber's findings. The Chamber considered the substance of the evidence⁶²⁸ that the *Emir* was at the top of the EMD's hierarchy overseeing all civilian and military matters.⁶²⁹ Even if it was true that his permission had to be obtained, that does not mean that he would not have responded to Delić's order as the EMD's superior commander, especially if it was accompanied by a threat to disband the unit.

228. The Chamber acknowledged the evidence that the *shura* was the highest body and final authority for the EMD.⁶³⁰ The existence of the *shura* had no impact on Delić's ability to issue orders to the EMD, to require his subordinates to follow up in respect of the prisoners or to generally exercise effective control over the EMD.⁶³¹

(d) Sub-ground 3(C)(d): The Chamber reasonably found that Delić could have imposed measures but failed to do so

229. In this subground Delić apparently asserts that some of the general measures he took to control the EMD should exonerate him for his failure to take specific measures to protect the VRS prisoners once they were in the hands of the EMD. Tribunal case-law makes clear that a superior cannot be relieved of his duty to take specific preventative measures relating to the crimes in question by arguing that he took general measures unrelated to the crimes in question.⁶³²

230. The Chamber rejected Delić's argument that his general orders promoting IHL and prisoner protection were sufficient to discharge his duty to protect the VRS prisoners in July and August 1995.⁶³³ [REDACTED].⁶³⁴ It considered similar orders

⁶²⁷ Delić Brief, paras.54, 331.

⁶²⁸ Delić Brief, fn.81.

⁶²⁹ Judgement, para.188.

⁶³⁰ Judgement, para.189. *Compare* Delić Brief, paras.335, 336.

⁶³¹ *Above*, para.46.

⁶³² *E.g. Halilović* TJ, para.89 (referring to the Tokyo Tribunal's ruling that a superior's duty may not be discharged by the issuance of "routine orders"). *See also Strugar* TJ, para.374.

⁶³³ Judgement, para.544; Delić Brief, paras.51, 348.

⁶³⁴ [REDACTED].

by Delić to the corps to treat enemy detainees in accordance with the Geneva Conventions.⁶³⁵ The Chamber reasonably concluded that such general measures alone were insufficient to discharge Delić's duty to prevent cruel treatment.⁶³⁶

231. Delić simply re-argues his trial submissions on effective control and seeks a different interpretation of the evidence.⁶³⁷ The Chamber considered much of the evidence Delić now cites and concluded that it supported its finding of effective control. In particular, the Majority:

- made detailed findings regarding Delić's order for the EMD's formation and subordination to the 3rd Corps and considered this to be an indicator of effective control;⁶³⁸ and
- found that Delić authorised operation *Vranduk*.⁶³⁹ Delić's strong reaction in clamping down on the EMD in this context reinforced the Majority's conclusion that Delić had the power to investigate and sanction the EMD.

232. Delić now asks the Appeals Chamber to ignore the relevance of this evidence to the question of effective control and instead conclude that its only relevance is in showing that Delić did everything within his power to bring the EMD in line. Delić fails to explain why the Majority was wrong to conclude that he did in fact bring the EMD under his effective control but thereafter failed to take the specific measures the Chamber identified to protect the VRS prisoners.⁶⁴⁰

233. Delić's order of 28 August 1994 to the 3rd and 7th Corps commanders to ensure EMD compliance with IHL⁶⁴¹ is consistent with the Chamber's findings on effective control. It shows Delić taking responsibility for the actions of the EMD, as would be expected by a commander in a position of superiority over them. It does not undermine the Chamber's finding that Delić failed to take the specific preventative steps it identified regarding the VRS prisoners. The same applies to Delić's order of

⁶³⁵ Judgement, para.544.

⁶³⁶ Judgement, para.544.

⁶³⁷ Delić Brief, para.342-347.

⁶³⁸ Judgement, paras.172-177, 360-364 (*de jure* subordination to the 3rd Corps), 461; Delić Brief, para.344.

⁶³⁹ Judgement, para.526; Delić Brief, para.347.

⁶⁴⁰ *Above*, para.200.

23 November 1994 that the EMD be placed in the system of command and control or be disbanded.⁶⁴²

(e) Subground 3(C)(e): The Majority was correct to find that Delić had the material ability to prevent and punish

(i) ARBiH commanders including Delić had the material ability to investigate, prevent and punish

234. Delić reads the Majority's findings on his material ability to prevent and punish out of context.⁶⁴³ The Majority's conclusion was based on, among other things, the ability to investigate illegal acts, as well as on the fact that previous criminal proceedings had been brought against members of the EMD.⁶⁴⁴

235. First, Delić failed to react meaningfully to the alarming information he received and he did not investigate the EMD's conduct, despite a specific opportunity to do so on 29 July 1995.⁶⁴⁵ He could have asked for further information and ordered enquiries.⁶⁴⁶ He could have asked for the intervention of the 3rd Corps Commander, who had the trust and respect of the EMD.⁶⁴⁷ By failing to investigate Delić breached his duty to prevent and his duty to punish at the first opportunity.

236. Second, he failed to use the Security Administration or the framework of the ARBiH to prevent the commission of cruel treatment,⁶⁴⁸ as he did during Operation *Vranduk*, for example.⁶⁴⁹ Neither Delić nor any of his subordinates referred any member of the EMD for disciplinary or criminal proceedings with respect to the cruel treatment.⁶⁵⁰ Finally, Delić failed to disband the EMD,⁶⁵¹ or "press the matter, if necessary to the point of resigning."⁶⁵²

⁶⁴¹ Delić Brief, para.346.

⁶⁴² Delić Brief, para.347.

⁶⁴³ *Contrast* Delić Brief, para.349 (citing Judgement, para.470).

⁶⁴⁴ Judgement, para.470.

⁶⁴⁵ Judgement, paras.545, 553.

⁶⁴⁶ Judgement, paras.546, 549.

⁶⁴⁷ Judgement, fn.1203.

⁶⁴⁸ *Above*, paras.198-199.

⁶⁴⁹ *Above*, paras.199; Judgement, para.526 [REDACTED].

⁶⁵⁰ Judgement, para.554.

⁶⁵¹ Judgement, para.469.

⁶⁵² *See Kvočka* TJ, para.305 (citing the *IMTFE* Judgement, p.458). *See also Strugar* TJ, para.445.

(ii) Delić urges a different interpretation of the evidence considered in paragraphs 447 to 452 of the Judgement without demonstrating that the Majority was unreasonable

237. Delić challenges the Chamber's findings in paragraphs 447 to 452 of the Judgement, which are the basis for the finding in paragraph 470 that "foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behaviour, although not for violations of international humanitarian law."⁶⁵³ In bringing these challenges,⁶⁵⁴ Delić simply seeks a different interpretation of the evidence, without demonstrating that the findings were unreasonable.

a. The Majority took into account the fact that criminal proceedings in the Paul Goodall case were never concluded

238. Contrary to Delić's argument,⁶⁵⁵ the Majority's findings regarding criminal proceedings instituted against two EMD members for the murder of Paul Goodall are reasonable.

239. First, Delić has failed to articulate the error he alleges in the Chamber's findings in paragraph 448 of the Judgement. Second, whether criminal proceedings were completed⁶⁵⁶ is irrelevant. The significant factor is that there was a mechanism for proceedings to be instituted and the authority to trigger that mechanism in respect of the EMD's conduct.⁶⁵⁷ In any event, the Chamber twice acknowledged that the arrested EMD members escaped from custody and fully took this factor into account in reaching its conclusions.⁶⁵⁸ Third, the Chamber found that EMD members were arrested by a joint military-civilian force and that criminal proceedings against them were initiated by the civilian prosecutor's office in Zenica before a civilian court.⁶⁵⁹ Delić fails to show why the fact that the civilian police filed the criminal report with

⁶⁵³ See Judgement, para.470, citing Judgement, paras.447-452.

⁶⁵⁴ Delić Brief, paras.352-372.

⁶⁵⁵ Delić Brief, paras.353-357.

⁶⁵⁶ Delić Brief, paras.354, 356.

⁶⁵⁷ See *Halilović* AJ, para.182; *Strugar* TJ, paras.376, 414. See also Judgement, paras.74-75.

⁶⁵⁸ Judgement, paras.448, 495. *Contrast* Delić Brief, para.354.

⁶⁵⁹ Judgement, paras.448, 495.

the Zenica public prosecutor's office,⁶⁶⁰ which the Chamber expressly considered,⁶⁶¹ has any bearing on the Majority's conclusions.

240. Co-operating with civilian authorities to take measures against the EMD does not negate Delić's ability to take measures. Such co-operation with the civilian authorities occurred on other occasions.⁶⁶² It only serves to underscore the many options at the disposal of the ARBiH to respond to criminal action by EMD members.⁶⁶³

241. Finally, Delić takes Exhibit 1013 out of context to support his assertion that EMD members were "not subject to the jurisdiction of RBiH authorities."⁶⁶⁴ This document contains a *request* from Abu Haris that the two EMD members be released. It further states that:

if necessary the investigation can continue. We want complete co-operation with the authorised organs for establishing peace and order in the [RBiH].⁶⁶⁵

In any event, the Chamber took this and the evidence of Awad, which Delić cites, into account when it found that the *shura* could decide to hand over an individual to the Bosnian authorities for trial.⁶⁶⁶ No error has been demonstrated.

⁶⁶⁰ Delić Brief, para.355, fn.454 (citing Exh.659 (not confidential)).

⁶⁶¹ Judgement, fn.1244.

⁶⁶² Judgement, paras.441, 526.

⁶⁶³ *Above*, para.48.

⁶⁶⁴ Delić Brief para.357.

⁶⁶⁵ Exh.1013 (not confidential).

⁶⁶⁶ Judgement, fn.514. *See also* Delić Closing Brief, para.486, fns.995, 996. *Contrast* Delić Brief, para.357.

b. The Majority took into account the fact that no actual measures were taken against the EMD following Delić's order of 9 December 1993

242. Delić seeks a reinterpretation of the Chamber's finding that, following his 9 December 1993⁶⁶⁷ order to clamp down on the illegal activities of the EMD and Guerrilla Group, actual measures were only taken against the latter.⁶⁶⁸

243. The Majority reasonably considered Delić's order of 9 December 1993⁶⁶⁹ as an example of his ability to order that measures be taken against the EMD.⁶⁷⁰ Although cases of EMD misconduct were registered, no "energetic measures" were taken so as not to spoil relations with the EMD.⁶⁷¹ This does not compel the conclusion that Delić was unable to take measures against the EMD at the relevant time. Rather, it reinforces the Chamber's finding that, for reasons of military expediency, a choice was made to do nothing about the EMD's misconduct.⁶⁷²

c. The Chamber correctly found that there was an investigation concerning the demolition of Orthodox tombstones by EMD members

244. The Chamber reasonably used the 26 May 1995 report by the Assistant Commander for Military Security of the 3rd Corps⁶⁷³ in concluding that Delić could investigate with a view to taking punitive measures against EMD members.⁶⁷⁴ The report was made in the context of Operation *Vranduk*.⁶⁷⁵ The fact that the EMD members ignored the warnings of the ARBiH 328th Mountain Brigade Officers to stop demolishing the tombstones at the time of the incident does not undermine the Chamber's finding about subsequent investigations by the Security Administration of the 3rd Corps.⁶⁷⁶

⁶⁶⁷ The reference to 9 December 1994 is a typographical error in the Judgement, paragraph 449. *Contrast* Judgement, fn.1159 to para.449, which gives the correct date 9 December 1993.

⁶⁶⁸ Delić Brief, paras.358-360; Judgement, para.449.

⁶⁶⁹ Exh.690 (not confidential)

⁶⁷⁰ Judgement, paras.368, 447-452.

⁶⁷¹ Judgement, fn.1159.

⁶⁷² *Above*, para.39.

⁶⁷³ Exh.934 (not confidential).

⁶⁷⁴ Judgement, paras.447 and 450. *Contrast* Delić Brief, paras.361-363.

⁶⁷⁵ *Above*, paras.199.

⁶⁷⁶ Judgement, para.450, *Contrast* Delić Brief, paras.361-363.

d. The Majority took into account the absence of evidence on the outcome of investigations and criminal proceedings

245. The Chamber found that, in July 1995, the 3rd Corps conducted an investigation concerning threats by EMD members against a Croat ARBiH soldier.⁶⁷⁷ This finding supported the Majority's conclusion that ARBiH commanders had the material ability to investigate, prevent and punish crimes by EMD members.⁶⁷⁸ The Chamber specifically acknowledged that there is no evidence on the outcome of the investigation.⁶⁷⁹ The salient point is that the 3rd Corps took responsibility for the EMD's misconduct and had the ability to conduct an investigation, whether or not they followed it through to successful completion.

246. The Majority's finding that, on another occasion, one EMD member was subject to criminal proceedings for theft likewise supports its conclusion that ARBiH commanders had the material ability to prevent and punish crimes by EMD members.⁶⁸⁰ As Delić acknowledges, the Chamber found that there was no evidence as to the outcome of the proceedings.⁶⁸¹ Delić simply seeks a reinterpretation of the evidence. The Majority was reasonable in concluding that Delić's subordinates (the 3rd Corps Military Police Battalion) were able to institute criminal proceedings against EMD members thereby supporting its conclusion that investigations and referral for criminal prosecution were within the material ability of Delić and his ARBiH commanders.⁶⁸²

(iii) There is no contradiction between finding that foreign EMD members were subject to criminal proceedings in some instances but not in others

247. Contrary to Delić's argument,⁶⁸³ the Majority's finding in paragraph 470 of the Judgement that "foreign members of the EMD were in fact subject to criminal proceedings in some instances of illegal behaviour" is consistent with the Chamber's finding at paragraph 510 that "the criminal reports in evidence [...] show that

⁶⁷⁷ Judgement, para.451, fn.1162.

⁶⁷⁸ Judgement, para.470. *Contrast* Delić Brief, paras.366, 367.

⁶⁷⁹ Judgement, para.451. *See also* fn.1162 (confirming that the Chamber specifically considered Exhs.938 and 764, on which Delić now relies).

⁶⁸⁰ Judgement, paras.451, 470.

⁶⁸¹ Judgement, para.452; Delić Brief, para.370.

⁶⁸² Judgement, paras.452, 470.

⁶⁸³ Delić Brief, para.350.

proceedings were initiated only against those ABiH members who did not form part of the EMD.”

248. The findings in each paragraph must be understood in their proper context. Paragraph 470 deals with Delić’s ability to investigate, prevent and punish, including subjecting EMD members to investigation and criminal proceedings. It refers to instances where such measures were taken.⁶⁸⁴ In contrast, paragraph 510 of the Judgement under the notice section deals with the lack of any such measures against EMD members in response to the calls for action in the bulletins of 12 March 1995 and 15 April 1995.⁶⁸⁵ It is obvious that the Chamber did not mean that no criminal proceedings were ever instituted against foreign members of the EMD as the Chamber expressly found that such proceedings were initiated in reaction to the killing of Paul Goodall.⁶⁸⁶

(f) Subground 3(C)(f): The Chamber correctly found that Delić failed to take the necessary and reasonable measures to prevent the cruel treatment of the VRS prisoners

249. In this subground, Delić takes issue with the Chamber’s finding that neither he, nor anyone under his command, “took any measures to prevent the future commission of the cruel treatment in Livade and in the Kamenica Camp.”⁶⁸⁷ Delić seeks to rely on a handful of partial and ineffective steps taken by some of his subordinates to contradict this finding.⁶⁸⁸

250. In making this argument, Delić fails to recognise that when the Chamber referred to the absence of “any measures,” it meant the absence of the necessary and reasonable measures to prevent the crimes. Prior to reaching the conclusion that Delić impugns, the Chamber had allowed for the possibility that Delić reacted in some way to the alarming information in Bulletin 137. It nevertheless emphasised that Delić

⁶⁸⁴ Judgement, paras.447-452.

⁶⁸⁵ Judgement, paras.508, 509. *See also* para.511. Paragraphs 447-452 of the Judgement, which form the basis for the Majority’s conclusion in paragraph 470, detail one occasion where criminal proceedings were initiated against EMD members after March/April 1995 – criminal proceedings for stealing (Judgement, para.452). Footnote 1274 to Judgement paragraph 510, under the notice section, specifically acknowledges this instance but notes that it took place after the crimes in July and August 1995.

⁶⁸⁶ Judgement, paras.448, 496-497.

⁶⁸⁷ Delić Brief, para.373, citing Judgement, para.550.

⁶⁸⁸ Delić Brief, paras.374-379.

“failed to take the necessary and reasonable measures that were within his material ability to prevent the cruel treatment of the VRS soldiers.” The Chamber then specifically cited Delić’s failure to engage the Security Administration or to otherwise use the institutional framework of the ARBiH to successfully prevent the crimes.⁶⁸⁹

251. Even if the Appeals Chamber was to consider that the Chamber made a more far-reaching determination that there was an absence of any measures at all, this error would not invalidate the verdict. The only relevant question is whether Delić failed to take all necessary and reasonable measures. The Chamber’s findings support such a conclusion.

252. Delić relies on the Chamber’s own findings⁶⁹⁰ and on evidence he cited at trial⁶⁹¹ to urge a different ultimate conclusion on his material ability to prevent and his failure to do so. However, none of the evidence Delić cites demonstrates that he or those subordinated to him took all the necessary and reasonable measures to prevent the cruel treatment of the VRS prisoners. [REDACTED].⁶⁹²

253. Delić relies on the fact that 35th Division Security Officers conducted interviews with the VRS prisoners, the duration of which was limited by the EMD.⁶⁹³ He omits to mention that the ARBiH officers who were initially given only limited access to the prisoners did not make any further attempts to seek access or request the intervention of their superiors.⁶⁹⁴

254. Delić misstates the Chamber’s findings. He refers to the *Commander of the 3rd Corps* potentially asking for the “approval of Abu Maali to take over the prisoners.”⁶⁹⁵ However, the citation from paragraph 408 of the Judgement, incompletely set out in Delić’s Brief, recounts that “[t]he *Intelligence Service of the 3rd Corps* reported that it intended to ‘request approval to contact the prisoners’ [...] from the commander of the EMD” (emphasis added).

⁶⁸⁹ Judgement, para.548.

⁶⁹⁰ Delić Brief, paras.374-375 (citing to Judgement, paras.408, 468).

⁶⁹¹ The evidence cited in Delić Brief paras.377-378 was referred to in Delić’s Closing Brief, paras.548-549.

⁶⁹² [REDACTED].

⁶⁹³ Delić Brief, para.374.

⁶⁹⁴ Judgement, fn.1200.

⁶⁹⁵ Delić Brief, para.379.

255. Despite the contacts between ARBiH personnel and the prisoners on which Delić now relies, no follow up or investigation of their treatment at the hands of the EMD was ordered or carried out. The Chamber found that reports transmitted up the chain of command only concerned the collection of intelligence from the detainees and entirely failed to address the conditions of their detention at Livade and in the Kamenica Camp.⁶⁹⁶ This is despite the fact that Delić's subordinate officers knew or had reason to know of their cruel treatment:

- In his report on the VRS prisoners, Imamović, Assistant Commander of the 35th Division for Intelligence and Security, did not mention their condition. Yet he had met with three of the prisoners who looked “very, very scared” and one of them was tied to a pole and his hands were blue.⁶⁹⁷
- Mrkaljević, the Chief of the Analysis Section of the Intelligence Service of the 3rd Corps, obtained authorisation from the 3rd Corps Commander to “meet with superior officer of the El-Mujahidin Detachment to remove part of the seized documents and request approval to contact the prisoners.”⁶⁹⁸ However, he failed to raise any issue concerning the VRS prisoners and only requested the documents.⁶⁹⁹

256. In these circumstances, Delić's failure to order further enquiries and follow up is a clear failure to take necessary and reasonable measures to prevent cruel treatment. Delić cannot show that no reasonable finder of fact could have reached this conclusion.

(g) Subground 3(C)(g): The use of force against the EMD was not the only measure available to Delić

257. In this sub-ground Delić, yet again, repeats his assertion that he did not have the material ability to take steps against the EMD. His argument relies heavily on the proposition that the use of force against the EMD was impossible.⁷⁰⁰ This argument is

⁶⁹⁶ Judgement, para.549.

⁶⁹⁷ Judgement, paras.275-276; Exh.553 (not confidential).

⁶⁹⁸ Judgement, para.277 (internal quotation marks omitted).

⁶⁹⁹ Judgement, para.278.

⁷⁰⁰ Delić Brief, paras.382, [REDACTED], 388-392.

irrelevant because the Chamber did not contemplate the use of force as one of the measures that Delić should have taken.⁷⁰¹

258. Further, the evidence that Delić cites undermines his own assertion that the use of force was the only available option to control the EMD.⁷⁰²

[REDACTED].⁷⁰³

4. Sub-ground 3(D): The Chamber correctly found that Delić’s duty to punish was triggered

259. Contrary to Delić’s argument, the Chamber did not “automatically” convict him of failing to punish his subordinates simply because it convicted him of failing to prevent their crimes of cruel treatment.⁷⁰⁴ Rather, the Chamber applied the facts as found to the governing legal standard and correctly concluded that the elements for both failure to prevent and failure to punish were met.

260. As the Chamber recognised, the duty to prevent the commission of a crime and the duty to punish the perpetrators thereof are “two distinct and separate legal obligations.”⁷⁰⁵ A conviction may be entered for both failures if the elements of each are satisfied.⁷⁰⁶

261. Furthermore, the Tribunal’s case-law prescribes parallel legal tests for assessing both types of omission. For failure to prevent, the superior must know or have reason to know of the risk that his subordinates might commit future crimes. For failure to punish, the superior must know or have reason to know of the risk that his subordinates might have committed crimes in the past.⁷⁰⁷

262. In each case, a superior who has reason to know is expected to make further inquiries to find out whether in truth crimes are about to occur or have occurred.⁷⁰⁸ If the superior fails to do so this cannot relieve him or her of the duty to prevent or to

⁷⁰¹ Above, paras.207-210.

⁷⁰² Delić Brief, paras.383-398.

⁷⁰³ [REDACTED].

⁷⁰⁴ Delić Brief, para.402.

⁷⁰⁵ Judgement, para.69. *See also* Judgement, para.71.

⁷⁰⁶ *E.g. Strugar* TJ, para.446; *Strugar* AJ, p.146.

⁷⁰⁷ *See generally Krnojelac* AJ, para.169; *Čelebići* AJ, para.238.

⁷⁰⁸ *Čelebići* TJ, para.393; *Čelebići* AJ, para.236 ff. *See further Strugar* AJ, para.304.

punish. Rather, the superior is chargeable with the information that would have been acquired, had he or she made the proper inquiries.⁷⁰⁹

263. The Chamber correctly applied this legal standard when it concluded that Delić failed to punish the crimes of his EMD subordinates. The Chamber was satisfied that, upon receipt of Bulletin 137 (and against the backdrop of the other information he had about the criminal propensity of EMD members⁷¹⁰) Delić had reason to know that cruel treatment might be committed against the VRS prisoners.⁷¹¹ Delić failed to take the necessary and reasonable measures to prevent those crimes from materialising into a reality.⁷¹² Accordingly, he then had reason to know of the risk that crimes might have subsequently occurred. The only reason Delić did not find out that the crimes had in fact occurred was his failure to inquire further. The Chamber correctly recognised that, under the applicable legal standards, this failure cannot shield Delić from liability for failure to punish.⁷¹³

264. Delić's suggestion that the Chamber engaged in impermissible "double counting"⁷¹⁴ is based on a misunderstanding of the Tribunal's case-law. There is no reason why the same piece of evidence cannot be relevant to assessing the *mens rea* for both failure to prevent and failure to punish. Delić cites no valid authority in support of his contrary assertion.⁷¹⁵

265. Instead, Delić relies on sentencing case-law forbidding "double-counting", but the principle he cites is not relevant. Double counting in sentencing occurs, for example, if a factor is considered in assessing the gravity of the offence and then also used as an aggravating circumstance.⁷¹⁶ This has no bearing on the question whether, as an evidentiary matter, a single piece of evidence may go toward proof of two distinct omissions, as in this case.

⁷⁰⁹ *E.g.* UNWCC Law Reports, pp.94-95, citing 39 *Am. Jur.*, pp.236-237, sec.12 ("whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained").

⁷¹⁰ *Above*, paras.121-131.

⁷¹¹ *Judgement*, para.513.

⁷¹² *Judgement*, para.545.

⁷¹³ *E.g.* *Judgement*, para.553.

⁷¹⁴ *Delić Brief*, paras.400-406.

⁷¹⁵ *Delić Brief*, para.405.

⁷¹⁶ *See Deronjić SAJ*, para.106. *See further Naletilić AJ*, para.610.

VI. CONCLUSION

266. For all the reasons given above, Delić's appeal should be dismissed in its entirety.

RULE 112(B) DECLARATION

The Prosecutor will exercise due diligence to comply with his continuing Rule 68 disclosure obligations during the appeal stage of this case. As of the date of this filing, the Prosecutor has disclosed, or is in the process of disclosing, to Delić all material under Rule 68(i) which has come into his actual knowledge and, in addition, has made available to Delić collections of relevant material held by the Prosecutor.

Word Count: 29,440

Dated this 9th day of February 2009
At The Hague, The Netherlands

A handwritten signature in black ink, appearing to read 'M. Jarvis', is written over a horizontal line.

Michelle Jarvis
Appeals Counsel

VII. GLOSSARY

Pleadings, Orders, Decisions etc from Prosecutor v. Delić, Case No. IT-04-83

Abbreviation used in Prosecution Response Brief	Full citation
Chamber	Trial Chamber in <i>Prosecutor v. Delić</i> , Case No.: IT-04-83-T
Delić Pre-Trial Brief	Pre-Trial Brief of Rasim Delić Pursuant to Rule 65ter (F), 19 January 2007
Delić Brief	Defence Appellant's Brief, 29 December 2008 [PUBLIC REDACTED] [7 JANUARY 2009]
Delić Closing Brief	Defence Closing Brief, 30 May 2008 [PUBLIC REDACTED] [13 JUNE 2008]
Delić's Notice of Appeal	Defence Notice of Appeal, 14 October 2008
Dissenting Opinion	Dissenting Opinion of Judge Moloto
Indictment	Amended Indictment, 14 July 2006
Judgement	Judgement, 15 September 2008
Majority	Majority Judgement of Judges Harhoff and Lattanzi, Judgement, paragraphs 459-471
Prosecution Brief	Prosecution's Appeal Brief, 14 November 2008
Prosecution Closing Brief	Prosecution's Final Trial Brief, 30 May 2008 [PUBLIC REDACTED] [13 JUNE 2008]
Prosecution Pre-Trial Brief	Prosecution Submission Pursuant to Rule 65ter (partly confidential), 31 October 2006
Prosecution Reply	Prosecution's Reply Brief, 22 December 2008

Other ICTY authorities

Abbreviation used in Prosecution Response Brief	Full citation
<i>Aleksovski</i> AJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-A, App.Ch., Judgement, 24 March 2000

<i>Aleksovski</i> TJ	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No. IT-95-14/1-T, T.Ch., Judgement, 25 June 1999
<i>Blaškić</i> AJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-A, App.Ch., Judgement, 29 July 2004
<i>Blaškić</i> TJ	<i>Prosecutor v. Tihomir Blaškić</i> , Case No. IT-95-14-T, T. Ch., Judgement, 3 March 2000
<i>Blagojević</i> AJ	<i>Prosecutor v. Vidoje Blagojević & Dragan Jokić</i> , Case No. IT-02-60-A, App.Ch., Judgement, 9 May 2007
<i>Brdanin</i> AJ	<i>Prosecutor v Radoslav Brdanin</i> , Case No. IT-99-36-A, App.Ch., Judgement, 3 April 2007
<i>Brdanin</i> TJ	<i>Prosecutor v Radoslav Brdanin</i> , Case No. IT-99-36-T, T. Ch., Judgement, 1 September 2004
<i>Čelebići</i> AJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-A, App.Ch., Judgement, 20 February 2001
<i>Čelebići</i> TJ	<i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić & Esad Landžo, a.k.a. "Zenga"</i> , Case No. IT-96-21-T, T.Ch., Judgement, 16 November 1998
<i>Deronjić</i> SAJ	<i>The Prosecutor v. Miroslav Deronjić</i> , Case No. IT-02-61-A, App.Ch., <i>Judgement on Sentencing Appeal</i> , 20 July 2005
<i>Galić</i> AJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-A, App.Ch., Judgement, 30 November 2006
<i>Galić</i> TJ	<i>Prosecutor v. Stanislav Galić</i> , Case No. IT-98-29-T, T.Ch., Judgement, 5 December 2003
<i>Hadžihasanović</i> Superior Responsibility AD	<i>Prosecutor v. Enver Hadžihasanović & Amir Kubura</i> , Case No.IT-01-47-AR72, App.Ch, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003
<i>Hadžihasanović</i> TJ	<i>Prosecutor v. Enver Hadzihasanovic & Amir Kubura</i> , Case No. IT-01-47-T, T.Ch. Judgement, 15 March 2006
<i>Hadžihasanović</i> AJ	<i>Prosecutor v. Enver Hadzihasanovic & Amir Kubura</i> , Case No. IT-01-47-A, App.Ch. Judgement, 22 April 2008
<i>Halilović</i> AJ	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-A, App.Ch., Judgement, 16 October 2007

<i>Halilović TJ</i>	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-T, T.Ch., Judgement, 16 November 2005
<i>Kordić TJ</i>	<i>Prosecutor v. Dario Kordić & Mario Čerkez</i> , Case No. IT-95-14/2-T, T.Ch., Judgement, 26 February 2001
<i>Krnojelac AJ</i>	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-A, App.Ch., Judgement, 17 September 2003
<i>Krnojelac TJ</i>	<i>Prosecutor v. Milorad Krnojelac</i> , Case No. IT-97-25-T, T.Ch., Judgement, 15 March 2002
<i>Kupreškić AJ</i>	<i>Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović & Vladimir Šantić</i> , Case No. IT-95-16-A, App.Ch., Judgement, 23 October 2001
<i>Kvočka AJ</i>	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-A, App.Ch., Judgement, 28 February 2005
<i>Kvočka TJ</i>	<i>Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić & Dragoljub Prcać</i> , Case No. IT-98-30/1-T, T.Ch., Judgement, 2 November 2001
<i>Martić AJ</i>	<i>Prosecutor v. Milan Martić</i> , Case No. IT-95-11-A, App.Ch., Judgement, 8 October 2008
<i>Naletilić AJ</i>	<i>Prosecutor v. Mladen Naletilić & Vinko Martinović</i> , Case No. IT-98-34-A, App.Ch., Judgement, 3 May 2006
<i>Naletilić TJ</i>	<i>Prosecutor v. Mladen Naletilić & Vinko Martinović</i> , Case No. IT-98-34-T, T.Ch., Judgement, 31 March 2003
<i>Orić AJ</i>	<i>Prosecutor v. Naser Orić</i> , Case No. IT-03-68-T, A.Ch., Judgement, 3 July 2008
<i>Prlić Interlocutory AD</i>	<i>Prosecutor v. Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić</i> , Case No. IT-04-74 AR73.13, App.Ch., Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009
<i>Simić AJ</i>	<i>Prosecutor v. Blagoje Simić</i> , Case No. IT-95-9-A, App.Ch., Judgement, 28 November 2006

<i>Strugar</i> TJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-T, T.Ch., Judgement, 31 January 2005
<i>Strugar</i> AJ	<i>Prosecutor v. Pavle Strugar</i> , Case No. IT-01-42-A, App.Ch., Judgement, 17 July 2008
<i>Tadić</i> AJ	<i>Prosecutor v. Duško Tadić a/k/a “Dule”</i> , Case No. IT-94-1-A, App.Ch., Judgement, 15 July 1999

ICTR/SCSL authorities

Abbreviation used in Prosecution Response Brief	Full citation
<i>Akayesu</i> AJ	<i>Prosecutor v Jean-Paul Akayesu</i> , Case No. ICTR-96-4-A, App.Ch., Judgement, 1 June 2001
<i>Bagilishema</i> AJ	<i>Prosecutor v. Ignace Bagilishema</i> , Case No. ICTR-95-1A-A, App.Ch., Appeal Judgement (Reasons), 3 July 2002
<i>Brima</i> TJ	<i>Prosecutor v. Brima et al.</i> , Case No. SCSL-04-16-T, T.Ch., Judgement, 20 June 2007
<i>Gacumbitsi</i> AJ	<i>Prosecutor v Sylvestre Gacumbitsi</i> , Case No. ICTR-2001-64-A, App.Ch., Judgement, 7 July 2006
<i>Nahimana</i> AJ	<i>Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze</i> , Case No. ICTR-99-52-A, App.Ch., Judgement, 28 November 2007
<i>Simba</i> AJ	<i>Prosecutor v. Aloys Simba</i> , Case No. ICTR-01-76-A, App.Ch., 27 November 2007

Pleadings from other cases

Abbreviation used in Prosecution Response Brief	Full citation
<i>Halilović</i> Indictment	<i>Prosecutor v. Sefer Halilović</i> , Case No. IT-01-48-T, Indictment, 12 September 2001

Judgements and Decisions Relating to Crimes Committed During WWII

Abbreviation used in Prosecution Response Brief	Full citation
<i>High Command Case</i>	<i>United States v. Wilhelm von Leeb et al.</i> , Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No.10 (Washington: United States Government Printing Office, 1950), Vol.XI
<i>Hostage Case</i>	<i>The Trial of Wilhelm List and Others</i> (“Hostage case”), Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No.10 (Washington: United States Government Printing Office, 1950), Vol.XI

General Sources

Abbreviation used in Prosecution Response Brief	Full citation
API	Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
ICRC Commentary	Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Commentary (Geneva: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987)
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907
UNWCC Law Reports	United Nations War Crimes Commission, <i>Law Reports of Trials of War Crimes</i> (London: His Majesty’s Stationary Office, 1948), Vol.IV
Gasser	Hans-Peter Gasser, “International Humanitarian Law: an Introduction,” in Hans Haug, ed., <i>Humanity for All: The International Red Cross and Red Crescent Movement</i> (Haupt: Henry Dunant Institute, 1993).

Other Abbreviations

Abbreviation used in Prosecution Response Brief	Full citation
ARBiH	Army of the Republic of Bosnia and Herzegovina
AoR	Area of Responsibility
Art.	Article
EMD	<i>El Mujahed</i> Detachment of the ARBiH 3 rd Corps
Exh.	Exhibit
Exhs.	Exhibits
fn.	Footnote
fns.	Footnotes
HVO	Croatian Defence Council (army of the Bosnian Croats)
IHL	International Humanitarian Law
IKM	Forward Command Post
IMTFE	International Military Tribunal for the Far East
JNA	Yugoslav People's Army (Army of the Socialist Federal Republic of Yugoslavia)
OG	Operations Group
para.	paragraph
Paras	paragraphs
p.	page
pp.	pages
Practice Direction on Appeals Requirements	Practice Direction on Formal Requirements for Appeals from Judgement (IT-201) Rev.1, 7 March 2002
RBiH	Republic of Bosnia and Herzegovina

Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia established by the Security Council Resolution 827 (1993)
T.	Trial Transcript
TO	Territorial Defence of the RBiH
VRS	Army of the Serbian Republic of Bosnia and Herzegovina (<i>Vojska republike srpske</i>), and later <i>Republika Srpska</i> , as of 19 May 1992
KM Kakanj	ARBiH Command Post in Kakanj, RBiH

VIII. APPENDIX A

Para(s). in appeal brief repeating trial argument	Para(s). in closing brief containing trial argument	Similarity of arguments between appeal, trial	Para(s). in Judgement addressing trial arguments	Subject of argument
GROUND 1				
17	899	Closely follows	374	Location of Kamenica Camp
18	884	Virtually identical	373	Joining army voluntarily
19	885	Virtually identical	373	Records of EMD members
20	887	Virtually identical	373	Identity of EMD members
24	902	Identical	363	Re-subordination
25	903	Identical	363	Re-subordination
26	904	Virtually identical	363, 388, 407, 432	Re-subordination
27	905	Identical	210, 339, 389, 390, 432-436	Re-subordination
28	898	Virtually identical	363, 364, 389, 392-402	Re-subordination
29	908	Virtually identical	210, 275, 339, 408, 434, 436	Hostility towards ARBiH
30	908	Virtually identical	434, 435, 533	Insubordination
41	895	Virtually identical	388	Insubordination
42	896	Virtually identical	389	Insubordination
43	897	Identical	390	Insubordination
60	963	Closely follows	439	Chain-of-command

Para(s). in appeal brief repeating trial argument	Para(s). in closing brief containing trial argument	Similarity of arguments between appeal, trial	Para(s). in Judgement addressing trial arguments	Subject of argument
67, 68	912, 914	Closely follows	424-426, 463	Reports
69	919	Virtually identical	408, 423-425	Security reports
70	913, 917	Closely follows	426, 463	Reports
80	933-935	Closely follows	395, 431	Chain of command
87	1021	Virtually identical	441	Chief of Zavidovići Municipality
95-96	991-1002	Closely follows	190	Sheikh Shaban
99	983-994	Closely follows	190, 438, 442-446	Foreign influence
104	981, 982	Virtually identical	445	Foreign influence
112	1010	Closely follows	188, 192	Ranks and structure
137	871, 872	Closely follows	360, 361	Chain-of-command
139	873	Closely follows	177	Foreign volunteers
141	877	Virtually identical	431-433	Chain-of-command
146	952	Virtually identical	196-199, 456-458	Dayton Accords
147	953	Virtually identical	198, 458	Intercepted fax
148	954	Virtually identical	198, 455, 456	Citations
149	955	Virtually identical	198, 357, 454-456	Political decision
150, 151	956-958	Virtually identical	196-199, 457, 458, 469	Meeting on disbandment of EMD

Para(s). in appeal brief repeating trial argument	Para(s). in closing brief containing trial argument	Similarity of arguments between appeal, trial	Para(s). in Judgement addressing trial arguments	Subject of argument
154	960	Virtually identical	362-364	Delić's order
160	964	Virtually identical	431, 433, 460, 462	Trust and respect
196	856	Identical	140, 441	Undermining of ARBiH
197	858	Virtually identical	441	Appeal to authority by Hasanagić
GROUND 2				
243-246	512, 514-519, 735-737, 809-811	Closely follows	154, 480	Receipt of reports
255	514-516, 561	Closely follows	146, 481	Visit to Split
256	561, 562	Virtually identical	481	KM Kakanj conference
278	515-516	Closely follows	146, 480, 501	Receipt of Bulletin 125
GROUND 3				
318-320, 323, 325	67-71, 885-887, 890, 1104	Closely follows	83, 113, 165-167, 192, 373, 408, 423-425, 463	Identification of EMD, control of borders, communication with ARBiH
331	1104, fn.2088	Closely follows	264, 279, 325, 406-408, 410, 468, 475, 482, 512	Access to camps
332, 334	1105-1107	Closely follows	277, 279-282, 447-453, 470, 526	Investigations
335	980, 1003-1016, 1105	Closely follows	189, 194, 385	Disciplinary system of EMD
336	1003-1016, 1105, 1107	Closely follows	188, 189, 194, 198, 385	<i>shura</i>

Para(s). in appeal brief repeating trial argument	Para(s). in closing brief containing trial argument	Similarity of arguments between appeal, trial	Para(s). in Judgement addressing trial arguments	Subject of argument
344	1094	Virtually identical	177, 197, 360-361, 439, 458	Formation and subordination of EMD
345	883-884, 1074	Closely follows	113, 373	Delić's orders
347	1099, 1101	Virtually identical	526	Command and control
348	1102	Virtually identical	544	Delić's orders
355, 356	486, 1109	Virtually identical	448, 495	Paul Goodall
357	486	Virtually identical	194, fn.514	Statement of Abu Haris
360	1097	Virtually identical	449	Turkish guerrilla group
371	1106	Virtually identical	405, 553	Disciplinary measures
377, 378	548-549	Virtually identical	282	Detailed interviews
379	1107	Closely follows	408	Access to VRS prisoners
383	1126	Identical	468-470	Use of force
384	1127	Virtually identical	468, 470	Use of force
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
387	1130	Identical	140, 437, 439-441	Number and strength of EMD Local support
388, 389	1131, 1132	Virtually identical	468, 470	Use of force
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Para(s). in appeal brief repeating trial argument	Para(s). in closing brief containing trial argument	Similarity of arguments between appeal, trial	Para(s). in Judgement addressing trial arguments	Subject of argument
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
392	1136	Identical	468, 470	Use of force
394-398	1120, 1124-1125	Virtually identical	137, 358	Use of force