

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-56-A

Date: 11 March 2020

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IN THE APPEALS CHAMBER

Before: Judge Prisca Matimba Nyambe, Presiding
Judge Aminatta Lois Runeni N'gum
Judge Gberdao Gustave Kam
Judge Seymour Panton
Judge Elizabeth Ibanda-Nahamya

Registrar: Mr. Olufemi Elias

Decision of: 11 March 2020

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC REDACTED

**DECISION ON MOTIONS
FOR ADMISSION OF ADDITIONAL EVIDENCE ON APPEAL**

The Office of the Prosecutor:

Mr. Serge Brammertz
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I. BACKGROUND.....	2
II. APPLICABLE LAW	4
III. PRELIMINARY MATTERS	5
A. IDENTIFICATION OF GROUNDS OF APPEAL.....	5
B. CREDIBILITY OF PROPOSED ADDITIONAL EVIDENCE	5
C. AVAILABILITY	5
IV. RULE 142 MOTIONS.....	6
A. FIRST MOTION.....	6
1. Rose House of Lords Statement.....	7
2. [REDACTED] and Testimony.....	12
B. SECOND MOTION.....	15
1. VRS Reports of 7 June 1994 and 19 September 1994.....	16
2. Order of 10 October 1993.....	20
C. THIRD MOTION.....	22
1. CIA Memorandum of 4 December 1995	24
2. CIA Intelligence Report of 19 September 1995, CIA Document of 7 August 1995, and UN Coded Cable of 16 August 1995	29
D. FOURTH MOTION.....	35
1. Sarajevo Sniping and Shelling Documents.....	36
2. Third Sarajevo Document	42
3. Eighth Sarajevo Document	44
E. FIFTH MOTION.....	46
1. Demilitarization Documents	47
2. Delić Letter	52
V. DISPOSITION	54

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seized of five motions filed by Ratko Mladić (“Mladić”) on 31 December 2018, as well as a corrigendum filed by him on 10 January 2019, requesting the admission of additional evidence on appeal pursuant to Rule 142 of the Rules of Procedure and Evidence of the Mechanism (“Rules” and “Rule 142 Motions”, respectively).¹ The Office of the Prosecutor of the Mechanism (“Prosecution”) responded to the Rule 142 Motions on 24 May 2019.² Mladić filed his replies on 28 June 2019.³

¹ Ratko Mladić’s First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with public and confidential annexes) (“First Motion”); Ratko Mladić’s Second Motion to Admit New Evidence Pursuant to Rule 142, 31 December 2018 (public with confidential annexes); Ratko Mladić’s Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America, 31 December 2018 (“Third Motion”); Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 31 December 2018 (“Fourth Motion”); Ratko Mladić’s Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 31 December 2018 (“Fifth Motion”); Corrigendum to Ratko Mladić’s Second Motion to Admit New Evidence Pursuant to Rule 142, 10 January 2019 (public with confidential annexes) (“Second Motion”). In accordance with the Pre-Appeal Judge’s decision issued on 22 January 2019, Mladić filed a shorter extract of confidential Annex A to the First Motion on 1 February 2019 and the translations of certain annexes to the Rule 142 Motions in the official language of the Mechanism on 1 February 2019, 8 March 2019, and 24 April 2019. *See* Decision on Prosecution’s Motion to Strike Mladić’s Motions to Admit Additional Evidence, 22 January 2019 (“Decision of 22 January 2019”), pp. 3, 4; Notice of Filing of as to: Ratko Mladić’s First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 1 February 2019 (public with confidential Annex A3 and public Annex B); Notice of Filing of as to: Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 1 February 2019 (“Notice of Filing of Translations Relating to Fourth Motion”); Notice of Filing of Translations Relating to: Ratko Mladić’s Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 1 February 2019 (“Notice of Filing of Translations Relating to Fifth Motion”); Second Notice of Filing of Translations Relating to: Ratko Mladić’s First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 8 March 2019 (confidential) (“Second Notice of Filing of Translations Relating to First Motion”); Second Notice of Filing of Translations Relating to: Ratko Mladić’s [Fourth] Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 24 April 2019 (“Second Notice of Filing of Translations Relating to Fourth Motion”). *See also* Urgent Prosecution Motion to Strike Mladić’s Motions to Admit Additional Evidence, 10 January 2019. In the Decision of 22 January 2019, the Pre-Appeal Judge ordered the Prosecution to file any response to the Rule 142 Motions within 30 days of the filing of the final translations of the above-mentioned annexes to the Rule 142 Motions. *See* Decision of 22 January 2019, p. 4.

² Prosecution Response to Mladić’s First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 24 May 2019 (confidential; public redacted version filed on 6 June 2019) (“First Response”); Prosecution Response to Mladić’s Second Motion to Admit New Evidence Pursuant to Rule 142, 24 May 2019 (confidential; public redacted version filed on 6 June 2019) (“Second Response”); Prosecution Response to Mladić’s Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America, 24 May 2019 (“Third Response”); Prosecution Response to Mladić’s Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 24 May 2019 (“Fourth Response”); Prosecution Response to Mladić’s Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 24 May 2019 (“Fifth Response”).

³ Defence Reply to Prosecution Response to Mladić’s First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 28 June 2019 (confidential) (“First Reply”); Defence Reply to Prosecution Response to Mladić’s Second Motion to Admit New Evidence Pursuant to Rule 142, 28 June 2019 (confidential) (“Second Reply”); Defence Reply [to] Prosecution Response to Mladić’s Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America, 28 June 2019 (“Third Reply”); Defence Reply [to] Prosecution Response to Mladić’s Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 28 June 2019 (“Fourth Reply”). Mladić did not file a reply to the Fifth Response. On 7 June 2019, the Appeals Chamber granted Mladić’s request for an extension of time to file his replies. *See* Decision on a Consolidated Request for an Extension of Time to File Replies Concerning Motions Brought Pursuant to Rule 142 of the Rules, 7 June 2019, p. 3. *See also* Ratko Mladić’s Consolidated Request for Short Extension of Time to File Replies to Rule 142 Motions for new Evidence, 7 June 2019.

I. BACKGROUND

2. On 22 November 2017, Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia (“Trial Chamber” and “ICTY”, respectively) convicted Mladić, Commander of the Main Staff of the Army of *Republika Srpska* (“VRS”), pursuant to Article 7(1) of the ICTY Statute of genocide, crimes against humanity (persecution, extermination, murder, deportation, and inhumane acts), and violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and hostage-taking),⁴ and sentenced him to life imprisonment.⁵

3. The Trial Chamber found Mladić responsible for committing these crimes through his participation in four joint criminal enterprises.⁶ Specifically, the Trial Chamber found that: (i) from 12 May 1992 until 30 November 1995, Mladić participated in a joint criminal enterprise with the objective of permanently removing the Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in Bosnia and Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation (“Overarching JCE”);⁷ (ii) between 12 May 1992 and November 1995, Mladić participated in a joint criminal enterprise with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling (“Sarajevo JCE”);⁸ (iii) from the days immediately preceding 11 July 1995 to at least October 1995, Mladić participated in a joint criminal enterprise with the objective of eliminating the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men (“Srebrenica JCE”);⁹ and (iv) from around 25 May 1995 until approximately 24 June 1995, Mladić participated in a joint criminal enterprise with the objective of capturing United Nations personnel deployed in various parts of Bosnia and Herzegovina (“UN” and “UN Personnel”, respectively) and detaining them in strategic military locations to prevent the North Atlantic Treaty Organization (“NATO”) from launching further military air strikes on Bosnian Serb military targets (“Hostage-Taking JCE”).¹⁰ The Trial Chamber found that Mladić

⁴ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (public with confidential annex) (“Trial Judgement”), paras. 275, 276, 5214.

⁵ Trial Judgement, para. 5215.

⁶ Trial Judgement, paras. 4232, 4238, 4612, 4688, 4740, 4893, 4921, 4987, 4988, 5131, 5141, 5142, 5156, 5163, 5165, 5166, 5214.

⁷ Trial Judgement, paras. 4232, 4238, 4610, 4612, 4688, 5189. The Trial Chamber determined that the Overarching JCE existed between 1991 and 30 November 1995. See Trial Judgement, paras. 4232, 4610.

⁸ Trial Judgement, paras. 4740, 4892, 4893, 4921, 5190.

⁹ Trial Judgement, paras. 4987, 4988, 5096-5098, 5128, 5130, 5131. The Trial Chamber determined that in the days immediately preceding 11 July 1995, the objective of the Srebrenica JCE involved the commission of the crimes of persecution and inhumane acts (forcible transfer), but that by the early morning of 12 July 1995, the crimes of genocide, extermination, and murder became part of the means to achieve that objective. See Trial Judgement, paras. 4987, 5096.

¹⁰ Trial Judgement, paras. 5141, 5142, 5156, 5163, 5192.

significantly contributed to and shared the intent to achieve the common objective of these joint criminal enterprises.¹¹

4. Mladić filed his notice of appeal of the Trial Judgement on 22 March 2018 and the briefing of his appeal concluded with the filing of his reply brief on 29 November 2018.¹² In Grounds 3 to 6 of his appeal, Mladić challenges the Trial Chamber's convictions in relation to his participation in the Overarching JCE,¹³ Sarajevo JCE,¹⁴ Srebrenica JCE,¹⁵ and Hostage-Taking JCE.¹⁶

5. In the Rule 142 Motions, Mladić seeks to admit as additional evidence on appeal 21 documents which he claims undermine the Trial Chamber's conclusion that he participated in the four joint criminal enterprises. In the First Motion, Mladić requests: (i) the admission of a transcript from a hearing before the United Kingdom House of Lords of former UN Protection Force ("UNPROFOR") Commander Michael Rose ("Rose"), and to recall him as a witness to authenticate the transcript;¹⁷ and (ii) [REDACTED].¹⁸ In the Second Motion, Mladić requests the admission of: (i) two VRS reports, which he claims were drafted in his absence from the VRS Main Staff or *Republika Srpska*; and (ii) a Drina Corps order prohibiting the provision of information to the media without approval.¹⁹ In the Third Motion, he requests the admission of: (i) three declassified documents from the Central Intelligence Agency of the United States ("CIA") Balkan Task Force;²⁰ and (ii) a coded cable from UNPROFOR Special Representative of the UN Secretary General Yasushi Akashi ("Akashi") to the UN Secretary General.²¹ In the Fourth Motion, he requests the admission of eight documents relating to the demilitarization and ceasefire agreements, shelling and sniping, as well as restriction of humanitarian aid to Sarajevo.²² In the Fifth Motion, he requests the admission of four documents relating to the demilitarization of Srebrenica, Žepa and Goražde or the

¹¹ Trial Judgement, paras. 4612, 4688, 4893, 4921, 5097, 5098, 5128, 5130, 5131, 5156, 5163.

¹² Ratko Mladić's Notice of Appeal, 22 March 2018 (public with confidential annex) ("Mladić Notice of Appeal"); Ratko Mladić's Reply Brief, 29 November 2018 ("Mladić Reply Brief").

¹³ See Mladić Notice of Appeal, paras. 33-38; Mladić Appeal Brief, paras. 13, 152-335; Mladić Reply Brief, paras. 38-66.

¹⁴ See Mladić Notice of Appeal, paras. 39-50; Mladić Appeal Brief, paras. 14, 336-564; Mladić Reply Brief, paras. 67-85.

¹⁵ See Mladić Notice of Appeal, paras. 51-66; Mladić Appeal Brief, paras. 15, 570-694; Mladić Reply Brief, paras. 86-99.

¹⁶ See Mladić Notice of Appeal, paras. 67-71; Mladić Appeal Brief, paras. 16, 695-759; Mladić Reply Brief, paras. 100-104.

¹⁷ First Motion, paras. 2, 10, 14, p. 8, Annex B.

¹⁸ First Motion, Confidential Annex A, paras. A1, A2, A9. See also First Motion, p. 8.

¹⁹ Second Motion, paras. 2, 16, 17, 28, p. 13, Confidential Annexes A, B.

²⁰ Third Motion, paras. 2, 11, 20, 27, Annexes A-C.

²¹ Third Motion, paras. 32, 35, Annex D.

²² Fourth Motion, paras. 2, 17, 19, 21, 23, 24, 26, 28, 30, Annexes A-H.

supply of materials and equipment to the Army of the Republic of Bosnia and Herzegovina (“ABiH”).²³

II. APPLICABLE LAW

6. Rule 142 of the Rules governs the admission of additional evidence on appeal. For additional evidence to be admissible under Rule 142(C) of the Rules, the applicant must demonstrate that the additional evidence was not available at trial in any form, or discoverable through the exercise of due diligence.²⁴ The applicant must also show that the additional evidence is relevant to a material issue at trial and is credible.²⁵ Once it has been determined that the additional evidence meets these conditions, the Appeals Chamber will determine, in accordance with Rule 142(C) of the Rules, whether it *could* have been a decisive factor in reaching the verdict.²⁶ Where the Appeals Chamber finds that the evidence was available at trial, it may still be admissible pursuant to Rule 142(C) of the Rules. However, in such a case, the applicant must demonstrate that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that, if it had been admitted at trial, it *would* have had an impact on the verdict.²⁷

7. In both cases, the applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber’s verdict.²⁸ An applicant who fails to do so runs the risk that the tendered material will be rejected without detailed consideration.²⁹

²³ Fifth Motion, paras. 2, 15, 17, 19, 22, p. 9. Annexes A-D.

²⁴ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018 (“*Karadžić* Decision of 2 March 2018”), para. 7; *Prosecutor v. Jean Uwinkindi*, MICT-12-25-AR14.1, Decision on Requests for Admission of Additional Evidence on Appeal, 22 September 2016 (“*Uwinkindi* Decision of 22 September 2016”), para. 5; *Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Decision on Ngirabatware’s Motions for Relief for Rule 73 Violations and Admission of Additional Evidence on Appeal, 21 November 2014 (“*Ngirabatware* Decision of 21 November 2014”), para. 24.

²⁵ *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 5; *Ngirabatware* Decision of 21 November 2014, para. 25. Evidence is relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence, and is credible if it appears to be reasonably capable of belief or reliance. *Ngirabatware* Decision of 21 November 2014, para. 25.

²⁶ *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 5; *Ngirabatware* Decision of 21 November 2014, para. 26.

²⁷ *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

²⁸ *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28.

²⁹ *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28.

III. PRELIMINARY MATTERS

A. Identification of Grounds of Appeal

8. The Appeals Chamber recalls that the Practice Direction on Requirements and Procedures for Appeals provides that any party applying to present additional evidence pursuant to Rule 142 of the Rules shall provide, in its motion, an identification of each ground of appeal to which the evidence relates.³⁰ The Appeals Chamber observes that, in the Rule 142 Motions, Mladić generally does not identify specific grounds of his appeal to which the proposed evidence relates. Nevertheless, given the importance of the issues raised in the Rule 142 Motions, the Appeals Chamber will proceed to examine Mladić's submissions in the interest of justice.

B. Credibility of Proposed Additional Evidence

9. Mladić submits that the proposed additional evidence in the Rule 142 Motions is credible as it consists of official documents containing stamps and signatures,³¹ disclosed from an official website,³² or concerns the testimony or a publication of a credible person.³³ The Prosecution does not dispute the credibility of the proposed additional evidence. The Appeals Chamber recalls that evidence is credible if it appears to be reasonably capable of belief.³⁴ The Appeals Chamber finds that the proposed additional evidence in the Rule 142 Motions is reasonably capable of belief and is therefore sufficiently credible for admission as additional evidence on appeal.

C. Availability

10. As set out above, the Appeals Chamber recalls that for additional evidence to be admissible under Rule 142(C) of the Rules, the applicant must demonstrate that the additional evidence was not available at trial in any form, or discoverable through the exercise of due diligence.³⁵ Whether proffered evidence was available at trial is not a question of whether the evidence was "available" in a literal sense but rather whether the applicant could, by exercising due diligence, have obtained the evidence at an earlier date.³⁶ The mere assertion that proposed evidence was found only after the rendering of the Trial Judgement is not sufficient to demonstrate that due diligence had been

³⁰ MICT/10/Rev.1, 20 February 2019, para. 12(b).

³¹ See Second Motion, para. 19; Third Motion, para. 33; Fourth Motion, para. 10; Fifth Motion, para. 13.

³² See Third Motion, para. 9.

³³ See First Motion, paras. 9, 10. See also First Motion, Confidential Annex A, para. A7.

³⁴ Karadžić Decision of 2 March 2018, n.25; Ngirabatware Decision of 21 November 2014, para. 25.

³⁵ See *supra* para. 6.

³⁶ See Ngirabatware Decision of 21 November 2014, para. 32; Šainović *et al.* Decision of 11 March 2010, paras. 5, 17.

exercised.³⁷ Furthermore, the ICTY Appeals Chamber has clarified that, for the purposes of admission of additional evidence on appeal, evidence is “available at trial” if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the trial chamber, and depending on the circumstances, evidence received after closing arguments in a case may meet this standard.³⁸ Therefore, in respect of the Rule 142 Motions, evidence received after closing arguments and before the delivery of the Trial Judgement on 22 November 2017 may be considered available for the purposes of admission on appeal.

IV. RULE 142 MOTIONS

A. First Motion

11. In assessing Mladić’s contribution to the Overarching JCE and the Sarajevo JCE, the Trial Chamber found, *inter alia*, that Mladić prevented and obstructed the delivery of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in Serb-controlled territory and to Sarajevo, respectively.³⁹ In reaching this finding, the Trial Chamber reviewed, *inter alia*, Witness Rose’s evidence.⁴⁰ Furthermore, the Trial Chamber noted Mladić’s submission that problems with the delivery of humanitarian aid and supplies to the enclaves arose out of UNPROFOR’s inability to effectively prevent smuggling and misuse of humanitarian aid convoys.⁴¹ In this regard, the Trial Chamber found that aid convoys occasionally may have contained weapons, ammunition, or explosives, contrary to the UN mandate for delivery of humanitarian aid, but that the convoys were subjected to stringent checks and controls by the VRS, and that the blockading of delivery of humanitarian aid and the deliberately obstructive inspections by the VRS were disproportionate and calculated to restrict humanitarian aid to the enclaves.⁴²

12. In the context of the Sarajevo JCE, the Trial Chamber also found that on 28 August 1995, VRS members fired mortar shells onto Markale Market and its vicinity, wounding and killing a

³⁷ See *Šainović et al.* Decision of 29 April 2010, para. 20.

³⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 (“*Popović et al.* Decision of 20 October 2011”), para. 34; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Appellant Vidoje Blagojević’s Motion for Additional Evidence Pursuant to Rule 115, 21 July 2005 (“*Blagojević and Jokić* Decision of 21 July 2005”), para. 10.

³⁹ Trial Judgement, paras. 4601-4608, 4886-4890.

⁴⁰ See, e.g., Trial Judgement, paras. 4548, 4557, 4562, 4564, 4586, 4588. See also Trial Judgement, para. 4841.

⁴¹ Trial Judgement, para. 4577.

⁴² Trial Judgement, para. 4608.

large number of civilians,⁴³ which it found constituted murder under Counts 5 and 6 of the Indictment, for which it found Mladić guilty.⁴⁴

13. In the First Motion, Mladić seeks to admit as additional evidence on appeal, first, a transcript of a United Kingdom House of Lords hearing dated 6 September 2017 containing statements by Witness Rose (“Rose House of Lords Statement”), and requests that Witness Rose be recalled to authenticate the aforementioned transcript.⁴⁵ Second, Mladić requests that [REDACTED].⁴⁶ The Appeals Chamber will address these requests in turn.

1. Rose House of Lords Statement

14. Mladić submits that the Rose House of Lords Statement was not available during trial as it was made and was disclosed by the Prosecution after the deadline for the introduction of evidence from the bar table on 18 January 2016.⁴⁷ Mladić further submits that Witness Rose’s statement before the House of Lords concerning humanitarian aid and the situation in the Eastern enclave of Bosnia and Herzegovina, in particular, that “very few people died [...] of cold or hunger”, differs from Witness Rose’s testimony during his trial,⁴⁸ and is relevant to contradict the Trial Chamber’s findings on the role the Serbs and Mladić had in causing starvation and prolonging the suffering of Bosnian Muslims and Bosnian Croats.⁴⁹ In addition, Mladić highlights Witness Rose’s statement before the House of Lords that the UN’s peacekeeping efforts were undermined by NATO and the United States, who were arming the Bosnian Muslims in violation of the arms embargo, as a consequence of which the conflict and suffering were prolonged.⁵⁰ Mladić asserts that the Rose House of Lords Statement corroborates other evidence that NATO and the United States were arming the Bosnian Muslims and were biased against the Serbs, calls into question testimonies of other witnesses at trial, and is directly relevant to all of his convictions relating to the four joint

⁴³ Trial Judgement, paras. 2097, 2150, 2151.

⁴⁴ Trial Judgement, pp. 1611, 1612, 1615, para. 5214.

⁴⁵ First Motion, paras. 2, 10, p. 8.

⁴⁶ First Motion, Confidential Annex A, paras. A1, A9. *See also* First Motion, p. 8.

⁴⁷ First Motion, para. 3; First Reply, para. 7.

⁴⁸ First Motion, paras. 9, 13, 14.

⁴⁹ First Motion, para. 15. Specifically, Mladić avers that the Rose House of Lords Statement is relevant to the Trial Chamber’s “findings and observations”: (i) that, by March 1993, Srebrenica town had almost no running water as VRS forces had destroyed the town’s water supplies, and food, medicine, and other essentials were extremely scarce; (ii) that on 6 July 1995, the Bosnia and Herzegovina government reported the death of 13 civilians in Srebrenica due to starvation, and by 8 July 1995, due to refusal of permission of entry to the enclaves, the United Nations High Commissioner for Refugees (“UNHCR”) could only meet less than 25 per cent of the needs of the population; and (iii) in chapter 9.3.11 of the Trial Judgement regarding his orders and approvals to the VRS about authorisation and passage of humanitarian aid, including UNPROFOR convoys, into the Bosnian Serb Republic. *See* First Motion, para. 12, referring to Trial Judgement, paras. 2360, 4606, 4686.

⁵⁰ First Motion, paras. 14-16.

criminal enterprises.⁵¹ Mladić argues that “taken cumulatively together with other Defence evidence that was disregarded by the Trial Chamber”, Witness Rose’s additional evidence could and would have made a difference to the verdict.⁵²

15. The Prosecution responds that the First Motion should be denied.⁵³ The Prosecution asserts that the Rose House of Lords Statement was available at trial, over two months before the issuance of the Trial Judgement, as Witness Rose testified before the House of Lords on 6 September 2017 during a public hearing.⁵⁴ The Prosecution contends that the content of the Rose House of Lords Statement was also available at trial as it was of the same nature as his testimony given during trial, and that Witness Rose was cross-examined by the Defence.⁵⁵ The Prosecution argues that Mladić fails to specify which Trial Chamber findings instrumental to the conviction or sentence are allegedly impacted by the proposed evidence.⁵⁶ It claims that Witness Rose’s additional evidence would not undermine the verdict as it duplicates evidence which the Trial Chamber considered.⁵⁷

16. Mladić replies that the Prosecution incorrectly claims that the timeframe for the proposed evidence to be considered as available at trial includes the period between the date imposed by the Trial Chamber for Defence bar table submissions and the issuance of the judgement.⁵⁸ Mladić further reiterates that the Rose House of Lords Statement reflects new information which differs from evidence already on the record,⁵⁹ and that given its importance, the exclusion of the proposed evidence would result in a miscarriage of justice.⁶⁰

17. Turning first to the issue of availability of the proposed additional evidence, the Appeals Chamber notes that Witness Rose gave the statement before the House of Lords during a public hearing on 6 September 2017,⁶¹ before the Trial Judgement was issued on 22 November 2017. As set out above, the Appeals Chamber recalls that the ICTY Appeals Chamber has clarified that, for the purposes of admission of additional evidence on appeal, evidence is “available at trial” if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the trial chamber, and depending on the circumstances, evidence received after

⁵¹ First Motion, paras. 15, 16.

⁵² First Motion, para. 17.

⁵³ First Response, paras. 1, 6. *See also* First Response, paras. 2-5, 7-31, 33.

⁵⁴ First Response, para. 3.

⁵⁵ First Response, para. 4. The Prosecution asserts that it did not disclose the Rose House of Lords Statement. *See* First Response, para. 2.

⁵⁶ First Response, paras. 7, 8.

⁵⁷ First Response, paras. 10-14.

⁵⁸ First Reply, paras. 6, 7, 13.

⁵⁹ First Reply, paras. 8, 9.

⁶⁰ First Reply, paras. 12-14, 16.

⁶¹ *See* First Motion, Annex B, Registry Pagination (“RP.”) 8773.

closing arguments in a case may meet this standard.⁶² Therefore, Mladić's assertion – that any evidence admitted between the deadline for the introduction of evidence from the bar table and the issuance of the Trial Judgement would have been automatically considered unavailable⁶³ – lacks merit. Mladić also does not offer any argument as to why he did not attempt to have the proposed additional evidence admitted by the Trial Chamber prior to the issuance of the Trial Judgement.⁶⁴ The Appeals Chamber, Judge Nyambe dissenting, considers in this respect that he has not exercised due diligence in attempting to bring the evidence before the Trial Chamber.⁶⁵ Consequently, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Rose House of Lords Statement was unavailable at trial or that it could not have been discovered through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Rose House of Lords Statement *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.⁶⁶

18. The Appeals Chamber notes that the proposed evidence consists of excerpts of answers given by Witness Rose to the United Kingdom House of Lords International Relations Committee, based on his experiences as the UNPROFOR Commander in Bosnia and Herzegovina from 1994 to 1995, as part of an inquiry on the situation in the Balkans and the involvement of the United Kingdom in the region.⁶⁷ The Rose House of Lords Statement concerns, *inter alia*, the Dayton peace agreement, the mandate and performance of UNPROFOR, the humanitarian situation in Bosnia and Herzegovina, the military intervention by the United States and NATO, and the smuggling of illegal arms.⁶⁸ The Appeals Chamber finds that the Rose House of Lords Statement is relevant to material issues at trial as it concerns the statement of one of the witnesses at trial whose evidence about similar issues the Trial Chamber considered in reaching its finding that Mladić prevented and obstructed the delivery of humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves located in Serb-controlled territory, which was calculated to restrict humanitarian aid to

⁶² *Popović et al.* Decision of 20 October 2011, para. 34; *Blagojević and Jokić* Decision of 21 July 2005, para. 10.

⁶³ First Motion, para. 3; First Reply, para. 7.

⁶⁴ *Cf. Popović et al.* Decision of 20 October 2011, para. 33.

⁶⁵ *Cf. Popović et al.* Decision of 20 October 2011, para. 33.

⁶⁶ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

⁶⁷ See First Motion, Annex B, RP. 8773, 8772.

⁶⁸ See First Motion, Annex B, RP. 8773-8771.

the enclaves.⁶⁹ The Trial Chamber relied on this finding in determining that Mladić significantly contributed to the Overarching JCE and the Sarajevo JCE.⁷⁰

19. In attempting to demonstrate the relevance and impact of the proposed evidence, the Appeals Chamber observes that Mladić points to the Trial Chamber's conclusion that he was responsible for a joint criminal enterprise which brought about "restrictions in humanitarian aid" to Bosnian Muslim and Bosnian Croat areas in an effort to make "unbearable living conditions for those inhabitants".⁷¹ He further specifically points to paragraphs 2360, 4606, and 4886 of the Trial Judgement concerning the Trial Chamber's "findings and observations" on the humanitarian situation in Srebrenica as well as his role in authorizing the passage of humanitarian aid.⁷² Mladić claims that the proposed evidence: (i) is relevant to contradicting the Trial Chamber's findings on his actions and those of the Bosnian Serbs which led to starvation and a prolonging of the dire humanitarian situation; (ii) corroborates evidence that NATO and the United States were arming Bosnian Muslims and were biased against the Bosnian Serbs; and (iii) has direct relevance to every count of the Judgement for which he was convicted, including all four joint criminal enterprises.⁷³

20. The Appeals Chamber is not convinced that the admission of the Rose House of Lords Statement would have impacted the verdict. The Appeals Chamber considers that the Rose House of Lords Statement does not add meaningful new information to the evidence the Trial Chamber already considered. The excerpt from the Rose House of Lords Statement – generally asserting that "the UN was succeeding remarkably well in [...] delivering humanitarian aid" and "Bosnia remains one of the few major conflicts of our time where [...] very few people died, either of cold or hunger"⁷⁴ – does not impact the Trial Chamber's findings to which Mladić points in arguing for the admission of this statement. As discussed below, the Appeals Chamber considers that each of the findings at paragraphs 2360, 4606, and 4886 of the Trial Judgement, to which Mladić refers, was based on the Trial Chamber's assessment of extensive evidence.

⁶⁹ See, e.g., Trial Judgement, paras. 1850, 1852, 1874, 1882, 1944, 1947, 1949, 2051, 2052, 2058, 2064, 2073, 4294, 4458, 4472, 4548, 4557, 4562, 4564, 4586, 4588, 4694, 4705, 4709, 4744, 4788, 4841, 4895, 4909. See also Trial Judgement, para. 4841.

⁷⁰ See Trial Judgement, paras. 4601, 4603-4609, 4611, 4612, 4886-4891, 4893. Specifically, the Trial Chamber found that Mladić significantly contributed to: (i) the Overarching JCE including through placing severe restrictions on the delivery of humanitarian aid from 10 April 1994 onwards (see Trial Judgement, paras. 4611, 4612); and (ii) the Sarajevo JCE including through frequently ordering the restriction of humanitarian aid to Sarajevo (see Trial Judgement, para. 4893).

⁷¹ See First Motion, para. 12, referring to Trial Judgment, paras. 1884, 1887; 2330, 2333-2335, 2360; 4550-4576, 4578, 4588, 4591, 4593, 4599-4609, 4845, 4846, 4858, 4859, 4862, 4863, 4865, 4866, 4870, 4871, 4873-4875, 4877, 4878, 4886-4891.

⁷² First Motion, para. 12.

⁷³ First Motion, paras. 15, 16.

⁷⁴ See First Motion, paras. 13, 14, referring to First Motion, Annex B, RP. 8772.

21. The Trial Chamber's finding, at paragraph 2360 of the Trial Judgement, that "[b]y March 1993, Srebrenica Town had almost no running water as VRS forces had destroyed the town's water supplies [and] [f]lood, medicine, and other essentials were extremely scarce", was based on its review of an abundance of evidence concerning the lead-up to the fall of the Srebrenica enclave, and particularly the conditions in Srebrenica Town.⁷⁵ In the same vein, the Trial Chamber's finding, at paragraph 4606 of the Trial Judgement, that "[o]n 6 July 1995, the Bosnian-Herzegovina government reported the death of 13 civilians in Srebrenica due to starvation [and] [b]y 8 July 1995 due to refusal of permission of entry to the enclaves UNHCR could only meet less than 25 percent of the needs of the population", was supported by its consideration of extensive evidence in Chapter 9.3.11 of the Trial Judgement regarding the restriction of humanitarian aid throughout Bosnia and Herzegovina, including in Srebrenica.⁷⁶ The Appeals Chamber observes that at paragraph 4886 of the Trial Judgement, the Trial Chamber, in addressing the situation in Sarajevo, recalled its findings in Chapter 9.3.11 of the Trial Judgement regarding Mladić's orders, instructions, and approvals *vis-à-vis* humanitarian aid, including UNPROFOR convoys, into *Republika Srpska*. As already noted, the Trial Chamber's findings in Chapter 9.3.11 of the Trial Judgement are based on its examination of extensive evidence in this regard.⁷⁷

22. The Appeals Chamber also does not see how the remaining excerpts of the Rose House of Lords Statement to which Mladić refers would impact the Trial Chamber's verdict. In this regard, in addition to Witness Rose's evidence, the Trial Chamber reviewed other evidence and addressed arguments concerning the UN's success and challenges in alleviating the humanitarian situation in Bosnia⁷⁸ and the smuggling of arms in humanitarian convoys.⁷⁹ Furthermore, the Trial Chamber already heard Witness Rose's evidence concerning the arming of Bosnian Muslims and Bosnian Croats by NATO and the United States in contravention of the arms embargo and NATO's undermining of the UN's peacekeeping mission.⁸⁰ In this respect, Witness Rose testified before the Trial Chamber, as follows:

[M]y belief certainly in retrospect is that sometime during 1994 the NATO led by the Americans decided to breach their own United Nations Security Council Resolutions regarding the arms embargo and started to train and equip the Muslims and the Croats. And that, therefore, inevitably placed NATO on one side and the Serbs on the other, leaving the United Nations trying to hold the two sides from the middle. It certainly made the peacekeeping mission almost impossible to proceed with.

⁷⁵ See Trial Judgement, paras. 2330-2336, 2360. See also First Motion, para. 12.

⁷⁶ See Trial Judgement, paras. 4548-4606. See also First Motion, para. 12.

⁷⁷ See Trial Judgement, paras. 4548-4608, 4886. See also First Motion, para. 12.

⁷⁸ See, e.g., Trial Judgement, para. 4595. See also T. 18 January 2013 pp. 6985, 6986.

⁷⁹ See, e.g., Trial Judgement, paras. 4557, 4578, 4579, 4581, 4608, 4864, 4890. See also T. 16 January 2013 pp. 6872, 6873.

⁸⁰ See, e.g., T. 17 January 2013 p. 6952.

The Appeals Chamber notes that Mladić extensively cross-examined Witness Rose during his testimony from 16 to 18 January 2013.⁸¹ Thus, the Appeals Chamber finds that the Rose House of Lords Statement would not have impacted the Trial Chamber's evaluation of Mladić's restriction of the delivery of humanitarian aid, which was based on an abundance of evidence.⁸² Therefore, Mladić does not establish that not admitting the Rose House of Lords Statement as additional evidence would lead to a miscarriage of justice and impact the verdict.

23. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Rose House of Lords Statement does not satisfy the requirements of Rule 142 of the Rules.

2. [REDACTED] and Testimony

24. Mladić seeks to call [REDACTED] to testify or admit the [REDACTED] as additional evidence on appeal and submits that the proposed evidence was not available during trial as the [REDACTED] in late 2016 and only disclosed by the Prosecution after the deadline for the introduction of evidence from the bar table on 18 January 2016.⁸³ Mladić asserts that [REDACTED].⁸⁴ Mladić contends that [REDACTED] are relevant and critical to his case as they cover topics such as: [REDACTED].⁸⁵

25. The Prosecution responds that Mladić's request to admit proposed evidence should be denied.⁸⁶ The Prosecution submits that the proposed evidence was available at trial, through the exercise of due diligence, [REDACTED].⁸⁷ The Prosecution contends that Mladić's failure to make "appropriate use of all mechanisms" available under the Statute and Rules to secure [REDACTED] evidence does not render his evidence unavailable.⁸⁸ The Prosecution further submits that, apart from listing topics and citing summaries of evidence in the Trial Judgement, Mladić fails to specify which Trial Chamber findings are allegedly impacted by the proposed evidence.⁸⁹ It contends that

⁸¹ See T. 16 January 2013 pp. 6838-6897; T. 17 January 2013 pp. 6901-6972; T. 18 January 2013 pp. 6973-7000.

⁸² See, e.g., Trial Judgement, paras. 4550-4600, 4842, 4844, 4845, 4847, 4850-4853, 4855, 4858-4860, 4862, 4863, 4865, 4866, 4870, 4871, 4875, 4877, 4885, 4889.

⁸³ First Motion, para. 3, Confidential Annex A, paras. A1, A3.

⁸⁴ First Motion, Confidential Annex A, para. A2.

⁸⁵ First Motion, Confidential Annex A, para. A6, *referring to* Trial Judgement, paras. 2122, 2130, 2131, 2133, 2147, 4915, 4921. See also Second Notice of Filing of Translations Relating to First Motion, para. 8. Mladić adds that [REDACTED] affects topics and sections of the Trial Judgement concerning [REDACTED]. See First Motion, Confidential Annex A, para. A8.

⁸⁶ First Response, paras. 1, 6. See also First Response, paras. 2-5, 7-31, 33.

⁸⁷ First Response, para. 5. The Prosecution asserts that it did not disclose [REDACTED]. See First Response, para. 2.

⁸⁸ First Response, paras. 2, 3. See also First Response, paras. 4, 5.

⁸⁹ First Response, para. 7. See also First Response, paras. 8, 9, 15, 16.

the proposed evidence would not undermine Mladić's convictions, which were based on similar evidence considered by the Trial Chamber and the entire trial record.⁹⁰

26. Mladić replies that the Prosecution claims incorrectly that [REDACTED] was available at trial, arguing that the relevant timeframe for availability during trial does not include the period between the date imposed by the Trial Chamber for Defence bar table submissions and the issuance of the Trial Judgement.⁹¹ Mladić further disputes the Prosecution's position that the proposed additional evidence is of a similar nature to evidence at trial⁹² and emphasizes that, the exclusion of the proposed additional evidence would result in a miscarriage of justice.⁹³

27. With respect to the issue of availability, as recalled above, the ICTY Appeals Chamber has clarified that, for the purposes of admission of additional evidence on appeal, evidence is "available at trial" if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the trial chamber, and depending on the circumstances, evidence received after closing arguments in a case may meet this standard.⁹⁴ The Appeals Chamber notes Mladić's claim that [REDACTED], almost a year before the issuance of the Trial Judgement on 22 November 2017. The Appeals Chamber further notes the Prosecution's submission that [REDACTED] were available online in Serbian by at least 26 April 2017 and in English by 7 July 2017,⁹⁵ several months before the issuance of the Trial Judgement. Considering Mladić's prior interest in [REDACTED] evidence, he could have been aware of the existence or content of [REDACTED] through the exercise of due diligence. The Appeals Chamber recalls that the party seeking the admission of additional evidence on appeal bears the burden of demonstrating how it exercised due diligence to discover and present the evidence at trial, and that it has requested the trial chamber to utilize its powers to compel witnesses to testify if appropriate.⁹⁶ Mladić does not mention any attempts he made to admit [REDACTED] before the issuance of the Trial Judgement, to compel [REDACTED] testimony, or to apprise the Trial Chamber of any difficulties he encountered in obtaining the proposed evidence. The Appeals Chamber finds, Judge Nyambe

⁹⁰ First Response, para. 15. *See also* First Response, paras. 16-31. In particular, the Prosecution claims that [REDACTED]. *See* First Response, para. 19. The Prosecution also submits that, in the event that the Appeals Chamber admits the proposed evidence, it should make Rose and [REDACTED] available for cross-examination. *See* First Response, para. 32.

⁹¹ First Reply, para. 7.

⁹² First Reply, paras. 10, 11.

⁹³ First Reply, paras. 12-16.

⁹⁴ *Popović et al.* Decision of 20 October 2011, para. 34, *Blagojević and Jokić* Decision of 21 July 2005, para. 10.

⁹⁵ *See* First Response, para. 3.

⁹⁶ *See Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Motion to Admit Additional Evidence, 12 February 2010 (public redacted version), para. 21; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 40.

dissenting, that Mladić therefore fails to demonstrate that [REDACTED] was unavailable at trial or undiscoverable through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting [REDACTED] *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.⁹⁷

28. A review of [REDACTED] submitted by Mladić reveals [REDACTED].⁹⁸ The Appeals Chamber recalls that the Trial Chamber found that, on 28 August 1995, VRS members fired a mortar shell onto Markale Market and its vicinity, wounding and killing a large number of civilians, and that Mladić was convicted for murder on the basis of, *inter alia*, this incident.⁹⁹ The Appeals Chamber finds that the proposed evidence is therefore relevant to the extent that it relates to this finding.¹⁰⁰ With respect to the remaining [REDACTED] to which Mladić points, he does not demonstrate how the proposed evidence relates to a material issue at trial.

29. As previously recalled, an applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence would have had upon the trial chamber's verdict.¹⁰¹ The Appeals Chamber finds that, by merely listing a number of topics, sections, and paragraphs containing mostly summaries of evidence in the Trial Judgement,¹⁰² Mladić does not identify with precision the specific Trial Chamber findings to which the proposed evidence pertains or how the proposed evidence would have impacted the Trial Chamber's verdict. In any event, the Appeals Chamber considers that [REDACTED] would not have had an impact on the Trial Judgement as the Trial Chamber already considered a wide range of evidence on the shelling of Markale Market.¹⁰³

⁹⁷ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

⁹⁸ See, e.g., Second Notice of Filing of Translations Relating to First Motion, RP. 9560-9551, 9544-9542, 9538-9530.

⁹⁹ See Trial Judgement, paras. 2150, 2151, 3051, 3065, 5214, p. 1612.

¹⁰⁰ [REDACTED]. See Mladić Appeal Brief, paras. 526, 553, 558.

¹⁰¹ *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28.

¹⁰² See First Motion, Confidential Annex A, paras. A6, A8, *referring to, inter alia*, Trial Judgement, para. 2122, 2130, 2131, 2133. To the extent that Mladić argues that [REDACTED], Mladić's argument is undeveloped, unsupported by the references he cites, and does not demonstrate how the proposed evidence would have impacted the Trial Chamber's verdict. See First Motion, Confidential Annex A, para. A6, n. 18, *referring to* Trial Judgement, para. 2147. Similarly, his argument that [REDACTED] is vague, undeveloped, and fails to demonstrate any impact on the Trial Chamber's verdict. See First Motion, Confidential Annex A, para. A6, n. 19, *referring to* Trial Judgement, paras. 4915, 4921.

¹⁰³ See, e.g., Trial Judgement, paras. 2121-2139. With respect to the remaining excerpts of [REDACTED]: (i) the Trial Chamber heard Rose's testimony on the United States' violation of the arms embargo (*see* T. 17 January 2013 p. 6952); (ii) Mladić's argument and supporting evidence that Izetbegović sacrificed Srebrenica in order to gain US military intervention were already considered and rejected by the Trial Chamber (*see* Trial Judgement, paras. 4198, 4201, 4212); and (iii) Mladić's assertion that [REDACTED]. See First Motion, Confidential Annex A, para. A8. Mladić's argument

30. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's requests to [REDACTED] do not satisfy the requirements of Rule 142 of the Rules.

B. Second Motion

31. In assessing Mladić's alleged contribution in relation to the Overarching JCE, the Trial Chamber found, *inter alia*, that: (i) that the VRS had a well-functioning communication system which allowed Mladić to effectively communicate with his subordinates; (ii) Mladić issued orders to VRS units and closely monitored their implementation; and (iii) Mladić communicated regularly with his subordinates and was well aware of the developments on the ground.¹⁰⁴ The Trial Chamber further relied, *inter alia*, on its finding that between September 1992 and at least March 1995, Mladić introduced and maintained a controlled and centralized system of spreading propaganda related to Bosnian Croats and Bosnian Muslims.¹⁰⁵ In assessing Mladić's alleged contribution to the Srebrenica JCE through his command and control of the VRS, the Trial Chamber found that, between 11 July 1995 and 11 October 1995, Mladić issued several orders to VRS forces and that, from 10 July 1992 to 17 July 1995, he received reports from VRS units, including the Drina Corps, which were present in and around Srebrenica.¹⁰⁶

32. In assessing the existence of and Mladić's *mens rea* for the Srebrenica JCE, the Trial Chamber considered that he gave an order on 13 July 1995 calling for the prevention of the entry of local and foreign journalists into the zones of combat operations in Srebrenica and Žepa as well as a ban on giving any information to the media about operations in Srebrenica ("Order of 13 July

on [REDACTED] was already put forward by him at trial. See Mladić Final Trial Brief, para. 2826; T. 12 December 2016 p. 44706. Concerning [REDACTED], the Trial Chamber noted that accounts differed, and concluded, after having considered the evidence in its entirety, that the camp was a mixed-purpose facility that served as a detention facility as well as a transit centre for non-Serbs, and that "differences which exist in the accounts of the camp's purpose and the treatment of non-Serbs there are not necessarily contradictory, but instead relate to different sections of the camp, as well as the different categories of non-Serbs located at the camp, and the differences in the time periods discussed". See Trial Judgement, para. 1320. Furthermore, the Trial Chamber found based on its review of a large amount of evidence that Mladić deliberately provided misleading information about crimes against Bosnian Muslims and Bosnian Croats and the role of the Serb forces in those crimes to, *inter alia*, the international community. See Trial Judgement, paras. 4511, 4512, 4830, 4831, 5081-5084. The Trial Chamber found based on an extensive review of evidence that Mladić participated in policy discussions regarding Sarajevo and proposed "a massive bombardment of Sarajevo with explicit disregard for the safety of civilians". See Trial Judgement, para. 4823. See also Trial Judgement, paras. 4815-4822. On humanitarian aid, the Trial Chamber found based on an extensive assessment that Mladić prevented and obstructed its delivery to Bosnian Muslim and/or Bosnian Croat enclaves located in Serb-controlled territory, in an effort to create unbearable living conditions for their inhabitants. See Trial Judgement, paras. 4601-4608, 4886-4890. See also Trial Judgement, paras. 4548-4600, 4841-4885.

¹⁰⁴ Trial Judgement, paras. 4387, 4393. See also Trial Judgement, paras. 275, 276.

¹⁰⁵ Trial Judgement, paras. 4498, 4611, 4612.

¹⁰⁶ Trial Judgement, paras. 5049, 5050.

1995”).¹⁰⁷ It found that Mladić’s action was intended to keep the media and international community from knowing what was happening in Srebrenica.¹⁰⁸

33. In his Second Motion, Mladić seeks to admit three documents as additional evidence on appeal: (i) a strictly confidential VRS Main Staff report signed by Chief of Staff Manojlo Milovanović (“Milovanović”) on 7 June 1994 (“VRS Report of 7 June 1994”); (ii) a strictly confidential VRS Main Staff report signed by Milovanović on 19 September 1994 (“VRS Report of 19 September 1994”); and (iii) an order issued by Drina Corps Commander Milenko Živanović on 10 October 1993 (“Order of 10 October 1993”).¹⁰⁹ The Appeals Chamber will first consider the VRS Reports of 7 June 1994 and 19 September 1994 before turning to the Order of 10 October 1993.

1. VRS Reports of 7 June 1994 and 19 September 1994

34. Mladić submits that the VRS Report of 7 June 1994 and the VRS Report of 19 September 1994 (“Two VRS Reports”) were not available to him during the trial as they were disclosed by the Prosecution after 20 October 2017, that is after the 18 January 2016 deadline for the introduction of evidence from the bar table and after the conclusion of the trial.¹¹⁰ Mladić further submits that the Two VRS Reports, which he claims were drafted in his absence from the VRS Main Staff or *Republika Srpska*, are relevant to demonstrate that: (i) he did not have effective control over the VRS at all times and was not always informed of the situation on the ground;¹¹¹ (ii) his role and position were not crucial for the operational functioning of the VRS which was not dependent on his presence;¹¹² (iii) his deputy commander, Milovanović, could exercise authority in his absence without consulting or informing him;¹¹³ and (iv) Mladić was completely removed from the chain of command and reporting at various times during the war.¹¹⁴ Mladić asserts that the Two VRS Reports corroborate other evidence demonstrating his limited control, call into question testimonies of witnesses at trial concerning his authority, and contradict the Trial Chamber’s conclusion that Mladić was well aware of the developments on the ground.¹¹⁵ Mladić claims that the Two VRS Reports render unsafe the Trial Chamber’s finding regarding his command and control as well as

¹⁰⁷ Trial Judgement, paras. 4982, 5072, 5081, 5117, 5128.

¹⁰⁸ Trial Judgement, paras. 4982, 5081, 5117, 5128.

¹⁰⁹ Second Motion, paras. 2, 16, 17, 28, Confidential Annexes A, B.

¹¹⁰ Second Motion, paras. 2-4, 10, 12, 13, *referring to* Disclosure Batch 138.

¹¹¹ Second Motion, paras. 15, 22.

¹¹² Second Motion, paras. 18, 19, 22.

¹¹³ Second Motion, paras. 15, 20, 22.

¹¹⁴ Second Motion, paras. 15, 18-20, 22. Mladić further contends that unlike other similar evidence adduced at trial, the Two VRS reports do not mention any of his orders or that the documents were signed “for the Commander” by Milovanović. *See* Second Motion, para. 20, *referring to* Exhibits P929, P4317.

his knowledge of events while he was not at the Main Staff, particularly during the events in Srebrenica in July 1995.¹¹⁶

35. The Prosecution responds that the Two VRS Reports were available to Mladić at trial through the exercise of due diligence, as they were on the Electronic Disclosure Suite (“EDS”) since 2005 as part of the Drina Corps collection and were therefore available to Mladić since shortly after his arrest.¹¹⁷ Furthermore, the documents were disclosed to Mladić on 11 November 2011 and again on 20 October 2017.¹¹⁸ The Prosecution submits that the Two VRS Reports do not undermine the verdict and that they are duplicative of other evidence on the trial record.¹¹⁹ The Prosecution further submits that the Trial Chamber already considered and dismissed Mladić’s arguments that Milovanović was in command of the VRS while Mladić was absent from Srebrenica in July 1995 and that Mladić was not fully informed of the situation on the ground and had limited influence over the VRS.¹²⁰ The Prosecution adds that Mladić fails to explain how the reports respectively signed in June and September 1994 would render unsafe the findings on Mladić’s position and authority during the events in Srebrenica in July 1995.¹²¹

36. In his reply, Mladić highlights the Prosecution’s alleged “massive disclosure problems” and submits that the Two VRS Reports were not accessible through the EDS during the trial notwithstanding an exercise of due diligence as he was not given means to know when documents were uploaded or provided with any metadata to allow the reports to be identified.¹²² He further submits that the Prosecution fails to give sound reasoning with respect to the impact the proposed document would have had on the verdict.¹²³

37. Turning first to availability, the Appeals Chamber notes that it is not disputed that the Two VRS Reports were disclosed to Mladić on 20 October 2017.¹²⁴ The Appeals Chamber also notes the Prosecution’s submission that the Two VRS Reports have been available in the EDS since 2005 and were disclosed to Mladić on 11 November 2011. As recalled above, for the purposes of admission

¹¹⁵ Second Motion, paras. 21, 22.

¹¹⁶ Second Motion, para. 21.

¹¹⁷ Second Response, para. 3.

¹¹⁸ Second Response, para. 3. Specifically, the Prosecution submits that VRS Report of 7 June 1994 was disclosed in Disclosure Batch 5 on 11 November 2011 and the VRS Report of 19 September 1994 is a duplicate of a document disclosed in Disclosure Batch 5 containing a different code. *See* Second Response, para. 3.

¹¹⁹ Second Response, paras. 3, 5, 6. Specifically, the Prosecution submits that VRS Report of 7 June 1994 was disclosed under a different ERN number on 11 November 2011 and that VRS Report of 19 September 1994 is a duplicate of a document already disclosed on 11 November 2011. Second Response, para. 3.

¹²⁰ Second Response, paras. 6-9.

¹²¹ Second Response, para. 9.

¹²² Second Reply, paras. 5, 6, 8, 13.

¹²³ Second Reply, para. 11.

¹²⁴ *See* Second Motion, para. 12; Second Reply, para. 5.

of additional evidence on appeal, evidence is “available at trial” if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the trial chamber, and depending on the circumstances, evidence received after closing arguments in a case may meet this standard.¹²⁵ Therefore, Mladić’s argument that any document he obtained after the deadline for the introduction of evidence from the bar table on 18 January 2016 is considered “unavailable” for the purposes of Rule 142 of the Rules, is unsupported. Mladić also does not offer any argument as to why he did not attempt to have the proposed additional evidence admitted by the Trial Chamber prior to the issuance of the Trial Judgement.¹²⁶ The Appeals Chamber considers, in this respect, that he has not exercised due diligence in attempting to bring the evidence before the Trial Chamber.¹²⁷ Furthermore, considering Mladić’s arguments at trial concerning his command and control over the VRS, in particular, that his deputy commander could exercise authority independently in his absence¹²⁸ and that Mladić had limited influence over the VRS and was not fully informed of the situation on the ground,¹²⁹ the Appeals Chamber considers that through the exercise of due diligence, he could have been aware of the existence of the proposed evidence in the EDS. With respect to his alleged difficulties in identifying documents without metadata, the Appeals Chamber recalls that the ICTY Appeals Chamber upheld the Trial Chamber’s determination that the Prosecution had not violated its disclosure obligation by disclosing evidence in the EDS without providing searchable metadata.¹³⁰ Accordingly, Mladić does not demonstrate that the Two VRS Reports were unavailable or undiscoverable through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Two VRS Reports *would* lead to a miscarriage of justice, in that, if these documents individually or collectively had been admitted at trial, it *would* have had an impact on the verdict.¹³¹

38. The Appeals Chamber observes that the Two VRS Reports concern combat operations issued by the VRS’ Main Staff, signed by Chief of Staff Milovanović, addressed to the President of

¹²⁵ *Popović et al.* Decision of 20 October 2011, para. 34, *Blagojević and Jokić* Decision of 21 July 2005, para. 10.

¹²⁶ *Cf. Popović et al.* Decision of 20 October 2011, para. 33.

¹²⁷ *Cf. Popović et al.* Decision of 20 October 2011, para. 33.

¹²⁸ See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Corrigendum to Annex A to Notice of Filing Under Objection and with Reservation of Rights, Filed 25 October 2016, 2 November 2016, Annex A (confidential; public redacted version filed on 8 March 2018) (“Mladić Final Trial Brief”), para. 670.

¹²⁹ See Trial Judgement, paras. 4393, 5050, 5053.

¹³⁰ See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber’s Decision on EDS Disclosure Methods, 28 November 2013 (“Decision of 28 November 2013”), paras. 45, 46; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Submissions Relative to the Proposed “EDS” Method of Disclosure, 26 June 2012 (“Decision of 26 June 2012”), paras. 12-14.

¹³¹ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

Republika Srpska and VRS units operating across the territory of Bosnia and Herzegovina.¹³² The Appeals Chamber finds that the Two VRS Reports are relevant to the issue concerning Mladić's command and control of VRS which the Trial Chamber considered in determining Mladić's contribution to the Overarching JCE and Srebrenica JCE.¹³³

39. However, the Two VRS Reports are cumulative of evidence already considered by the Trial Chamber. In this regard, the Trial Chamber considered Mladić's arguments and reviewed evidence that his deputy commander could exercise authority independently in his absence and that Mladić had limited influence over the VRS and was not fully informed of the situation on the ground.¹³⁴ With respect to the Overarching JCE, the Trial Chamber rejected Mladić's arguments in this regard and found that Mladić effectively and regularly communicated with his subordinates, issued orders and closely monitored their implementation, and was well aware of the developments on the ground.¹³⁵ With respect to the Srebrenica JCE, the Trial Chamber rejected Mladić's argument that because he was travelling to Belgrade in July 1995, he was unable to exercise command and control over the VRS forces.¹³⁶ The Trial Chamber found that irrespective of whether Mladić was in Srebrenica or Belgrade in July 1995, he was still the Commander of the VRS Main Staff giving instructions and issuing orders and that, throughout July 1995, including during his travel to Belgrade, Mladić: (i) was in contact with the VRS Main Staff and maintained command and control; (ii) gave orders to the VRS units which were implemented; (iii) took measures to ensure the implementation of his orders; and (iv) communicated over the phone with his Chief of Staff Milovanović, on a regular basis.¹³⁷ Furthermore, Mladić does not demonstrate how the Two VRS Reports, which were issued in June and September 1994, respectively, would have impacted the Trial Chamber's findings concerning his command and control in Srebrenica in July 1995. Mladić therefore does not demonstrate that the Two VRS Reports would have impacted the Trial Chamber's verdict and that not admitting them as additional evidence would lead to a miscarriage of justice.

40. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Two VRS Reports does not satisfy the requirements of Rule 142 of the Rules.

¹³² See Second Motion, Confidential Annex A, RP. 9067-9065, 9060-9057.

¹³³ See Trial Judgement, paras. 4293-4395, 4611, 4612, 4991-5053, 5097, 5098.

¹³⁴ See Mladić Final Trial Brief, paras. 670, 2878, *referring to* T. 12 November 2013 p. 19204, T. 16 September 2013 p. 16809, T. 16 November 2015 pp. 41393-41394; Trial Judgement, paras. 4374, 4391-4394, 4991, 4994, 5050, 5053.

¹³⁵ See Trial Judgement, paras. 4387, 4393. *See also*, Trial Judgement, paras. 275, 276.

¹³⁶ See Trial Judgement, para. 5053.

¹³⁷ Trial Judgement, para. 5053.

2. Order of 10 October 1993

41. Mladić submits that, like the Two VRS Reports, the Order of 10 October 1993 was not available at trial as it was disclosed after 20 October 2017.¹³⁸ Mladić further submits that the Order of 10 October 1993, which was signed by Drina Corps Commander Živanović, prohibits the “Press Centre” from providing information related to the Drina Corps’ work to the media without approval and was not intended to conceal crimes.¹³⁹ He claims that a ban on sharing information with the media is normal practice in the context of a military operation and that the Order of 10 October 1993 corroborates other evidence showing the pursuit of a legitimate activity during warfare as well as the strategic protection of VRS military interests.¹⁴⁰ Mladić contends that the Order of 10 October 1993 renders unsafe the Trial Chamber’s findings that Mladić introduced and maintained a controlled and centralized system of spreading propaganda related to Bosnian Croats and Bosnian Muslims and that he kept the media and the international community from knowing what was happening in Srebrenica.¹⁴¹

42. The Prosecution responds that, for the same reasons as set out above in respect of the Two VRS Reports, the Order of 10 October 1993 was available at trial.¹⁴² The Prosecution submits that the Order of 10 October 1993 is duplicative of similar evidence Mladić adduced at trial concerning other orders prohibiting leaks of information to the media or the public.¹⁴³ The Prosecution argues that the Order of 10 October 1993 would not undermine the Trial Chamber’s finding, based on a wealth of evidence, that Mladić introduced and maintained a controlled propaganda system to engender fear and hatred of Bosnian Croats and Bosnian Muslims.¹⁴⁴ The Prosecution further submits that the Order of 10 October 1993 would also not undermine the Trial Chamber’s finding that Mladić’s Order of 13 July 1995, issued two years after the Order of 10 October 1993, was intended to keep the media from knowing what was happening in Srebrenica, since this finding was based on the specific language of the Order of 13 July 1995 and the context in which it was issued.¹⁴⁵

43. Similar to his reply regarding the Two VRS Reports, Mladić highlights the Prosecution’s alleged “massive disclosure problems” and that the Order of 10 October 1993 was not accessible

¹³⁸ Second Motion, paras. 2-4, 12, 13, 24.

¹³⁹ Second Motion, paras. 24, 28.

¹⁴⁰ Second Motion, paras. 26, 29, 30.

¹⁴¹ Second Motion, paras. 26, 27, 30, *referring to* Trial Judgement, paras. 4498, 4982, 5081, 5117.

¹⁴² Second Response, paras. 1-4.

¹⁴³ Second Response, paras. 10, 11.

¹⁴⁴ Second Response, paras. 11-13.

¹⁴⁵ Second Response, para. 13.

through the EDS during trial notwithstanding an exercise of due diligence.¹⁴⁶ Mladić further contends that the Order of 10 October 1993 does not duplicate evidence on the trial record.¹⁴⁷

44. For the same reasons set out above in relation to the Two VRS Reports,¹⁴⁸ the Appeals Chamber finds that the Order of 10 October 1993 was available at trial. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Order of 10 October 1993 *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.¹⁴⁹

45. The Appeals Chamber observes that the Order of 10 October 1993 stipulates that information to media may only be given by the VRS Press Center of the Drina Corps upon Mladić's authorization or, in his absence, the authorization of his Chief of Staff and that anyone violating this order would be subject to disciplinary or criminal sanctions.¹⁵⁰ The Appeals Chamber considers that the proposed evidence relates to VRS's control of the dissemination of information to the public and the media, an issue which the Trial Chamber discussed and considered in making its findings that Mladić introduced and maintained a controlled and centralized system of spreading propaganda related to Bosnian Croats and Bosnian Muslims¹⁵¹ and that he kept the media and the international community from knowing what was happening in Srebrenica.¹⁵² The Appeals Chamber is thus satisfied that the Order of 10 October 1993 is sufficiently relevant to a material issue at trial.

46. However, the Appeals Chamber considers that the content of the Order of 10 October 1993 is cumulative of other evidence considered by the Trial Chamber. For example, in relation to the Overarching JCE, the Trial Chamber considered a VRS Main Staff report from September 1992, wherein Mladić set out a number of tasks placed before VRS members, including that information and propaganda should be carefully directed and controlled.¹⁵³ With respect to the Srebrenica JCE, the Trial Chamber considered the Order of 13 July 1995, wherein Mladić ordered a ban on providing entry and information to local and foreign media about operations in Srebrenica.¹⁵⁴ Consequently, the Appeals Chamber finds that the Order of 10 October 1993 would not have

¹⁴⁶ Second Reply, paras. 5, 6, 8, 13.

¹⁴⁷ Second Reply, para. 12.

¹⁴⁸ See *supra* para. 37.

¹⁴⁹ See Karadžić Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

¹⁵⁰ See Second Motion, Confidential Annex B, RP. 9055.

¹⁵¹ See Trial Judgement, paras. 4480-4498, 4611, 4612.

¹⁵² See Trial Judgement, paras. 4982, 5081, 5117.

¹⁵³ See Trial Judgement, para. 4481, referring to Exhibit P1966.

¹⁵⁴ See Trial Judgement, paras. 5072, 5081, 5117, referring to Exhibit P2120. See also T. 27 November 2014 pp. 29013, 29014 (private session) [REDACTED]; T. 18 December 2014 pp. 30034-30037 (private session) [REDACTED], referring to, *inter alia*, Exhibits P6957, P5047, P6646, P6641, P5224.

impacted the Trial Chamber's finding in respect of the Overarching JCE that, based on an abundance of evidence, between September 1992 and at least March 1995, Mladić introduced and maintained a controlled propaganda system to engender fear and hatred of Bosnian Croats and Bosnian Muslims.¹⁵⁵ Similarly, Mladić does not demonstrate how an order issued in October 1993 would have impacted the Trial Chamber's assessment of another order issued in July 1995 or its finding that, in relation to the Srebrenica JCE, Mladić's action was intended to keep the media and international community from knowing what was happening in Srebrenica in July 1995.¹⁵⁶ Mladić therefore does not demonstrate that the Order of 10 October 1993 would have impacted the Trial Chamber's verdict and that not admitting it as additional evidence would lead to a miscarriage of justice.

47. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Order of 10 October 1993 does not satisfy the requirements of Rule 142 of the Rules.

C. Third Motion

48. In assessing Mladić's contribution to the Overarching JCE, the Trial Chamber found, *inter alia*, that Mladić prevented the delivery of humanitarian aid and authorized deliberately obstructive inspections calculated to restrict humanitarian aid to Bosnian Muslim and/or Bosnian Croat enclaves in Bosnian Serb controlled territories.¹⁵⁷ Specifically, the Trial Chamber considered its finding that Mladić placed severe restrictions on the delivery of humanitarian aid from 10 April 1994 onwards by ordering all VRS units to block all UNPROFOR and humanitarian organizations' activity on the territory of the *Republika Srpska*.¹⁵⁸ Despite its finding that aid convoys occasionally may have contained weapons, ammunition or explosives, the Trial Chamber found that the blockading of delivery of humanitarian aid and deliberately obstructive inspections by the VRS were disproportionate and calculated to restrict humanitarian aid to the enclaves.¹⁵⁹

49. In determining Mladić's significant contribution to the Srebrenica JCE, the Trial Chamber considered, *inter alia*, its finding that, in July and August 1995, Mladić provided misleading information about the crimes committed in Srebrenica.¹⁶⁰ In finding that Mladić shared the intent to achieve the common objective of the Srebrenica JCE, the Trial Chamber considered Mladić's denial

¹⁵⁵ See Trial Judgement paras. 4480-4500.

¹⁵⁶ See Trial Judgement, paras. 5081, 5117.

¹⁵⁷ Trial Judgement, para. 4601. See also Trial Judgement, paras. 4602-4608.

¹⁵⁸ Trial Judgement, paras. 4604, 4611, 4612.

¹⁵⁹ Trial Judgement, para. 4608.

¹⁶⁰ Trial Judgement, paras. 5079, 5082, 5084, 5097, 5098,

of the crimes committed in Srebrenica as well as the measures he took to provide misleading information and to prevent the media from knowing what was happening in Srebrenica.¹⁶¹

50. With respect to Mladić's significant contribution to the Sarajevo JCE, the Trial Chamber found that he provided misleading information about crimes and failed to investigate crimes and/or punish members of the VRS *Sarajevo Romanija Korps* ("SRK") who committed them.¹⁶² The Trial Chamber considered evidence related to various incidents including the shelling near Markale Market in Sarajevo on 28 August 1995 by the SRK, where 43 people were killed and 88 injured,¹⁶³ for which Mladić blamed the Bosnian Muslims rather than Serb forces and did not take any serious steps to independently investigate the involvement of members of the SRK.¹⁶⁴

51. In the context of the Hostage-Taking JCE, the Trial Chamber found that, between 25 May and 24 June 1995, VRS soldiers and officers detained UN Personnel in Pale, Banja Luka, Goražde, and in and around Sarajevo, held some of them in strategic military locations which were potential targets of NATO air strikes, and threatened to kill them in order to exert leverage over NATO to end air strikes against Bosnian Serb military targets, recover Serb weapons under UNPROFOR control, and compel UNPROFOR forces to surrender or exchange prisoners.¹⁶⁵

52. In the Third Motion, Mladić seeks to admit as additional evidence on appeal a UN coded cable dated 16 August 1995 from UNPROFOR Special Representative Akashi to the UN Secretary General ("UN Coded Cable of 16 August 1995")¹⁶⁶ and three declassified CIA documents ("CIA Documents"),¹⁶⁷ namely: (i) a memorandum dated 4 December 1995 to the Director of Central Intelligence ("DCI") from the Deputy Chief of the DCI Interagency Balkan Task Force ("CIA Memorandum of 4 December 1995");¹⁶⁸ (ii) an intelligence report from the DCI Interagency Balkan Task Force dated 19 September 1995 ("CIA Intelligence Report of 19 September 1995");¹⁶⁹ and (iii) a document from the DCI Interagency Balkan Task Force dated 7 August 1995 ("CIA Document of 7 August 1995").¹⁷⁰ The Appeals Chamber will first consider the CIA Memorandum of 4 December 1995 and then turn to the remaining documents.

¹⁶¹ Trial Judgement, paras. 5117, 5128

¹⁶² Trial Judgement, paras. 4830, 4838, 4839, 4893.

¹⁶³ Trial Judgement, paras. 4829. *See also* Trial Judgement, paras. 2120-2150

¹⁶⁴ Trial Judgement, paras. 4830, 4838.

¹⁶⁵ Trial Judgement, paras. 2315, 2316. *See also* Trial Judgement, paras. 3218-3220, 5136.

¹⁶⁶ Third Motion, paras. 32, 35.

¹⁶⁷ Third Motion, para. 2.

¹⁶⁸ Third Motion, para. 11. *See also* Third Motion, Annex A, p. 1.

¹⁶⁹ Third Motion, para. 20. *See also* Third Motion, Annex B, p. 1.

¹⁷⁰ Third Motion, para. 27. *See also* Third Motion, Annex C, p. 1.

1. CIA Memorandum of 4 December 1995

53. Mladić submits that the CIA Memorandum of 4 December 1995 was not available to him at trial since the CIA Documents were only available online to the public in January 2017, after the Defence's deadline to introduce evidence from the bar table on 18 January 2016.¹⁷¹ Mladić further submits that the document is relevant to "every count" of his convictions concerning the four joint criminal enterprises¹⁷² and directly impacts and renders unsafe the Trial Chamber's assessment of evidence concerning: (i) his statements to the media upon which the Trial Chamber relied in finding his criminal intent and participation, particularly with respect to the Srebrenica JCE;¹⁷³ (ii) arms smuggling through Tuzla airport to the Muslim forces in Srebrenica, which the Trial Chamber disregarded in finding that his restrictions on aid into Srebrenica were unjustified and constituted evidence of his criminal intent;¹⁷⁴ and (iii) the threat posed by the presence and activities of "Mujahedin fighters" in Bosnia and Herzegovina which the Trial Chamber disregarded in considering "Serb statements as to the Mujahedin enemies as meaning a JCE against Bosnian Croats and Bosnian Muslims, rather than legitimate fight against Mujah[e]din".¹⁷⁵

54. The Prosecution responds that Mladić fails to demonstrate that the CIA Memorandum of 4 December 1995 was not available to him during trial, including through the exercise of due diligence,¹⁷⁶ as the CIA Documents were made publicly available online on 1 October 2013 as part of the CIA Historical Collection¹⁷⁷ and Mladić acknowledges that he knew about the CIA Documents 10 months before the delivery of the Judgement.¹⁷⁸ The Prosecution further responds that Mladić fails to identify with precision any specific findings of fact made by the Trial Chamber that are impacted by the CIA Memorandum of 4 December 1995.¹⁷⁹ It argues that the document

¹⁷¹ Third Motion, para. 3.

¹⁷² Third Motion, para. 14.

¹⁷³ Third Motion, paras. 11, 12, n. 11, *referring to* Trial Judgement, paras. 4466, 4473, 4474, 4865, 4870, 4920, 5085, 5088, 5093, 5097, 5099-5131. Mladić adds that the proposed evidence directly impacts and renders unsafe the Trial Chamber's assessment of "exculpatory evidence because it contradicted [his statements] to the Media." Third Motion, paras. 11, 12, n. 12, *referring to* Trial Judgement, para. 4822.

¹⁷⁴ Third Motion, paras. 11, 13, n. 13, *referring to* Trial Judgement, paras. 4603-4609. Mladić adds that the proposed evidence corroborates the testimony of Rose in the First Rule 142 Motion. *See* Third Motion, paras. 13, 14.

¹⁷⁵ Third Motion, paras. 11, 17, n. 14, *referring to* Trial Judgement, paras. 3704, 3708. Mladić adds that the CIA Memorandum of 4 December 1995 is corroborative of other evidence which demonstrates that NATO and the United States were arming the Bosnian Muslim side and acting in a biased manner against Serbs, calling into question testimonies of other witnesses. *See* Third Motion, para. 15.

¹⁷⁶ Third Response, paras. 1-4.

¹⁷⁷ *See* Third Response, para. 4.

¹⁷⁸ Third Response, para. 3.

¹⁷⁹ *See* Third Response, para. 9.

cannot undermine the Trial Chamber's well-supported conclusions as it has marginal relevance and is duplicative of evidence adduced at trial.¹⁸⁰

55. Mladić replies that the CIA Memorandum of 4 December 1995 was not available through the exercise of due diligence as it was only available online in January 2017 and refers to the *Kupreškić et al.* case in this regard.¹⁸¹ He asserts that the Prosecution fails to address his arguments and contends that the exclusion of the proposed evidence would occasion a miscarriage of justice.¹⁸²

56. Turning to the availability of the proposed additional evidence, the Appeals Chamber notes that it is not disputed that the CIA Document of 4 December 1995 was available online to the public at least by January 2017, before the Trial Judgement was delivered on 22 November 2017.¹⁸³ As recalled above, evidence is "available at trial" if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the trial chamber, and depending on the circumstances, evidence received after closing arguments in a case may meet this standard.¹⁸⁴ Therefore, as already discussed, Mladić's assertion, that any evidence admitted between the deadline for the introduction of evidence from the bar table and the issuance of the Trial Judgement would have been automatically considered unavailable, lacks merit. Mladić also does not offer any argument as to why he did not attempt to have the proposed additional evidence admitted by the Trial Chamber prior to the issuance of the Trial Judgement.¹⁸⁵ The Appeals Chamber considers, in this respect, that he has not exercised due diligence in attempting to bring the evidence before the Trial Chamber.¹⁸⁶ The Appeals Chamber finds Mladić's reference to an ICTY Appeals Chamber decision in the *Kupreškić et al.* case to be misguided as in that case the proposed

¹⁸⁰ See Third Response, paras. 1, 6, 10. See also Third Response, paras. 8-15. In particular, the Prosecution submits that: (i) Mladić fails to explain how the proposed evidence contradicts the Trial Chamber's finding that he made misleading statements to the media and that, in any event, the Trial Chamber did not rely solely on such statements to conclude that he shared the *mens rea* for the Srebrenica JCE (see Third Response, paras. 10, 12); (ii) the Trial Chamber already considered evidence of occasional arms smuggling through aid convoys and reasonably found that the blockading of delivery of humanitarian aid into Srebrenica was disproportionate (see Third Response, para. 13); (iii) the presence of foreign Mujahedin fighting alongside the ABiH forces is immaterial as Mladić was not convicted for legitimate military actions (see Third Response, para. 14); and (iv) the Trial Chamber took into account Mladić's argument that Bosnian Serb military actions were legitimate and found that it did not constitute a valid defence to his crimes (see Third Response, para. 14).

¹⁸¹ Third Reply, paras. 6, 7, referring to *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić, and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001 (confidential; public redacted version filed on 30 May 2001) ("*Kupreškić et al.* Decision of 26 February 2001"), para. 61.

¹⁸² Third Reply, paras. 10, 11. Mladić incorporates by reference his submissions in the Second Reply and to Ground 8.D of his appellant's brief. See Third Reply, paras. 8, 12.

¹⁸³ See Third Motion, para. 3; Third Response, para. 3; Third Reply, para. 6.

¹⁸⁴ *Popović et al.* Decision of 20 October 2011, para. 34, *Blagojević and Jokić* Decision of 21 July 2005, para. 10.

¹⁸⁵ Cf. *Popović et al.* Decision of 20 October 2011, para. 33.

¹⁸⁶ Cf. *Popović et al.* Decision of 20 October 2011, para. 33.

additional evidence was found unavailable due to the Prosecution's concession that the evidence was not available to them during the preparation and trial stages of the case, and therefore it does not follow from the reasoning of this decision that "archives [that became] available to the parties after the conclusion of trial [...] were not available through the use of due diligence" in the context of Rule 142 of the Rules.¹⁸⁷ Consequently, Mladić does not demonstrate that the CIA Document of 4 December 1995 was unavailable at trial or could not have been discovered through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the CIA Document of 4 December 1995 *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.¹⁸⁸

57. The Appeals Chamber notes that the CIA Memorandum of 4 December 1995 concerns points of discussion for a meeting regarding the status and issues surrounding the deployment of NATO Implementation Force ("IFOR") in Sarajevo.¹⁸⁹ The three excerpts to which Mladić points in the CIA Memorandum of 4 December 1995 discuss: (i) disagreements on "Mladić's attitude" and that "some of the Bosnian-Serb statements [were interpreted] as posturing to try to reopen the deal on Sarajevo" as "[t]hey feel betrayed by Milo[š]evi[ć] and are seeking a better deal" ("First Excerpt"); (ii) the "Iranian arms pipeline to Bosnia" ("Second Excerpt"); and (iii) the presence of the "Mujahedin threat" ("Third Excerpt").¹⁹⁰ To the extent that the Trial Chamber considered issues related to, *inter alia*, Mladić's statements in favour of peace negotiations,¹⁹¹ arms being smuggled into enclaves,¹⁹² and the threat of the "Mujahedin",¹⁹³ the Appeals Chamber is satisfied that the CIA Memorandum of 4 December 1995 is relevant to matters at issue at trial.

58. Mladić submits that the First Excerpt impacts the Trial Chamber's finding in relation to his criminal intent and participation, particularly with respect to the Srebrenica JCE.¹⁹⁴ However, the Appeals Chamber notes that the First Excerpt concerns a general assessment of his attitude on the deployment of IFOR in Sarajevo in December 1995 and of Bosnian Serb statements which were interpreted as "posturing to try to reopen the deal on Sarajevo".¹⁹⁵ Mladić does not demonstrate how this would impact the Trial Chamber's purported reliance on "misleading" statements he made

¹⁸⁷ See Third Reply, para. 7; *Kupreškić et al.* Decision of 26 February 2001, paras. 60, 61.

¹⁸⁸ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

¹⁸⁹ Third Motion, Annex A, p. 1.

¹⁹⁰ See Third Motion, paras. 12, 13, 17, referring to Annex A, pp. 1, 2.

¹⁹¹ See, e.g., Trial Judgement, paras. 4462, 4466, 4477, 4676, 4687. See also Mladić Final Trial Brief, paras. 1841, 1842, 2483, 2485, 2488, 2490.

¹⁹² See, e.g., Trial Judgement, paras. 4608, 4890. See also Mladić Final Trial Brief, paras. 1807, 1821, 1822, 2818-2839.

¹⁹³ See Trial Judgement, para. 3703.

¹⁹⁴ See Third Motion, paras. 11, 12, n. 11, referring to Trial Judgement, paras. 4466, 4473, 4474, 4865, 4870, 4920, 5085, 5088, 5093, 5097, 5099-5131.

in the media to find his intent and participation in the context of an entirely different joint criminal enterprise, namely the Srebrenica JCE, at a different time, namely from the days preceding 11 July 1995 to at least October 1995.¹⁹⁶ Moreover, the Appeals Chamber notes that the Trial Chamber's determination on Mladić's significant contribution and *mens rea* for the Srebrenica JCE was based, among other findings, on his denial of the crimes and his taking measures to provide misleading information and to prevent the media from knowing what was happening in Srebrenica.¹⁹⁷ In reaching this conclusion, the Trial Chamber considered, *inter alia*, its finding that, in July and August 1995, Mladić provided misleading information about the crimes by: (i) informing UNPROFOR that the separated boys and men had been taken to Bijeljina; (ii) denying UNPROFOR allegations of atrocities committed after the fall of Srebrenica, stating that these were rumours being spread to divert attention from crimes Croats in the Krajina were committing; and (iii) stating in a CNN interview that the majority of the men from Srebrenica had escaped to Muslim territory, denying that executions had taken place.¹⁹⁸ Mladić therefore does not demonstrate that the First Excerpt would impact these findings concerning his participation and shared intent for the Srebrenica JCE which were based on an abundance of evidence. To the extent that Mladić contends that the First Excerpt is relevant and impacts his conviction for the Overarching JCE and Sarajevo JCE, the Appeals Chamber dismisses this contention without further consideration as he simply points to summaries of evidence in the Trial Judgement and/or otherwise fails to provide any arguments substantiating his claim.¹⁹⁹ The Appeals Chamber also dismisses Mladić's submission that the proposed evidence renders unsafe the Trial Chamber's assessment of exculpatory evidence. Contrary to Mladić's elusive argument, the Trial Chamber did not "disregard" evidence – suggesting that Mladić was in favour of demilitarization and peace in Sarajevo – "because it contradicted [Mladić's statements] to the [m]edia", but found the evidence inconsistent with Mladić's conduct and statements before the Bosnian Serb Assembly which demonstrated that he favoured the military implementation of Bosnian Serb policies for Sarajevo.²⁰⁰ Mladić therefore does not demonstrate that the First Excerpt would impact his conviction for the Overarching JCE and Sarajevo JCE.

59. With respect to the Second Excerpt, which, in Mladić's submission, acknowledges the "Iranian Pipeline" to Bosnia, he argues that it impacts the Trial Chamber's "finding that [Mladić's] complaints and restrictions on aid into Srebrenica were unjustified and constituted evidence of

¹⁹⁵ Third Motion, Annex A, p. 2.

¹⁹⁶ See Trial Judgement, paras. 5096-5098. See also Third Motion, para. 11, Annex A, p. 2.

¹⁹⁷ See Trial Judgement, paras. 5079, 5082, 5084, 5097, 5098, 5117, 5128.

¹⁹⁸ Trial Judgement, paras. 5079, 5084, 5097.

¹⁹⁹ See Third Motion, para. 11, *referring to, inter alia*, Trial Judgement, paras. 4466, 4473, 4474, 4865, 4870, 4920.

criminal intent”.²⁰¹ In attempting to support his submission, Mladić refers to paragraphs of the Trial Judgement on his role in the restriction of access for humanitarian aid convoys.²⁰² However, Mladić does not demonstrate how the Second Excerpt would impact the Trial Chamber’s findings. The findings – that he had the “final say” on the passage of aid convoys and placed severe restrictions on humanitarian aid²⁰³ and that, despite instances of weapons and ammunition being found in UNPROFOR and humanitarian aid convoys, the blockading of delivery of humanitarian aid and deliberately obstructive inspections by the VRS were disproportionate and calculated to restrict humanitarian aid to the enclaves – were based on a wealth of evidence.²⁰⁴ Mladić therefore does not demonstrate that the Second Excerpt would impact the Trial Chamber’s findings concerning his participation in and shared intent for the Overarching JCE. The Appeals Chamber further dismisses Mladić’s unsupported argument that the CIA Memorandum of 4 December 1995 corroborates “other evidence [...] calling into question other testimony of other witnesses”.²⁰⁵ Mladić’s submission that the proposed evidence corroborates the testimony of Witness Rose is also dismissed without further consideration as parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere.²⁰⁶

60. With respect to the Third Excerpt, which according to Mladić “acknowledges the problem and presence of Mujahedin elements on the territory of Bosnia-Herzegovina that cause a threat to the implementation of peace accords”, he claims that the Trial Chamber “disregarded evidence of the threat posed by the presence and activities of Mujahedin fighters in Bosnia”.²⁰⁷ In this respect, he points to paragraphs of the Trial Judgement concerning his statements before the Bosnian Serb Assembly on 12 May 1992 in relation to Radovan Karadžić’s “six strategic objectives”.²⁰⁸ However, Mladić makes no attempt to demonstrate how the Third Excerpt would impact any findings made in the cited passages of the Trial Judgement. Mladić therefore does not demonstrate that the Third Excerpt would have impacted the Trial Chamber’s verdict.

²⁰⁰ See Third Motion, para 11; Trial Judgement, para. 4822.

²⁰¹ See Third Motion, paras. 11, 13.

²⁰² See Third Motion, para. 11, n. 13, referring to Trial Judgement, paras. 4603-4609.

²⁰³ Trial Judgement, paras. 4601, 4604-4606, 4611, 4612.

²⁰⁴ Trial Judgement, paras. 4607, 4608.

²⁰⁵ See Third Motion, para. 15.

²⁰⁶ See Third Motion, paras. 13, 14. See also *Prosecutor v. Jovica Stanišić and Franko Simatović*, Cases No. IT-03-69-A & IT-04-75-T, Decision on Goran Hadžić’s Motion for Access to Confidential Material in the Stanišić and Simatović Case, 1 November 2013 (“*Stanišić & Simatović* Decision of 1 November 2013”), para. 8; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 (“*Karadžić* Decision of 9 July 2009”), para. 13.

²⁰⁷ See Third Motion, paras. 11, 17.

²⁰⁸ See Third Motion, para. 11, n. 14, referring to Trial Judgement, paras. 3704, 3708.

61. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the CIA Memorandum of 4 December 1995 does not satisfy the requirements of Rule 142 of the Rules.

2. CIA Intelligence Report of 19 September 1995, CIA Document of 7 August 1995, and UN Coded Cable of 16 August 1995

62. Mladić submits that the proposed evidence was not available at trial as the CIA Intelligence Report of 19 September 1995 and the CIA Document of 7 August 1995 were only available online to the public in January 2017 and the UN Coded Cable of 16 August 1995 was disclosed to him on 20 October 2017, after the Defence's deadline to introduce evidence from the bar table.²⁰⁹ Mladić further submits that the CIA Intelligence Report of 19 September 1995 demonstrates that NATO's air campaign was designed to force the Serbs to enter negotiations to end the conflict and that the attacks assisted the Bosnian Croat and Bosnian Muslim military offensives against the Bosnian Serbs and were viewed as military intervention by the "warring parties".²¹⁰ He contends that the CIA Intelligence Report of 19 September 1995 renders unsafe the Trial Chamber's findings concerning the demilitarization of Sarajevo²¹¹ and the shelling near Markale Market in Sarajevo on 28 August 1995,²¹² which the Trial Chamber relied upon to convict him "for the Sarajevo Counts".²¹³ Mladić adds that the CIA Intelligence Report of 19 September 1995 demonstrates that NATO was conducting a military campaign in coordination with the Bosnian Muslim and Bosnian Croat forces and renders unsafe his conviction for the Hostage-Taking JCE.²¹⁴

63. Mladić further submits that the CIA Document of 7 August 1995 demonstrates that before the September 1995 bombing campaign, preparations were made by the United States as to how air strikes could assist the Bosnian Muslims against the Bosnian Serbs.²¹⁵ He adds that the proposed

²⁰⁹ Third Motion, paras. 3, 32.

²¹⁰ Third Motion, para. 22. Mladić adds that the CIA Intelligence Report of 19 September 1995 supports the arguments raised in the First Motion. *See* Third Motion, para. 23.

²¹¹ Third Motion, para. 23, *referring to* Trial Judgement, paras. 1853, 1855-1891, Scheduled Incidents G.1, G.4, G.7, F.3, F.4, F.5, F.12, F.13, F.15, F.16, Unscheduled Sniping Incident (I).

²¹² Third Motion, para. 23, *referring to* Trial Judgement, paras. 3057, 4740, 4892, 4893, 4921, and "conviction for [Scheduled Incident] G.18".

²¹³ Third Motion, para. 21, *referring to* Trial Judgement, paras. 2122, 2130, 2131, 2133, 2144, 2147.

²¹⁴ Third Motion, para. 26, *referring to* Trial Judgement, paras. 5132-5163. Mladić adds that the CIA Intelligence Report of 19 September 1995 renders unsafe the Trial Chamber's exclusion of Richard Dannatt's testimony that the US controlled NATO airstrikes and coordinated with Bosnian Muslim and Croat forces. *See* Third Motion, paras. 24, 25, *referring to* Trial Judgement, para. 5286, T. 12 November 2013 pp. 19188-19194.

²¹⁵ Third Motion, para. 27.

evidence “acknowledges the flow of Islamic weapon supply to the Bosnian Muslims which was known and tolerated”.²¹⁶

64. With respect to the UN Coded Cable of 16 August 1995, Mladić submits that it demonstrates that the United States dictated how the UNPROFOR mission should be carried out, that NATO Commanders believed that they had the sole authority to decide on air strikes, that the UN was essentially an organ of the United States or NATO and by “firing on Serbs positions” committed acts of war as a combatant.²¹⁷ He contends that this renders unsafe his conviction for the Hostage-Taking JCE.²¹⁸

65. The Prosecution responds that Mladić fails to demonstrate that the proposed evidence was not available to him during trial, including through the exercise of due diligence.²¹⁹ It submits that a document containing the pages of the UN Coded Cable of 16 August 1995 was uploaded into the EDS in June 2012 and was already available to Mladić before its re-disclosure on 20 October 2017.²²⁰ The Prosecution contends that Mladić fails to demonstrate that the CIA Intelligence Report of 19 September 1995 renders unsafe the Trial Chamber’s findings regarding the demilitarization of Sarajevo, the shelling of Markale Market on 28 August 1995, and his conviction for the Hostage-Taking JCE.²²¹ It submits that the issue that NATO may not have been neutral, that the air strikes were intended to trigger the Bosnian Serbs to negotiate, or that they assisted the Bosnian Muslims and Bosnian Croats against the Bosnian Serbs, is immaterial to his conviction.²²² The Prosecution adds that, in any event, the proposed evidence cannot undermine the Trial Chamber’s well-supported conclusions as it has marginal relevance and is duplicative of evidence adduced at trial.²²³ Specifically, the Prosecution asserts that the Trial Chamber already considered evidence or arguments that Mladić was in favour of demilitarization in Sarajevo and that the UN was biased against the Bosnian Serbs.²²⁴

²¹⁶ Third Motion, para. 28. Mladić asserts that the CIA Document of 7 August 1995 supports the same challenges to the Trial Judgement he made with respect to the CIA Intelligence Report of 19 September 1995 and his submissions in the First Motion pertaining to Rose and “in the prior Rule 142 motion”. *See* Third Motion, paras. 29, 30.

²¹⁷ Third Motion, paras. 35, 36. Mladić adds that the UN Coded Cable of 16 August 1995 corroborates the testimony of Rose in the First Motion. Third Motion, para. 36.

²¹⁸ Third Motion, para. 36. Mladić also adds that the document “rebut[s] the use of the [the Markale Market incident] as being blamed on the Serbs”. Third Motion, para. 36.

²¹⁹ Third Response, paras. 1-5.

²²⁰ Third Response, para. 5.

²²¹ Third Response, para. 16. The Prosecution adds that Mladić’s argument concerning Richard Dannatt’s evidence should be dismissed as it falls outside the scope of his appeal. *See* Third Response, para. 19.

²²² Third Response, para. 17.

²²³ *See* Third Response, paras. 1, 6. *See also* Third Response, paras. 8, 9, 16-23.

²²⁴ Third Response, para. 18.

66. The Prosecution further submits that Mladić fails to point to any findings that would be impacted by the CIA Document of 7 August 1995 or to explain how the proposed evidence is helpful to his case, since he was not convicted for legitimate military actions and the source of weaponry of the ABiH is irrelevant to his convictions.²²⁵

67. The Prosecution also submits that, while the UN Coded Cable of 16 August 1995 may show discussions between the UN and the United States concerning the peace process and “the preferred way forward”, it does not show that the UN served as a NATO or United States organ and was a party to the conflict, nor is it relevant to Mladić’s responsibility for the shelling of Markale Market in Sarajevo on 28 August 1995.²²⁶ The Prosecution adds that, with respect to hostage-taking, the Trial Chamber found the status of the UN Personnel as combatants or civilians to be irrelevant to his convictions.²²⁷

68. Mladić replies that the CIA Intelligence Report of 19 September 1995 and the CIA Document of 7 August 1995 were not available through the exercise of due diligence as they were only available online in January 2017.²²⁸ He adds that the Prosecution fails to address his arguments concerning the impact of the proposed evidence and contends that its exclusion would occasion a miscarriage of justice.²²⁹

69. Turning to the issue of availability, the Appeals Chamber notes that it is not disputed that the CIA Intelligence Report of 19 September 1995 and the CIA Document of 7 August 1995 were available online to the public at least by January 2017 and that the UN Coded Cable of 16 August 1995 was disclosed by the Prosecution on 20 October 2017, before the Trial Judgement was delivered on 22 November 2017.²³⁰ For the same reasons stated above with respect to the CIA Memorandum of 4 December 1995, the Appeals Chamber finds that Mladić does not demonstrate that the three documents were unavailable at trial or could not have been discovered through the exercise of due diligence.²³¹ The Appeals Chamber also dismisses without further consideration Mladić’s reference to submissions made in other motions or his appellant’s brief as parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere.²³² The Appeals Chamber will therefore proceed to assess

²²⁵ Third Response, paras. 20, 21.

²²⁶ Third Response, para. 22.

²²⁷ Third Response, para. 23.

²²⁸ Third Reply, paras. 6, 7, *referring to Kupreškić et al.* Decision of 26 February 2001, para. 61.

²²⁹ Third Reply, paras. 10, 11.

²³⁰ See Third Motion, para. 3; Third Response, paras. 3, 5; Third Reply, paras. 5, 6.

²³¹ See *supra* para. 56.

²³² Third Reply, paras. 8, 12. See also *Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13.

whether Mladić demonstrates that not admitting the CIA Intelligence Report of 19 September 1995, the CIA Document of 7 August 1995, or the UN Coded Cable of 16 August 1995 *would* lead to a miscarriage of justice, in that, if these documents individually or collectively had been admitted at trial, it *would* have had an impact on the verdict.²³³

70. The Appeals Chamber observes that the CIA Intelligence Report of 19 September 1995 discusses the impact of the NATO air campaign on the warring parties in Bosnia and Herzegovina and states, *inter alia*, that the campaign: (i) was perceived by some observers as designed to “force the Bosnian Serbs to enter into serious negotiations that would lead to an end of the Bosnian conflict”; (ii) attacked key Bosnian Serb military infrastructure and may have aided the successful attacks by the Bosnian Muslims and the Croats; and (iii) was viewed by the Bosnian Government as a “Western military intervention”.²³⁴ The Appeals Chamber therefore considers that this proposed evidence is relevant to a material issue at trial, namely the impact of NATO’s air campaign on the warring parties, which the Trial Chamber considered in determining Mladić’s intent for the Sarajevo JCE as well as the existence of and Mladić’s participation in the Hostage-Taking JCE.²³⁵

71. The Appeals Chamber considers Mladić’s submissions – that the CIA Intelligence Report of 19 September 1995 renders the Trial Chamber’s findings regarding the demilitarization of Sarajevo and the 28 August 1995 shelling of Markale Market in relation to the Sarajevo JCE are unsafe²³⁶ – to be insufficient to demonstrate any impact on the verdict. By referring essentially to the entire section of the Trial Judgement on the Sarajevo JCE, Mladić does not identify with precision the Trial Chamber’s specific findings of fact to which the proposed evidence pertains or how the proposed evidence would have impacted the Trial Chamber’s verdict.²³⁷ In any event, the proposed evidence is cumulative of evidence already considered by the Trial Chamber that NATO and the UN were biased against the Bosnian Serbs,²³⁸ including in relation to the shelling of Markale Market on 28 August 1995.²³⁹ The Trial Chamber also considered evidence that Mladić favoured demilitarization and a peaceful resolution of the situation in Sarajevo, but found that this was not an accurate reflection of his mental state as it was directly contradicted by his other contemporaneous statements and conduct.²⁴⁰ The Appeals Chamber similarly considers that Mladić’s submissions,

²³³ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

²³⁴ Third Motion, Annex B, pp. 1, 2, 4.

²³⁵ See, e.g., Trial Judgement, paras. 4916, 4921, 5141, 5156.

²³⁶ See Third Motion, para. 23.

²³⁷ See Third Motion, para. 23.

²³⁸ See, e.g., Trial Judgement, paras. 2217, 4279, 4315.

²³⁹ See, e.g., Trial Judgement, para. 4915.

²⁴⁰ See, e.g., Trial Judgement, paras. 4822, 4896, 4920, 4921.

which refer to the entire section of the Trial Judgement on the Hostage-Taking JCE,²⁴¹ do not identify with precision the Trial Chamber's specific findings of fact to which the CIA Intelligence Report of 19 September 1995 pertains or how the proposed evidence renders unsafe his conviction in this respect. In any event, the Appeals Chamber finds that the proposed evidence would not have had any impact on the verdict as similar evidence and arguments on the alleged bias of the UN and NATO against Bosnian Serbs in the conflict were already before the Trial Chamber.²⁴² Furthermore, Mladić's contention that the CIA Intelligence Report of 19 September 1995 supports the arguments raised in the First Motion is dismissed, as parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere.²⁴³ Mladić's assertion that the Intelligence Report of 19 September 1995 renders unsafe the Trial Chamber's exclusion of Richard Dannatt's testimony is also dismissed as Mladić does not substantiate how the proposed evidence would impact specific findings crucial to his conviction.²⁴⁴

72. With respect to the CIA Document of 7 August 1995, the Appeals Chamber observes that it presents the CIA's assessment of both the ABiH and Bosnian Serb military capabilities together with an analysis of the ABiH's requirements as a defensive and an offensive force, including as to the impact of any air strikes.²⁴⁵ The Appeals Chamber considers that this document is relevant to the impact of NATO's air strikes on the warring parties and as such is pertinent to the Sarajevo JCE and the Hostage-Taking JCE, which were material issues at trial.²⁴⁶ The Appeals Chamber considers, however, that Mladić does not identify with precision the Trial Chamber's specific findings of fact to which the proposed evidence pertains or how the proposed evidence would have impacted the Trial Chamber's verdict. In this regard, Mladić does not substantiate how this document would impact the Trial Chamber's findings as his submissions make no reference to parts of the Trial Judgement he seeks to challenge. Mladić's reference to submissions in the First Motion is also dismissed as parties are not to support their arguments with submissions made elsewhere.²⁴⁷ Additionally, his statement that this document "again acknowledges the flow of Islamic weapons supply to the Bosnian Muslims which was known and tolerated"²⁴⁸ does not substantiate how any part of the Trial Chamber's verdict would be impacted. The Appeals Chamber observes, in any

²⁴¹ See Third Motion, para. 26.

²⁴² See Trial Judgement, para. 2295; Mladić Final Trial Brief, paras. 172, 176, 3310, 3312, 3331, 3332, 3339, 3340, 3344, 3347. See also Trial Judgement, paras. 2216, 3224.

²⁴³ See Third Motion, para. 23; *Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13.

²⁴⁴ See Third Motion, paras. 24, 25.

²⁴⁵ See Third Motion, Annex C, pp. 1-4.

²⁴⁶ See, e.g., Trial Judgement, paras. 4916, 4921, 5141, 5156.

²⁴⁷ See Third Motion, para. 29. See *Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13.

²⁴⁸ Third Motion, para. 28.

event, that similar evidence at trial addressed the provision of weapons and fighters to Bosnian Muslims.²⁴⁹ In light of the foregoing, the Appeals Chamber finds that Mladić does not demonstrate that the CIA Document of 7 August 1995 would have impacted the Trial Chamber's verdict.

73. With respect to the UN Coded Cable of 16 August 1995, the Appeals Chamber observes that the document concerns a summary of a meeting between Akashi and the United States delegation discussing the United States peace initiative, noting, *inter alia*, that parts of the meeting were comprised of "very forcefully delivered messages from the US delegation" and that United States General Wesley Clark stated that an agreement at the highest strategic and political level has been reached that once "the defined 'triggers' for air strikes have been activated by the behaviour [...] of a warring party, air strikes will take place regardless of consequences for UNPROFOR".²⁵⁰ The Appeals Chamber considers that the proposed evidence is relevant to the issue of the influence of the United States on the UN and the status of UN Personnel as combatants, which was a material issue at trial in relation to the Hostage-Taking JCE.²⁵¹ However, apart from generally asserting that the proposed evidence "affect[s] the entirety of the findings as to the hostage taking count" and "rebut[s] the use of [the shelling of Markale Market on 28 August 1995] as being blamed on the Serbs", Mladić does not identify the specific findings made by the Trial Chamber to which the additional evidence pertains or provides any demonstration that the proposed evidence would have impacted the Trial Chamber's findings.²⁵²

74. In any event, the Appeals Chamber observes that the Trial Chamber already considered evidence to the effect that, after the NATO air strikes, the Bosnian Serb leadership considered the UN to be a combatant in the conflict²⁵³ as well as evidence concerning the alleged bias of the UN and NATO against Bosnian Serbs.²⁵⁴ Significantly, the Trial Chamber found that the status of the UN Personnel, as combatants or civilians, is irrelevant to determining whether they were entitled to the protection against hostage-taking as set out in Common Article 3 to the four Geneva

²⁴⁹ See, e.g., T. 18 December 2014 pp. 30041, 30050; T. 26 February 2015 p. 32357; T. 17 November 2015 pp. 41455-41457.

²⁵⁰ See Third Motion, Annex D, pp. 1-3 (emphasis omitted).

²⁵¹ See Trial Judgement, paras. 2217, 3224.

²⁵² Third Motion, para. 36. Mladić's contention that the UN Coded Cable of 16 August 1995 corroborates the testimony of Rose in the First Motion is dismissed, as parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere. See Third Motion, para. 36. See also *Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13.

²⁵³ See Trial Judgement, paras. 2217, 3224.

²⁵⁴ See Trial Judgement, para. 4910. See also Trial Judgement, para. 5287.

Conventions of 1949.²⁵⁵ Mladić therefore does not demonstrate that the UN Coded Cable of 16 August 1995 would have impacted the Trial Chamber's verdict.

75. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the CIA Intelligence Report of 19 September 1995, the CIA Document of 7 August 1995, and the UN Coded Cable of 16 August 1995 does not satisfy the requirements of Rule 142 of the Rules.

D. Fourth Motion

76. As recalled above, the Trial Chamber found that, from 12 May 1992 until November 1995, Mladić participated in the Sarajevo JCE with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling.²⁵⁶ In assessing the sniping and shelling incidents in relation to the Sarajevo JCE, the Trial Chamber found, *inter alia*, that: (i) members of the SRK fired artillery, rockets, and mortars against Sarajevo from 5.00 p.m. on 28 May 1992 until early the next morning ("Scheduled Incident G.1");²⁵⁷ and (ii) on 5 February 1994, members of the SRK fired a mortar shell from Mrkovići which hit Markale Market, killing 68 people and injuring over 140 others ("Scheduled Incident G.8").²⁵⁸

77. In assessing the scope of the Sarajevo JCE, the Trial Chamber considered the general conditions in Sarajevo and reviewed evidence concerning agreements made between the Bosnian Serb leadership and the leadership of Bosnia and Herzegovina or with the UN on the withdrawal of heavy weapons and ceasefires.²⁵⁹ These included agreements signed by both parties in June 1992 for a unilateral ceasefire and the concentration of all heavy weapons within range of the airport in five collection centres where the weapons would be under the observation of UNPROFOR,²⁶⁰ and agreements signed in February 1994 concerning an immediate ceasefire in Sarajevo and the withdrawal of heavy artillery from an agreed 20-kilometre Total Exclusion Zone ("TEZ") around Sarajevo ("TEZ Agreements").²⁶¹

78. Furthermore, in concluding that Mladić significantly contributed to the Sarajevo JCE, the Trial Chamber found, *inter alia*, that he frequently ordered the restriction of humanitarian aid to

²⁵⁵ Trial Judgement, para. 3224.

²⁵⁶ Trial Judgement, paras. 4740, 4892, 4893, 4921, 5190. *See* Trial Judgement, paras. 4740, 4892.

²⁵⁷ Trial Judgement, para. 2022.

²⁵⁸ Trial Judgement, para. 2097.

²⁵⁹ *See* Trial Judgement, paras. 1852-1854.

²⁶⁰ Trial Judgement, para. 1852.

²⁶¹ Trial Judgement, para. 1852.

Sarajevo.²⁶² In reaching this finding, the Trial Chamber considered evidence that both the ABiH and the VRS, but particularly the VRS, attempted to close the Sarajevo airport by shooting at aircraft, and that the closure of the airport interrupted the arrival of humanitarian aid.²⁶³

79. In the Fourth Motion, Mladić seeks to admit the following eight documents as additional evidence on appeal: (i) an ABiH report dated 13 February 1994 (“First Sarajevo Document”);²⁶⁴ (ii) a UNPROFOR letter dated 12 August 1994 (“Second Sarajevo Document”);²⁶⁵ (iii) a UNPROFOR letter dated 13 August 1994 (“Third Sarajevo Document”);²⁶⁶ (iv) a strictly confidential ABiH document dated 17 August 1994 (“Fourth Sarajevo Document”);²⁶⁷ (v) a strictly confidential ABiH document dated 14 September 1994 (“Fifth Sarajevo Document”);²⁶⁸ (vi) a strictly confidential ABiH document dated 16 February 1994 (“Sixth Sarajevo Document”);²⁶⁹ (vii) an ABiH document dated 14 February 1994 (“Seventh Sarajevo Document”);²⁷⁰ and (viii) a UN coded cable dated 9 February 1994 (“Eighth Sarajevo Document”).²⁷¹ The First, Second, Fourth, Fifth, Sixth, and Seventh Sarajevo Documents relate to the demilitarization and ceasefire agreements and the shelling and sniping in Sarajevo and thus will be referred to collectively as “Sarajevo Sniping and Shelling Documents”. The Appeals Chamber will consider these documents first and then proceed to consider the Third and Eighth Sarajevo Documents, respectively.

1. Sarajevo Sniping and Shelling Documents

80. Mladić submits that the Sarajevo Sniping and Shelling Documents were not available to him at trial because he received them from the Republican Center for the Investigation of War Crimes in Banja Luka following a request for assistance after the conclusion of trial.²⁷² Mladić contends that these documents are relevant for the following reasons: (i) the First Sarajevo Document demonstrates that the ABiH forces remained active in the area around Sarajevo airport, positioned its infantry forces for continual combat, and never put or intended to surrender its functional heavy weaponry to UNPROFOR or to adhere to the ceasefire and cessation of hostilities;²⁷³ (ii) the

²⁶² Trial Judgement, paras. 4887, 4893.

²⁶³ Trial Judgement, para. 4862, *referring to* T. 11 December 2012 p. 6107.

²⁶⁴ Fourth Motion, para. 17, Annex A.

²⁶⁵ Fourth Motion, para. 19, Annex B.

²⁶⁶ Fourth Motion, para. 21, Annex C.

²⁶⁷ Fourth Motion, para. 23, Annex D.

²⁶⁸ Fourth Motion, para. 24, Annex E.

²⁶⁹ Fourth Motion, para. 26, Annex F.

²⁷⁰ Fourth Motion, para. 28, Annex G.

²⁷¹ Fourth Motion, para. 30, Annex H.

²⁷² Fourth Motion, paras. 2, 3, 8.

²⁷³ Fourth Motion, paras. 17, 18, Annex A, *referring to* Trial Judgement, para. 1860 (“[...] Civilians in ABiH-held areas of Sarajevo were attacked from SRK-controlled territory. As a result, and at a minimum, hundreds of civilians were killed and thousands of others were injured. During this time, the conflict in the city of Sarajevo was mainly static and

Second Sarajevo Document shows the firing of a mortar shell on the Serb-held territory of Dobrinja in breach of the TEZ Agreement by the ABiH and that the ABiH used civilians as human shields while also conducting military attacks against the Serbs;²⁷⁴ (iii) the Fourth Sarajevo Document confirms the “uncontrolled entries in UNMO zones” and the intentional firing on Sarajevo airport by ABiH fighters to “portray a humanitarian disaster in Sarajevo”;²⁷⁵ (iv) the Fifth Sarajevo Document confirms that the ABiH used the Igman demilitarized zone under UNPROFOR control for military purposes and activities;²⁷⁶ (v) the Sixth Sarajevo Document confirms the use of civilian objects and placement of weapons by the ABiH in Sarajevo and its vicinity without UNPROFOR’s knowledge;²⁷⁷ and (vi) the Seventh Sarajevo Document demonstrates that the ABiH 1st Corps in Sarajevo had a significant number of sniper rifles at their disposal in 1994.²⁷⁸ Mladić also asserts that the Sarajevo Sniping and Shelling Documents demonstrate that VRS activity in the Sarajevo area was of a legitimate military nature and that the responsibility for the incidents of sniping and shelling of civilians in Sarajevo cannot be “simply ‘attached’ to the VRS or to [Mladić]”.²⁷⁹ He adds that the Sarajevo Sniping and Shelling Documents point to a different source of origin of the alleged campaign of sniping and shelling and to other reasonable conclusions about the incidents and reflect that, while the legitimate military actions of the VRS were misinterpreted, the significance of the military presence and activities of the ABiH was minimized or neglected.²⁸⁰ Mladić contends that the Sarajevo Sniping and Shelling Documents undermine certain findings in the Trial Judgement and could affect the accuracy of the Trial Chamber’s evaluation of the presence, activity, and strategy of ABiH forces in Sarajevo.²⁸¹

apart from some changes, most of the confrontation lines remained unchanged. The SRK’s main forces were positioned around what was colloquially called the inner ring of Sarajevo, in particular in the area of Ilidža, Neđarići, and Grbavica. ABiH-held territory, including most of the city, was almost completely surrounded by SRK forces [...]”.

²⁷⁴ Fourth Motion, paras. 19, 20, Annex B, *referring to* Trial Judgement, para. 1865 (“From August 1994 to November 1995, sniper fire and shelling against civilians within the confrontation lines primarily came from SRK-held territory. As a result of the sniping and shelling, civilians were seriously injured or killed. The shots and shells, originating from SRK-held territory, were fired by members of the SRK”).

²⁷⁵ Fourth Motion, paras. 23, 25, Annex D, *referring to* Trial Judgement, paras. 1860, 1861 (“[...] The same pattern of regular fire at civilians from SRK-controlled positions or areas appeared consistently throughout ABiH-held areas of the city of Sarajevo”).

²⁷⁶ Fourth Motion, paras. 24, 25, Annex E, *referring to* Trial Judgement, paras. 1860, 1861.

²⁷⁷ Fourth Motion, paras. 26, 27, Annex F, *referring to* Trial Judgement, para. 2022 (“[...] Witness RM-115 was seriously injured at the State hospital in the Marin Dvor neighbourhood, when shrapnel came through a window and hit her. A flag with the Red Cross emblem was placed on the south side of the building facing Vrace Hill and Trebević which, could be seen from 500 metres away. No armed ABiH soldiers or security guards were inside the hospital, and there were no military-related facilities in the hospital’s vicinity [...]”).

²⁷⁸ Fourth Motion, paras. 28, 29, Annex G, *referring to* Trial Judgement, paras. 1860, 1861, 1865.

²⁷⁹ Fourth Motion, para. 15.

²⁸⁰ Fourth Motion, para. 16.

²⁸¹ Fourth Motion, paras. 11-16, *referring to* Trial Judgement, paras. 1860-1862, 1865, 1871, 1872, 2022, 2097, 4759.

81. The Prosecution responds that Mladić fails to show that the Sarajevo Sniping and Shelling Documents were not available to him at trial including through the exercise of due diligence.²⁸² The Prosecution contends that Mladić fails to specify when he received the Sarajevo Sniping and Shelling Documents and what effort he made during trial to obtain the information contained in them.²⁸³ Specifically, the Prosecution asserts that it disclosed the Second Sarajevo Document to Mladić prior to trial and that it was a Defence exhibit at trial.²⁸⁴ It also submits that it disclosed the Sixth and Seventh Sarajevo Documents to Mladić on 24 April 2015.²⁸⁵ The Prosecution further responds that Mladić fails to specify with sufficient clarity the impact the proposed evidence could or would have had on the verdict.²⁸⁶ The Prosecution submits that the Sarajevo Sniping and Shelling Documents cannot undermine the verdict as they are duplicative of evidence adduced at trial, the information in them is consistent with the Trial Chamber's findings, or is not sufficient to counter the extensive contrary evidence on which the Trial Chamber relied.²⁸⁷

82. Mladić replies that he exercised due diligence in obtaining the Sarajevo Sniping and Shelling Documents since he sought the proposed evidence only after trial and that any alleged disclosure by the Prosecution does not confirm that they were accessible through the EDS due to constant technical problems.²⁸⁸ Mladić also contends that the Prosecution fails to address his submissions on the impact the proposed evidence would have had on the verdict and presents

²⁸² Fourth Response, paras. 2-6.

²⁸³ Fourth Response, paras. 2-6.

²⁸⁴ Fourth Response, paras. 5, 12.

²⁸⁵ Fourth Response, para. 6. The Prosecution submits that the Sixth Sarajevo Document was disclosed in Disclosure Batch 118 on 24 April 2015 as ERN Y015-0518-Y015-0519 and the Seventh Sarajevo Document was disclosed in Disclosure Batch 4 on 3 October 2011 and in Disclosure Batch 118 on 24 April 2015 as ERN Y016-6392-Y016-6393. See Fourth Response, para. 6.

²⁸⁶ Fourth Response, paras. 1, 7-9.

²⁸⁷ Fourth Response, paras. 9-21. The Prosecution specifically argues that: (i) the First Sarajevo Document reflects that the ABiH intended to hand over to the UNPROFOR its non-functioning weapons before the functioning ones, that it was willing to withdraw infantry following an agreement with the ABiH authorities but not solely upon Serbs' demands, and that in any event, Mladić made the same arguments at trial that the ABiH ignored the weapons exclusion zones, violated ceasefires, did not demilitarize Sarajevo, and conducted military activities around or towards the airport (see Fourth Response, paras. 10, 11); (ii) the Second Sarajevo Document was part of the evidentiary record already considered by the Trial Chamber (see Fourth Response, para. 12); (iii) the Fourth Sarajevo Document merely contains an instruction for the ABiH to secretly transit through the UNMO zone for the purpose of combat operations and that the Trial Chamber had considered similar evidence that the UN was not aware of all ABiH movements, of Muslim propaganda, or the ABiH military operations around the airport (see Fourth Response, paras. 13-15); (iv) the Fifth Sarajevo Document at best shows that the ABiH violated the demilitarization agreements which was already argued and considered at trial (see Fourth Response, para. 16); (v) the Sixth Sarajevo Document, consisting of an order to remove heavy artillery from the TEZ, is duplicative of evidence already considered at trial and has no relevance to the Trial Judgement paragraph to which he points (see Fourth Response, paras. 17-19); and (vi) the Seventh Sarajevo Document does not show that ABiH possessed a *significant* amount of rifles and the fact that ABiH possessed rifles was not a point of contention and was discussed at trial (see Fourth Response, paras. 20, 21).

²⁸⁸ Fourth Reply, paras. 5-8, 13.

incorrect and unsupported assessments and arguments concerning the facts, the proposed evidence, and the Trial Chamber's analysis.²⁸⁹

83. As to the availability of the Sarajevo Sniping and Shelling Documents, the Appeals Chamber considers that the mere assertion that Mladić sought and received the "new documents" after the conclusion of trial without explaining what efforts he made to obtain such information during trial does not satisfy the burden of demonstrating that he acted with due diligence in obtaining the proposed evidence.²⁹⁰ His general contention that there had been technical difficulties in accessing the EDS is insufficient to demonstrate that he exercised due diligence. The Appeals Chamber recalls that the ICTY Appeals Chamber has previously upheld the Trial Chamber's conclusion that there was no significant burden on Mladić caused by the lack of metadata.²⁹¹ Mladić incorporates by reference his submission in his Second Reply on the Prosecution's "disclosure problems" relating to the EDS.²⁹² The Appeals Chamber recalls that parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere.²⁹³ Accordingly, in this section, the Appeals Chamber will only evaluate submissions made in support of the Fourth Motion. Furthermore, the Appeals Chamber notes that the content of the Second Sarajevo Document is identical with Exhibit D1814 which Mladić requested to admit on 18 January 2016 and which was admitted on 30 May 2016 during trial.²⁹⁴ Mladić has therefore failed to demonstrate that the Sarajevo Sniping and Shelling Documents were unavailable at trial or could not have been discovered through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Sarajevo Sniping and Shelling Documents *would* lead to a miscarriage of justice, in that, if these documents individually or collectively had been admitted at trial, it *would* have had an impact on the verdict.²⁹⁵

²⁸⁹ Fourth Reply, paras. 9-12.

²⁹⁰ See *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Second Motion to Admit Additional Evidence on Appeal, 29 April 2010 ("*Šainović et al.* Decision of 29 April 2010"), para. 20.

²⁹¹ See Decision of 28 November 2013, paras. 42, 45, 46. Furthermore, the Appeals Chamber has rejected Mladić's submission in the Second Motion in this respect. See *supra* para. 37.

²⁹² See Fourth Reply, para. 7.

²⁹³ See *Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13.

²⁹⁴ Compare Fourth Motion, Annex B with Exhibit D1814. See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defen[c]e Fifth Motion to Admit Documents for the Bar-Enemy Actions, 18 January 2016, Annex A, p. 132; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, p. 15.

²⁹⁵ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

84. The Appeals Chamber observes that the Sixth Sarajevo Document is an ABiH order dated 16 February 1994 to remove heavy artillery from the TEZ before allowing in the UN observers.²⁹⁶ Mladić provides no explanation on how the Sixth Sarajevo Document, which provides general information about the removal of artillery in the vicinity of Marin Dvor on 16 February 1994,²⁹⁷ is relevant to the Trial Chamber's finding of Mladić's responsibility for Scheduled Incident G.1 which occurred in May 1992.²⁹⁸ In any event, the Trial Chamber has considered similar evidence that ABiH possessed heavy artillery within the TEZ.²⁹⁹ Accordingly, the Appeals Chamber finds that Mladić does not demonstrate that the Sixth Sarajevo Document is relevant or would have had an impact on the Trial Chamber's verdict.

85. With respect to the relevance and potential impact of the remainder of the Sarajevo Sniping and Shelling Documents, the Appeals Chamber observes that the First, Second, Fourth, Fifth, and Seventh Sarajevo Documents show that the ABiH did not adhere to the TEZ and demilitarization agreements.³⁰⁰ Mladić generally points to paragraphs 1860, 1861, and 1865 of the Trial Judgement concerning the Trial Chamber's summary of evidence on the SRK's sniping and shelling in Sarajevo,³⁰¹ without specifying any particular findings of the Trial Chamber to which these documents relate. Furthermore, apart from generally asserting that this proposed evidence challenges certain paragraphs of the Trial Judgement, Mladić does not explain how the First, Second, Fourth, Fifth, and Seventh Sarajevo Documents would have impacted Trial Chamber's verdict. Consequently, Mladić neither identifies the specific findings of fact made by the Trial Chamber to which the additional evidence pertains nor demonstrates the relevance of or any potential impact the First, Second, Fourth, Fifth, and Seventh Sarajevo Documents would have had on the Trial Chamber's verdict.

²⁹⁶ Fourth Motion, Annex F.

²⁹⁷ Fourth Motion, Annex F.

²⁹⁸ See Trial Judgement, para. 2022.

²⁹⁹ See Trial Judgement, paras. 1852, 1853, *referring to* Exhibit P736, para. 50 (showing that both Bosnian Serbs and the ABiH concealed a certain number of weapons within the TEZ), Adjudicated Fact 1745 (indicating that neither the SRK nor the ABiH adhered to the TEZ and that the SRK and the ABiH kept heavy weaponry within the 20-kilometre zone around Sarajevo and outside the Weapons Collection Points ("WCPs") between August 1994 and November 1995).

³⁰⁰ In this respect: (i) the First Sarajevo Document shows that the ABiH remained active in the area of Sarajevo airport, ignored weapons exclusion zones, and did not demilitarize Sarajevo (*see* Fourth Motion, Annex A); (ii) the Second Sarajevo Document shows that the ABiH violated the TEZ Agreement by firing a mortar shell to the Serb-held territory of Dobrinja (*see* Fourth Motion, Annex B); (iii) the Fourth Sarajevo Document shows that the ABiH received warnings from UNPROFOR regarding instances of the ABiH soldiers entering the UNMO zone, as well as small-arms provocations against the airport and that the ABiH instructed its forces to secretly transit through the UNMO zone for the purpose of combat operations (*see* Fourth Motion, Annex D); (iv) the Fifth Sarajevo Document shows that the ABiH forces were undertaking military activities and inserting forces in the Igman demilitarized zone (*see* Fourth Motion, Annex E); and (v) the Seventh Sarajevo Document is an order to equip the ABiH units with weapons with a view to carrying out combat operations (*see* Fourth Motion, Annex G).

³⁰¹ See Fourth Motion, paras. 13, 18, 20, 25, 29 *referring to, inter alia*, Trial Judgement, paras. 1860, 1861, 1865.

86. In any event, the information contained in the First, Second, Fourth, Fifth, and Seventh Sarajevo Documents is largely duplicative of evidence already considered by the Trial Chamber. Specifically, the Appeals Chamber notes that: (i) with respect to the First, Second, Fifth, and Seventh Sarajevo Documents, the Trial Chamber considered similar evidence that the ABiH possessed weapons, conducted military activities, and violated the demilitarization and TEZ agreements;³⁰² and (ii) with respect to the Fourth Sarajevo Document, the Trial Chamber assessed similar evidence that the UN was not aware of all ABiH movements³⁰³ and of small-arms provocations against the airport.³⁰⁴ The Appeals Chamber also observes that the Defence tendered the Second Sarajevo Document as an exhibit at trial.³⁰⁵

87. Moreover, the Appeals Chamber observes that Mladić's responsibility for crimes pursuant to the Sarajevo JCE was based on extensive evidence of his participation in the joint criminal enterprise,³⁰⁶ rather than on evidence concerning the parties' adherence to the TEZ and demilitarization agreements. Thus, the Appeals Chamber finds that Mladić does not demonstrate that the information contained in the First, Second, Fourth, Fifth, and Seventh Sarajevo Documents would have had an impact on the verdict had they, or any of them, been available at trial.

88. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Sarajevo Sniping and Shelling Documents does not satisfy the requirements of Rule 142 of the Rules.

³⁰² See Trial Judgement, paras. 1852, 1853, 1872, 1917, *referring to* Exhibit P736 (showing that both the VRS and the ABiH concealed a certain number of weapons within the TEZ), Adjudicated Fact 1745 (showing that neither the SRK nor the ABiH adhered to the TEZ and that the SRK and the ABiH kept heavy weaponry within the 20-kilometre zone around Sarajevo and outside the WCPs at times between August 1994 and November 1995), Exhibit P293 (showing that both the SRK and the ABiH engaged in sniping), Exhibit D524 (showing that the witness testified that his unit at Baba Stijena was under constant sniper and mortar fire from the ABiH positions, located exclusively in civilian houses and facilities).

³⁰³ See, e.g., Trial Judgement, para. 1877, *referring to* Exhibit P576, para. 95 (under seal) (showing that the ABiH also had snipers, but as they moved around, UNPROFOR was not aware of their precise locations).

³⁰⁴ See Trial Judgement, para. 4862, *referring to* T. 11 December 2012 p. 6107 (private session) (in which [REDACTED]).

³⁰⁵ See Exhibit D1814.

³⁰⁶ See Trial Judgement, paras. 4893 (where, in finding that Mladić significantly contributed to the Sarajevo JCE, the Trial Chamber considered that Mladić: (i) worked on establishing the SRK in May 1992; (ii) made personnel decisions in the SRK; (iii) commanded SRK units from 1992 to 1995 in various operations; (iv) ordered the production and use of modified air bombs; (v) procured military assistance from the Yugoslav Army for the SRK; (vi) participated in policy discussions between 1992 and 1995 with members of the Bosnian Serb government; (vii) participated in the dissemination of anti-Muslim and anti-Croat propaganda between September 1992 and June 1995; (viii) provided misleading information about crimes to representatives of the international community; (ix) failed to investigate crimes and/or punish members of the SRK who committed crimes; and (x) frequently ordered the restriction of humanitarian aid to Sarajevo), 5190. See also Trial Judgement, Chapters 9.5.2-9.5.10.

2. Third Sarajevo Document

89. Mladić submits that the Third Sarajevo Document he seeks to admit was not available to him at trial because he received it from the Republican Center for the Investigation of War Crimes in Banja Luka following a request for assistance after the conclusion of trial.³⁰⁷ Mladić also submits that this document, stating that three bullets were fired from ABiH-held territory causing the closing of the Sarajevo airport and the postponement of UNHCR flights carrying humanitarian aid,³⁰⁸ is relevant to paragraphs 1872 and 4759 of the Trial Judgement, which lack any analysis as to ABiH activity.³⁰⁹ Mladić argues that the Third Sarajevo Document could have impacted his conviction related to restrictions on humanitarian aid to Sarajevo.³¹⁰

90. The Prosecution responds that Mladić fails to demonstrate that the Third Sarajevo Document was not available to him at trial³¹¹ and recalls that it disclosed this document to Mladić and that he tendered two pages of the document into evidence as a Defence exhibit on 8 February 2013 during trial.³¹² The Prosecution also argues that Mladić's submissions concerning the Third Sarajevo Document point to the Trial Chamber's summaries of evidence in the Trial Judgement not to its findings and that Mladić fails to specify with sufficient clarity the impact the Third Sarajevo Document could or would have had upon the verdict.³¹³

91. With respect to availability, the Appeals Chamber observes that the first page of the Third Sarajevo Document which contains the relevant passage to which Mladić refers is identical to a page in Exhibit D194.³¹⁴ The information contained in the Third Sarajevo Document was therefore available at trial and indeed formed part of the trial record. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Third Sarajevo Document on

³⁰⁷ Fourth Motion, paras. 2, 3, 8. *See also* Fourth Reply, paras. 5-8, 13.

³⁰⁸ Fourth Motion, para. 21, Annex C.

³⁰⁹ Fourth Motion, para. 22, *referring to* Trial Judgement, paras. 1872 (where the Trial Chamber considered evidence that "[t]he Serbs sniped at civilians, including women and children, who were crossing the airport"), 4759 (where the Trial Chamber considered evidence that "Bosnian-Serb forces controlled the airport and the area around it"). Mladić also argues that Sarajevo was a legitimate military target and while the legitimate military actions of the VRS were misinterpreted, the significance of the military presence and activities of the ABiH was minimized or neglected. *See* Fourth Motion, paras. 15, 16.

³¹⁰ Fourth Motion, paras. 11-16, 21, 22, *referring to* Trial Judgement, paras. 1872, 4759.

³¹¹ Fourth Response, paras. 2, 3.

³¹² Fourth Response, paras. 5, 12.

³¹³ Fourth Response, paras. 8, 9, 12.

³¹⁴ *Compare* Fourth Motion, Annex C, RP. 9603 *with* Exhibit D194. The remaining pages of the Third Sarajevo Document contain further specification and a map to support the content in the first page. *See* Fourth Motion, Annex C, RP. 9601, 9599.

appeal *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.³¹⁵

92. The Appeals Chamber observes that the Third Sarajevo Document is a letter dated 13 August 1994 from the UNPROFOR Chief of Staff to the Deputy Commander of the ABiH Supreme Command Staff regarding the opening of fire on 11 August 1994, stating, *inter alia*, that “three bullets fired from the territory held by the [ABiH]” resulted in the suspension of airlifts which are used to provide food to people.³¹⁶ In support of his submissions on relevance and impact of this document, Mladić simply points to paragraphs 1872 and 4759 of the Trial Judgement containing summaries of evidence that Bosnian Serb forces sniped at civilians at the airport and controlled the airport and makes no argument on how the proposed evidence would impact specific findings of the Trial Chamber. Nevertheless, considering that the main text of the Third Sarajevo Document is identical with Exhibit D194 that has been considered by the Trial Chamber, the proposed evidence merely proffers information that was already before the Trial Chamber. The Trial Chamber also considered similar evidence that both the ABiH and the VRS attempted to close the Sarajevo airport by shooting at aircraft.³¹⁷ Mladić therefore does not demonstrate that the Third Sarajevo Document would have impacted the Trial Chamber’s finding that he frequently ordered the restriction of humanitarian aid to Sarajevo which rested upon extensive evidence.³¹⁸ Thus, the Appeals Chamber finds that Mladić does not demonstrate that the Third Sarajevo Document would have had an impact on the verdict and that not admitting it as additional evidence would lead to a miscarriage of justice.

93. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić’s request to admit the Third Sarajevo Document does not satisfy the requirements of Rule 142 of the Rules.

³¹⁵ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

³¹⁶ See Second Notice of Filing of Translations Relating to Fourth Motion, Annex C, RP. 9603.

³¹⁷ Trial Judgement, para. 4862, *referring to* T. 11 December 2012 p. 6107 (private session).

³¹⁸ In reaching this finding, the Trial Chamber reviewed evidence on, *inter alia*: (i) the VRS’s acts to control the provision of aid, either by allowing or blocking its movement to Sarajevo, and evidence that the VRS command gave the orders on how to proceed (*see* Trial Judgement, paras. 4844, 4847, 4850-4853, 4855, 4858-4860, 4863, 4865, 4866, 4875, 4877-4885); (ii) the VRS control over the use of the airport to deliver humanitarian aid (*see* Trial Judgement, paras. 4870, 4871); (iii) both sides obstructing the movement of UNPROFOR and UNHCR convoys (*see* Trial Judgement, paras. 4845, 4862); (iv) UNPROFOR taking threats from the VRS seriously and statements that they could no longer “guarantee” the safety of aircrafts approaching the Sarajevo airport which halted the use of the airport for two days (*see* Trial Judgement, paras. 4865, 4889); and (v) a UNPROFOR weekly report dated 10 December 1994 stating that Serbs blockaded and restricted the movement of humanitarian supplies to Sarajevo and threatened to shoot at UN vehicles if they were to use alternative routes to the city (*see* Trial Judgement, para. 4866).

3. Eighth Sarajevo Document

94. Mladić submits that the Eighth Sarajevo Document was not available to him at trial because he received it from the Republican Center for the Investigation of War Crimes in Banja Luka following a request for assistance after the conclusion of trial.³¹⁹ Mladić argues that the proposed evidence is relevant because it shows that UNPROFOR had no final proof to justify attributing responsibility for Scheduled Incident G.8 to any particular party,³²⁰ reflects that the ABiH was the party that was reticent to place its heavy weaponry in Sarajevo under UN control, and demonstrates that legitimate combat could be conducted in Sarajevo since it was not considered a demilitarized zone by the ABiH.³²¹ Mladić further submits that the Eighth Sarajevo Document rebuts the adjudicated facts and the Trial Chamber's findings in relation to his liability and that of his subordinates in relation to Scheduled Incident G.8.³²²

95. The Prosecution responds that Mladić fails to show that the Eighth Sarajevo Document was not available to him at trial including through the exercise of due diligence since it was disclosed to Mladić in January 2013.³²³ The Prosecution argues that, in any event, the Eighth Sarajevo Document does not undermine his conviction since the trial record shows that UNPROFOR did not attribute responsibility for Scheduled Incident G.8 to the VRS or the ABiH,³²⁴ the proposed evidence states nothing about the ABiH's willingness to demilitarize, and the Trial Chamber already considered the ABiH's violation of the TEZ in making its findings.³²⁵

96. With respect to availability, the Appeals Chamber notes the Prosecution's submission that it disclosed the Eighth Sarajevo Document to Mladić in January 2013.³²⁶ For the same reasons discussed in relation to the Sarajevo Sniping and Shelling Documents, the Appeals Chamber considers that Mladić's general submission that he faced problems obtaining disclosed materials due to technical difficulties concerning the EDS is insufficient to demonstrate that he has exercised due diligence to avail himself of this document during trial.³²⁷ Given that this document was available at trial, the Appeals Chamber will proceed to assess whether Mladić demonstrates that not

³¹⁹ Fourth Motion, paras. 2, 3, 8. *See also* Fourth Reply, paras. 5-8, 13.

³²⁰ Fourth Motion, para. 30.

³²¹ Fourth Motion, para. 31.

³²² Fourth Motion, para. 31. *See also* Fourth Motion, paras. 15, 16.

³²³ Fourth Response, paras. 2-4, 6. According to the Prosecution, this document was disclosed as ERN 0171-1150-0171-1152, within ERN range 0171-1150-0171-1163, by email on 11 January 2013 and in Disclosure Batch 53 on 18 January 2013. *See* Fourth Response, para. 6.

³²⁴ Fourth Response, para. 22.

³²⁵ Fourth Response, paras. 22, 23. The Prosecution also contends that Mladić's arguments concerning Scheduled Incident G.8 should be dismissed as they fall outside of the scope of his appeal. *See* Fourth Response, para. 22.

³²⁶ *See* Fourth Response, para. 6.

³²⁷ *See supra* para. 83.

admitting the Eighth Sarajevo Document *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.³²⁸

97. The Appeals Chamber observes that the Eighth Sarajevo Document is a UN coded cable dated 9 February 1994 from UNPROFOR Special Representative Akashi to the UN Secretary General concerning Akashi's comments on a draft letter to the UN Security Council ("UNSC"), stating, *inter alia*, that "UNPROFOR cannot go beyond saying that no final proof has emerged to justify attributing responsibility to any particular party" and that "the withdrawal and placing under UNPROFOR control of Serb artillery, was the central problem raised by both parties, [...] first and foremost by the BiH side, and not by the Serbs."³²⁹ The Appeals Chamber considers that the proposed evidence is relevant to the Trial Chamber's findings concerning Mladić's liability and that of his subordinates in relation to Scheduled Incident G.8.³³⁰

98. However, the Appeals Chamber observes that apart from generally asserting, without explanation or substantiation, that the proposed evidence rebuts adjudicated facts and the Trial Chamber's findings about his liability and that of his subordinates in relation to Scheduled Incident G.8, Mladić does not specify any findings made by the Trial Chamber to which the Eighth Sarajevo Document pertains or the impact it would have had upon the Trial Chamber's verdict.³³¹ In any event, the information contained in the Eighth Sarajevo Document proffers information already considered by the Trial Chamber. For example, the Trial Chamber explicitly considered evidence that UNPROFOR did not attribute responsibility for Scheduled Incident G.8 to either the ABiH or the VRS.³³² However, the Trial Chamber considered that such evidence does not provide conclusive answers to the matters established in Adjudicated Facts 2519 and 2525 showing that the mortar shell, which exploded at Markale Market: (i) was fired from SRK-controlled territory; and (ii) travelled a distance considerably greater than 2,600 metres from the north-east direction, placing

³²⁸ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

³²⁹ Fourth Motion, Annex H.

³³⁰ See Trial Judgement, paras. 2067, 2084.

³³¹ See Fourth Motion, paras. 30, 31; *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28. With respect to the Prosecution's submission that Mladić's arguments concerning Scheduled Incident G.8 fall outside of the scope of his appeal, the Appeals Chamber observes that Mladić challenges his conviction in relation to this event. See Mladić Appeal Brief, paras. 512-526.

³³² See, e.g., Trial Judgement, para. 2067, referring to Exhibits D1220 (indicating that an UNPROFOR situation report of 5 February 1994 showed that the shell could have been fired from ABiH or Serb positions), P4 (indicating that according to an UNPROFOR weekly report of 9 February 1994, it was not possible to say that the round had come from Serb positions), D8 (indicating that a second, more thorough, investigation by UNPROFOR concluded that it still could not be determined from which side of the confrontation line the bomb had been fired). See also Trial Judgement, para. 2084 (stating that "[t]he Trial Chamber has received evidence from both parties which deals with the origin of fire as stated in the Adjudicated Facts, namely that an investigation carried out by UNPROFOR concluded that – at that time – it could not be determined from which side of the confrontation line the mortar shell had been fired").

the position from which the shell was fired well within SRK-controlled territory.³³³ The Trial Chamber found that such evidence does not contradict Adjudicated Facts 2519 and 2525.³³⁴ Thus, the Appeals Chamber considers that Mladić does not demonstrate that the Eighth Sarajevo Document would have rebutted these adjudicated facts or impacted the Trial Chamber's conclusions concerning Scheduled Incident G.8. For the same reasons discussed in relation to the Sarajevo Sniping and Shelling Documents, the Appeals Chamber rejects Mladić's submission that the Eighth Sarajevo Document demonstrates that legitimate combat could be conducted in Sarajevo since it was not considered a demilitarized zone by the ABiH.³³⁵ The Appeals Chamber therefore finds that Mladić does not demonstrate that the Eighth Sarajevo Document would have had an impact on the verdict and that not admitting it as additional evidence would lead to a miscarriage of justice.

99. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Eighth Sarajevo Document does not satisfy the requirements of Rule 142 of the Rules.

E. Fifth Motion

100. In reviewing the evidence concerning the lead up to the fall of the Srebrenica enclave, the Trial Chamber noted that, on 16 April 1993, the UNSC adopted Resolution 819, declaring Srebrenica and its surrounding area a "safe area",³³⁶ free from armed attack or any other hostile act.³³⁷ The Trial Chamber found that, on 17 April 1993, the VRS and the ABiH concluded a demilitarization agreement, including a total cease-fire in the Srebrenica area, and, on 8 May 1993, Mladić and ABiH Commander General Sefer Halilović concluded a second demilitarization agreement, declaring that the areas of Srebrenica and Žepa be demilitarized.³³⁸ The Trial Chamber further found that both the VRS and the ABiH violated the 8 May 1993 demilitarization agreement, with military activity between the two sides.³³⁹

101. Furthermore, in assessing Mladić's contribution to the Overarching JCE and the Sarajevo JCE, the Trial Chamber found, *inter alia*, that Mladić prevented the delivery of humanitarian aid and authorized deliberately obstructive inspections calculated to restrict humanitarian aid to the

³³³ See Trial Judgement, para. 2084.

³³⁴ See Trial Judgement, para. 2084.

³³⁵ See *supra* para. 86.

³³⁶ The Trial Chamber noted that at the same time, the UNSC created, with Resolution 824, two other UN protected enclaves, Žepa and Goražde. See Trial Judgement, para. 2337.

³³⁷ Trial Judgement, para. 2361.

³³⁸ See Trial Judgement, paras. 2338, 2342, 2361, 4325.

³³⁹ Trial Judgement, paras. 2344, 2338, 2361, n. 10018.

enclaves or UN “safe areas”.³⁴⁰ Despite its finding that in some instances weapons and ammunition were found in UNPROFOR and humanitarian aid convoys, the Trial Chamber found that the blockading of delivery of humanitarian aid and deliberately obstructive inspections by the VRS were disproportionate and calculated to restrict humanitarian aid to the enclaves.³⁴¹

102. In the Fifth Motion, Mladić seeks to admit the following documents as additional evidence on appeal: (i) a UN Coded Cable dated 23 April 1993 from the UN Secretary General Kofi Annan to UNPROFOR’s Lieutenant General Lars-Eric Wahlgren concerning the demilitarization of Srebrenica (“UN Coded Cable of 23 April 1993”);³⁴² (ii) an order dated 29 August 1994 by ABiH Commander Rasim Delić (“Delić”) directing the Bosnian Muslim forces in Srebrenica and Žepa to restock supplies of military materiel and technical equipment and raise the level of combat readiness in the event of the weapons embargo being lifted (“ABiH Document of 29 August 1994”);³⁴³ (iii) an order dated 18 September 1994 by Delić instructing ABiH forces to carry out combat operations in Goražde (“ABiH Document of 18 September 1994”);³⁴⁴ and (iv) a letter dated 16 October 1994 from Delić to the United States Colonel General Clark (“Delić Letter”).³⁴⁵ The UN Coded Cable of 23 April 1993, the ABiH Document of 29 August 1994, and the ABiH Document of 18 September 1994 relate to the demilitarization in the “safe areas” and thus will be referred to as “Demilitarization Documents”, collectively. The Appeals Chamber will first consider the Demilitarization Documents and then turn to the Delić Letter.

1. Demilitarization Documents

103. Mladić submits that the Demilitarization Documents were not available at trial because they were given to him “recently” by the Republican Center for the Investigation of War Crimes in Banja Luka after the conclusion of trial pursuant to his requests for assistance.³⁴⁶ Mladić further submits that the Demilitarization Documents are relevant because: (i) the UN Coded Cable of 23 April 1993 demonstrates that the “safe area” of Srebrenica was not properly demilitarized and that the UNPROFOR forces were neither empowered nor encouraged to undertake the

³⁴⁰ See Trial Judgement, paras. 4601, 4603-4609, 4611, 4612, 4886-4891, 4893.

³⁴¹ See Trial Judgement, paras. 4608, 4890 (wherein the Trial Chamber recalled its finding and summary of evidence in Chapter 9.3.6 of the Trial Judgement concerning the smuggling of weapons and ammunition in humanitarian aid convoys allegedly by the ABiH or other Bosnian Muslim forces).

³⁴² Fifth Motion, para. 2, Annex A.

³⁴³ Fifth Motion, para. 2, Annex B; Notice of Filing of Translations Relating to Fifth Motion, Annex B.

³⁴⁴ Fifth Motion, para. 2, Annex C; Notice of Filing of Translations Relating to Fifth Motion, Annex C.

³⁴⁵ Fifth Motion, para. 2, Annex D; Notice of Filing of Translations Relating to Fifth Motion, Annex D.

³⁴⁶ Fifth Motion, paras. 2-4, 10, 12. According to Mladić, any evidence not in the possession of the Defence prior to the 18 January 2016 deadline for the introduction of evidence from the bar table was “not available at trial”. See Fifth Motion, para. 4.

demilitarization;³⁴⁷ (ii) the ABiH Document of 29 August 1994 shows that the ABiH engaged in re-supplying military technical supplies and paid no heed to the demilitarization of Srebrenica;³⁴⁸ and (iii) the ABiH Document of 18 September 1994 shows that attacks were staged to provoke a response from the VRS and that neither the ABiH nor UNPROFOR was enforcing the demilitarization in accordance with the law.³⁴⁹ Mladić contends that the Demilitarization Documents could have impacted the Trial Chamber's evaluation of the activities relating to the "safe areas", in connection with which the Trial Chamber found his intent to participate in a joint criminal enterprise, and render unsafe multiple findings in the Trial Judgement, including those relating to various "safe areas" and his convictions concerning the Overarching JCE, Sarajevo JCE, and Srebrenica JCE.³⁵⁰

104. The Prosecution responds that Mladić fails to demonstrate that the Demilitarization Documents were not available to him at trial, including through the exercise of due diligence,³⁵¹ as: (i) the ABiH Document of 18 September 1994 was disclosed to him during trial on 24 April 2015;³⁵² (ii) a different version of the ABiH Document of 29 August 1994 was disclosed to him on 11 November 2011 before the start of trial³⁵³ and on three subsequent occasions;³⁵⁴ and (ii) the UN Coded Cable of 23 April 1993 was admitted in the *Slobodan Milošević* case on 3 November 2003 as a public exhibit during the public testimony of Witness David Owen, who referred to it as "a fairly well-known UN document".³⁵⁵ The Prosecution further responds that Mladić fails to clearly identify with precision material issues and specific findings impacted by the Demilitarization Documents.³⁵⁶ The Prosecution submits that the Trial Chamber did not exclude that some military actions by the Bosnian Serb forces in 1993 and 1994 were "legitimate" in finding that Mladić contributed to and shared the common purpose of the Srebrenica JCE.³⁵⁷ It argues that the Demilitarization Documents cannot undermine the Trial Chamber's well-supported findings as they

³⁴⁷ Fifth Motion, paras. 15, 16. Mladić adds that the Trial Chamber misinterpreted legitimate military actions as the basis of his criminal intent for his conviction in relation to Srebrenica. *See* Fifth Motion, para. 16.

³⁴⁸ Fifth Motion, paras. 17, 18.

³⁴⁹ Fifth Motion, paras. 19, 20. Mladić adds that the Trial Chamber relied upon such attacks in finding his intent, rather than considering such attacks as legitimate acts of self-defense. *See* Fifth Motion, para. 20.

³⁵⁰ Fifth Motion, para. 14, *referring to* Trial Judgement, paras. 2122, 2130, 2131, 2133, 2147, 2330, 2333-2336, 2360, 4591, 4593, 4599, 4600, 4606, 4886, 4915, 4921, 4548-4609, 4841-4891. *See also* Fifth Motion, paras. 2, 10.

³⁵¹ Fifth Response, paras. 1-6.

³⁵² Fifth Response, para. 3, *referring to* Disclosure Batch 118 as ERN Y016-7346-Y016-7350.

³⁵³ Fifth Response, para. 3, *referring to* Disclosure Batch 5 as ERN 0554-2019-0554-2020 (in ERN range 0554-1945-0554-2066).

³⁵⁴ Fifth Response, para. 3, n. 5, *referring to* Disclosure Batch 25 (20 June 2012), Disclosure Batch 118 (24 April 2015) and Disclosure Batch 138 (20 October 2017).

³⁵⁵ Fifth Response, paras. 4, 5. The Prosecution contends that Mladić's claim that any evidence unavailable prior to the 18 January 2016 deadline for the introduction of evidence from the bar table would have to be considered "not available at trial" is unsupported and should be rejected. *See* Fifth Response, para. 6.

³⁵⁶ Fifth Response, paras. 8, 9.

³⁵⁷ Fifth Response, para. 10.

have marginal relevance, are duplicative of evidence adduced at trial, and are consistent with the Trial Chamber's findings.³⁵⁸

105. With respect to the availability of the Demilitarization Documents, the Appeals Chamber recalls that whether proffered evidence was available at trial is not a question of whether the evidence was "available" in a literal sense but rather whether the applicant could, by exercising due diligence, have obtained the evidence at an earlier date.³⁵⁹ The mere assertion that proposed evidence was found only after the rendering of the Trial Judgement is not sufficient to demonstrate that due diligence had been exercised.³⁶⁰ The Appeals Chamber notes that Mladić does not dispute the Prosecution's contention that the ABiH Document of 18 September 1994 was disclosed during his trial on 24 April 2015 and that a different version of the ABiH Document of 29 August 1994 was disclosed before the start of his trial on 11 November 2011 and during the trial on 20 June 2012, 24 April 2015, and 20 October 2017, respectively. Similarly, Mladić makes no attempt to demonstrate that, by exercising due diligence, he could not have obtained the UN Coded Cable of 23 April 1993, which was filed as a public exhibit in the *Slobodan Milošević* case on 3 November 2003.³⁶¹ The Appeals Chamber recalls that it has previously rejected Mladić's assertion that he was prevented from attempting to admit additional evidence after the deadline for the introduction of evidence from the bar table on 18 January 2016.³⁶² Accordingly, Mladić fails to meet his burden to demonstrate that the Demilitarization Documents were neither available at trial nor discoverable through the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Demilitarization Documents *would* lead to a miscarriage of justice, in that, if these documents individually or collectively had been admitted at trial, it *would* have had an impact on the verdict.³⁶³

³⁵⁸ Fifth Response, paras. 1, 7, 10-13. The Prosecution specifically argues that: (i) with respect to the UN Coded Cable of 23 April 1993, Mladić advances the same arguments he made at trial about the ineffectiveness of UNPROFOR in enforcing the demilitarization of Srebrenica and the Trial Chamber expressly noted that demilitarization was unsuccessful (see Fifth Response, para. 11, *referring to* Mladić Final Trial Brief, paras. 2474, 2491, 2493, 2495, Trial Judgement, para. 2347); (ii) the ABiH Document of 29 August 1994 is consistent with the Trial Chamber's finding that "[b]oth parties to the conflict violated the demilitarization agreement, with military activity between the two sides" and its explicit acknowledgement that the ABiH failed to completely disarm (see Fifth Response, para. 12, *referring to* Trial Judgement, paras. 2344, 2346, 2361); and (iii) with respect to the ABiH Document of 18 September 1994, Mladić made the same argument at trial concerning the improper use of the "safe areas" and the attacks and provocation by the Bosnian Muslim forces from the "safe areas", and furthermore, his responsibility for the events in Srebrenica in 1995 charged in the Indictment does not hinge on the Bosnian Serb forces militarily actions in Goražde in 1994 (see Fifth Response, para. 13, *referring to* Mladić Final Trial Brief, paras. 2472, 2474, 2478).

³⁵⁹ See *Ngirabatware* Decision of 21 November 2014, para. 32; *Šainović et al.* Decision of 11 March 2010, paras. 5, 17.

³⁶⁰ See *Šainović et al.* Decision of 29 April 2010, para. 20.

³⁶¹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Exhibit C19.

³⁶² See *supra* para. 17.

³⁶³ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

106. The Appeals Chamber notes that the Demilitarization Documents show, *inter alia*: (i) the challenges and limited resources of UNPROFOR in ensuring that both parties honour their commitments to demilitarize Srebrenica in April 1993;³⁶⁴ (ii) that, at the end of August 1994, the Commander of the ABiH requested the Bosnian Muslim forces in Srebrenica and Žepa to ensure “combat readiness” in the event of the lifting of the arms embargo in Bosnia and Herzegovina and reprisals in Srebrenica, Žepa, and Goražde;³⁶⁵ and (iii) that, in September 1994, the Commander of the ABiH ordered the Bosnian Muslim forces in Goražde to commence combat operations and to assess whether to “provoke a new attack” on Goražde as a pretext that “can be presented to the UN as a response to Chetnik provocations”.³⁶⁶ The proposed evidence is therefore relevant to the Trial Chamber’s findings concerning military activity after the conclusion of the “safe area” agreement, namely that both the VRS and the ABiH violated the demilitarization agreement, with military activity between the two sides.³⁶⁷

107. The Appeals Chamber reiterates that the applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber’s verdict.³⁶⁸ In this respect, the Appeals Chamber observes that while Mladić points to particular paragraphs of the Trial Judgement as examples, he fails to clearly identify the specific findings to which each of the Demilitarization Documents pertain.³⁶⁹ Rather, he vaguely refers to “multiple findings in the [Trial] Judgement, including but not limited to those relating to the various ‘safe areas’ and convictions as to the [Overarching JCE, Sarajevo JCE, and Srebrenica JCE]”.³⁷⁰ Thus, the Appeals Chamber finds that Mladić has not met the burden to clearly identify with precision the specific finding of fact made by the Trial Chamber under Rule 142(A) of the Rules.

108. The Appeals Chamber also observes that the Demilitarization Documents proffer information already considered by the Trial Chamber as: (i) with respect to the UN Coded Cable of 23 April 1993, the Trial Chamber considered similar arguments raised by Mladić at trial that the “safe area” of Srebrenica was not properly demilitarized and that the UNPROFOR forces did not

³⁶⁴ See Fifth Motion, Annex A.

³⁶⁵ See Notice of Filing of Translations Relating to Fifth Motion, Annex B.

³⁶⁶ See Notice of Filing of Translations Relating to Fifth Motion, Annex C.

³⁶⁷ See Trial Judgement, para. 2361.

³⁶⁸ See *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28.

³⁶⁹ See Fifth Motion, n. 10, *referring to, inter alia*, Trial Judgement, paras. 2122, 2130, 2131, 2133, 2147, 2330, 2333-2336, 2360, 4591, 4593, 4599, 4600, 4606, 4886, 4915, 4921, 4548-4609, 4841-4891.

³⁷⁰ See Fifth Motion, para. 14.

effectively enforce the demilitarization of Srebrenica;³⁷¹ (ii) with respect to the ABiH Document of 29 August 1994, the Trial Chamber considered similar information that the ABiH forces were continuously arming themselves³⁷² and that they failed to demilitarize;³⁷³ and (iii) with respect to the ABiH Document of 18 September 1994, similar evidence, showing the attacks and provocation by the Bosnian Muslim forces from the “safe areas” and that neither the ABiH nor UNPROFOR was enforcing the demilitarization, was already on the trial record.³⁷⁴ Moreover, the Trial Chamber did not rely on its finding that the VRS and the ABiH engaged in military activities in the “safe areas” such as Srebrenica and Žepa³⁷⁵ in determining Mladić’s intent to participate in the Srebrenica JCE. Rather the Trial Chamber based this determination on Mladić’s statements and conduct throughout the take-over of the Srebrenica enclave.³⁷⁶

109. In light of the above, the Appeals Chamber finds that Mladić does not demonstrate that the Demilitarization Documents would have impacted the Trial Chamber’s verdict and that not admitting them as additional evidence would lead to a miscarriage of justice. The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić’s request to admit the Demilitarization Documents does not satisfy the requirements of Rule 142 of the Rules.

³⁷¹ See, e.g., Trial Judgement, paras. 2344, 2347. See also Mladić Final Trial Brief, paras. 2474, 2491, 2493, 2495.

³⁷² See Trial Judgement, para. 2344, referring to Adjudicated Facts 1305.

³⁷³ See Trial Judgement, paras. 2344, 2346, 2347, referring to Adjudicated Facts 1304, Exhibits D365, p. 1, P1157, paras. 4, 7, 9.

³⁷⁴ See Mladić Final Trial Brief, paras. 2472, 2474, 2478, referring to Exhibit D1468, p. 7 (showing that the Bosnian Government often took advantage of the six designated “safe areas” – Sarajevo, Tuzla, Srebrenica, Žepa, Goražde and Bihac – as places in which to rest its troops or equip and train them, and from which to organise attacks on the Serb forces), Exhibit D1637, p. 2 (wherein the Secretary General has drawn attention to the problems of the Safe Area Regime in the following areas: (a) lack of resources; (b) use of the “safe areas” by the Bosnian Government for military purposes; (c) provocation and attacks from within the “safe areas”; and (d) the limitations of the credibility of deterrence and the consequences of the use of air power), T. 18 February 2015, p. 31856 (wherein Witness Milenko Jevdjovic testified that the ABiH in Srebrenica, Žepa, and Goražde showed that demilitarization had not been carried out at all and their military activities had actually continued), T. 16 September 2013 p. 16796 (wherein Witness Richard Butler testified that the UN never had enough troops to fulfil their mandate of demilitarizing the “safe areas” of Srebrenica and Žepa).

³⁷⁵ See Trial Judgement, paras. 2359, 2361.

³⁷⁶ See Trial Judgement, paras. 5128, 5130, 5131. In determining whether Mladić shared the intent to achieve the common objective of the Srebrenica JCE, the Trial Chamber considered Mladić’s statements and conduct throughout the take-over of the Srebrenica enclave, including: (i) his command and control over VRS and MUP units operating in and around Srebrenica in July 1995; (ii) his role in the Hotel Fontana meetings on 11 and 12 July 1995 during which the transportation of Bosnian Muslims out of Srebrenica Municipality was discussed; (iii) his presence at a meeting at the Bratunac Command Centre on 13 July 1995 with VRS and MUP officers during which the task of killing about 8,000 Muslim males near Konjević Polje was discussed; (iv) his presence during the gathering of Bosnian Muslims in Potočari on 12 and 13 July 1995 and during the separation of Bosnian Muslim men; (v) his denial of the crimes committed in Srebrenica; (vi) the measures he took to provide misleading information and to prevent the media from knowing what was happening in Srebrenica; (vii) his statements that the Bosnian Muslims should be evacuated including those who did not want to leave and his request to open a road towards Kladanj for the evacuation; (viii) that from at least 1994 and throughout July 1995, Mladić made numerous statements expressing the need to take revenge on the Bosnian Muslims from Srebrenica, adding that they would have ‘disappeared a long time ago’ had it not been for the involvement of the international community. See Trial Judgement, para. 5128.

2. Delić Letter

110. Mladić submits that the Delić Letter was unavailable at trial because it was provided to the Defence by the Republican Center for the Investigation of War Crimes in Banja Luka after the conclusion of trial pursuant to his requests for assistance.³⁷⁷ Mladić further argues that the Delić Letter is relevant because it reveals a secret discussion concerning the delivery of materials and equipment, demonstrating a secret collaboration between the United States and the ABiH at the time of an arms embargo that was not known to the Trial Chamber in evaluating the evidence and making its findings.³⁷⁸ Mladić asserts that the Delić Letter “might affect the verdict” and that the exclusion of this document would lead to a potential miscarriage of justice.³⁷⁹

111. The Prosecution responds that Mladić fails to demonstrate that the Delić Letter was not available to him at trial, including through the exercise of due diligence.³⁸⁰ It further responds that Mladić fails to clearly identify with precision the specific finding of fact to which the Delić Letter is directed.³⁸¹ The Prosecution submits that the Delić Letter would not impact Mladić’s convictions³⁸² as the document only reflects an inquiry about a possible delivery of “resources” and, in any event, the information that the United States was supplying weapons to the ABiH was already before the Trial Chamber.³⁸³

112. With respect to the availability of the Delić Letter, the Appeals Chamber recalls that the applicant seeking the admission of evidence bears the burden of demonstrating that he acted with due diligence in obtaining the evidence.³⁸⁴ The Appeals Chamber notes that Mladić makes no submissions to indicate his due diligence in attempting to obtain the Delić Letter. As recalled above, the mere assertion that the document was found only after the rendering of the Trial Judgement is not sufficient to demonstrate that due diligence had been exercised.³⁸⁵ The Appeals Chamber thus considers that Mladić’s assertion that the Delić Letter was given to him after the conclusion of trial fails to demonstrate that the Delić Letter was not available to him at trial through

³⁷⁷ Fifth Motion, paras. 2-4, 10, 12.

³⁷⁸ Fifth Motion, paras. 22, 23, 25. Mladić adds that the letter also supports his arguments in the First Motion concerning the statements of Rose and “the other confidential witness” and should be considered alongside the actions of United States General Clark regarding air strikes against the Serbs referred to in the Third Motion. *See* Fifth Motion, para. 23. Parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere. *See Stanišić & Simatović* Decision of 1 November 2013, para. 8; *Karadžić* Decision of 9 July 2009, para. 13. To the extent that Mladić develops these arguments in the First and Third Motions, the Appeals Chamber will evaluate them in connection with the submissions made in support of these motions only.

³⁷⁹ Fifth Motion, paras. 24, 25.

³⁸⁰ Fifth Response, paras. 1, 2, 4-6.

³⁸¹ Fifth Response, paras. 8, 9.

³⁸² Fifth Response, para. 14.

³⁸³ Fifth Response, para. 14, *referring to* Mladić Final Trial Brief, paras. 2760, 2764, 2829, 3322.

³⁸⁴ *See Ngirabatware* Decision of 21 November 2014, para. 24; *Šainović et al.* Decision of 11 March 2010, para. 17.

the exercise of due diligence. The Appeals Chamber will therefore proceed to assess whether Mladić demonstrates that not admitting the Delić Letter *would* lead to a miscarriage of justice, in that, if this document had been admitted at trial, it *would* have had an impact on the verdict.³⁸⁶

113. The Appeals Chamber observes that in the Delić Letter, the ABiH Commander Delić requested the United States Colonel General Clark to inform him through the United States Embassy in Bosnia and Herzegovina “whether there is any possibility that [Clark] may start to deliver at least a part of the resources [...]”.³⁸⁷ The Appeals Chamber considers that the proposed evidence is relevant to the issue of smuggling of weapons and ammunition allegedly by the ABiH or other Bosnian Muslim forces, which the Trial Chamber considered in the Trial Judgement.³⁸⁸

114. As recalled above, an applicant bears the burden of identifying with precision the specific finding of fact made by the trial chamber to which the additional evidence pertains, and of specifying with sufficient clarity the impact the additional evidence could or would have had upon the trial chamber’s verdict.³⁸⁹ The Appeals Chamber observes that Mladić neither refers to any specific finding made by the Trial Chamber to which the Delić Letter pertains, nor does he substantiate how its exclusion would lead to a potential miscarriage of justice. To the extent that Mladić refers to his submissions in other motions to support his arguments, in disposing of the Fifth Motion, the Appeals Chamber only addresses Mladić’s submissions developed in this motion.³⁹⁰

115. In any event, the Appeals Chamber is not convinced that the admission of the Delić Letter would have impacted the verdict. First, contrary to Mladić’s assertion that this document demonstrates a secret collaboration between the US and the ABiH that was not known to the Trial Chamber,³⁹¹ the Appeals Chamber observes that similar evidence showing that the US was supplying weapons, equipment, or resources to the ABiH was already on the trial record.³⁹² Second, the Delić Letter does not contradict the Trial Chamber’s finding concerning the smuggling of weapons and ammunition in humanitarian aid convoys allegedly by the ABiH or other Bosnian Muslim forces,³⁹³ which the Trial Chamber considered in finding that the blockading of delivery of

³⁸⁵ See *Šainović et al.* Decision of 29 April 2010, para. 20.

³⁸⁶ See *Karadžić* Decision of 2 March 2018, para. 7; *Uwinkindi* Decision of 22 September 2016, para. 6; *Ngirabatware* Decision of 21 November 2014, para. 27.

³⁸⁷ See Fifth Motion, Annex D; Notice of Filing of Translations Relating to Fifth Motion, Annex D.

³⁸⁸ See Trial Judgement, paras. 4608, 4890.

³⁸⁹ See *Karadžić* Decision of 2 March 2018, para. 8; *Uwinkindi* Decision of 22 September 2016, para. 7; *Ngirabatware* Decision of 21 November 2014, para. 28.

³⁹⁰ See Fifth Motion, paras. 23, 24, referring to First Motion, Third Motion, paras. 32-37. See *supra* n. 378.

³⁹¹ See Fifth Motion, para. 23.

³⁹² See Mladić Final Trial Brief, paras. 2760, 2764, 2829, 3322, referring to Exhibits D 278, D1363, D 699, T. 25 April 2013 pp. 10350, 10351, T. 07 May 2013, pp. 10769, 10770, T. 17 September 2015, pp. 39017, 39018.

³⁹³ See Trial Judgement, paras. 4608, 4890.

humanitarian aid and deliberately obstructive inspections by the VRS were disproportionate and calculated to restrict humanitarian aid to the enclaves.³⁹⁴ Thus, the Appeals Chamber finds that Mladić does not demonstrate that the Delić Letter would have impacted the Trial Chamber's verdict and that not admitting it as additional evidence would lead to a miscarriage of justice.

116. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's request to admit the Delić Letter does not satisfy the requirements of Rule 142 of the Rules.

V. DISPOSITION

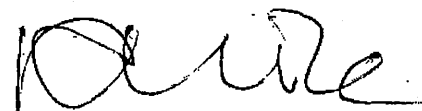
117. For the foregoing reasons, the Appeals Chamber **DENIES**, Judge Nyambe dissenting, the Rule 142 Motions in their entirety.

118. The Appeals Chamber emphasizes that its findings in this decision pertain strictly to the admissibility of the proposed additional evidence and are in no way indicative of its consideration of the merits of Mladić's appeal.

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

Judge Prisca Matimba Nyambe issues a dissenting opinion.

Done this 11th day of March 2020,
At The Hague,
The Netherlands



Judge Prisca Matimba Nyambe
Presiding Judge

[Seal of the Mechanism]

³⁹⁴ See Trial Judgement, paras. 4608, 4890. In this respect, the Trial Chamber relied on the finding that Mladić prevented the delivery of humanitarian aid and authorised deliberately obstructive inspections calculated to restrict humanitarian aid to the enclaves or UN "safe areas" in determining Mladić's contribution to the Overarching JCE and the Sarajevo JCE. See Trial Judgement, paras. 4601, 4603-4609, 4611, 4612, 4886-4891, 4893. Specifically, the Trial Chamber found that: (i) Mladić significantly contributed to the Overarching JCE including through placing severe restrictions on the delivery of humanitarian aid from 10 April 1994 onwards (see Trial Judgement, paras. 4611, 4612); and (ii) Mladić significantly contributed to the Sarajevo JCE including through frequently ordering the restriction of humanitarian aid to Sarajevo (see Trial Judgement, para. 4893).



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