**UNITED NATIONS**

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| | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 | Case No.: | IT-05-88-A |
| | | Date: | 30 January 2015 |
| | | Original: | English |

**IN THE APPEALS CHAMBER**

**Before:** **Judge Patrick Robinson, Presiding**
**Judge William H. Sekule**
**Judge Fausto Pocar**
**Judge Arlette Ramaroson**
**Judge Mandiaye Niang**

**Registrar:** **Mr. John Hocking**

**Judgement of:** **30 January 2015**

**PROSECUTOR**

**v.**

**VUJADIN POPOVIĆ**
**LJUBIŠA BEARA**
**DRAGO NIKOLIĆ**
**RADIVOJE MILETIĆ**
**VINKO PANDUREVIĆ**

***PUBLIC***

# JUDGEMENT

**The Office of the Prosecutor:**

Mr. Peter Kremer QC and Mr. Paul Rogers assisted by:
Ms. Najwa Nabti and Ms. Lada Šoljan re: Mr. Vujadin Popović;
Mr. Matthew Gillett re: Mr. Ljubiša Beara;
Mr. Todd Schneider and Ms. Marie-Hélène Proulx re: Mr. Drago Nikolić;
Ms. Barbara Goy, Ms. Laurel Baig, and Ms. Giulia Pinzauti re: Mr. Radivoje Miletić; and
Mr. Kyle Wood and Mr. Nema Milaninia re: Mr. Vinko Pandurević.

**Counsel for Appellants:**

Mr. Zoran Živanović and Ms. Mira Tapušković for Mr. Vujadin Popović
Mr. John Ostojić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Peter Haynes QC and Mr. Simon Davis for Mr. Vinko Pandurević

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# I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "ICTY" or "Tribunal", respectively) is seised of appeals from the judgement rendered by Trial Chamber II of the Tribunal ("Trial Chamber") on 10 June 2010 in the case of *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T ("Trial Judgement").[1]

## A. Background

2. The events giving rise to this case took place in July 1995, in and around Srebrenica and Žepa in the Podrinje region, in the eastern part of Bosnia and Herzegovina ("BiH").[2] The Trial Chamber found that these events followed an intense military assault by the Bosnian Serb Forces ("BSF") on the United Nations-protected areas of Srebrenica and Žepa in July 1995.[3] Bosnian Muslims fled Srebrenica to the nearby town of Potočari, where the women, children, and the elderly were loaded onto packed buses and transported away from their homes in Eastern BiH.[4] Thousands of males were detained in horrific conditions and subsequently summarily executed.[5] In Žepa, a series of military attacks also led to the removal of the entire Bosnian Muslim population by transport or flight.[6]

3. The Trial Chamber found that there was a joint criminal enterprise ("JCE") to murder the able-bodied Bosnian Muslim men from Srebrenica in July 1995 ("JCE to Murder").[7] The Trial Chamber determined that Vujadin Popović, Ljubiša Beara, and Drago Nikolić were participants in the JCE to Murder ("**Popović**", "**Beara**", and "**Nikolić**", respectively).[8] The Trial Chamber further found that there was a JCE to forcibly remove the Bosnian Muslim populations from Srebrenica and Žepa ("JCE to Forcibly Remove"),[9] and that Radivoje Miletić ("**Miletić**") participated in the JCE to Forcibly Remove.[10]

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1 The Trial Judgement was issued confidentially with a public redacted version issued on the same day.
2 Trial Judgement, paras 1, 86.
3 Trial Judgement, para. 1. The Appeals Chamber notes that the term BSF includes VRS forces, MUP forces, and paramilitary forces associated with the VRS and/or MUP.
4 Trial Judgement, para. 1.
5 Trial Judgement, para. 1.
6 Trial Judgement, para. 1.
7 Trial Judgement, para. 1072. See also Trial Judgement, paras 1047-1071.
8 Trial Judgement, paras 1168, 1302, 1392.
9 Trial Judgement, para. 1087. See also Trial Judgement, paras 1084-1086.
10 Trial Judgement, para. 1718.

4. According to the Indictment, **Popović** was born on 14 March 1957 in Popovići, Šekovići Municipality, BiH.[11] In 1995, **Popović** was Chief of Security of the Army of the Republika Srpska ("VRS") Drina Corps, holding the rank of Lieutenant Colonel.[12] **Beara** was born on 14 July 1939 in Sarajevo, BiH.[13] In 1995, **Beara** was the Chief of the VRS Main Staff's Administration for Security, holding the rank of Colonel.[14] The Trial Chamber found **Popović** and **Beara** guilty of genocide, conspiracy to commit genocide, murder as a violation of the laws or customs of war and as a crime against humanity, extermination as a crime against humanity, and persecution as a crime against humanity through murder and cruel and inhumane treatment; it acquitted them of inhumane acts (forcible transfer) as a crime against humanity.[15] However, on the basis of the principles relating to cumulative convictions, the Trial Chamber did not convict them of conspiracy to commit genocide and murder as a crime against humanity.[16] **Popović** and **Beara** were sentenced to life imprisonment.[17]

5. **Nikolić** was born on 9 November 1957 in Brana Bačić, Bratunac Municipality, BiH.[18] In July 1995, **Nikolić** was the Chief of Security in the 1st Light Infantry Zvornik Brigade ("Zvornik Brigade") of the VRS Drina Corps, and held the rank of Second Lieutenant.[19] **Nikolić** was found guilty of murder as a violation of the laws or customs of war and as a crime against humanity, extermination as a crime against humanity, and persecution as a crime against humanity through murder and cruel and inhumane treatment.[20] The Trial Chamber also found **Nikolić** guilty of aiding and abetting genocide.[21] He was acquitted of inhumane acts (forcible transfer) as a crime against humanity and conspiracy to commit genocide.[22] Based on the principles relating to cumulative convictions, the Trial Chamber did not convict him of murder as a crime against humanity.[23] The Trial Chamber sentenced **Nikolić** to 35 years of imprisonment.[24]

6. According to the Indictment, **Miletić** was born on 6 December 1947 in Štović, Foča Municipality, BiH.[25] **Miletić** was the Chief of the VRS Main Staff's Administration for Operations and Training during the relevant Indictment period.[26] In June 1995, he was promoted to the rank of

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11 Indictment, para. 6. See also Pre-Trial Brief of the Defence of Vujadin Popovic [sic], 12 July 2006, para. 26(a).
12 Trial Judgement, paras 3, 1090.
13 Trial Judgement, para. 1200.
14 Trial Judgement, paras 3, 1202.
15 Trial Judgement, paras 2104-2105, Disposition, Popović and Beara sections.
16 Trial Judgement, Disposition, Popović and Beara sections.
17 Trial Judgement, Disposition, Popović and Beara sections.
18 See Indictment, para. 7; Nikolić's Final Brief, para. 346.
19 Trial Judgement, paras 3, 1337.
20 Trial Judgement, para. 2106, Disposition, Nikolić section.
21 Trial Judgement, para. 2106, Disposition, Nikolić section.
22 Trial Judgement, para. 2106, Disposition, Nikolić section.
23 Trial Judgement, Disposition, Nikolić section.
24 Trial Judgement, Disposition, Nikolić section.
25 Indictment, para. 2.
26 Trial Judgement, paras 4, 1622.

General.[27] The Trial Chamber found **Miletić** guilty of murder as a crime against humanity, inhumane acts (forcible transfer) as a crime against humanity, and persecution as a crime against humanity through forcible transfer, cruel and inhumane treatment, terrorising civilians, and murder; it acquitted him of murder as a violation of the laws or customs of war.[28] The Trial Chamber sentenced **Miletić** to 19 years of imprisonment.[29]

7. Vinko Pandurević ("**Pandurević**") was born on 25 June 1959 in Jasik, Sokolac Municipality, BiH.[30] During the relevant Indictment period, **Pandurević** held the rank of Lieutenant Colonel and was the Commander of the Zvornik Brigade of the VRS Drina Corps.[31] The Trial Chamber found him guilty of aiding and abetting the murder of ten wounded Bosnian Muslim prisoners from Milići Hospital ("Milići Prisoners") as a violation of the laws or customs of war and as a crime against humanity.[32] The Trial Chamber also found **Pandurević** guilty of aiding and abetting inhumane acts (forcible transfer) as a crime against humanity and aiding and abetting persecution as a crime against humanity through aiding and abetting forcible transfer.[33] The Trial Chamber further found him guilty under Article 7(3) of the Statute of murder as a violation of the laws or customs of war and as a crime against humanity.[34] The Trial Chamber acquitted him of genocide, conspiracy to commit genocide, and extermination as a crime against humanity.[35] **Pandurević** was sentenced to 13 years of imprisonment.[36]

8. All Appellants were acquitted of the crime of deportation charged under Count 8 of the Indictment.[37] Ljubomir Borovčanin ("Borovčanin") did not appeal his trial convictions or sentence, and the Office of the Prosecutor ("Prosecution") filed no grounds of appeal against him. Milan Gvero's ("Gvero") participation in the appellate proceedings was terminated upon his death.[38]

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27 Trial Judgement, para. 1622. See also Trial Judgement, para. 4.
28 Trial Judgement, para. 2108, Disposition, Miletić section.
29 Trial Judgement, Disposition, Miletić section.
30 Trial Judgement, para. 1839.
31 Trial Judgement, paras 3, 1839, 1841.
32 Trial Judgement, para. 2110, Disposition, Pandurević section.
33 Trial Judgement, para. 2110, Disposition, Pandurević section.
34 Trial Judgement, para. 2110, Disposition, Pandurević section.
35 Trial Judgement, para. 2110, Disposition, Pandurević section.
36 Trial Judgement, Disposition, Pandurević section.
37 Trial Judgement, paras 962, 1198, 1335, 1430, 1723, 2102, Disposition.
38 See *infra*, Annex I, Procedural History, paras 19-24.

## B. The Appeals

### 1. Popović's appeal

9. **Popović**'s appeal brief does not follow the order of the grounds of appeal set out in his notice of appeal but rather raises contentions under ten titles.[39] **Popović** requests that the Appeals Chamber reverse the convictions entered by the Trial Chamber and acquit him on all counts.[40] Alternatively, **Popović** requests that the Appeals Chamber quash all convictions and order a new trial, or reduce his sentence.[41] The Prosecution submits that the Appeals Chamber should dismiss **Popović**'s appeal in its entirety.[42]

### 2. Beara's appeal

10. **Beara** presents 40 grounds of appeal.[43] He argues that the Trial Chamber committed: (1) procedural errors during the course of the trial proceedings;[44] (2) errors in respect of his criminal responsibility;[45] and (3) errors in sentencing.[46] **Beara** requests that the Appeals Chamber grant him a new trial, dismiss the charges, or substantially reduce the sentence imposed on him.[47] In response, the Prosecution submits that **Beara**'s appeal should be dismissed in its entirety.[48]

### 3. Nikolić's appeal

11. **Nikolić** advances 22 grounds of appeal.[49] He requests that the Appeals Chamber quash his convictions and impose a new sentence of no more than 15 years of imprisonment should grounds of appeal 2 through 25 be granted.[50] Alternatively, **Nikolić** requests that his convictions be quashed and a new sentence of not more than 20 years of imprisonment be imposed should ground of appeal 7 on the JCE to Murder be rejected but grounds of appeal 2 through 25, in whole or in part, be granted.[51] Also in the alternative, he requests that his sentence be revised and a new sentence of no

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39 "Introduction", Popović's Appeal Brief, paras 1-16; "Errors of law and/or facts related to genocide", Popović's Appeal Brief, paras 17-33; "Plan to murder", Popović's Appeal Brief, paras 34-168; "Expansion of the plan to [murder] the captured men from the column", Popović's Appeal Brief, paras 169-308; "Ročevići", Popović's Appeal Brief, paras 309-335; "Pilica", Popović's Appeal Brief, paras 336-351; "Wounded prisoners from the Standard Barracks", Popović's Appeal Brief, paras 352-386; "Bišina", Popović's Appeal Brief, paras 387-411; "Number of deceased", Popović's Appeal Brief, paras 412-481; "Sentencing", Popović's Appeal Brief, paras 482-484.

40 Popović's Notice of Appeal, para. 442.1; Popović's Appeal Brief, para. 485(A).

41 Popović's Notice of Appeal, paras 442.2-442.3; Popović's Appeal Brief, paras 485(B)-(C).

42 Prosecution's Response Brief (Popović), paras 7, 319.

43 **Beara** has withdrawn ground of appeal 20. See Beara's Appeal Brief, p. 78.

44 Beara's Notice of Appeal, pp. 2-10; Beara's Appeal Brief, paras 3-58.

45 Beara's Notice of Appeal, pp. 10-35; Beara's Appeal Brief, paras 59-309.

46 Beara's Notice of Appeal, pp. 35-42; Beara's Appeal Brief, paras 310-347.

47 Beara's Appeal Brief, para. 347.

48 Prosecution's Response Brief (Beara), paras 6, 340.

49 **Nikolić** originally advanced 26 grounds of appeal, but has withdrawn his grounds of appeal 11, 12, 17, and 26. See Nikolić's Appeal Brief, paras 170-171, 271, 399.

50 Nikolić's Appeal Brief, paras 4, 400(A).

51 Nikolić's Appeal Brief, paras 4, 400(B).

more than 25 years of imprisonment be imposed should ground of appeal 1 on his sentence be granted.[52] The Prosecution responds that **Nikolić**'s appeal should be dismissed in its entirety.[53]

### 4. Miletić's appeal

12. **Miletić** presents 28 grounds of appeal. He challenges his convictions and the determination of his sentence.[54] **Miletić** requests that either the Trial Judgement be quashed and his case be remanded to the Trial Chamber for a trial *de novo* or that his sentence be reduced.[55] The Prosecution responds that **Miletić**'s grounds of appeal should be dismissed with the exception of ground of appeal 6.[56]

### 5. Pandurević's appeal

13. **Pandurević** advances four grounds of appeal. He requests that the Appeals Chamber quash all his convictions and, either in addition or in the alternative, reduce his sentence.[57] In response, the Prosecution requests that the Appeals Chamber dismiss **Pandurević**'s appeal in its entirety.[58]

### 6. The Prosecution's appeal

14. The Prosecution presents seven grounds of appeal. First, the Prosecution requests that the Appeals Chamber: (1) convict **Pandurević** of committing extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity through his membership in the JCE to Murder or, alternatively, for aiding and abetting these crimes, and to increase his sentence;[59] (2) convict **Pandurević** for having failed to prevent and to punish his subordinates for their criminal acts and to increase his sentence accordingly;[60] and (3) revise **Pandurević**'s manifestly inadequate sentence.[61] Second, the Prosecution requests that the Appeals Chamber convict **Popović** and **Beara** for conspiracy to commit genocide.[62] Third, the Prosecution submits that **Nikolić** should be convicted for committing genocide and for conspiracy to commit genocide, and that a life sentence should be imposed.[63] Finally, the Prosecution requests

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52 Nikolić's Appeal Brief, paras 4, 400(C).
53 Prosecution's Response Brief (Nikolić), paras 7, 344.
54 Miletić's Notice of Appeal, paras 198-203; Miletić's Appeal Brief, paras 453-458.
55 Miletić's Notice of Appeal, paras 201-202; Miletić's Appeal Brief, paras 456-457.
56 Prosecution's Response Brief (Miletić), paras 4, 368. See Prosecution's Response Brief (Miletić), paras 126-129.
57 Pandurević's Notice of Appeal, paras 6-7; Pandurević's Appeal Brief, paras 271-272.
58 Prosecution's Response Brief (Pandurević), para. 174.
59 Prosecution's Notice of Appeal, paras 3-12; Prosecution's Appeal Brief, paras 10-103.
60 Prosecution's Notice of Appeal, paras 13-27; Prosecution's Appeal Brief, paras 104-186.
61 Prosecution's Notice of Appeal, paras 28-29; Prosecution's Appeal Brief, paras 187-224.
62 Prosecution's Notice of Appeal, paras 35-37; Prosecution's Appeal Brief, paras 227-235.
63 Prosecution's Notice of Appeal, paras 38-42; Prosecution's Appeal Brief, paras 236-320.

that **Miletić** be convicted of murder as a violation of the laws or customs of war.[64] In their responses, **Pandurević**,[65] **Popović**,[66] **Nikolić**,[67] and **Miletić**[68] oppose the Prosecution's appeal as far as they are individually concerned. **Beara** did not respond to the Prosecution's appeal.

### C. Appeal Hearing

15. The Appeals Chamber heard the oral submissions of the Parties regarding their appeals from 2 to 6 December 2013. Having considered their written and oral arguments, the Appeals Chamber hereby renders its Judgement.

64 Prosecution's Notice of Appeal, paras 43-45; Prosecution's Appeal Brief, paras 321-331.
65 Pandurević's Response Brief, para. 6.
66 Popović's Response Brief, para. 21.
67 Nikolić's Response Brief, para. 262.
68 Miletić's Response Brief, paras 9-10.

## II. STANDARD OF APPELLATE REVIEW

16. Article 25 of the Statute states that the Appeals Chamber may affirm, reverse, or revise the decisions taken by the trial chamber. On appeal, parties must limit their arguments to errors of law that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice.[69] These criteria are set forth in Article 25 of the Statute and are well established in the jurisprudence of both the Tribunal and the International Criminal Tribunal for Rwanda ("ICTR").[70] In exceptional circumstances, the Appeals Chamber will also hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the Trial Judgement, but is nevertheless of general significance to the Tribunal's jurisprudence.[71]

17. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[72] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[73] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find, for other reasons, that there is an error of law.[74] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[75]

18. The Appeals Chamber reviews the trial chamber's findings of law to determine whether or not they are correct.[76] Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[77] In so doing, the Appeals Chamber not only corrects the error of law, but when necessary applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself

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69 *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Furundžija* Appeal Judgement, paras 35-37.

70 *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Vasiljević* Appeal Judgement, para. 5. See *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8.

71 *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Kupreškić et al.* Appeal Judgement, para. 22 (referring to *Tadić* Appeal Judgement, para. 247).

72 *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Krnojelac* Appeal Judgement, para. 10.

73 *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Krnojelac* Appeal Judgement, para. 10.

74 *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Furundžija* Appeal Judgement, para. 35.

75 *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Kvočka et al.* Appeal Judgement, para. 25 (referring to *Kordić and Čerkez* Appeal Judgement, para. 21).

76 *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Krnojelac* Appeal Judgement, para. 10.

77 *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, paras 384-386; *Blaškić* Appeal Judgement, para. 15. See *Kalimanzira* Appeal Judgement, paras 99, 199.

convinced beyond reasonable doubt as to the factual finding challenged by an appellant before the finding is confirmed on appeal.[78] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[79]

19. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[80] In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original decision.[81] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[82] It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has occasioned a miscarriage of justice.[83]

20. In determining whether or not a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a trial chamber.[84] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in *Kupreškic et al.*, wherein it was stated that:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[85]

21. The same standard of reasonableness and the same deference to factual findings applies when the Prosecution appeals against an acquittal.[86] Thus, when considering an appeal by the

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78 *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Blaškić* Appeal Judgement, para. 15.

79 *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 21 & fn. 12.

80 *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Boškoski and Tarčulovski* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 11. See *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

81 *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

82 *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Galić* Appeal Judgement, para. 9 & fn. 21.

83 *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Furundžija* Appeal Judgement, para. 37.

84 *Đorđević* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 23. See *Furundžija* Appeal Judgement, para. 37.

85 *Kupreškić et al.* Appeal Judgement, para. 30. See *Đorđević* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 23. See also *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.

86 *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Limaj et al.* Appeal Judgement, para. 13.

Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[87] Considering it is the Prosecution that bears the burden at trial of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal from that of a defence appeal against conviction.[88] An accused must show that the trial chamber's factual errors create reasonable doubt as to his guilt.[89] The Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[90]

22. The Appeals Chamber recalls that it has inherent discretion to determine which of the parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[91] Indeed, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[92] In order for the Appeals Chamber to assess a party's arguments on appeal, the party is expected to present its case clearly, logically, and exhaustively.[93] The appealing party is also expected to provide precise reference to relevant transcript pages or paragraphs in the decision or judgement to which the challenges are being made.[94] Likewise, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party's submissions are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[95]

23. When applying these basic principles, the Appeals Chamber recalls that it has identified the types of deficient submissions on appeal which need not be considered on the merits.[96] In particular, the Appeals Chamber will dismiss without detailed analysis: (i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings; (ii) mere assertions that the trial chamber must have failed to

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87 *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24. See *Bagilishema* Appeal Judgement, paras 13-14.
88 *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Limaj et al.* Appeal Judgement, para. 13 (referring to, *inter alia*, *Bagilishema* Appeal Judgement, para. 14).
89 *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Limaj et al.* Appeal Judgement, para. 13. See *Bagilishema* Appeal Judgement, para. 14.
90 *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Limaj et al.* Appeal Judgement, para. 13 (referring to, *inter alia*, *Bagilishema* Appeal Judgement, para. 14).
91 *Đorđević* Appeal Judgement, para. 19 (citing *D. Milošević* Appeal Judgement, para. 16); *Šainović et al.* Appeal Judgement, para. 26; *Kunarac et al.* Appeal Judgement, paras 47-48.
92 *Đorđević* Appeal Judgement, para. 19 (citing *D. Milošević* Appeal Judgement, para. 16); *Šainović et al.* Appeal Judgement, para. 26; *Kunarac et al.* Appeal Judgement, para. 43.
93 *Đorđević* Appeal Judgement, para. 19 (citing *D. Milošević* Appeal Judgement, para. 16); *Šainović et al.* Appeal Judgement, para. 26; *Kunarac et al.* Appeal Judgement, para. 43.
94 Practice Direction on Formal Requirements, paras 1(c)(iii)-(iv), 4(b)(ii); *Šainović et al.* Appeal Judgement, para. 26; *Perišić* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, para. 44.
95 *Đorđević* Appeal Judgement, para. 19 (citing *D. Milošević* Appeal Judgement, para. 16); *Šainović et al.* Appeal Judgement, para. 26; *Kunarac et al.* Appeal Judgement, para. 43 & fn. 21.
96 *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Strugar* Appeal Judgement, paras 17-24 (referring to, *inter alia*, *Brđanin* Appeal Judgement, paras 17-31).

consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the trial chamber did; (iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding; (iv) arguments that challenge a trial chamber's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence; (v) arguments contrary to common sense; (vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party; (vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; (viii) allegations based on material not on record; (ix) mere assertions unsupported by any evidence, undeveloped assertions, or failure to articulate error; and (x) mere assertions that the trial chamber failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.[97]

24. Finally, where the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, does not pose a clear legal challenge but essentially disputes the trial chamber's factual findings in terms of its assessment of evidence, it will either analyse these allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.[98]

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[97] *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15. See also *Krajišnik* Appeal Judgement, paras 17-27; *Martić* Appeal Judgement, paras 14-21; *Strugar* Appeal Judgement, paras 18-24; *Brđanin* Appeal Judgement, paras 17-31; *Galić* Appeal Judgement, paras 256-313.

[98] *Đorđević* Appeal Judgement, para. 21; *D. Milošević* Appeal Judgement, para. 18. *Cf. Strugar* Appeal Judgement, paras 252, 269.

# III. THE INDICTMENT

## A. Introduction

25. **Popović**, **Miletić**, and **Pandurević** advance arguments contending that the Trial Chamber erred in law by convicting them either on the basis of crimes not charged in the Indictment or on the basis of allegations not clearly pleaded in the Indictment. They submit that the alleged errors of law invalidate the Trial Judgement under one or more counts.

## B. Popović's Appeal

### 1. Alleged errors based on victims at Orahovac and Kozluk not pleaded in the Indictment

26. **Popović** submits that the Trial Chamber erred when it found that between 800 and 2,500 men were executed at Orahovac on 14 July 1995 as he was only indicted for the death of approximately 1,000 men at that location.[99] Similarly, **Popović** submits that the Trial Chamber erred in finding that over 1,000 males were executed at Kozluk on 15 July 1995 while recognising that the Indictment only charged him with the killing of about 500 men at that location.[100] He submits, in relation to both locations, that the Trial Chamber violated his fair trial rights by convicting him for more than what he was charged with in the Indictment.[101]

27. The Prosecution responds that: (1) the Indictment provided **Popović** with fair notice of the scale of the allegations he faced; (2) the scale of the murder operation made it impractical to require a higher degree of specificity in the Indictment; and (3) **Popović** was not convicted for killings in excess of the charges in the Indictment.[102]

28. With regard to Orahovac, the Indictment alleges that approximately 1,000 Bosnian Muslim males were executed in a nearby field during the afternoon and evening of 14 July 1995.[103] The Trial Chamber found that between 800 and 2,500 Bosnian Muslim males were executed at Orahovac on 14 July 1995.[104]

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99 Popović's Appeal Brief, paras 432, 436; Popović's Reply Brief, para. 128; Appeal Hearing, AT. 98-99 (2 Dec 2013).

100 Popović's Appeal Brief, paras 438, 442-443; Popović's Reply Brief, para. 132; Appeal Hearing, AT. 93-94, 98, 156-157 (2 Dec 2013).

101 Popović's Appeal Brief, paras 436, 442; Popović's Reply Brief, paras 128, 132; Appeal Hearing, AT. 94-95 (2 Dec 2013). **Popović** further argues that it would set a "dangerous precedent" to dismiss an increase in the number of victims as an instance of providing a "higher degree" of specificity and that the Prosecution could have filed a motion to amend the Indictment. Popović's Reply Brief, para. 128; Appeal Hearing, AT. 157 (2 Dec 2013).

102 Prosecution's Response Brief (Popović), paras 292, 296; Appeal Hearing, AT. 144-146 (2 Dec 2013).

103 Indictment, para. 30.6.

104 Trial Judgement, para. 492.

29. Regarding Kozluk, paragraph 30.8.1 of the Indictment alleges that on "14/15 July 1995", the majority of approximately 500 Muslim males were removed from the Ročević School and executed at a site on the bank of the Drina River near Kozluk.[105] Paragraph 30.10 of the Indictment alleges that on 15 July 1995, VRS and/or Ministry of the Interior of Republika Srpska ("MUP" and "RS", respectively) personnel transported about 500 Bosnian Muslim males to an isolated place near Kozluk and executed them.[106] The Trial Chamber found that over 1,000 males were executed at Kozluk on 15 July 1995 ("Kozluk Killings").[107] The Trial Chamber further found, based on paragraphs 30.8.1 and 30.10 of the Indictment, that "[t]he Indictment alleges that approximately 500 Bosnian Muslim males were detained in the Ročević School and then transported to a site near Kozluk and executed".[108] The Trial Chamber proceeded to note "that the victims detained at Ročević School are the same killed near Kozluk".[109] The Trial Chamber thus interpreted the Indictment to allege the murder of 500 rather than 1,000 Muslim males near Kozluk on 15 July 1995.

30. With regard to both Orahovac and Kozluk, the Appeals Chamber notes the discrepancy between the number of executed persons alleged in the Indictment,[110] and the number of persons that the Trial Chamber found had been executed. However, **Popović** has provided no support for his argument that the Trial Chamber *convicted* him for any number of murder victims in excess of the charges against him in the Indictment. In addition, the Appeals Chamber observes that the relevant charges against **Popović** concern mass killings, that the number of victims pleaded in the Indictment was approximate,[111] and that **Popović**'s ability to challenge the charge was not affected. The Appeals Chamber therefore dismisses his arguments.

2. Alleged errors based on execution/grave sites not pleaded in the Indictment

31. **Popović** argues that he was convicted, in part, on the basis of execution/grave sites encompassed in the Janc Report that were not pleaded in the Indictment.[112] According to **Popović**, 158 victims of killings that were not pleaded in the Indictment should not have been included in the Trial Chamber's calculation of the total number of persons executed following the fall of

105 Indictment, para. 30.8.1.
106 Indictment, para. 30.10.
107 Trial Judgement, para. 524.
108 Trial Judgement, fn. 1839.
109 Trial Judgement, fn. 1839.
110 As interpreted by the Trial Chamber, in the case of Kozluk. See *supra*, para. 29.
111 See Indictment, paras 30.6, 30.8.1, 30.10.
112 Popović's Appeal Brief, paras 462-463, referring to Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009" ("Janc Report"). See also Appeal Hearing, AT. 92 (2 Dec 2013).

Srebrenica.[113] The Prosecution responds that the Trial Chamber did not convict **Popović** for any uncharged killings.[114]

32. The Appeals Chamber finds **Popović**'s arguments difficult to follow. In particular, **Popović** appears to confuse grave sites and execution sites. In this regard, the Appeals Chamber notes that the Janc Report covers grave sites, not execution sites.[115] By contrast, in order to support the allegation that 7,000 Bosnian Muslim males were murdered by VRS and MUP forces following the fall of Srebrenica, the Indictment details the circumstances surrounding the execution of Bosnian Muslim males at specific execution sites.[116] The Appeals Chamber therefore dismisses **Popović**'s arguments as obscure and deficient.

## C. Miletić's Appeal

### 1. Alleged errors concerning facts and conduct not pleaded in the Indictment (Ground 1)

#### (a) Whether the column leaving Srebrenica was pleaded as part of the forcible transfer (Sub-ground 1.1)

33. **Miletić** submits that the Indictment does not allege that the men in the column of Bosnian Muslims who were not captured or did not surrender were part of the forcible transfer.[117] He contends that the Trial Chamber, by including the column *per se* in the forcible transfer, exceeded the scope of the charges in the Indictment, thereby committing an error of law invalidating the Trial Judgement.[118] **Miletić** submits that the defect in the Indictment was not cured in a timely manner and that he suffered prejudice since he had no reason throughout the trial to present a defence regarding the men in the column.[119] Moreover, in his view, as the column was not included in the charges against him, any of his acts that may be related to the column cannot be taken into account

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113 Popović's Appeal Brief, paras 455-456, 464. **Popović** specifies that these persons include 39 individuals identified at the Bišina grave site. The Appeals Chamber considers the inclusion of the word "not" to have been a typographical error. See also Appeal Hearing, AT. 85, 90 (2 Dec 2013).

114 Prosecution's Response Brief (Popović), para. 309 & fn. 1113. See also Prosecution's Response Brief (Popović), paras 262-263.

115 See Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 2-5.

116 See Indictment, paras 25, 30-31. In addition, the Indictment mentions grave sites in the context of the reburial operation. See Indictment, para. 32.

117 Miletić's Appeal Brief, paras 13-15, 25; Miletić's Reply Brief, para. 3. When discussing the group of persons whom he submits were not part of the forcible transfer allegations, **Miletić** also refers to "the column", "the column *per se*", "men in the column", "civilian men from the column", and "civilians from the column". See, *e.g.*, Miletić's Appeal Brief, paras 14-15, 22-23, 26-27; Miletić's Reply Brief, paras 3-5.

118 Miletić's Appeal Brief, paras 11-15, 25-26; Miletić's Reply Brief, para. 6.

119 Miletić's Appeal Brief, paras 14-26; Miletić's Reply Brief, paras 4-5; Appeal Hearing, AT. 447-449 (5 Dec 2013). See also Miletić's Appeal Brief, para. 27.

in assessing his contribution to the JCE to Forcibly Remove.[120] **Miletić** therefore asks to be acquitted under Count 7 (forcible transfer as a crime against humanity).[121]

34. Specifically, **Miletić** contends that by including the column in the forcible transfer, the Trial Chamber erroneously relied upon paragraph 56 of the Indictment.[122] In his view, this paragraph describes the events happening around Srebrenica on 10-11 July 1995 and in no way indicates that the men in the column could be considered victims of the forcible transfer.[123] Moreover, he submits that the Prosecution never referred to paragraph 56 of the Indictment when identifying the victims of forcible transfer.[124]

35. **Miletić** also argues that paragraph 48(e) of the Indictment states that "forcible transfer was committed by forcing women and children to board buses, and also the men, who were separated from their loved ones in Poto[č]ari, or who had been captured or had surrendered while in the column",[125] thus excluding the men in the column who did not surrender or were not captured.[126] **Miletić** argues that had the Prosecution intended to allege that all the men in the column were part of the forcible transfer, paragraph 48(e) of the Indictment would not have specified that the forcible transfer concerned the men who had surrendered or were captured.[127]

36. The Prosecution responds that the Indictment was clear that the forcible transfer allegations against **Miletić** included the civilian component of the column and those among the column who were later executed.[128]

37. With regard to the column, the Appeals Chamber notes that the section of the Indictment under the sub-heading "The Forcible Removal of the Muslim Population from Srebrenica" could, when read in isolation, be understood to pertain only to the men from the column who were captured or who surrendered to MUP or VRS forces.[129] However, the Appeals Chamber recalls that when considering whether an accused received clear and timely notice, the indictment must be considered as a whole.[130] To this end, the Appeals Chamber observes that under Count 7, the Indictment alleges that the purpose of the JCE to Forcibly Remove was "to force the Muslim

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120 Miletić's Appeal Brief, paras 27-28.
121 Miletić's Appeal Brief, para. 38; Miletić's Reply Brief, para. 6; Indictment, Count 7, p. 27. **Miletić** also bases this request on his sub-ground of appeal 1.2. See *infra*, para. 775.
122 Miletić's Appeal Brief, paras 13-15, 23.
123 Miletić's Appeal Brief, para. 14.
124 Miletić's Appeal Brief, para. 23.
125 Miletić's Appeal Brief, para. 14.
126 Miletić's Appeal Brief, paras 14-15, 23; Miletić's Reply Brief, paras 3, 5.
127 Miletić's Appeal Brief, para. 15 & fn. 20.
128 Prosecution's Response Brief (Miletić), paras 5-9, 16. See also Prosecution's Response Brief (Miletić), paras 10-15.
129 Indictment, paras 63-64. See also Indictment, paras 61-62.
130 *Karemera and Ngirumpatse* Appeal Judgement, paras 370, 399; *Bizimungu* Appeal Judgement, para. 99; *Đorđević* Appeal Judgement, para. 588; *Mrkšić and Šljivančanin* Appeal Judgement, para. 138.

population out of the Srebrenica and Žepa enclaves".[131] Under the sub-heading "The Joint Criminal Enterprise to Forcibly Remove the Muslim Population from Srebrenica and Žepa", it further alleges that one purpose of the 2 July 1995 VRS attack on the Srebrenica enclave was to force the Muslim population into the small town of Srebrenica "thereby creat[ing] conditions where it would be impossible for the entire Muslim population to sustain itself, and that would require its departure".[132] Thus, the Indictment is clear that the target of the JCE to Forcibly Remove extended to the entire Bosnian Muslim population of Srebrenica. It necessarily follows that the target of the JCE included those Bosnian Muslims who would eventually flee Srebrenica in the column. Paragraph 56 under the same sub-heading of the Indictment reinforces such an understanding in that the description of the JCE includes "approximately 15,000 Bosnian Muslim men from the enclave, with some women and children, [...] [including approximately 5,000] armed Bosnian Muslim military personnel" amassed in a column and headed towards Tuzla.[133]

38. In view of these allegations, the Appeals Chamber considers that **Miletić**'s submission that the Prosecution did not refer to paragraph 56 of the Indictment is of no consequence.

39. Finally, and notably, the Appeals Chamber is not convinced by **Miletić**'s contention regarding paragraph 48(e) of the Indictment. This paragraph, under Count 6, directs the reader to all of the allegations contained under the two previously mentioned sub-headings under Count 7[134] for the detailed description of the means through which persecution was carried out.[135] The Appeals Chamber observes in this regard that it is Count 7, and not Count 6, which is relevant to **Miletić**'s impugned conviction for inhumane acts (forcible transfer) as a crime against humanity.

40. In light of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber exceeded the scope of the charges in the Indictment. The Appeals Chamber therefore declines to consider the remainder of his arguments under sub-ground 1.1 of his appeal.[136] Accordingly, the Appeals Chamber dismisses this sub-ground of appeal.

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131 Indictment, para. 49, heading following para. 49.
132 Indictment, para. 53.
133 Indictment, para. 56.
134 See *supra*, para. 37.
135 See Indictment, paras 48, 50-64.
136 This concerns **Miletić**'s arguments regarding whether the alleged defect in the Indictment was cured at a later stage, whether it would have required a formal amendment, whether he bears the burden of proof that his ability to prepare his defence was materially impaired, and whether he suffered prejudice from the alleged defect. See Miletić's Appeal Brief, paras 14-27; Miletić's Reply Brief, paras 4-5; Appeal Hearing, AT. 447-449 (5 Dec 2013).

(b) Whether certain acts of persecution fell within the scope of the JCE to Forcibly Remove (Sub-ground 1.3)

41. **Miletić** contends that the Trial Chamber erred in law when it found that the terrorising and cruel and inhumane treatment of the Bosnian Muslim population in Srebrenica were part of the common purpose of the JCE to Forcibly Remove.[137] He submits that, by contrast, the Indictment defined the common purpose of the JCE as "to force the Muslim population out of the Srebrenica and [Ž]epa enclaves".[138] Thus, in his view, terrorising and cruel and inhumane treatment were not pleaded in the Indictment as part of the common purpose of the JCE to Forcibly Remove.[139] On the contrary, **Miletić** submits that these persecutory acts were pleaded as part of the allegations relating to JCE III.[140] He iterates that at no time did the Prosecution indicate that these persecutory acts were part of the common purpose of the JCE to Forcibly Remove, which resulted in prejudice to him.[141] **Miletić** requests to be acquitted under Count 6 for persecution as a crime against humanity on the basis of terrorisation and cruel and inhumane treatment.[142]

42. The Prosecution responds that the Indictment notified **Miletić** that persecution based on the terrorising and cruel and inhumane treatment of the Bosnian Muslim population of Srebrenica and Žepa formed part of the JCE to Forcibly Remove.[143] It further responds that it was only in the alternative that these acts of persecution were charged pursuant to JCE III.[144]

43. The Trial Chamber found that "the terrorising and cruel and inhumane treatment of the Bosnian Muslim population in Srebrenica were inherent components of the implementation of the plan to forcibly remove the Bosnian Muslim population and thus part of the common purpose of the JCE".[145] This wording might indicate that the Trial Chamber considered the terrorising and cruel and inhumane treatment both as a means to achieve the common purpose of the JCE and as a part of that purpose. However, the Appeals Chamber notes that the Trial Chamber prefaced its finding with the words "[a]s found above", indicating that it was restating a previous finding. The Appeals Chamber understands the Trial Chamber to have referred to the immediately preceding paragraph of the Trial Judgement, which reads as follows:

> The Trial Chamber recalls that the plan as laid out in Directive 7 and the 20 March Drina Corps Order was to create "an unbearable situation of total insecurity with no hope of further survival or

137 Miletić's Appeal Brief, paras 12, 39, 45; Miletić's Reply Brief, para. 11.
138 Miletić's Appeal Brief, para. 41, citing Indictment, para. 49.
139 Miletić's Appeal Brief, paras 11, 41; Miletić's Reply Brief, para. 9; Appeal Hearing, AT. 449 (5 Dec 2013).
140 Miletić's Appeal Brief, para. 43; Miletić's Reply Brief, paras 9-10; Appeal Hearing, AT. 449-450 (5 Dec 2013).
141 Miletić's Appeal Brief, paras 42, 44; Miletić's Reply Brief, para. 9.
142 Miletić's Appeal Brief, para. 45; Miletić's Reply Brief, para. 11.
143 Prosecution's Response Brief (Miletić), paras 18-21.
144 Prosecution's Response Brief (Miletić), para. 22.
145 Trial Judgement, para. 1087.

> life for the inhabitants of Srebrenica and Žepa". This plan was first pursued by limiting the aid to the enclaves and the subsequent military attacks. Eventually, the implementation of the plan culminated in the terrorising of the people in Srebrenica town, as well as the terrorising and cruel and inhumane treatment of the people gathered at Potočari. The Trial Chamber is satisfied that all these acts were intrinsic steps to the ultimate aim to force the Bosnian Muslim populations out of the enclaves. This common purpose was finally achieved through the actual busing of the people out of the enclaves and amounted to forcible transfer of the Bosnian Muslim civilian population from Srebrenica and the Bosnian Muslim population from Žepa.[146]

In the view of the Appeals Chamber, this paragraph clearly indicates that the Trial Chamber considered the terrorising and cruel and inhumane treatment as intrinsic steps toward implementing the common purpose of the JCE to Forcibly Remove. This conclusion is buttressed by the Trial Chamber's finding, in the same paragraph as the impugned finding, that there was "a joint criminal enterprise of the Bosnian Serb political and military leadership to forcibly remove the Bosnian Muslim populations from Srebrenica and Žepa".[147] Consequently, the Appeals Chamber is not convinced that the Trial Chamber expanded the scope of the JCE to Forcibly Remove alleged in the Indictment.

44. The Appeals Chamber further observes that the Trial Chamber did not exceed the scope of the charges in the Indictment by analysing acts of terrorising and cruel and inhumane treatment as intrinsic steps toward achieving the common purpose of the JCE to Forcibly Remove. Count 7 contains, under the sub-heading "The Joint Criminal Enterprise to Forcibly Remove the Muslim Population from Srebrenica and Žepa", factual allegations that are clearly relevant in this regard, such as that VRS and MUP forces terrorised the Bosnian Muslim refugee population in and around Potočari,[148] and that prisoners were mistreated in Potočari and Bratunac.[149] Cross-references to these allegations are found in paragraph 48 under Count 6,[150] which lists "the cruel and inhumane treatment of Bosnian Muslim civilians" and "the terrorising of Bosnian Muslim civilians in Srebrenica and at Potočari" among the alleged underlying acts of persecution.[151] Acts of terrorising and cruel and inhumane treatment were thus pleaded as part of the factual narrative underpinning the JCE to Forcibly Remove. It is irrelevant in this regard that the persecutory acts alleged in paragraph 48 of the Indictment were also charged pursuant to JCE III liability.[152]

45. In view of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred. The Appeals Chamber dismisses sub-ground 1.3 of **Miletić**'s appeal.

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146 Trial Judgement, para. 1086 (internal references omitted).
147 Trial Judgement, para. 1087.
148 Indictment, para. 60.
149 Indictment, para. 64.
150 Indictment, para. 48, referring to Indictment, paras 31, 50-71.
151 Indictment, paras 48(b)-(c).
152 Indictment, para. 83, referring to, *inter alia*, Indictment, para. 48.

(c) Whether the Indictment should have pleaded that the drafting of Directive 7/1 was part of Miletić's contribution to the JCE to Forcibly Remove (Sub-ground 1.4)

46. **Miletić** contends that the Trial Chamber erred in law when it found that his contribution to the JCE to Forcibly Remove included the drafting of Directive 7/1.[153] This directive, he submits, was never pleaded in the Indictment, even though it was known to the Prosecution at the time of the drafting of the Indictment, and it was not disclosed to the Defence in support of the Indictment.[154] **Miletić** further contends that at no time did the Prosecution allege that his participation in the drafting of Directive 7/1 might constitute a contribution to the JCE to Forcibly Remove, which resulted in prejudice to him.[155] The Prosecution responds that Directive 7/1 merely continued the policy and goals of Directive 7, which was more significant and explicitly pleaded.[156]

47. The Appeals Chamber recalls that when the Prosecution alleges JCE liability in an indictment, it must plead, among other material facts, the nature of the accused's participation in the JCE.[157] The question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[158] Finally, the Appeals Chamber recalls the distinction between those material facts upon which the Prosecution relies, which must be pleaded in an indictment, and the evidence by which those material facts will be proved, which need not be pleaded.[159]

48. Turning to the relevant material facts pleaded in the Indictment, the Appeals Chamber observes that under the heading "Role and Actions of the Accused [...] in Furtherance of the Joint Criminal Enterprise to Forcibly Transfer and Deport the Srebrenica and Žepa Muslim Population", the Indictment alleges that **Miletić** contributed to the JCE by making life unbearable for the inhabitants of the enclave.[160] Specifically, it alleges that **Miletić** drafted Directive 7 and took part in and helped implement the policy set out in Directive 7 to restrict humanitarian aid to the Muslim

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153 Miletić's Appeal Brief, paras 12, 46 (referring to Trial Judgement, para. 1706), 51, 53-54. See also Miletić's Reply Brief, para. 13.
154 Miletić's Appeal Brief, paras 11, 48, 50-51; Miletić's Reply Brief, para. 12.
155 Miletić's Appeal Brief, paras 48-49, 52-53.
156 Prosecution's Response Brief (Miletić), paras 23 (referring to Indictment, para. 75(a)(i)), 24-25.
157 *Karemera and Ngirumpatse* Appeal Judgement, para. 105; *Šainović et al.* Appeal Judgement, para. 214; *Simić* Appeal Judgement, para. 22. See also *Mugenzi and Mugiraneza* Appeal Judgement, para. 116.
158 *Karemera and Ngirumpatse* Appeal Judgement, para. 105; *Đorđević* Appeal Judgement, para. 331; *Blaškić* Appeal Judgement, para. 209. See also *Mugenzi and Mugiranzea* Appeal Judgement, para. 116.
159 *Blaškić* Appeal Judgement, para. 210. See *Nzabonimana* Appeal Judgement, para. 29; *Đorđević* Appeal Judgement, para. 331; *Šainović et al.* Appeal Judgement, para. 213.
160 Indictment, para. 75(a).

populations of Srebrenica and Žepa.[161] The Indictment does not explicitly refer to any role **Miletić** played in relation to Directive 7/1.

49. In assessing **Miletić**'s participation in the JCE to Forcibly Remove, the Trial Chamber found, *inter alia*, the following:

> Main Staff Directive 7/1 was a continuation of the policy and goals set out in Directive 7, regardless of whether it repeated the criminal language of Directive 7. Directive 7/1, referring to Directive 7, elaborated on and specified the operations regarding the Srebrenica and Žepa enclaves, which operations were to include, to **Miletić**'s knowledge, the unlawful removal of its Bosnian Muslim inhabitants. Therefore, by drafting this Directive, **Miletić** made a further contribution to the plan to remove the Bosnian Muslims from the enclaves.[162]

50. The Appeals Chamber considers that, in the context of the Indictment, Directive 7/1 was a matter of evidence to prove the allegation that **Miletić** took part in and helped implement the policy set out in Directive 7. The Appeals Chamber therefore considers that it was not a requirement that Directive 7/1 be pleaded in the Indictment. The Appeals Chamber concludes that **Miletić** has failed to demonstrate that the Trial Chamber erred and dismisses his sub-ground of appeal 1.4.

2. Alleged errors concerning acts not sufficiently pleaded in the Indictment (Ground 2)

(a) Alleged ambiguities regarding Miletić's advisory and co-ordinating functions (Sub-ground 2.1 in part)

51. **Miletić** submits that paragraph 11 of the Indictment was ambiguous regarding his responsibilities under the positions of "Chief of Operations and Training and [...] standing in for the Chief of Staff of the Main Staff of the VRS", and his advisory responsibilities vis-à-vis Mladić.[163] He contends that the imprecisions in paragraph 11 prevented him from mounting an effective defence.[164] The Prosecution responds that a less restrictive reading of paragraph 11 of the Indictment as well as paragraphs 75(b)-(c) shows that **Miletić** was alleged to have *in effect* played a co-ordinating and advisory role to Mladić.[165]

52. **Miletić** does not identify the supposed ambiguities in paragraph 11 of the Indictment that would be relevant to his argument. The Appeals Chamber considers that this paragraph clearly alleges that, during the Indictment period, **Miletić** was "Chief of Operations and Training" and was "Standing in for the Chief of Staff of the Main Staff of the VRS". It is furthermore clear that the allegations that **Miletić** "acted as principal adviser to the Commander" and was "the primary

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161 Indictment, paras 75(a)(i)-(ii).

162 Trial Judgement, para. 1706 (internal references omitted).

163 Miletić's Appeal Brief, para. 57. See Miletić's Appeal Brief, paras 11-12, 56, 58, 62-63. See also Miletić's Appeal Brief, para. 59. **Miletić** concedes that paragraph 11 of the Indictment does not imply a formal appointment as Stand-in Chief of Staff. Miletić's Reply Brief, para. 14.

164 Miletić's Appeal Brief, para. 56.

facilitator through which the Commander's intent, orders and directives were organised and processed for execution" are limited to when **Miletić** was Stand-in Chief of Staff.

53. For the foregoing reasons, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred. Accordingly, the relevant parts of **Miletić**'s sub-ground of appeal 2.1 are dismissed.

(b) Alleged errors pertaining to the term "to monitor" in different language versions of the Indictment (Sub-ground 2.2)

54. **Miletić** submits that the Trial Chamber erred by not recognising and correcting an inconsistency in the charges in the different language versions of the Indictment concerning his alleged contribution to the JCE to Forcibly Remove and by subsequently not considering the Bosnian/Croatian/Serbian ("BCS") version of the Indictment.[166] Specifically, **Miletić** argues that the Trial Chamber erred by adopting a broad notion of "monitoring" when the BCS translation of that term did not have the same broad meaning.[167] The Prosecution responds that **Miletić** was on notice of the meaning of the term "monitoring", that the Trial Chamber was correct in interpreting this term broadly, and that **Miletić** fails to show an error.[168]

55. The Appeals Chamber considers that **Miletić** has failed to identify any finding by the Trial Chamber concerning his participation in the JCE to Forcibly Remove that hinged on a broad notion of the term "monitoring".[169] As such, he has failed to demonstrate how the alleged error would invalidate the Trial Chamber's decision. Accordingly, the Appeals Chamber dismisses sub-ground 2.2 of **Miletić**'s appeal.

(c) Allegedly erroneous inclusion of acts related to the approval of UNPROFOR convoys in Miletić's contribution to the JCE to Forcibly Remove (Sub-ground 2.3)

56. **Miletić** submits that the Trial Chamber erred in law when it included acts related to the approval of United Nations Protection Force ("UNPROFOR") convoys in its finding concerning his contribution to the JCE to Forcibly Remove.[170] First, he argues that the Trial Chamber misinterpreted paragraph 75(a)(i) of the Indictment to allege that he ordered the relevant State and

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165 Prosecution's Response Brief (Miletić), paras 26-28.

166 Miletić's Appeal Brief, paras 11, 64 (referring to Indictment, paras 75(b)(i)-(iii), 75(c)(i)-(ii)), 65-69, 72; Miletić's Reply Brief, paras 17-19. See also Miletić's Appeal Brief, paras 70-71. **Miletić** contends that the Trial Chamber thereby committed errors of law violating Articles 20(1) and 21(4)(a) of the Statute, which invalidate the Trial Judgement under all counts. Miletić's Appeal Brief, paras 12, 55, 68-69; Miletić's Reply Brief, para. 19.

167 Miletić's Appeal Brief, para. 66; Miletić's Reply Brief, para. 17.

168 Prosecution's Response Brief (Miletić), paras 29-30. See also Prosecution's Response Brief (Miletić), para. 31.

169 *Cf.* Miletić's Appeal Brief, para. 72, referring to Trial Judgement, paras 1711-1716.

170 Miletić's Appeal Brief, paras 12, 55, 77-78 (referring to Trial Judgement, para. 1716); Miletić's Reply Brief, para. 24.

military organs to reduce and limit the logistic support of UNPROFOR, when that paragraph only dealt with his role in drafting Directive 7.[171] Second, he argues that the Trial Chamber erroneously based its findings on his role in the approval of humanitarian convoys solely on evidence pertaining to UNPROFOR convoys, the material facts of which were not properly pleaded in the Indictment.[172] **Miletić** submits that had the Trial Chamber not erred, its finding regarding his contribution to the common purpose of the JCE to Forcibly Remove would undoubtedly have been different.[173] The Prosecution responds that the Indictment charged **Miletić** with participation in a general effort to restrict aid and relief to the enclaves, including UNPROFOR convoys, and that the Trial Chamber found that **Miletić** participated in the approval of all types of convoys.[174]

57. The Appeals Chamber considers that **Miletić** has failed to argue, let alone demonstrate, that the Trial Chamber relied on its allegedly erroneous interpretation of paragraph 75(a)(i) of the Indictment to reach its finding on his contribution to the JCE to Forcibly Remove. Accordingly, the argument is dismissed.

58. Regarding **Miletić**'s second argument, the Appeals Chamber recalls that when the Prosecution alleges JCE liability in an indictment, it must plead, among other material facts, the nature of the accused's participation in the JCE.[175] The Appeals Chamber considers that in setting out **Miletić**'s alleged acts in furtherance of the JCE to Forcibly Remove, paragraph 75(a)(i) of the Indictment links UNPROFOR logistics support with the provision of humanitarian aid. Moreover, paragraph 75(a)(ii) of the Indictment alleges that **Miletić** "took part in and helped implement the policy set out in Directive 7 to restrict humanitarian aid to the Muslim populations of Srebrenica and Žepa".[176] The Appeals Chamber furthermore observes that paragraph 75 refers the reader to paragraphs 50-54 under Count 7, under the sub-heading "The Joint Criminal Enterprise to Forcibly Remove the Muslim Population from Srebrenica and Žepa". These paragraphs contain facts additional to those in paragraph 75 concerning **Miletić**'s commission of acts in furtherance of the JCE to Forcibly Remove.[177] In particular, paragraph 51 alleges that **Miletić** "played a central role in organising and facilitating the effort to restrict aid and supplies to [...] Srebrenica and Žepa".[178] The Appeals Chamber therefore dismisses **Miletić**'s argument.

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171 Miletić's Appeal Brief, paras 73-75.
172 Miletić's Appeal Brief, paras 75-77; Miletić's Reply Brief, paras 20-23.
173 Miletić's Appeal Brief, para. 78, referring to Trial Judgement, para. 1716.
174 Prosecution's Response Brief (Miletić), paras 32-36.
175 *Karemera and Ngirumpatse* Appeal Judgement, para. 105; *Šainović et al.* Appeal Judgement, para. 214; *Simić* Appeal Judgement, para. 22. See also *Mugenzi and Mugiranzea* Appeal Judgement, para. 116.
176 Indictment, para. 75(a)(ii).
177 Indictment, para. 75, referring to Indictment, paras 50-54.
178 Indictment, para. 51.

59. In view of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber committed an error of law invalidating any decision of the Trial Chamber. Accordingly, the Appeals Chamber dismisses sub-ground 2.3 of **Miletić**'s appeal.

## D. Pandurević's Appeal (Sub-ground 1.3)

### 1. Arguments of the Parties

60. **Pandurević** submits that in convicting him for aiding and abetting by omission the murder of the Milići Prisoners on the basis of a failure to discharge a legal duty, the Trial Chamber committed an error of law invalidating his conviction.[179] **Pandurević** asserts that the Prosecution neither pleaded nor gave any indication during trial that he was charged with having aided and abetted the murder of the Milići Prisoners by omission through a failure to discharge a legal duty.[180]

61. **Pandurević** advances four main lines of argumentation in support of these submissions. First, he argues that the omission for which he was alleged to be responsible – the failure to prevent harm to prisoners to whom he owed a duty of protection – appeared in the Indictment to be relevant to the charges of JCE, conspiracy to commit genocide, and superior responsibility.[181] Second, he contends that between 2006 and 2007, during which most of the Prosecution's case was heard, the jurisprudence indicated that his alleged failure was relevant to other forms of liability rather than the one for which he was convicted.[182] Third, **Pandurević** argues that the contrast between the pleadings against himself and his co-accused, Borovčanin, demonstrates that the Prosecution knew how to unambiguously plead omission through a failure to discharge a legal duty under Article 7(1) of the Statute, but chose not to do so in his case.[183] Fourth, he submits that the Indictment is not as clear and specific as the culpable omission allegations in the *Mrkšić et al.* indictment – that Veselin Šljivančanin "permitted JNA soldiers under his command to deliver custody of this group of

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179 Pandurević's Appeal Brief, paras 2, 11, 13, 96. See Trial Judgement, para. 1991.

180 Pandurević's Appeal Brief, paras 2, 16, 94, 99; Pandurević's Reply Brief, paras 16, 22.

181 Pandurević's Appeal Brief, paras 94, 99-104, 116, 118-121. See also Pandurević's Appeal Brief, para. 113; Pandurević's Reply Brief, para. 22.

182 Pandurević's Appeal Brief, paras 108, 116-117, 122-133; Pandurević's Reply Brief, paras 23-27. **Pandurević** concedes that the Prosecution was not prevented from pleading aiding and abetting through a failure to discharge a legal duty, although he claims it was a novel form of aiding and abetting liability, so long as the pleading was sufficiently explicit to provide him with notice of the allegation against him. Pandurević's Appeal Brief, para. 133. See also Pandurević's Appeal Brief, paras 98, 114-115.

183 Pandurević's Appeal Brief, paras 16, 94, 107-108, 114-115, 133; Pandurević's Reply Brief, paras 17-22, 27. The same contrast is apparent, in **Pandurević**'s view, in the Prosecution's Pre-Trial Brief and its Opening Statement. Pandurević's Appeal Brief, para. 109.

detainees to other Serb forces who physically committed the crimes charged"[184] – and that it nowhere alleges that **Pandurević** "permitted" prisoners to be "delivered" into anyone's custody.[185]

62. **Pandurević** concludes that the Prosecution's failure to unambiguously plead the form of liability through which he was convicted is inherently prejudicial, and as such, he should not be required to show prejudice.[186] Nonetheless, he submits that the Trial Chamber's error prejudiced him in that he was deprived of the opportunity to make legal submissions and to adduce evidence uniquely relevant to aiding and abetting by omission.[187]

63. The Prosecution responds that **Pandurević** ignores relevant paragraphs of the Indictment, which, when read as a whole, sufficiently informed him that, in addition to JCE, he was being charged with aiding and abetting through acts and omissions, including breaching his duty by failing to protect the Milići Prisoners.[188] The Prosecution further argues that the jurisprudence on which **Pandurević** relies does not support his position regarding the state of the law between 2006 and 2007.[189] The Prosecution also argues that the fact that the Indictment gave Borovčanin more detailed notice does not change the fact that **Pandurević** had sufficient notice.[190] Finally, the Prosecution argues that the words "permitted" and "delivered" were not necessary for the Indictment to meaningfully inform **Pandurević** of the allegations against him.[191]

64. On the topic of prejudice, the Prosecution submits that **Pandurević** raised the alleged defect in the Indictment for the first time on appeal and, as such, bears the burden of showing that his ability to prepare his defence was materially impaired.[192] The Prosecution argues that **Pandurević** provided little detail and few relevant arguments in this regard, prepared his case in accordance with the charge of aiding and abetting by omission, and therefore has failed to meet his burden.[193]

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184 Pandurević's Appeal Brief, para. 110, citing *Mrkšić et al.* Third Consolidated Amended Indictment, para. 11(g) (emphasis removed).

185 Pandurević's Appeal Brief, paras 2, 16, 105-106, 110-111. See also Pandurević's Reply Brief, para. 20. **Pandurević** also argues that the Indictment does not allege liability based on custody. Pandurević's Appeal Brief, para. 111.

186 Pandurević's Appeal Brief, paras 95-96, 135-136. See also Pandurević's Appeal Brief, para. 16; Pandurević's Reply Brief, para. 28. **Pandurević** also argues that the failure to plead the mode of liability for which he was convicted ought not to be curable. Pandurević's Appeal Brief, para. 135.

187 Pandurević's Appeal Brief, paras 16, 95, 137-138; Pandurević's Reply Brief, para. 28. See also Pandurević's Appeal Brief, paras 13, 17.

188 Prosecution's Response Brief (Pandurević), paras 40-45, 47-52, 64. See also Prosecution's Response Brief (Pandurević), paras 39, 46, 53-54.

189 Prosecution's Response Brief (Pandurević), paras 40, 55-59.

190 Prosecution's Response Brief (Pandurević), para. 54.

191 Prosecution's Response Brief (Pandurević), para. 53.

192 Prosecution's Response Brief (Pandurević), para. 60.

193 Prosecution's Response Brief (Pandurević), paras 40, 60-64.

### 2. Applicable law

65. The Appeals Chamber recalls that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[194] An indictment which fails to set forth the specific material facts underpinning the charges against the accused is defective.[195] Whether a fact is "material" cannot be determined in the abstract and depends on the nature of the Prosecution's case.[196] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct of the accused.[197]

66. When the Prosecution intends to rely on all modes of liability encompassed by Article 7(1) of the Statute, the material facts relevant to each of those modes of liability must be pleaded in the indictment.[198] The omission of a material fact underpinning a charge in the indictment can, in certain cases, be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges.[199] A defective indictment which has not been cured causes prejudice to the accused.[200] The defect may only be deemed harmless through a demonstration that the accused's ability to prepare his or her defence was not materially impaired.[201]

### 3. Analysis

67. The Trial Chamber found that **Pandurević**'s failure to discharge his duty to protect the Milići Prisoners "assisted in and substantially contributed to the murder of the ten men",[202] and, therefore, that he was responsible for their murder through aiding and abetting by omission.[203] The Trial Chamber did not discuss whether there was any defect in the Indictment in this regard.[204] The Appeals Chamber will consider whether the Indictment charged **Pandurević** with aiding and

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194 *Karemera and Ngirumpatse* Appeal Judgement, para. 594; *Bizimungu* Appeal Judgement, para. 46; *Đorđević* Appeal Judgement, para. 574; *Šainović et al.* Appeal Judgement, paras 213, 225, 262.

195 *Karemera and Ngirumpatse* Appeal Judgement, para. 371; *Bizimungu* Appeal Judgement, para. 46; *Đorđević* Appeal Judgement, para. 576; *Bagosora and Nsengiyumva* Appeal Judgement, para. 96.

196 *Đorđević* Appeal Judgement, paras 331, 575; *Stakić* Appeal Judgement, para. 117; *Krnojelac* Appeal Judgement, para. 132.

197 *Bagosora and Nsengiyumva* Appeal Judgement, para. 132; *Krnojelac* Appeal Judgement, para. 132. See *Bizimungu* Appeal Judgement, para. 79; *Đorđević* Appeal Judgement, para. 575.

198 *Simić* Appeal Judgement, para. 21.

199 *Karemera and Ngirumpatse* Appeal Judgement, para. 371; *Bizimungu* Appeal Judgement, para. 46; *Ndindiliyimana et al.* Appeal Judgement, paras 172, 176; *Šainović et al.* Appeal Judgement, para. 262. See *Đorđević* Appeal Judgement, para. 576.

200 *Šainović et al.* Appeal Judgement, para. 262; *Renzaho* Appeal Judgement, para. 125. See *Đorđević* Appeal Judgement, para. 576.

201 *Šainović et al.* Appeal Judgement, para. 262; *Renzaho* Appeal Judgement, para. 125. See *Đorđević* Appeal Judgement, para. 576.

202 Trial Judgement, para. 1988.

203 Trial Judgement, para. 1991. See Trial Judgement, paras 1984-1990.

204 See Trial Judgement, paras 1980-1981, referring to Indictment, paras 30.15, 39(c)(vi), 88-90.

abetting by omission the murder of the Milići Prisoners and pleaded the material facts in support of that charge.[205]

68. The Appeals Chamber recalls that, in considering whether an appellant received clear and timely notice, the indictment must be considered as a whole.[206] The Appeals Chamber notes that the Indictment explicitly alleges, *inter alia,* that **Pandurević** is responsible under Article 7(1) of the Statute for having "otherwise 'aided and abetted'"[207] murder, through his "acts and omissions described in the preceding paragraphs".[208] Among them, paragraph 39(c)(vii) of the Indictment alleges that **Pandurević** "had responsibility for all the Bosnian Muslim prisoners detained in the Zvornik Brigade zone of responsibility [...] and to ensure their safety and welfare. *He failed to do so.*"[209] The Appeals Chamber also notes that paragraph 39(c)(vi) of the Indictment alleges that **Pandurević** "remained in command and control [...] in the Zvornik Brigade zone of responsibility [...] and had knowledge of and assisted in [the summary execution of the Milići Prisoners]". Moreover, paragraph 30.15 of the Indictment alleges that the "removal of [the Milići Prisoners from the Zvornik Brigade Headquarters] and summary executions were done with the knowledge and under the authority of [**Pandurević**]". The Appeals Chamber, Judge Niang dissenting, considers that these allegations provided notice to **Pandurević** of the material facts underlying the charge that he aided and abetted the murder of the Milići Prisoners by omission. This conclusion is not affected by any additional relevance that the material facts may have had to the charges of JCE, conspiracy to commit genocide, and superior responsibility.

69. Regarding **Pandurević**'s arguments related to the comparison of allegations against accused in other cases[210] and those against his co-accused, Borovčanin, the Appeals Chamber recalls that whether a fact is material cannot be determined in the abstract but depends on the nature of the Prosecution's case.[211] The Appeals Chamber, Judge Niang dissenting, therefore does not consider these comparisons to the Prosecution's case against other accused to be helpful in determining whether **Pandurević** was put on notice of the material facts underlying the charges against him. Accordingly, the Appeals Chamber, Judge Niang dissenting, dismisses these arguments.

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205 The Appeals Chamber recalls in this regard that the *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act. *Mrkšić and Šljivančanin* Appeal Judgement, para. 146. See *Šainović et al.* Appeal Judgement, para. 1677, fn. 5510; *Mrkšić and Šljivančanin* Appeal Judgement, para. 49.

206 *Karemera and Ngirumpatse* Appeal Judgement, paras 370, 399; *Bizimungu* Appeal Judgement, para. 99; *Đorđević* Appeal Judgement, para. 588; *Mrkšić and Šljivančanin* Appeal Judgement, para. 138.

207 Indictment, paras 88, 90.

208 Indictment, paras 46-47, p. 25.

209 Indictment, para. 39(c)(vii) (emphasis added).

210 See *Mrkšić and Šljivančanin* Appeal Judgement, paras 139-141, where the Appeals Chamber determined that the allegations put Šljivančanin on notice that he was charged with aiding and abetting by omission.

211 See *supra*, para. 65.

70. As the Appeals Chamber, Judge Niang dissenting, considers that the Indictment provided **Pandurević** with notice, it need not address his arguments regarding prejudice. Similarly, as **Pandurević** has conceded that the Prosecution was not prevented from pleading aiding and abetting by omission through the failure to discharge a legal duty so long as the pleading was sufficient to put him on notice of these charges,[212] it is not necessary for the Appeals Chamber to address his arguments related to the state of the jurisprudence in 2006-2007.

#### 4. Conclusion

71. For the above reasons, the Appeals Chamber, Judge Niang dissenting, finds that **Pandurević** has failed to show that he lacked adequate notice that he was charged with having aided and abetted by omission the murder of the Milići Prisoners. The Appeals Chamber, Judge Niang dissenting, therefore dismisses **Pandurević**'s sub-ground of appeal 1.3.

### E. Conclusion

72. The Appeals Chamber has dismissed all challenges relating to the Indictment.

212 See *supra*, note 182.

# IV. ADMISSIBILITY AND WEIGHT OF THE EVIDENCE

## A. Introduction

73. **Beara**, **Nikolić**, and **Miletić** present several challenges to the admission of evidence (documentary and testimonial) by the Trial Chamber, some of which are combined with challenges to the Trial Chamber's assessment or weighing of that evidence.[213]

74. Trial chambers exercise broad discretion in determining the admissibility of evidence. The Appeals Chamber must thus accord due deference to a trial chamber's decision in this respect.[214] The Appeals Chamber's examination is consequently limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error. The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[215]

## B. Impugned Decisions Not to Admit Evidence

### 1. Beara's appeal (Ground 1)

75. **Beara** submits that the Trial Chamber erred in law and abused its discretion by not admitting into evidence three statements pertaining to his driver Miloš Tomović, which he tendered during cross-examination of **Pandurević** and which were relevant to his whereabouts.[216] **Beara** argues that the Prosecution questioned Tomović on his whereabouts and stated that it knew that **Beara** was in Belgrade on "the 13th through the 15th", the importance of which the Trial Chamber failed to recognise.[217] **Beara** further argues that the statements were crucial for a proper assessment of **Pandurević**'s credibility and that the Trial Chamber contravened his right to impeach **Pandurević** on cross-examination by denying their admission.[218]

76. The Prosecution responds that the Trial Chamber acted within its discretion when declining to admit these statements into evidence and that **Beara** fails to show otherwise.[219] It further argues

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213 The Appeals Chamber furthermore addresses challenges to the admission of evidence, *infra*, paras 294, 297, 308-309, 317-318, 1314.

214 *Šainović et al.* Appeal Judgement, paras 152, 161.

215 *Šainović et al.* Appeal Judgement, para. 29; *Lukić and Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.

216 Beara's Appeal Brief, intro before para. 3, paras 3, 5, 8; Appeal Hearing, AT. 163-164 (2 Dec 2013). See also Beara's Reply Brief, para. 8. As a result, according to **Beara**, his right to a fair trial was violated, leading to a miscarriage of justice. Beara's Appeal Brief, intro before para. 3, paras 3, 5, 16.

217 Appeal Hearing, AT. 164 (2 Dec 2013).

218 Beara's Appeal Brief, paras 5-8. See also Beara's Reply Brief, para. 7; Appeal Hearing, AT. 163-164 (2 Dec 2013).

219 Prosecution's Response Brief (Beara), paras 7-8. See Appeal Hearing, AT. 214 (3 Dec 2013).

that **Beara** fails to identify an adverse finding that would have been affected by the statements or to explain how they contradicted **Pandurević**'s testimony.[220]

77. The Appeals Chamber considers that **Beara**'s arguments lack specificity as to why the admission of the statements into evidence was crucial to assessing the credibility of **Pandurević** with respect to **Beara**'s actions and whereabouts. **Beara** indicates that the issue is his alleged presence in Belgrade from 13 to 15 July 1995, but does not demonstrate how that is relevant to **Pandurević**'s credibility or how it might show an error in the Trial Chamber's decision not to admit these statements into evidence. The Appeals Chamber therefore finds that **Beara** has failed to substantiate his claim that the Trial Chamber abused its discretion in denying admission of the statements and has not shown an error of law. The Appeals Chamber accordingly dismisses **Beara**'s ground of appeal 1.

### 2. Nikolić's appeal

#### (a) The Trial Chamber's refusal to allow Defence expert witness and report (Ground 2)

78. **Nikolić** submits that the Trial Chamber erred in law by not allowing him to call Professor William Schabas as an expert witness and by not admitting the Schabas Report into evidence.[221] According to **Nikolić**, the Trial Chamber misconstrued the subject matter of the Schabas Report and wrongly held, without providing reasons, that Schabas's expertise fell directly within its competence.[222] **Nikolić** further argues that the Trial Chamber erred by dismissing Schabas's views in the Trial Judgement without proper consideration.[223] The Prosecution responds that the Trial Chamber correctly denied **Nikolić** permission to call Schabas as an expert witness,[224] and that **Nikolić** suffered no prejudice.[225]

79. The Trial Chamber denied **Nikolić** permission to call Schabas as an expert witness or tender the Schabas Report as an expert report, reasoning that Schabas's legal expertise fell within its competence and that **Nikolić** was free to incorporate into his submissions the legal analysis

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220 Prosecution's Response Brief (Beara), para. 9.

221 Nikolić's Appeal Brief, para. 46, referring to a report provided by Professor William Schabas on "State Policy as an Element of the Crime of Genocide" contained in Nikolić's Final Brief (corrigendum filed on 15 September 2009) (public), Annex D ("Schabas Report"). **Nikolić** argues that this decision by the Trial Chamber violated his right under Article 21(4)(e) of the Statute to obtain the attendance and examination of witnesses on his behalf. Nikolić's Appeal Brief, para. 46.

222 Nikolić's Appeal Brief, paras 47-48, 50-51; Nikolić's Reply Brief, paras 25-26. See also Nikolić's Reply Brief, para. 27.

223 Nikolić's Appeal Brief, para. 53; Nikolić's Reply Brief, para. 28. **Nikolić** submits that the errors can only be remedied by calling Schabas to testify at the Appeal Hearing. Nikolić's Appeal Brief, para. 54; Nikolić's Reply Brief, para. 28.

224 Prosecution's Response Brief (Nikolić), paras 40-41. See also Prosecution's Response Brief (Nikolić), para. 42.

225 Prosecution's Response Brief (Nikolić), paras 40, 43.

contained in the Schabas Report.[226] The Appeals Chamber recalls that trial chambers have the discretion to bar the testimony of an expert witness called to give evidence on legal matters.[227] **Nikolić** describes Schabas as an expert on the historical-legal evolution of genocide at the intersection of the law of state responsibility and individual criminal responsibility.[228] This topic falls squarely within the field of customary international law, which the Tribunal constantly applies.[229] Furthermore, **Nikolić** incorporated the opinions contained in the Schabas Report into his final brief and closing arguments,[230] and the Trial Chamber considered these submissions.[231] The Appeals Chamber therefore dismisses **Nikolić**'s ground of appeal 2.

(b) The Trial Chamber's refusal to grant protective measures to 3DW5 (Ground 15)

80. **Nikolić** submits that the Trial Chamber erred in law and in fact by not granting protective measures to Defence Witness 3DW5.[232] According to **Nikolić**, the testimony would have further exposed Prosecution Witness Srećko Aćimović as unreliable and constituted a crucial factor in the assessment of his credibility.[233] **Nikolić** argues that no reasonable trial chamber could have found that there were insufficient grounds for granting protective measures,[234] and that the Trial Chamber failed to provide a reasoned opinion for its refusal to grant protective measures.[235] According to **Nikolić**, the Trial Chamber further erred by denying, without a reasoned opinion, certification to appeal the decision, which also prevented him from seeking a subpoena compelling the testimony.[236] **Nikolić** argues that the Trial Chamber wrongly determined that the Defence withdrew 3DW5, whereas it was 3DW5 who refused to testify.[237] **Nikolić** concludes that the Trial Chamber's refusal to grant protective measures to 3DW5 violated his rights under Article 21(4)(e) of the Statute, thereby occasioning a miscarriage of justice and/or invalidating the Trial Judgement.[238]

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226 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, 1 July 2008, paras 8-9. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on the Request for Reconsideration of the Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, 30 July 2008, p. 2.

227 *Nahimana et al.* Appeal Judgement, paras 292-294. See also *Šainović et al.* Appeal Judgement, para. 1295; *Renzaho* Appeal Judgement, para. 289.

228 Nikolić's Appeal Brief, paras 48, 50.

229 See, *e.g.*, *Kordić and Čerkez* Appeal Judgement, para. 66; *Tadić* Appeal Judgement, paras 194 *et seq.*

230 See Trial Judgement, paras 826-827. *Cf. Nahimana et al.* Appeal Judgement, para. 294.

231 Trial Judgement, paras 828-830.

232 Nikolić's Appeal Brief, para. 252; Nikolić's Reply Brief, para. 105. Though mindful that 3DW5 neither testified nor was granted protective measures, the Appeals Chamber will use the pseudonym as it sees no reason to reveal to the public that that person may have consented to testifying if he or she had been granted protective measures. *Cf. Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, para. 67.

233 Nikolić's Appeal Brief, paras 252, 254, 260; Nikolić's Reply Brief, para. 103.

234 Nikolić's Appeal Brief, paras 253-255; Nikolić's Reply Brief, para. 105. See also Nikolić's Appeal Brief, para. 256; Nikolić's Reply Brief, para. 102.

235 Nikolić's Appeal Brief, paras 257-258; Nikolić's Reply Brief, para. 104.

236 Nikolić's Appeal Brief, paras 259, 262.

237 Nikolić's Appeal Brief, para. 259; Nikolić's Reply Brief, para. 103.

238 Nikolić's Appeal Brief, paras 252, 260. The only sufficient remedy, according to **Nikolić**, would be to allow 3DW5 to testify on appeal with protective measures. Nikolić's Appeal Brief, para. 261. **Nikolić** adds that if the Appeals

81. The Prosecution responds that **Nikolić** fails to demonstrate that the Trial Chamber erred.[239] The Prosecution submits that the proposed testimony would not have added any new evidence to the record,[240] that 3DW5 failed to meet the threshold requirements for obtaining protective measures,[241] and that **Nikolić** could have requested a subpoena to secure 3DW5's testimony.[242]

82. The Appeals Chamber notes that **Nikolić** premises his arguments on the Trial Chamber's alleged violation of his rights under Article 21(4)(e) of the Statute, which provides the accused with the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". The Appeals Chamber considers that the Trial Chamber's denial of protective measures and denial of certification to appeal did not exhaust **Nikolić**'s avenues to obtain the attendance of 3DW5 before the Trial Chamber. In particular, **Nikolić** has failed to show that he did not have legal recourse to a subpoena to compel 3DW5 to testify.[243] The record indicates that counsel for **Nikolić** told 3DW5 that he would not force 3DW5 to testify publicly and this in turn motivated counsel to withdraw 3DW5 instead of seeking a subpoena.[244] This was a choice made by **Nikolić**, not an error of the Trial Chamber. The Appeals Chamber therefore considers that **Nikolić**'s argument is without merit and dismisses his ground of appeal 15.

### 3. Miletić's appeal (Ground 22)

83. **Miletić** submits that the "Mladić Diary", which the Trial Chamber declined to admit into evidence, had "the capacity to have a pivotal impact upon the assessment of [his] responsibility".[245] **Miletić** argues that the Mladić Diary is relevant because, by not referring to him, it shows that he did not have the supposed position of advisor or co-ordinator.[246] He also submits that the Trial Chamber erroneously treated as a bar table motion an application by **Miletić** to re-open his case, and denied admission of documents that would have shed new light on his role and had an impact on the Trial Judgement.[247] **Miletić** argues that in both these instances the Trial Chamber misapplied Rules 89(B) and (C) of the Rules of Procedure and Evidence of the ICTY ("Rules"), in violation of

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Chamber does not grant him this remedy, he would seek a subpoena compelling 3DW5 to testify. Nikolić's Appeal Brief, para. 262.

239 Prosecution's Response Brief (Nikolić), paras 228-237.

240 Prosecution's Response Brief (Nikolić), paras 228, 232.

241 Prosecution's Response Brief (Nikolić), para. 233. See also Prosecution's Response Brief (Nikolić), para. 234.

242 Prosecution's Response Brief (Nikolić), paras 232, 236.

243 See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 15.

244 T. 25817-25819 (16 Sept 2008).

245 Miletić's Appeal Brief, para. 422. See Miletić's Appeal Brief, paras 421, 426. See also Appeal Hearing, AT. 434-435 (private session) (5 Dec 2013).

246 Miletić's Reply Brief, para. 141. See also Miletić's Appeal Brief, para. 422.

247 Miletić's Appeal Brief, paras 423, 426.

its duty under the Statute to ensure a fair trial.[248] **Miletić** concludes that the Trial Chamber's refusal to admit these exhibits into evidence has rendered the trial unfair and invalidates the verdict against him on all counts.[249]

84. The Prosecution responds that **Miletić** fails to show that the Trial Chamber abused its discretion or that the admission into evidence of any of the documents would have had any impact on the Trial Judgement.[250]

85. Regarding the documents other than the Mladić Diary, **Miletić**'s argument lacks specificity as to why they would have shed new light on his role and how they would have had an impact on the Trial Judgement. As for the Mladić Diary, **Miletić** makes a general claim as to its relevance, but does not show how its admission into evidence would have affected any relevant factual finding of the Trial Chamber. The Appeals Chamber therefore finds that **Miletić** has failed to present sufficient arguments in support of his claims and thus has not shown an error of law. The Appeals Chamber accordingly dismisses **Miletić**'s ground of appeal 22.

## C. Admission of Statements (Beara's Appeal)

### 1. Admission of Rule 92 *quater* statements of Miloslav Deronjić and Nada Stojanović (Ground 2)

#### (a) Arguments of the Parties

86. **Beara** submits that the Trial Chamber erred in law and abused its discretion by admitting into evidence, pursuant to Rule 92 *quater* of the Rules,[251] statements by Witnesses Miloslav Deronjić and Nada Stojanović.[252] **Beara** further contends that their admission into evidence violated his right to a fair trial, prejudicing him and invalidating the Trial Judgement.[253]

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248 Miletić's Appeal Brief, paras 424-426; Miletić's Reply Brief, para. 140.

249 Miletić's Appeal Brief, para. 427.

250 Prosecution's Response Brief (Miletić), paras 330-332; Appeal Hearing, AT. 472 (5 Dec 2013).

251 Rule 92 *quater* of the Rules provides as follows:

> (A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:
>
> (i) is satisfied of the person's unavailability as set out above; and
>
> (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.
>
> (B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

252 Beara's Appeal Brief, intro before para. 9, paras 9, 14-16; Appeal Hearing, AT. 159 (2 Dec 2013); AT. 190-191 (3 Dec 2013).

253 Beara's Appeal Brief, intro before para. 9, paras 11, 14, 16.

87. With regard to Deronjić's statement, **Beara** submits that the Appeals Chamber should reconsider its decision affirming its admission into evidence due to a clear error of reasoning and the necessity to prevent injustice.[254] He maintains that Deronjić's statement pertains to his acts and conduct, contains internal inconsistencies, is uncorroborated, and was not subject to cross-examination by the Beara Defence.[255] **Beara** claims that a decision issued by the *Karadžić* Trial Chamber denied admission of the Deronjić statement into evidence for similar reasons.[256] According to **Beara**, both the Appeals Chamber and the Trial Chamber erred in failing to take the approach adopted in the *Karadžić* case and in failing to review all relevant factors associated with the statement.[257] He further argues that the Trial Chamber relied heavily on the Deronjić statement in making several findings that led to his conviction, which justifies a reconsideration of the Appeals Chamber's interlocutory decision.[258]

88. As for the Stojanović statement, **Beara** submits that it pertains to his acts and conduct as an accused, was neither given under oath nor subject to cross-examination, lacks credibility due to Stojanović's status as a suspect, was not corroborated by other credible and reliable evidence, and was contradicted by other evidence. **Beara** also submits that the Stojanović statement had an impact on his verdict, as the Trial Chamber relied on Stojanović's evidence pertaining to **Beara**'s acts and conduct for its finding that he was present at a site of mass execution on 14 July 1995 and participated in the JCE to Murder.[259]

89. The Prosecution responds that **Beara** repeats trial arguments on the admission into evidence of the statements but fails to show any error.[260] It argues that the *Karadžić* decision does not show a clear error of reasoning or an injustice.[261] The Prosecution further argues that **Beara** fails to show an error in the Trial Chamber's cautious reliance upon Deronjić's and Stojanović's evidence.[262]

(b) Analysis

90. **Beara** requests that the Appeals Chamber reconsider its prior decision affirming the Trial Chamber's decision to admit Deronjić's statement into evidence.[263] Thus, **Beara** attempts to

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254 Beara's Appeal Brief, para. 9; Beara's Reply Brief, para. 9.

255 Beara's Appeal Brief, paras 10-13; Beara's Reply Brief, para. 10; Appeal Hearing, AT. 159 (2 Dec 2013); AT. 186, 191, 193 (3 Dec 2013).

256 Beara's Appeal Brief, paras 12-14; Beara's Reply Brief, para. 11; Appeal Hearing, AT. 191-192 (3 Dec 2013).

257 Beara's Appeal Brief, paras 10-13; Appeal Hearing, AT. 192 (3 Dec 2013).

258 Beara's Appeal Brief, para. 13; Beara's Reply Brief, paras 10, 12; Appeal Hearing, AT. 192-193 (3 Dec 2013).

259 Beara's Appeal Brief, para. 15; Beara's Reply Brief, para. 13.

260 Prosecution's Response Brief (Beara), paras 11-12, 14-16. See also Prosecution's Response Brief (Beara), para. 19.

261 Prosecution's Response Brief (Beara), para. 12.

262 Prosecution's Response Brief (Beara), paras 11, 14-18.

263 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Decision on Beara's and Nikolić's Interlocutory Appeals Against Trial Chamber's Decision of 21 April 2008 Admitting 92 *quater* Evidence,

relitigate an issue that the Appeals Chamber has already settled. The Appeals Chamber recalls that it may reconsider a previous interlocutory decision if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.[264] **Beara** has failed to establish a clear error of reasoning in the interlocutory decision. In particular, it is patently insufficient to refer to a decision denying admission into evidence of the same statement issued by a trial chamber in another case against another defendant. Indeed, "the probative value of a document may be assessed differently in different cases, depending on the circumstances".[265] **Beara**'s further argument regarding how the Trial Chamber relied on the Deronjić statement in the Trial Judgement confuses the separate issues of admission into evidence, which occurs during the trial, and the weight ultimately given to the evidence in the Trial Judgement.[266] The latter issue cannot justify a reconsideration of the Appeals Chamber's interlocutory decision on the former issue. **Beara** does not advance any further arguments in support of his request for reconsideration. The Appeals Chamber therefore concludes that **Beara** has failed to show that reconsideration is warranted.

91. The Stojanović statement is the transcript of a tape-recorded interview with Stojanović conducted by members of the Prosecution.[267] The Appeals Chamber has previously analysed the reliability of a recorded interview, as follows:

> A recorded questioning includes, by definition, all questions, all answers, every pause and request for clarifications by all attendees. The parties and the Judges also have the possibility to listen to the audio recording itself, which might provide additional guidance in the understanding of the overall demeanor of the questioned person as well as of those questioning him. The danger that the Prosecution uses this type of questioning to "craft" evidence against the (other) accused persons at trial [...] is, in such instances, reduced to a minimum. In this sense, a recorded questioning may be considered more reliable than a [Rule 92 *bis*] statement.[268]

In its decision to admit the statement into evidence, the Trial Chamber took into consideration that it included evidence going to the acts and conduct of **Beara**,[269] that Stojanović had been informed that she was a suspect,[270] that she was not cross-examined, and that her interview related to events about which there was other evidence.[271] This evidence included corroborating evidence that had

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18 August 2008 (confidential). See also Miloslav Deronjić, Ex. P03139a, "92 *quater* transcript" (19 Jan 2004) (confidential).

[264] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(c), Decision on Motions for Reconsideration, 1 December 2006, para. 6; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction" Dated 31 August 2004, 15 June 2006, para. 9; *Kajelijeli* Appeal Judgement, para. 203.

[265] *Simba* Appeal Judgement, para. 132. See *Bizimungu* Appeal Judgement, para. 210.

[266] The Appeals Chamber considers **Beara**'s arguments regarding the Trial Chamber's reliance on the Deronjić statement, *infra*, paras 1220 *et seq.*

[267] Nada Stojanović, Ex. 3D00511, "92 *quater* statement" (1 July 2002), p. 1; *Popović et al.* Decision of 19 February 2009, paras 43-45.

[268] *Prlić et al.* November 2007 Appeal Decision, para. 44.

[269] *Popović et al.* Decision of 19 February 2009, paras 42, 49.

[270] *Popović et al.* Decision of 19 February 2009, para. 44.

[271] *Popović et al.* Decision of 19 February 2009, para. 46.

been subject to cross-examination.[272] In light of these considerations, the Appeals Chamber finds that **Beara** has not shown that the Trial Chamber erred in law and abused its discretion by admitting the Stojanović statement into evidence pursuant to Rule 92 *quater* of the Rules.

92. The Appeals Chamber accordingly dismisses **Beara**'s ground of appeal 2 in its entirety.

#### 2. Admission of statements of Borovčanin and PW-116 (Ground 3 in part)

93. **Beara** submits that the Trial Chamber erred in law and abused its discretion by admitting into evidence statements by Borovčanin and Prosecution Witness PW-116, respectively.[273] With regard to Borovčanin's statement ("Borovčanin Interview"), **Beara** submits that it should not have been admitted, as it asserts acts and conduct relating to him.[274] The Prosecution responds that **Beara** fails to show any error regarding the admission of the statements.[275]

94. With regard to the Borovčanin Interview, the Appeals Chamber recalls that it dismissed **Beara**'s interlocutory appeal on the admission into evidence of this statement and notes that **Beara** proffers no reason for reconsideration of that decision.[276] As for the statement of PW-116, the Appeals Chamber considers that **Beara** has failed to articulate an error with respect to the admission into evidence of this statement. **Beara**'s arguments are therefore dismissed.

### D. Use of Untested and Uncorroborated Evidence

95. **Popović** and **Beara** present several challenges relating to the Trial Chamber's use of evidence that allegedly was neither tested in cross-examination nor corroborated by other evidence.

96. The Appeals Chamber recalls that a conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[277] This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond

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272 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *quater*, 18 December 2008 (confidential), para. 47.

273 Beara's Appeal Brief, intro before para. 17, paras 17-20, 23.

274 Beara's Appeal Brief, para. 18.

275 Prosecution's Response Brief (Beara), paras 20-21, 30. See also Prosecution's Response Brief (Beara), para. 31.

276 *Popović et al.* Decision of 14 December 2007, paras 27-29, 47-52, p. 19 (Disposition).

277 *Đorđević* Appeal Judgement, para. 807; *Haraqija and Morina* Contempt Appeal Judgement, para. 61; *Popović et al.* Decision of 14 December 2007, para. 48; *Prlić et al.* November 2007 Appeal Decision, para. 53. See also *Rukundo* Appeal Judgement, paras 134-135.

reasonable doubt".[278] It is considered to "run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration".[279]

### 1. The evidence of PW-116

#### (a) Arguments of the Parties

##### (i) Beara's Ground 3 in part

97. **Beara** submits that the Trial Chamber gave undue weight to PW-116's transcript, which was the only evidence of the Kravica Supermarket beatings and killings.[280] **Beara** contends that the Trial Chamber erred in relying on PW-116's transcript to prove the Kravica Supermarket killings, arguing that untested and uncorroborated evidence cannot be used to prove a charge against an accused.[281] **Beara** concludes that the Trial Chamber's errors violated his right to a fair trial, invalidating the Trial Judgement.[282]

98. The Prosecution responds that **Beara** fails to show that the Trial Chamber erred.[283] The Prosecution argues that **Beara**'s convictions are based on many killings other than the Kravica Supermarket killings. Indeed, according to the Prosecution, PW-116's evidence was not the sole or decisive basis for **Beara**'s conviction under any count of the Indictment.[284] The Prosecution submits that the Trial Chamber was not required to seek corroboration of untested evidence for each separate charged event within a count.[285] The Prosecution adds that requiring corroboration for evidence admitted under Rules 92 *bis* and 92 *quater* of the Rules would undermine their purpose of enhancing the efficiency and expedition of trials, particularly with regard to crime-base evidence.[286] In the alternative, the Prosecution argues that PW-116's account of the Kravica Supermarket killings was in fact corroborated by other circumstantial evidence, demonstrating a pattern of conduct that may be used as corroboration.[287]

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278 *Prlić et al.* November 2007 Appeal Decision, para. 59. See also *Haradinaj et al.* Appeal Judgement, fn. 252.
279 *Haraqija and Morina* Contempt Appeal Judgement, para. 61, citing *Prlić et al.* November 2007 Appeal Decision, para. 59. See also *Martić* Decision of 14 September 2006, para. 20; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, fn. 34.
280 Beara's Appeal Brief, intro before para. 17, paras 20-21, 23.
281 Beara's Appeal Brief, paras 20-22. See also Beara's Reply Brief, para. 16.
282 Beara's Appeal Brief, intro before para. 17.
283 Prosecution's Response Brief (Beara), para. 23. See also Prosecution's Response Brief (Beara), paras 24, 31.
284 Prosecution's Response Brief (Beara), para. 24.
285 Prosecution's Response Brief (Beara), para. 25.
286 Prosecution's Response Brief (Beara), para. 26.
287 Prosecution's Response Brief (Beara), paras 27-29.

(ii) Popović's appeal

99. **Popović** submits that the Trial Chamber erred in law and fact by finding that the Kravica Supermarket killings occurred.[288] First, he argues that the evidence of PW-116, who was the only witness to give evidence on the Kravica Supermarket killings, was uncorroborated and admitted through Rule 92 *bis*(D) of the Rules thereby depriving him of an opportunity to challenge his evidence by cross-examination.[289] Second, **Popović** asserts that PW-116 did not witness any killings, but only saw beatings and mistreatment.[290] Third, he argues that the Trial Chamber erred in proving one incident by using proof of other incidents.[291] **Popović** contends that successful proof of other underlying acts cannot be viewed as corroborative evidence of a specific separate charge in the Indictment.[292]

100. The Prosecution responds that **Popović**'s convictions are based on other analogous "opportunistic" killings and that PW-116's evidence regarding the Kravica Supermarket killings does not form the sole or even a decisive basis for the conviction of any accused. The Prosecution argues that this approach accords with relevant jurisprudence.[293]

(b) Analysis

101. The evidence of PW-116 is in the form of a transcript of his trial testimony in the *Krstić* case.[294] PW-116 was not cross-examined on the part of his evidence in relation to the Kravica Supermarket killings during the *Krstić* trial proceedings. The transcript of PW-116 was admitted into evidence in the *Popović et al.* case under former Rule 92 *bis*(D) of the Rules without cross-examination by the Accused.[295] In the present case, this transcript is the only evidence of crimes committed near the Kravica Supermarket in the night between 13 and 14 July 1995, as charged in paragraph 31.3 of the Indictment.[296]

102. The Trial Chamber noted with regard to the Kravica Supermarket allegations "that the circumstances described by PW-116 are analogous to those in other locations where 'opportunistic' killings have been found to have occurred".[297] It then analysed the structure of the Indictment and

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288 Popović's Appeal Brief, para. 426.
289 Popović's Appeal Brief, para. 427.
290 Popović's Appeal Brief, para. 427.
291 Popović's Appeal Brief, para. 428.
292 Popović's Appeal Brief, para. 428, referring to Trial Judgement, Dissenting and Separate Opinions of Judge Kwon ("Judge Kwon Dissent").
293 Prosecution's Response Brief (Popović), para. 286.
294 PW-116, Ex. P02205, "92*bis* transcript" (14 Apr 2000).
295 *Popović et al.* Decision of 12 September 2006, para. 81, p. 37 (Disposition); Prosecution 12 May 2006 Motion, Annex A, p. 10.
296 Trial Judgement, para. 448.
297 Trial Judgement, para. 448. The term "opportunistic" was used by the Prosecution "to describe killings [...] by individual soldiers, acting on their own, likely without orders from superior officers". Indictment, para. 83. However, in

concluded that since each count was underpinned by numerous factual allegations, "PW-116's uncorroborated evidence, in the context of the facts of this case, cannot be classified as evidence which could form the sole or even a decisive basis for the conviction of any of the Accused".[298] The Trial Chamber found that parts of the allegations in paragraph 31.3 of the Indictment were proven on the basis of the untested and uncorroborated evidence of PW-116.[299] The Kravica Supermarket killings[300] were included in the crimes underlying **Popović**'s and **Beara**'s convictions under Counts 1, 3, 5, and 6.[301]

103. The Appeals Chamber must examine whether **Popović**'s and **Beara**'s convictions rest solely, or in a decisive manner, on the untested and uncorroborated evidence of PW-116. The Trial Chamber found that other "opportunistic" killings had been proven and were foreseeable consequences of the JCE to Murder.[302] No conviction for "opportunistic" killings was based on the Kravica Supermarket events alone. The allegations contained in paragraph 31.3 of the Indictment were therefore not indispensable for any of **Popović**'s or **Beara**'s convictions. The Appeals Chamber consequently finds that these convictions would stand even without the finding that the Kravica Supermarket killings took place.

104. Furthermore, the Appeals Chamber notes that the Trial Chamber's approach is consistent with the reasoning in *Stakić*, where the conviction on the charge of killing 77 Croats was upheld, despite highlighting that the only evidence supporting the relevant finding was admitted under Rule 92 *bis* of the Rules and was untested.[303] As in this case, the killing of the 77 Croats was one of many killings underlying the convictions for the counts of extermination, murder, and persecution as crimes against humanity. The Appeals Chamber concludes that **Popović** has failed to show an error in the Trial Chamber's finding that the Kravica Supermarket killings were analogous to the other "opportunistic" killings.[304] The Appeals Chamber further observes that evidence that

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the context of the JCE to Murder, the Appeals Chamber considers the term "opportunistic" killings to be inappropriate. The word "opportunistic" implies a motive behind the killings, whereas the Trial Chamber found that there was a plan "to murder the able-bodied Bosnian Muslim males from Srebrenica, and that [the plurality of persons in the JCE to Murder] participated in the common purpose and shared the intent to murder". (Trial Judgement, para. 1072, emphasis added). It is therefore inappropriate to classify killings of able-bodied Bosnian Muslim men as "opportunistic" when such killings were in fact the aim of the common purpose of the JCE to Murder. Although the Appeals Chamber considers the term "opportunistic killings" to be imprecise in the context of the JCE to Murder, in light of the numerous references to it throughout the Trial Judgement, including with respect to the JCE to Forcibly Remove, and the submissions of the Parties, the Appeals Chamber will continue to refer to these killings as "opportunistic" killings, in quotation marks, throughout this Appeal Judgement. See also *infra*, fn. 4040.

298 Trial Judgement, para. 448.

299 Trial Judgement, paras 448-449. See also Trial Judgement, fn. 1614. The Trial Chamber made no finding on the last sentence of paragraph 31.3 of the Indictment, which alleges that the detention of the prisoners at the Kravica Supermarket on 13 and 14 July 1995 was supervised and co-ordinated by **Popović** and **Beara**. See Trial Judgement, para. 449.

300 Trial Judgement, paras 1169, 1187, 1192, 1196, 1303-1304, 1327, 1330, 1332.

301 Trial Judgement, paras 2104-2105, Disposition, Popović and Beara sections.

302 Trial Judgement, paras 354-361, 452-457, 460-463, 497, 1081-1082.

303 *Stakić* Appeal Judgement, para. 201(8).

304 Trial Judgement, para. 448.

demonstrates a pattern of conduct may be used as corroborative evidence.[305] The Appeals Chamber recalls that this conclusion finds support in Rule 93(A) of the Rules, which allows for the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice.[306] Accordingly, the Appeals Chamber finds that **Popović** and **Beara** have failed to identify an error by the Trial Chamber in relation to the admitted evidence of PW-116.

### 2. The evidence of Borovčanin (Beara's Ground 3 in part)

105. **Beara** submits that the Trial Chamber gave undue weight to the Borovčanin Interview, considering that he had no opportunity to cross-examine Borovčanin.[307] According to **Beara**, the Trial Chamber relied on the Borovčanin Interview to make various findings regarding him including his involvement in a plan to murder.[308] **Beara** further submits that the evidence in the Borovčanin Interview regarding his own acts and conduct was only corroborated in part, by inconsistent and mutually contradictory evidence, and was contradicted by other evidence.[309] The Prosecution responds that **Beara** singles out the Borovčanin Interview, despite corroborative evidence and other relevant factual findings showing his role in the murder operation.[310]

106. The Trial Chamber admitted into evidence the Borovčanin Interview, given by Borovčanin to the Prosecution in 2002 when he was a suspect.[311] At trial, Borovčanin exercised his right not to testify[312] which resulted in his co-accused having no opportunity to cross-examine him. The Appeals Chamber has carefully reviewed the relevant parts of the Trial Judgement to which the Parties referred[313] and considers that **Beara**'s convictions based on his participation in the JCE to Murder rest on numerous different sources of evidence and that the Borovčanin Interview was not decisive in this regard. The Appeals Chamber therefore finds that **Beara** has failed to identify an error by the Trial Chamber that could invalidate the Trial Judgement or result in a miscarriage of justice.

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305 See *Kupreškić et al.* Appeal Judgement, para. 321.
306 *Kupreškić et al.* Appeal Judgement, para. 321.
307 Beara's Appeal Brief, intro before para. 17, paras 18-19.
308 Beara's Appeal Brief, para. 19.
309 Beara's Appeal Brief, para. 19; Beara's Reply Brief, para. 14.
310 Prosecution's Response Brief (Beara), para. 22. See also Prosecution's Response Brief (Beara), paras 20, 31.
311 Trial Judgement, para. 18; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List, 25 October 2007, para. 40; *Popović et al.* Decision of 14 December 2007, paras 50-52; T. 19992-19993 (18 Jan 2008); Ex. P02853, "Transcript of OTP Interview of Borovčanin, 11 and 12 Mar 2002". The Appeals Chamber notes that another statement given by Borovčanin was also admitted into evidence (Ex. P02852, "Transcript of OTP Interview of Borovčanin, 20 Feb 2002") and that **Beara** does not specify in his ground of appeal to which statement he refers. However, the Appeals Chamber understands from his references to the Trial Judgement that he means Exhibit P02853.
312 Article 21(4)(g) of the Statute.
313 See Beara's Appeal Brief, paras 18-19; Prosecution's Response Brief (Beara), para. 22; Beara's Reply Brief, para. 14 and references cited therein.

### 3. The evidence of PW-120 (Popović's appeal)

107. **Popović** submits that the Trial Chamber erred in finding that the Cerska Valley killings took place on 13 July 1995. First, he argues that the evidence of Prosecution Witness PW-120, who was the only witness to give evidence on the Cerska Valley killings, was admitted through Rule 92 *bis* of the Rules, thereby depriving the Defence of an opportunity to test his evidence in cross-examination.[314] Second, **Popović** asserts that the Trial Chamber contravened its own standard when using PW-120's evidence as the basis for his genocide conviction and to support the existence of the plan to murder Bosnian Muslims captured from the column on 13 July 1995.[315]

108. The Prosecution responds that the Trial Chamber properly relied on PW-120's evidence regarding an incident forming one of several allegations that cumulatively supported the charges and that the Cerska Valley killings do not form the sole or even a decisive basis for **Popović**'s conviction for genocide or participation in the JCE to Murder.[316] It also submits that the trial record corroborates PW-120's evidence as to the day and occurrence of the Cerska Valley killings.[317]

109. The Appeals Chamber notes that **Popović** does not contest that executions took place in Cerska Valley, only that they occurred on 13 July 1995,[318] an argument which the Appeals Chamber dismisses below.[319] The evidence of PW-120 is a transcript of the witness's testimony in the *Krstić* case. The witness was not cross-examined on that part of his evidence during the *Krstić* trial. Similar to PW-116's transcript, it was admitted into evidence in the present case under former Rule 92 *bis*(D) of the Rules without cross-examination by the Accused.[320]

110. The Appeals Chamber observes that PW-120's evidence that the Cerska Valley killings took place on 13 July 1995 is supported by forensic evidence and various adjudicated facts upon which the Trial Chamber relied.[321] Although the forensic evidence did not speak to the date of the killings, a reasonable trial chamber could have relied on this combined body of evidence to find that the Cerska Valley killings took place on 13 July 1995, particularly given the fact that the Trial Chamber found "that the location identified by PW-120 is the same as the location of the grave exhumed in

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314 Popović's Appeal Brief, para. 208.
315 Popović's Appeal Brief, para. 209. See Popović's Reply Brief, para. 66.
316 Prosecution's Response Brief (Popović), para. 119.
317 Prosecution's Response Brief (Popović), para. 117.
318 Popović's Appeal Brief, para. 18.
319 See *infra*, paras 908-910.
320 *Popović et al.* Decision of 12 September 2006, para. 81 (Disposition); Prosecution 12 May 2006 Motion, Annex A, p. 10.
321 Trial Judgement, paras 411-413 & fns 1455-1463 (referring to *Popović et al.* Decision of 26 September 2006); Ex. P00611, "Report by William Haglund – Forensic Investigation of the Cerska Grave Site, 15 June 1998"; William Haglund, Ex. P02150, "92 *ter* transcript", KT. 3734-3742 (29 May 2000); Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009".

1996".[322] Thus, **Popović** has failed to identify an error by the Trial Chamber in relation to the admitted evidence of PW-120.

## E. Admission of Other Documentary Evidence (Beara's Ground 4)

### 1. Arguments of the Parties

111. **Beara** submits that the Trial Chamber erred in law and abused its discretion by admitting into evidence and attaching improper weight to certain unreliable documents, namely various intercepts, aerial images, and the Zvornik Brigade Duty Officer's Notebook[323] ("Duty Officer's Notebook").[324] As a result, according to **Beara**, his right to a fair trial was violated, leading to a miscarriage of justice.[325] The Prosecution responds that the Trial Chamber properly admitted these documents into evidence and that **Beara**'s ground of appeal 4 should be summarily dismissed.[326]

112. Regarding the intercepts, **Beara** submits that the Trial Chamber erred in law by relying on "the general procedures employed by the intercept operators" when assessing the reliability of the intercepts.[327] He also submits that the Trial Chamber failed to recognise reasonable interpretations of the vague intercepted conversations in accordance with the principle that all reasonable inferences should be made in favour of an accused.[328] The Prosecution responds that the Trial Chamber properly admitted the intercepts as a contemporaneous record of VRS conversations.[329]

113. Concerning intercept P01130, **Beara** argues that the Trial Chamber relied on the typed version and disregarded Prosecution Witness PW-124's testimony that the original handwritten manuscript was more authoritative and that the words attributed to **Beara** in the typed version should be attributed to "Lučić".[330] The Prosecution responds that **Beara** repeats trial arguments without showing an error.[331]

114. With respect to intercept P01164, **Beara** argues that the Trial Chamber should not have admitted it since Prosecution Witness PW-132 testified that he never wrote **Beara**'s name in the transcript, that it was revised and edited, and that someone else subsequently added the name

322 Trial Judgement, fn. 1455, para. 414. See also Trial Judgement, para. 410.
323 Ex. P00377, "Zvornik Brigade Duty Officers Notebook, 29 May–27 July 1995".
324 Beara's Appeal Brief, intro before para. 24, paras 24-36; Beara's Reply Brief, paras 17-18.
325 Beara's Appeal Brief, intro before para. 24.
326 Prosecution's Response Brief (Beara), paras 32, 34-36, 38.
327 Beara's Appeal Brief, para. 24.
328 Beara's Appeal Brief, para. 25.
329 Prosecution's Response Brief (Beara), paras 32-33.
330 Beara's Appeal Brief, para. 26. Although **Beara** refers to "PW-127" in his submissions, the testimony which he cites is that of PW-124.
331 Prosecution's Response Brief (Beara), para. 34.

"Beara" to the line of participants.[332] **Beara** further argues that the Trial Chamber erred in its assessment of the intercept by finding that the changes to it served to *increase* the reliability of the identification of the participants in the conversation.[333] The Prosecution responds that **Beara** repeats trial arguments, while ignoring explanations provided by the intercept operator, and does not show that the Trial Chamber's analysis was unreasonable.[334]

115. Regarding intercept P01179, **Beara** argues that the Trial Chamber erred in admitting it into evidence and relying on it, considering the testimony of Prosecution Witness PW-133 who purported to identify **Beara** as a participant in the intercepted conversation based only on voice recognition.[335] **Beara** argues, on the basis of PW-133's evidence in a previous case and other evidence in the present case, that PW-133 could not have recognised **Beara**'s voice.[336] The Prosecution responds that **Beara** repeats trial arguments, while ignoring that three operators independently and extemporaneously identified **Beara** as a participant in the conversation.[337]

116. As for intercepts P01178 and P01179, **Beara** argues that the Trial Chamber erred in authenticating them based on the evidence of Prosecution Witness PW-157, who acknowledged not remembering **Beara**'s voice characteristics. Further, **Beara** argues that PW-157 testified in the *Krstić* trial that he was "most probably" a participant in the conversation recorded in P01178 and then retracted the words "most probably" in the *Popović et al.* trial. According to **Beara**, PW-157 could not, contrary to his own assertion, have reviewed the transcript of his testimony in the *Krstić* proceedings because it was not provided to him in a language he understands.[338] The Prosecution responds that PW-157 had a sound basis for recognising **Beara**'s voice, his correction of his previous evidence was minor, and he was assisted by an interpreter when he reviewed his prior evidence.[339]

117. With regard to intercept P01187, **Beara** argues that the Trial Chamber erred in admitting it into evidence and in giving it any weight, as it was shown to be wholly unreliable by other evidence, notably Prosecution Witness Nedeljko Trkulja's denial that he had asked to see or talk to **Beara** as alleged in the intercept.[340] The Prosecution responds that **Beara** repeats trial arguments without showing that the Trial Chamber's analysis was unreasonable.[341]

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332 Beara's Appeal Brief, para. 27; Beara's Reply Brief, para. 17.
333 Beara's Appeal Brief, para. 27.
334 Prosecution's Response Brief (Beara), para. 34.
335 Beara's Appeal Brief, para. 28.
336 Beara's Appeal Brief, para. 28.
337 Prosecution's Response Brief (Beara), para. 34; Appeal Hearing, AT. 220-221 (3 Dec 2013).
338 Beara's Appeal Brief, para. 29.
339 Prosecution's Response Brief (Beara), para. 34.
340 Beara's Appeal Brief, para. 30; Beara's Reply Brief, para. 18.
341 Prosecution's Response Brief (Beara), para. 34.

118. Concerning the Duty Officer's Notebook, **Beara** argues that the Trial Chamber erred in admitting it into evidence and giving it any weight, while unreasonably disregarding indications that it was altered and contains ten pages by unknown authors as well as entries concerning **Beara** that were written asynchronously.[342] The Prosecution responds that **Beara** repeats trial arguments and attempts to substitute his own evaluation of the evidence for that of the Trial Chamber.[343]

119. Finally, **Beara** argues that the Trial Chamber erred in admitting into evidence and relying on certain aerial images because: (1) Prosecution expert Witness Jean René Ruez impermissibly added and removed dates on them; (2) reliance on aerial images may be misleading and inaccurate; and (3) such images do not exist for every relevant calendar day.[344] **Beara** seems to argue that the chronological lacunae in the aerial images of grave sites prevent them from establishing with sufficient precision the time of alleged executions.[345] The Prosecution argues that **Beara** repeats trial arguments without demonstrating that the Trial Chamber erred.[346]

### 2. Analysis

120. The Appeals Chamber first turns to **Beara**'s challenges to the admission of evidence, which are based on an alleged lack of probative value. **Beara** appears to challenge the admission of all the above-mentioned exhibits, but only provides clear arguments for some of them. The Appeals Chamber dismisses as undeveloped those of his assertions that are not linked to identified exhibits and supported by specific arguments.[347] **Beara**'s specific challenges to the admission of P01164, P01179, P01187, and the Duty Officer's Notebook cannot establish that these contemporaneous documents are so devoid of probative value that their admission into evidence constituted an abuse of discretion and a discernible error by the Trial Chamber.[348] The Appeals Chamber consequently dismisses all challenges to the admission of evidence under **Beara**'s ground of appeal 4.

121. Turning to **Beara**'s challenges to how the Trial Chamber assessed or weighed the evidence, the Appeals Chamber finds that **Beara** has failed to develop his general arguments regarding the intercepts, namely that the Trial Chamber failed to accept other reasonable interpretations of the intercepted conversations more favourable to him and erred in law by relying on the general procedures employed by intercept operators. The Appeals Chamber therefore dismisses these arguments.

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342 Beara's Appeal Brief, paras 31-32; Beara's Reply Brief, para. 19.
343 Prosecution's Response Brief (Beara), para. 35.
344 Beara's Appeal Brief, paras 33-36. See also Beara's Reply Brief, para. 20.
345 Beara's Reply Brief, para. 20.
346 Prosecution's Response Brief (Beara), paras 36-37.
347 The Appeals Chamber further observes that **Beara** has not identified, by exhibit number, the aerial images that he argues should not have been admitted into evidence.

122. Regarding **Beara**'s arguments about P01130 and that the Trial Chamber disregarded PW-124's evidence, the Appeals Chamber has carefully examined intercept P01130 and the parts of PW-124's testimony to which the Parties referred. Contrary to **Beara**'s contentions, the Trial Chamber considered PW-124's evidence that he identified **Beara** because **Beara** introduced himself as such and could be heard very clearly. The Trial Chamber also considered that PW-124's corrections to the intercept added to its reliability because PW-124 had made the alterations upon listening to the conversation again.[349] Accordingly, the Appeals Chamber finds that **Beara** has not demonstrated any error in this analysis and therefore dismisses these arguments.

123. The Appeals Chamber has also carefully examined intercept P01164 and the parts of the trial record and Trial Judgement to which the Parties referred. The Trial Chamber found in particular that the corrections made to the transcript of the intercept after PW-132 listened to the conversation multiple times "improve[d] the reliability of the identification of the participants and the content of the intercept".[350] The Appeals Chamber finds that **Beara** has failed to show any error.

124. The Appeals Chamber's scrutiny of intercept P01179 and the portions of PW-133's testimony to which **Beara** referred reveals that he misrepresents PW-133's testimony on several occasions. The Appeals Chamber finds that **Beara** has failed to show that PW-133 could not have recognised his voice and notes that the Trial Chamber found that three different operators in three different locations identified **Beara** as a participant in the conversation based on, *inter alia*, voice recognition and **Beara** introducing himself.[351] **Beara** has therefore failed to show that the Trial Chamber erred in giving weight to P01179.

125. As for the Trial Chamber's reliance on the testimony of PW-157 to authenticate P01178 and P01179, the Appeals Chamber first notes that while PW-157 testified that he could not remember **Beara**'s voice characteristics at the time of his testimony in 2007, he was able to recognise **Beara**'s voice at the time of intercepting the conversation.[352] The Appeals Chamber further considers that the difference between identifying a speaker as **Beara** and identifying him as "most probably" **Beara** could, in the context, reasonably be qualified as minor.[353] The Appeals Chamber notes that any contradiction in PW-157's testimony regarding his review of his prior testimony[354] concerns a peripheral matter unrelated to PW-157's authentication of P01178 and P01179. It does not follow

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348 See *Ntagerura et al.* Appeal Judgement, para. 273; *Rutaganda* Appeal Judgement, para. 266; *Akayesu* Appeal Judgement, para. 286.
349 Trial Judgement, para. 1233.
350 Trial Judgement, para. 1234.
351 Trial Judgement, para. 1236.
352 PW-157, T. 7222 (9 Feb 2007).
353 The Appeals Chamber notes that the Prosecution did not dispute **Beara**'s assertion as to the difference in PW-157's testimony on this topic in the *Krstić* and *Popović et al.* cases.
354 See PW-157, T. 7162, 7221 (9 Feb 2007).

that PW-157 is a generally unreliable witness or that no reasonable trier of fact could have relied on PW-157 to authenticate P01178 and P01179. The Appeals Chamber therefore finds that **Beara** has failed to show that the Trial Chamber erred in relying on the evidence of PW-157.

126. Intercept P01187 records "Cerović" as saying that "Trkulja was here with me just now and he was looking for you".[355] **Beara** directs the Appeals Chamber to a part of the testimony of Witness Trkulja denying that he ever asked to see or talk to **Beara**.[356] Even assuming that the "Trkulja" mentioned in P01187 is Witness Trkulja, the mere discrepancy between the two sources of evidence is patently insufficient to show that the Trial Chamber erred in giving weight to P01187, particularly as there was corroborating evidence.[357] Since Trkulja's evidence forms the basis of the only discernible challenge to the Trial Chamber's reliance on P01187,[358] the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred.

127. Regarding the Duty Officer's Notebook, **Beara** repeats arguments rejected by the Trial Chamber.[359] He questions the origin, timing, and integrity of certain parts of the notebook but does not show that the Trial Chamber relied, let alone erred in relying, upon those specific parts. The Appeals Chamber also notes the Trial Chamber's findings that various entries in the Duty Officer's Notebook were confirmed and explained by numerous witnesses and were consistent with documentary evidence.[360] Accordingly, **Beara** has failed to show that no reasonable trier of fact could have concluded that the Duty Officer's Notebook is accurate, authentic, and reliable.[361] Thus, the Appeals Chamber dismisses **Beara**'s arguments.

128. Finally, the Appeals Chamber considers that **Beara** has failed to show how the alteration of aerial images by Witness Ruez affects their probative value to the point that no reasonable trial chamber could have relied on them. Similarly, the Appeals Chamber finds that the argument that aerial images do not exist for every relevant calendar day or that such images lack chronological information is too vague to succeed. **Beara** neither points to specific days lacking such images or specific images lacking such information, nor does he show how the Trial Chamber's reliance on any aerial images was rendered unreasonable. As for the assertion that reliance on aerial images may be misleading and inaccurate, it is far too undeveloped for the Appeals Chamber to analyse its

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355 Ex. P01187a, "Intercept, 16 July 1995, 11:11 hours".
356 Beara's Appeal Brief, para. 30, referring to Nedeljko Trkulja, T. 15133 (10 Sept 2007).
357 Trial Judgement, para. 1286.
358 **Beara** makes two other arguments with regard to Exhibit P01187, one which is a mere assertion without any reference to the trial record, and one which concerns another exhibit. The Appeals Chamber therefore dismisses these arguments.
359 See Trial Judgement, paras 78-79, 82.
360 Trial Judgement, para. 82.
361 Trial Judgement, para. 82.

possible merits. The Appeals Chamber therefore dismisses **Beara**'s arguments with regard to the Trial Chamber's reliance on certain, unspecified, aerial images.

129. The Appeals Chamber accordingly dismisses **Beara**'s ground of appeal 4 in its entirety.

## F. Conclusion

130. The Appeals Chamber has dismissed all challenges regarding admissibility or weight of evidence covered in the present chapter.

# V. WITNESS CREDIBILITY

## A. Applicable Law

### 1. Discretionary decisions on assessment of credibility

131. The Appeals Chamber recalls that a trial chamber is best placed to assess the credibility of a witness and reliability of the evidence adduced,[362] and therefore has broad discretion in assessing the appropriate weight and credibility to be accorded to the testimony of a witness.[363] Indeed, the ICTR Appeals Chamber has previously noted that it "is loathe to disturb such credibility assessments".[364] As with other discretionary decisions, the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the trial chamber has correctly exercised its discretion in reaching that decision".[365] The party challenging a discretionary decision by the trial chamber must demonstrate that the trial chamber has committed a discernible error. The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[366] In such cases the Appeals Chamber will deem that the witness evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or that the evaluation of the evidence was "wholly erroneous", and proceed to substitute its own finding for that of the Trial Chamber.[367]

132. The Appeals Chamber is mindful that when exercising its broad discretion, a trial chamber has to consider relevant factors on a case-by-case basis, including the witness's demeanour in court; his role in the events in question; the plausibility and clarity of his testimony; whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence; any prior examples of false testimony; any motivation to lie; and the witness's responses during cross-examination.[368] The Appeals Chamber recalls that the many potential factors relevant

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362 *Šainović et al.* Appeal Judgement, paras 437, 464, 1296; *Lukić and Lukić* Appeal Judgement, para. 296. See *Đorđević* Appeal Judgement, para. 395.

363 *Đorđević* Appeal Judgement, paras 781, 797, 819; *Ndahimana* Appeal Judgement, paras 43, 93; *Lukić and Lukić* Appeal Judgement, paras 86, 235, 363, 375.

364 *Nizeyimana* Appeal Judgement, para. 56; *Hategekimana* Appeal Judgement, para. 202; Second *Muvunyi* Appeal Judgement, para. 26, citing *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 244. See *Šainović et al.* Appeal Judgement, para. 1384.

365 *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, para. 11; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007, para. 4; *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 6.

366 See *supra*, para. 74.

367 *Kupreškić et al.* Appeal Judgement, paras 30, 41, 130, 225. See also *supra*, para. 20.

368 *Nzabonimana* Appeal Judgement, para. 45; *Nchamihigo* Appeal Judgement, para. 47, referring to *Nahimana et al.* Appeal Judgement, para. 194. See *Nizeyimana* Appeal Judgement, para. 92.

to the trial chamber's assessment of a witness's credibility include corroboration,[369] the witness's close personal relationship to an accused,[370] and the witness's criminal history.[371] The application of these factors, and the positive or negative impact they may have on the witness's credibility, varies according to the specific circumstances of each case.[372] Finally, a trial chamber can reasonably accept certain parts of a witness's testimony and reject others.[373]

### 2. Reasoned opinion

133. The Appeals Chamber recalls that a trial chamber is not required to set out in detail why it accepted or rejected a particular testimony,[374] and that an accused's right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses.[375] However, a trial chamber must provide reasons for accepting testimony despite alleged or material inconsistencies when it is the principal evidence relied upon to convict an accused.[376]

### 3. Accomplice witnesses

134. The Appeals Chamber recalls that a trial chamber has the discretion to rely upon evidence of accomplice witnesses. However, when weighing the probative value of such evidence, the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[377] The Appeals Chamber also recalls that evidence of witnesses who might have motives or incentives to implicate the accused is not *per se* unreliable, especially where such a witness may be thoroughly cross-examined; therefore, reliance upon this evidence does not, as such, constitute an error of law.[378] However, a trial chamber must explain the reasons for accepting the evidence of such a

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369 *Nchamihigo* Appeal Judgement, para. 47, referring to *Simba* Appeal Judgement, para. 24.

370 *Nizeyimana* Appeal Judgement, para. 57; *Kanyarukiga* Appeal Judgement, para. 121, referring to *Bikindi* Appeal Judgement, para. 117.

371 *Nzabonimana* Appeal Judgement, para. 93, referring to *Bagosora and Nsengiyumva* Appeal Judgement, para. 264, *Kamuhanda* Appeal Judgement, para. 142.

372 *Nchamihigo* Appeal Judgement, para. 47, referring to *Simba* Appeal Judgement, para. 24.

373 *Šainović et al.* Appeal Judgement, paras 294, 336, 342, 382, 437, 564, 644; *Ndahimana* Appeal Judgement, para. 183; *Boškoski and Tarčulovski* Appeal Judgement, para. 59 and references cited therein. See *Bagosora and Nsengiyumva* Appeal Judgement, para. 253.

374 *Gatete* Appeal Judgement, para. 136; *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269. See *Lukić and Lukić* Appeal Judgement, para. 112.

375 *Kajelijeli* Appeal Judgement, para. 60.

376 *Haradinaj et al.* Appeal Judgement, paras 129, 134, 252; *Kupreškić et al.* Appeal Judgement, paras 135, 202. See First *Muvunyi* Appeal Judgement, paras 144, 147. See also *Bizimungu* Appeal Judgement, para. 64; *Kajelijeli* Appeal Judgement, para. 61.

377 *Bizimungu* Appeal Judgement, para. 63; *Lukić and Lukić* Appeal Judgement, para. 128 and references cited therein. See *Karemera and Ngirumpatse* Appeal Judgement, para. 42.

378 *Šainović et al.* Appeal Judgement, para. 1101; *Krajišnik* Appeal Judgement, para. 146.

witness.[379] Particularly relevant factors for the assessment of accomplice witnesses' credibility include:

> the extent to which discrepancies in the testimony were explained; whether the accomplice witness has made a plea agreement with the Prosecution; whether he has already been tried and, if applicable, sentenced for his own crimes or is still awaiting the completion of his trial; and whether the witness may have any other reason for holding a grudge against the accused.[380]

135. A trial chamber's discretion to rely on uncorroborated, but otherwise credible, witness testimony applies equally to the evidence of witnesses who may have motive to implicate the accused, provided that appropriate caution is exercised in the evaluation of their testimonies.[381]

#### 4. Inconsistencies

136. The Appeals Chamber recalls that it is not an error of law *per se* to accept and rely on evidence that is inconsistent with a prior statement or other evidence adduced at trial.[382] A trial chamber has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his previous statements.[383] However, a trial chamber must take into account any explanations offered for such inconsistencies when determining the probative value of the evidence.[384]

137. Similarly, a trial chamber has the discretion to evaluate any inconsistencies that may arise within or among witnesses' testimonies and to determine whether, in the light of the overall evidence, the witnesses were reliable and credible.[385] Considering that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of a trial chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[386]

### B. Introduction

138. **Popović**, **Beara**, **Nikolić**, and **Miletić** present challenges concerning the credibility of witnesses who testified in this case. In the present section, the Appeals Chamber will address the arguments that relate to alleged errors in the Trial Chamber's assessment of the overall credibility

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379 See *Lukić and Lukić* Appeal Judgement, para. 128; *Haradinaj et al.* Appeal Judgement, para. 242; *Krajišnik* Appeal Judgement, para. 146.

380 *Nchamihigo* Appeal Judgement, para. 47 (internal references omitted) and references cited therein.

381 *Šainović et al.* Appeal Judgement, para. 1101, referring to *Nchamihigo* Appeal Judgement, paras 42-48.

382 *Šainović et al.* Appeal Judgement, para. 424; *Nchamihigo* Appeal Judgement, para. 201 and references cited therein.

383 *Đorđević* Appeal Judgement, para. 422; *Rukundo* Appeal Judgement, para. 86 and references cited therein.

384 *Šainović et al.* Appeal Judgement, para. 424; *Nchamihigo* Appeal Judgement, para. 201 and references cited therein.

385 See *Karemera and Ngirumpatse* Appeal Judgement, paras 179, 467-468; *Đorđević* Appeal Judgement, paras 395, 422; *Ndahimana* Appeal Judgement, para. 93; First *Muvunyi* Appeal Judgement, para. 144.

of those witnesses. Matters that deal with the Trial Chamber's reliance on specific parts of their evidence are discussed in those sections of the Judgement to which that evidence relates.

## C. PW-168

139. [REDACTED][387] [REDACTED] he testified before the Trial Chamber as Prosecution Witness PW-168 for 18 days and his evidence was subject to cross-examination by all seven accused.[388] The Trial Chamber stated that it considered PW-168's [REDACTED] as well as his statements [REDACTED] for the purpose of assessing his credibility but did not rely on them for other purposes.[389] At trial, **Popović**, **Beara**, **Nikolić**, and **Pandurević** challenged PW-168's credibility.[390] The Trial Chamber concluded that PW-168 was an overall credible witness with the caveat that this conclusion did not mean it accepted his evidence in its entirety, and that the Trial Chamber would remain vigilant throughout the assessment of his evidence to the possibility that PW-168 erroneously reconstructed events in his mind based on a misinterpretation of documentary material.[391]

140. On appeal, **Popović**, **Beara**, and **Nikolić** allege that the Trial Chamber erred in finding PW-168's testimony credible.

### 1. Popović's appeal

141. **Popović** submits that the Trial Chamber erred in accepting as credible the evidence of PW-168 who minimised his own liability while falsely incriminating others, including **Popović**.[392] **Popović** adds that the Trial Chamber unreasonably considered that PW-168's credibility was not affected by [REDACTED] that could incriminate him with regard to the Srebrenica events.[393] The Prosecution argues that the Trial Chamber carefully assessed the evidence and overall credibility of PW-168 as well as Defence challenges and that **Popović**'s arguments should be summarily dismissed.[394]

142. The Appeals Chamber notes that **Popović** provides very few references to the trial record in support of his submissions on PW-168's overall credibility and that the ones he does provide are clearly insufficient to sustain his allegations, let alone show that the Trial Chamber erred in its

386 *Đorđević* Appeal Judgement, para. 797; *Lukić and Lukić* Appeal Judgement, paras 112, 135; *Kvočka et al.* Appeal Judgement, para. 23. *Cf. supra*, note 376.
387 Trial Judgement, para. 28, referring to [REDACTED].
388 Trial Judgement, para. 31.
389 Trial Judgement, para. 29 & fn. 38, para. 30.
390 Trial Judgement, paras 32, 34-41, 44; Beara's Final Brief, paras 187 *et seq.*
391 Trial Judgement, paras 33, 42-43, 45-47.
392 Popović's Appeal Brief, paras 215, [REDACTED]; Popović's Reply Brief, paras 113, 116; [REDACTED].
393 Popović's Appeal Brief, paras 242-243.
394 Prosecution's Response Brief (Popović), paras 135-142; Appeal Hearing, AT. 101-102, 111-112 (2 Dec 2013).

assessment of PW-168's evidence. With regard to PW-168's [REDACTED], **Popović** does not demonstrate any error in the Trial Chamber's finding that while PW-168 lacked candour in this regard it was not "sufficiently material to the facts of the case so as to raise doubts about his credibility".[395] **Popović**'s arguments are therefore dismissed.

2. Beara's appeal (Ground 5 in part)

(a) Arguments of the Parties

143. **Beara** argues that the Trial Chamber erred in law and abused its discretion in allowing or admitting, and giving undue weight to, the testimony of PW-168,[396] which "should have been carefully scrutinized" due to the fact that [REDACTED].[397] **Beara** asserts that no weight should have been accorded to the evidence of PW-168, who had lied [REDACTED].[398] **Beara** argues that PW-168: (1) attempted to influence other witnesses, including [REDACTED] to corroborate certain events; (2) "acknowledged that he [REDACTED] and that he previously lied about his involvement [REDACTED]"; (3) offered to say whatever needed in relation to Exhibit [REDACTED]; and (4) had extensive access to "documents and statements" [REDACTED] and constructed his evidence accordingly.[399]

144. In response, the Prosecution submits that the Trial Chamber carefully and properly assessed PW-168's credibility and that **Beara**'s arguments should be dismissed as he simply repeats arguments made at trial without showing that the Trial Chamber erred.[400]

(b) Analysis

145. **Beara**'s assertions that PW-168 lied [REDACTED] and continued to minimise his role in the crimes [REDACTED] are without any supporting references and therefore fail. The Trial Chamber expressly considered that PW-168 had lied [REDACTED]. However, the Trial Chamber found that his previous motivations to lie "no longer existed when he provided his testimony", and his prior lies therefore did "not raise issues as to the credibility of his testimony".[401] **Beara** has failed to show that the Trial Chamber abused its discretion in making these findings.

146. Concerning PW-168's alleged pressure on witnesses, **Beara** directs the Appeals Chamber to a section of the transcripts wherein the Prosecution confronted PW-168 with the allegation that

395 Trial Judgement, para. 37.
396 Beara's Appeal Brief, intro before para. 37, paras 48-49, 51. See also Beara's Reply Brief, para. 25.
397 Beara's Appeal Brief, para. 48.
398 Beara's Appeal Brief, paras 48-49; Beara's Reply Brief, para. 25.
399 Beara's Appeal Brief, para. 49 (internal references omitted). See also Beara's Reply Brief, para. 25.
400 Prosecution's Response Brief (Beara), paras 52-59.
401 Trial Judgement, para. 38.

[REDACTED] had felt pressured by him, and in which PW-168 testified that he "never put any pressure on anybody".[402] **Beara** has thus failed to substantiate this allegation.

147. **Beara** refers to a part of PW-168's testimony in which he acknowledges [REDACTED]. However, **Beara** has failed to demonstrate that, as a consequence, no reasonable trial chamber could have found PW-168's lack of candour insufficiently material to the facts of the case so as to raise doubts about his credibility.[403]

148. Regarding Exhibit [REDACTED], and contrary to **Beara**'s allegation, PW-168 merely explained that what he had said during the proofing session reflected that he had no further arguments to convince the Prosecution regarding the proper interpretation of the document.[404]

149. With respect to PW-168's access to "documents and statements" [REDACTED], the Trial Chamber concluded that PW-168 did not deliberately construct false evidence on the basis of that material and that the possibility of some occasional erroneous reconstruction of the events did not detract from his overall credibility.[405] **Beara** simply disagrees with this conclusion and has failed to show that the Trial Chamber erred.

150. For the foregoing reasons, the Appeals Chamber dismisses **Beara**'s arguments under his ground of appeal 5 with regard to the overall credibility of PW-168. The Appeals Chamber further dismisses **Beara**'s contention that the Trial Chamber should not have allowed or admitted PW-168's testimony, as **Beara** advances no arguments relevant to the admission of evidence or calling of witnesses.

### 3. Nikolić's appeal

#### (a) Arguments of the Parties

##### (i) Nikolić's Ground 10

151. **Nikolić** submits that the Trial Chamber erred in law by failing to impose sanctions for violations committed by the Prosecution [REDACTED].[406] **Nikolić** claims that because the Prosecution did not provide records or notes [REDACTED], he could not fully expose PW-168's untruths.[407]

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402 Beara's Appeal Brief, para. 49, referring to PW-168, T. 15939 (closed session) (27 Sept 2007).
403 Trial Judgement, para. 37.
404 PW-168, T. 15946-15947 (closed session) (27 Sept 2007).
405 Trial Judgement, paras 44-47.
406 Nikolić's Appeal Brief, para. 158.
407 Nikolić's Appeal Brief, para. 158; Nikolić's Reply Brief, para. 62.

152. **Nikolić** argues that the Trial Chamber erred in misapplying Rule[REDACTED] 66 of the Rules [REDACTED].[408] [REDACTED] **Nikolić** asserts that the application of Rule 66(A)(ii) of the Rules [REDACTED] requiring that a recording be made [REDACTED].[409] [REDACTED][410] [REDACTED][411]

153. **Nikolić** contends that the Trial Chamber erred in holding [REDACTED] that "recordings and notes [REDACTED] are not subject to disclosure by virtue of Rule 70(A)" of the Rules.[412] [REDACTED] fall outside the scope of Rule 70(A) of the Rules which deals with the investigatory or preparatory stages of the case.[413] Moreover, according to **Nikolić**, in light of the Prosecution's failure to record [REDACTED], it was obliged to provide notes related thereto as the sole means to alleviate the prejudice caused to **Nikolić**'s defence.[414] **Nikolić** contends that while the Prosecution asserted that the notes, later destroyed, were incorporated into [REDACTED] the latter does not fully reflect [REDACTED] and it is impossible to verify that the former fully incorporates the missing aspects of [REDACTED].[415] Lastly, **Nikolić** argues that the Trial Chamber erred in failing to grant certification to appeal [REDACTED].[416]

154. **Nikolić** argues that these alleged violations and errors compromised his "right to full answer and defence" and invalidate the Trial Judgement because he could not effectively cross-examine PW-168 and ultimately establish that PW-168 falsely implicated him.[417] He further contends that the Trial Chamber compounded its error by dismissing his request that it call as a witness an interpreter [REDACTED].[418] In conjunction with his ground of appeal 14, **Nikolić** seeks the reversal of the Trial Chamber's findings that are based on PW-168's testimony and, consequently, the reassessment of his criminal responsibility and sentence.[419]

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408 Nikolić's Appeal Brief, para. 159. See also Nikolić's Reply Brief, para. 60.
409 Nikolić's Appeal Brief, para. 160.
410 Nikolić's Appeal Brief, para. 161.
411 Nikolić's Appeal Brief, para. 162.
412 Nikolić's Appeal Brief, para. 163, citing [REDACTED].
413 Nikolić's Appeal Brief, para. 164.
414 Nikolić's Appeal Brief, para. 165.
415 Nikolić's Appeal Brief, para. 166.
416 Nikolić's Appeal Brief, para. 167; Nikolić's Reply Brief, para. 61.
417 Nikolić's Appeal Brief, paras 168-169.
418 Nikolić's Appeal Brief, para. 168. **Nikolić** further submits that the interpreter should be called to testify on appeal. Nikolić's Reply Brief, para. 62.
419 Nikolić's Appeal Brief, para. 169.

(ii) Nikolić's Ground 14 in part

155. **Nikolić** submits that the Trial Chamber erred by failing to: (1) consider several matters going directly to the credibility of PW-168; (2) correctly interpret parts of PW-168's evidence; and (3) draw the appropriate inferences on the basis of PW-168's testimony.[420]

156. Specifically, **Nikolić** argues that the Trial Chamber erred in finding that PW-168's [REDACTED] strengthened his overall credibility.[421] In this regard, the Trial Chamber failed to consider, according to **Nikolić**, that: [REDACTED].[422]

157. **Nikolić** further submits that the Trial Chamber erred in its assessment of PW-168's demeanour,[423] which was "of virtually no assistance in evaluating his credibility".[424] In particular, **Nikolić** claims that the Trial Chamber failed to consider that: (1) prior to his testimony [REDACTED], PW-168 had [REDACTED];[425] (2) his testimony was thoroughly prepared and rehearsed during an interview with the Prosecution;[426] (3) he "was bound to strictly maintain the narrative [REDACTED]";[427] and (4) he testified in closed session, knowing that his testimony would remain hidden from the public.[428]

158. **Nikolić** also argues that the Trial Chamber erroneously failed to consider PW-168's actions in connection with [REDACTED] that severely affect his credibility.[429] Specifically, **Nikolić** contends that the Trial Chamber failed to consider that PW-168 admitted his [REDACTED] almost four years after [REDACTED], when confronted with the relevant evidence, and furthermore lied under oath about the manner in which he [REDACTED].[430] **Nikolić** further argues that PW-168 tried to shape the evidence of [REDACTED], used the information they gave him to concoct his story, and lied under oath about what he was told.[431]

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420 Nikolić's Appeal Brief, paras 187-188, 215; Nikolić's Reply Brief, paras 70, 78-79. See also Appeal Hearing, AT. 269-274 (private session) (3 Dec 2013).
421 Nikolić's Appeal Brief, para. 189.
422 Nikolić's Appeal Brief, paras 190-192; Appeal Hearing, AT. 270 (private session) (3 Dec 2013); AT. 335-336 (private session) (4 Dec 2013).
423 Nikolić's Appeal Brief, paras 193-195; Nikolić's Reply Brief, para. 77; Appeal Hearing, AT. 272-274 (private session) (3 Dec 2013).
424 Nikolić's Appeal Brief, para. 194.
425 Nikolić's Appeal Brief, para. 193.
426 Nikolić's Appeal Brief, para. 193; Nikolić's Reply Brief, para. 77.
427 Nikolić's Appeal Brief, para. 194; Appeal Hearing, AT. 269-270 (private session) (3 Dec 2013).
428 Nikolić's Appeal Brief, para. 194.
429 Nikolić's Appeal Brief, paras 196-199.
430 Nikolić's Appeal Brief, para. 197; Nikolić's Reply Brief, para. 72.
431 Nikolić's Appeal Brief, para. 199; Nikolić's Reply Brief, para. 73.

159. **Nikolić** claims that the Trial Chamber failed to consider that the Prosecution pressured PW-168 [REDACTED].[432] **Nikolić** further argues that the Trial Chamber erred, considering all the relevant evidence, in failing to establish that PW-168 lied about his presence at [REDACTED].[433] **Nikolić** also contends that the Trial Chamber failed to consider that PW-168 provided false evidence incriminating others, specifically that he testified that **Pandurević** was at the Zvornik Brigade Command on 12 July 1995 and incriminated **Popović** and **Pandurević** with respect to the fuel provided by the Main Staff for the reburial operation.[434] Furthermore, **Nikolić** submits that the Trial Chamber failed to consider the impact on PW-168's credibility of his criminal activities and [REDACTED].[435] Finally, **Nikolić** claims that the Trial Chamber failed to consider that when PW-168 provided incriminating evidence, often: (1) [REDACTED]; (2) he could not remember who had been with him; (3) he claimed to have been with someone whom he knew would not testify; and/or (4) those who did testify contradicted him on material aspects of his evidence.[436]

(iii) The Prosecution's response

160. The Prosecution responds that **Nikolić**'s challenges regarding the overall credibility of PW-168 should be dismissed as he fails to show any error in the Trial Chamber's careful assessment or any impact on the verdict.[437] The Prosecution contends that **Nikolić** challenges PW-168's testimony on some peripheral or non-material matters,[438] while the core of PW-168's evidence regarding **Nikolić**'s involvement in the crimes is consistent with other witness testimony and corroborated by other evidence.[439] It further submits that PW-168's demeanour was but one of the factors the Trial Chamber took into account with respect to his credibility.[440] The Prosecution adds that **Nikolić**'s argument regarding the Trial Chamber's refusal to call the interpreter as a witness should be summarily dismissed as vague and unsubstantiated and because **Nikolić** withdrew his corresponding ground of appeal.[441] The Prosecution further argues that **Nikolić** fails to substantiate or support his arguments concerning the alleged pressure exerted on PW-168 [REDACTED].[442] It contends that the Trial Chamber reasonably found that [REDACTED] was a

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[432] Nikolić's Appeal Brief, paras 200-201; Nikolić's Reply Brief, para. 77. In this regard, **Nikolić** reiterates his submission that the Trial Chamber erred in refusing to call as a witness an interpreter [REDACTED]. Nikolić's Appeal Brief, para. 202. See *supra*, para. 154.

[433] Nikolić's Appeal Brief, paras 203-206; Nikolić's Reply Brief, para. 71.

[434] Nikolić's Appeal Brief, paras 207-209; Nikolić's Reply Brief, paras 72, 75-76.

[435] Nikolić's Appeal Brief, paras 210-213; Nikolić's Reply Brief, paras 71, 73-75; Appeal Hearing, AT. 336 (private session) (4 Dec 2013).

[436] Nikolić's Appeal Brief, para. 214; Appeal Hearing, AT. 271 (private session) (3 Dec 2013).

[437] Prosecution's Response Brief (Nikolić), paras 182-184, 187-188, 193-200, 202, 207, 216, 221. See also Prosecution's Response Brief (Nikolić), paras 174-181.

[438] Prosecution's Response Brief (Nikolić), paras 187-192.

[439] Prosecution's Response Brief (Nikolić), paras 176, 182, 185-187; Appeal Hearing, AT. 330-331 (4 Dec 2013).

[440] Prosecution's Response Brief (Nikolić), paras 197-198.

[441] Prosecution's Response Brief (Nikolić), para. 201.

[442] Prosecution's Response Brief (Nikolić), para. 203.

factor in favour of PW-168's credibility and that **Nikolić** fails to show otherwise.[443] Finally, the Prosecution argues that the Trial Chamber reasonably found that the evidence and arguments regarding PW-168's acts and conduct [REDACTED] were either speculative or concerned non-material issues.[444]

(b) Analysis

(i) Nikolić's Ground 10

161. [REDACTED][445] The Appeals Chamber dismisses **Nikolić**'s unsubstantiated arguments to the contrary.

162. [REDACTED]

163. [REDACTED][446] [REDACTED][447] [REDACTED][448] [REDACTED]. Consequently, the Appeals Chamber dismisses **Nikolić**'s arguments with regard to recording [REDACTED]. The Appeals Chamber therefore dismisses **Nikolić**'s arguments with regard to recording [REDACTED] and **Nikolić**'s argument concerning [REDACTED] is therefore moot. Finally, the Appeals Chamber dismisses as misconceived **Nikolić**'s argument with regard to Rule 66(A) of the Rules, since this rule regulates the disclosure, not the taking, of statements. The Appeals Chamber concludes that **Nikolić** has failed to show any error in the Trial Chamber's holdings [REDACTED].

164. The Trial Chamber further held that there were no violations of disclosure obligations under Rules 66(A)(ii) and 68 of the Rules.[449] Pursuant to Rule 66(A)(ii) of the Rules, the Prosecutor has a duty to, *inter alia*, make available to the Defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial.[450] The Appeals Chamber has noted that "[t]he usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime".[451] It follows from the Appeals Chamber's [REDACTED], that notes taken by the Prosecution [REDACTED] do not qualify as witness statements within the meaning of Rule 66(A)(ii) of the Rules. Rather, they qualify as internal documents prepared by the Prosecution in the sense of Rule

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443 Prosecution's Response Brief (Nikolić), paras 204-207. See also Prosecution's Response Brief (Nikolić), paras 216, 218-219.
444 Prosecution's Response Brief (Nikolić), paras 216, 218-221.
445 [REDACTED]
446 [REDACTED]
447 [REDACTED]
448 [REDACTED]
449 [REDACTED]
450 [REDACTED]
451 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.

70(A) of the Rules.[452] Consequently, the Appeals Chamber dismisses **Nikolić**'s disclosure-related arguments with regard to [REDACTED]. Having done so, his argument regarding certification of interlocutory appeal is moot. As for **Nikolić**'s arguments regarding the interpreter, the Appeals Chamber dismisses them on the grounds that **Nikolić** merely "invit[ed] the Trial Chamber to consider exercising its discretionary power pursuant to Rule 98 of the Rules, to call [the interpreter] as a witness" and added that it "should not be seen as a formal application requesting the Trial Chamber to call him".[453]

165. In conclusion, the Appeals Chamber finds that **Nikolić** has failed to show an error of law under his ground of appeal 10, which is consequently dismissed.

(ii) Nikolić's Ground 14 in part

166. The Trial Chamber found that PW-168's [REDACTED] prior to his testimony [REDACTED], weighed in favour of his credibility and emphasised that [REDACTED] reduced the likelihood that he would give false evidence [REDACTED].[454] **Nikolić** focuses on PW-168's incentives to minimise his own criminal involvement [REDACTED], rather than on whether those incentives remained [REDACTED].[455] As such, he has failed to show that the Trial Chamber erred in its consideration of [REDACTED].

167. The particular factors that **Nikolić** claims the Trial Chamber failed to consider with regard to PW-168's demeanour would not necessarily, even if they were all established, render his demeanour "of virtually no assistance in evaluating his credibility".[456] In the present case, the Trial Chamber duly considered PW-168's demeanour and appropriately placed its assessment in the context of other relevant considerations.[457] Accordingly, **Nikolić** has failed to show that the Trial Chamber abused its discretion in considering PW-168's demeanour as favourable to his overall credibility.[458] Thus, the Appeals Chamber dismisses **Nikolić**'s arguments with regard to the Trial Chamber's assessment of PW-168's demeanour.[459]

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452 [REDACTED]

453 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Motion on Behalf of Drago Nikolić Inviting the Trial Chamber to Exercise Its Discretionary Power Pursuant to Rule 98 to Call a Witness, 11 November 2008 (confidential), para. 53.

454 Trial Judgement, paras 28-29, 1352. See *supra*, para. 134.

455 See *supra*, para. 156.

456 Nikolić's Appeal Brief, para. 194.

457 Trial Judgement, para. 31. See Trial Judgement, paras 28-30, 32-47. See also *supra*, para. 134.

458 See Second *Muvunyi* Appeal Judgement, para. 26. See also *Lukić and Lukić* Appeal Judgement, para. 296; *Limaj et al.* Appeal Judgement, para. 88; *Stakić* Appeal Judgement, para. 206; *Kordić and Čerkez* Appeal Judgement, fn. 12; *Kupreškić et al.* Appeal Judgement, para. 32.

459 See *supra*, para. 157.

168. Regarding PW-168's [REDACTED], **Nikolić** has failed to demonstrate any error in the Trial Chamber's finding.[460] The Appeals Chamber further rejects **Nikolić**'s argument that PW-168 tried to shape the evidence of [REDACTED], considering that **Nikolić** points to evidence indicating that PW-168 contacted several persons during [REDACTED],[461] while PW-168 testified before the Trial Chamber [REDACTED].[462] Finally, in support of the allegation that PW-168 concocted his story and lied under oath, **Nikolić** provides the evidence of only one witness, [REDACTED],[463] which the Trial Chamber weighed against other evidence and found not to be reliable.[464] In sum, the Appeals Chamber finds that **Nikolić** has failed to demonstrate, based on this evidence, any error in the Trial Chamber's assessment of PW-168's credibility. The Appeals Chamber therefore dismisses **Nikolić**'s arguments with regard to PW-168's actions in connection with [REDACTED].[465]

169. **Nikolić**'s unsubstantiated allegations concerning pressure from the Prosecution [REDACTED] fail to show any error in the Trial Chamber's finding that there was "no evidence of any such pressure having been applied".[466] As for the question of PW-168's presence at [REDACTED], the Trial Chamber noted contradictory evidence and found that it did not affect his overall credibility.[467] **Nikolić** points to evidence that indicates the possibility that PW-168 was present,[468] but does not demonstrate that the Trial Chamber erred by not establishing that PW-168 lied in this regard.

170. The Appeals Chamber is further not convinced by the examples and references to the trial record that **Nikolić** offers in support of his allegation that PW-168 provided false evidence incriminating others. First, **Nikolić** has failed to establish that PW-168 falsely testified that **Pandurević** was at the Zvornik Brigade Command on 12 July 1995. The Trial Chamber found, in light of conflicting evidence and given the burden of proof, that the evidence was insufficient to establish that **Pandurević** went to the Zvornik Brigade Headquarters ("Standard Barracks") and met with Obrenović on 12 July 1995.[469] The Trial Chamber thus gave the Defence the benefit of the doubt. Second, **Nikolić** provides no convincing support for his assertion that the cross-examination

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460 Trial Judgement, para. 37.
461 See Nikolić's Appeal Brief, para. 199 & fns 481-490.
462 Trial Judgement, para. 28. See also Trial Judgement, para. 30.
463 See Nikolić's Appeal Brief, para. 199 & fns 491-492, referring to [REDACTED].
464 [REDACTED]
465 See *supra*, para. 158.
466 Trial Judgement, para. 40. Nikolić's Appeal Brief, para. 201, refers to Ex. 7D00289 (confidential), pp. 2-6, which does not support **Nikolić**'s allegation. See also Ex. P02911 (confidential), paras 19, 21.
467 Trial Judgement, para. 34.
468 See Nikolić's Appeal Brief, para. 203 and references cited therein. **Nikolić** refers to, *inter alia*, [REDACTED]'s evidence. The Appeals Chamber notes the Trial Chamber's finding "that while [REDACTED] places [REDACTED] at [REDACTED], there were significant issues as to the consistency of his evidence regarding the relevant dates on which events occurred". Trial Judgement, fn. 50.
469 Trial Judgement, para. 1852.

of PW-168 lead to the "sole conclusion"[470] that he falsely incriminated **Popović** and **Pandurević** with respect to the fuel provided by the Main Staff for the reburial operation. **Nikolić** has also failed to demonstrate how PW-168's alleged criminal behaviour, even if established, would necessarily affect his credibility as a witness in the present case.[471] As for PW-168's alleged [REDACTED], the Trial Chamber considered these allegations[472] and **Nikolić** has failed to show that it committed an error in this regard.[473] Finally, as for PW-168's evidence that was uncorroborated or contradicted by other witnesses, the Appeals Chamber recalls that it is within the Trial Chamber's discretion to rely on such evidence and finds that **Nikolić** has failed to demonstrate that the Trial Chamber erred in its approach.[474]

171. Considering the above, the Appeals Chamber finds that **Nikolić** has failed to show that the Trial Chamber committed any error, and dismisses **Nikolić**'s ground of appeal 14 in relevant part.

#### 4. Conclusion

172. In light of the foregoing, the Appeals Chamber finds that none of the appellants succeeded in challenging the Trial Chamber's finding regarding PW-168's overall credibility.

### D. Momir Nikolić

173. Noting certain concerns about the credibility of Chamber Witness Momir Nikolić, the Trial Chamber stated that it would adopt a very cautious and careful approach when considering his evidence.[475] The Trial Chamber also found "that his evidence ha[d] probative value and merit[ed] consideration where relevant"[476] and decided to consider his credibility, on issues of significance, on each point individually, taking into account factors such as "the specific context and nature of the evidence and whether there [was] any corroboration".[477] On appeal, **Popović**, **Beara**, and **Nikolić** allege that the Trial Chamber erred in its assessment of M. Nikolić's credibility.

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470 Nikolić's Appeal Brief, para. 209.
471 See Trial Judgement, para. 36.
472 Trial Judgement, paras 41, 1352-1353.
473 In this regard, **Nikolić** argues that the Trial Chamber failed to recognise that PW-168 implicated him without any basis in the crimes committed against the Milići Prisoners. See Nikolić's Appeal Brief, para. 213; Nikolić's Reply Brief, paras 74-75. **Nikolić** has failed to establish this allegation. In any event, the Trial Chamber found that the evidence did not allow for a conclusion beyond reasonable doubt that **Nikolić** was involved in their murder. See Trial Judgement, para. 1380.
474 See *supra*, paras 132, 135.
475 Trial Judgement, paras 48-51. See also Trial Judgement, para. 53.
476 Trial Judgement, para. 53.
477 Trial Judgement, para. 53. See also Trial Judgement, para. 52.

1. Popović's appeal

174. **Popović** argues that the Trial Chamber unreasonably found that M. Nikolić's self-incrimination weighed in favour of his credibility.[478] To the contrary, **Popović** argues that M. Nikolić had incentives to lie to secure a plea agreement and falsely incriminated himself and **Popović**.[479] In addition, **Popović** submits that his fair trial rights were compromised because, first, the material regarding the plea negotiations with M. Nikolić, revealing that he had invented his conversation with **Popović**, was not released to him and, second, the Trial Chamber's "last minute decision" to call M. Nikolić as a witness at the very end of the trial left **Popović** with no time to prepare his case challenging M. Nikolić.[480] Furthermore, **Popović** argues that the Trial Chamber was beguiled by M. Nikolić's demeanour in court, having found that he had been untruthful on certain points yet failing to see that his demeanour was generally the same throughout his testimony.[481] According to **Popović**, M. Nikolić's demeanour was not indicative of reliability but rather of his extensive experience as a witness in several cases.[482] Finally, **Popović** argues that the Trial Chamber accepted without corroboration only M. Nikolić's most incriminating evidence, thereby deviating from the standard it had set out for assessing his evidence.[483]

175. The Prosecution responds that the Trial Chamber's assessment of M. Nikolić's credibility was reasonable and that it duly considered **Popović**'s arguments regarding his candour.[484] The Prosecution submits that on 15 July 2005, it disclosed to **Popović** the material related to M. Nikolić's plea-related interviews and information reports memorialising those interviews.[485] The Prosecution argues that **Popović** had adequate time to prepare for M. Nikolić's testimony and to rebut his evidence after he testified.[486] It further argues that **Popović** never asked at trial for additional time to rebut M. Nikolić's evidence and has waived his right to do so now.[487] As for M. Nikolić's demeanour, the Prosecution argues that it was only one of several factors taken into consideration by the Trial Chamber and that **Popović**'s arguments in this regard should be summarily dismissed as being merely his own assertions and interpretation of the evidence.[488]

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478 Popović's Appeal Brief, paras 89, 92, 118 (referring to Trial Judgement, paras 49, 52, 284, 287); Appeal Hearing, AT. 156 (2 Dec 2013).
479 Popović's Appeal Brief, paras 89-93, 95, 100-107, 109, 115-117; Appeal Hearing, AT. 72-73, 156 (2 Dec 2013).
480 Popović's Appeal Brief, paras 108-114.
481 Popović's Appeal Brief, paras 119-121; Appeal Hearing, AT. 73 (2 Dec 2013).
482 Popović's Appeal Brief, para. 120.
483 Appeal Hearing, AT. 156 (2 Dec 2013), referring to Trial Judgement, para. 53.
484 Prosecution's Response Brief (Popović), paras 72-73; Appeal Hearing, AT. 106 (2 Dec 2013). See also Appeal Hearing, AT. 101-102, 105, 107-108, 111 (2 Dec 2013).
485 Prosecution's Response Brief (Popović), paras 76-78.
486 Prosecution's Response Brief (Popović), paras 76, 79-82.
487 Prosecution's Response Brief (Popović), para. 82.
488 Prosecution's Response Brief (Popović), paras 74-75; Appeal Hearing, AT. 106 (2 Dec 2013).

176. Regarding the plea negotiations material, **Popović** has failed to rebut or even address in his reply brief the Prosecution's contentions that it disclosed the material to him, that he had more than one month to prepare for M. Nikolić's testimony,[489] and that he did not ask for additional time to rebut M. Nikolić's testimony. The Appeals Chamber recalls that if a party raises no objection to a particular issue before a trial chamber when it could have reasonably done so, in the absence of special circumstances, the Appeals Chamber will find that the party has waived his right to raise the issue on appeal.[490] Thus, the Appeals Chamber finds no merit in **Popović**'s arguments that the material regarding the plea negotiations with M. Nikolić was not disclosed to him and that he had insufficient time to prepare for M. Nikolić's testimony. Accordingly, the Appeals Chamber finds that **Popović** has failed to establish that his fair trial rights were compromised.

177. **Popović**'s arguments regarding M. Nikolić's untruthfulness do not establish any error in the Trial Chamber's discretionary finding that the self-incriminating nature of certain parts of M. Nikolić's evidence added to the credibility of those parts.[491] The Appeals Chamber further notes that the Trial Chamber considered a number of factors relevant to M. Nikolić's credibility as a witness.[492] The Appeals Chamber finds no indication that the Trial Chamber gave excessive weight to M. Nikolić's demeanour as a witness, whether in favour of or against his credibility.[493] In any event, **Popović**'s assertions as to the reasons behind M. Nikolić's demeanour in court are not supported by references to the trial record and are therefore dismissed. For the same reason, the Appeals Chamber dismisses the submission that the Trial Chamber accepted without corroboration only M. Nikolić's most incriminating evidence.

178. For the foregoing reasons, the Appeals Chamber dismisses **Popović**'s arguments with regard to the overall credibility of M. Nikolić.

### 2. Beara's appeal (Ground 5 in part)

179. **Beara** argues that the Trial Chamber erred in allowing or admitting and giving undue weight to the testimony of M. Nikolić,[494] which "should have been carefully scrutinized" due to the fact that M. Nikolić was accused of the same events.[495] **Beara** argues that minimal or no weight should have been accorded to M. Nikolić's evidence because of his history of false evidence, in

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489 Prosecution's Response Brief (Popović), para. 79 & fn. 322; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Order to Summon Momir Nikolić, 10 March 2009; Momir Nikolić, T. 32894-32895 (21 Apr 2009).

490 *Šainović et al.* Appeal Judgement, paras 125, 134, 223, 533; *Blaškić* Appeal Judgement, para. 222.

491 Trial Judgement, para. 52. See *supra*, para. 132.

492 Trial Judgement, paras 48-53.

493 See Trial Judgement, para. 53.

494 Beara's Appeal Brief, intro before para. 37, paras 48, 50-51, 54; Beara's Reply Brief, para. 26. See *infra*, paras 188, 190.

495 Beara's Appeal Brief, para. 48.

particular his lies during his plea negotiations with the Prosecution.[496] According to **Beara**, the Trial Chamber ignored M. Nikolić's evidence acknowledging his lies in this regard.[497]

180. The Prosecution responds that the Trial Chamber adopted a cautious and reasonable approach to M. Nikolić's evidence, and that **Beara** repeats trial arguments without showing an error.[498]

181. The Appeals Chamber notes that the Trial Chamber took into consideration M. Nikolić's guilty plea and sentence for his involvement in the Srebrenica events as well as his provision of false information to the Prosecution during his plea negotiations.[499] The Trial Judgement further indicates that the Trial Chamber carefully scrutinised M. Nikolić's evidence[500] and **Beara** has failed to establish otherwise. The references to the trial record **Beara** provides in support of his allegations of M. Nikolić's prior untruths are insufficient to show that the Trial Chamber abused its discretion in evaluating the credibility and reliability of M. Nikolić's evidence. Consequently, the Appeals Chamber dismisses **Beara**'s arguments with regard to the overall credibility of M. Nikolić. The Appeals Chamber further dismisses **Beara**'s contention that the Trial Chamber should not have allowed or admitted M. Nikolić's testimony, as **Beara** advances no relevant arguments.

### 3. Nikolić's appeal (Ground 20 in part)

182. **Nikolić** submits that the Trial Chamber's assessment of M. Nikolić's credibility was wholly erroneous, occasioning a miscarriage of justice and invalidating the judgement.[501] Specifically, **Nikolić** argues that the Trial Chamber erred in finding that the evidence of M. Nikolić on certain points was more reliable because it was highly self-incriminatory.[502] According to **Nikolić**, the Trial Chamber failed to consider that providing self-incriminating information is inherent to the Tribunal's plea agreement procedure, shields M. Nikolić from prosecution, and does not add to his credibility as a witness in a separate trial.[503] The Trial Chamber's error is compounded, according to **Nikolić**, by not attaching sufficient weight to M. Nikolić's repeated refusal to provide truthful information during his plea negotiations and while testifying in various cases before the Tribunal including the present case.[504] **Nikolić** further argues that the Trial Chamber erred in not considering several matters going directly to M. Nikolić's credibility in relation to the plausibility and clarity of

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496 Beara's Appeal Brief, paras 48, 50, 54; Beara's Reply Brief, para. 26; Appeal Hearing, AT. 253 (3 Dec 2013).
497 Beara's Appeal Brief, para. 50.
498 Prosecution's Response Brief (Beara), paras 60-64.
499 Trial Judgement, paras 48-49.
500 Trial Judgement, paras 48-53.
501 Nikolić's Appeal Brief, paras 340, 352; Nikolić's Reply Brief, para. 150.
502 Nikolić's Appeal Brief, para. 341.
503 Nikolić's Appeal Brief, paras 341-342; Nikolić's Reply Brief, para. 151.
504 Nikolić's Appeal Brief, paras 341, 343; Nikolić's Reply Brief, para. 151; Appeal Hearing, AT. 336-337 (4 Dec 2013).

his testimony concerning his visit to **Nikolić** at the forward command post ("IKM") of the Zvornik Brigade ("Kitovnice IKM") on 13 July 1995 as well as in not considering the contradictions or inconsistencies between M. Nikolić's evidence and other evidence on the topic.[505] Finally, **Nikolić** argues that the Trial Chamber erred in finding that the core of the evidence of M. Nikolić and that of PW-168 was substantially similar, having failed to consider numerous glaring inconsistencies.[506]

183. The Prosecution responds that the Trial Chamber adopted a cautious and reasonable approach to M. Nikolić's evidence, that **Nikolić** repeats arguments made at trial without demonstrating any error by the Trial Chamber, and that he fails to show how the Trial Chamber's alleged error has any effect on his convictions or amounts to a miscarriage of justice.[507] Regarding the plea agreement, the Prosecution submits that M. Nikolić did not receive immunity from prosecution, was subject to sanctions for false testimony, and had not yet been sentenced when he first described his self-incriminating conversation with **Nikolić** on 13 July 1995.[508] The Prosecution argues that the alleged inconsistencies or contradictions in the evidence have no effect on M. Nikolić's credibility as assessed by the Trial Chamber because they are minor, non-existent, or come from a witness whom the Trial Chamber reasonably found lacked credibility.[509]

184. Upon reviewing the evidence, the Trial Chamber found that M. Nikolić's evidence was, in some parts, as incriminatory of himself as it was of others, which added to the credibility of those parts of his evidence.[510] The fact that self-incrimination is inherent in the Tribunal's plea agreement procedure does not show any error in this finding. **Nikolić**'s submissions concerning M. Nikolić's lies and the Prosecution's and previous trial chambers' negative assessments of his credibility do not suffice to show that the Trial Chamber committed a discernible error in its assessment of M. Nikolić's credibility. In particular, the Appeals Chamber observes that the Trial Chamber was not bound by the views of the Prosecution or of other trial chambers.[511] It would not be an error *per se* for the Trial Chamber to accept and rely on any evidence of M. Nikolić that deviated from other

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505 Nikolić's Appeal Brief, paras 344-345; Nikolić's Reply Brief, paras 152-153. **Nikolić** specifically contends that the Trial Chamber failed to properly consider relevant evidence by Witnesses Janjić, Jeremić, Kostić, and Sreten Milošević as well as the Duty Officer's Notebook (Ex. P00377) and that the Trial Chamber also failed to consider M. Nikolić's testimonial contradictions. Nikolić's Appeal Brief, paras 345-348; Nikolić's Reply Brief, paras 154-155.

506 Nikolić's Appeal Brief, paras 349-352; Nikolić's Reply Brief, paras 156-158. See also Nikolić's Reply Brief, para. 150.

507 Prosecution's Response Brief (Nikolić), paras 290-295, 299-304, 309-310, 313, 315-317. See also Appeal Hearing, AT. 330-331 (4 Dec 2013).

508 Prosecution's Response Brief (Nikolić), paras 296-298.

509 Prosecution's Response Brief (Nikolić), paras 304-316.

510 Trial Judgement, paras 52, 1269.

511 See, *e.g.*, *Bizimungu* Appeal Judgement, para. 210; *Đorđević* Appeal Judgement, paras 257, 701; *Krnojelac* Appeal Judgement, para. 12. See also *infra*, para. 1677.

evidence adduced at trial.[512] In these circumstances, the Appeals Chamber considers that it was not unreasonable for the Trial Chamber to rely on M. Nikolić's testimony.[513]

185. Concerning **Nikolić**'s arguments on the plausibility and clarity of M. Nikolić's testimony regarding his visiting **Nikolić** at the Kitovnice IKM on 13 July 1995, the Appeals Chamber considers that **Nikolić** overstates the relevance of the references to the trial record he provides. The Appeals Chamber also recalls that it is within a trial chamber's discretion to evaluate and rely on evidence containing inconsistencies.[514] Accordingly, **Nikolić** has failed to demonstrate an error in the Trial Chamber's nuanced assessment of M. Nikolić's overall credibility. Regarding the alleged inconsistencies between the testimony of M. Nikolić and that of PW-168, the Appeals Chamber considers that **Nikolić**'s selective reliance on parts of the evidence and questionable interpretations thereof fail to show that the Trial Chamber erred in finding that the core of the evidence of M. Nikolić and PW-168 was substantially similar.[515]

186. Considering the above, the Appeals Chamber finds that **Nikolić** has failed to show that the Trial Chamber committed any error with regard to M. Nikolić's overall credibility. The Appeals Chamber therefore dismisses **Nikolić**'s ground of appeal 20 in relevant part.

#### 4. Conclusion

187. In light of the foregoing, the Appeals Chamber finds that none of the appellants succeeded in challenging the Trial Chamber's findings regarding M. Nikolić's overall credibility.

### E. Miroslav Deronjić, PW-161, PW-162/Srbislav Davidović, Ljubisav Simić, Zlatan Čelanović, Božo Momčilović, and Ljubomir Borovčanin (Beara's Ground 5 in part and Ground 6 in part)

188. **Beara** argues that the Trial Chamber erred in law and abused its discretion by giving any weight to the purportedly biased and prejudiced testimonies of Witnesses PW-161, PW-162/Davidović, Ljubisav Simić, Božo Momčilović, Zlatan Čelanović, Deronjić, M. Nikolić, and Borovčanin.[516] He further claims that the Trial Chamber ignored the close relationship between these witnesses and failed to give any weight to, or draw inference from, evidence of the meetings between them and their motives to manipulate the truth.[517] **Beara** further contends that the testimonies of PW-161, PW-162/Davidović, L. Simić, Čelanović, and Deronjić were co-ordinated

512 See *supra*, para. 136.
513 See *Setako* Appeal Judgement, paras 144-145, affirming *Setako* Trial Judgement, para. 367.
514 See *supra*, paras 136-137. See also Trial Judgement, paras 48-53, 1269.
515 Trial Judgement, para. 1354.
516 Beara's Appeal Brief, intro before para. 37, paras 54, 58; Appeal Hearing, AT. 251-256 (3 Dec 2013).

and constructed in order to shift culpability to him.[518] He also contends that the Trial Chamber wrongly shifted the burden to establish such collusion onto him.[519] Consequently, **Beara** maintains that the Trial Chamber's reliance on their testimonies constitutes errors resulting in a miscarriage of justice.[520]

189. The Prosecution responds that **Beara** fails to show any collusion among the witnesses or error in the Trial Chamber's analysis.[521] It also submits that the Trial Chamber did not shift the burden of proof, but merely found that the evidence did not support his allegations.[522]

190. The Appeals Chamber has already dismissed **Beara**'s challenge to the overall credibility of M. Nikolić.[523] The Appeals Chamber notes that the Trial Chamber considered at length **Beara**'s challenges to the evidence of Deronjić, PW-161, PW-162/Davidović, L. Simić, and Čelanović and concluded that the evidence did not suggest that they collaborated to fabricate evidence against **Beara**.[524] **Beara**'s attack on the credibility of Momčilović, L. Simić, Čelanović, and Borovčanin is dismissed as being unsubstantiated.[525] As for Deronjić, PW-161, and PW-162/Davidović, the Appeals Chamber has carefully considered the parts of the trial record to which **Beara** refers in his arguments and finds that **Beara** has failed to demonstrate that the Trial Chamber erred. In support of his argument that the Trial Chamber improperly shifted the burden of proof, **Beara** merely points to the Trial Chamber's analysis of whether the evidence supported his arguments.[526] The Trial Chamber found "no evidence which would suggest that these witnesses collaborated to construct their evidence to cast blame on **Beara** and thus no reasonable doubt as to the reliability of their evidence arises on that basis".[527] Thus, the Appeals Chamber finds that **Beara** has failed to demonstrate a shifting of the burden of proof in the Trial Chamber's analysis.

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517 Beara's Appeal Brief, paras 55-56. See also Beara's Appeal Brief, para. 118 (under **Beara**'s ground of appeal 7).

518 Beara's Appeal Brief, paras 73-74; Beara's Reply Brief, para. 28. See also Beara's Appeal Brief, paras 119-120 (under **Beara**'s ground of appeal 7). In addition, **Beara** argues that L. Simić's testimony placing him in the offices of the President of the Bratunac SDS ("Bratunac SDS Offices") on 13 July 1995 was contradicted by Deronjić's testimony suggesting that L. Simić was asleep. Appeal Hearing, AT. 195 (3 Dec 2013), referring to Trial Judgement, fn. 4118.

519 Beara's Appeal Brief, para. 73; Beara's Reply Brief, para. 35.

520 Beara's Appeal Brief, intro before para. 59, para. 75. See also Beara's Appeal Brief, para. 58.

521 Prosecution's Response Brief (Beara), paras 67-70, 89; Appeal Hearing, AT. 223-224 (3 Dec 2013). See also Prosecution's Response Brief (Beara), paras 114, 116, responding to **Beara**'s ground of appeal 7.

522 Prosecution's Response Brief (Beara), para. 89.

523 See *supra*, para. 181.

524 Trial Judgement, paras 1208-1216.

525 In **Beara**'s written submissions, the attack on their credibility was not supported by any references to the trial record. Regarding L. Simić, **Beara** referred during the appeal hearing to Trial Judgement, fn. 4118, but did not provide any support for his contention that Deronjić's testimony suggested that L. Simić was asleep. See Appeal Hearing, AT. 195 (3 Dec 2013). With regard to Borovčanin, **Beara** referred during the appeal hearing to Ex. P00886, "Document from the Zvornik CJB to the RS MUP, type-signed Vasić, 13 July 1995", but failed to explain how this exhibit shows that Borovčanin colluded with others. See Appeal Hearing, AT. 251-252 (3 Dec 2013).

526 Beara's Appeal Brief, para. 73, referring to Trial Judgement, para. 1210.

527 Trial Judgement, para. 1210.

191. The Appeals Chamber therefore dismisses **Beara**'s challenges to the overall credibility of Deronjić, PW-161, PW-162/Davidović, Momčilović, L. Simić, Čelanović, and Borovčanin.

## F. PW-101

192. **Popović** and **Nikolić** submit that the Trial Chamber erred in its assessment of the overall credibility of Prosecution Witness PW-101.

### 1. Popović's appeal

193. **Popović** argues that the Trial Chamber made erroneous findings regarding the evidence of PW-101.[528] **Popović** further argues that PW-101 provided false testimony, which was logically inconsistent and contradicted by other witnesses, with the goal of securing relocation and other benefits for himself and his family.[529] The Prosecution responds that the Trial Chamber reasonably found that it could rely on PW-101's evidence and that **Popović**'s speculative challenges to his evidence should be summarily dismissed.[530]

194. The Appeals Chamber notes that although **Popović** purports to challenge PW-101's evidence by showing that it is logically inconsistent and contradicted by other evidence, his appeal brief does not contain any references to PW-101's evidence.[531] **Popović** has consequently failed to demonstrate any contradictions or logical inconsistencies and has failed to show that the Trial Chamber erred. The Appeals Chamber therefore dismisses **Popović**'s challenge to the evidence of PW-101.

### 2. Nikolić's appeal (Ground 19)

#### (a) Arguments of the Parties

195. **Nikolić** submits that the Trial Chamber's assessment of PW-101's credibility was wholly erroneous.[532] **Nikolić** argues that the contradictions in the evidence, both within PW-101's evidence and between his and other evidence (notably that of Defence Witness 3DPW-10), strike at the heart of PW-101's credibility and establish that on 14 July 1995 the witness: (1) arrived too late at the

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528 Popović's Appeal Brief, para. 299, referring to Trial Judgement, para. 1111.

529 Popović's Appeal Brief, paras 300-304; Appeal Hearing, AT. 78-79, 155 (2 Dec 2013). See also Popović's Reply Brief, paras 71, 75-81.

530 Prosecution's Response Brief (Popović), paras 173-190; Appeal Hearing, AT. 112 (2 Dec 2013).

531 The Appeals Chamber recalls in this regard that an appeal brief shall contain "the arguments in support of each ground of appeal, including [...] factual arguments and, if applicable, arguments in support of any objections as to whether a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement". Practice Direction on Formal Requirements, para. 4(b)(ii). In his reply brief, **Popović** included a reference to the evidence of PW-101 in support of only one of his many factual arguments. See Popović's Reply Brief, para. 77.

532 Nikolić's Appeal Brief, paras 316, 337-338; Nikolić's Reply Brief, para. 126.

Orahovac School to witness the loading of prisoners on trucks or the shooting of prisoners who tried to escape; (2) never went to the Orahovac execution site to deliver food; and (3) did not drive a wounded Muslim boy alone in his van from the execution site directly to the Zvornik hospital.[533] **Nikolić** adds that the Trial Chamber had a duty to provide a reasoned opinion on 3DPW-10's credibility, considering the crucial nature of his evidence.[534] **Nikolić** further argues that PW-101 had motivation to lie and falsely implicate him – in order to obtain relocation – and that the Trial Chamber erred by failing to explain why it accepted his evidence despite that motivation.[535] Finally, **Nikolić** argues that the Trial Chamber erred in its finding regarding the consistency of PW-101's testimony and his steadfastness in cross-examination since PW-101 was inconsistent and evasive and repudiated key parts of his testimony.[536] For these reasons, **Nikolić** submits that no reasonable trial chamber could have accepted PW-101's uncorroborated testimony that he saw **Nikolić** at the site of the Orahovac killings on 14 July 1995.[537] **Nikolić** submits that since the Trial Chamber attached significant weight to his presence there, rectifying the error calls for a significant reduction of his criminal liability and sentence.[538]

196. The Prosecution responds that **Nikolić** fails to show any error in the Trial Chamber's reasonable approach to PW-101's evidence.[539] The Prosecution concedes some inconsistencies or contradictions in PW-101's evidence, but argues that it was within the Trial Chamber's discretion to accept his evidence.[540] The Prosecution further argues that the Trial Chamber explicitly considered the only substantive contradiction between the evidence of PW-101 and that of 3DPW-10, and reasonably preferred the evidence of the former.[541] The Prosecution rejects **Nikolić**'s arguments regarding PW-101's responses in cross-examination as mere overstatements and misrepresentations.[542] Finally, the Prosecution argues that PW-101's legitimate desire for protective measures does not give him a motivation to lie or implicate **Nikolić**.[543]

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533 Nikolić's Appeal Brief, paras 317-329, 338; Nikolić's Reply Brief, paras 125-126, 128-142, 145-146; Appeal Hearing, AT. 310-313 (4 Dec 2013). See also Nikolić's Reply Brief, para. 147; Appeal Hearing, AT. 341 (4 Dec 2013).

534 Nikolić's Reply Brief, para. 127. See also Nikolić's Appeal Brief, para. 321. **Nikolić** contends that if the Trial Chamber had carried out this duty, it would have found 3DPW-10 to be a fully credible witness. Nikolić's Reply Brief, para. 127.

535 Nikolić's Appeal Brief, paras 330-331, 338; Nikolić's Reply Brief, para. 142; Appeal Hearing, AT. 340-341 (private session) (4 Dec 2013).

536 Nikolić's Appeal Brief, paras 332-338; Nikolić's Reply Brief, paras 143-144.

537 Nikolić's Appeal Brief, paras 316, 318, 320, 326, 338; Nikolić's Reply Brief, para. 147.

538 Nikolić's Appeal Brief, para. 339; Nikolić's Reply Brief, para. 148.

539 Prosecution's Response Brief (Nikolić), paras 267-275, 281, 286, 288-289; Appeal Hearing, AT. 329 (4 Dec 2013).

540 Prosecution's Response Brief (Nikolić), paras 276, 278-280, 288.

541 Prosecution's Response Brief (Nikolić), para. 277.

542 Prosecution's Response Brief (Nikolić), paras 281-286.

543 Prosecution's Response Brief (Nikolić), para. 287.

(b) Analysis

197. With regard to the alleged inconsistencies and contradictions in the evidence, the Appeals Chamber observes that several of **Nikolić**'s arguments rely on unsupported inferences. For instance, PW-101 may have been present despite some witnesses' testimony that they did not see him or his van at the site of the Orahovac killings[544] or that they noticed heavy machinery at the execution site that he did not see.[545] Similarly, PW-101 may have delivered food to the Orahovac School despite certain witnesses in the vicinity testifying that they had not received food.[546] Other arguments advanced by **Nikolić** misrepresent the evidence. For instance, **Nikolić** asserts that Tanacko Tanić saw two bodies before PW-101 claimed they were shot, but relies on evidence that appears to concern two different events.[547] **Nikolić** also asserts that Defence Witness Sreten Milošević, Assistant Commander for Logistics in the Zvornik Brigade, denied having arranged for the delivery of food, whereas he actually testified that he did not remember doing so.[548] Similarly, **Nikolić** claims that PW-101 testified that he drove straight from the execution site to the hospital, yet refers to a part of his testimony in which PW-101 clearly states that he drove to the school.[549] Finally, the question of whether PW-101's sister-in-law was threatened by a nurse for taking care of a wounded Muslim boy has little if any impact on PW-101's credibility as none of the cited witnesses had first-hand knowledge of the supposed event.[550] Moreover, it is within a trial chamber's discretion to evaluate minor contradictions and inconsistencies.[551] For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to establish most of the alleged inconsistencies and contradictions.

198. The Appeals Chamber considers that the notable inconsistencies and contradictions with regard to PW-101's testimony concern, first, who brought the wounded Muslim boy from the execution site to the Orahovac School – PW-101 or 3DPW-10 – and, second, whether PW-101 drove the boy from the Orahovac School to the Zvornik hospital with other persons present in the car. The Trial Chamber considered the differing accounts of the boy's journey from the execution site to the hospital and ultimately decided to accept the evidence of PW-101.[552] The Appeals Chamber notes that more than one witness claimed to have been in the van when PW-101 drove the

544 See Nikolić's Appeal Brief, paras 319, 322.
545 See Nikolić's Appeal Brief, para. 328.
546 See Nikolić's Appeal Brief, para. 329, referring to Cvijetin Ristanović, T. 13622-13623 (10 July 2007), Dragoje Ivanović, T. 14565 (30 Aug 2007), Stanoje Birčaković, T. 10771 (1 May 2007).
547 Nikolić's Appeal Brief, para. 327, referring to PW-101, T. 7677-7678 (23 Feb 2007), Tanacko Tanić, T. 10334, 10336, 10384 (23 Apr 2007).
548 Nikolić's Appeal Brief, para. 329, referring to Sreten Milošević, T. 33985-33987 (15 July 2009).
549 Nikolić's Appeal Brief, paras 319, 323, referring to, *inter alia*, PW-101, T. 7583 (22 Feb 2007).
550 See Nikolić's Appeal Brief, para. 324, referring to PW-101, T. 7593 (22 Feb 2007), Jugoslav Gavrić, T. 9121 (21 Mar 2007), Vela Jovičić, T. 25720 (15 Sept 2008). See also Nikolić's Reply Brief, para. 145, referring to PW-101, T. 7647-7651 (23 Feb 2007).
551 See *supra*, para. 137.

boy from the school to the hospital, while PW-101 is the sole witness testifying that they were alone. However, the Appeals Chamber finds that **Nikolić**'s speculative argument concerning PW-101's general motivation to lie (for the purpose of securing relocation) fails to explain why PW-101 would have lied about these particular things.[553] Similarly, **Nikolić** has not explained why PW-101's purported motivation to lie would lead him to specifically implicate **Nikolić**. The Appeals Chamber notes in this regard that PW-101's evidence of seeing **Nikolić** at the site of the Orahovac killings is supported by other evidence.[554] The Appeals Chamber further notes the testimony of PW-101 that some persons tried to convince him to say that they were in the van with him and the boy.[555] In light of the foregoing, the Appeals Chamber finds that a reasonable trier of fact could have relied on PW-101's evidence notwithstanding the differing accounts of other witnesses.

199. As for PW-101's behaviour in cross-examination, the references to his testimony provided by **Nikolić** do not support his argument that PW-101 was inconsistent and evasive, and repudiated key parts of his testimony. When asked why he had not provided – prior to December 2006 – information about **Nikolić**'s acts at the Orahovac School, PW-101 answered "[p]erhaps I should have told this at the time, but we didn't go into details and this may have been the reason".[556] PW-101 did correct his previous evidence on his interaction with the chief of logistics, acknowledging that it may have been the deputy chief,[557] but that does not render his testimony unreliable.[558] Finally, when faced with a rendition of events about the boy that differed from his own story, PW-101 speculated that there might have been more than one child,[559] which does not constitute a retraction of his evidence.

200. As for **Nikolić**'s submission that the Trial Chamber should have provided a reasoned opinion as to 3DPW-10's credibility, the Appeals Chamber notes that **Nikolić** refers to a challenge to 3DPW-10's credibility that the Prosecution made at trial.[560] An assessment of 3DPW-10's credibility is implicit in the Trial Chamber's discussion of the contradictions between his evidence and that of PW-101, and its ultimate acceptance of the evidence of PW-101.[561] The Appeals

552 Trial Judgement, fn. 1772.
553 See *Haradinaj et al.* Appeal Judgement, paras 244-248.
554 See Trial Judgement, para. 1362.
555 PW-101, T. 7663-7665, 7668-7670 (23 Feb 2007).
556 PW-101, T. 7689-7690 (23 Feb 2007).
557 PW-101, T. 7626-7628 (22 Feb 2007).
558 See *supra*, para. 137.
559 PW-101, T. 7697-7698 (23 Feb 2007).
560 Nikolić's Appeal Brief, fn. 821, referring to Prosecution's Final Brief, paras 2728-2729.
561 Trial Judgement, fn. 1772.

Chamber considers that it was not necessary for the Trial Chamber to explicitly and separately assess the credibility of 3DPW-10.[562]

201. Accordingly, the Appeals Chamber finds that, based upon the references to the trial record provided by the Parties, a reasonable trial chamber could have relied on the evidence of PW-101 to establish **Nikolić**'s presence at the Orahovac killing site on 14 July 1995.[563] **Nikolić** has further failed to show that the Trial Chamber's assessment of PW-101's credibility was wholly erroneous. The Appeals Chamber therefore dismisses **Nikolić**'s ground of appeal 19 in its entirety.

## G. PW-143 (Nikolić's Grounds 22 and 25)

202. **Nikolić** submits that the Trial Chamber committed a mixed error of fact and law by making two unreasonable factual findings that were based on a wholly erroneous assessment of Prosecution Witness PW-143's credibility.[564] **Nikolić** challenges the findings that he was present at the Grbavci School in Orahovac in the night of 13 July 1995,[565] and that he left the Grbavci School in the afternoon of 14 July 1995, driving in the direction of trucks transporting prisoners to an execution field.[566] **Nikolić** argues that the Trial Chamber either failed to consider or to accord sufficient weight to contradictory evidence emanating from Prosecution Witnesses Stanoje Birčaković, Milorad Birčaković, and Dragoje Ivanović.[567] **Nikolić** further argues that PW-143's responses in court show his uncertainty about the events that the Trial Chamber found had occurred.[568] In addition, **Nikolić** submits that there was no corroboration for PW-143's evidence on these topics.[569] Finally, **Nikolić** argues that the Trial Chamber impermissibly allowed the Prosecution to re-examine PW-143 on matters that had been raised in examination-in-chief and ask the witness whether he was still certain about his testimony-in-chief.[570] **Nikolić** concludes that since the Trial Chamber attached significant weight to the impugned findings in assessing his responsibility and determining his sentence, the Trial Chamber's error occasioned a miscarriage of justice, invalidates the Trial Judgement, and warrants a significant reduction of his liability and sentence.[571]

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562 See *supra*, para. 133.
563 Trial Judgement, paras 486, 1111, 1362, 1364, 1390, 1409.
564 Nikolić's Appeal Brief, paras 363, 371, 392, 398; Nikolić's Reply Brief, para. 179. See also Appeal Hearing, AT. 337-338 (4 Dec 2013).
565 Nikolić's Appeal Brief, para. 363, referring to Trial Judgement, paras 471, 1350. See also Appeal Hearing, AT. 342-343 (4 Dec 2013).
566 Nikolić's Appeal Brief, para. 392, referring to Trial Judgement, para. 1362.
567 Nikolić's Appeal Brief, paras 364-366, 393-394; Nikolić's Reply Brief, paras 163, 177; Appeal Hearing, AT. 342 (4 Dec 2013).
568 Nikolić's Appeal Brief, paras 367-369, 395-397; Nikolić's Reply Brief, paras 162, 178. See also Appeal Hearing, AT. 341, 343 (4 Dec 2013).
569 Nikolić's Appeal Brief, paras 366, 371, 398; Nikolić's Reply Brief, para. 163.
570 Nikolić's Appeal Brief, paras 363, 369-370, 392, 397; Nikolić's Reply Brief, paras 164, 180; Appeal Hearing, AT. 341-342 (4 Dec 2013).
571 Nikolić's Appeal Brief, paras 372, 398; Nikolić's Reply Brief, para. 181.

203. The Prosecution responds that **Nikolić** fails to demonstrate that the Trial Chamber erred in its assessment of the credibility of PW-143, a clear, careful, and consistent witness whose evidence was corroborated on many of its main points.[572] According to the Prosecution, the Trial Chamber explicitly considered **Nikolić**'s arguments concerning the evidence of S. Birčaković, M. Birčaković, and D. Ivanović, whose individual perspectives and recollections do not constitute contradictory evidence *per se*.[573] Finally, with regard to the allegedly improper re-examination, it argues that the Trial Chamber acted within its discretion.[574]

204. The Appeals Chamber recalls that it will decline, as a general rule, to discuss those alleged errors which have no impact on the conviction or sentence.[575] **Nikolić** relies on specific parts of the Trial Judgement in support of his argument that the Trial Chamber attached significant weight to the impugned findings. However, the references he provides regarding the night of 13 July 1995 either do not refer to PW-143's evidence[576] or merely make implicit reference to it among a multitude of other more significant findings.[577] As for the afternoon of 14 July 1995, his references do not rely on the impugned finding or not to any significant extent.[578] The Appeals Chamber notes that PW-143's evidence on **Nikolić** leaving in the direction of the execution field is much less significant in this regard than PW-101's evidence that **Nikolić** was present at the execution field and gave directions there.[579] **Nikolić** has failed to establish that a reversal of the impugned findings would have an impact on his conviction or sentence.

205. As for **Nikolić**'s argument regarding impermissible re-examination, the Appeals Chamber notes that a trial chamber has discretion to determine the modalities of re-examination,[580] and that the Appeals Chamber must ascertain whether the trial chamber properly exercised its discretion and, if not, whether the accused's defence was substantially affected.[581] **Nikolić** shows that PW-143 was examined, cross-examined, and re-examined on the same topic.[582] However, the re-examination elicited explanations and qualifications to answers given by the witness in cross-examination.[583] The Appeals Chamber considers that **Nikolić** has failed to show that the Trial Chamber abused its discretion.

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572 Prosecution's Response Brief (Nikolić), paras 335-338, 342.
573 Prosecution's Response Brief (Nikolić), paras 339-340.
574 Prosecution's Response Brief (Nikolić), para. 341.
575 *Karemera and Ngirumpatse* Appeal Judgement, para. 737; *Kanyarukiga* Appeal Judgement, paras 62, 172; *Krajišnik* Appeal Judgement, para. 20.
576 Nikolić's Appeal Brief, fn. 1009, referring to, *inter alia*, Trial Judgement, paras 1364, 1409.
577 Nikolić's Appeal Brief, fn. 1009, referring to, *inter alia*, Trial Judgement, para. 1390.
578 Nikolić's Appeal Brief, fn. 1088, referring to Trial Judgement, paras 1364, 1390, 1409.
579 See Trial Judgement, para. 1362.
580 *Nahimana et al.* Appeal Judgement, para. 182. See also Rule 90(F) of the Rules.
581 *Nahimana et al.* Appeal Judgement, para. 182.

206. The Appeals Chamber dismisses **Nikolić**'s grounds of appeal 22 and 25 in their entirety.

## H. Srećko Aćimović

207. **Popović** and **Nikolić** submit that the Trial Chamber erred in its assessment of the overall credibility of Witness Aćimović.

### 1. Popović's appeal

208. **Popović** presents a series of challenges to the credibility of Aćimović's evidence and alleges that he lied about a number of issues.[584] The Prosecution responds that **Popović** fails to show any error in the Trial Chamber's careful and nuanced assessment of Aćimović's credibility.[585] To the extent that **Popović** intended to challenge the *overall* credibility of Aćimović, the Appeals Chamber finds that **Popović** has failed to articulate an error and dismisses his arguments.

### 2. Nikolić's appeal (Ground 18 in part)

#### (a) Arguments of the Parties

209. **Nikolić** submits that the Trial Chamber's assessment of Aćimović's credibility was wholly erroneous, occasioning a miscarriage of justice.[586] **Nikolić** argues that the Trial Chamber failed to take into account Aćimović's inconsistent evidence and attempts to minimise his responsibility with regard to his evidence on the telegrams/orders and his conversations with **Nikolić**.[587] **Nikolić** further argues that other evidence reveals that the extent of Aćimović's lies and his involvement in the crimes were much greater than what the Trial Chamber found.[588] In particular, **Nikolić** contends that there were no coded telegrams, that Aćimović's alleged conversations with **Nikolić** never took place, and that Aćimović never attempted to contact his superiors regarding the content of the supposed first telegram.[589] He further submits that the Trial Chamber overlooked contradictions and discrepancies in successive statements made by Aćimović as well as his nebulous responses during cross-examination.[590] Finally, **Nikolić** argues that Aćimović held a grudge against him.[591] The

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582 Regarding **Nikolić**'s presence at Grbavci School in the night of 13 July 1995, see PW-143, T. 6532-6536, 6601-6602, 6608, 6611-6612 (30 Jan 2007). Regarding **Nikolić**'s presence in the car that left Grbavci School on 14 July 1995, see PW-143, T. 6540, 6603, 6606-6607, 6612-6614 (30 Jan 2007).

583 PW-143, T. 6611-6614 (30 Jan 2007).

584 See Popović's Appeal Brief, paras 309-335.

585 Prosecution's Response Brief (Popović), paras 204-206; Appeal Hearing, AT. 112 (2 Dec 2013).

586 Nikolić's Appeal Brief, paras 273, 314; Nikolić's Reply Brief, paras 110-111.

587 Nikolić's Appeal Brief, paras 274-276, 279, 283; Nikolić's Reply Brief, para. 112; Appeal Hearing, AT. 308-309 (4 Dec 2013).

588 Nikolić's Appeal Brief, paras 277-278; Nikolić's Reply Brief, paras 112-113.

589 Nikolić's Appeal Brief, paras 275, 278-280; Nikolić's Reply Brief, paras 112-113, 115.

590 Nikolić's Appeal Brief, paras 281-283; Nikolić's Reply Brief, para. 115. **Nikolić** contends that the Trial Chamber's recognition of Aćimović's lack of credibility should have led it to exhaustively consider all credibility criteria. Nikolić's Reply Brief, paras 111, 115.

Prosecution responds that **Nikolić** fails to demonstrate an error in the Trial Chamber's careful and reasonable assessment of Aćimović's overall credibility.[592]

(b) Analysis

210. The Trial Chamber accepted Aćimović's evidence that in the early morning on 15 July 1995, he received a telegram from the Standard Barracks requesting that a platoon of soldiers be dispatched to execute prisoners at the Ročević School and that **Nikolić** then phoned him to stress that the order had to be carried out.[593] The Trial Chamber found that prisoners at the Ročević School were subsequently transported to Kozluk, where they were executed.[594] The Appeals Chamber notes that the Trial Chamber took into account doubts about Aćimović's credibility stemming from his involvement in the events at Ročević, and adopted a nuanced assessment of his overall credibility.[595]

211. In support of his argument, **Nikolić** refers to evidence of Aćimović's involvement in the crimes,[596] and progressive revelation of new information over the course of giving statements and testimony on various occasions.[597] The Trial Chamber took these matters into account, as reflected in its observations that "Aćimović sought to downplay his own involvement" and "was not always truthful [...] nor fully forthcoming".[598] The Appeals Chamber finds that **Nikolić** has failed to show any error in this regard. In particular, the Appeals Chamber is not convinced, considering the sensitivity of the matter, that Aćimović's attempts to reach his superiors at the Zvornik Brigade regarding the telegram would necessarily have been recorded in the Duty Officer's Notebook, or that Aćimović would necessarily have been put in touch with his superiors present at the Standard Barracks. The Appeals Chamber furthermore considers that **Nikolić** has failed to show that Aćimović's testimony about receiving a coded telegram reveals any error in the Trial Chamber's assessment of his overall credibility.[599] Finally, **Nikolić** has failed to substantiate his claim that Aćimović held a grudge against him, providing only a citation to his evidence that does not show any such grudge.[600] In light of the foregoing, **Nikolić** has failed to show that the Trial Chamber erred in its assessment of Aćimović's evidence.

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591 Nikolić's Appeal Brief, para. 282; Nikolić's Reply Brief, para. 114.
592 Prosecution's Response Brief (Nikolić), paras 239-242, 265-266; Appeal Hearing, AT. 329 (4 Dec 2013). See also Prosecution's Response Brief (Nikolić), paras 243 *et seq.*
593 Trial Judgement, paras 508-510, 1367-1368.
594 Trial Judgement, paras 511-520, 1371.
595 Trial Judgement, para. 506.
596 Nikolić's Appeal Brief, fns 684-687 and references cited therein.
597 Nikolić's Appeal Brief, fns 700-705 and references cited therein.
598 Trial Judgement, para. 506.
599 The Appeals Chamber will further consider **Nikolić**'s arguments concerning Aćimović's testimony on receiving coded telegram(s). See *infra*, paras 1341-1354.
600 Nikolić's Appeal Brief, para. 282, referring to Srećko Aćimović, T. 13129 (22 June 2007).

212. The Appeals Chamber therefore dismisses **Nikolić**'s ground of appeal 18 in relevant part.

## I. Manojlo Milovanović (Miletić's Ground 20)

### 1. Arguments of the Parties

213. **Miletić** argues that the Trial Chamber erred by not carefully assessing the testimony of Prosecution Witness Manojlo Milovanović despite: (1) his incentive to shift his own responsibility to **Miletić**; (2) his credibility being disputed by both the Prosecution and the Defence; (3) his testimony about facts that took place during his absence or about which he said he had no knowledge; and (4) the existence of abundant evidence contradicting his testimony.[601] **Miletić** submits that this violated his right to a fair trial, invalidates the Trial Judgement, and calls for all of his convictions to be set aside.[602]

214. The Prosecution responds that the Trial Chamber assessed Milovanović's evidence with caution, as an accomplice witness, and that **Miletić** fails to show otherwise.[603] The Prosecution submits that Milovanović emphasised the limits of **Miletić**'s powers and testified about matters that he was well placed to know, and that the Parties' reservations about Milovanović's credibility on certain issues or the existence of contradictory evidence are insufficient to show that the Trial Chamber erred.[604] The Prosecution further argues that **Miletić** fails to identify the precise findings that he challenges and how they could not have been made on the totality of the evidence.[605]

### 2. Analysis

215. **Miletić** refers to sections of the Trial Judgement in which the Trial Chamber relied on Milovanović's testimony for the following topics: (1) the rank, position, responsibilities, and functions of various persons including **Miletić**; (2) the tasks and responsibilities that **Miletić** assumed when Milovanović was away; (3) the reporting and decision-making process at the Main Staff; and (4) the nature and drafting procedure of directives. In light of this, and considering that Milovanović was Chief of Staff and the immediate superior of **Miletić**,[606] the Appeals Chamber is not convinced by the argument that Milovanović testified about facts that took place during his

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601 Miletić's Appeal Brief, paras 409-413; Appeal Hearing, AT. 435-438 (5 Dec 2013). See also Miletić's Reply Brief, para. 132.

602 Miletić's Appeal Brief, para. 413. Alternatively, **Miletić** requests that the Appeals Chamber call Milovanović to testify on appeal. Miletić's Appeal Brief, para. 414. See also Miletić's Reply Brief, para. 133; Appeal Hearing, AT. 436-437 (5 Dec 2013).

603 Prosecution's Response Brief (Miletić), paras 307, 310; Appeal Hearing, AT. 473 (5 Dec 2013). See also Prosecution's Response Brief (Miletić), paras 308, 313.

604 Prosecution's Response Brief (Miletić), paras 307, 311-313.

605 Prosecution's Response Brief (Miletić), paras 308, 314. In response to **Miletić**'s alternative argument, the Prosecution argues that, if **Miletić** wanted to recall Milovanović, he should have made such a request at trial. Prosecution's Response Brief (Miletić), paras 309, 315-316.

absence or about which he said he had no knowledge. The Prosecution's caveat on the credibility of Milovanović did not concern any of these topics.[607] **Miletić** points out that he challenged the credibility of Milovanović on the topic of the duties and the position of **Miletić** before the Trial Chamber; however, that challenge contained no specific references to the evidence.[608] Furthermore, **Miletić** does not show how any specific findings of the Trial Chamber based on Milovanović's evidence would have required the Trial Chamber to discuss an incentive to shift responsibility to **Miletić**. The Appeals Chamber notes in this regard that the Trial Chamber also relied on corroborative evidence from other sources.[609] As for the evidence that allegedly contradicted Milovanović's testimony, the Appeals Chamber examined that evidence and finds that **Miletić** has failed to demonstrate any clear, relevant contradictions.[610] For the foregoing reasons, the Appeals Chamber finds that **Miletić** has failed to establish an error in the Trial Chamber's assessment of Milovanović's evidence and, accordingly, dismisses his ground of appeal 20 in its entirety.[611]

## J. Svetozar Kosorić (Popović's Appeal)

### 1. Arguments of the Parties

216. **Popović** submits that the Trial Chamber erred in finding unreliable the evidence of Defence Witness Svetozar Kosorić on the content of a conversation that allegedly took place between Kosorić, M. Nikolić, and himself on 12 July 1995 ("12 July Conversation"), during which Kosorić denied that he discussed the killing operation.[612] **Popović** argues that no reasonable trial chamber would have found that Kosorić was evasive.[613] **Popović** also argues that Kosorić provided his important testimony without any preparation and understandably could not recall all the details of events that took place 14 years earlier,[614] and that forgetting such details has no bearing on the truthfulness of his account.[615] **Popović** further argues that Kosorić had no need to lie because he had been apprised of his right not to answer questions that could incriminate him.[616] Finally, **Popović**

606 Trial Judgement, paras 105, 110, 1630.
607 Prosecution's Final Brief, para. 55; Prosecution Closing Arguments, T. 34060 (2 Sept 2009).
608 Miletić Closing Arguments, T. 34616 (10 Sept 2009).
609 See, *e.g.*, Trial Judgement, para. 1634 & fn. 4993, para. 1635 & fns 4995-4996.
610 While some witnesses contradicted Milovanović's evidence on his own familiarity with Directive 7, the Appeals Chamber notes that their evidence was based on opinions and inferences, and that **Miletić** does not show that the Trial Chamber relied on Milovanović's evidence on this matter. See Miletić's Appeal Brief, para. 412 & fn. 852 and references cited therein.
611 The Appeals Chamber dismisses the undeveloped allegations of erroneous conclusions in the paragraphs of the Trial Judgement listed in Miletić's Appeal Brief, fn. 858.
612 Popović's Appeal Brief, para. 127, referring to Trial Judgement, para. 288.
613 Popović's Appeal Brief, paras 127, 140, 146, 152-154, 157.
614 Popović's Appeal Brief, paras 128-136, 140-144, 152-153, 157. See also Appeal Hearing, AT. 155-156 (2 Dec 2013).
615 Popović's Appeal Brief, para. 142. According to **Popović**, Kosorić recalled important issues and categorically denied that he was a party to the 12 July Conversation. **Popović** also contends that the Trial Chamber misrepresented the evidence regarding the 12 July Conversation. Popović's Appeal Brief, paras 129, 137, 149, 157.
616 Popović's Appeal Brief, para. 138.

takes issue with three examples of Kosorić's evasiveness provided by the Trial Chamber and submits that the Trial Chamber misrepresented the evidence and disregarded other relevant evidence.[617]

217. The Prosecution responds that the Trial Chamber reasonably found that Kosorić was not credible,[618] and that **Popović** repeatedly seeks to substitute his own evaluation of Kosorić's evidence for that of the Trial Chamber.[619] It further argues that the right against self-incrimination does not protect against subsequent prosecution and being apprised of this right did not automatically remove any incentive for Kosorić to lie, be evasive, or minimise his own culpability.[620]

### 2. Analysis

218. The Appeals Chamber notes that **Popović** focuses his arguments on addressing Kosorić's evasiveness, particularly on the three specific examples that the Trial Chamber provided in a footnote of the Trial Judgement.[621] However, the impugned finding on the reliability of Kosorić's evidence concerning the 12 July Conversation rests on a broader basis than Kosorić's evasiveness. First, the Trial Chamber found that Kosorić was "a reluctant witness" whose "evidence was not forthcoming", and who was "evasive in his answers and [...] clearly downplaying his role in events and denying any involvement on his part".[622] Second, the impugned finding took into account M. Nikolić's evidence on the same topic[623] as well as other corroborating evidence.[624] As such, the Appeals Chamber considers that a reasonable trial chamber could have found that M. Nikolić's evidence was more reliable than that of Kosorić.[625] The Appeals Chamber further dismisses **Popović**'s speculative and unpersuasive argument that Kosorić had no need to lie.

219. **Popović**'s remaining submissions that the Trial Chamber misrepresented the evidence are either wrong or pertain to details that have no bearing on the reasonableness of the impugned finding. **Popović**'s claim that the Trial Chamber wrongly relied on the evidence of Kosorić to find that he joined the discussion between **Popović** and M. Nikolić[626] misrepresents the Trial Chamber's

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617 Popović's Appeal Brief, paras 146-157.
618 Prosecution's Response Brief (Popović), paras 60-62.
619 Prosecution's Response Brief (Popović), paras 61, 67. See Prosecution's Response Brief (Popović), paras 63-66.
620 Prosecution's Response Brief (Popović), para. 62.
621 See Popović's Appeal Brief, paras 146-157; Trial Judgement, fn. 938.
622 Trial Judgement, para. 288.
623 Trial Judgement, paras 280, 288.
624 Trial Judgement, para. 285. In this regard, the Appeals Chamber considers that a reasonable trial chamber could have found that Prosecution Witness Pieter Boering, who was an eyewitness, corroborated M. Nikolić's evidence despite saying that he "believed" that Kosorić was present. See Trial Judgement, para. 285; Pieter Boering, T. 1976-1977 (21 Sept 2006).
625 Trial Judgement, paras 287-288.
626 See Popović's Appeal Brief, para. 139.

findings. The Trial Chamber relied on the evidence of Kosorić to establish his position and relied on the evidence of M. Nikolić to establish the participants in and the topic of the discussion.[627] **Popović**'s contention that the Trial Chamber wrongly relied on the evidence of M. Nikolić[628] is correct only to the extent that the evidence cited by the Trial Chamber provides no explicit indication that the discussion began before Kosorić joined it. However, this has no impact on the reasonableness of the impugned finding.

220. The Appeals Chamber therefore dismisses **Popović**'s argument that the Trial Chamber erred in its assessment of the reliability of Kosorić's evidence on the 12 July Conversation.

### K. Svetlana Gavrilović and Miroslava Čekić (Beara's Ground 7 in part)

221. **Beara** argues that the Trial Chamber erred in law and abused its discretion by applying inconsistent credibility standards in evaluating the testimonies of Prosecution Witnesses PW-161 and PW-162/Davidović, on one hand, and Defence Witnesses Svetlana Gavrilović and Miroslava Čekić, on the other hand.[629] **Beara** submits that in both cases: (1) the witnesses had discussed with each other the events pertaining to their testimonies; and (2) their testimonies contained similarities.[630] Moreover, **Beara** submits that the Trial Chamber unreasonably found that the testimonies of Gavrilović and Čekić lacked credibility.[631] **Beara** concludes that the Trial Chamber's error resulted in a miscarriage of justice.[632]

222. The Prosecution responds that the Trial Chamber reasonably assessed the testimonies of PW-161, PW-162/Davidović, Gavrilović, and Čekić.[633] Specifically, it argues that the circumstances surrounding their respective testimonies were quite different and that the Trial Chamber applied the same standard to both pairs of witnesses.[634]

223. The Trial Chamber found **Beara**'s challenge to the evidence of PW-161 and PW-162/Davidović to be unfounded and noted that "both witnesses testified to distinct meetings and different events such that there is little intersection in their evidence so as to allow for construction or even 'refreshment' of memory".[635] The Appeals Chamber notes that **Beara** has

627 Trial Judgement, para. 280.
628 See Popović's Appeal Brief, para. 139.
629 Beara's Appeal Brief, intro before para. 116, paras 116-118, 121; Beara's Reply Brief, para. 48.
630 Beara's Appeal Brief, paras 116, 118-121; Beara's Reply Brief, para. 48.
631 Beara's Appeal Brief, paras 116-117.
632 Beara's Appeal Brief, intro before para. 116.
633 Prosecution's Response Brief (Beara), paras 111-112, 115-116.
634 Prosecution's Response Brief (Beara), paras 113-115.
635 Trial Judgement, para. 1211.

failed to substantiate his submissions with regard to the similarities in their evidence.[636] As for Gavrilović and Čekić, the Trial Chamber stated that:

> their detailed and almost identical accounts of 14 July 1995 are so unusual—particularly in comparison to their memory of other events—that they lack credibility individually and cumulatively. In addition, the circumstance by which the information was conveyed to the defence, in particular as to the date and the reasons for the clear recollection of it, further damages the reliability of the evidence.[637]

224. Based on the foregoing, the Appeals Chamber can see no indication that the Trial Chamber applied inconsistent standards in its evaluation of the testimonies of Gavrilović and Čekić, on one hand, and PW-161 and PW-162/Davidović, on the other hand. Finally, **Beara** provides no arguments or evidence in support of his submission that it was unreasonable for the Trial Chamber to find that the testimonies of Gavrilović and Čekić lacked credibility.[638] Consequently, the Appeals Chamber dismisses **Beara**'s ground of appeal 7 in relevant part.

## L. Vinko Pandurević (Beara's Ground 5 in part)

225. **Beara** argues that the Trial Chamber erred in law and abused its discretion when it permitted and gave undue weight to the unreliable evidence of **Pandurević**.[639] **Beara** argues that, as a co-accused, **Pandurević** was motivated to shift responsibility to the security sector and to **Beara**.[640] He further submits that the Trial Chamber allowed **Pandurević** to testify at the end of the trial, such that he could tailor his evidence to the full trial record.[641]

226. The Prosecution responds that **Beara** fails to show any error in the Trial Chamber's cautious approach to **Pandurević**'s evidence and fails to identify any findings against himself that were based to any significant degree on **Pandurević**'s evidence.[642]

227. The Trial Chamber noted that **Pandurević** gave extensive evidence over a period of 22 days and was tested in cross-examination by the Prosecution and four of his co-accused, including **Beara**.[643] The Trial Chamber found many parts of **Pandurević**'s evidence credible and relied upon it to establish facts or to raise reasonable doubt.[644]

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636 See Beara's Appeal Brief, para. 119.
637 Trial Judgement, para. 1246.
638 See Beara's Appeal Brief, paras 116-117.
639 Beara's Appeal Brief, intro before para. 37, paras 52-53.
640 Beara's Appeal Brief, paras 52-53. **Beara** submits that **Pandurević**'s evidence was used as crucial corroboration regarding his conduct. Beara's Reply Brief, para. 27.
641 Beara's Appeal Brief, para. 53.
642 Prosecution's Response Brief (Beara), paras 65-66.
643 Trial Judgement, para. 22 & fn. 30.
644 Trial Judgement, para. 22.

228. The Appeals Chamber observes that **Beara** provides only one reference to the trial record in support of his arguments,[645] which in fact indicates that the Trial Chamber treated **Pandurević**'s evidence with appropriate caution.[646] The Appeals Chamber furthermore observes that pursuant to Rule 85(C) of the Rules, **Pandurević** was entitled to appear as a witness in his own defence. This rule contains no restrictions with regard to when, during the defence case, the accused can choose to exercise this right. **Beara** does not demonstrate that the Trial Chamber erred in this regard. The Appeals Chamber concludes that **Beara** has failed to show any error in the Trial Chamber's approach to the assessment of the evidence of his co-accused.

229. Consequently, the Appeals Chamber dismisses **Beara**'s challenge, as part of his ground of appeal 5, regarding the overall credibility of **Pandurević**.

## M. Conclusion

230. The Appeals Chamber has dismissed all challenges regarding the overall credibility of witnesses covered in the present chapter.

645 See Beara's Appeal Brief, paras 52-53 and reference cited therein.
646 Trial Judgement, para. 23.

# VI. EVIDENCE REGARDING THE NUMBER OF DECEASED

## A. Introduction

231. The Trial Chamber reached its conclusions on the number of persons executed following the fall of Srebrenica by conducting two types of calculations. First, the Trial Chamber determined the number of persons executed at each specific execution site based on the evidence relevant to each site.[647] Second, the Trial Chamber calculated the total number of persons executed based on forensic and demographic evidence.[648] The Trial Chamber relied on both types of calculations when it considered whether the legal requirements were met for: (1) murder as a crime against humanity and as a violation of the laws or customs of war; (2) extermination as a crime against humanity; and (3) genocide.[649]

232. Whereas **Popović** impugns the Trial Chamber's findings based on both methods of calculation, **Beara** and **Nikolić** appeal only the findings arising from calculations based on forensic and demographic evidence. The Appeals Chamber will address the challenges to the findings based on both methods of calculation in turn.

## B. Number of Deceased at Specific Execution Sites (Popović's appeal)

### 1. Introduction

233. **Popović** challenges the Trial Chamber's findings on the number of persons killed at several specific execution sites.[650] Although **Popović** includes in the same section of his appeal brief arguments regarding Nova Kasaba, the Sandići Meadow, and the Drina River bank near the Kozluk grave, these arguments in fact relate to the Trial Chamber's findings pertaining to the total number of persons executed based on forensic and demographic evidence.[651] The Appeals Chamber accordingly will discuss them in the next section.

### 2. DutchBat compound killings

234. **Popović** submits that the Trial Chamber erred by finding that the nine bodies exhumed from the Rabin field were the bodies of individuals that were allegedly killed on 13 July 1995 near a

647 Trial Judgement, paras 351-361, 408-463, 475-550, 565-589, 597-599.
648 Trial Judgement, paras 607-664.
649 Trial Judgement, paras 790, 793-796, 802-806, 834, 837, 841, 856-859 and references cited therein.
650 Popović's Appeal Brief, paras 412-414, 421-425, 430-435, 437-440, 443-449, 452-454; Popović's Reply Brief, paras 125-127, 129-130, 133-134. The Appeals Chamber has addressed the Kravica Supermarket killings in the chapter on admission of evidence where **Popović**'s arguments in this regard were dismissed. See *supra*, paras 99 *et seq.* **Popović**'s arguments regarding the identity of six alleged victims of the Trnovo killings are moot as a result of the Appeals Chamber's finding that a reasonable trier of fact could not have concluded that the members of the JCE to Murder were responsible for the Trnovo killings. See *infra*, para. 1069.

stream, 500 metres from the DutchBat compound in Potočari.[652] According to **Popović**, the Trial Chamber relied on aerial images that were inconclusive with regard to the content and location of what they depicted.[653] The Prosecution responds that **Popović**'s arguments should be summarily dismissed.[654]

235. The Appeals Chamber notes that **Popović** misrepresents the Trial Chamber's finding. The Trial Chamber found that nine Bosnian Muslim men were killed by the BSF in a field near a stream, about 500 metres from the DutchBat compound on 13 July 1995.[655] In doing so, the Trial Chamber relied on extensive evidence such as DutchBat officers' testimony, exhumation sketches, exhumation/autopsy reports, Defence expert Witness Dušan Dunjić's testimony and report, and the Janc Report.[656] In neglecting to address this evidence, **Popović** has failed to show an error in the Trial Chamber's finding regarding the nine individuals. The Appeals Chamber therefore dismisses his argument in this regard.

### 3. Kravica Warehouse killings

236. **Popović** submits that the Trial Chamber erred by finding that at least 1,000 people were killed at the Kravica Warehouse on 13 July 1995.[657] **Popović** argues that the Trial Chamber should not have found that victims from the Kravica Warehouse were buried in the Ravnice 1 and 2 graves because these graves contained exclusively "surface remains" with totally skeletonised bodies bearing no blindfolds, ligatures, or traces of blast injuries characteristic of the victims at the Kravica Warehouse.[658] **Popović** further argues that the Trial Chamber linked the Ravnice bodies to the killings at the warehouse based only on building materials found in the graves and the warehouse, whereas other reasonable inferences could be drawn from the presence of the building materials.[659] **Popović** also contends that the Trial Chamber erroneously included in the total number of victims approximately 50 persons from the Blječeva 1 secondary grave, whose deaths occurred in 1992 and were not related to the fall of Srebrenica.[660]

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651 Popović's Appeal Brief, paras 415-420, 441; Popović's Reply Brief, paras 123-124, 131.
652 Popović's Appeal Brief, paras 412, 414, referring to killings near the Dutch Battalion ("DutchBat") compound of the UNPROFOR.
653 Popović's Appeal Brief, para. 413.
654 Prosecution's Response Brief (Popović), paras 274-275.
655 Trial Judgement, paras 359, 794(2).
656 Trial Judgement, paras 354-358 and references cited therein.
657 Popović's Appeal Brief, para. 425.
658 Popović's Appeal Brief, paras 421-423; Popović's Reply Brief, para. 125.
659 Popović's Appeal Brief, para. 423; Popović's Reply Brief, para. 126.
660 Popović's Appeal Brief, para. 424; Popović's Reply Brief, para. 127.

237. The Prosecution responds that **Popović**'s arguments should be summarily dismissed and that the Trial Chamber excluded from its estimate the individuals whose deaths occurred in 1992.[661]

238. The Appeals Chamber first turns to **Popović**'s argument regarding the Ravnice 1 and 2 graves and observes that he provides no support for his contention that the graves contained exclusively surface remains.[662] The Appeals Chamber accordingly dismisses **Popović**'s argument.

239. The Trial Chamber relied on evidence in the Janc Report showing that the building materials found in the Ravnice graves were indistinguishable from those found at the Kravica Warehouse, thereby forensically linking the graves to the Kravica Warehouse killings.[663] The Appeals Chamber is not convinced by the alternate inference that **Popović** suggests could be drawn from the evidence, namely that "[t]he foam, concrete and plaster could have been dispersed over the location even before the killings occurred, for instance as a result of waste [*sic*] its construction".[664] Furthermore, **Popović** does not address other forensic evidence, such as broken masonry, door frames, and matching body parts, similarly linking other primary and secondary grave sites to the killings at the warehouse.[665] The Appeals Chamber thus finds that he has failed to show that the Trial Chamber erred in its analysis of the evidence.

240. Regarding the Blječeva 1 secondary grave, the Trial Chamber found that Prosecution Witness Dušan Janc, an investigator for the Prosecution,[666] identified it as a mixed grave containing remains of individuals whose death was not related to the events following the fall of Srebrenica and that he excluded these individuals from the total number of persons buried in the Srebrenica Related Graves.[667] Janc testified that approximately 50 individuals whose remains were found in the Blječeva 1 grave had died in 1992[668] and were excluded from his calculations.[669] The Trial

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661 Prosecution's Response Brief (Popović), paras 280-283.

662 See Popović's Appeal Brief, paras 421-422; Popović's Reply Brief, para. 125.

663 Trial Judgement, para. 439 & fn. 1594; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", p. 12.

664 See Popović's Appeal Brief, para. 423.

665 See Trial Judgement, paras 439-440; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", p. 12. The Trial Chamber described a primary grave as the first grave in which remains were buried after the death, and a secondary grave as a grave to which remains were transferred after initially being buried in a primary grave. See Trial Judgement, para. 608.

666 Trial Judgement, para. 650.

667 Trial Judgement, para. 652 & fn. 2355. See also Trial Judgement, para. 608 (internal references omitted):

> The Prosecution conducted exhumations in and around Srebrenica from 1996 until 2001, when responsibility for exhuming the remaining graves was handed over to the BiH Government, in conjunction with the International Commission on Missing Persons ("ICMP"). As of March 2009, 73 graves had been identified, and all but one exhumed: 31 primary graves, 37 secondary graves, and five graves for which no information was available as to whether they were primary or secondary (together, the "Srebrenica Related Graves").

668 Dušan Janc, T. 33525-33526 (1 May 2009).

669 Dušan Janc, T. 33508-33509 (1 May 2009).

Chamber factored this testimony into its finding on the total number of victims.[670] The Appeals Chamber accordingly finds that **Popović**'s argument is without merit.

241. The Appeals Chamber concludes that **Popović** has failed to show an error in the Trial Chamber's finding regarding the Kravica Warehouse killings and accordingly dismisses **Popović**'s arguments in this regard.

### 4. Killings at a hangar in Bratunac

242. **Popović** submits that the Trial Chamber erred by "exaggerating the evidence" in finding that approximately 400 persons were detained in a hangar behind the Vuk Karadžić School in Bratunac and that between 40 and 80 Bosnian Muslim prisoners from the hangar were killed on 12 and 13 July 1995, based on the uncorroborated testimony of PW-169 who did not directly witness the killings.[671] The Prosecution responds that **Popović** fails to show an error in the Trial Chamber's assessment of the evidence, warranting summary dismissal of his argument.[672]

243. The Appeals Chamber notes that **Popović** refers selectively to parts of the testimony of PW-169 and omits references to key evidence underlying the numerical findings of the Trial Chamber.[673] Notably, the Trial Chamber referred to evidence that PW-169 was informed by those who dragged the bodies of five beaten prisoners out of the room he was in that they saw a pile of bodies behind the hangar.[674] Thus, **Popović** alleges an error without discussing the Trial Chamber's assessment of the evidence or referring to the full analysis of the Trial Chamber. The Appeals Chamber finds that **Popović** has failed to show that the Trial Chamber erred in relying on the evidence of PW-169. The Appeals Chamber recalls in this regard that a trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony.[675] The Appeals Chamber accordingly finds that **Popović** has failed to show an error in the Trial Chamber's finding regarding the killings at the hangar in Bratunac and dismisses his argument in this respect.

### 5. Orahovac killings

244. **Popović** submits that the Trial Chamber erred by finding that between 800 and 2,500 prisoners were executed at Orahovac on 14 July 1995.[676] **Popović** argues that the finding was

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670 Trial Judgement, fn. 2357, referring to Dušan Janc, T. 33508-33509, 33526-33527 (1 May 2009).
671 Popović's Appeal Brief, paras 430-431.
672 Prosecution's Response Brief (Popović), para. 288.
673 Popović's Appeal Brief, para. 431. *Cf.* Trial Judgement, paras 452-455.
674 Trial Judgement, para. 453. See also Trial Judgement, paras 452, 454-455.
675 *Nizeyimana* Appeal Judgement, paras 63, 246; *Gatete* Appeal Judgement, para. 138; *D. Milošević* Appeal Judgement, para. 215. See also *Šainović et al.* Appeal Judgement, para. 1101.
676 Popović's Appeal Brief, paras 432, 436.

unreasonably based on indeterminate witness estimates, ranging from 500 to 2,500 prisoners at the Grbavci School in Orahovac, rather than on precise forensic evidence which provided no support for the existence of up to 2,500 victims.[677] The Prosecution responds that **Popović** fails to show an error in the Trial Chamber's findings and misunderstands its method of calculation.[678]

245. The Trial Chamber found that between 800 and 2,500 Bosnian Muslim males were executed at Orahovac on 14 July 1995.[679] In reaching its finding, the Trial Chamber considered a large body of forensic evidence,[680] including the testimonies and assessments of witnesses who estimated the number of detainees in the Grbavci School to be between 500 and 2,500.[681] The Trial Chamber's finding is expressed in terms of a numerical range and not as an exact number. The sheer scale of the crimes alleged in the Indictment makes it no less impracticable to require a high degree of specificity in numbering the victims than it does in specifying their identities or the dates of their deaths.[682] While the range is broadly expressed, **Popović** has not shown that it was unreasonably derived, was unsupported by the evidence, or resulted in a miscarriage of justice. The Appeals Chamber therefore dismisses **Popović**'s arguments regarding the number of executed prisoners at Orahovac.

### 6. Petkovci killings

246. **Popović** challenges, under the title "Petkovci", the DNA connections "from Liplje as primary and Hodžići Road as secondary graves" identifying 805 individuals.[683] The Prosecution responds that **Popović** fails to articulate any error, warranting summary dismissal of his argument.[684] The Appeals Chamber finds that **Popović** does not explain on what basis he challenges the DNA connections. He refers to arguments developed in another part of his brief[685] that the Appeals Chamber dismisses below,[686] but does not clarify the connection between those arguments and killings at Petkovci or the Liplje and Hodžići Road graves. His argument is undeveloped, fails to articulate any error, and is dismissed.

### 7. Kozluk killings

247. **Popović** submits that the Trial Chamber erred by finding that over 1,000 males were executed at Kozluk on 15 July 1995, based on: (1) the connections between the Kozluk primary

677 Popović's Appeal Brief, paras 432-435; Popović's Reply Brief, paras 129-130.
678 Prosecution's Response Brief (Popović), paras 289-291.
679 Trial Judgement, paras 492, 794(8).
680 Trial Judgement, paras 491-492 and references cited therein.
681 Trial Judgement, fn. 1788.
682 *Cf. Lukić and Lukić* Appeal Judgement, fn. 1527; *Kupreškić et al.* Appeal Judgement, para. 89.
683 Popović's Appeal Brief, para. 437, referring to Popović's Appeal Brief, paras 475-481.
684 Prosecution's Response Brief (Popović), para. 293.
685 See *infra*, para. 281.

grave and secondary graves which were contested at trial; and (2) a single eyewitness, Prosecution Witness PW-142, who did not want to "play with figures" when he estimated the number detained in the Ročević School.[687] The Prosecution responds that **Popović**'s arguments should be summarily dismissed as they are undeveloped.[688]

248. The Trial Chamber found that over 1,000 males were executed at Kozluk on 15 July 1995, based on, *inter alia*, forensic evidence linking the primary Kozluk grave and six of the secondary Čančari Road graves, the Janc Report regarding 1,040 individuals identified from those graves, and PW-142's estimate that approximately 1,000 persons were detained at the Ročević School.[689] **Popović**'s assertion that connections between the primary grave and the secondary graves were contested at trial is patently insufficient to show that the Trial Chamber erred. With regard to PW-142's testimony, **Popović** has failed to show that the Trial Chamber's reliance on PW-142's cautious estimate was erroneous, particularly in light of the corroborating forensic evidence. The Appeals Chamber accordingly finds that **Popović** has failed to show an error in the Trial Chamber's finding regarding the Kozluk Killings and dismisses his arguments in this respect.

### 8. Pilica area killings

249. **Popović** submits that the Trial Chamber erred by finding that: (1) there were 500 Bosnian Muslims detained in the Pilica Cultural Centre on 16 July 1995; (2) five of the secondary Čančari Road graves were linked to the killings in the Pilica area (at the Branjevo Military Farm and the Pilica Cultural Centre); and (3) between 1,000 and 2,000 persons were killed in the Pilica area on 16 July 1995.[690] In order to support his submissions, **Popović** challenges Janc's evidence on the DNA connections between the Branjevo Military Farm grave and the Čančari Road 9, 10, 11, and 12 graves.[691] With regard to the Čančari Road 8 grave, **Popović** argues that given the absence of a proper forensic examination, five ligatures found at the grave were an insufficient basis to link them to the similar ligatures found at the Branjevo Military Farm.[692] The Prosecution responds that **Popović** repeats his trial submissions and offers his own view of the evidence without showing that the Trial Chamber erred, warranting summary dismissal of his arguments.[693]

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686 See *infra*, paras 282-286.

687 Popović's Appeal Brief, paras 438-440, 443. **Popović** posits that "no reasonable Chamber would [...] calculate that number in the total number of individuals", but does not even attempt to show that the Trial Chamber did so. Popović's Appeal Brief, para. 443.

688 Prosecution's Response Brief (Popović), para. 294.

689 Trial Judgement, paras 523-524 & fns 1925-1926, para. 794(11).

690 Popović's Appeal Brief, paras 444, 447. See also Trial Judgement, para. 550.

691 Popović's Appeal Brief, para. 445, referring to Popović's Appeal Brief, paras 475-481.

692 Popović's Appeal Brief, para. 446.

693 Prosecution's Response Brief (Popović), para. 297.

250. The Trial Chamber concluded based on a large body of evidence, including evidence regarding the estimated number of prisoners executed and the transport of bodies from the Pilica Cultural Centre to the Branjevo Military Farm, that between 1,000 and 2,000 persons were executed in the Pilica area (the Branjevo Military Farm and the Pilica Cultural Centre) on 16 July 1995 ("Pilica Area Killings").[694] In reaching its conclusion, the Trial Chamber also found that 500 Bosnian Muslims were detained in the Pilica Cultural Centre on 16 July 1995[695] and that the Čančari Road 8, 9, 10, 11, and 12 graves were linked to the Pilica Area Killings.[696] With regard to the Čančari Road 9, 10, 11, and 12 graves, the Appeals Chamber finds that **Popović** has failed to articulate how the Trial Chamber allegedly erred. He refers to arguments developed in another part of his brief[697] that the Appeals Chamber dismisses below,[698] but does not clarify the connection between those arguments and these graves. In linking the Čančari Road 8 grave to the Branjevo Military Farm primary grave, the Trial Chamber referred to evidence that ligatures found during the exhumation of the Čančari Road 8 grave were consistent with "ligatures found at Branjevo Military Farm with regard to material (cloth and string), colour (white and blue) and make (frayed and straight edges suggesting ripping and cutting)".[699] The Appeals Chamber finds that **Popović** has failed to show an error in this regard. Accordingly, the Appeals Chamber dismisses his arguments.

### 9. Snagovo killings

251. **Popović** submits that the Trial Chamber made a series of erroneous findings regarding the capture and killing of Bosnian Muslim men near Snagovo in late July 1995.[700] Specifically, **Popović** stresses that the Trial Chamber made inconsistent findings with regard to how many of them were executed.[701]

252. The Prosecution submits that the Trial Chamber's inconsistency on the number of executed men reflects an immaterial scrivener's error.[702] It argues that **Popović**'s remaining assertions are undeveloped and should be summarily dismissed.[703]

253. The Trial Chamber found that the BSF captured five Bosnian Muslim men near Snagovo around 20 July 1995 and killed *four* of them near Snagovo on or around 22 July 1995.[704] The Trial

694 Trial Judgement, paras 550, 794(13). See also Trial Judgement, paras 525-549.
695 Trial Judgement, para. 540.
696 Trial Judgement, paras 548-550.
697 See *infra*, para. 281.
698 See *infra*, paras 282-286.
699 Trial Judgement, para. 549, referring to Ex. P04499, "ICMP Summary Report on Čančari Road 8, created from 20 Oct to 19 Nov 2008", p. 8. The quoted text, in paragraph 38 of Exhibit P04499, refers to figures comparing ligatures at page 18 of Exhibit P04499.
700 Popović's Appeal Brief, para. 448.
701 Popović's Appeal Brief, paras 448-449.
702 Prosecution's Response Brief (Popović), para. 298.
703 Prosecution's Response Brief (Popović), para. 299.

Chamber, however, recalled later in the Trial Judgement that *five* Bosnian Muslim men were killed near Snagovo on or about 22 July 1995.[705] In so doing, the Trial Chamber merely referred back to its previous detailed findings from which it is clear that only four men were killed, with no explanation of the discrepancy.[706] The Appeals Chamber therefore considers the Trial Chamber's reference to "five" Bosnian Muslim men to be a typographical error. The Appeals Chamber considers that **Popović** suffered no prejudice as a result of this error. With regard to his remaining arguments, the Appeals Chamber finds that **Popović** has failed to articulate in what way the Trial Chamber allegedly erred and failed to support his arguments with any references to the trial record. The Appeals Chamber accordingly finds that **Popović** has failed to show any error in the impugned findings and dismisses his arguments in this respect.

## C. Total Number of Deceased

### 1. The Trial Chamber's findings

254. The Trial Chamber was "satisfied beyond reasonable doubt that at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica".[707] The Appeals Chamber considers this to constitute a conclusive finding beyond reasonable doubt of the overall number of persons executed. To reach this finding, the Trial Chamber largely relied on the Janc Report, which was mainly based on the 2009 ICMP List of Deceased, and deducted 22 individuals, whom the Trial Chamber could not connect to the executions, from the 5,358 individuals listed in the Janc Report as individuals identified from the Srebrenica Related Graves.[708] The Trial Chamber proceeded to note that "the evidence before it is not all encompassing. Graves continue to be discovered and exhumed to this day, and the number of identified individuals will rise. The Trial Chamber therefore considers that the number could well be as high as 7,826."[709] The Appeals Chamber regards this as an observation on the potential highest number of persons executed which was not meant to constitute a conclusive finding beyond reasonable doubt. The Trial Chamber calculated this number by adding the individuals reported missing following the fall of Srebrenica on the 2005 List of Missing (7,661) and the unique DNA profiles identified through DNA analysis

704 Trial Judgement, para. 580 & fn. 2118, para. 583.
705 Trial Judgement, para. 794(17).
706 Trial Judgement, fn. 2886, referring to Trial Judgement, paras 578-583.
707 Trial Judgement, para. 664.
708 Trial Judgement, paras 650, 659-664 & fn. 2380; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 2-5. See also Trial Judgement, para. 638, referring to, *inter alia*, a list compiled by the ICMP of individuals whose remains have been exhumed in the Srebrenica Related Graves and identified ("2009 ICMP List of Deceased").
709 Trial Judgement, para. 664 (internal reference omitted).

which did not match persons reported missing (165).[710] As such, the total number of persons executed was not expressed in terms of a range.[711] The Appeals Chamber will further consider this matter below when dealing with specific challenges to the Trial Chamber's observation on the potential highest number of persons executed.

## 2. Popović's appeal

### (a) Introduction

255. The Appeals Chamber will first consider a general challenge to **Popović**'s arguments made by the Prosecution. It will then address **Popović**'s arguments on the Trial Chamber's findings on: (1) the total number of persons executed following the fall of Srebrenica; (2) the potential highest number of persons executed following the fall of Srebrenica; (3) the Janc Report; and (4) the ICMP data on deceased persons.

### (b) Preliminary issue concerning the total number of persons executed

256. The Prosecution contends that **Popović**'s arguments regarding the total number of persons executed have no impact on his conviction or sentence.[712] **Popović** replies that the Trial Chamber considered the number to be relevant to certain crimes of which he was convicted and that he is entitled to dispute the number without regard to the impact on conviction or sentence since the crimes will ultimately be expressed through the number of victims.[713]

257. The Trial Chamber recognised that since a conclusion as to the number of persons executed following the fall of Srebrenica did not form an element of the crimes alleged in the Indictment, a precise number of persons executed was not necessary for a conclusion regarding those crimes.[714] However, the Trial Chamber considered the estimated number of persons executed to be relevant with respect to certain crimes for which **Popović** was convicted, particularly genocide and extermination as a crime against humanity.[715] The Appeals Chamber thus finds that the alleged errors in the Trial Chamber's findings on the total number of persons executed, if proven, could have an impact on its findings regarding those particular crimes. The Appeals Chamber therefore dismisses the Prosecution's arguments with regard to this preliminary issue.

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710 Trial Judgement, paras 626, 659, 664 & fn. 2381. See also Trial Judgement, para. 625, referring to, *inter alia*, a list compiled by the Prosecution of 7,661 persons who went missing in Srebrenica around the time of its fall (Ex. P02413) ("2005 List of Missing").

711 Unlike, *e.g.*, the findings with respect to the Orahovac killings. See *supra*, para. 245.

712 Prosecution's Response Brief (Popović), paras 277, 306.

713 Popović's Reply Brief, paras 123, 135-136.

714 Trial Judgement, para. 607 & fn. 2214.

715 Trial Judgement, para. 607, Disposition, Popović section.

(c) The Trial Chamber's findings on the total number of persons executed

(i) Individuals identified from the Nova Kasaba graves

258. **Popović** submits that the Trial Chamber erred by including 90 individuals identified from the Nova Kasaba graves in its estimate of the total number of persons executed following the fall of Srebrenica.[716] **Popović** argues that there is reasonable doubt as to whether the killings happened in the Indictment period, noting that: (1) the executions on 13 July 1995 near Nova Kasaba were not proven; (2) no blindfolds or ligatures were found in four of the Nova Kasaba 1999 graves; and (3) there were no DNA connections between each Nova Kasaba grave and other graves.[717] **Popović** further argues that one could reasonably conclude that the individuals from the Nova Kasaba graves were combat casualties rather than victims of executions, considering in particular that: (1) the Trial Chamber did not establish the time of the executions; (2) there were no survivors or witnesses; and (3) some of the Srebrenica Related Graves were mixed graves.[718]

259. The Prosecution responds that the Trial Chamber reasonably included the 90 individuals identified from the Nova Kasaba graves in its estimate, and that **Popović**'s incomplete and undeveloped arguments should be summarily dismissed.[719]

260. The Appeals Chamber notes that the Trial Chamber was not satisfied that the executions on 13 July 1995 near Nova Kasaba for which **Popović** was indicted were proven beyond reasonable doubt.[720] The Trial Chamber found, however, that the DNA and forensic evidence linked the remains found in the Nova Kasaba 1996 and 1999 graves to the mass killings following the fall of Srebrenica[721] and included 90 individuals identified from the Nova Kasaba 1996, 1999, 2001, and individual graves in its finding on the total number of persons executed.[722] The Appeals Chamber therefore considers that the Trial Chamber found that the 90 individuals were the victims of Srebrenica-related executions, though not necessarily the executions alleged to have taken place on 13 July 1995 near Nova Kasaba. The Appeals Chamber accordingly finds that the fact that the latter executions were not proven at trial does not undermine the Trial Chamber's inclusion of the 90 individuals in its overall number of victims. For the same reason, the Appeals Chamber dismisses **Popović**'s arguments with regard to the absence of a finding establishing the time of the executions and the absence of survivors or witnesses.

716 Popović's Appeal Brief, para. 415.
717 Popović's Appeal Brief, paras 416-418; Popović's Reply Brief, para. 123; Appeal Hearing, AT. 89-90 (2 Dec 2013). See also Indictment, para. 30.3.1.
718 Popović's Reply Brief, paras 123-124.
719 Prosecution's Response Brief (Popović), paras 276, 278.
720 Trial Judgement, paras 415-420, 798, 2104 & fn. 6096; Indictment, para. 30.3.1.
721 Trial Judgement, para. 420. See also Trial Judgement, paras 415-419.

261. With regard to the Nova Kasaba 1999 graves, the Trial Chamber found that none of the exhumed bodies had blindfolds or ligatures.[723] As stated above, however, the Trial Chamber found that the DNA and forensic evidence linked the remains found in the Nova Kasaba 1999 graves to the mass killings following the fall of Srebrenica. Given the totality of the Trial Chamber's findings on DNA and forensic evidence,[724] the Appeals Chamber finds that **Popović** has not shown that a reasonable trial chamber could not have included the individuals identified from the Nova Kasaba 1999 graves in its overall number of victims.

262. The Appeals Chamber further dismisses **Popović**'s submission on the absence of DNA connections between each Nova Kasaba grave and other graves, as he has failed to explain how that would impact the Trial Chamber's inclusion of the individuals identified from the Nova Kasaba graves in its overall number of victims.

263. In regard to mixed graves, the Trial Chamber found that Janc identified three mixed graves which contained remains of individuals for whom there was evidence that the circumstances of their death were not linked to the events following the fall of Srebrenica.[725] According to the findings of the Trial Chamber, the mixed graves did not include any of the Nova Kasaba graves.[726] **Popović** has failed to show otherwise, providing only an overly broad reference to the expert report of Dunjić.[727] The Appeals Chamber considers that **Popović** has failed to explain how the existence of the mixed graves undermines the Trial Chamber's inclusion of the individuals identified from the Nova Kasaba graves in its overall number of victims.

264. In light of the foregoing, the Appeals Chamber finds that **Popović** has failed to show an error in the Trial Chamber's inclusion of the 90 individuals identified from the Nova Kasaba graves in its overall number of victims, and accordingly dismisses **Popović**'s arguments.

(ii) Individuals identified from the Sandići grave

265. **Popović** submits that since he was held responsible for the deaths of only 10-15 men, who were killed after being detained at the Sandići Meadow, the Trial Chamber erred by calculating all of the 17 individuals identified from the Sandići grave in its estimate of the total number of persons

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722 Trial Judgement, paras 659-664; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 3-4.

723 Trial Judgement, para. 417.

724 Trial Judgement, paras 607-624, 638-664.

725 Trial Judgement, para. 652.

726 Trial Judgement, para. 652 & fn. 2355.

727 Popović's Reply Brief, para. 124 & fn. 339 ("Defence expert Dunjić reported he was not able to exclude that individuals died in combat activities", referring to "Exh. 1D1070", without specific references to any portion of this 131 page exhibit).

executed.[728] The Prosecution responds that **Popović** fails to show that the Trial Chamber erred in including the 17 individuals in its estimate of the total number of persons killed, which he confuses with the number of murders proved.[729]

266. The Trial Chamber found that 10-15 Bosnian Muslims were killed at the Sandići Meadow on 13 July 1995.[730] It further found that the remains of 17 persons exhumed from a grave near the Sandići Meadow had been identified as persons reported missing following the fall of Srebrenica.[731] The Trial Chamber, however, explicitly abstained from finding that this grave was linked to the Sandići Meadow killings charged in the Indictment.[732] In its total number of persons executed, the Trial Chamber included all 17 individuals from the Sandići grave.[733] The Appeals Chamber therefore considers that the Trial Chamber found that these 17 individuals were the victims of Srebrenica-related executions, though not necessarily the Sandići Meadow killings. The Appeals Chamber accordingly finds that **Popović** has failed to show an error in the Trial Chamber's inclusion of the 17 individuals in its overall number of victims and dismisses his arguments.

(iii) Individuals identified from the Drina River bank near the Kozluk grave

267. **Popović** contends that the Trial Chamber erred by including 14 individuals, identified from the Drina River bank several hundred metres from the Kozluk grave, in its estimate of the total number of persons executed, given that the remains of the 14 individuals should have been considered surface remains.[734] The Prosecution responds that **Popović**'s undeveloped argument warrants summary dismissal.[735]

268. In its overall number of persons executed, the Trial Chamber included 14 individuals identified from the Drina River bank near the Kozluk grave.[736] The Appeals Chamber finds that **Popović** has failed to show an error in this regard, considering that Janc did not classify the remains of the 14 individuals as surface remains, noting in particular that they were found close to an execution site and out of the route of the column.[737] **Popović**'s argument is dismissed.

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728 Popović's Appeal Brief, paras 419-420.
729 Prosecution's Response Brief (Popović), para. 279.
730 Trial Judgement, paras 421, 423, 794(3).
731 Trial Judgement, para. 422.
732 Trial Judgement, para. 422, fn. 1496. See also Indictment, para. 30.4.1.
733 Trial Judgement, paras 659-664; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 4, 33-34.
734 Popović's Appeal Brief, para. 441; Popović's Reply Brief, para. 131, referring to, *inter alia*, the opinion of "Manning"; Appeal Hearing, AT. 88-89 (2 Dec 2013).
735 Prosecution's Response Brief (Popović), para. 294 & fn. 1062.
736 Trial Judgement, paras 659-664; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 3, 10-11.
737 Dušan Janc, T. 33551 (1 May 2009). In his report, Janc classified remains collected on the ground or in shallow unmarked graves as surface remains. See Ex. P04490, "Update to the Summary of Forensic Evidence –

(iv) Other individuals

269. **Popović** submits that the Trial Chamber erred by including the following individuals in its total number of persons executed following the fall of Srebrenica:[738] (1) 294 individuals whose DNA profiles did not match persons reported missing;[739] (2) 648 individuals found as surface remains;[740] (3) 45 individuals for whom it was impossible to determine whether their remains were exhumed or simply collected from the ground;[741] and (4) 18 individuals whose bodies were found on the Drina River bank and who may have drowned.[742]

270. The Prosecution responds that **Popović** fails to show an error in the Trial Chamber's estimate of the number of persons executed.[743] The Prosecution submits that the Trial Chamber correctly included the 294 individuals and explicitly excluded the 648 individuals from its estimate.[744] With regard to the 45 individuals and the 18 individuals, it argues that **Popović** merely attempts to substitute his own evaluation of the evidence for that of the Trial Chamber.[745]

271. The Trial Chamber found that Janc included the 294 individuals in his report,[746] but that he excluded from the report individuals for whom information existed that their death was not related to the events following the fall of Srebrenica.[747] The Trial Chamber included the 294 individuals in its overall number of persons executed, based on the Janc Report.[748] The Appeals Chamber notes that their bodies were found in the Srebrenica Related Graves[749] and considers that the absence of matching donors does not necessarily mean that the Trial Chamber erred in considering the 294 individuals as Srebrenica victims. The Appeals Chamber finds that **Popović** has failed to show that a reasonable trial chamber could not have included the 294 individuals in its overall number of persons executed.

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Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", p. 5. **Popović** fails to substantiate his reference to the opinion of "Manning" in this regard.

738 Popović's Appeal Brief, paras 455-456. **Popović** also argues that the killing of 158 individuals was not included in the Indictment. Popović's Appeal Brief, paras 462-464; Appeal Hearing, AT. 90, 92 (2 Dec 2013). The Appeals Chamber has previously rejected this argument. See *supra*, para. 32.

739 Popović's Appeal Brief, para. 458; Popović's Reply Brief, para. 137. See also Popović's Appeal Brief, para. 469.

740 Popović's Appeal Brief, para. 459; Appeal Hearing, AT. 89-90 (2 Dec 2013).

741 Popović's Appeal Brief, para. 460; Popović's Reply Brief, para. 138; Appeal Hearing, AT. 90 (2 Dec 2013).

742 Popović's Appeal Brief, paras 465-466; Appeal Hearing, AT. 91 (2 Dec 2013).

743 Prosecution's Response Brief (Popović), para. 306.

744 Prosecution's Response Brief (Popović), para. 308.

745 Prosecution's Response Brief (Popović), para. 309.

746 "The ICMP Standard Operating Procedures for statistical calculations of DNA-based identification lists anybody with a biological blood relationship to a missing individual as a potential donor." Trial Judgement, fn. 2329.

747 Trial Judgement, para. 650 & fn. 2352.

748 Trial Judgement, paras 659-664; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", p. 2.

749 Trial Judgement, para. 650 & fn. 2352.

272. The Appeals Chamber notes that the Trial Chamber excluded from its overall number of persons executed the 648 individuals,[750] the 45 individuals, and the 18 individuals.[751] The Appeals Chamber therefore finds that, in regard to all these individuals, **Popović** misrepresents the Trial Chamber's factual findings.

273. The Appeals Chamber accordingly finds that **Popović** has failed to show an error in the Trial Chamber's alleged inclusion of the individuals mentioned above in the overall number of persons executed, and dismisses **Popović**'s arguments in this respect.

(d) The Trial Chamber's observation on the potential highest number of persons executed

274. **Popović** submits that the Trial Chamber erred by finding that the total number of persons executed following the fall of Srebrenica could be as high as 7,826.[752] **Popović** specifically argues that the Trial Chamber erroneously included certain individuals in this number.[753] The Prosecution calls for the summary dismissal of **Popović**'s arguments.[754]

275. The Appeals Chamber recalls that it regards the Trial Chamber's calculation that the number of persons executed "could well be as high as 7,826" as an observation not meant to constitute a conclusive finding beyond reasonable doubt.[755] **Popović** does not show that any of his convictions rely on this observation, and the Appeals Chamber therefore dismisses all of his challenges in this regard.

(e) The Trial Chamber's findings on the Janc Report

(i) ABiH data and the reliability of the Janc Report

276. **Popović** submits that the Trial Chamber erred by finding that the Janc Report was reliable despite the fact that Janc did not use data from the Army of Bosnia and Herzegovina ("ABiH") which was considered one of the most significant sources by the Prosecution.[756] The Prosecution argues that **Popović**'s challenge to the reliability of the Janc Report is a mere repetition of his trial argument without showing an error of the Trial Chamber.[757]

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750 Trial Judgement, paras 659-660, 664 & fn. 2380.
751 Trial Judgement, paras 659-664; Ex. P04490, "Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009", pp. 2-5, 39-40.
752 Popović's Appeal Brief, para. 455.
753 Popović's Appeal Brief, paras 457, 461; Popović's Reply Brief, para. 137; Appeal Hearing, AT. 88 (2 Dec 2013). See also Trial Judgement, paras 625-626, 659, 664 & fn. 2381.
754 Prosecution's Response Brief (Popović), paras 306-307 & fn. 1107.
755 See *supra*, para. 254.
756 Popović's Appeal Brief, paras 455, 460.
757 Prosecution's Response Brief (Popović), para. 307 & fn. 1107.

277. The Trial Chamber found the Janc Report reliable.[758] The Appeals Chamber notes that **Popović** appears to rely on a database regarding the ABiH members who died during the conflict between 1992 and 1995.[759] **Popović** does not substantiate his assertion that the Prosecution regarded the database as a significant source and has failed to show that it was essential to the reliability of the Janc Report. The Appeals Chamber therefore finds that **Popović** has failed to develop his assertion that the Trial Chamber erred regarding the reliability of the Janc Report and dismisses his argument in this respect.

(ii) Whether the Janc Report was an expert report

278. **Popović** submits that the Trial Chamber erred by finding that the Janc Report was an expert report.[760] **Popović** argues that Janc was only an investigator for the Prosecution whose expertise was not established and who simply updated Dean Manning's summary.[761] According to **Popović**, he was therefore prejudiced by the factual findings based on the Janc Report.[762] Finally, **Popović** argues that findings made by the Trial Chamber in the *Tolimir* case are at odds with the Janc Report, showing that it is not reliable.[763]

279. The Prosecution responds that **Popović** chose not to cross-examine Janc on his qualifications or expertise and fails to show an error in the Trial Chamber's acceptance of Janc's evidence.[764] Regarding the *Tolimir* case, the Prosecution argues that it is improper to refer to evidence or findings from another case.[765]

280. The Trial Chamber characterised the Janc Report as an "expert report".[766] There is no information before the Appeals Chamber to show that Janc's expertise was established at trial. However, the Trial Chamber found that the Janc Report contained a summary of the forensic evidence related to the missing and dead following the fall of Srebrenica and that the Janc Report presented an update of an expert report prepared by Dean Manning,[767] an investigator for the Prosecution.[768] The Appeals Chamber considers that **Popović** does not challenge the expertise of Manning and has not shown that Janc required any particular expertise to update Manning's expert

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758 Trial Judgement, para. 660.
759 Popović's Appeal Brief, para. 460 & fn. 677, referring to "P02412, last paragraph on page 5 and page 6".
760 Popović's Appeal Brief, paras 472-474; Appeal Hearing, AT. 99 (2 Dec 2013).
761 Popović's Appeal Brief, paras 473-474.
762 Popović's Appeal Brief, para. 474. **Popović** also argues that he did not cross-examine Janc on his expertise because he was not presented as an expert. Popović's Reply Brief, para. 139.
763 Appeal Hearing, AT. 95, 97, 99 (2 Dec 2013), referring to *Tolimir* Trial Judgement, paras 480-481, 581, 596, fn. 2564.
764 Prosecution's Response Brief (Popović), paras 313-315.
765 Appeal Hearing, AT. 95-97 (2 Dec 2013).
766 See, *e.g.*, Trial Judgement, Chapter III, Section J.6.
767 Trial Judgement, para. 650 & fn. 2350.
768 Trial Judgement, para. 622.

report. **Popović** focuses on how the Trial Chamber described the Janc Report rather than demonstrate that it contained any findings or conclusions that required qualifications which Janc did not possess. Finally, the Appeals Chamber considers that the factual comparisons between the present case and the *Tolimir* case are legally irrelevant.[769] The Appeals Chamber therefore concludes that **Popović** has failed to demonstrate an error and dismisses his arguments.

(iii) Connections between the primary and secondary graves

281. **Popović** submits that the Trial Chamber erred by rejecting Witness Dunjić's challenges to the Janc Report regarding connections between primary and secondary graves.[770] According to **Popović**, the Trial Chamber misinterpreted Dunjić's evidence with regard to: (1) DNA connections between primary and secondary graves; and (2) whether certain bodies had been reburied.[771] **Popović** further argues that the Trial Chamber unreasonably dismissed the possibility that bodies at different stages of putrefaction contained in the same grave could have been killed and/or buried at different times, considering the evidence of mixed graves and remains of persons killed in 1992.[772] Finally, **Popović** argues that, contrary to the Trial Chamber's findings and Janc's conclusions, the Čančari Road 1, 6, and 8 graves were *primary* graves because they had no established DNA connections. Specifically with regard to the Čančari Road 6 grave, **Popović** further argues that the presence of animal bones within it shows that it contained surface remains.[773] The Prosecution responds that **Popović**'s arguments should be summarily dismissed.[774]

282. With regard to the DNA connections between the primary and secondary graves, the Trial Chamber noted Dunjić's challenge that only the bodies for which a DNA connection existed could be considered to have originated from the primary grave with which the connection had been established. The Trial Chamber found, based on the Janc Report, that all but one of the primary graves were linked to the secondary graves through both DNA and forensic connections. In this context, the Trial Chamber found that Dunjić: (1) did not have evidence before him of the forensic connections between the graves; and (2) erroneously thought that DNA connections were Janc's sole basis for linking the bodies from the secondary graves to the primary graves.[775] The Trial Chamber specifically based these findings on Dunjić's evidence that the Janc Report connected all the bodies in the secondary graves with the primary graves based on a limited number of

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769 See, *e.g.*, *Bizimungu* Appeal Judgement, para. 210; *Đorđević* Appeal Judgement, paras 257, 701; *Krnojelac* Appeal Judgement, para. 12. See also *infra*, para. 1677.
770 Popović's Appeal Brief, paras 475-479.
771 Popović's Appeal Brief, paras 475-478. See also Trial Judgement, paras 655-656.
772 Popović's Appeal Brief, paras 478-480.
773 Popović's Appeal Brief, para. 481.
774 Prosecution's Response Brief (Popović), paras 316-317.
775 Trial Judgement, para. 655.

established DNA connections and "without appropriate forensic support".[776] **Popović** has failed to show that Dunjić took into account evidence of the forensic connections between the graves[777] and that no reasonable trial chamber could have rejected Dunjić's challenge to the Janc Report based on the combination of DNA evidence and other forensic evidence.

283. With respect to reburial, the Trial Chamber noted Dunjić's opinion that, in light of the different stages of putrefaction and skeletonisation of corpses, many bodies found in the secondary graves had been buried there for the first time.[778] The Trial Chamber found that Dunjić's opinion did not raise a reasonable doubt with regard to the reburial of the relevant remains, considering in particular "the compelling evidence of the re-association of bodies".[779] **Popović** does not specifically assert any error in the Trial Chamber's reliance on this evidence. Instead, he points to Dunjić's criticism of certain individual autopsy reports and Dunjić's opinion that some reports contained insufficient and inadequate information.[780] The Appeals Chamber considers that **Popović** has failed to show any error in the reasoning of the Trial Chamber.

284. The Trial Chamber found that, even in the absence of specific evidence showing that the remains of individuals unrelated to the fall of Srebrenica had been buried in a grave, there always existed a possibility that individuals who died in circumstances unrelated to the Srebrenica events were added to the secondary graves.[781] As examples to contradict the Trial Chamber's finding that this possibility was very slight, **Popović** points to the Čančari Road 4 grave and the Blječeva 1 grave.[782] However, **Popović** does not substantiate the former example. As for the latter example, **Popović** points to Janc's evidence, showing that he had information that the Blječeva 1 grave included approximately 50 bodies of persons related to an incident in 1992.[783] The Appeals Chamber considers that this example constitutes specific evidence of the kind noted by the Trial Chamber and does not show that its finding was erroneous.

285. Finally, in regard to the Čančari Road graves, **Popović** has failed to substantiate his claims. Regarding the Čančari Road 6 grave, **Popović** merely refers to some evidence indicating that

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776 Trial Judgement, para. 655 & fn. 2365, referring to Dušan Dunjić, Ex. 1D01447, "92 *bis* statement" (10 May 2009), paras 77-85.

777 See Popović's Appeal Brief, fn. 703, referring to Ex. 1D01070 "Forensic Examination of Autopsy Reports and Medical Documentation on Exhumation, by Dušan Dunjić, March/April 2008", p. 23 ("We agree that persons on whose body 'ligatures' and/or blindfolds were found were victims of execution by shooting").

778 Trial Judgement, para. 656 & fn. 2367.

779 Trial Judgement, para. 656.

780 See Popović's Appeal Brief, fns 707-708, referring to Dušan Dunjić, T. 22790:8-18 (25 June 2008), T. 22856:23-25, 22873:19-22 (26 June 2008), Ex. 1D01070, "Forensic Examination of Autopsy Reports and Medical Documentation on Exhumation, by Dušan Dunjić, March/April 2008", pp. 42-44.

781 Trial Judgement, para. 658.

782 Popović's Appeal Brief, para. 480.

783 Popović's Appeal Brief, fn. 710, referring to Dušan Janc, T. 33525-33526 (1 May 2009).

animal bones were found within the grave.[784] He neither refers to any finding of the Trial Chamber, nor shows that the Trial Chamber erred in any way. His remaining arguments concerning the Čančari Road graves are not supported by any references to the trial record.

286. In light of the above, the Appeals Chamber finds that **Popović** has failed to show an error in the Trial Chamber's findings on the connections between the primary and secondary graves in the Janc Report, and accordingly dismisses his arguments in this regard.

(f) The Trial Chamber's findings on the ICMP data on deceased persons

287. **Popović** submits that the Trial Chamber erred by accepting Prosecution expert Witness Thomas Parsons's calculation that the total number of persons buried in the Srebrenica Related Graves could be approximately 8,100.[785] **Popović** argues that remains found on the surface and 225 DNA profiles with no family matches should have been excluded from Parsons's estimate.[786] **Popović** also asserts that the Trial Chamber's denial of his motions requesting access to raw DNA data and other documents deprived him of a fair trial.[787] **Popović** further alleges that Defence expert Witness Oliver Stojković identified a high error ratio among the 30 DNA reports he reviewed, thus contradicting the Trial Chamber's finding that his analysis confirmed the reliability of the DNA evidence.[788] The Prosecution responds that **Popović** fails to show that the Trial Chamber erred with regard to Parsons's estimate and that **Popović**'s arguments regarding denial of access to raw DNA data should be summarily dismissed.[789]

288. The Appeals Chamber considers that **Popović** has failed to substantiate his assertion that the Trial Chamber "accepted" Parsons's estimate. The key part of the Trial Judgement to which he refers provides that Parsons "used the data available to him to estimate the total number of persons who perished following the fall of Srebrenica" and "estimated this total number to be approximately 8,100".[790] The Trial Chamber considered Parsons's estimate in the course of its discussion about the data on deceased persons.[791] Analysing this and other evidence, the Trial Chamber was, as noted above, "satisfied beyond reasonable doubt that at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica".[792] The Appeals Chamber finds that **Popović** has failed to show that the Trial Chamber erred in considering Parsons's estimate.

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784 Popović's Appeal Brief, fn. 711, referring to "P04498, p.8, para 37".
785 Popović's Appeal Brief, para. 467.
786 Popović's Appeal Brief, paras 468-469.
787 Popović's Appeal Brief, para. 470.
788 Popović's Appeal Brief, para. 471.
789 Prosecution's Response Brief (Popović), paras 310-312.
790 Trial Judgement, para. 641.
791 Trial Judgement, paras 638-649.
792 See *supra*, para. 254. See also Trial Judgement, para. 664.

289. As for the motions denied at trial, **Popović** only provides a reference to a Trial Chamber decision on one motion.[793] **Popović** asserts that "the disclosure of the requested material would have significantly facilitated the defense's efforts to prove that the ICMP DNA evidence was unreliable", but does not substantiate any alleged error of the Trial Chamber regarding either of the two decisions.[794] Consequently, he has failed to show that he was deprived of a fair trial.

290. The Appeals Chamber finally turns to **Popović**'s argument with regard to Stojković and notes that the Trial Chamber considered his evidence.[795] The Trial Chamber found that Stojković's test of sample electropherograms served only to strengthen the reliability of the ICMP DNA analysis.[796] In challenging the Trial Chamber's finding, **Popović** points to two individual cases in which Stojković expressed some degree of hesitation concerning the reliability of a given identification.[797] Since it is apparent from the Trial Judgement that the Trial Chamber based its finding on a much broader analysis of the evidence provided by both Parsons and Stojković,[798] the Appeals Chamber considers that **Popović**'s argument falls short of showing any error.

291. In light of the foregoing, the Appeals Chamber finds that **Popović** has failed to show an error in the Trial Chamber's analysis of the ICMP data and dismisses his arguments in this regard.

(g) Conclusion

292. In light of the above, the Appeals Chamber dismisses all of **Popović**'s arguments regarding the Trial Chamber's findings on the total number of persons executed.

### 3. Beara's appeal (Grounds 5 in part, 13, 14, and 17 in part)

(a) Introduction

293. **Beara** alleges a number of errors in the Trial Chamber's findings regarding the total number of persons executed. Specifically, **Beara** impugns findings on the manner and cause of death, on demographic evidence, and on ICMP data on deceased persons.[799] The Prosecution responds that

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793 Popović's Appeal Brief, para. 470, referring to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Motion for the Production of Documents Pursuant to Rule 54, 19 February 2009 (confidential). See also Trial Judgement, para. 647 & fn. 2346.

794 See Popović's Appeal Brief, para. 470.

795 Trial Judgement, paras 645-649.

796 Trial Judgement, paras 648-649.

797 Popović's Appeal Brief, fn. 695, referring to "1D01403, paras 20,21,27", which the Appeals Chamber understands to be a reference to Oliver Stojković, Ex. 1D01448, "92 *bis* statement" (9 May 2009), paras 20-21, 27.

798 Trial Judgement, paras 639-649.

799 Beara's Appeal Brief, paras 38-47, 160-174, 200.

the Appeals Chamber should dismiss these challenges.[800] The Appeals Chamber will address **Beara**'s arguments pertaining to each type of finding.[801]

(b) The Trial Chamber's findings on the manner and cause of death

(i) Forensic evidence

294. **Beara** submits that the Trial Chamber erred in law and abused its discretion by admitting the testimonies or reports of Prosecution forensic experts and by giving undue weight to them.[802] **Beara** contends that the forensic reports did not establish the precise time of death and in many cases did not determine the cause of death.[803] **Beara** specifically argues that the Trial Chamber erroneously disregarded the testimonies of Defence experts that the conclusions of William Haglund, a forensic anthropologist, and Christopher Lawrence and John Clark, forensic pathologists, could not be confirmed due to the lack of precision and detail in their descriptions of injuries.[804] **Beara** also stresses that Haglund's methodology was criticised by colleagues and rejected by other international tribunals.[805] **Beara** further alleges that the conclusions of the Prosecution forensic experts were based solely on circumstantial evidence. For example, according to **Beara**, Haglund concluded that the manner of death for all the victims in certain graves was homicide, although he admitted that the cause of death for some of the victims was undetermined.[806]

295. **Beara** submits that the Trial Chamber erred in concluding "that all of the bodies found [in the Cerska grave] were victims of 13 July".[807] **Beara** argues that the Trial Chamber disregarded evidence provided by Janc, which proved that some of the approximately 150 men supposedly killed at Cerska on 13 July 1995 were actually killed after 17 July 1995.[808]

296. The Prosecution responds that **Beara** fails to show any error in the Trial Chamber's reasonable finding that the forensic reports were reliable in light of other corroborating evidence of

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800 Prosecution's Response Brief (Beara), paras 39, 164, 169, 204.

801 **Beara** further submits that the Trial Chamber did not give proper consideration to the testimonies of Dunjić and Stojković. Beara's Appeal Brief, intro before para. 168. The Appeals Chamber dismisses the argument as **Beara** fails to articulate the alleged error.

802 Beara's Appeal Brief, intro before para. 37, paras 38, 42-43, 160-161; Beara's Reply Brief, paras 21, 23.

803 Beara's Appeal Brief, para. 38.

804 Beara's Appeal Brief, para. 40. See also Trial Judgement, paras 412, 609.

805 Beara's Appeal Brief, para. 39.

806 Beara's Appeal Brief, para. 43.

807 Beara's Appeal Brief, paras 41, 200; Beara's Reply Brief, para. 21. **Beara** argued in his appeal brief that the Trial Chamber erred in concluding that Cerska was a primary grave. Beara's Appeal Brief, para. 200. However, **Beara** provided no support of any evidence for his submission, which he largely retracted in his reply brief. Beara's Reply Brief, para. 21. His submission is therefore dismissed.

808 Beara's Appeal Brief, para. 200. See also Beara's Appeal Brief, para. 41; Beara's Reply Brief, para. 21.

mass executions.[809] The Prosecution further responds that **Beara** fails to show how the addition of a small number of men to the Cerska grave after 13 July 1995 contradicts the Trial Judgement.[810]

297. The Appeals Chamber recalls that trial chambers exercise broad discretion in determining the admissibility of evidence.[811] The Appeals Chamber's examination is limited to establishing whether the Trial Chamber abused its discretion by committing a discernible error.[812] The Appeals Chamber finds that **Beara** has failed to show that the admission into evidence of the testimonies or reports of Prosecution forensic experts constituted an abuse of discretion by the Trial Chamber. In particular, **Beara** does not explain why the absence of a precise time or cause of death in forensic reports would render the forensic evidence inadmissible. The Appeals Chamber therefore will give no further consideration to **Beara**'s argument regarding the admission of the forensic evidence and turns to the weight that the Trial Chamber accorded to the evidence.

298. The Trial Chamber found that the forensic reports presented by the Prosecution did not generally provide a precise time of death for those buried in the Srebrenica Related Graves and that the cause of death could not be established in a significant number of cases.[813] The Trial Chamber also noted Dunjić's criticism of the work of Haglund, Lawrence, and Clark regarding the description of injuries for individuals found in some of the Srebrenica Related Graves.[814] The Trial Chamber further noted that Dunjić himself acknowledged that there were many factors to consider other than the state of the remains when determining the cause of death, and the Trial Chamber noted examples such as ligatures, blindfolds, bullet holes through blindfolds, body postures indicating bound wrists, and shell casings found in graves.[815] The Trial Chamber considered the reports together with other evidence of large-scale mass executions in the Srebrenica area in July 1995 and found the reports and the conclusions on the cause of death in the reports to be reliable.[816] In light of the foregoing, the Appeals Chamber finds that **Beara** has failed to show any error in the Trial Chamber's reliance on the reports despite the lack of information regarding the time and cause of death and Dunjić's criticism concerning the imprecise description of injuries.

299. The Trial Chamber also noted that Haglund's methodology was criticised by a forensic pathologist and rejected by an ICTR trial chamber. The Trial Chamber nevertheless found that nothing raised by the Defence created a reasonable doubt as to the reliability of Haglund's work because, *inter alia*, the criticised determinations of cause of death were in fact made by another

809 Prosecution's Response Brief (Beara), paras 39-41, 43-44.
810 Prosecution's Response Brief (Beara), para. 202. See also Prosecution's Response Brief (Beara), para. 42.
811 *Šainović et al.* Appeal Judgement, paras 152, 161.
812 *Šainović et al.* Appeal Judgement, paras 152, 161.
813 Trial Judgement, paras 610-612.
814 Trial Judgement, para. 614.
815 Trial Judgement, para. 616.
816 Trial Judgement, paras 611, 619.

expert in the ICTR case, and an expert panel set up by the Prosecution to investigate complaints against Haglund cleared him of any wrongdoing.[817] The Appeals Chamber finds that **Beara** has failed to show that no reasonable trial chamber could have concluded that the reliability of Haglund's work was not tarnished by the criticism of his methodology.

300. As for Haglund's conclusions on the manner and cause of death, the Appeals Chamber is not convinced that the determination of the manner of death necessarily hinges on the identification of the cause of death. Thus, even when it is impossible to determine the cause of death because body parts and soft tissue are missing,[818] there may be other evidence showing, for instance, gunshot wounds in bones, shattering of skulls and bones, projectiles in body parts, amputation of body parts, or blindfolds. The Appeals Chamber is therefore not convinced that a reasonable trial chamber could not have relied on Haglund's conclusions. **Beara** has failed to provide any further examples of his assertion that the conclusions of the Prosecution forensic experts were based solely on circumstantial evidence.

301. The Trial Chamber found that, on 13 July 1995, members of the BSF killed approximately 150 Bosnian Muslim men in an area along a dirt road in the Cerska Valley.[819] It also found that the bodies of 150 males were recovered from the grave.[820] The Appeals Chamber notes that the Prosecution and **Beara** agree that some of the victims found in the grave were in fact killed after 13 July 1995.[821] **Beara** refers to Janc's evidence indicating that ten individuals may have been killed as late as 17 July 1995.[822] While the Trial Chamber did not explicitly address this evidence in the Trial Judgement,[823] it concluded that "*approximately* 150" Bosnian Muslim men were killed on 13 July 1995.[824] In light of this, and considering the nature of the evidence on which **Beara** relies, the Appeals Chamber is not convinced that the Trial Chamber "completely disregarded"[825] this evidence or that the impugned finding is erroneous. In any event, it remains undisputed that the vast majority of the victims – approximately 140 out of 150 – were killed on 13 July 1995. The Appeals Chamber therefore finds that **Beara** has failed to show that any alleged error would cause a miscarriage of justice.

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817 Trial Judgement, para. 620.
818 See Trial Judgement, para. 612.
819 Trial Judgement, para. 414.
820 Trial Judgement, paras 412-413.
821 Beara's Appeal Brief, para. 200; Prosecution's Response Brief (Beara), para. 202, referring to Prosecution's Final Brief, para. 581.
822 Beara's Appeal Brief, paras 41, 200, referring to Dušan Janc, T. 33528-33529 (1 May 2009), Ex. 1D01391, "Disclosure of Information Provided to the Office of the Prosecutor, 27 April 2009", p. 2.
823 See Trial Judgement, paras 410-414.
824 Trial Judgement, para. 414 (emphasis added).
825 *Kvočka et al.* Appeal Judgement, para. 23.

302. Thus, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred regarding the forensic evidence and therefore dismisses his appeal in this regard.

(ii) Number of persons killed in legitimate combat operations

303. **Beara** submits that the Trial Chamber violated the best evidence rule by giving undue weight to flawed, circumstantial, and unreliable Prosecution expert witness evidence and by disregarding survivors' testimonies and documentary evidence supporting the view that many were killed in legitimate combat operations.[826] **Beara** also contends that the Trial Chamber ignored the geographical proximity and overlap between legitimate combat operations and the mass graves which Janc depicted on a map.[827] **Beara** further asserts that the Trial Chamber erroneously failed to address Defence arguments that Prosecution expert reports did not exclude the possibility that a substantial number of identified Bosnian Muslim men were killed in combat.[828] **Beara** argues that the Trial Chamber also erred in failing to analyse Defence expert Witness Svetlana Radovanović's evidence of 3,277 overlaps between the ABiH database and the 2005 List of Missing, which supported the view that many died in combat.[829] Finally, **Beara** submits that by failing to discuss all available evidence regarding members of the Bosnian Muslim column dying from legitimate combat operations,[830] the Trial Chamber violated his right to a fair trial, leading to a miscarriage of justice.[831] The Prosecution responds that **Beara** fails to show any error in the Trial Chamber's finding.[832]

304. With regard to the number of deaths from legitimate combat operations, the Appeals Chamber notes that in reaching its estimate of the number of persons executed, the Trial Chamber excluded 648 individuals identified from surface remains based on Janc's testimony that cases involving death from a land mine, suicide, or legitimate combat operation were most likely to be found among surface remains.[833] The Appeals Chamber further notes that the Trial Chamber did consider relevant testimony from all the witnesses listed by **Beara**.[834] The Trial Chamber also took into account documentary evidence on the topic, including that on which **Beara** relies.[835] Regarding the geographical proximity or overlap between legitimate combat operations and the Srebrenica

826 Beara's Appeal Brief, paras 160-162, 164; Beara's Reply Brief, paras 62-64; Appeal Hearing, AT. 205-206 (3 Dec 2013). See also Beara's Reply Brief, para. 67.
827 Beara's Appeal Brief, para. 163.
828 Beara's Appeal Brief, para. 164.
829 Beara's Appeal Brief, para. 165; Beara's Reply Brief, para. 64. See also Trial Judgement, para. 625.
830 Beara's Appeal Brief, paras 166-167; Beara's Reply Brief, paras 62, 64.
831 Beara's Appeal Brief, intro before para. 160, para. 160.
832 Prosecution's Response Brief (Beara), paras 156-163; Appeal Hearing, AT. 214-215 (3 Dec 2013).
833 Trial Judgement, para. 617 & fn. 2255, para. 660. The Trial Chamber observed that Janc calculated a total of 648 individuals whose remains were found on the ground or surface. Trial Judgement, fn. 2256.
834 Trial Judgement, paras 380-381 and references cited therein. See Beara's Appeal Brief, para. 161; Beara's Reply Brief, fn. 45.

Related Graves, the Trial Chamber found that legitimate combat operations occurred close to some of the graves based on Janc's testimony and the map to which **Beara** refers.[836] The Appeals Chamber therefore dismisses **Beara**'s contention that the Trial Chamber disregarded any of this evidence.

305. As for the Defence arguments which **Beara** submits were ignored by the Trial Chamber, the Appeals Chamber recalls that, although a trial chamber is obliged to set out a reasoned opinion in writing, it is not obliged to address every argument in detail.[837] The Appeals Chamber finds that **Beara** has failed to explain why the alleged omissions invalidate the Trial Judgement.

306. With respect to Radovanović's evidence, the Trial Chamber considered but rejected her critique of the methodology applied to the 2005 List of Missing.[838] In doing so, the Trial Chamber did not specifically address Radovanović's conclusion regarding overlaps of the ABiH database with the 2005 List of Missing.[839] The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[840] The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[841] **Beara** contends that the evidence "supports the Defence argument that many of these soldiers actually died as a result of their engagement with VRS forces".[842] The Appeals Chamber considers that evidence purporting to conclude that a number of soldiers contained in the ABiH database also appeared on the 2005 List of Missing is not necessarily relevant to the Trial Chamber's findings regarding the total number of persons executed. Furthermore, the Appeals Chamber can see no indication that the number of identified victims of execution was based on the 2005 List of Missing.[843] Consequently, the Appeals Chamber is not convinced that the Trial Chamber disregarded the evidence.

307. In light of the above, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred with respect to the number of persons executed following the fall of Srebrenica and therefore dismisses this aspect of his appeal.

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835 Trial Judgement, para. 617 & fn. 2256, referring to, *inter alia*, Ex. 1D00374, "UNPROFOR, Srebrenica-Tuzla Update, 17 July 1995". See Beara's Appeal Brief, fn. 209; Appeal Hearing, AT. 205-206 (3 Dec 2013).

836 Trial Judgement, para. 617 & fn. 2257. See Beara's Appeal Brief, fn. 211.

837 *Haradinaj et al.* Appeal Judgement, para. 128.

838 Trial Judgement, paras 634-637.

839 Trial Judgement, paras 634-637. See also Beara's Final Brief, para. 520.

840 *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

841 *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

842 Beara's Appeal Brief, para. 165.

843 See *infra*, para. 336.

(c) The Trial Chamber's findings on demographic evidence

308. **Beara** submits that the Trial Chamber erred in law and abused its discretion by failing to properly consider and give adequate weight to the testimonies of Defence demographic expert Witnesses Miladin Kovačević and Radovanović.[844] **Beara** argues that, instead, the Trial Chamber found that Prosecution demographic experts' conclusions were reliable and shifted the burden of proof to the Defence to prove otherwise.[845] **Beara** contends that, as a result, his right to a fair trial was violated, leading to a miscarriage of justice.[846] Furthermore, he submits that the Trial Chamber erred in law and abused its discretion by admitting the evidence of Prosecution demographic experts and by giving undue weight to it.[847]

309. The Appeals Chamber finds that **Beara** has failed to develop any arguments in support of his assertion that the Trial Chamber erred by admitting the evidence of Prosecution demographic experts.[848] The Appeals Chamber therefore will not give further consideration to **Beara**'s argument regarding admission into evidence and turns to the weight accorded to the evidence.

(i) The Trial Chamber's rejection of the evidence of Kovačević

310. **Beara** submits that the Trial Chamber erred by disregarding, without a reasoned opinion, Kovačević's analysis that showed that the conclusion of the Prosecution experts on the number of missing persons was inaccurate.[849] **Beara** argues that the Trial Chamber erroneously found that Kovačević's approach was fundamentally flawed because he did not use data from the International Committee of the Red Cross ("ICRC") and Physicians for Human Rights on persons reported missing, and that this error effectively shifted the burden of proof onto the Defence.[850] **Beara** also contends that the Trial Chamber erroneously found that Kovačević's evidence was speculative due to the lack of explanation of the sources of the documents used.[851] The Prosecution responds that **Beara** fails to show an error in the Trial Chamber's findings and that the Trial Chamber did not shift the burden of proof to the Defence.[852]

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844 Beara's Appeal Brief, intro before para. 168, paras 168-172. See also Trial Judgement, paras 630, 634.
845 Beara's Appeal Brief, intro before para. 168, paras 168-171. See also Beara's Appeal Brief, para. 44.
846 Beara's Appeal Brief, intro before para. 168.
847 Beara's Appeal Brief, intro before para. 37, para. 44. In support of his submission, **Beara** presents the same detailed arguments as the ones he advances regarding the Trial Chamber's alleged failure to properly consider the testimony of Defence experts. Beara's Appeal Brief, paras 44, 168 and references cited therein. See also Beara's Reply Brief, para. 65.
848 See Beara's Appeal Brief, para. 44; Beara's Reply Brief, para. 24.
849 Beara's Appeal Brief, paras 44, 168 & fns 80, 223; Beara's Reply Brief, paras 24, 66, 68.
850 Beara's Appeal Brief, para. 169.
851 Beara's Appeal Brief, para. 172; Beara's Reply Brief, para. 67.
852 Prosecution's Response Brief (Beara), paras 39, 45, 165.

311. The Appeals Chamber notes that the Trial Chamber considered but ultimately rejected Kovačević's challenges to Prosecution Witness Helge Brunborg's compilation of the 2005 List of Missing.[853] The Trial Chamber found Kovačević's analysis unreliable because he: (1) calculated the number of missing persons in Srebrenica after the fall of the town using an imprecise methodology;[854] (2) ignored certain important data sources used by Brunborg;[855] and (3) relied upon documents that the Trial Chamber could not properly identify and whose reliability it could not assess.[856] Consequently, the Appeals Chamber rejects **Beara**'s initial assertion that the Trial Chamber disregarded Kovačević's analysis without a reasoned opinion. Turning to each of the bases supporting the Trial Chamber's finding, the Appeals Chamber notes that **Beara** simply ignores the Trial Chamber's first basis for rejecting Kovačević's analysis. With regard to the second basis, he has failed to adequately explain how it amounted to a reversal of the burden of proof. As for the third basis, **Beara** merely asserts that the Trial Chamber erred without substantiating his argument. The Appeals Chamber therefore finds that **Beara** has failed to show an error in the Trial Chamber's findings regarding Kovačević's evidence and dismisses **Beara**'s appeal in this respect.

(ii) The Trial Chamber's rejection of the evidence of Radovanović

312. **Beara** submits that the Trial Chamber erred by disregarding without a reasoned opinion Radovanović's testimony critiquing the methodology of the Prosecution demographic experts and showing that the latter: (1) disregarded available sources that would have produced a more reliable list of missing persons; (2) used a large number of identification keys to match persons between the 1991 Census and a list of voters made after 1995; and (3) did not define the actual territory of Srebrenica.[857] **Beara** argues that the Trial Chamber shifted the burden of proof to the Defence when: (1) comparing Brunborg's result with Radovanović's on the total number of missing persons, and rejecting Radovanović's conclusion that 1,002 individuals who did not match the 1991 Census records should have been excluded from the number; and (2) finding, without giving a reason, that people who may have died prior to 10 July 1995 were not wrongly included in the 2005 List of Missing despite Defence arguments that bodies not related to the executions were buried in the Srebrenica Related Graves.[858] Finally, **Beara** contends that the Trial Chamber erroneously found that Radovanović's evidence was speculative due to the lack of explanation about the sources of the documents she used, when in fact she testified that she had received the documents from the

853 See Trial Judgement, paras 630-633, 637.
854 Trial Judgement, para. 632. See also Trial Judgement, para. 631.
855 Trial Judgement, para. 633.
856 Trial Judgement, para. 637.
857 Beara's Appeal Brief, paras 44, 168 & fns 77-79, 220-222; Beara's Reply Brief, paras 24, 66, 68.
858 Beara's Appeal Brief, paras 170-171; Beara's Reply Brief, para. 69.

Defence as materials disclosed by the Prosecution.[859] The Prosecution responds that **Beara** fails to show an error in the Trial Chamber's findings and that the burden of proof was not shifted.[860]

313. The Appeals Chamber observes that the Trial Chamber considered but ultimately rejected several challenges presented by Radovanović to Brunborg's compilation of the 2005 List of Missing. The Appeals Chamber first notes that the Trial Chamber gave a reasoned opinion for relying on the 2005 List of Missing despite Radovanović's testimony that Brunborg ignored many available sources that would have produced a more reliable list.[861] Second, the Appeals Chamber considers that **Beara** has failed to develop the allegation that Prosecution experts used an unreasonably large number of identification keys. Instead, he merely refers to Radovanović's opinion that "if you have 71 keys for matching, you can match anything".[862] Third, regarding the territorial definition of Srebrenica, **Beara** refers to Radovanović's testimony on the importance of defining the space under consideration in statistical and demographic research and her criticism of Prosecution expert reports in this regard.[863] However, in the same reference Radovanović seemingly stated that Brunborg considered Srebrenica to be "just the town of Srebrenica".[864] Finally, **Beara** asserts that the "objections and accompanying evidence are of the utmost importance for the determination of the overall number of victims of the alleged JCE to Murder",[865] but has failed to explain why the alleged omissions invalidated any decision of the Trial Chamber.

314. **Beara**'s allegations that the Trial Chamber shifted the burden of proof to the Defence are, in the view of the Appeals Chamber, not supported by either of the examples he provides. In the first example, the Trial Chamber explained why it accepted the work of Brunborg despite the criticism of Radovanović that the 2005 List of Missing wrongly included persons who could not be found on the 1991 Census.[866] In the second example, the Trial Chamber explained why it rejected Radovanović's criticism that the 2005 List of Missing wrongly included persons who were not associated with the July 1995 events in Srebrenica.[867] This is properly within the Trial Chamber's task of weighing the evidence[868] and does not amount to a reversal of the burden of proof.[869] The Appeals Chamber therefore finds that **Beara**'s allegations are without merit. The Appeals Chamber further notes with regard to the second example that **Beara** raises a new argument in his reply brief

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859 Beara's Appeal Brief, para. 172; Beara's Reply Brief, para. 67.
860 Prosecution's Response Brief (Beara), paras 39, 45, 165-167.
861 See Trial Judgement, paras 634-637.
862 Beara's Appeal Brief, paras 44, 168, referring to Svetlana Radovanović, T. 24339 (29 July 2008).
863 Beara's Appeal Brief, paras 44, 168, referring to Svetlana Radovanović, T. 24366 (30 July 2008).
864 Svetlana Radovanović, T. 24366 (30 July 2008).
865 Beara's Reply Brief, para. 24.
866 Trial Judgement, para. 635.
867 Trial Judgement, para. 636.
868 See, *e.g.*, *Lukić and Lukić* Appeal Judgement, paras 86, 112; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
869 *Cf. Nizeyimana* Appeal Judgement, para. 136.

that the Trial Chamber's reasoning was erroneously based on a portion of Prosecution Witness Ewa Tabeau's testimony.[870] The Appeals Chamber declines to consider this new argument to which the Prosecution did not have an opportunity to respond.[871]

315. Finally, the Appeals Chamber turns to **Beara**'s contention that the Trial Chamber erroneously found that Radovanović did not explain the sources of the documents she used, when in fact she testified from whom she had received them. The Trial Chamber found that Radovanović's report explained neither the source nor the content of the documents that she used in calculating the number of displaced persons following the fall of Srebrenica. The Trial Chamber consequently found that it had no basis to assess their reliability and qualified Radovanović's evidence as speculative.[872] The Trial Chamber noted Radovanović's testimony that she had received the documents from the Defence as materials disclosed by the Prosecution.[873] In the Appeals Chamber's view, **Beara** misunderstands the Trial Chamber's reasoning that its ability to assess the reliability of documents hinged on knowing the provenance and content of the documents and not who may have provided them to Radovanović. The Appeals Chamber therefore finds that **Beara**'s argument is without merit.

316. In light of the foregoing, the Appeals Chamber finds that **Beara** has failed to show an error in the Trial Chamber's findings regarding Radovanović's evidence and accordingly dismisses **Beara**'s appeal in this regard.

(d) The Trial Chamber's findings on the ICMP data on deceased persons

(i) The Trial Chamber's reliance on the evidence of Parsons

317. Regarding the number of persons buried in the Srebrenica Related Graves, **Beara** submits that the Trial Chamber erred in law and abused its discretion by admitting the evidence of Witness Parsons, Director of Forensic Science at the ICMP, and by giving undue weight to this evidence.[874] Specifically, **Beara** argues that: (1) the ICMP never provided electropherograms showing the results of the DNA analysis; (2) the Trial Chamber dismissed a Defence motion requesting the disclosure of records establishing the identity of exhumed persons for the purpose of verifying the records; (3) Parsons's conclusions did not represent a list of closed cases, but rather DNA match reports; (4) many identifications were conducted prior to the accreditation of the ICMP; and (5)

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870 Beara's Reply Brief, fn. 52, incorrectly referring to "Tabeau testimony T21502-21503". See Trial Judgement, fn. 2315, referring to Ewa Tabeau, T. 21052 (5 Feb 2008).
871 See *Mugenzi and Mugiraneza* Appeal Judgement, fn. 273; *Martić* Appeal Judgement, para. 229.
872 Trial Judgement, para. 637.
873 Trial Judgement, fn. 2317.
874 Beara's Appeal Brief, intro before para. 37, paras 45-47. See also Trial Judgement, para. 639.

Parsons's methodology was erroneous and his assumptions were speculative.[875] The Prosecution responds that **Beara** fails to show an error in the Trial Chamber's admission and evaluation of the evidence, and that Witness Stojković was provided with sample electropherograms and reached the same conclusions as the ICMP.[876]

318. The Appeals Chamber finds that **Beara** has failed to show that the admission of Parsons's evidence constituted an abuse of discretion by the Trial Chamber.[877] The Appeals Chamber therefore will not give further consideration to this argument and turns to the weight that the Trial Chamber accorded to the evidence, addressing each of **Beara**'s arguments in turn.

319. The Trial Chamber found that Stojković was provided with a sample bunch of DNA analyses, including electropherograms, relating to one of the Srebrenica Related Graves and that Stojković, through his test of the sample, came to the same conclusion as the ICMP.[878] **Beara** ignores relevant factual findings and has failed to explain how the Trial Chamber erred.

320. The Trial Chamber dismissed **Popović**'s motion asking for the disclosure of records establishing the identity of exhumed persons due to the lateness of the request and failure to show the Prosecution's custody or control of the material.[879] **Beara** stresses that the disclosure would have made it possible to verify or dispute the Prosecution experts' results,[880] but has failed to articulate how the Trial Chamber erred in disposing of the motion.

321. The Trial Chamber noted Parsons's testimony that the 2009 ICMP List of Deceased did not represent a list of closed cases, but rather DNA match reports with high statistical certainty ascribing an individual name to a victim sample.[881] **Beara** has failed to develop why this should have prevented the Trial Chamber from relying on the list.

322. The Trial Chamber also noted Stojković's criticism that 4,000 identifications had been conducted by the ICMP before it received professional accreditation, but the Trial Chamber rather viewed the accreditation as an expression of approval of the ICMP's work.[882] **Beara** has failed to articulate how the Trial Chamber erred in this regard.

323. The Trial Chamber also found that Parsons estimated the total number of persons buried in the Srebrenica Related Graves to be approximately 8,100, based on ICMP data and the following

875 Beara's Appeal Brief, paras 45-46.
876 Prosecution's Response Brief (Beara), paras 39, 46-51.
877 See *supra*, para. 297.
878 Trial Judgement, paras 646, 648-649.
879 Trial Judgement, para. 647 & fn. 2346.
880 Beara's Appeal Brief, para. 45.
881 Trial Judgement, para. 644.
882 Trial Judgement, para. 645 & fn. 2340.

two assumptions: (1) the bone samples were representative, in terms of the chance of making a DNA match, of all persons found in the graves; and (2) the failure to make a DNA match on a given bone sample was due to the lack of DNA profiles from living family members of the missing.[883] The Appeals Chamber finds that **Beara** has failed to develop how Parsons's methodology and assumptions were erroneous.

324. In light of the above, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred in admitting and weighing the evidence of Parsons and therefore dismisses **Beara**'s appeal in this respect.

(ii) The Trial Chamber's rejection of the evidence of Debra Komar

325. **Beara** submits that the Trial Chamber erred in law and abused its discretion by rejecting the evidence and conclusions of Defence expert Witness Debra Komar regarding ICMP data.[884] **Beara** argues that the Trial Chamber erred in not accepting Komar's conclusion that only 3,959 individuals could be identified once duplicate matches were eliminated, although Komar extensively explained her methodology.[885] **Beara** also contends that the Trial Chamber completely disregarded Komar's evidence disputing a Prosecution expert's inclusion of 758 purportedly unique DNA profiles not associated with specific individuals in the total number of people associated with Srebrenica.[886] As a result, according to **Beara**, his right to a fair trial was violated, leading to a miscarriage of justice.[887] The Prosecution responds that **Beara** fails to show any error in how the Trial Chamber dealt with Komar's evidence.[888]

326. The Trial Chamber noted Komar's criticism that Parsons's estimate of approximately 8,100 persons buried in the Srebrenica Related Graves was based upon unreliable extrapolation from available data and would be reduced to only 3,959 identified individuals once duplicate matches were eliminated.[889] The Trial Chamber found, however, that Komar did not explain how and on what basis she arrived at that number.[890] **Beara** refers to Komar's testimony on her reorganisation and analysis of the ICMP data.[891] The Appeals Chamber cannot find in this testimony any explanation how and on what basis she came to the specific number of 3,959. The Appeals Chamber therefore finds that **Beara**'s argument is undeveloped.

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883 Trial Judgement, para. 641.
884 Beara's Appeal Brief, intro before para. 168, paras 173-174. See also Trial Judgement, para. 642.
885 Beara's Appeal Brief, para. 173.
886 Beara's Appeal Brief, para. 174.
887 Beara's Appeal Brief, intro before para. 168.
888 Prosecution's Response Brief (Beara), para. 168.
889 Trial Judgement, paras 641-642.
890 Trial Judgement, para. 642.
891 Beara's Appeal Brief, fn. 232, referring to Debra Komar, T. 23949-23958 (24 July 2008).

327. Finally, with regard to Komar's evidence disputing the 758 DNA profiles, the Appeals Chamber notes that although the Trial Chamber did not explicitly address this evidence,[892] **Beara** has failed to explain why the omission invalidates the Trial Judgement.

328. In light of the foregoing, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred with respect to Komar's evidence and dismisses this aspect of **Beara**'s appeal.

(e) Conclusion

329. The Appeals Chamber therefore dismisses all of **Beara**'s arguments under grounds of appeal 5 in relevant part, 13, 14, and 17 in relevant part.

4. Nikolić's appeal (Sub-ground 4.4)

(a) Introduction

330. **Nikolić** submits that the Trial Chamber erred in finding that at least 5,336 individuals were executed following the fall of Srebrenica.[893] **Nikolić** specifically impugns the Trial Chamber's: (1) rejection of Radovanović's evidence on the methodology applied to the 2005 List of Missing; and (2) alleged failure to consider the evidence establishing that up to 3,000 persons died from suicides or legitimate combat operations.[894] The Prosecution responds that **Nikolić**'s submission should be dismissed.[895]

331. The Appeals Chamber will first address whether **Nikolić**'s challenge to the Trial Chamber's finding could have any impact on its conclusion on genocidal intent, before turning to his arguments regarding the evidence of Radovanović and deaths that did not result from executions.

(b) The potential impact on genocidal intent of the number of persons executed

332. **Nikolić** submits that the number of persons executed was significantly lower than 5,336 and therefore no reasonable trier of fact could have found that the murder operation of the BSF was perpetrated with genocidal intent.[896] Thus, according to **Nikolić**, his conviction for aiding and abetting genocide must be quashed.[897]

333. The Prosecution responds that the Trial Chamber did not directly attribute the total number of persons executed (5,336) to any of the accused or to the JCE to Murder, but rather used the

892 See Trial Judgement, paras 641-644.
893 Nikolić's Appeal Brief, para. 78; Nikolić's Reply Brief, para. 34.
894 Nikolić's Appeal Brief, paras 79-85.
895 Prosecution's Response Brief (Nikolić), paras 68, 77.
896 Nikolić's Appeal Brief, paras 85, 87-88; Nikolić's Reply Brief, para. 35.

number of persons executed at specific execution sites as the basis for adjudging convictions and sentences in relation to genocide.[898] The Prosecution further argues that the scale of the murders was only one of many factors that the Trial Chamber considered concerning genocidal intent. According to the Prosecution, **Nikolić** fails to demonstrate any impact on the Trial Chamber's determination of genocide or on his conviction and sentence.[899]

334. As stated above, for its conclusion on genocide, the Trial Chamber relied on both its calculations regarding the number of persons executed at each execution site and its calculations on the total number of persons executed.[900] The Appeals Chamber notes that the Trial Chamber regarded the scale of the murder operation as relevant for deciding that genocide was committed by members of the BSF[901] and also counted **Nikolić**'s awareness of the scale and scope of the killing operations as one of the elements relevant for concluding that he aided and abetted genocide.[902] In light of the above, the Appeals Chamber finds that an alleged error in the Trial Chamber's calculation of the number of persons executed, if proven, could have an impact on the Trial Chamber's findings on genocide. The Appeals Chamber is therefore not convinced by the Prosecution's arguments in this regard. Accordingly, the Appeals Chamber will proceed to consider **Nikolić**'s arguments regarding the Trial Chamber's rejection of the evidence of Radovanović and its alleged failure to consider evidence of non-execution deaths.

(c) The Trial Chamber's rejection of the evidence of Radovanović

335. **Nikolić** submits that the Trial Chamber erred when rejecting Radovanović's testimony that no more than 3,225 individuals on the 2005 List of Missing matched individuals in the 1991 Census.[903] The Prosecution responds that **Nikolić**'s arguments should be summarily dismissed.[904]

336. The Appeals Chamber recalls that the impugned finding,[905] that "at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica",[906] was largely based on the Janc Report, which in turn was mainly based on the 2009 ICMP List of Deceased.[907] The Appeals Chamber can see no indication that the figure of 5,336 identified execution victims was

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897 Nikolić's Appeal Brief, para. 88.
898 Prosecution's Response Brief (Nikolić), paras 68-70.
899 Prosecution's Response Brief (Nikolić), para. 70.
900 See *supra*, para. 231.
901 Trial Judgement, paras 823, 837, 841, 856, 863.
902 Trial Judgement, paras 1404-1405, 1407, 1415.
903 Nikolić's Appeal Brief, paras 79-82, 85; Nikolić's Reply Brief, para. 34.
904 Prosecution's Response Brief (Nikolić), paras 68, 71, 73-74, 76.
905 See Nikolić's Appeal Brief, para. 78.
906 Trial Judgement, para. 664.
907 See *supra*, para. 254.

based on the 2005 List of Missing, to which Radovanović's evidence pertains.[908] Thus, the alleged errors are not relevant to the impugned finding. **Nikolić**'s arguments are therefore dismissed.

(d) The Trial Chamber's failure to consider evidence of non-execution deaths

337. **Nikolić** submits that the Trial Chamber erred by failing to consider evidence showing that up to 3,000 persons died as a result of suicide or legitimate combat operations, referring to: (1) Parsons's testimony that the ICMP established neither the manner nor the time of death; (2) several estimates of the number of combat casualties; and (3) a memorandum by Tabeau indicating that up to 73 per cent of the persons on the 2005 List of Missing could be matched with ABiH military records ("Tabeau Memorandum").[909] The Prosecution responds that **Nikolić** fails to show any error.[910]

338. The Appeals Chamber notes that Parsons accepted that "the ICMP establishes neither the year nor the manner and time of death".[911] However, the Appeals Chamber observes that the Trial Chamber considered other evidence of mass executions which took place in the Srebrenica area in July 1995 in rejecting Defence challenges pertaining to the cause or precise time of death of the individuals found in the Srebrenica Related Graves.[912] The Appeals Chamber therefore finds that **Nikolić** has failed to establish any error in this regard.

339. The Trial Chamber explicitly considered the evidence pertaining to the number of combat casualties, which included estimates as high as 3,000.[913] The Trial Chamber, however, did not accept those high estimates.[914] The Appeals Chamber recalls that in reaching its estimate of the number of persons executed, the Trial Chamber excluded 648 individuals identified from surface remains based on Janc's testimony that deaths from land mines, suicide, or legitimate combat operations were most likely to be found among surface remains.[915] The Appeals Chamber finds that **Nikolić** has failed to explain how the Trial Chamber allegedly erred with regard to the estimates of the number of combat casualties.

340. The Appeals Chamber notes that the Trial Chamber did not explicitly address the Tabeau Memorandum, which reported that there were approximately 70 per cent of matches between ABiH

908 See Trial Judgement, paras 635-637.
909 Nikolić's Appeal Brief, paras 83-85; Nikolić's Reply Brief, paras 34-35.
910 Prosecution's Response Brief (Nikolić), paras 71-72.
911 Thomas Parsons, T. 20919 (1 Feb 2008).
912 See, in particular, Trial Judgement, paras 611, 619.
913 Trial Judgement, para. 617 & fn. 2256. *Cf.* Nikolić's Appeal Brief, para. 84 and references cited therein. The relevant part of Exhibit 2D00669 is discussed at Dušan Janc, T. 33595-33599 (4 May 2009).
914 Trial Judgement, para. 617 & fn. 2256, para. 660.
915 Trial Judgement, para. 617 & fn. 2255, para. 660. See also *supra*, para. 304.

military records for the Tuzla region and the 2005 List of Missing.[916] The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[917] The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[918] **Nikolić** contends that the evidence provided "further corroboration of a high number of combat casualties".[919] The Appeals Chamber recalls that evidence purporting to conclude that a number of persons contained in the ABiH military records also appeared on the 2005 List of Missing is not necessarily relevant to the Trial Chamber's findings regarding the total number of persons executed,[920] and that it found no indication that the number of identified execution victims was based on the 2005 List of Missing.[921] Consequently, the Appeals Chamber finds that **Nikolić** has failed to establish that the Trial Chamber erred with regard to the Tabeau Memorandum.

(e) Conclusion

341. In light of the above, the Appeals Chamber finds that **Nikolić** has failed to show that the Trial Chamber erred in calculating the number of persons executed. Thus, the Trial Chamber's findings on genocide are not impacted. Accordingly, the Appeals Chamber dismisses his sub-ground of appeal 4.4.

## 5. Conclusion

342. The Appeals Chamber has dismissed all challenges regarding the total number of deceased.

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916 Ex. 3D00457, "Internal memorandum from Ewa Tabeau to Peter McCloskey: ABiH Military Records Overlapping with 2005 OTP List of Srebrenica Missing, 24 July 2008", pp. 1-2.

917 *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

918 *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

919 Nikolić's Appeal Brief, para. 84.

920 See *supra*, para. 306.

921 See *supra*, para. 336.

# VII. OTHER EVIDENTIARY MATTERS

## A. Alibi Evidence

### 1. Applicable law

343. The Appeals Chamber recalls that an alibi does not constitute a defence in its proper sense.[922] Where an accused raises an alibi he is merely denying that he was in a position to commit the crime with which he was charged.[923] It is settled jurisprudence of both the ICTY and the ICTR that an accused does not bear the burden of proof beyond reasonable doubt in relation to establishing an alibi[924] but only needs to produce evidence likely to raise a reasonable doubt in the Prosecution's case.[925] If the alibi is reasonably possibly true, it must be accepted.[926] Where the alibi evidence does *prima facie* account for the accused's activities at the relevant time of the commission of the crime, the onus remains on the Prosecution to eliminate any reasonable possibility that the alibi is true.[927] The Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[928]

### 2. Popović's appeal

#### (a) Alleged errors in relation to Popović's alibi for the evening of 14 July 1995

344. The Trial Chamber found that on 14 July 1995, **Popović** was embroiled in several important aspects of the murder operation in Orahovac.[929] It concluded that around 8:00 a.m. on 14 July 1995, **Popović**, **Beara**, and **Nikolić** met at the Standard Barracks in Zvornik to discuss the organisation and co-ordination of the murder operation ("14 July Meeting");[930] **Popović** spent that morning in the company of **Nikolić** transporting prisoners from Bratunac to the Grbavci School;[931] and, **Popović**, together with **Nikolić**, was present in Orahovac in the afternoon of that day, directing the executions there.[932] Finally, the Trial Chamber concluded that in the evening of 14 July 1995,

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922 *Zigiranyirazo* Appeal Judgement, para. 17; *Ndindabahizi* Appeal Judgement, para. 66, citing *Kamuhanda* Appeal Judgement, para. 167. See *Čelebići* Appeal Judgement, para. 581.
923 *Renzaho* Appeal Judgement, para. 303; *Zigiranyirazo* Appeal Judgement, para. 17. See *Čelebići* Appeal Judgement, para. 581.
924 *Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Setako* Appeal Judgement, para. 224; *Renzaho* Appeal Judgement, para. 303.
925 *Ndahimana* Appeal Judgement, para. 91; *Lukić and Lukić* Appeal Judgement, paras 72, 361; *Setako* Appeal Judgement, para. 224.
926 *Ndahimana* Appeal Judgement, para. 91; *Renzaho* Appeal Judgement, para. 303. See *Nizeyimana* Appeal Judgement, para. 38.
927 *Nizeyimana* Appeal Judgement, para. 35; *Kanyarukiga* Appeal Judgement, para. 167; *Setako* Appeal Judgement, para. 224; *Zigiranyirazo* Appeal Judgement, para. 18; *Limaj et al.* Appeal Judgement, para. 64.
928 *Ndahimana* Appeal Judgement, para. 91; *Kanyarukiga* Appeal Judgement, para. 167.
929 Trial Judgement, para. 1112.
930 Trial Judgement, paras 1106, 1112.
931 Trial Judgement, paras 1107-1109, 1112.
932 Trial Judgement, paras 1111-1112.

Witness Aćimović called the Standard Barracks in Zvornik and, after being told that **Popović** had just arrived, had a conversation with him.[933]

345. On the basis of the evidence of Defence Witness Gordan Bjelanović, **Popović** presented an alibi.[934] The Trial Chamber found that Bjelanović's testimony did not raise a reasonable doubt that **Popović** was in the Zvornik area on 14 July 1995.[935]

346. **Popović** submits that the Trial Chamber erred in failing to consider all the evidence on the trial record in rejecting his alibi that he could not have participated in the Orahovac killings because he was at the IKM in Krivače ("Krivače IKM") on 14 July 1995.[936] More specifically, **Popović** first contends that the Trial Chamber erred in considering that because his alibi witness, Bjelanović, was uncertain about the date he saw **Popović** at the Krivače IKM and the proximity of the Krivače IKM to Zvornik, Bjelanović's testimony did not raise a reasonable doubt as to **Popović**'s presence in Zvornik on 14 July 1995.[937] **Popović** argues that the Trial Chamber failed to support its erroneous finding that the Krivače IKM was "roughly 40 kilometers" from Zvornik, and suggests that this estimate is only half of the actual distance, which he could not have traversed in the relevant time frame.[938] Second, **Popović** contends that the Trial Chamber misinterpreted Prosecution Witness PW-109's testimony in finding that **Popović** spoke with Radislav Krstić twice during the Žepa operation "in the *second half* of July" – an operation which began on 14 July 1995 – and that Bjelanović's testimony that he saw **Popović** at the Krivače IKM on 14 or 15 July 1995 makes it reasonable to conclude that PW-109 likewise saw him in the first half of July.[939] Third, **Popović** submits that his presence at the Krivače IKM in the evening hours of 14 July 1995 is confirmed by: (1) the intercept of 17 July 1995 at 12:42 p.m. ("17 July Intercept"); (2) Prosecution Witness Dragan Todorović's testimony of **Popović**'s appearance in Dragasevac close to Krivače in the morning of 15 July 1995; and (3) the testimony of Defence expert Witness Petar Vuga.[940]

347. The Prosecution responds that the Trial Chamber reasonably considered and rejected **Popović**'s alibi.[941] The Prosecution submits that **Popović** fails to demonstrate any impact of the Trial Chamber's finding on the estimated distance between the Krivače IKM and Zvornik.[942] It concedes that the Trial Chamber misinterpreted PW-109's evidence, but submits that this error has

933 Trial Judgement, para. 1113.
934 Trial Judgement, para. 1114.
935 Trial Judgement, para. 1115.
936 Popović's Appeal Brief, paras 305-308. See Trial Judgement, paras 1114-1115. See also Popović's Reply Brief, paras 82-83; Appeal Hearing, AT. 79 (2 Dec 2013).
937 Popović's Appeal Brief, para. 305. See Trial Judgement, paras 1114-1115.
938 Popović's Appeal Brief, para. 305; Popović's Reply Brief, para. 82.
939 Popović's Appeal Brief, para. 306 (emphasis in original).
940 Popović's Appeal Brief, para. 307; Popović's Reply Brief, para. 83.
941 Prosecution's Response Brief (Popović), paras 192-197.
942 Prosecution's Response Brief (Popović), paras 193-194.

no impact on the verdict.[943] Finally, the Prosecution submits that the 17 July Intercept does not advance **Popović**'s alibi, and that he merely repeats his trial submissions regarding the testimony of Vuga.[944]

348. The Appeals Chamber notes that in rejecting **Popović**'s alibi for 14 July 1995, the Trial Chamber took into consideration the "closeness" or proximity of the Krivače IKM to Zvornik and Bjelanović's uncertainty about the times and dates relevant to when he saw **Popović** at the Krivače IKM.[945] Both factors were considered in conjunction with one another in finding that there was no reasonable doubt as to **Popović**'s presence in the Zvornik area on 14 July 1995. The Appeals Chamber finds that **Popović** has failed to articulate any error with respect to the Trial Chamber's finding on Bjelanović's uncertainty about when he saw **Popović** at the Krivače IKM. As to the distance between the Krivače IKM and Zvornik, the Appeals Chamber observes that the Trial Chamber found it to be "roughly 40 kilometres".[946] **Popović** does not substantiate his claim that the estimate is erroneous or that it would impact the Trial Chamber's rejection of his alibi. Further, in light of the other factor considered, *i.e.* Bjelanović's uncertainty about when he saw **Popović**, such an error would not constitute a miscarriage of justice.

349. The Appeals Chamber finds that the Trial Chamber indeed misinterpreted the evidence of PW-109[947] who testified that **Popović** visited Krivače and met with Krstić during the Žepa operation but without giving specific dates.[948] While this evidence does not exclude the possibility that **Popović** was seen in Krivače in the first part of July 1995,[949] it lacks sufficient clarity to bolster **Popović**'s claim of an alibi for 14 July 1995. Thus, **Popović** has failed to demonstrate that the Trial Chamber's error in interpreting PW-109's evidence resulted in a miscarriage of justice.

350. In addition, the Appeals Chamber notes that while the Trial Chamber did not refer to the 17 July Intercept or the testimonies of Witnesses Todorović and Vuga in its discussion of **Popović**'s alibi, it does not necessarily follow that the evidence was disregarded.[950] Regarding the 17 July Intercept, the Appeals Chamber observes that the VRS officer's communications that "**Popović** isn't at the IKM Krivače" and that "he hasn't returned yet but he'll be back in the afternoon"[951] do not attest to **Popović**'s presence at the Krivače IKM *on 14 July 1995*. The Appeals Chamber notes the testimony of Vuga concerning **Popović**'s duty as Chief of Security Staff of the Drina Corps to

943 Prosecution's Response Brief (Popović), para. 195.
944 Prosecution's Response Brief (Popović), paras 196-197.
945 Trial Judgement, para. 1115.
946 Trial Judgement, para. 1115.
947 Trial Judgement, para. 1157.
948 PW-109, T. 14603 (closed session) (31 Aug 2007).
949 The Appeals Chamber notes that the VRS military operation against Žepa started on 14 July 1995. See Trial Judgement, paras 682 *et seq.*
950 *Krajišnik* Appeal Judgement, para. 19; *Kvočka et al.* Appeal Judgement, para. 23.

secure the command post from which the combat operation in Žepa would be commanded. According to Vuga, the critical moment to put the security measures in place is at "the time of preparedness of the command post".[952] This evidence concerns what the ideal procedure would have been under normal circumstances rather than the actual events unfolding on the ground in July 1995 and as such sheds no light on whether there is a reasonable possibility that **Popović** was there on 14 July 1995. Further, the Appeals Chamber refers to its findings on the Trial Chamber's purported error in not providing reasons for rejecting the evidence of Todorović regarding **Popović**'s presence in Dragasevac, near Vlasenica, in the morning of 15 July 1995.[953] However, even on the assumption that **Popović** was present at the Krivače IKM on 15 July 1995, it does not provide support for the reasonable possibility of his presence there the previous day. Indeed, the Appeals Chamber does not find this evidence to be sufficiently relevant to the Trial Chamber's finding on **Popović**'s alibi, such that no explicit mention of it would indicate disregard.

351. In light of the above, the Appeals Chamber finds that **Popović** has failed to show an error in the Trial Chamber's assessment of the evidence with regard to his alibi for 14 July 1995. His arguments are therefore dismissed.

(b) Alleged errors in relation to Popović's alibi with respect to his presence in Bišina

352. The Trial Chamber found that on 23 July 1995, **Popović** joined the convoy of vehicles bringing prisoners to Bišina.[954] It concluded that **Popović** was the most senior officer present when the soldiers from the 10th Sabotage Detachment were shooting prisoners in the vicinity of the Bišina Battalion Command.[955] The Trial Chamber also found that after the executions were completed and a construction machine arrived to dig a hole, **Popović** prompted two military policemen to take part in loading the dead bodies.[956]

353. On the basis of the evidence of Defence Witnesses Slaviša Vlačić, Milenko Kojić, and Dragiša Čojić, **Popović** presented an alibi concerning his involvement in the Bišina killings.[957] The Trial Chamber found that the alibi evidence presented by **Popović** did not raise a reasonable doubt as to the Prosecution evidence placing him in Bišina when the executions took place.[958]

354. **Popović** submits that the Trial Chamber erred in dismissing his alibi for 23 July 1995 by disregarding the evidence that places him in a meeting with Vlačić at the time of the Bišina

951 Ex. P01218a, "Intercept of conversation between Golić and Zlatar 1, 17 July 1995, 12:42 hours".
952 Petar Vuga, T. 23234-23235 (3 July 2008).
953 See *infra*, paras 1134 *et seq.*
954 Trial Judgement, para. 1146.
955 Trial Judgement, paras 1146-1147.
956 Trial Judgement, para. 1148.
957 Trial Judgement, para. 1149.

killings.[959] Specifically, he asserts that Prosecution Witness PW-172 fabricated his evidence and that the Trial Chamber disregarded parts of Vlačić's testimony,[960] the intercept of 23 July 1995 at 9:04 a.m. ("9:04 a.m. Intercept"),[961] the vehicle log of a car assigned to **Popović**,[962] as well as evidence provided by Kojić and Čojić,[963] all of which show that **Popović** arrived at Bišina after the executions were completed.[964] At the same time, **Popović** argues that the Trial Chamber erred in finding that the military trucks seen by Kojić and Čojić were not necessarily used to transport the prisoners to their execution sites.[965] In support of his contention, **Popović** refers to evidence that he was emotionally affected after returning from where the trucks had gone.[966]

355. The Prosecution responds that **Popović** fails to demonstrate any error in the Trial Chamber's approach to his alibi evidence.[967] It contends that the Trial Chamber specifically considered the vehicle log as well as the evidence of Vlačić, Kojić, and Čojić, but nevertheless relied on the account of PW-172.[968] Further, it argues that none of the alibi witnesses could be clear as to when they saw **Popović**, and that the 9:04 a.m. Intercept only indicated that **Popović** would meet Vlačić without specifying a time.[969] Finally, the Prosecution submits that the testimony suggesting that **Popović** was emotionally affected when Kojić saw him has no logical connection to the assertion that **Popović** must have arrived at Bišina *after* the executions.[970]

356. At the outset, the Appeals Chambers recalls that, in its findings on **Popović**'s presence in Bišina during executions, the Trial Chamber relied on the account of PW-172,[971] whom it found to be a credible witness.[972]

357. The Appeals Chamber notes that, contrary to **Popović**'s submission, the Trial Chamber considered the evidence of Vlačić including his claim that his meeting with **Popović** took place several days after Djordije Popović was captured on 18 July 1995.[973] The fact that Vlačić also stated

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958 Trial Judgement, para. 1151.
959 Popović's Appeal Brief, paras 395-396; Popović's Reply Brief, para. 121. See Appeal Hearing, AT. 85 (2 Dec 2013).
960 Popović's Appeal Brief, paras 393-395.
961 Popović's Appeal Brief, para. 395 referring to Ex. P01313a, "Intercept", 23 July 1995; Popović's Reply Brief, para. 121.
962 Popović's Appeal Brief, para. 396; Popović's Reply Brief, paras 118-119, 121.
963 Popović's Appeal Brief, para. 398.
964 Popović's Appeal Brief, paras 394, 400-401; Popović's Reply Brief, para. 121. See Appeal Hearing, AT. 85 (2 Dec 2013).
965 Popović's Appeal Brief, paras 398-399.
966 Popović's Appeal Brief, para. 400.
967 Prosecution's Response Brief (Popović), para. 266.
968 Prosecution's Response Brief (Popović), paras 264-265, 267, 269-270.
969 Prosecution's Response Brief (Popović), paras 266, 268.
970 Prosecution's Response Brief (Popović), para. 271 (emphasis in original).
971 Trial Judgement, paras 1147-1149.
972 Trial Judgement, para. 1151.
973 Trial Judgement, paras 1149-1151.

that the meeting took place several days before the body of Djorđije Popović was found,[974] although not specifically referred to in the Trial Judgement, does not add any more clarity to Vlačić's account and as such does not show that the Trial Chamber disregarded it.

358. Similarly, the Appeals Chamber observes that, contrary to **Popović**'s assertion, the Trial Chamber specifically considered **Popović**'s vehicle log as well as the evidence of Kojić and Čojić in reaching its conclusion on his alibi.[975] The Appeals Chamber finds that **Popović** merely disagrees with the Trial Chamber's interpretation of evidence, presenting his own version of events without showing any error in this regard. This warrants dismissal.

359. At the same time, the Appeals Chamber notes that in assessing **Popović**'s alibi for 23 July 1995, the Trial Chamber did not refer to the 9:04 a.m. Intercept statement that "**Popović** is going to see Vlačić".[976] The Appeals Chamber reiterates that unless there is an indication that the Trial Chamber completely disregarded a particular piece of evidence, it is presumed that the Trial Chamber evaluated all the evidence before it.[977] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[978]

360. In considering whether the Trial Chamber disregarded evidence, the Appeals Chamber notes that the 9:04 a.m. Intercept does not unambiguously confirm that, at 9:04 a.m. on 23 July 1995, **Popović** was on his way to meet Vlačić. Instead, it merely indicates that **Popović** was going to see Vlačić at some unspecified moment in the future. The 9:04 a.m. Intercept is too vague – even when considered alongside other evidence emphasised by **Popović** – to successfully demonstrate that PW-172 fabricated his testimony as to **Popović**'s presence in Bišina during the killings. Given the vagueness of the 9:04 a.m. Intercept, **Popović** has failed to demonstrate that the Trial Chamber erred in not referring to it.

361. Finally, the Appeals Chamber finds that **Popović** has failed to show how the Trial Chamber erred in its assessment of the evidence of Kojić and Čojić. A reasonable trier of fact could have concluded that Kojić's statement that **Popović** returned appearing tired and miserable after going in the direction two military trucks had taken[979] is incapable of raising reasonable doubt as to the Trial Chamber's finding that **Popović** was involved in, and present during, the Bišina killings. The Appeals Chamber notes in this regard that according to Kojić **Popović** seemed perturbed even

974 Slaviša Vlačić, Ex. 1D01438, "92 *ter* statement" (20 Apr 2008), p. 3.
975 See Trial Judgement, paras 1149-1151.
976 Ex. P01313a, "Intercept", 23 July 1995.
977 *Kvočka et al.* Appeal Judgement, para. 23. See *Đorđević* Appeal Judgement, fn. 2527; *Šainović et al.* Appeal Judgement, fns 3289, 4205.
978 *Kvočka et al.* Appeal Judgement, para. 23.

before he left to follow the trucks and upon coming back "*still* seemed tired and miserable".[980] As a consequence, the Appeals Chamber finds that **Popović** has failed to demonstrate that the Trial Chamber erred in relying on the testimony of PW-172.

362. For the foregoing reasons, the Appeals Chamber dismisses **Popović**'s arguments that the Trial Chamber erred in its assessment of the evidence with regard to his alibi for 23 July 1995.

### 3. Beara's appeal (Grounds 9 and 12)

363. The Trial Chamber found that on 13 and 14 July 1995, **Beara** was present in Bratunac and Zvornik and was actively engaged in the organisation of the murder operation.[981] It placed **Beara** at a series of meetings which took place in the Bratunac SDS offices during the evening of 13 July 1995 continuing until the early morning hours of 14 July 1995, where the logistics of the planned murder operation were discussed.[982] The Trial Chamber also found that **Beara** attended the 14 July Meeting.[983]

364. **Beara** raised an alibi for 13 and 14 July 1995, arguing that he was present in Belgrade at that time in order to celebrate his birthday. **Beara** relied on Defence Witnesses Čekić, Gavrilović, and Milan Kerkez, all of whom testified to his presence in Belgrade on those dates.[984] The Trial Chamber found that the alibi raised by **Beara** was not reasonably possibly true and did not raise a reasonable doubt about his presence in Bratunac and Zvornik on 13 and 14 July 1995.[985]

#### (a) Alleged errors concerning the assessment of evidence

365. Under his ground of appeal 9, **Beara** submits that the Trial Chamber erred when it refused to properly consider the testimonies of Defence witnesses that contradicted Prosecution evidence concerning his whereabouts on 13 and 14 July 1995.[986] **Beara** claims that the Trial Chamber "did not admit any of the defence witnesses' testimonies"[987] or completely disregarded them.[988] He argues that the Trial Chamber chose to rely only on Prosecution witnesses and asserts that the testimonies of Čekić, Gavrilović, and Kerkez, who testified under oath, cannot be of less evidential value than the untested, uncorroborated, and/or unreliable statements and testimonies of Witnesses

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979 See Milenko Kojić, Ex. 1D01446, "92 *ter* statement" (25 Dec 2008), p. 4.
980 Milenko Kojić, Ex. 1D01446, "92 *ter* statement" (25 Dec 2008), p. 4.
981 Trial Judgement, paras 1255-1280.
982 Trial Judgement, para. 1271.
983 Trial Judgement, para. 1272.
984 Trial Judgement, para. 1238.
985 Trial Judgement, para. 1249.
986 Beara's Appeal Brief, intro before para. 140, para. 140.
987 Beara's Reply Brief, para. 53.
988 Beara's Appeal Brief, para. 140; Beara's Reply Brief, para. 53.

Deronjić, M. Nikolić, and Borovčanin, among others.[989] **Beara** then posits that as a consequence a reasonable trial chamber would not have concluded that none of the evidence he proffered raised a reasonable doubt about his presence in Bratunac and Zvornik on 13 and 14 July 1995.[990]

366. The Prosecution responds that the Trial Chamber analysed and properly rejected Čekić's, Gavrilović's, and Kerkez's testimonies, and correctly found that there was no reasonable doubt as to **Beara**'s presence in Bratunac and Zvornik on 13 and 14 July 1995.[991]

367. The Appeals Chamber first observes that the Trial Chamber heard Čekić,[992] Gavrilović,[993] and Kerkez,[994] whose evidence forms part of the trial record.[995] **Beara**'s mere assertion that the Trial Chamber "did not admit any of the defence witnesses' testimonies" is therefore without merit. Similarly, the Appeals Chamber notes that **Beara** has failed to specify which evidence was allegedly disregarded by the Trial Chamber. Accordingly, this undeveloped assertion warrants dismissal.

368. Second, the Appeals Chamber recalls that the preference for live testimony, although acknowledged in the Tribunal's Rules and jurisprudence, is not absolute.[996] It observes that the Trial Judgement discusses Čekić's, Gavrilović's, and Kerkez's testimonies[997] and provides detailed reasoning why their evidence was deemed unreliable and accorded no weight.[998] **Beara** has failed to demonstrate that the Trial Chamber ought to have preferred their testimonies over other evidence.

369. In light of the foregoing, the Appeals Chamber finds that **Beara** has failed to demonstrate that the Trial Chamber erred in assessing the evidence concerning his whereabouts on 13 and 14 July 1995. As a consequence, his challenge to the Trial Chamber's finding that the testimonies of Defence witnesses did not raise a reasonable doubt about his presence in Bratunac and Zvornik at the relevant time also fails. **Beara**'s ground of appeal 9 is therefore dismissed.

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989 Beara's Appeal Brief, para. 141. See Beara's Reply Brief, para. 54.
990 Beara's Appeal Brief, paras 140-141.
991 Prosecution's Response Brief (Beara), paras 136-138. See also Appeal Hearing, AT. 217-222, 230 (3 Dec 2013).
992 Miroslava Čekić, T. 24824-24860 (28 Aug 2008); 24873-24903 (29 Aug 2008).
993 Svetlana Gavrilović, T. 24755-24784 (27 Aug 2008); 24785-24791 (28 Aug 2008).
994 Milan Kerkez, T. 24906-24958 (29 Aug 2008).
995 See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Prosecution's Motion for Clarification of the Appeals Chamber's Decision Dated 4 December 2002 on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits in the Blaškić Case, 8 March 2004, para. 34, stating that once a testimony is given in court it becomes part of the trial record.
996 Rules 89(F), 92 *bis*(A), 94 *bis*(C) of the Rules; *Simba* Appeal Judgement, para. 103; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras 16-17.
997 Trial Judgement, paras 1238-1241, 1244-1247.
998 Trial Judgement, paras 1246-1247. See also *supra*, paras 221-224.

(b) Alleged errors concerning the legal standard

370. Under his ground of appeal 12, **Beara** submits that the Trial Chamber erred as a matter of law and abused its discretion in finding that his alibi evidence was not reasonably possibly true and did not raise a reasonable doubt as to his presence in Bratunac and Zvornik on 13 and 14 July 1995.[999] **Beara** argues that the Trial Chamber inappropriately shifted the burden of proof to the Defence by requiring it to prove his alibi beyond reasonable doubt and that this constituted a miscarriage of justice.[1000] In this regard, **Beara** argues that the Trial Chamber's finding that the testimonies of Čekić and Gavrilović lacked credibility did not mean they were not reasonably possibly truthful in their testimonies.[1001]

371. In response, the Prosecution argues that the Trial Chamber applied the correct standard to the alibi evidence.[1002] It emphasises that the Trial Chamber's finding on **Beara**'s presence in Bratunac and Zvornik on 13 and 14 July 1995 was based on abundant evidence and that **Beara**'s wholly unreliable alibi evidence was properly dismissed by the Trial Chamber.[1003]

372. The Appeals Chamber observes that the Trial Chamber correctly recalled the law and burden of proof to be applied in the assessment of alibi evidence.[1004] The sole instance **Beara** contests concerns the testimonies of two alibi witnesses[1005] whose recollections the Trial Chamber considered to be "simply unreliable" and to which it attributed "no weight".[1006] In light of the totality of the evidence, including other alibi evidence[1007] and "convincing evidence" placing **Beara** in the Bratunac and Zvornik areas on 13 and 14 July 1995,[1008] the Trial Chamber found the alibi raised by **Beara** to be not reasonably true and insufficient to raise a reasonable doubt as to **Beara**'s presence in Bratunac and Zvornik at the relevant time.[1009] **Beara** misunderstands the Trial Chamber's finding that the alibi "does not raise a reasonable doubt"[1010] as being somehow equivalent to the Trial Chamber requiring **Beara** to prove his alibi beyond reasonable doubt. By finding that the alibi did not raise a reasonable doubt, the Trial Chamber was saying no more than

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999 Beara's Appeal Brief, intro before para. 156, paras 156, 159.
1000 Beara's Appeal Brief, intro before para. 156, paras 156-159; Beara's Reply Brief, para. 60.
1001 Beara's Reply Brief, para. 61.
1002 Prosecution's Response Brief (Beara), paras 153-154.
1003 Prosecution's Response Brief (Beara), para. 154.
1004 Trial Judgement, paras 57 (recalling that "[t]he Prosecution must establish beyond reasonable doubt that, despite the alibi evidence, the facts alleged in the Indictment are nevertheless true"), 1243 (recalling that "where alibi evidence has been raised by an accused, the burden remains on the Prosecution to eliminate any reasonable possibility that the alibi is true"). See *Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Lukić and Lukić* Appeal Judgement, paras 72, 361; *Kanyarukiga* Appeal Judgement, para. 167.
1005 Beara's Appeal Brief, fn. 208; Beara's Reply Brief, para. 61.
1006 Trial Judgement, para. 1246.
1007 Trial Judgement, paras 1247-1248.
1008 Trial Judgement, paras 1249, 1255-1280.
1009 Trial Judgement, para. 1249.
1010 Trial Judgement, para. 1249.

despite the alibi evidence, the facts alleged in the Indictment (that **Beara** was in the Bratunac and Zvornik areas on 13 and 14 July 1995) are nevertheless true. The basis for this finding is that the Prosecution established this fact beyond reasonable doubt. Thus, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber improperly shifted the burden of proof to the Defence.

373. The Appeals Chamber thus considers that **Beara** has failed to demonstrate that the Trial Chamber erred in finding that his alibi evidence was not reasonably possibly true and did not raise a reasonable doubt as to his presence in Bratunac and Zvornik on 13 and 14 July 1995.[1011] **Beara**'s ground of appeal 12 is dismissed.

## B. Expert Evidence Not Regarding the Number of Deceased

### 1. Nikolić's appeal (Ground 13)

374. **Nikolić** submits that the Trial Chamber erred in law and fact by failing to consider or attach probative value to Defence expert Witness Rémi Landry's evidence, which showed from a military perspective that PW-168 was not a credible witness.[1012] **Nikolić** argues that the Trial Chamber's insufficient analysis of part of Landry's evidence led it to make findings that were unreasonable and wholly erroneous, in contravention of its obligation to provide a reasoned opinion.[1013] In this regard, **Nikolić** also argues that the Trial Chamber erroneously referred to Prosecution expert Witness Richard Butler's evidence in the context of discussing Landry's evidence.[1014] **Nikolić** further argues that the Trial Chamber entirely failed to consider other parts of Landry's evidence.[1015] **Nikolić** concludes that the Trial Chamber's error caused a miscarriage of justice, as its finding on the credibility of PW-168 was a prerequisite for reaching three factual findings against **Nikolić**.[1016] The Prosecution responds that the Trial Chamber reasonably rejected Landry's evidence and that **Nikolić** fails to demonstrate any error.[1017]

375. The Appeals Chamber recalls that a trial chamber does not have to refer to the testimony of every witness or every piece of evidence on the trial record;[1018] it is to be presumed that the Trial Chamber evaluated all the evidence before it.[1019] In the present case, the Trial Chamber explicitly

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1011 See *supra*, para. 343.
1012 Nikolić's Appeal Brief, paras 172, 178, 181, 185; Nikolić's Reply Brief, para. 65. See also Appeal Hearing, AT. 294-295 (private session) (4 Dec 2013).
1013 Nikolić's Appeal Brief, paras 173-180; Nikolić's Reply Brief, para. 67.
1014 Nikolić's Appeal Brief, para. 181. See also Trial Judgement, para. 1355.
1015 Nikolić's Appeal Brief, paras 182-184.
1016 Nikolić's Appeal Brief, paras 172, 185; Nikolić's Reply Brief, para. 68.
1017 Prosecution's Response Brief (Nikolić), paras 209-211, 227.
1018 *Šainović et al.* Appeal Judgement, para. 658.
1019 *Đorđević* Appeal Judgement, fn. 2527; *Šainović et al.* Appeal Judgement, fns 3289, 4205; *Krajišnik* Appeal Judgement, para. 141; *Kvočka et al.* Appeal Judgement, para. 23.

addressed one aspect of Landry's evidence. Its analysis of Landry's evidence on this point is telling of the Trial Chamber's assessment of his evidence in general, notably that he "strayed well beyond the purview of an expert witness" and that his "testimony was premised on a hypothesis as to how a military person should react [...]. As such Landry's comments can only be viewed as purely speculative and not founded on any military expertise."[1020] The Appeals Chamber recalls that the purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it, and that in the ordinary case an expert witness offers a view based on specialised knowledge regarding a technical, scientific or otherwise discrete set of ideas or concepts that is expected to fall outside the lay person's ken.[1021] Landry's evidence purported to analyse whether it was plausible from a military viewpoint that Major Dragan Obrenović acted in the way described by PW-168.[1022] The Appeals Chamber considers that a reasonable trial chamber could have dismissed such evidence as straying beyond the purview of an expert witness and into the trial chamber's firmly established role of making factual findings, including assessments of the credibility of witnesses.[1023] Thus, the Appeals Chamber is not convinced that the Trial Chamber contravened its obligation to provide a reasoned opinion.[1024]

376. The Appeals Chamber recalls that it has already dismissed **Nikolić**'s claim that the Trial Chamber's assessment of PW-168's credibility was "wholly erroneous".[1025] The Appeals Chamber further recalls that it is within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the "fundamental features" of the evidence.[1026] The Appeals Chamber considers that it was within the discretion of the Trial Chamber to prefer the evidence of a credible witness of fact over the evidence of an expert witness regarding what that expert witness considered plausible from a military point of view. Finally, the Appeals Chamber cannot see the relevance of the Trial Chamber's discussion of Butler's evidence to the impugned findings on Landry's evidence.[1027] The Appeals Chamber is therefore not convinced that **Nikolić** has shown that the Trial Chamber's assessment of Landry's evidence contains any error resulting in a miscarriage of justice.

377. Having examined **Nikolić**'s arguments, the Appeals Chamber considers that they amount to a mere assertion that the Trial Chamber failed to give sufficient weight to Landry's evidence. The Appeals Chamber therefore dismisses **Nikolić**'s ground of appeal 13.

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1020 Trial Judgement, para. 1355.
1021 *Nahimana et al.* Appeal Judgement, para. 198, citing *Semanza* Appeal Judgement, para. 303.
1022 Ex. 3D00409, "Military Expert Report by Rémi Landry" (confidential), para. 71.
1023 *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 132; *Musema* Appeal Judgement, para. 18.
1024 See Article 23(2) of the Statute; Rule 98 *ter*(C) of the Rules.
1025 See *supra*, para. 171.
1026 *Đorđević* Appeal Judgement, para. 395; *Naletilić and Martinović* Appeal Judgement, para. 517; *Kupreškić et al.* Appeal Judgement, para. 31. See *supra*, paras 136-137.
1027 See Trial Judgement, para. 1355.

## 2. Beara's appeal (Grounds 10 and 11)

### (a) Identification evidence (Beara's Ground 10)

378. **Beara** challenges the Trial Chamber's general approach towards identification evidence, as well as its findings with regard to specific identifications. The Prosecution responds that **Beara** fails to demonstrate an error in the Trial Chamber's approach to identification evidence which invalidates its judgement and that his arguments should be dismissed. The Appeals Chamber will examine each of **Beara**'s challenges in turn.

#### (i) The Trial Chamber's general approach towards identification evidence

##### a. Identifications without the use of a photo line-up

379. **Beara** submits that the Trial Chamber erred in law and abused its discretion in finding that the lack of a photo line-up did not reduce the probative value of identification evidence.[1028] **Beara** argues that the Trial Chamber should have barred the identification evidence of five witnesses, namely PW-162/Davidović, PW-104, Slavko Perić, PW-165, and Vincent Egbers, because the absence of a proper photo line-up rendered their identifications unreliable.[1029] The Prosecution submits that the Tribunal's jurisprudence does not prohibit reliance on identification evidence in the absence of a photo line-up and that such photo line-ups can at times be ineffective.[1030]

380. The Trial Chamber acknowledged that a photo line-up may "add to the strength of an identification", but held "that such evidence must be considered on a case-by-case basis and the absence of a line-up does not necessarily reduce the probative value of the identification".[1031] The Trial Chamber indicated that it "analysed all the circumstances under which the relevant identifications were made and [...] assessed the reliability of those identifications with caution".[1032] The Appeals Chamber considers that **Beara** has failed to show any error in the Trial Chamber's approach.[1033] Consequently, the Appeals Chamber dismisses **Beara**'s arguments.

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1028 Beara's Appeal Brief, intro before para. 142, para. 148; Beara's Reply Brief, para. 55.
1029 Beara's Appeal Brief, paras 143, 148.
1030 Prosecution's Response Brief (Beara), para. 141.
1031 Trial Judgement, para. 1219.
1032 Trial Judgement, para. 1219.
1033 *Cf. Lukić and Lukić* Appeal Judgement, para. 140; *Kalimanzira* Appeal Judgement, para. 96; *Čelebići* Appeal Judgement, para. 495.

b. Factors for assessing the reliability of identification evidence

381. **Beara** contends that the Trial Chamber did not apply the correct factors for assessing identification evidence.[1034] The Prosecution argues that the Trial Chamber took a proper approach.[1035]

382. The Appeals Chamber recalls that where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber needs to "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence".[1036] The Appeals Chamber stresses that this is required only when a witness's identification was made under difficult circumstances, such as in the dark or as a result of a fleeting glance.[1037] **Beara** does not specifically argue that any of the challenged identifications occurred under "difficult circumstances". The Appeals Chamber considers that **Beara** has failed to show that Prosecution Witnesses PW-162/Davidović, PW-104, and Vincent Egbers identified him under such circumstances.[1038] The Appeals Chamber therefore dismisses **Beara**'s argument with regard to these three identifications. The situation with regard to Prosecution Witnesses Perić and PW-165 is less clear.[1039] However, the Appeals Chamber notes that **Beara** does not put forward any specific arguments challenging the factors on which the Trial Chamber relied when accepting the identification made by Perić and therefore dismisses this aspect of his argument. The Appeals Chamber will further address **Beara**'s arguments concerning PW-165 when discussing the Trial Chamber's findings pertaining to the specific identification evidence provided by this witness.[1040]

c. Distinction between identification and recognition witnesses

383. **Beara** asserts that the Trial Chamber failed to make a distinction between recognition and identification witnesses.[1041] The Prosecution responds that the Trial Chamber did make such a distinction and that **Beara** fails to show that the Trial Chamber ignored the basis on which recognition witnesses knew him.[1042]

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1034 Beara's Appeal Brief, paras 142, 148.
1035 Prosecution's Response Brief (Beara), para. 141; Appeal Hearing, AT. 222-223 (3 Dec 2013).
1036 *Lukić and Lukić* Appeal Judgement, para. 136 (emphasis omitted); *Haradinaj et al.* Appeal Judgement, para. 152; *Kupreškić et al.* Appeal Judgement, para. 39.
1037 *Renzaho* Appeal Judgement, para. 531, referring to *Kupreškić et al.* Appeal Judgement, paras 34, 39-40. See also *Lukić and Lukić* Appeal Judgement, para. 137; *Gatete* Appeal Judgement, para. 193.
1038 See Trial Judgement, paras 1220, 1224-1225, 1274, 1278.
1039 See Trial Judgement, fn. 3674, para. 1228.
1040 See *infra*, paras 391-392.
1041 Beara's Appeal Brief, paras 142, 148.
1042 Prosecution's Response Brief (Beara), para. 141.

384. The Appeals Chamber recalls that a witness who has acquired sufficient knowledge of an accused may be considered a "recognition" witness, whereas someone to whom the accused was previously unknown by sight may be considered an "identification" witness.[1043] However, the Appeals Chamber considers that **Beara** has failed to explain why it was incumbent on the Trial Chamber to distinguish between recognition and identification witnesses in the present case. In particular, **Beara** has not shown that the Trial Chamber's alleged failure to make such a distinction would have any effect on, let alone invalidate, its decision regarding the reliability of identification evidence. The Appeals Chamber therefore considers that it is not necessary to assess whether the Trial Chamber made a distinction between identification and recognition evidence and dismisses **Beara**'s arguments in this regard.

d. Witnesses who did not mention that Beara wore glasses

385. **Beara** argues that the Trial Chamber should have dismissed the identifications made by three of the witnesses because they failed to indicate that the person identified as **Beara** wore glasses, even though he always wore glasses.[1044] The Prosecution argues that **Beara**'s contentions are unsupported or have no impact.[1045]

386. The Appeals Chamber notes that **Beara** provides only one reference to the trial record in support of his argument, which is to the testimony of Defence expert Witness Willem Wagenaar.[1046] Wagenaar testified that four witnesses said that the person they saw did not wear glasses or did not continually wear glasses, which Wagenaar thought would be quite surprising if **Beara** always wore glasses. Wagenaar also testified that he was not an expert on **Beara**'s habit of wearing glasses.[1047] The Appeals Chamber considers that **Beara**'s reliance on an expert witness to establish facts related to his habit of wearing glasses, when the role of an expert is to provide specialised knowledge – be it a skill or knowledge acquired through training – that may assist the fact finder to understand the evidence presented, is plainly unhelpful to his case. As such, **Beara** has failed to show any error. The Appeals Chamber therefore dismisses **Beara**'s argument.

e. Conclusion

387. In light of the foregoing, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred in its general evaluation of the identification evidence.

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1043 *Lukić and Lukić* Appeal Judgement, paras 118-119.
1044 Beara's Appeal Brief, para. 147.
1045 Prosecution's Response Brief (Beara), para. 145.
1046 Beara's Appeal Brief, para. 147, referring to Willem Wagenaar, T. 25354 (8 Sept 2008).
1047 Willem Wagenaar, T. 25354 (8 Sept 2008).

(ii) The Trial Chamber's findings with regard to specific identifications

388. **Beara** submits that the Trial Chamber erred in relying on the identification evidence provided by PW-162/Davidović, PW-104, PW-165, and Vincent Egbers.[1048]

a. Identifications by PW-104 and PW-162/Davidović

389. **Beara** alleges that the Trial Chamber erred in relying, for the purpose of identification, on PW-104's and PW-162/Davidović's evidence that the man they saw introduced himself as "Beara". He argues that PW-104 stated that **Beara** did not and does not resemble the person that PW-104 supposedly met in July 1995 and that PW-162/Davidović stated that he would not be able to recognise **Beara** today. **Beara** alleges that the Trial Chamber "glossed over" these statements and erroneously dismissed more reasonable inferences other than that these witnesses correctly identified him.[1049] Finally, **Beara** contends that the Trial Chamber erroneously relied on other non-credible evidence to corroborate the identifications made by PW-104 and PW-162/Davidović.[1050] The Prosecution argues that **Beara** attempts to substitute the Trial Chamber's reasonable evaluation of the evidence with his own.[1051]

390. The Appeals Chamber notes that the Trial Chamber acknowledged **Beara**'s submission regarding PW-162/Davidović's inability to recognise **Beara** if he would see him today in the street[1052] and considered PW-104's statement that when he saw **Beara** on television on his way to The Hague, he did not look like the person he met in 1995.[1053] With regard to PW-104, the Trial Chamber relied on his identification evidence because: (1) the person whom PW-104 met introduced himself as "Colonel Beara" and physically resembled **Beara** at the time; (2) a considerable amount of time passed before the witness saw **Beara** again; and (3) other evidence placed **Beara** in similar meetings at the time.[1054] As for PW-162/Davidović, the Trial Chamber relied on the witness's evidence that the person introduced himself as "Beara" as well as other evidence concerning **Beara**'s presence at the location where the witness met him.[1055] The testimony of PW-162/Davidović to which the Trial Chamber referred can reasonably be interpreted as a remark that **Beara** had substantially aged since the witness last saw him.[1056] Finally, the Appeals

1048 Beara's Appeal Brief, paras 144-146.
1049 Beara's Appeal Brief, para. 144.
1050 Beara's Reply Brief, para. 56.
1051 Prosecution's Response Brief (Beara), para. 142.
1052 Trial Judgement, para. 1222, referring to, *inter alia*, PW-162/Srbislav Davidović, T. 9267 (22 Mar 2007).
1053 Trial Judgement, para. 1225, referring to PW-104, T. 8015 (1 Mar 2007).
1054 Trial Judgement, para. 1225.
1055 Trial Judgement, para. 1224.
1056 PW-162/Srbislav Davidović, T. 9267 (22 Mar 2007) ("Q. I would also like to ask you if you remember the person that you spoke with and who introduced himself as Colonel Ljubi[š]a Beara? A.Yes, I do remember that person. Q. Can you describe that person? A. I see that person here now. And the face has changed a lot. At the time he looked very different, more vigorous, younger, in a better mood. I don't know. Had I not known that it was Colonel Beara,

Chamber notes that **Beara** does not substantiate his contention that the Trial Chamber erred in relying on other non-credible evidence in order to corroborate the identifications made by PW-104 and PW-162/Davidović.[1057] In these circumstances, the Appeals Chamber is not convinced that **Beara** has shown that the Trial Chamber erred or abused its discretion when relying on the identification evidence of PW-104 and PW-162/Davidović.

b. Identification by PW-165

391. **Beara** submits that he was not identified by PW-165 and that the Trial Chamber unreasonably inferred that the person PW-165 saw from the back was **Beara**.[1058] According to the Prosecution, **Beara**'s challenge to PW-165's identification repeats his ground of appeal 6 and should be dismissed.[1059]

392. The Trial Chamber found that someone told PW-165 that two of the men PW-165 saw from the back at the Standard Barracks at 6:30 p.m. on 15 July 1995 were **Popović** and **Beara**.[1060] The Trial Chamber indicated that since PW-165 only saw the back of **Beara** and was not able to subsequently identify him, he did not "directly" identify **Beara**.[1061] Accordingly, the Trial Chamber took into account the unusual nature of the identification by PW-165, which was based on hearsay. The Appeals Chamber recalls that identification hearsay evidence may, depending on the circumstances of the case, require other credible or reliable evidence in order to support a finding of fact beyond reasonable doubt.[1062] In the present case, the Trial Chamber further based its finding regarding **Beara**'s presence on the partial confirmation of the hearsay evidence through the subsequent identification of **Popović** as well as other evidence on **Beara**'s presence in the area at the time.[1063] Thus, the issue is not an identification made in difficult circumstances, but rather an identification based on circumstantial evidence. In light of the foregoing, the Appeals Chamber is not convinced that **Beara** has shown that the Trial Chamber erred or abused its discretion when relying on, *inter alia*, the evidence of PW-165 to identify **Beara**.

c. Identification by Vincent Egbers

393. **Beara** contends that the Trial Chamber erred in accepting Egbers's identification, which was mistaken, uncorroborated, and only made after repeated viewings of a video in which the only

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I would not have recognised him if I saw him in the street. I still have - or I still remember him as what - what he looked like then.").

1057 See Beara's Reply Brief, para. 56.

1058 Beara's Appeal Brief, para. 145; Appeal Hearing, AT. 198-200 (3 Dec 2013).

1059 Prosecution's Response Brief (Beara), para. 143.

1060 Trial Judgement, paras 1227-1228.

1061 Trial Judgement, para. 1228.

1062 See *Renzaho* Appeal Judgement, para. 534. See also *Lukić and Lukić* Appeal Judgement, paras 387, 577.

1063 Trial Judgement, para. 1228, referring to Trial Judgement, para. 1123.

person on the video who remotely resembled **Beara** was **Beara** himself.[1064] **Beara** further contends that the Trial Chamber erred by not requiring the Prosecution to corroborate Egbers's identification,[1065] and by not inferring from the absence of corroborating evidence that he was not present at Nova Kasaba on 14 July 1995.[1066] **Beara** invites the Appeals Chamber to follow judicial opinions in other cases that questioned Egbers's testimony.[1067] **Beara** concludes that the Trial Chamber's errors invalidate the Trial Judgement insofar as his physical presence was considered to be important.[1068]

394. The Prosecution responds that the law does not require corroboration of Egbers's identification and that **Beara** ignores relevant evidence and fails to establish that it was unreasonable for the Trial Chamber to rely on Egbers's evidence.[1069]

395. The Appeals Chamber dismisses **Beara**'s arguments regarding Egbers's identification as they are not supported by any references to the trial record. The Appeals Chamber further observes that there was no legal requirement that Egbers's evidence be corroborated.[1070] Finally, **Beara**'s allusions to judicial opinions in other cases are not supported by any precise references and fail to explain why the findings of the Trial Chamber were allegedly unreasonable.[1071] Thus, **Beara** has not shown that the Trial Chamber erred when relying on the evidence of Egbers to identify **Beara**.

d. Conclusion

396. The Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred in relying on the identification evidence provided by PW-162/Davidović, PW-104, PW-165, and Egbers.

(iii) Overall conclusion

397. The Appeals Chamber dismisses **Beara**'s ground of appeal 10 in its entirety.

(b) Linguistic expert evidence (Beara's Ground 11)

398. **Beara** submits that the Trial Chamber erred in law and abused its discretion in not relying on the evidence of Defence linguistic expert Witness Slobodan Remetić, which cast doubt on the

1064 Beara's Appeal Brief, para. 146.
1065 Appeal Hearing, AT. 160-163, 167-168 (2 Dec 2013); AT. 195-198 (3 Dec 2013).
1066 Appeal Hearing, AT. 168 (2 Dec 2013); AT. 198 (3 Dec 2013).
1067 Appeal Hearing, AT. 198 (3 Dec 2013).
1068 Appeal Hearing, AT. 197-198 (3 Dec 2013).
1069 Prosecution's Response Brief (Beara), para. 144; Appeal Hearing, AT. 213-214 (3 Dec 2013).
1070 See *Đorđević* Appeal Judgement, paras 819, 858; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.
1071 See also *infra*, para. 1677.

attribution of certain intercept evidence to him.[1072] **Beara** argues that the Trial Chamber erroneously rejected Remetić's conclusions because they were formed on the basis of limited contact with **Beara** and without hearing the audio recordings of the relevant intercepts.[1073] **Beara** contends in this regard that Remetić's conclusions were in fact based on all of the available intercept evidence as well as audio recordings of **Beara**'s interview with the Prosecution and Remetić's personal meetings with him.[1074] **Beara** further submits that the Trial Chamber disregarded the corroborating evidence of various witnesses regarding "**Beara**'s linguistic patterns of speech" and his distinct accent.[1075] **Beara** also submits that the Trial Chamber erred in rejecting Remetić's findings on the basis of a lack of audio recordings of the relevant intercepts, when it had previously rejected the Defence's objection to their admissibility on the same grounds.[1076] Finally, **Beara** states that the evidence of the intercept operators does not affect Remetić's conclusions, based on linguistic expertise, that **Beara** did not participate in specific intercepted conversations.[1077] The Prosecution argues that the Trial Chamber reasonably rejected Remetić's conclusions, a matter that is unrelated to the admission of the intercept evidence, and specifically addressed the evidence relating to **Beara**'s accent.[1078]

399. According to the Trial Chamber, Remetić analysed 18 transcripts of intercepted conversations allegedly involving **Beara** and concluded that only one of those 18 intercepts was consistent with **Beara**'s speech patterns at the time of Remetić's observations.[1079] The Trial Chamber considered Remetić's evidence in relation to specific intercepts challenged by **Beara**.[1080] The intercept operators identified **Beara** as a participant in the particular intercepted conversations on the basis of, *inter alia*, **Beara** identifying himself in the conversation,[1081] another participant in the conversation identifying **Beara**,[1082] and the operators recognising **Beara**'s voice.[1083] In assessing the intercept evidence, the Trial Chamber considered the accuracy of the intercept process to be a factor weighing in favour of the credibility of the intercept evidence.[1084] In particular, the Trial Chamber considered that corrections to the transcripts made by the intercept operators after re-listening to the conversations, sometimes several times, as well as the intercept operators' joint

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1072 Beara's Appeal Brief, intro before para. 149, paras 149, 153-154; Beara's Reply Brief, para. 57. See also Beara's Reply Brief, para. 58.
1073 Beara's Appeal Brief, para. 149 & fn. 202.
1074 Beara's Appeal Brief, para. 149 & fn. 202, para. 150; Beara's Reply Brief, para. 58. See also Beara's Appeal Brief, paras 152-154.
1075 Beara's Appeal Brief, para. 150. See also Beara's Appeal Brief, para. 154.
1076 Beara's Appeal Brief, paras 149, 151; Beara's Reply Brief, para. 58.
1077 Beara's Reply Brief, para. 59.
1078 Prosecution's Response Brief (Beara), paras 147-152.
1079 Trial Judgement, para. 1231.
1080 Trial Judgement, paras 1231, 1233-1237.
1081 Trial Judgement, paras 1233, 1236.
1082 Trial Judgement, paras 1234, 1237.
1083 Trial Judgement, paras 1235-1236.
1084 Trial Judgement, para. 1232.

efforts to ensure the accuracy of these transcripts, improved the reliability of the intercept evidence.[1085] By contrast, the Trial Chamber notably considered that Remetić's evidence was formed on the basis of two meetings with **Beara** and that his analysis of the intercepts was carried out without having heard audio recordings of them, where **Beara**'s linguistic patterns of speech would be most apparent.[1086]

400. **Beara** has failed to show that a reasonable trial chamber could not have placed more weight on the intercept evidence than on evidence of **Beara**'s linguistic speech patterns. This is especially so as the intercept evidence relied on included the intercepts themselves and the evidence of the intercept operators, who personally heard and/or transcribed the conversations and who identified **Beara** as a participant in them.[1087] **Beara** has further failed to substantiate how the evidence of his accent would have been relevant to the Trial Chamber's findings regarding his involvement in these intercepted conversations, particularly considering that several intercept operators recognised his voice. **Beara** has also failed to develop his assertion that the Trial Chamber rejected the Defence's objection to the admissibility of the intercepted conversations on the grounds of a lack of audio recordings. In any event, the lack of audio recordings of the intercepted conversations was only one of many elements that the Trial Chamber weighed in its analysis.[1088] The Appeals Chamber therefore considers that **Beara** has failed to show that the Trial Chamber erred in its assessment of Remetić's evidence.

401. For the foregoing reasons, **Beara**'s ground of appeal 11 is dismissed.

### C. Intercept Evidence (Miletić's Ground 21)

402. **Miletić** submits that by failing to properly analyse certain intercepted conversations, and by neglecting to address relevant factors in its assessment, the Trial Chamber reached erroneous conclusions.[1089] He submits further that the Trial Chamber erred in law as the evidence did not allow the Trial Chamber to reach its conclusions beyond reasonable doubt.[1090] **Miletić** concludes that the magnitude of these errors invalidates all his convictions.[1091] The Prosecution responds that the Trial Chamber reasonably assessed the intercepts and that **Miletić** fails to show otherwise.[1092]

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1085 Trial Judgement, paras 1232-1236.
1086 Trial Judgement, para. 1231.
1087 Trial Judgement, paras 1231-1237.
1088 Trial Judgement, para. 1231. See also Trial Judgement, paras 1232-1237.
1089 Miletić's Appeal Brief, paras 415, 418.
1090 Miletić's Appeal Brief, para. 419. In this regard, **Miletić** alleges a violation of Article 21(3) of the Statute and Rule 87(A) of the Rules. Miletić's Appeal Brief, para. 419.
1091 Miletić's Appeal Brief, para. 420. See also Miletić's Appeal Brief, paras 418-419.
1092 Prosecution's Response Brief (Miletić), paras 317-318.

403. The Appeals Chamber first turns to **Miletić**'s submission that the credibility of each conversation ought to have been assessed separately.[1093] The Trial Chamber assessed the credibility of the entire body of intercept evidence before it,[1094] explained that it assessed the weight to be attributed to each individual intercept,[1095] and individually addressed specific challenges to certain intercepts.[1096] The Trial Chamber was satisfied that the intercepts constituted a contemporaneous record of intercepted VRS communications[1097] and relied on them to, *inter alia*, reach conclusions about **Miletić**'s authority, role, and actions.[1098] **Miletić** points to evidence indicating that the transcription, numbering, and dating of the intercepted conversations were not flawless,[1099] but does not, in this context, point to any evidence indicating that the Trial Chamber erred in its reliance on any specific intercept evidence. **Miletić** further points to the evidence of one witness who testified that events as described in intercepted conversations would not always correspond to what happened in reality.[1100] **Miletić** refers to no evidence of any specific instance of such a discrepancy. The Appeals Chamber further observes that for the specific intercepts addressed in the present ground of appeal, the Trial Chamber generally assessed the events described in the intercepted conversations in light of other evidence relating to the same events, before reaching any findings.[1101] The Appeals Chamber sees no error in the Trial Chamber's approach and therefore dismisses **Miletić**'s submission.

404. **Miletić** challenges the Trial Chamber's finding that one of the interlocutors in an intercepted conversation of 14 July 1995 identified as "Vilotić" was **Miletić** and proposes that it could have been General Krstić or General Živanović.[1102] He contends that the Trial Chamber failed to properly assess the evidence, referring in particular to evidence provided by Butler.[1103] The Appeals Chamber has examined all of the evidence to which **Miletić** refers and considers that he has failed to establish an error in the Trial Chamber's finding. While Butler accepted the proposition put to him by counsel that the sentence "carry out my orders immediately" in the intercepted conversation would be typical for a corps commander dealing with his subordinates,[1104] **Miletić** has failed to demonstrate that the same sentence would have been inconsistent with his authority. **Miletić**'s proposition that PW-168 "appeared to connect" this conversation with a corps

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1093 Miletić's Appeal Brief, para. 415; Miletić's Reply Brief, para. 134.
1094 Trial Judgement, paras 64-66.
1095 Trial Judgement, para. 1232.
1096 Trial Judgement, para. 66.
1097 Trial Judgement, para. 65.
1098 Trial Judgement, paras 1674, 1678, 1682, 1694, 1696.
1099 Miletić's Appeal Brief, para. 415, referring to PW-129, T(F). 5676 (10 Jan 2007); PW-134, T(F). 5950, 5953 (16 Jan 2007); PW-145, T(F). 7270 (19 Feb 2007).
1100 Miletić's Appeal Brief, para. 415, referring to PW-147, T(F). 6329-6330 (24 Jan 2007).
1101 See Trial Judgement, paras 1674, 1682, 1694, 1696. *Cf.* Trial Judgement, para. 1678.
1102 Miletić's Appeal Brief, para. 416 (referring to Ex. P01166a, "Intercept 14 July 1995, 22:27 hours", Trial Judgement, para. 1674); Miletić's Reply Brief, para. 135.
1103 Miletić's Appeal Brief, para. 416; Miletić's Reply Brief, para. 135.

commander[1105] is without support in the cited evidence.[1106] While Butler testified that "it's an intriguing possibility that it could be General Krsti[ć]",[1107] he specifically stated that "none of the information [he was] aware of would lend weight to" the possibility that "Vilotić" may have been Corps Commander General Krstić.[1108] Finally, **Miletić** repeats his argument made before the Trial Chamber that "Vilotić" may have been General Živanović[1109] without identifying an error or pointing to specific evidence the Trial Chamber failed to consider in concluding otherwise. The Appeals Chamber therefore finds that **Miletić** has not shown that no reasonable trier of fact could have found that he was "Vilotić".

405. **Miletić** then disputes the Trial Chamber's finding that an intercept of 30 July 1995 established "the close cooperation between Mladić and **Miletić** and that **Miletić** was coordinating and relaying information between different sections of the VRS", by submitting that the Trial Chamber wrongly identified one of the interlocutors in this conversation – "Mićo" – as **Miletić**.[1110] He contends in particular that the Trial Chamber failed to consider the fact that "Mićo" called another interlocutor, Savo, "boss" and that **Miletić** did not have a superior named Savo.[1111] The Appeals Chamber observes that while "Mićo" greeted Savo by using the word "boss", **Miletić** does not demonstrate that this conveyed that Savo was actually a superior of "Mićo".[1112] Moreover, **Miletić** ignores the fact that the Trial Chamber's finding was based also on the content of the intercept regarding "Mićo"'s role and acts, and the context of the events taking place on and around 30 July 1995.[1113] The intercept shows "Mićo" updating Mladić on the events that were unfolding at the time regarding Žepa.[1114] Finally, **Miletić** argues that "Mićo" is a very common name among Serbs and therefore it was not shown that this particular "Mićo" was **Miletić**.[1115] However, the evidence on which he relies does not support this contention, nor does **Miletić** show that there was any other "Mićo" who may reasonably have been the interlocutor in the intercepted conversation. The Appeals Chamber therefore finds that **Miletić** has failed to show that no reasonable trier of fact could have identified "Mićo" as **Miletić**.

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1104 Richard Butler, T. 20615 (29 Jan 2008).
1105 Miletić's Appeal Brief, para. 416.
1106 PW-168, T. 15999 (closed session) (28 Sept 2007).
1107 Richard Butler, T. 20615 (29 Jan 2008). See Richard Butler, T. 20614 (29 Jan 2008).
1108 Richard Butler, T. 20615 (29 Jan 2008).
1109 Miletić's Appeal Brief, para. 416 & fn. 870, referring to Miletić's Final Brief, para. 534.
1110 Miletić's Appeal Brief, para. 417, referring to Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours", Trial Judgement, para. 1696. See also Miletić's Reply Brief, para. 136.
1111 Miletić's Appeal Brief, para. 417.
1112 Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours", pp. 1-2.
1113 Trial Judgement, para. 1696.
1114 Trial Judgement, para. 1696. See Trial Judgement, paras 1693-1695, 1697-1699. See also Trial Judgement, paras 725-738.
1115 Miletić's Reply Brief, para. 136, referring to Slobodan Remetić, T. 24637 (26 Aug 2008).

406. **Miletić** further challenges the Trial Chamber's conclusion, based on an intercepted conversation of 28 July 1995, that he had a position of authority.[1116] The intercept is a conversation in which Obrenović tells the duty officer of the Drina Corps Command that **Miletić** was looking for him and asking "why it hasn't started yet" to which the duty officer responds "[t]ell him it'll start in half an hour because a part of the unit has not arrived".[1117] **Miletić** argues that it is not established how Obrenović obtained this information, how **Miletić** phoned Obrenović, and why he was looking for the Drina Corps Command duty officer in the Zvornik Brigade.[1118] In the view of the Appeals Chamber, **Miletić** has failed to identify any error in the Trial Chamber's assessment of the intercept. **Miletić**'s argument that it is unclear how Obrenović obtained the information and how **Miletić** phoned Obrenović has no bearing on the Trial Chamber's conclusions. He also has failed to demonstrate why it would be surprising for **Miletić** to search for a Drina Corps duty officer at the Zvornik Brigade, considering that the Zvornik Brigade was a subordinate unit of the Drina Corps.[1119] Moreover, the Appeals Chamber notes that the Trial Chamber found, based on the evidence before it and the time and content of the intercept, that the conversation referred to the dispatch of a unit from the Zvornik Brigade to the 2nd Krajina Corps.[1120] This finding supports the Trial Chamber's conclusion that the intercept is evidence of **Miletić**'s authority and his involvement in following up on the reassignment of units. The Appeals Chamber therefore dismisses **Miletić**'s argument.

407. **Miletić** also disputes the Trial Chamber's conclusion that two intercepted conversations of 15 July 1995 were evidence of the direct contact he had with the Zvornik Brigade. He submits that the interlocutors in these conversations are unknown and there is no evidence that they had contact with **Miletić** or were members of the Zvornik Brigade.[1121] The Trial Chamber found that during a conversation intercepted in the evening of 15 July 1995 between Baki and an unidentified person, the two interlocutors discussed "equipment" and "what goes with it" which "General Miletić ordered" to be sent to **Pandurević**.[1122] A few minutes later another conversation was intercepted in which reference was made to "Miletić" and that "he insisted that it must go during the night, to get to Vinko".[1123] The Trial Chamber was satisfied on the basis of the content of these conversations

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1116 Miletić's Appeal Brief, para. 417, referring to Ex. P01370c, "Intercept, 28 July 1995, 17:30 hours", Trial Judgement, para. 1694.
1117 Trial Judgement, para. 1694, citing Ex. P01370c, "Intercept, 28 July 1995, 17:30 hours".
1118 Miletić's Appeal Brief, para. 417.
1119 Trial Judgement, para. 135.
1120 Trial Judgement, para. 1694.
1121 Miletić's Appeal Brief, para. 417, referring to Ex. P01182a, "Intercept, 15 July 1995, 22:25 hours", Ex. P02367c, "Intercept, 15 July 1995, 22:26 hours", Ex. P02368c, "Intercept, 15 July 1995, 22:28 hours", Trial Judgement, para. 1678.
1122 Trial Judgement, para. 1678, citing Ex. P02367c, "Intercept, 15 July 1995, 22:26 hours".
1123 Trial Judgement, para. 1678, citing Ex. P02368c, "Intercept, 15 July 1995, 22:28 hours".

that they referred to **Miletić** and Vinko **Pandurević**.[1124] This conclusion stands irrespective of the fact that the identities of the interlocutors were not established. Further, the Appeals Chamber is of the view that **Miletić** has failed to demonstrate an error in the Trial Chamber's finding concerning his direct contact with the Zvornik Brigade, considering the clear evidence of such contact in the paragraph immediately preceding that of the impugned finding, *i.e.* **Miletić**'s conversation with Obrenović and his issuance of orders.[1125] In any event, the Appeals Chamber is not convinced that the part of the Trial Chamber's finding referring specifically to *direct* contact, if it were in error, would lead to any miscarriage of justice as there was clearly, at the very least, indirect contact. **Miletić**'s submission is dismissed.

408. Further, **Miletić** challenges[1126] the Trial Chamber's finding that in the intercepted conversation dated 2 August 1995 **Popović** told Krstić that **Beara** just told him that **Beara** had reported to **Miletić** that "there are 500 to 600 Bosnian Muslims in Serbia, but that the Serb authorities would not allow anyone to speak to them".[1127] This finding was based on the text of the intercepted conversation, in which **Popović**'s statement that **Beara** "said he reported to Miletić" is followed by his statements "[t]here are about 500-600 of them over there" and "[t]hey don't allow anyone to talk to them at all".[1128] Krstić then tells **Popović** to go to Bajina Bašta, which is located in Serbia, "to bring me Turks back here".[1129] In these circumstances the Appeals Chamber considers that a reasonable trier of fact could have made this finding. Moreover, the Trial Chamber considered this intercept together with other evidence about events on 1 and 2 August 1995 and its conclusions are based on this context.[1130] The Appeals Chamber also observes that, while **Miletić** argues that the conversation does not allow for a conclusion that he was "fully informed", he points to no such finding of the Trial Chamber. He also argues that the report he received from **Beara** on 2 August 1995 does not indicate that he was informed in the course of July 1995, because at that time there were other generals at the Main Staff who could receive information.[1131] However, he has failed to show that the Trial Chamber drew from the impugned findings the conclusion that he was informed in the course of July 1995. Finally, while **Miletić** argues that the intercept of 2 August 1995 is tied only to the movement of an ABiH unit and does not show that he played any

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1124 Trial Judgement, para. 1678.
1125 See Trial Judgement, para. 1677.
1126 Miletić's Appeal Brief, para. 417, referring to Ex. P01395g, "Intercept, 2 August 1995, 13:00 hours", Trial Judgement, para. 735.
1127 Trial Judgement, para. 735, referring to Ex. P01395g, "Intercept, 2 August 1995, 13:00 hours".
1128 Ex. P01395g, "Intercept, 2 August 1995, 13:00 hours".
1129 Ex. P01395g, "Intercept, 2 August 1995, 13:00 hours".
1130 Trial Judgement, para. 735.
1131 Miletić's Appeal Brief, para. 417, referring to Ljubomir Obradović, T. 28293-28294 (17 Nov 2008), Ex. 5D01415, "VRS Main Staff report to units in the zone of operations, 31 July 1995", p. 1, Ex. P02948, "Sarajevo Sector Memo, 31 July 1995", pp. 2-3. See also Miletić's Reply Brief, para. 138.

role in the criminal activities,[1132] he has failed to show that the Trial Chamber drew any such conclusion from the intercept. The Appeals Chamber therefore dismisses **Miletić**'s argument relating to the intercepted conversation of 2 August 1995.

409. **Miletić** further disputes the Trial Chamber's finding that an intercepted conversation of 12 August 1995 is evidence that he was directly involved in a medical evacuation by UNPROFOR, by submitting that General Nicolai expressed his gratitude to him because he happened to be the one speaking with him.[1133] The Appeals Chamber recalls that it may dismiss challenges to factual findings on which a conviction does not rely and notes that the challenged finding appears in a footnote as additional support for the conclusion that **Miletić** forwarded the approvals and denials of convoys to UNPROFOR and at times had direct contact with UNPROFOR,[1134] a conclusion that **Miletić** does not dispute under the present ground of appeal. The Appeals Chamber therefore dismisses this argument.

410. Finally, **Miletić** challenges the Trial Chamber's finding that an intercepted conversation of 17 July 1995 is indicative of his co-ordinating role.[1135] The Trial Chamber found that around 8:00 p.m. on 17 July 1995 Mladić told Krstić in an intercepted conversation that he did not accept "the Turks' conditions", "full steam ahead", and to "get in touch with Miletić on the secure line, full steam ahead".[1136] The Trial Chamber concluded that the conversation refers to Žepa and that the "Miletić" referred to in the conversation is **Miletić**, considering the context of the events taking place at the time and the participants in the conversation.[1137] It had found previously that on 12 July 1995 Mladić ordered Krstić to prepare for the liberation of Žepa.[1138] In the view of the Appeals Chamber, **Miletić** has failed to show that no reasonable trier of fact could have found that the intercepted conversation provided further proof of his vital co-ordinating role at the Main Staff.[1139] **Miletić** submits that he had no co-ordinating authority over his superior Mladić and over Krstić, who were in direct contact.[1140] The Trial Chamber's finding that the intercept again shows his vital co-ordinating role at the Main Staff, including between Krstić and Mladić during the Žepa operation, is not inconsistent with **Miletić**'s argument that Mladić was his superior, as one is not

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1132 Miletić's Reply Brief, para. 137.
1133 Miletić's Appeal Brief, para. 417, referring to Ex. 5D01281, "Intercepted conversation between Miletić and Nicolai, 12 August 1995, 11:47 hours", Ljubomir Obradović, T. 28294 (17 Nov 2008), Trial Judgement, para. 1642 & fn. 5029.
1134 Trial Judgement, para. 1642 & fn. 5029.
1135 Miletić's Appeal Brief, para. 417, referring to Ex. P01231a, "Intercept, 17 July 1995, 19:50 hours", Trial Judgement, para. 1682, Miletić Closing Arguments, T. 34671 (11 Sept 2009), Miletić's Appeal Brief, para. 238. See also Miletić's Reply Brief, para. 139.
1136 Trial Judgement, para. 1682, citing Ex. P01231a, "Intercept, 17 July 1995, 19:50 hours".
1137 Trial Judgement, para. 1682.
1138 Trial Judgement, para. 674. See also Trial Judgement, para. 681.
1139 Trial Judgement, para. 1682.
1140 Miletić's Appeal Brief, para. 417, referring to Ex. P01231a, "Intercept, 17 July 1995, 19:50 hours", Trial Judgement, para. 1682, Miletić Closing Arguments, T. 34671 (11 Sept 2009), Miletić's Appeal Brief, para. 238.

necessarily precluded from exercising the authority to co-ordinate the activities of a superior. Nor can the Appeals Chamber discern an error in the Trial Chamber's finding that the intercept provides evidence of **Miletić**'s co-ordinating role *between* Krstić and Mladić during the Žepa operation. While the intercept indicates that Krstić and Mladić were in direct contact,[1141] the Trial Chamber's finding must be read in its context, which includes the finding that during the Žepa operation, **Miletić** "coordinated between the Main Staff and the field".[1142]

411. In view of the above, the Appeals Chamber dismisses **Miletić**'s ground of appeal 21 in its entirety.

## D. Conclusion

412. The Appeals Chamber has dismissed all challenges regarding evidentiary matters addressed in the present chapter.

1141 Ex. P01231a, "Intercept, 17 July 1995, 19:50 hours".

1142 Trial Judgement, para. 1681. In any event, the Appeals Chamber is not convinced that the portion of the Trial Chamber's finding referring specifically to **Miletić**'s co-ordination *between* Krstić and Mladić, if it were in error, would lead to any miscarriage of justice.

# VIII. CRIMES

## A. Genocide

### 1. Introduction

413. Count 1 alleges that **Popović**, **Beara**, and **Nikolić** are responsible for genocide.[1143] In considering this count, the Trial Chamber concluded that members of the BSF committed genocide against the Muslims of Eastern Bosnia,[1144] which constituted a substantial component of Bosnian Muslims as a group.[1145] The Trial Chamber was satisfied beyond reasonable doubt that **Popović** and **Beara** committed genocide through their participation in the JCE to Murder with genocidal intent.[1146] The Trial Chamber found that **Nikolić** did not have genocidal intent but it concluded that he aided and abetted genocide.[1147]

414. **Popović**, **Beara**, **Nikolić**, and the Prosecution present various challenges to the Trial Chamber's determinations in relation to genocide. In this section, the Appeals Chamber will address the arguments that relate to the Trial Chamber's alleged legal errors regarding this crime and assessment of the facts relevant to the findings on individual criminal liability for genocide.

415. Before discussing the various arguments before it, the Appeals Chamber considers it necessary to clarify the terminology it will adopt in its discussion of genocide. Article 4(2) of the Statute defines genocide to mean any of the acts listed "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Appeals Chamber will use the terms "specific intent" and "genocidal intent" interchangeably to describe the intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such.[1148]

### 2. Targeted group (Beara's Ground 21)

#### (a) Arguments of the Parties

416. **Beara** argues that the Trial Chamber erred in law and abused its discretion in finding that the targeted part of the group of Bosnian Muslims was a substantial part of the entire group, as required for genocide.[1149] He claims that the Trial Chamber ignored the numeric size of the targeted

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1143 Indictment, para. 26, p. 17.
1144 Trial Judgement, para. 863. See Trial Judgement, paras 856-862.
1145 Trial Judgement, para. 865. See Trial Judgement, paras 839-840, 864, 866.
1146 Trial Judgement, paras 1180-1181, 1318-1319. See Trial Judgement, paras 1175-1179, 1310-1317. See also Trial Judgement, Disposition, Popović and Beara sections.
1147 Trial Judgement, paras 1414-1415. See Trial Judgement, paras 1397-1413. See also Trial Judgement, Disposition, Nikolić section.
1148 See *Jelisić* Appeal Judgement, para. 45.
1149 Beara's Appeal Brief, intro before para. 226, paras 226, 237.

group and based its finding on factors of secondary importance which could not compensate for the fact that not enough members of the group were targeted to satisfy this requirement.[1150] Specifically, **Beara** challenges the Trial Chamber's reliance on or application of the following three factors in finding that the Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership:

> (1) the ethnically Serb [S]tate [that the Bosnian Serb leadership] sought to create would remain divided and access to Serbia disrupted without Srebrenica; (2) most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would accomplish the goal of eliminating the Muslim presence in the entire region; and (3) the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their defencelessness and be "emblematic" of the fate of all Bosnian Muslims.[1151]

**Beara** argues that Srebrenica's strategic location is relevant to territorial aspirations rather than genocidal intent and that the Trial Chamber failed to show otherwise.[1152] He further argues that the Trial Chamber's apparent consideration of "Muslims living in the geographic region of Eastern Bosnia", as opposed to the "Bosnian Muslims of Eastern Bosnia" defined by the Prosecution, infringed upon his right to know the case against him, as it diverged from the narrower population outlined in the Indictment.[1153] **Beara** adds in this regard that the Trial Chamber's impermissible widening of the scope of the group highlights how the population of the enclave cannot be considered as even a "distinct part of the group".[1154] Finally, **Beara** claims that the Trial Chamber's conclusion that the destruction of the Srebrenica and Žepa Muslims would threaten the viability of Bosnian Muslims as a whole was not supported by the evidence.[1155] These errors, he submits, invalidate a significant portion of the Trial Judgement and constitute a miscarriage of justice.[1156]

417. In addition, **Beara** argues that the Trial Chamber failed to consider and address arguments and supporting evidence presented in his final brief.[1157] Specifically, he argues that the Trial Chamber relied exclusively on the *Krstić* case in order to determine that the substantiality requirement was met, in spite of the introduction of new evidence and arguments.[1158]

418. The Prosecution responds that the Trial Chamber correctly applied the substantiality requirement and correctly evaluated the size of the targeted group together with the factors

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1150 Beara's Appeal Brief, paras 226, 230-232, 235, 237; Beara's Reply Brief, para. 86.
1151 Beara's Appeal Brief, paras 227-228, citing Trial Judgement, para. 865. See also Beara's Appeal Brief, 233-235.
1152 Beara's Appeal Brief, para. 233. See also Beara's Reply Brief, para. 87; Appeal Hearing, AT. 255 (3 Dec 2013).
1153 Beara's Appeal Brief, para. 234 & fn. 326.
1154 Beara's Appeal Brief, para. 234 (citing *Krstić* Trial Judgement, para. 590); Beara's Reply Brief, para. 88.
1155 Beara's Appeal Brief, para. 235.
1156 Beara's Appeal Brief, intro before para. 226, paras 226, 237.
1157 Beara's Appeal Brief, para. 226.
1158 Beara's Appeal Brief, para. 236; Beara's Reply Brief, para. 86.

pertaining to the strategic importance of Srebrenica.[1159] Furthermore, it submits that **Beara**'s allegations that the Trial Chamber disregarded evidence are unsupported and undeveloped.[1160]

(b) Analysis

419. The Appeals Chamber notes that, in enunciating the applicable law on genocide, the Trial Chamber referred to the *Krstić* Appeal Judgement and held that "[i]f a group is targeted in part, the portion targeted must be a substantial part of the group because it must be significant enough to have an impact on the group as a whole".[1161] The Trial Chamber proceeded to restate the law on the meaning of "substantial".[1162] Neither party disputes that the Trial Chamber correctly enunciated the applicable law on the substantiality requirement for genocide. Notably, **Beara** does not dispute that the Trial Chamber was entitled to rely on factors other than numeric size in determining whether the substantiality requirement was met. The task before the Appeals Chamber is therefore limited to determining whether that law was applied correctly to the facts.

420. **Beara**'s assertion that the Trial Chamber ignored the numeric size of the targeted part of the group is unfounded. The Trial Chamber stated that the numeric size of the targeted part of the group is the necessary and important starting point for any inquiry into whether the substantiality requirement for genocide is met.[1163] It went on to recognise that "the size of the Bosnian Muslim population in Srebrenica before its capture by the VRS was a small percentage of the overall Muslim population of BiH at the time".[1164] **Beara** supports his contention that not enough group members were targeted by reference to this quote, which is itself drawn directly from the *Krstić* Appeal Judgement.[1165] This contention, however, disregards the fact that the Appeals Chamber held in that case that secondary factors may be considered "[i]n addition to the numeric size of the targeted portion".[1166] The Trial Chamber found "that the Muslims of Eastern Bosnia constitute a substantial component of the entire group, Bosnian Muslims" and then observed with regard to Srebrenica that "the import of the community is not appreciated solely by its size".[1167] **Beara** has failed to identify any error in the approach taken by the Trial Chamber.

421. As for **Beara**'s claim that the Trial Chamber relied exclusively on the *Krstić* case in finding that the substantiality requirement was met, the Appeals Chamber notes that the Trial Chamber did

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1159 Prosecution's Response Brief (Beara), paras 233-242; Appeal Hearing, AT. 235-238 (3 Dec 2013).
1160 Prosecution's Response Brief (Beara), para. 242.
1161 Trial Judgement, para. 831 (internal quotation marks omitted), referring to *Krstić* Appeal Judgement, para. 8.
1162 Trial Judgement, para. 832, referring to *Krstić* Appeal Judgement, paras 12-14.
1163 Trial Judgement, para. 832, referring to *Krstić* Appeal Judgement, para. 12.
1164 Trial Judgement, para. 865, referring to *Krstić* Appeal Judgement, para. 15.
1165 Beara's Appeal Brief, para. 231, referring to Trial Judgement, para. 865.
1166 *Krstić* Appeal Judgement, paras 12-13.
1167 Trial Judgement, para. 865. See also Trial Judgement, para. 832.

not explicitly refer to any evidence when making this finding.[1168] However, at the outset of the section of the Trial Judgement relating to findings on genocide, the Trial Chamber recalled that several thousand Bosnian Muslim males were executed[1169] and noted that "[a]lthough the Trial Chamber has considered all of the relevant evidence in its totality in order to determine whether genocide was committed, it will only repeat the most pertinent as part of this analysis below".[1170] The Trial Chamber then referred to the Appeals Chamber's analysis of the substantiality requirement in the *Krstić* case[1171] and stated that it "agrees with this analysis and adopts the conclusion".[1172] The Trial Chamber committed no error by adopting the analytical legal framework used by the Appeals Chamber. In these circumstances, the Appeals Chamber cannot infer that the Trial Chamber's finding on the substantiality requirement was based exclusively on the *Krstić* Appeal Judgement without regard for the evidence admitted in the present case.

422. The Appeals Chamber now turns to the question of whether secondary factors were given undue weight or erroneously applied by the Trial Chamber. In relation to the first factor that, without Srebrenica, the ethnically Serb State that the Bosnian Serb leadership sought to create would remain divided and access to Serbia disrupted, the Appeals Chamber considers that **Beara**'s argument that Srebrenica's strategic location is relevant to territorial aspirations rather than genocidal intent proceeds from a misunderstanding of the test for substantiality. Although the substantiality requirement is textually indicated in the provision describing the specific intent required for genocide, *i.e.* the requirement that there must exist an "intent to destroy, *in whole or in part*, a national, ethnical, racial or religious group, as such",[1173] it is the objective, contextual characteristics of the targeted part of the group, including, *inter alia*, its numeric size relative to the total size of the group,[1174] that form the basis for determining whether the targeted part of the group is substantial.[1175] As **Beara** does not articulate any further error in the Trial Chamber's partial reliance on the strategic importance of Srebrenica, the Appeals Chamber dismisses his arguments in relation to the first factor.

423. In relation to the second factor that most Muslim inhabitants of the region had, at the relevant time, sought refuge in the Srebrenica enclave and the elimination of the enclave would

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1168 See Trial Judgement, para. 865.
1169 Trial Judgement, para. 837.
1170 Trial Judgement, para. 838.
1171 Trial Judgement, fns 3018-3019.
1172 Trial Judgement, para. 865.
1173 Article 4(2) of the Statute (emphasis added). See *Krstić* Appeal Judgement, paras 6, 8-9. See also Article II of the Genocide Convention.
1174 *Krstić* Appeal Judgement, para. 12.
1175 See *Krstić* Appeal Judgement, paras 12-17 (where substantiality is discussed by reference to various contextual and objective characteristics of the targeted part of the group, the Bosnian Muslims of Srebrenica); Benjamin Whitaker, Revised and Updated Report on the Question of Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6, para. 29 ("'In part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group, such as its leadership.").

accomplish the goal of eliminating the Muslim presence in the entire region, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber took into consideration a part of the group broader than that pleaded in the Indictment. **Beara** makes a purely semantic distinction between the "Bosnian Muslims of Eastern Bosnia" and "Muslims living in the geographic region of Eastern Bosnia" and provides no specific references to the trial record that might explain the origin or relevance of these terms. **Beara**'s further contention regarding the group's lack of "distinct" character relies on that same unsupported semantic distinction. **Beara**'s arguments in relation to the second factor are therefore dismissed.

424. With regard to the third factor – *i.e.* that the enclave's elimination despite international assurances of safety would demonstrate to the Bosnian Muslims their "defencelessness" and be "emblematic" of the fate of all Bosnian Muslims – **Beara**'s argument is not supported by any references to the purported evidence and is therefore dismissed.

425. Finally, **Beara**'s argument that the Trial Chamber failed to consider and address his arguments and supporting evidence regarding whether the substantiality requirement was met is merely supported by a blanket reference to a section of his final brief.[1176] **Beara** has failed to identify the specific issues and arguments that the Trial Chamber omitted to address and explain why this omission invalidated the decision. Furthermore, the only specific argument **Beara** makes in support of his claim is that the Trial Chamber failed to consider evidence that "the enclave" was never fully demilitarised. The Trial Chamber, however, repeatedly acknowledged that the Srebrenica and Žepa enclaves were never fully demilitarised.[1177]

426. Consequently, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred and, accordingly, dismisses his ground of appeal 21 in its entirety.

### 3. State policy (Nikolić's Ground 3)

#### (a) Arguments of the Parties

427. **Nikolić** contends that the Trial Chamber erred in law by failing to identify State policy as an essential element of the crime of genocide.[1178] He relies on "historical-legal" arguments made in the Schabas Report, seeking to demonstrate that State policy must form part of the crime of genocide under international law.[1179] **Nikolić** argues that the Trial Chamber erred in holding that he submitted arguments that had already been considered and rejected in the case law of the Tribunal and the

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1176 See Beara's Appeal Brief, fn. 316, referring to Beara's Final Brief, paras 696-725.
1177 Trial Judgement, paras 98, 197, 666, 774.
1178 Nikolić's Appeal Brief, paras 55, 59.
1179 Nikolić's Appeal Brief, para. 55. See *supra*, note 221.

ICTR, citing in particular Schabas's theory as an argument which had not been considered by the Tribunal in the past.[1180] He also claims that the Trial Chamber relied on the *Krstić*, *Jelisić*, and *Kayishema and Ruzindana* Appeal Judgements, which do not address the question of whether State policy is a legal element of the crime of genocide.[1181] He asserts that this error of law invalidates the Trial Judgement as the charge of genocide was adjudicated on the basis of an incorrect definition.[1182] According to **Nikolić**, the Appeals Chamber should therefore apply the correct definition and find that genocide was not committed during the period relevant to the Indictment.[1183]

428. Alternatively, **Nikolić** argues that there are cogent reasons in the interests of justice for the Appeals Chamber to depart from its previous jurisprudence and recognise State policy as an element of the crime of genocide.[1184] First, **Nikolić** argues that the Schabas Report establishes that the Appeals Chamber's previous rulings were rendered *per incuriam* insofar as they failed to recognise State policy as an essential element of the crime of genocide.[1185] Second, **Nikolić** contends that the Appeals Chamber is required to reassess its case law in order to ensure a unified approach toward genocide in international law which reconciles the differing approaches to assessing State responsibility and individual criminal liability, thus enabling the two distinct regimes to operate in a complementary manner.[1186] Third, **Nikolić** submits that unification is necessary even within international criminal law itself, where different legal standards for the crime of genocide are applied by the Tribunal and by the International Criminal Court ("ICC"), a dissonance which could undermine the credibility, certainty, and effectiveness of international criminal law.[1187] Last, **Nikolić** argues that it is necessary for the purposes of fairness to redefine the crime of genocide in order to prevent future trials taking place under the current flawed definition.[1188]

429. The Prosecution responds that the Trial Chamber was correct in concluding that a plan or policy is not an element of the crime of genocide.[1189] It further submits that **Nikolić** presents no cogent reason in the interests of justice to depart from the Appeals Chamber's jurisprudence.[1190]

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1180 Nikolić's Appeal Brief, para. 56; Nikolić's Reply Brief, para. 29.
1181 Nikolić's Appeal Brief, paras 57-58; Nikolić's Reply Brief, para. 29.
1182 Nikolić's Appeal Brief, para. 60.
1183 Nikolić's Appeal Brief, paras 60-62.
1184 Nikolić's Appeal Brief, para. 63; Nikolić's Reply Brief, para. 30.
1185 Nikolić's Appeal Brief, para. 59; Nikolić's Reply Brief, para. 30.
1186 Nikolić's Appeal Brief, para. 64; Nikolić's Reply Brief, para. 30.
1187 Nikolić's Appeal Brief, para. 65; Nikolić's Reply Brief, para. 30.
1188 Nikolić's Appeal Brief, para. 66; Nikolić's Reply Brief, para. 30.
1189 Prosecution's Response Brief (Nikolić), paras 44-50.
1190 Prosecution's Response Brief (Nikolić), paras 44, 51-56.

(b) Analysis

430. In holding that the crime of genocide does not require the existence of a State policy, the Trial Chamber relied on, *inter alia*, the *Krstić*, *Jelisić*, and *Kayishema and Ruzindana* Appeal Judgements.[1191] The Appeals Chamber considers that it was inapposite to rely on the *Krstić* Appeal Judgement, in which the Appeals Chamber held that participation in a widespread and systematic attack against a civilian population is not an element of the crime of genocide.[1192] However, the Appeals Chamber considers that the Trial Chamber did not err in relying on the *Jelisić* and *Kayishema and Ruzindana* Appeal Judgements. In the *Jelisić* Appeal Judgement, the Appeals Chamber held that "the existence of a plan or policy is not a legal ingredient of the crime",[1193] while in *Kayishema and Ruzindana* the ICTR Appeals Chamber stated that "a genocidal plan is not a constituent element of the crime of genocide".[1194] Although these judgements do not explicitly address the issue of *State* policy, the Appeals Chamber considers that if a policy is not a legal requirement, it follows that State policy cannot be a legal requirement. Thus, the question of whether the existence of a State policy is required for the crime of genocide has already been considered by the Tribunal.

431. The Appeals Chamber recalls that the Schabas Report was addressed by the Trial Chamber, which considered the report's argument with regard to State policy and dismissed it.[1195] The Appeals Chamber notes that the central argument of the Schabas Report is the importance of State policy for determining whether genocide was perpetrated.[1196] Considering that the jurisprudence of the Appeals Chamber excludes State policy as a requirement for the crime of genocide, the Appeals Chamber finds that **Nikolić** has failed to show any error in how the Trial Chamber addressed the Schabas Report.

432. With regard to the alternative argument presented by **Nikolić**, the Appeals Chamber notes that it is well-established that while it should ordinarily follow its previous decisions, it may depart from them for cogent reasons in the interests of justice.[1197] The Appeals Chamber will examine whether **Nikolić** has established the existence of such cogent reasons.

433. In relation to **Nikolić**'s submission that the Appeals Chamber's previous rulings were rendered *per incuriam*, the Appeals Chamber recalls that cogent reasons in the interests of justice

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1191 Trial Judgement, paras 828-830.
1192 Trial Judgement, para. 828 & fn. 2961, referring to *Krstić* Appeal Judgement, para. 223.
1193 *Jelisić* Appeal Judgement, para. 48.
1194 *Kayishema and Ruzindana* Appeal Judgement, para. 138.
1195 Trial Judgement, paras 826-829 & fns 2956-2959.
1196 This is particularly clear from the Schabas Report, Executive summary, pp. 4-5, first and penultimate bullet points.
1197 *Đorđević* Appeal Judgement, para. 23; *Čelebići* Appeal Judgement, para. 8; *Aleksovski* Appeal Judgement, paras 107-108.

may exist where a previous decision was given *per incuriam*, *i.e.* was "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[1198] The Appeals Chamber recalls that **Nikolić** relies in this regard on the legal arguments contained in the Schabas Report,[1199] which the Appeals Chamber will examine below.

434. **Nikolić** first suggests, by reference to the Schabas Report, that the issue of State policy as an element of the crime of genocide may not have been addressed by the drafters of the Genocide Convention because they believed the matter to be self-evident.[1200] The Appeals Chamber has reviewed the *travaux préparatoires* of the Genocide Convention and is of the view that the issue of State policy was far from self-evident to the drafters. For instance, in the Ad Hoc Committee on Genocide, the Chairman, speaking as the United States of America representative, proposed adding to the definition of genocide the words "with the complicity of the Government".[1201] The delegate from Poland was of the opinion that the proposed amendment "unduly restricted the concept of genocide",[1202] an argument echoed by the Venezuelan delegate who added that "it would prevent the punishment of numerous crimes committed by one group against another and having all the characteristics of genocide".[1203] At the Sixth Committee, there was substantial opposition to a French amendment which proposed to add to the definition of genocide that "[i]t is committed, encouraged or tolerated by the rulers of a State."[1204] The Pakistani delegate opposed the French amendment because it would exclude "fascist or terrorist organizations" which in his submission could commit genocide,[1205] while the Egyptian delegate was opposed on the basis that it would omit crimes committed by paramilitary groups.[1206] The French amendment was eventually rejected by 40 votes to two, with one abstention.[1207] Even if a "State policy" requirement as such was not debated, the Appeals Chamber considers that the reservations expressed by many delegates would have been equally applicable to the inclusion of a State policy requirement in the definition of genocide.

435. **Nikolić**, by incorporating the Schabas Report, makes a modest claim with regard to the support for the report's thesis found in the *Kayishema and Ruzindana* Appeal Judgement, merely noting that the author "would be inclined to treat *Kayishema* as supportive of the importance of a

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1198 *Đorđević* Appeal Judgement, para. 24; *Aleksovski* Appeal Judgement, para. 108.

1199 See *supra*, para. 428. The Schabas Report generally does not argue that a State policy must be considered an *element* of the crime of genocide, but the Appeals Chamber will consider the Schabas Report within the context of **Nikolić**'s appeal.

1200 Schabas Report, p. 304.

1201 Genocide Convention: The *Travaux*, p. 712.

1202 Genocide Convention: The *Travaux*, p. 714.

1203 Genocide Convention: The *Travaux*, p. 715.

1204 Genocide Convention: The *Travaux*, p. 1451.

1205 Genocide Convention: The *Travaux*, p. 1455.

1206 Genocide Convention: The *Travaux*, p. 1457. See also Genocide Convention: The *Travaux*, pp. 1456-1460, 1462-1468, in which the Iranian, Venezuelan, Swedish, Uruguayan, Cuban, Philippine, Yugoslavian, and Haitian delegates expressed opposition.

1207 Genocide Convention: The *Travaux*, p. 1471.

State policy in a judicial inquiry into genocide".[1208] The Appeals Chamber notes that it was stated in the *Kayishema and Ruzindana* Appeal Judgement that "even though a genocidal plan is not a constituent element of the crime of genocide, the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide".[1209] Moreover, the paragraph cited by **Nikolić** in support of his claim that the *Kayishema and Ruzindana* Appeal Judgement underlines the importance of State policy in fact merely restates certain relevant parts of the trial proceedings.[1210] None of this supports the claim that State policy is a requirement for the crime of genocide.

436. The Appeals Chamber recalls that reliance on the definitions of crimes provided in the ICC Elements of Crimes is inapposite, as these definitions are "not binding rules, but only auxiliary means of interpretation" of the ICC Statute.[1211] Nor is the ICC Statute itself, as a multilateral treaty, binding on the Tribunal.[1212] In any event, the Appeals Chamber is not convinced by **Nikolić**'s argument that the reference in the ICC Elements of Crimes to genocide being committed within a "manifest pattern of similar conduct"[1213] provides "strong evidence that [State policy] is implicit in customary international law".[1214] The Appeals Chamber considers that a "manifest pattern of similar conduct" does not necessarily imply the existence of a State policy.

437. With regard to the Report of the Darfur Commission, **Nikolić** relies, in particular, on the following statement:

> However, one crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.[1215]

The Appeals Chamber notes that the International Commission of Inquiry on Darfur to the United Nations Secretary-General ("Darfur Commission") searched for genocidal *intent* and considers it unsurprising that its focus on "the central Government authorities" would lead it to search for evidence of a State policy. The Appeals Chamber further notes that when setting out its approach to

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1208 Schabas Report, p. 307.
1209 *Kayishema and Ruzindana* Appeal Judgement, para. 138. See Schabas Report, pp. 306-307.
1210 *Kayishema and Ruzindana* Appeal Judgement, para. 139. See Schabas Report, pp. 306-307.
1211 *Krstić* Appeal Judgement, para. 224 & fn. 366.
1212 See *Šainović et al.* Appeal Judgement, para. 1648.
1213 The relevant text of the ICC Elements of Crimes for the crime of genocide says that "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." Article 6(a)(4) of the ICC Elements of Crimes. See Articles 6(a)(1)-(3), (b)-(e) of the ICC Elements of Crimes.
1214 Schabas Report, pp. 307-309.
1215 Report of the Darfur Commission, para. 518. See Schabas Report, p. 316.

genocidal intent, the Report of the Darfur Commission relied extensively on the case law of the Tribunal.[1216]

438. Similarly, in the *Bosnia Genocide* ICJ Judgement, the International Court of Justice ("ICJ") relied on the jurisprudence of the Tribunal when reaching the conclusion that the acts at Srebrenica from about 13 July 1995 were "committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such".[1217] **Nikolić** argues that the following passage from the *Bosnia Genocide* ICJ Judgement shows that "the Court analysed the issue of 'specific intent' in terms of the existence of a plan":[1218]

> The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading 'A Plan to Execute the Bosnian Muslim Men of Srebrenica', the Chamber 'finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave'.[1219]

This passage is of no assistance to **Nikolić**'s argument, as it concerns the value of a plan as evidence of genocidal intent.

439. **Nikolić** contends that, if the Darfur Commission and the ICJ had accepted that genocide does not require a State policy, they would have searched for evidence that an individual whose acts were attributable to Sudan or Serbia had killed a member of a targeted group with the intent to destroy it in whole or in part.[1220] The Appeals Chamber observes that the ICJ in fact devoted substantial discussion to an examination of whether the genocidal "acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to [the Republic of Serbia]".[1221] As for the Darfur Commission, the Appeals Chamber notes that in a passage referenced by **Nikolić**,[1222] the Report of the Darfur Commission cautions:

> One should not rule out the possibility that in some instances *single individuals*, including Government officials, may entertain a genocidal intent, or in other words, attack the victims with the specific intent of annihilating, in part, a group perceived as a hostile ethnic group. If any single individual, including Governmental officials, has such intent, it would be for a competent court to make such a determination on a case by case basis. Should the competent court determine that in some instances certain individuals pursued the genocidal intent, the question would arise of establishing any possible criminal responsibility of senior officials either for complicity in genocide or for failure to investigate, or repress and punish such possible acts of genocide.[1223]

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1216 See Report of the Darfur Commission, paras 491-493, 502-503, 520.
1217 *Bosnia Genocide* ICJ Judgement, paras 295-297.
1218 Schabas Report, p. 318.
1219 *Bosnia Genocide* ICJ Judgement, para. 292 (internal reference omitted).
1220 Schabas Report, p. 317.
1221 *Bosnia Genocide* ICJ Judgement, para. 379. See also *Bosnia Genocide* ICJ Judgement, paras 386-390, 394-395, 408-413. After detailed legal and factual consideration, the ICJ answered this question in the negative. *Bosnia Genocide* ICJ Judgement, para. 415.
1222 Schabas Report, p. 317.
1223 Report of the Darfur Commission, para. 520 (emphasis in original) (internal reference omitted). It is further stated in the report that "[a]s the ICTR Appeals Chamber rightly noted in *Kayishema and Ruzindana*, 'genocide is not a

Furthermore, the Appeals Chamber notes that while the Darfur Commission was empowered to conduct its inquiries "to identify the perpetrators of [, *inter alia*, acts of genocide] with a view to ensuring that those responsible are held accountable",[1224] it decided to keep confidential the names of those persons suspected of international crimes and expressed a preference that those names be forwarded to a competent prosecutor.[1225] Thus, the Appeals Chamber is not convinced that one can infer that the Darfur Commission and the ICJ viewed State policy as a requirement for genocide.

440. In light of the above, the Appeals Chamber considers that **Nikolić** has failed to demonstrate that State policy is an element of the crime of genocide. Consequently, the Appeals Chamber rejects his submission that the Appeals Chamber's previous rulings on the matter were rendered *per incuriam* insofar as they did not identify State policy as a requirement for the crime of genocide.

441. With regard to **Nikolić**'s second and third submissions, requesting that the Appeals Chamber ensure a unified approach towards genocide in international law, the Appeals Chamber observes that its task is not to act as a harmonising force in international law, but rather to decide the matters before it in accordance with applicable law. In this regard, the Appeals Chamber notes that it applies customary international law and that its jurisdiction *ratione materiae* is limited to individual criminal responsibility as opposed to State responsibility. The Appeals Chamber therefore dismisses these submissions.

442. Finally, the Appeals Chamber considers that **Nikolić**'s final submission that future trials must be prevented from proceeding on the basis of an erroneous definition of genocide is dependent on the unproven premise that the Tribunal's definition of the crime of genocide is erroneous and is, accordingly, rejected.

443. Having found that **Nikolić** has demonstrated neither that the Trial Chamber erred, nor that cogent reasons in the interests of justice demand a departure from the established jurisprudence of this Tribunal, the Appeals Chamber dismisses **Nikolić**'s ground of appeal 3 in its entirety.

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crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike'." Report of the Darfur Commission, fn. 190, citing *Kayishema and Ruzindana* Appeal Judgement, para. 170.

[1224] UNSC Res. 1564 (18 September 2004), para. 12.

[1225] Report of the Darfur Commission, p. 5, para. 525.

## 4. Direct perpetrators

### (a) Popović's appeal

444. **Popović** submits that the Trial Chamber erred by finding that the killing of the prisoners by the BSF was carried out with the genocidal intent to destroy the Muslims of Eastern Bosnia.[1226] He further submits that he, being a medium ranking officer, was convicted of genocide on the basis of an "arbitrary finding" that all members of the BSF committed genocide.[1227] The Prosecution submits that **Popović**'s genocide conviction does not depend on the intent of the direct perpetrators and that, in any case, the Trial Chamber reasonably concluded that members of the BSF had genocidal intent.[1228]

445. The Appeals Chamber observes that the Trial Chamber did not find that *all* members of the BSF committed genocide. Instead, the Trial Chamber found that "genocide was committed *by members* of the Bosnian Serb Forces, including members of the VRS Main Staff [and] the VRS Security Branch, such as **Popović** and **Beara**, against the Muslims of Eastern Bosnia, as part of the Bosnian Muslims".[1229] The reference to **Popović** in this finding, by way of example, relates to the Trial Chamber's separate finding as to his personal responsibility under Count 1 (genocide) of the Indictment,[1230] wherein the Trial Chamber set out explicitly the basis on which it convicted **Popović** for the commission of genocide, with focus on his genocidal intent.[1231] **Popović** completely disregards these detailed findings in his effort to establish some relevance between his conviction for genocide and the impugned finding that genocide was committed by members of the BSF.[1232] The Appeals Chamber observes that the intent of the members of the BSF did not form part of the "decisive factors" on which the Trial Chamber based its finding that **Popović** had genocidal intent.[1233] As such, **Popović**'s arguments regarding the genocidal intent of the members of the BSF cannot change the outcome of the Trial Chamber's decision. Accordingly, the Appeals Chamber dismisses these arguments.

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1226 Popović's Appeal Brief, paras 17, 19-32; Popović's Reply Brief, paras 15-19, 21-29; Appeal Hearing, AT. 85-87 (2 Dec 2013).
1227 Popović's Appeal Brief, paras 22-23; Appeal Hearing, AT. 86 (2 Dec 2013).
1228 Prosecution's Response Brief (Popović), paras 8-9, 13-27; Appeal Hearing, AT. 147-153 (2 Dec 2013).
1229 Trial Judgement, para. 863 (emphasis added). See also Trial Judgement, paras 856, 864, 866, 2080.
1230 Trial Judgement, para. 863, referring to, *inter alia*, Trial Judgement, para. 1181.
1231 Trial Judgement, paras 1175-1181.
1232 Popović's Appeal Brief, para. 19 & fn. 33, referring to Trial Judgement, paras 856, 863-864, 866, 2080.
1233 Trial Judgement, para. 1180.

(b) Beara's appeal (Ground 17 in part)

446. **Beara** asserts that the Trial Chamber erred in law in finding that the killings at Cerska, Kravica, and the Jadar River implied that genocidal intent existed on 13 July 1995.[1234] Specifically, he argues that the Kravica Warehouse killings were incidental, that not all victims from the Cerska grave were killed on 13 July 1995, and that the Jadar River killings were committed by the police, which shows that it was unreasonable to conclude that these killings indicated co-ordination.[1235] **Beara** submits that the Trial Chamber failed to give a reasoned opinion as to why it included the victims of the Kravica, Cerska, and Jadar River killings in the genocide count.[1236] The Prosecution submits that **Beara** fails to show that the Trial Chamber erred and ignores the Trial Chamber's detailed consideration of the scale and scope of the murder operation.[1237]

447. The Appeals Chamber notes that, within its findings on the genocidal intent of the BSF, the Trial Chamber found that: "A staggering number of killings occurred on 13 July in particular, indicating co-ordination rather than coincidence. On 13 July alone, Bosnian Muslim prisoners were killed at Jadar River, at Cerska Valley, at the Kravica Warehouse, at Sandići Meadow, and at Luke School."[1238]

448. With regard to the Kravica Warehouse and Jadar River killings, **Beara** provides no citations to the trial record other than to the finding mentioned above, and as such his arguments are mere undeveloped assertions.[1239] **Beara** also merely asserts that the Trial Chamber failed to interpret the evidence in a particular manner. In addition, the Appeals Chamber dismisses below, in the context of the JCE to Murder, **Beara**'s argument that the Kravica Warehouse killings were incidental[1240] and that the Jadar River killings were not co-ordinated because they were committed by the police.[1241] Accordingly, the Appeals Chamber dismisses **Beara**'s arguments on the relevance of the Kravica Warehouse and Jadar River killings to the genocidal intent of the BSF.

449. Regarding the Cerska Valley killings, the Appeals Chamber recalls that, while **Beara** refers to evidence indicating that ten individuals may have been killed as late as 17 July 1995, "the vast majority of the victims – approximately 140 out of 150 – were killed on 13 July 1995".[1242] Accordingly, the Appeals Chamber finds that, regardless of whether the total number of Bosnian

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1234 Beara's Appeal Brief, intro before para. 199, para. 199; Beara's Reply Brief, paras 76-77.
1235 Beara's Appeal Brief, paras 199-201 (referring to Trial Judgement, para. 859); Beara's Reply Brief, para. 77.
1236 Beara's Reply Brief, para. 76.
1237 Prosecution's Response Brief (Beara), paras 202, 204. See also Prosecution's Response Brief (Beara), para. 199.
1238 Trial Judgement, para. 859.
1239 See Beara's Appeal Brief, ground of appeal 17, in particular paras 199-200; Beara's Reply Brief, paras 76-77.
1240 See *infra*, para. 1040.
1241 See *infra*, para. 1057.
1242 See *supra*, para. 301.

Muslim prisoners killed at Cerska Valley on 13 July 1995 is 140 or 150, **Beara** has failed to demonstrate that no reasonable trier of fact could have concluded that the staggering number of killings that occurred on that day in various locations indicated co-ordination rather than coincidence. **Beara**'s argument is therefore dismissed.

450. Finally, the Appeals Chamber notes that **Beara** has failed to provide any reference to the "challenges made in relation to Kravica, Cerska and Jadar river murders" on which the Trial Chamber allegedly failed to provide a reasoned opinion.[1243] In addition, the Appeals Chamber considers that the Trial Chamber clearly indicated that the relevance of these murders to the genocide count was that they were part of a large number of murders all committed on 13 July 1995.[1244] The Appeals Chamber concludes that **Beara** has failed to demonstrate that the Trial Chamber erred in failing to provide a reasoned opinion.

### 5. Genocidal intent of the BSF

#### (a) Nikolić's appeal (Sub-grounds 4.1, 4.2 and 4.3)

##### (i) Arguments of the Parties

451. **Nikolić** argues that the Trial Chamber erred in law and fact in finding that the acts of killing and infliction of serious bodily and mental harm against the Muslims of Eastern Bosnia were perpetrated with genocidal intent.[1245]

452. The first argument advanced by **Nikolić** is that the Trial Chamber's finding that the BSF possessed genocidal intent was based on an erroneous assessment of the scope of the killing operation and a failure to consider the absence of genocidal acts against the Bosnian Muslims of Žepa.[1246] **Nikolić** argues that the protected group comprised Bosnian Muslims not only from Srebrenica, as in the *Krstić* case, but also from Žepa.[1247] Thus, according to **Nikolić**, the scope of the genocidal enterprise has to be measured on that broader basis.[1248] He claims that the BSF took full control of the Žepa enclave and could have escalated the killing operation but chose not to.[1249] Given that no killing operation was mounted against the Bosnian Muslims of Žepa and that the

1243 See Beara's Reply Brief, para. 76.
1244 Trial Judgement, para. 859.
1245 Nikolić's Appeal Brief, para. 67; Nikolić's Reply Brief, para. 31.
1246 Nikolić's Appeal Brief, para. 68.
1247 Nikolić's Appeal Brief, paras 68-69; Nikolić's Reply Brief, para. 32.
1248 Nikolić's Appeal Brief, para. 69.
1249 Nikolić's Appeal Brief, para. 70; Nikolić's Reply Brief, para. 33.

Trial Chamber found that their forcible transfer did not constitute an underlying act of genocide, **Nikolić** argues that no genocidal acts were perpetrated against the Bosnian Muslims of Žepa.[1250]

453. The second argument advanced by **Nikolić** is that the Trial Chamber failed to take into account the decision to allow up to 10,000 Bosnian Muslims to pass through the defence lines of the Zvornik Brigade.[1251] This decision was made, **Nikolić** points out, even though the column could have been attacked.[1252] **Nikolić** argues that, had the BSF truly possessed genocidal intent, the passage of the column would not have been allowed despite the possibility of Serb casualties.[1253]

454. Last, **Nikolić** argues that the Trial Chamber failed to take into account the numerous exchanges of Bosnian Muslim males between 18 and 26 July 1995.[1254] He contends that these were conducted by different VRS command levels, a fact which, when taken together with the large number of men exchanged, indicates that the exchanges were not isolated incidents.[1255] **Nikolić** submits that had the intention of the BSF truly been to kill all Bosnian Muslim male prisoners, these men would have been executed.[1256]

455. **Nikolić** claims that each of the arguments presented above shows that the BSF had ample opportunity to escalate the scale of the killings but did not do so, demonstrating a lack of genocidal intent.[1257] **Nikolić** contends that no reasonable trial chamber could have found that the killing operation was perpetrated with genocidal intent. He argues that this error constituted a miscarriage of justice and invalidates the Trial Judgement, with the consequence that his conviction for aiding and abetting genocide must be quashed.[1258]

456. The Prosecution responds that **Nikolić** fails to show any error in the Trial Chamber's reasoning.[1259] The Prosecution argues that the Trial Chamber in fact found that the Bosnian Muslims of Žepa were targeted for genocide.[1260] The Prosecution further contends that the decision to open the corridor was one of desperation resulting from an inability to block or destroy the column following prior heavy fighting.[1261] Finally, the Prosecution argues that **Nikolić** ignores that

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1250 Nikolić's Appeal Brief, para. 70.
1251 Nikolić's Appeal Brief, paras 71-72.
1252 Nikolić's Appeal Brief, para. 72; Nikolić's Reply Brief, para. 33.
1253 Nikolić's Appeal Brief, paras 72-73.
1254 Nikolić's Appeal Brief, paras 70, 74-76.
1255 Nikolić's Appeal Brief, para. 76.
1256 Nikolić's Appeal Brief, para. 77; Nikolić's Reply Brief, para. 33.
1257 Nikolić's Appeal Brief, para. 86; Nikolić's Reply Brief, para. 33. **Nikolić** also suggests that concern for public opinion cannot explain this non-escalation, as executions in these circumstances could have been more easily concealed than the mass killings elsewhere. Nikolić's Appeal Brief, para. 86.
1258 Nikolić's Appeal Brief, para. 88.
1259 Prosecution's Response Brief (Nikolić), paras 57-58, 60, 66-67.
1260 Prosecution's Response Brief (Nikolić), paras 61-62.
1261 Prosecution's Response Brief (Nikolić), para. 64. See also Prosecution's Response Brief (Nikolić), para. 63.

the mass executions had been completed before the relevant prisoner exchanges, which were rather a means of facilitating the return of captured VRS soldiers.[1262]

(ii) Analysis

457. With regard to Nikolić's first argument, the Appeals Chamber notes that the Trial Chamber did not explicitly address the alleged difference between the definition of the targeted part of the protected group put forward by the Prosecution in this case and that which was articulated in the *Krstić* Appeal Judgement.[1263] The Appeals Chamber recalls that the trial chamber in the *Krstić* case, when describing the targeted part of the protected group, "used the term 'Bosnian Muslims of Srebrenica' as a short-hand for the Muslims of both Srebrenica *and the surrounding areas*".[1264] In the present case, the Trial Chamber referred to the Prosecution's explanation that the targeted part of the protected group was "defined as the Muslims of Srebrenica and Žepa, and should include Goražde, but primarily Srebrenica and Žepa".[1265]

458. Moreover, when assessing the serious bodily or mental harm to members of the group caused by the killing operation, the Trial Chamber clarified that it was "not considering the forcible transfer in Srebrenica *or Žepa*".[1266] The Trial Chamber subsequently devoted substantial discussion to whether genocide was committed by virtue of the forcible transfer of the women and children from Srebrenica and Žepa under Articles 4(2)(c) and 4(2)(d) of the Statute.[1267] Thus, the Bosnian Muslims of Žepa feature at every stage of the Trial Chamber's consideration of genocide. In light of the above, the Appeals Chamber can only conclude that the Trial Chamber included the Bosnian Muslims of Žepa within the targeted part of the protected group, *i.e.* the Bosnian Muslims of Eastern Bosnia. As such, **Nikolić**'s submission that no genocidal acts were committed against the Bosnian Muslims of Žepa is contradicted by the Trial Judgement when the Trial Chamber outlines the various harms suffered by the Muslims of Eastern Bosnia. In its consideration of whether serious bodily or mental harm was caused to members of the group, for instance, the Trial Chamber found that "the killing operation inflicted serious bodily and mental harm on the Muslims of Eastern Bosnia".[1268] This harm was not limited to those who were directly subjected to it, but also included the suffering of the family members and loved ones of those killed.[1269] Contrary to **Nikolić**'s argument, the Muslims of Eastern Bosnia including the inhabitants of Žepa were found to be victims of the genocidal enterprise. **Nikolić**'s argument, based on a flawed premise, is dismissed.

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1262 Prosecution's Response Brief (Nikolić), para. 65. See also Prosecution's Response Brief (Nikolić), para. 63.
1263 Trial Judgement, para. 839.
1264 *Krstić* Appeal Judgement, fn. 24 (emphasis added).
1265 Trial Judgement, fn. 2978, citing Prosecution Closing Arguments, T. 34276 (4 Sept 2009).
1266 Trial Judgement, fn. 2984 (emphasis added).
1267 Trial Judgement, paras 848-855.
1268 Trial Judgement, para. 844.
1269 Trial Judgement, para. 846.

459. With regard to **Nikolić**'s second argument, the Appeals Chamber considers that the Trial Chamber was cognisant of the passage of the column in its analysis of whether the BSF had genocidal intent.[1270] The Trial Chamber found that the decision by **Pandurević** to allow the passage of the column was made contrary to Krstić's orders.[1271] Further, in its discussion of mitigating circumstances in the assessment of **Pandurević**'s sentence, the Trial Chamber noted that, "[a]t a time in which other VRS members were actively hunting down, capturing, and executing Bosnian Muslim men without mercy and pursuing a genocidal plan, **Pandurević**'s decision to open the corridor and enable the safe passage of thousands of Bosnian Muslim men is striking."[1272] On this basis, the Appeals Chamber considers that **Nikolić** has failed to demonstrate that the Trial Chamber erred in considering the opening of a corridor to be a unique departure from the genocidal plan promulgated by the VRS commanders rather than a factor showing absence of genocidal intent on behalf of the BSF more generally. Thus, **Nikolić**'s contention that if the BSF had possessed genocidal intent, they would not have allowed the passage of the column despite the prospect of sustaining casualties, is misplaced since the passage of the column was not according to plan. The Appeals Chamber recalls in this regard that "[t]he intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him".[1273] As such, the Appeals Chamber can discern no error in the reasoning of the Trial Chamber on genocidal intent in relation to the opening of the corridor. **Nikolić**'s argument is therefore rejected.

460. With regard to **Nikolić**'s final argument, the Appeals Chamber is not convinced that the Trial Chamber disregarded prisoner exchanges in its analysis of whether the BSF had genocidal intent.[1274] **Nikolić** relies on prisoner exchanges and prisoner transfers to other detention facilities that took place after 17 July 1995, at which stage the killing operation had largely been concluded.[1275] Furthermore, the Appeals Chamber notes that, based on the findings of the Trial Chamber to which the Parties refer, the number of prisoners transferred and exchanged is but a small fraction of the several thousands of prisoners who were executed.[1276] Consequently, the Appeals Chamber cannot discern any error in the Trial Chamber's reasoning on the exchanges and transfers of prisoners. **Nikolić**'s argument is therefore rejected.

461. The Appeals Chamber therefore dismisses **Nikolić**'s sub-grounds of appeal 4.1, 4.2, and 4.3.

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1270 See Trial Judgement, paras 551-561, 838 ("Although the Trial Chamber has considered all of the relevant evidence in its totality in order to determine whether genocide was committed, it will only repeat the most pertinent part of this analysis below.").
1271 Trial Judgement, para. 557. See also Trial Judgement, para. 553.
1272 Trial Judgement, para. 2219.
1273 *Krstić* Appeal Judgement, para. 13.
1274 See Trial Judgement, paras 590-596, 838. See *supra*, note 1270.

(b) Nikolić's appeal (Ground 5)

462. **Nikolić** argues that the Trial Chamber committed an error of law and fact by ignoring significant recent precedents, which, in his view, establish that killing a group of men while forcibly removing the remainder of a population does not evince genocidal intent.[1277] **Nikolić** claims that the relevant facts in the Report of the Darfur Commission and in a set of ICC decisions on the Darfur situation are similar to the situation in Srebrenica and Žepa.[1278] **Nikolić** submits that the Trial Chamber's erroneous legal classification of the crimes committed in Srebrenica as genocidal invalidated its decision and occasioned a miscarriage of justice and that, therefore, his conviction for aiding and abetting genocide should be quashed.[1279] Moreover, he contends that the Appeals Chamber must adhere to the aforementioned precedents in order to avoid fragmentation of international law.[1280]

463. The Prosecution responds that the Trial Chamber correctly applied the case law of the Tribunal and that **Nikolić** fails to show that the sources on which he relies are persuasive or binding on this Tribunal.[1281] The Prosecution also submits that findings made by other institutions on a different set of facts do not demonstrate that the Trial Chamber's findings were wrong in law or unreasonable.[1282]

464. The Appeals Chamber rejects **Nikolić**'s argument as neither the Report of the Darfur Commission nor the ICC jurisprudence cited by **Nikolić** is binding on this Tribunal.[1283] There was no obligation on the Trial Chamber to explicitly consider these authorities, which are at best persuasive. The Trial Chamber concluded, on the facts of this case, that the killing operation was conducted with genocidal intent.[1284] While there may be a superficial similarity between the facts outlined in the Darfur precedents relied on by **Nikolić** and those of this case, this alone cannot suffice to show an error in the Trial Chamber's reasoning. **Nikolić** has therefore failed to

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1275 Nikolić's Appeal Brief, paras 70, 75-76, referring to Trial Judgement, paras 591-594, 720 (findings on transfers and exchanges of prisoners), 1064 ("In the days that followed, primarily between 14 and 17 July, several thousand Bosnian Muslim men were executed.").

1276 See Trial Judgement, para. 794.

1277 Nikolić's Appeal Brief, paras 89-91, 93-96, 98, referring to Report of the Darfur Commission, *Prosecutor v. Omar Hassan Ahmad al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad al Bashir, 4 March 2009 (public redacted version), *Prosecutor v. Omar Hassan Ahmad al Bashir*, Case No. ICC-02/05-01/09 OA, Judgement on the Appeal of the Prosecutor Against the "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad al Bashir", 3 February 2010, *Prosecutor v. Omar Hassan Ahmad al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, 12 July 2010. See also Nikolić's Reply Brief, para. 36.

1278 Nikolić's Appeal Brief, paras 92, 97-98.

1279 Nikolić's Appeal Brief, paras 89, 99.

1280 Nikolić's Appeal Brief, para. 98.

1281 Prosecution's Response Brief (Nikolić), para. 78. See also Prosecution's Response Brief (Nikolić), para. 82.

1282 Prosecution's Response Brief (Nikolić), para. 78. See also Prosecution's Response Brief (Nikolić), paras 79-81.

1283 *Cf. Đorđević* Appeal Judgement, para. 83, referring to *Čelebići* Appeal Judgement, para. 24.

demonstrate any error on the part of the Trial Chamber. Furthermore, the Appeals Chamber recalls that its task is not to act as a harmonising force in international law, but rather to decide the matters before it in accordance with applicable law.[1285] **Nikolić**'s ground of appeal 5 is dismissed.

### 6. Appellants' liability for genocide

#### (a) Popović's appeal

##### (i) Arguments of the Parties

465. **Popović** submits that the Trial Chamber erred in concluding that he possessed genocidal intent and committed genocide through his participation in the JCE to Murder.[1286] He contends that it erroneously inferred his genocidal intent from a series of other findings.[1287] **Popović** additionally submits that the Trial Chamber erred by finding that he ordered and planned the commission of genocide.[1288] **Popović** argues that the Trial Chamber disregarded evidence which indicated that he did not possess genocidal intent, and specifically that he supported **Pandurević**'s decision to open the corridor to allow the column to pass through safely.[1289] **Popović** also argues that the Trial Chamber erroneously found his use of the term "balija", which it analysed out of context, to be relevant to his genocidal intent.[1290] **Popović** denies that he had a conversation with **Nikolić** in which he used the term and asserts with regard to one document containing the term that he merely forwarded what someone else had written. **Popović** argues that when he did use the term "balija", he was referring to criminals not to all Muslims.[1291] Finally, **Popović** argues that, contrary to what the Trial Chamber found, he did not direct the killing of the young boy because he was not present at the execution and had no authority regarding the treatment of the prisoners.[1292]

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1284 Trial Judgement, para. 861.
1285 See *supra*, para. 441.
1286 Popović's Appeal Brief, para. 17; Popović's Reply Brief, para. 17.
1287 According to **Popović**, the Trial Chamber found that he: (1) knew of the murder plan from its inception; (2) knew of its scope; (3) participated in the discussions at Bratunac before the operation began; (4) had an overview of the scale of the murder operation; (5) knew of the captured men from the column; (6) directly participated in the organisation of large-scale murders at the Grbavci School, the Ročević School, and Pilica; (7) visited almost all killing sites in the Zvornik area; (8) used the derogatory term "balija"; (9) stated that "all balijas have to be killed"; (10) knew of the intent to kill as many Bosnian Muslims as possible with the aim of destroying the group; (11) arranged the murder of the Milići Prisoners; and (12) aimed to spare no one amongst the Bosnian Muslims within his reach, not even a young boy. Popović's Appeal Brief, para. 33; Popović's Reply Brief, paras 16, 20. See also Popović's Appeal Brief, title above para. 404, para. 405.
1288 Popović's Appeal Brief, para. 17.
1289 Popović's Appeal Brief, para. 349.
1290 Popović's Appeal Brief, para. 402.
1291 Popović's Appeal Brief, para. 403.
1292 Popović's Appeal Brief, paras 404-411.

466. The Prosecution responds that **Popović** fails to demonstrate that the Trial Chamber's inference of his genocidal intent was erroneous.[1293] The Prosecution asserts that **Popović** merely repeats arguments made at trial regarding his lack of authority over the prisoners and his security responsibilities having prevented him from participating in the murder operation.[1294] Finally, the Prosecution contends that **Popović**'s use of the term "balija" was not a decisive factor in the Trial Chamber's determination of his genocidal intent.[1295]

(ii) Analysis

467. The Appeals Chamber first observes that **Popović** has failed to advance any argument to develop his submission that the Trial Chamber erred when it found that he ordered and planned the commission of genocide.[1296] Consequently, the Appeals Chamber dismisses this submission.

468. With respect to **Popović**'s arguments concerning the Trial Chamber's inference of his genocidal intent, the Appeals Chamber recalls that in the absence of direct evidence, genocidal intent may be inferred from the factual circumstances of the crime.[1297] The Appeals Chamber further recalls that:

> proof of specific intent [may] be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.[1298]

The Appeals Chamber observes that the Trial Chamber inferred **Popović**'s genocidal intent from such factors.[1299] The Appeals Chamber considers that no error of law has been demonstrated.

469. Concerning **Popović**'s argument regarding his support for opening the corridor, the Appeals Chamber notes the Trial Chamber's finding that **Popović** was referring to **Pandurević**'s Interim Combat Report of 16 July 1995 when stating that "[i]t's just like he wrote it ... I was there on the spot and saw for myself he had received some numbers".[1300] As found by the Trial Chamber, this report contains information on combat operations in the Zvornik area as well as **Pandurević**'s decision to open a corridor so that the civilian population could be evacuated.[1301] The Appeals

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1293 Prosecution's Response Brief (Popović), paras 8, 10-12, 19, 27, 72; Appeal Hearing, AT. 146-147 (2 Dec 2013).
1294 Prosecution's Response Brief (Popović), paras 164, 234-236.
1295 Prosecution's Response Brief (Popović), para. 12.
1296 See Popović's Appeal Brief, para. 17.
1297 *Krstić* Appeal Judgement, paras 20, 33-35; *Jelisić* Appeal Judgement, para. 47. See *Munyakazi* Appeal Judgement, para. 142 and references cited therein.
1298 *Jelisić* Appeal Judgement, para. 47.
1299 Trial Judgement, para. 1180, referring to *Jelisić* Appeal Judgement, para. 47.
1300 Trial Judgement, para. 1136. See Trial Judgement, paras 1137-1138.
1301 Trial Judgement, paras 1137-1138; Ex. 7DP00330, "Zvornik Brigade Interim Combat report, signed by Pandurević, 16 July 1995".

Chamber finds that **Popović** has failed to demonstrate that the Trial Chamber erred in finding that his words reflect his agreement with how **Pandurević** described the combat operations rather than his support for **Pandurević**'s decision to open the corridor. In any event, the Trial Chamber weighed the evidence and relied on **Popović**'s cumulative actions and words to show his genocidal intent.[1302] Thus, this argument is dismissed.

470. Regarding **Popović**'s use of the term "balija", the Trial Chamber found that it was "in no way determinative of his alleged specific intent to commit genocide, though it is relevant to it".[1303] The Appeals Chamber observes that his use of the term "balija" did not form part of the "decisive factors" in the Trial Chamber's finding that **Popović** had genocidal intent.[1304] The Appeals Chamber finds that **Popović** challenges the Trial Chamber's reliance on certain evidence, without explaining why the conviction should not stand on the basis of the remaining evidence and, therefore, dismisses his argument.

471. The Trial Chamber found that "**Popović** aimed to spare no one amongst the Bosnian Muslims within his reach, not even a young boy".[1305] This impugned finding was based on other findings regarding, notably, **Popović**'s involvement in co-ordinating the Orahovac killings on 14 July 1995 and the Kozluk Killings on 15 July 1995.[1306] Specifically, the Trial Chamber found that when a young boy emerged from a pile of corpses at the Orahovac execution site, calling for his father, **Popović** asked the executioners what they were waiting for and said "[j]ust finish him off".[1307] In this regard, the Appeals Chamber notes that it dismisses below **Popović**'s challenges to the Trial Chamber's findings that he was present at this execution site.[1308] The Trial Chamber further found that once someone had volunteered to participate in the executions that were to take place at Kozluk, **Popović** told the volunteer to go out and find other volunteers.[1309] The Appeals Chamber considers that **Popović** has failed to demonstrate that no reasonable trial chamber could have made the impugned finding based on its previous findings on **Popović**'s involvement in the Orahovac killings and Kozluk Killings. The Appeals Chamber further observes that the Trial Chamber did not rely on **Popović**'s authority regarding the prisoners to find his genocidal intent and instead relied on his actions and statements.[1310] Whether he had any specific authority over the prisoners is therefore irrelevant to the impugned finding and, by extension, to the Trial Chamber's

1302 Trial Judgement, paras 1178-1180.
1303 Trial Judgement, para. 1177.
1304 See Trial Judgement, para. 1180.
1305 Trial Judgement, para. 1179, referring to Trial Judgement, paras 1111-1122.
1306 Trial Judgement, paras 1111-1122.
1307 Trial Judgement, para. 1111.
1308 See *infra*, para. 1108.
1309 Trial Judgement, para. 1120.
1310 Trial Judgement, paras 1178-1180.

findings on his genocidal intent. The Appeals Chamber therefore dismisses **Popović**'s challenge to the impugned finding.

472. Finally, the Appeals Chamber has upheld all of the other findings on which **Popović** alleges the Trial Chamber based his conviction for commission of genocide.[1311] The Appeals Chamber therefore dismisses **Popović**'s arguments.

(b) Beara's appeal

(i) Grounds 6 in part, 8 in part, and 19

a. Arguments of the Parties

473. **Beara** argues, under his ground of appeal 19, that the Trial Chamber erred in law and abused its discretion in finding that he possessed both the intent to kill members of the group and the specific intent to destroy the group or part thereof, which resulted in a miscarriage of justice.[1312] The Trial Chamber, he submits, failed to consider the totality of the evidence, including reliable evidence that supports an alternative, non-criminal intent and that his actions were lawful combat-related activities.[1313] **Beara** argues that the Trial Chamber thereby failed to respect the legal requirement that a finding of *mens rea* inferred from circumstantial evidence must be the only reasonable conclusion available.[1314]

474. Specifically, **Beara** submits that the Trial Chamber reached the conclusion that he had knowledge of the killing operation solely as a result of his position as the most senior officer of the Security Branch of the VRS, despite the contradiction between its finding that the plan to murder had been formulated by the morning of 12 July 1995 and was under the co-ordination of the Security Branch and its finding that there was no "direct evidence" of his involvement prior to 13 July 1995.[1315] He also submits that in finding that he participated in meetings in the night of 13 July 1995 at which decisions were made about the killing operation, the Trial Chamber relied on contested and inconsistent testimony that could not support a finding beyond reasonable doubt.[1316] He further contends that the Trial Chamber disregarded exculpatory intercept evidence, in particular

1311 See *infra*, paras 813-815, 819, 822, 831, 845, 847, 874, 904, 910, 1077-1078, 1103-1104, 1107-1108, 1143, 1153-1154, 1196-1197.
1312 Beara's Appeal Brief, intro before para. 209, paras 209-210, 213, 225; Beara's Reply Brief, para. 85.
1313 Beara's Appeal Brief, paras 209, 224.
1314 Beara's Appeal Brief, paras 211-212, 214-215, 220, 225; Beara's Reply Brief, para. 85.
1315 Beara's Appeal Brief, paras 214, 216.
1316 Beara's Appeal Brief, para. 217; Appeal Hearing, AT. 200-201, 210 (3 Dec 2013).

a communication on 13 July 1995 at 11:25 a.m. ("11:25 a.m. Intercept"), and interpreted it in a way that defies logic, leading to erroneous inferences about his intent.[1317]

475. Under his ground of appeal 6, **Beara** contends that the Trial Chamber erred in law when drawing inferences from intercept Exhibits P01177 and P01179.[1318] In particular, **Beara** submits that the Trial Chamber failed to acknowledge the reasonable inference from Exhibit P01179, in light of Exhibit P02754, that **Beara**'s request to Krstić for additional men did not concern the killing operation but rather reflected a request for assistance in the form of an infantry company.[1319] **Beara** advances the argument that because the Trial Chamber used Exhibit P01179 to support its conclusion on his role in the killing operation and his genocidal state of mind, its error invalidated the Trial Judgement.[1320]

476. Under his ground of appeal 8, **Beara** argues that the Trial Chamber concluded that he was involved in securing equipment for murders partially based on evidence indicating that he requested the dispatch of a flat-bed trailer, whereas a reasonable alternative inference could have been made that it was intended for burying combat casualties.[1321]

477. Finally, **Beara** argues, under his ground of appeal 19, that the Trial Chamber failed to take into account the dual purpose of the military acts surrounding the Srebrenica enclave, which included legitimate military aims, instead seemingly following previous decisions of the Tribunal in the *Krstić* and *Blagojević and Jokić* cases.[1322] He alleges that, if the Trial Chamber had attributed appropriate weight to the dual purpose, it would have reached the same conclusion as the Trial Chamber in the *Brđanin* case, where a similar fact pattern led to a conclusion that did not support genocidal intent as the only reasonable inference.[1323]

478. The Prosecution responds with regard to **Beara**'s ground of appeal 19 that the Trial Chamber properly relied on abundant evidence to find that **Beara** had genocidal intent.[1324] Further, the Prosecution contends that the dual purpose of the BSF's actions does not, as a matter of law or fact, preclude a finding of genocidal intent.[1325] Finally, the Prosecution submits that **Beara**'s arguments under his grounds of appeal 6 and 8 warrant summary dismissal.[1326]

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1317 Beara's Appeal Brief; paras 218-219.
1318 Beara's Appeal Brief, intro before para. 59, paras 99-100. See also Beara's Reply Brief, para. 44.
1319 Beara's Appeal Brief, paras 99-101.
1320 Beara's Appeal Brief, intro before para. 59, para. 101.
1321 Beara's Appeal Brief, para. 136, referring to Trial Judgement, para. 1261.
1322 Beara's Appeal Brief, paras 221-223.
1323 Beara's Appeal Brief, para. 223.
1324 Prosecution's Response Brief (Beara), paras 219-228, 231-232; Appeal Hearing, AT. 222 (3 Dec 2013).
1325 Prosecution's Response Brief (Beara), paras 229-231; Appeal Hearing, AT. 227, 234-235 (3 Dec 2013).
1326 Prosecution's Response Brief (Beara), paras 102, 132. See also Prosecution's Response Brief (Beara), fn. 426.

b. Analysis

479. The Appeals Chamber first notes that while **Beara** disputes both the Trial Chamber's findings on the underlying act of killing members of the group and its findings on specific intent, it will limit its present analysis to the latter topic, as the former is more properly considered under the rubric of the JCE to Murder, examined below.

480. The Appeals Chamber also notes that the Trial Chamber did not "solely" rely on **Beara**'s position in concluding that he had knowledge of the killing operation. The Trial Chamber also referred to "his walk through Bratunac on the night of 13 July, his personal visits to the various execution [sites] and the extensive logistical challenges he faced throughout" to support the finding that he had detailed knowledge of the killing operation.[1327] Moreover, there is no contradiction between the Trial Chamber's finding that the plan to murder had been formulated by the morning of 12 July 1995 and was under the co-ordination of the Security Branch and the Trial Chamber's statement that there was no direct evidence of **Beara**'s participation in the murder operation prior to 13 July 1995.[1328] The Trial Chamber found as follows:

> there is clear evidence before the Trial Chamber that as of the morning of 12 July, **Popović**, **Beara**'s subordinate in the Security Branch, was aware of the plan to murder as were Momir Nikolić and Kosorić. In addition, the Trial Chamber has found that the orders with respect to this operation were given by Mladić. In these circumstances, and given his responsibilities as Chief of Security for the VRS Main Staff, the subordinate relationship of **Popović** to him and the role played by members of the Security Branch from the beginning, the Trial Chamber is satisfied that by the morning of 12 July, **Beara** was aware of and implicated in the plan to murder.[1329]

For the purposes of the present argument, **Beara** simply ignores this finding and has thus failed to demonstrate the alleged contradiction. His argument is therefore dismissed.

481. With regard to **Beara**'s claim that the Trial Chamber erroneously relied on contested and inconsistent testimony to support the finding that he participated in meetings in the night of 13 July 1995, the Appeals Chamber notes that the Trial Chamber explicitly acknowledged that while the evidence "is not consistent in every aspect and there are some discrepancies as to what was discussed and who participated in the meetings, the subject-matter remains essentially the same, as does the fact that **Beara** was present and actively involved in these discussions".[1330] The Appeals Chamber recalls that it is within the discretion of the Trial Chamber to evaluate any inconsistencies that may arise within or among witnesses' testimonies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features

1327 Trial Judgement, para. 1313.
1328 See Trial Judgement, para. 1299.
1329 Trial Judgement, para. 1299 (internal references omitted).
1330 Trial Judgement, fn. 4167.

of that evidence.[1331] **Beara** has failed to articulate with any degree of specificity the alleged error made by the Trial Chamber in accepting the contested evidence and, therefore, has failed to show that the evidence in question could not support the Trial Chamber's finding on his involvement in the meetings in the night of 13 July 1995.[1332] Thus, the Appeals Chamber dismisses his argument.

482. With regard to the 11:25 a.m. Intercept,[1333] the Appeals Chamber first observes that the Trial Chamber provided detailed reasons for finding that it was "deliberately misleading".[1334] **Beara**'s contention that the Trial Chamber's interpretation defies logic is an undeveloped assertion. **Beara** simply provides an alternative interpretation of the evidence, which cannot suffice to demonstrate that no reasonable trier of fact could have reached the Trial Chamber's conclusion. Accordingly, his arguments on this point are dismissed.

483. With regard to **Beara**'s arguments concerning the Trial Chamber's findings pertaining to intercept Exhibits P01177 and P01179, the Appeals Chamber recalls the Trial Chamber's conclusion that the only inference it could draw from Exhibit P01179 was "that **Beara** was organising troops to assist in relation to the killing operation" in the areas of the Ročević and Kula Schools and the Pilica Cultural Centre.[1335] **Beara** has failed to demonstrate that the Trial Chamber could have reached a different reasonable conclusion, providing only an alternative interpretation of the evidence without developing his arguments as to why the Trial Chamber should have adopted that particular interpretation. With respect to Exhibit P01177, the Appeals Chamber observes that, contrary to his contention,[1336] **Beara** does not provide any alternative inferences that the Trial Chamber could have reasonably drawn from this exhibit. **Beara**'s arguments concerning these intercepted communications are therefore dismissed.

484. **Beara**'s assertion regarding his request for a flat-bed trailer is not supported by any references to the trial record, beyond merely identifying the impugned finding of the Trial Chamber. It is therefore dismissed.

485. **Beara**'s submissions on the "dual purpose" of the military attack against the enclaves suggest that while some of the actions of the BSF were lawful combat-related activities, others were not. The Appeals Chamber considers that **Beara** has failed to demonstrate that the Trial Chamber erred in not considering the killing of several thousand detained Bosnian Muslim males to be lawful

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1331 *Đorđević* Appeal Judgement, paras 395, 422; *Hategekimana* Appeal Judgement, paras 82, 282; *Kanyarukiga* Appeal Judgement, para. 136; *Munyakazi* Appeal Judgement, para. 71.
1332 See Trial Judgement, para. 1271.
1333 See also *infra*, para. 979.
1334 Trial Judgement, para. 1259. See Trial Judgement, para. 1258.
1335 Trial Judgement, para. 1282.
1336 Beara's Reply Brief, para. 44.

combat-related activities[1337] and the Appeals Chamber finds that the same logic applies to the Trial Chamber's findings on the knowledge, words, and actions of **Beara** that underpin the finding on his genocidal intent.[1338] **Beara**'s suggestion that the Trial Chamber merely followed previous decisions in the *Krstić* and *Blagojević and Jokić* cases is dismissed as undeveloped. The Appeals Chamber finds that **Beara** has not shown any error in the Trial Chamber's reasoning. The conclusions reached in the *Brđanin* case by a different trial chamber are of no relevance in this regard.

486. In light of the foregoing, the Appeals Chamber concludes that **Beara** has failed to show that the Trial Chamber erred in finding that his genocidal intent had been proven beyond reasonable doubt. **Beara**'s ground of appeal 19 is therefore dismissed in its entirety, as are the relevant portions of his grounds of appeal 6 and 8.

(ii) Argument raised in the Appeal Hearing

a. Arguments of the Parties

487. **Beara** submits that the Trial Chamber erred in law by convicting him of genocide after acquitting him of the forcible transfer charge. He argues that the case law of the Tribunal, as applied to the present circumstances, shows that genocidal intent to destroy the Bosnian Muslims of Eastern Bosnia can only be inferred from a combined intent to murder the men and forcibly transfer the women, children, and the elderly.[1339] **Beara** further submits that the Trial Chamber itself recognised that it was a combination of the killings and the forcible transfer that resulted in the finding that he had genocidal intent.[1340] **Beara** also submits that the Indictment reflects the Prosecution's position that his genocide conviction would have "required genocidal intent with respect to both the execution of the men and the forcible transfer of the women and children".[1341] Finally, **Beara** argues that because he was acquitted on the forcible transfer charge, the only genocidal conduct for which he could be held accountable is the murder of an estimated 5,300 men.[1342] **Beara** claims this number neither meets the substantiality requirement for genocide nor constitutes a legally significant part of the targeted group, considering that these men were only part of the approximately 40,000 Bosnian Muslims of Eastern Bosnia targeted for destruction, who in turn only constituted part of the relevant group of approximately 1,400,000 Bosnian Muslims.[1343] **Beara**

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1337 See, *e.g.*, Trial Judgement, paras 774, 856, 860.
1338 See Trial Judgement, paras 1313-1318.
1339 Appeal Hearing, AT. 172, 179, 184-186 (3 Dec 2013). See Appeal Hearing, AT. 173-178 (3 Dec 2013), referring to *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen. See also Appeal Hearing, AT. 180-183, 256-262 (3 Dec 2013).
1340 Appeal Hearing, AT. 182-183 (3 Dec 2013), referring to Trial Judgement, paras 861-863.
1341 Appeal Hearing, AT. 181 (3 Dec 2013). See Appeal Hearing, AT. 179-180 (3 Dec 2013).
1342 Appeal Hearing, AT. 182 (3 Dec 2013).
1343 Appeal Hearing, AT. 181-182 (3 Dec 2013). See Appeal Hearing, AT. 185, 258 (3 Dec 2013).

concludes that he must be acquitted of genocide since he did not have the genocidal intent to destroy the Bosnian Muslims of Eastern Bosnia as a part of the protected group.[1344]

488. The Prosecution responds that **Beara**'s arguments should be rejected as they are not contained in his appeal brief.[1345] On the merits, the Prosecution submits that the Trial Chamber's approach to inferring genocidal intent, based primarily on the killings and secondarily on the forcible transfer, is consistent with the case law of the Tribunal.[1346] The Prosecution further submits that, in any event, the Trial Chamber found that **Beara** knew of the forcible transfer operation.[1347] Finally, the Prosecution submits that **Beara**'s genocide conviction was also based on causing serious bodily and mental harm to surviving men and family members.[1348]

b. Analysis

489. Although **Beara** submits that this argument is part of his ground of appeal 19,[1349] the Appeals Chamber fails to see its origin in Beara's Appeal Brief. The only common element between his oral argument and the written arguments contained in his ground of appeal 19 is that **Beara**'s *mens rea* for genocide is at issue. The Appeals Chamber recalls that it may decline to consider new arguments raised during an appeal hearing that were not contained in the written brief and presented without specific authorisation from the Appeals Chamber.[1350] In these circumstances, the Appeals Chamber would normally decline to consider **Beara**'s argument.[1351] The Appeals Chamber notes, however, that **Beara** was allowed to proceed with his argument during the appeal hearing[1352] and that the Prosecution had the opportunity to respond to this argument.[1353] The Appeals Chamber will therefore consider the argument on its merits.[1354]

490. **Beara**'s interpretation of the case law of the Tribunal is contradicted, notably, by the finding in the *Krstić* Appeal Judgement that "[t]he killing of the military aged men was, assuredly, a physical destruction, and given the scope of the killings the Trial Chamber could legitimately draw the inference that their extermination was motivated by a genocidal intent."[1355] Accordingly, the Appeals Chamber considers that the Trial Chamber was not required to find that **Beara** intended

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1344 Appeal Hearing, AT. 172, 186 (3 Dec 2013).
1345 Appeal Hearing, AT. 215-216 (3 Dec 2013). See Appeal Hearing, AT. 234 (3 Dec 2013)
1346 Appeal Hearing, AT. 231-233, 263-264 (3 Dec 2013), referring to *Krstić* Appeal Judgement.
1347 Appeal Hearing, AT. 233 (3 Dec 2013), referring to Trial Judgement, para. 1307.
1348 Appeal Hearing, AT. 233-234 (3 Dec 2013), referring to Trial Judgement, paras 842-847, 1310.
1349 Appeal Hearing, AT. 175-176 (3 Dec 2013).
1350 *Gotovina and Markač* Appeal Judgement, para. 18; *Haradinaj et al.* Appeal Judgement, para. 19 and reference cited therein.
1351 See *Gotovina and Markač* Appeal Judgement, para. 19.
1352 Appeal Hearing, AT. 175-176 (3 Dec 2013).
1353 See Appeal Hearing, AT. 215-217, 231-234, 263-264 (3 Dec 2013). See also *supra*, para. 488.
1354 *Cf. Gotovina and Markač* Appeal Judgement, para. 19.
1355 *Krstić* Appeal Judgement, para. 27.

both the murders and the forcible transfers before it could determine that he had genocidal intent. Rather, the Trial Chamber was required to determine whether there was sufficient evidence to find beyond reasonable doubt that **Beara** had genocidal intent.[1356] It did so, based in particular on the following "decisive" factors: (1) the scale and scope of the killing operation carried out with **Beara**'s knowledge, pursuant to his instructions and under his supervision; (2) his extensive and forceful participation in all components of the killing operation; (3) his demonstrated determination to kill as many Bosnian Muslims as possible; and (4) his vital contribution in overcoming hurdles and challenges to effective implementation.[1357] The Trial Chamber also considered **Beara**'s "destructive and discriminatory acts and his words" as evidence of his genocidal intent.[1358] **Beara** has not shown any error in the Trial Chamber's approach.

491. **Beara** alleges that the Trial Chamber recognised that it was a combination of the killings and the forcible transfer that resulted in the finding that he had genocidal intent. The Trial Chamber concluded "beyond all reasonable doubt" that members of the BSF perpetrated the underlying acts of killing and inflicting serious bodily and mental harm with genocidal intent,[1359] and subsequently drew "*further support*" for this conclusion from the "other culpable acts systematically directed against the same group", notably the forcible transfer operation and its accompanying circumstances.[1360] The Appeals Chamber is satisfied that the Trial Chamber did not require participation in the forcible transfer operation to reach a finding of genocidal intent but rather considered it as providing "*further* evidence that the intent was to destroy".[1361] **Beara**'s argument is therefore dismissed.

492. **Beara** bases his interpretation of the Indictment on two charges against him.[1362] The first charge is that **Beara**, while harbouring genocidal intent: (1) killed Bosnian Muslims; and (2) inflicted upon them serious bodily or mental harm, "including but not limited to [...] the forced movement of the population".[1363] The second charge is that **Beara** *knew* that the forcible transfer of the women and children from Srebrenica and Žepa created conditions that would contribute to the destruction of the entire Muslim population of Eastern Bosnia.[1364] These charges do not indicate that **Beara**'s genocide conviction would have "required genocidal intent with respect to both the execution of the men and the forcible transfer of the women and children".[1365] Rather, the

1356 *Cf. Blagojević and Jokić* Appeal Judgement, para. 226; *Jelisić* Appeal Judgement, para. 45.
1357 Trial Judgement, paras 1317-1318. See Trial Judgement, paras 1310-1316.
1358 Trial Judgement, para. 1318.
1359 Trial Judgement, para. 861. See Trial Judgement, para. 863.
1360 Trial Judgement, para. 862 (emphasis added).
1361 Trial Judgement, para. 862 (emphasis added).
1362 Appeal Hearing, AT. 180-181 (3 Dec 2013), referring to Indictment, paras 26, 33.
1363 Indictment, para. 26.
1364 Indictment, para. 33.
1365 See *supra*, para. 487.

Prosecution charged **Beara**, first, with carrying out acts of killing and serious bodily or mental harm with genocidal intent and, second, with knowing that the forcible transfer created conditions that would contribute to the genocide. The Appeals Chamber notes in this regard that the Trial Chamber found that **Beara** knew of the existence of the forcible transfer operation.[1366] The Appeals Chamber therefore dismisses **Beara**'s argument, which is premised on his misconstrued interpretation of the Indictment.

493. **Beara**'s argument that the thousands of murdered men were not a substantial or legally significant part of the targeted group reflects a purely numerical approach, which disregards other factors relevant to determining whether the targeted part of the group is substantial enough to meet the requirement.[1367] The Appeals Chamber recalls in this regard that:

> The intent requirement of genocide under Article 4 of the Statute is [...] satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group. The determination of when the targeted part is substantial enough to meet this requirement may involve a number of considerations. The numeric size of the targeted part of the group is the necessary and important starting point, though not in all cases the ending point of the inquiry. The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4.[1368]

In addition, the Appeals Chamber recalls the Trial Chamber's findings that **Beara** participated in the killings "with knowledge that they would contribute to the destruction of the group",[1369] and that the Muslims of Eastern Bosnia constituted a substantial part of the entire group of Bosnian Muslims, noting that "the import of the community is not appreciated solely by its size".[1370] Considering, finally, that **Beara**'s numerical argument is premised on his argument regarding his acquittal for forcible transfer which has been dismissed above,[1371] the Appeals Chamber finds that **Beara** has failed to demonstrate any error in the Trial Chamber's analysis with regard to the substantiality of the targeted part of the group.

494. The Appeals Chamber consequently dismisses **Beara**'s oral submissions regarding his genocidal intent.

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1366 Trial Judgement, paras 1307, 1309.
1367 *Cf. supra*, para. 420.
1368 *Krstić* Appeal Judgement, para. 12 (internal reference omitted). See also *Krstić* Appeal Judgement, para. 15.
1369 Trial Judgement, para. 1318.
1370 Trial Judgement, para. 865. The Appeals Chamber also notes that the Trial Chamber considered that the Srebrenica enclave was of immense strategic importance to the Bosnian Serb leadership. Trial Judgement, para. 865. See also Trial Judgement, para. 866.
1371 See *supra*, paras 490-492.

(c) The Prosecution's appeal concerning Nikolić (Ground 7)

(i) Introduction

495. The Prosecution submits that the Trial Chamber erred in law or, alternatively, in fact in failing to convict **Nikolić** for committing genocide and conspiracy to commit genocide on the basis that he lacked the requisite *mens rea*.[1372] The Prosecution requests the Appeals Chamber to correct these errors, convict **Nikolić** for both crimes, and increase his sentence to life imprisonment.[1373]

496. **Nikolić** opposes the ground of appeal.[1374] He submits that it contains a number of formal deficiencies which warrant summary dismissal.[1375] **Nikolić** further claims that the Prosecution fails to establish that the Trial Chamber erred in concluding that he lacked genocidal intent.[1376]

(ii) Alleged failure to apply accepted factors from which to infer genocidal intent

a. Arguments of the Parties

497. The Prosecution submits that the Trial Chamber failed to apply nine accepted factors for inferring genocidal intent to the evidence when assessing **Nikolić**'s *mens rea* for genocide.[1377]

498. **Nikolić** responds that the Prosecution's assertion should be summarily dismissed as it constitutes a new ground of appeal not announced in the Prosecution's Notice of Appeal.[1378] He also argues that the Prosecution fails to identify the Trial Chamber's precise error,[1379] and that the Trial Chamber examined all nine factors and other generally accepted factors for inferring genocidal intent.[1380]

499. The Prosecution replies that its argument is covered by paragraph 39 of its notice of appeal, which was sufficient to identify the arguments which were subsequently developed in its appeal brief,[1381] and that it articulated a precise error in its appeal brief.[1382]

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1372 Prosecution's Notice of Appeal, paras 38-39; Prosecution's Appeal Brief, paras 236, 238, 240, 295-297; Prosecution's Reply Brief, para. 152; Appeal Hearing, AT. 492-496 (6 Dec 2013).
1373 Prosecution's Appeal Brief, paras 240, 296-297; Prosecution's Reply Brief, para. 152.
1374 Nikolić's Response Brief, paras 2-3, 7, 109-110.
1375 Nikolić's Response Brief, paras 4, 8.
1376 Nikolić's Response Brief, paras 5, 8.
1377 Prosecution's Appeal Brief, paras 237-238, 241-243; Prosecution's Reply Brief, paras 108, 112.
1378 Nikolić's Response Brief, paras 9, 17-27, 66. See Appeal Hearing, AT. 545 (6 Dec 2013).
1379 Nikolić's Response Brief, paras 9, 17-18, 24-27, 66.
1380 Nikolić's Response Brief, paras 10, 18, 28-34; Appeal Hearing, AT. 548-551 (6 Dec 2013).
1381 Prosecution's Reply Brief, paras 103-104; Appeal Hearing, AT. 490-491 (6 Dec 2013).
1382 Prosecution's Reply Brief, paras 105-106. Alternatively, the Prosecution moves to vary its notice of appeal, pursuant to Rule 108 of the Rules. Prosecution's Reply Brief, para. 107; Appeal Hearing, AT. 491-492 (6 Dec 2013).

b. Analysis

500. The Appeals Chamber will first determine whether the Prosecution's submissions meet the formal requirements for consideration on the merits. The Appeals Chamber recalls that under Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought".[1383] Pursuant to paragraphs 1(c)(i) and (ii) of the Practice Direction on Formal Requirements, a notice of appeal shall contain, *inter alia*, the grounds of appeal, clearly specifying in respect of each ground of appeal "any alleged error on a question of law invalidating the decision", and/or "any alleged error of fact which has occasioned a miscarriage of justice". The only formal requirement under the Rules is that the notice of appeal contains a list of the grounds of appeal; it does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, the place for detailed arguments being the appellant's brief.[1384] The purpose of listing all the grounds of appeal in the notice of appeal is to "focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief".[1385]

501. The Appeals Chamber notes that the Prosecution's Notice of Appeal contains two sub-grounds of appeal in respect of **Nikolić**'s responsibility for committing genocide and conspiracy to commit genocide: (1) the Trial Chamber erred in law generally, with specific reference to "considering legally irrelevant matters in determining Drago Nikolić's *mens rea*"; and (2) the Trial Chamber "erred in fact as no reasonable trial chamber could have concluded that Drago Nikolić did not act with the *mens rea*".[1386]

502. In essence, the Prosecution's submission is that the Trial Chamber failed to fully apply the correct legal test to the facts in order to impute **Nikolić**'s *mens rea* for committing genocide and conspiracy to commit genocide.[1387] The failure of a trial chamber to apply the correct legal test to the evidence is an error of law.[1388] Contrary to the Prosecution's submission,[1389] such an argument cannot be characterised as an error of fact, the assessment of which must be based on the reasonableness of the factual conclusion. This sub-ground of appeal is therefore not covered by paragraph 39 of the Prosecution's Notice of Appeal. On the other hand, the Appeals Chamber is of the view that the Prosecution's sub-ground of appeal articulated in paragraph 38 of its notice of appeal covers the failure to apply accepted factors for inferring genocidal intent in this case. The

1383 *Boškoski and Tarčulovski* Appeal Judgement, para. 246.
1384 *Boškoski and Tarčulovski* Appeal Judgement, para. 246.
1385 *Boškoski and Tarčulovski* Appeal Judgement, para. 246.
1386 Prosecution's Notice of Appeal, paras 38-39.
1387 See Prosecution's Appeal Brief, para. 242, referring to Trial Judgement, paras 823, 830, outlining the applicable law on genocide where these factors are mentioned.
1388 *Strugar* Appeal Judgement, para. 304.
1389 Prosecution's Reply Brief, paras 103, 105.

first sentence of paragraph 38 provides a general argument which clearly speaks to the Trial Chamber erring in law. Although the Prosecution proceeds to specify that the Trial Chamber considered "legally irrelevant matters in determining Drago Nikolić's *mens rea* to commit genocide or conspiracy to commit genocide",[1390] the general contention made in the prior sentence is not necessarily confined to the Trial Chamber's consideration of "legally irrelevant matters". Bearing in mind that a notice of appeal need not detail the arguments the parties intend to use in support of the grounds of appeal,[1391] the Appeals Chamber finds that this submission formed a sub-ground of appeal that was covered by the Prosecution's Notice of Appeal.

503. The Prosecution argues that the Trial Chamber identified the nine factors as relevant but "unreasonably neglected to consider them".[1392] The first factor specified by the Prosecution is the scale of the atrocities committed.[1393] It is clear that the Trial Chamber was aware of the massive scale of crimes being committed, and had recalled that this would be a relevant consideration in determining genocidal intent.[1394] When specifically assessing whether **Nikolić** had genocidal intent, the Trial Chamber was satisfied that the killings that occurred after 13 July 1995 in which he was involved "were sufficient to make **Nikolić** aware of the scale and scope of this killing operation".[1395] It also found that soon after his involvement in the killing operation began, "**Nikolić** knew that this was a massive killing operation being carried out with a genocidal intent".[1396] The Trial Chamber further found that **Nikolić** played an important role in the JCE to Murder in terms of planning and organising detentions and executions.[1397] The Prosecution's general argument that the Trial Chamber did not consider that **Nikolić** "planned, ordered and committed the murders of up to 6,000 Bosnian Muslim prisoners"[1398] is unpersuasive. The Appeals Chamber is satisfied that the Trial Chamber explicitly noted and considered the scale of the atrocities committed in its assessment of **Nikolić**'s genocidal intent.

504. Likewise, contrary to the Prosecution's submission, the Trial Chamber did consider **Nikolić**'s participation in, and key contributions to, the killings, with the knowledge that the killings would contribute to the destruction of a group.[1399] After recalling its finding that **Nikolić** made a significant contribution to the commission of the crimes within the scope of the JCE to

1390 Prosecution's Notice of Appeal, para. 38.
1391 See *supra*, para. 500.
1392 Prosecution's Appeal Brief, para. 241. See Prosecution's Appeal Brief, paras 237, 242.
1393 Prosecution's Appeal Brief, paras 237, 242(1).
1394 Trial Judgement, paras 823, 856-863.
1395 Trial Judgement, para. 1405. See Trial Judgement, paras 1403-1404.
1396 Trial Judgement, para. 1407.
1397 Trial Judgement, para. 1408.
1398 Prosecution's Appeal Brief, para. 242(1).
1399 Prosecution's Appeal Brief, paras 237, 242(2).

Murder,[1400] the Trial Chamber discussed whether he participated with the knowledge that the murder operation was being carried out with genocidal intent.[1401] It concluded that as of the morning of 14 July 1995, the events that occurred were "more than sufficient for [**Nikolić**] to conclude that the plan was not just to kill but to destroy".[1402] The Trial Chamber found that "**Nikolić** knew that this was a massive killing operation being carried out with a genocidal intent. His key contributions to the JCE to Murder are made concurrent with, and after the acquisition of this knowledge."[1403] Accordingly, the Prosecution has failed to support its contention that the Trial Chamber did not consider **Nikolić**'s key contributions to the genocide during and after the time he acquired knowledge of the genocidal plan.

505. The Prosecution also argues that the Trial Chamber neglected to consider the systematic targeting of Bosnian Muslims, the repetition of destructive and discriminatory acts, and the perpetration of other culpable acts directed against the Bosnian Muslim prisoners.[1404] The Appeals Chamber notes that the Trial Chamber first recalled that "the perpetration of other culpable acts systematically directed against the same group [...], the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts" can be considered in inferring the intent to destroy.[1405] The Trial Chamber, after reviewing the charges of genocide against **Nikolić** and others as pleaded in the Indictment,[1406] explicitly addressed these factors in its discussion on genocidal intent.[1407] In the more specific discussion as to **Nikolić**'s genocidal intent, the Trial Chamber observed the Prosecution's arguments on the systematic and co-ordinated nature of the murder operation and the various forms and extent of **Nikolić**'s involvement,[1408] before concluding that "**Nikolić** observed first hand the systematic and organised manner in which the killing operation was planned and carried out and further he took an active role in it".[1409] While the Trial Chamber may not have entered into a specific discussion of each of the factors identified here, the Appeals Chamber is satisfied that the Trial Chamber was aware of the relevant factors and all the evidence before it, and took these factors into consideration, which are intrinsically encompassed in its discussion on **Nikolić**'s genocidal intent.[1410] Thus, the Appeals Chamber finds the Prosecution's submission to be without merit. For the same reasons, the Prosecution's argument that the Trial Chamber neglected to consider the general context of the

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1400 Trial Judgement, para. 1397.
1401 Trial Judgement, paras 1401-1403.
1402 Trial Judgement, para. 1404. See Trial Judgement, paras 1405-1406.
1403 Trial Judgement, para. 1407. See Trial Judgement, para. 1409.
1404 Prosecution's Appeal Brief, paras 237, 242(3)-(5).
1405 Trial Judgement, para. 823.
1406 Trial Judgement, paras 834-836.
1407 Trial Judgement, paras 837, 856-862.
1408 Trial Judgement, para. 1400.
1409 Trial Judgement, para. 1405.
1410 Trial Judgement, paras 1397-1415.

crimes, **Nikolić**'s *mens rea* for the underlying acts of genocide, and the existence of a plan or policy to commit genocide, is dismissed.[1411]

506. Finally, the Prosecution contends that the Trial Chamber considered **Nikolić**'s use of derogatory language "on its own" rather than in conjunction with other factors, and argues that the Trial Chamber unreasonably found that this factor did not support an inference of genocidal intent.[1412] The Appeals Chamber notes that the Trial Chamber did explicitly discuss **Nikolić**'s use of derogatory language as a relevant factor in inferring genocidal intent but concluded that "there is nothing to suggest this was [something] other than a reflection of an unacceptable but common practice".[1413] The Prosecution has failed to present any cogent argument why this conclusion was one that no reasonable trier of fact could have made. Furthermore, the Trial Chamber, after discussing **Nikolić**'s use of derogatory language, analysed other factors from which genocidal intent could be inferred,[1414] before concluding that "[h]aving considered and weighed all of the above factors individually and cumulatively, the Trial Chamber is not satisfied that the only reasonable inference to be drawn from **Nikolić**'s acts is that he shared the genocidal intent".[1415] In light of this, the Prosecution's argument that the Trial Chamber analysed **Nikolić**'s use of derogatory language "on its own" is without merit and fails.

507. In sum, the Prosecution has not demonstrated that the Trial Chamber erred by failing to consider relevant factors in determining whether **Nikolić** possessed genocidal intent. To the extent that the Prosecution's arguments could be interpreted as being that the Trial Chamber failed to give sufficient weight to the relevant factors it considered or failed to interpret the evidence in a particular manner, the Appeals Chamber recalls that such mere assertions warrant dismissal without detailed analysis. The Appeals Chamber will therefore not address the Prosecution's arguments in this light.

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1411 See Prosecution's Appeal Brief, paras 242(6), 242(8)-(9). See also Trial Judgement, paras 823, 837, 856-862, 1397-1415.
1412 Prosecution's Appeal Brief, para. 242(7) & fn. 655.
1413 Trial Judgement, para. 1399.
1414 Trial Judgement, paras 1400-1413.
1415 Trial Judgement, para. 1414.

(iii) Alleged application of irrelevant considerations to determine genocidal intent

a. Arguments of the Parties

508. The Prosecution submits that the Trial Chamber erred in law and in fact when it relied on irrelevant factual and legal considerations in concluding that **Nikolić** did not have genocidal intent.[1416] It argues that these errors invalidate the verdict and occasion a miscarriage of justice.[1417]

509. In terms of irrelevant legal considerations, the Prosecution argues that the Trial Chamber erred by considering **Nikolić**'s subordinate position and motive for participating in the mass murders as factors negating his specific intent for genocide.[1418]

510. With respect to irrelevant factual considerations, the Prosecution argues that the Trial Chamber erred by considering the following factors as negating **Nikolić**'s specific intent for genocide: (1) what **Nikolić** could have further done (instead of what he did and how he did it);[1419] (2) **Nikolić**'s lack of involvement in certain criminal acts (that were completed prior to his joining the murder operation);[1420] (3) factual findings contradicted by the Trial Chamber's prior findings related to **Nikolić**'s involvement in the movement of prisoners from Bratunac to Zvornik and the executions at the Branjevo Military Farm;[1421] and (4) **Nikolić**'s role in the fate of the Milići Prisoners, which showed his genocidal intent.[1422] The Prosecution also argues that the Appeals Chamber may intervene if the Trial Chamber has improperly considered evidence.[1423]

511. **Nikolić** responds that the Prosecution fails to establish that the Trial Chamber erred in its consideration of the relevant factors concerning his *mens rea*.[1424] **Nikolić** submits that: (1) the Prosecution did not announce in its notice of appeal the claim that the Trial Chamber relied on irrelevant factual considerations;[1425] (2) the Appeals Chamber should defer to the Trial Chamber on the subtle line between knowledge and sharing of intent;[1426] (3) the Prosecution misunderstands the

1416 Prosecution's Appeal Brief, paras 238, 272-273, 289; Prosecution's Reply Brief, para. 114.
1417 Prosecution's Appeal Brief, para. 272.
1418 Prosecution's Appeal Brief, paras 238, 274, 285-288; Prosecution's Reply Brief, paras 120-122; Appeal Hearing, AT. 493-495 (6 Dec 2013).
1419 Prosecution's Appeal Brief, paras 273, 275-278; Prosecution's Reply Brief, paras 102, 109, 116-118.
1420 Prosecution's Appeal Brief, paras 273, 279-280.
1421 Prosecution's Appeal Brief, paras 273, 281-282; Prosecution's Reply Brief, para. 119.
1422 Prosecution's Appeal Brief, paras 283-284; Prosecution's Reply Brief, para. 118.
1423 Prosecution's Reply Brief, paras 114-115.
1424 Nikolić's Response Brief, paras 14, 59-60; Appeal Hearing, AT. 551 (6 Dec 2013).
1425 Nikolić's Response Brief, paras 14, 59, 61-63, 66. **Nikolić** also argues that the Prosecution commingles the standards of appellate review for factual and legal errors. Nikolić's Response Brief, paras 14, 59, 64-65. The Appeals Chamber is satisfied that in the specific paragraphs dealing with each alleged error of fact or error of law, the Prosecution identifies a precise error, provides an explanation, and uses the correct legal standard. Prosecution's Appeal Brief, paras 238, 272, 274-288. *Cf.* Prosecution's Appeal Brief, paras 273, 289.
1426 Nikolić's Response Brief, paras 15, 60, 67-70.

Trial Chamber's duty to assess the *mens rea* for genocide based on the totality of the evidence;[1427] and (4) the Trial Chamber accurately considered all appropriate factors and was guided by the correct law.[1428]

b. Analysis

512. The Appeals Chamber will first consider **Nikolić**'s contention that the Prosecution's argument on irrelevant factual considerations is not covered in the Prosecution's Notice of Appeal. Although the notice of appeal does not specifically mention the argument that the Trial Chamber erred by considering irrelevant *factual* matters it does, however, clearly assert that the Trial Chamber made an error of fact in concluding that **Nikolić** did not act with genocidal intent.[1429] Recalling that a notice of appeal need not detail the arguments that the parties intend to use in support of the grounds of appeal,[1430] the Appeals Chamber finds that paragraph 39 of the Prosecution's Notice of Appeal was sufficient to put **Nikolić** on notice of this argument.

513. With respect to **Nikolić**'s argument that the Appeals Chamber should not entertain this ground of appeal on the basis that it "must not involve itself in appreciations as to the sharing of intent and knowledge of intent",[1431] the Appeals Chamber recalls that it has the authority to hear appeals on any error of law invalidating the decision or any error of fact which has occasioned a miscarriage of justice.[1432] This mandate necessarily includes correcting legal or factual errors by a trial chamber in assessing the *mens rea* for genocide.[1433] The Appeals Chamber recalls that a trial chamber is best placed to weigh and assess the evidence[1434] and for this reason it will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[1435] However, a margin of deference to the factual findings reached by a trial chamber does not amount to a rule precluding the Appeals Chamber from considering the line between sharing of genocidal intent and knowledge of intent, where a clear error has been made by a trial chamber.[1436]

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1427 Nikolić's Response Brief, paras 60, 67, 71-73.
1428 Nikolić's Response Brief, paras 15, 60, 74-108; Appeal Hearing, AT. 551-555 (6 Dec 2013).
1429 Prosecution's Notice of Appeal, para. 39.
1430 See *supra*, para. 500.
1431 Nikolić's Response Brief, para. 67. See Nikolić's Response Brief, para. 15.
1432 Article 25(1) of the Statute.
1433 See, *e.g.*, *Krstić* Appeal Judgement, para. 134 ("There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent.").
1434 *Lukić and Lukić* Appeal Judgement, para. 384; *Limaj et al.* Appeal Judgement, para. 88; *Kupreškić et al.* Appeal Judgement, para. 32.
1435 See *supra*, para. 19.
1436 See *Krstić* Appeal Judgement, paras 129, 134. The Appeals Chamber notes that **Nikolić** relies on paragraphs 38-39 of the Partial Dissenting Opinion of Judge Shahabuddeen in the *Krstić* Appeal Judgement for support (Nikolić's Response Brief, para. 68). However, Judge Shahabuddeen recognised that "[a] stringent test does not empower the Appeals Chamber to step in where otherwise it could not [...] *except in cases of error* - often qualified as having to be clear". *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 38 (emphasis added).

514. The Appeals Chamber recalls that where the Prosecution appeals an acquittal it must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[1437] Thus, in requesting the Appeals Chamber to overturn an acquittal for genocide based on alleged errors of fact underpinning a trial chamber's finding of a lack of the requisite *mens rea*, the Prosecution needs to show that, but for the Trial Chamber's errors, the specific intent for genocide would have been unequivocally established. Bearing this in mind, the Appeals Chamber will consider this sub-ground of appeal on its merits.

515. First, with regard to the averred irrelevant legal considerations, the Appeals Chamber notes that the Trial Chamber considered **Nikolić**'s personal circumstances and position within the VRS as relevant to assessing his personal intent to destroy a group by placing his participation in the context in which it clearly occurred.[1438] In the view of the Appeals Chamber, it is clear from the Trial Chamber's analysis that it did not draw a simple conclusion on the lack of genocidal intent by reason of **Nikolić**'s subordinate position within the VRS, but made a careful assessment of **Nikolić**'s role and position at the relevant time, which formed part of the evidence in totality. In this sense, the Trial Chamber found it relevant that **Nikolić** was a lower ranking military officer who was occupying a position of some importance in terms of functionality – the Chief of Security in the Zvornik Brigade. Contrary to the Prosecution's submission,[1439] the Trial Chamber did not fail to reflect the degree of authority that **Nikolić** practically enjoyed and exercised in this position – indeed it specifically noted that the position was usually reserved for the rank of Major or higher.[1440] The Trial Chamber observed, however, that "in the context of an operation directed by **Beara** and **Popović**, **Nikolić** would have little authority of his own".[1441] By reason of his position, **Nikolić** was ordered by his superiors to make logistical arrangements for the detention and killing of prisoners in the Zvornik area.[1442] The Trial Chamber also accepted evidence that **Nikolić** was devoted to the Security Service.[1443] As noted by the Trial Chamber, such factors do not justify or excuse the carrying out of patently illegal orders.[1444] In this regard, such factors are irrelevant to determining individual criminal responsibility.[1445] However, evidence of **Nikolić**'s personal circumstances and position in the VRS formed part of "all of the evidence, taken together" which may be assessed to determine the existence of genocidal intent.[1446] The Appeals Chamber finds that

1437 See *supra*, para. 21.
1438 Trial Judgement, para. 1412.
1439 Prosecution's Appeal Brief, para. 286.
1440 Trial Judgement, para. 1412.
1441 Trial Judgement, para. 1412.
1442 Trial Judgement, para. 1412.
1443 Trial Judgement, para. 1413.
1444 Trial Judgement, para. 1412.
1445 *Boškoski and Tarčulovski* Appeal Judgement, para. 52.
1446 See *Stakić* Appeal Judgement, para. 55.

such evidence was not legally irrelevant to the Trial Chamber's assessment of whether **Nikolić** personally had genocidal intent.

516. With regard to the Prosecution's argument that the Trial Chamber erred in law by considering that **Nikolić**'s possible motive for participating in the genocidal plan undermined his genocidal intent, the Appeals Chamber does not construe the Trial Chamber's assertion that "[a]nother reasonable inference is that **Nikolić**'s blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors"[1447] to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive would be incompatible with genocidal intent.[1448] The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established genocidal intent beyond reasonable doubt.

517. The Appeals Chamber now turns to the submission that the Trial Chamber considered irrelevant factual considerations. The Prosecution argues that the Trial Chamber erroneously focused on what **Nikolić** could have done, instead of what he did and how he did it,[1449] as well as on **Nikolić**'s lack of involvement in criminal acts that were completed prior to his joining the murder operation.[1450] The Appeals Chamber notes that the Trial Chamber found that, although **Nikolić**'s "acts and participation [...] provide some evidence from which a genocidal intent on his part could be inferred",[1451] "**Beara** and **Popović** can properly be described as architects of this genocidal operation, [while] **Nikolić** was brought in to carry out specific tasks assigned to him, in implementation of a monstrous plan, designed by others."[1452] The Trial Chamber did not discount the significance of what **Nikolić** did, nor unreasonably compare his contributions to those of **Beara** and **Popović**, nor require that **Nikolić** participate in criminal acts that were completed before he joined the genocide. Rather, the Trial Chamber specifically focused on the scope of **Nikolić**'s acts and participation for the purpose of determining whether and to what extent genocidal intent could be inferred. This does not mean that the Trial Chamber failed to appreciate that a genocidal plan involves a division of tasks.[1453] While the Trial Chamber may have placed undue emphasis on all of **Nikolić**'s tasks being confined to his sphere of military role and authority as a factor relevant to determining whether he had genocidal intent, it considered the scope of **Nikolić**'s acts and participation together with a range of other evidence that suggested to it that there were other

1447 Trial Judgement, para. 1414.
1448 See *Krnojelac* Appeal Judgement, para. 103.
1449 Prosecution's Appeal Brief, paras 273, 275-278; Prosecution's Reply Brief, paras 102, 109, 116-118.
1450 Prosecution's Appeal Brief, paras 273, 279-280.
1451 Trial Judgement, para. 1409.
1452 Trial Judgement, para. 1410.
1453 *Cf.* Prosecution's Appeal Brief, para. 275.

reasonable inferences that could be drawn about his mental state than that of genocidal intent.[1454] The Appeals Chamber recalls that where proof of state of mind is based on inference, it must be the only reasonable inference available on the evidence.[1455] The Trial Chamber's consideration of the specific tasks assigned to **Nikolić** in the context of the genocidal operation as a whole was part of the totality of the evidence and therefore relevant to determining whether genocidal intent was the only reasonable inference available on the evidence. The Appeals Chamber therefore concludes that the Prosecution misconstrues the Trial Chamber's basic reasoning.

518. As to the Prosecution's argument that the Trial Chamber contradicted its prior findings related to **Nikolić**'s involvement in the movement of prisoners from Bratunac to Zvornik,[1456] the Appeals Chamber notes that when discussing **Nikolić**'s possible *mens rea* for committing genocide and conspiracy to commit genocide, the Trial Chamber found that, "[w]hile he had some escort responsibilities, he was not implicated in the arrangements for the movement of the prisoners from Bratunac to Zvornik".[1457] The Appeals Chamber notes that this appears to contradict the Trial Chamber's earlier findings that **Nikolić** was heavily involved in organising the movement of these prisoners to Zvornik, by: (1) calling Obrenović on the evening of 13 July 1995 to tell him that **Popović** had informed him of the large number of prisoners that would be transferred from Bratunac to Zvornik in order to be executed on Mladić's orders and that **Nikolić** had been asked to assist ("Nikolić-Obrenović Conversation"); (2) requesting Obrenović to assign to him Miomir Jašikovac and a military police platoon to carry out the task; and (3) supervising the operation by personally being present when the buses of prisoners arrived and assigning the Zvornik Brigade Military Police Company to guard the prisoners.[1458]

519. The Prosecution also argues that the Trial Chamber contradicted an earlier finding when, in the context of assessing **Nikolić**'s *mens rea* for genocide, it considered that "he is not directly implicated in the killings at Branjevo Military Farm".[1459] The Appeals Chamber notes the Trial Chamber's earlier finding that "**Nikolić** ordered Perić of the Zvornik Brigade 1st Battalion to secure the prisoners at the Kula School in the awareness that these prisoners were to be executed."[1460] The Trial Chamber specified that "it is immaterial that **Nikolić** went to a funeral on 16 July 1995 on the day that they were killed at Branjevo Military Farm".[1461] In the view of the Appeals Chamber, in making this remark, the Trial Chamber was indicating that **Nikolić** was in fact implicated in the

1454 Trial Judgement, para. 1414.
1455 *Kvočka et al.* Appeal Judgement, para. 237; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, para. 120.
1456 Prosecution's Appeal Brief, paras 273, 281; Prosecution's Reply Brief, para. 119.
1457 Trial Judgement, para. 1410.
1458 Trial Judgement, paras 470-471, 1345, 1350.
1459 Prosecution's Appeal Brief, para. 282; Trial Judgement, para. 1410.
1460 Trial Judgement, para. 1360. *Cf. infra*, paras 1327-1328.

murders of these prisoners, in spite of the fact that he was not present on the day they were killed. The Appeals Chamber considers that this contradicts its later finding that **Nikolić** was not directly implicated in the killings at the Branjevo Military Farm.

520. The Appeals Chamber therefore finds that the Trial Chamber did contradict two of its earlier findings in discussing considerations militating against finding that **Nikolić** had the requisite genocidal intent. However, neither of these later contradictory findings necessarily amount to an error of fact which has occasioned a miscarriage of justice. In this regard, the Appeals Chamber notes **Nikolić**'s involvement in the arrangements for moving the prisoners from Bratunac to Zvornik and his role in securing the prisoners at the Kula School with the knowledge they would be later executed. The Appeals Chamber, however, finds that the Prosecution has failed to show that the Trial Chamber erred in its overall reasoning that genocidal intent was not the only reasonable inference available from the evidence as it relates to **Nikolić**'s mental state in carrying out the specific tasks assigned to him by reason of his military and security positions.

521. The Prosecution argues that the Trial Chamber also unreasonably considered as a factor negating **Nikolić**'s possible genocidal intent the fact that the Milići Prisoners remained alive in his custody until they were handed over to **Popović**.[1462] The Appeals Chamber observes that the Trial Chamber was unable to make precise findings on the role, if any, that **Nikolić** had in terms of the custody of the Milići Prisoners or their handover to **Popović**.[1463] Considering the lack of evidence or findings on **Nikolić**'s role in the matter, the Appeals Chamber is of the view that no reasonable trier of fact could have relied on the fact that the prisoners remained alive in the custody of the Zvornik Brigade to counter the inference that **Nikolić** had genocidal intent.[1464] At the same time, the Appeals Chamber finds that the incident does not necessarily provide support for **Nikolić**'s genocidal intent.[1465] However, the Appeals Chamber finds that the Trial Chamber's erroneous reliance on this evidence did not amount to a miscarriage of justice since the Trial Chamber based its reasoning on a wide range of evidence in addition to this one consideration. Thus, the absence of this consideration in the Trial Chamber's discussion would not have altered the Trial Chamber's conclusion that more than one inference about **Nikolić**'s mental state was reasonable.

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1461 Trial Judgement, para. 1360.
1462 Prosecution's Appeal Brief, paras 283-284; Prosecution's Reply Brief, para. 118. See Trial Judgement, para. 1411.
1463 Trial Judgement, para. 1380.
1464 Trial Judgement, para. 1411.
1465 See Prosecution's Appeal Brief, para. 283.

522. Finally, the Appeals Chamber finds that the errors discussed above[1466] are insufficient to demonstrate a miscarriage of justice even when taken cumulatively.

(iv) Alleged error of fact in finding that Nikolić lacked genocidal intent

a. Arguments of the Parties

523. The Prosecution submits that the Trial Chamber erred in fact as its finding that **Nikolić** lacked genocidal intent was one that no reasonable trial chamber would have made.[1467] The Prosecution contends that **Nikolić**'s genocidal intent is demonstrated by his: (1) awareness of the genocidal plan to destroy the Bosnian Muslims in Eastern Bosnia;[1468] (2) contribution to the furtherance of genocide by planning and carrying out detentions and executions across multiple crime sites in Zvornik;[1469] (3) single-minded devotion to the murder operation;[1470] and (4) ruthlessness and initiative in overcoming obstacles to the realisation of the genocide.[1471] The Prosecution also argues that the totality of the Trial Chamber's findings on **Nikolić**'s genocidal conduct show that the finding on his lack of genocidal intent is unsustainable,[1472] and that the only reasonable conclusion based on his criminal acts is that he intended to commit genocide and conspiracy to commit genocide.[1473]

524. **Nikolić** responds that the Prosecution's sub-ground of appeal is an attempt to re-litigate the case and substitute its own arguments for those of the Trial Chamber and should therefore be summarily dismissed.[1474] On the merits, **Nikolić** contends that the Prosecution inflates the Trial Chamber's findings against him, ignores other relevant findings, and fails to establish any error in the Trial Chamber's analysis of his *mens rea*.[1475] **Nikolić** also contends that, based on the totality of the evidence, the Trial Chamber correctly found that he did not harbour genocidal intent,[1476] and that such intent is not the only reasonable inference that could be drawn.[1477]

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1466 See *supra*, paras 520-521.
1467 Prosecution's Appeal Brief, paras 238, 244.
1468 Prosecution's Appeal Brief, paras 236-237, 244-246. See Appeal Hearing, AT. 492-493 (6 Dec 2013).
1469 Prosecution's Appeal Brief, paras 247-262; Prosecution's Reply Brief, para. 112. See Appeal Hearing, AT. 492-493 (6 Dec 2013).
1470 Prosecution's Appeal Brief, paras 236, 244, 263-268, 288; Prosecution's Reply Brief, para. 112. See Appeal Hearing, AT. 493 (6 Dec 2013).
1471 Prosecution's Appeal Brief, paras 244, 269-271; Prosecution's Reply Brief, para. 112.
1472 Prosecution's Reply Brief, para. 111. See Appeal Hearing, AT. 584-588 (6 Dec 2013).
1473 Prosecution's Appeal Brief, paras 238, 289, 292. See Appeal Hearing, AT. 496 (6 Dec 2013).
1474 Nikolić's Response Brief, paras 11, 35-41.
1475 Nikolić's Response Brief, paras 12-13, 35, 42-58.
1476 Nikolić's Response Brief, paras 16, 49, 60, 107-108.
1477 Appeal Hearing, AT. 546-547, 555, 558-560 (6 Dec 2013). **Nikolić** particularly points out his lack of contextual knowledge which he defines as "the full spectrum of the knowledge of the accused which necessarily has a bearing on his understanding of the situation and, accordingly, on his actions", Appeal Hearing, AT. 556-557 (6 Dec 2013). See Nikolić's Response Brief, paras 49, 110; Appeal Hearing, AT. 558-560 (6 Dec 2013).

b. Analysis

525. The Appeals Chamber notes that the Trial Chamber made reference to all four of the considerations enumerated by the Prosecution in assessing **Nikolić**'s *mens rea* for committing genocide and conspiracy to commit genocide. In terms of **Nikolić**'s awareness of the genocidal plan, it found that "soon after the inception of his involvement in the killing operation, and certainly by the time of executions at Orahovac, **Nikolić** knew that this was a massive killing operation being carried out with a genocidal intent".[1478]

526. The Trial Chamber also found that **Nikolić**'s key contributions to the genocide were made concurrent with, or after the acquisition of, this knowledge.[1479] These key contributions consisted of the planning and organising of detentions and executions of thousands of prisoners in multiple locations in the Zvornik area.[1480] Furthermore, the Trial Chamber specifically considered the persistent and determined efforts of **Nikolić** to contribute to this plan.[1481] With all of this in mind, the Trial Chamber determined that "the central issue, however, is whether those actions, combined with his knowledge of the genocidal intent of others, considered in the totality of the evidence, are sufficient to satisfy the Trial Chamber beyond reasonable doubt that **Nikolić** not only knew of the intent but that he shared it".[1482]

527. Ultimately, the Trial Chamber was not convinced beyond reasonable doubt that **Nikolić** shared the genocidal intent of which he was aware since this was not the only reasonable inference it could draw from the evidence, another being that "**Nikolić**'s blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors."[1483]

528. The Appeals Chamber recalls the margin of deference it gives to the factual findings reached by a trial chamber and that it will only intervene when a clear error has been made.[1484] The Appeals Chamber, Judge Niang dissenting, is not convinced that the errors made by the Trial Chamber in the course of its reasoning on **Nikolić**'s possible *mens rea* for genocide or conspiracy to commit genocide undermine the conclusions reached by the Trial Chamber.[1485]

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1478 Trial Judgement, para. 1407.
1479 Trial Judgement, para. 1407.
1480 Trial Judgement, paras 1404, 1408.
1481 Trial Judgement, paras 1408-1409.
1482 Trial Judgement, para. 1408.
1483 Trial Judgement, para. 1414.
1484 See *supra*, para. 513.
1485 See *supra*, paras 520-522.

(v) Conclusion

529. The Appeals Chamber, Judge Niang dissenting, finds that the Prosecution has failed to show that the Trial Chamber erred in concluding that **Nikolić** did not possess the requisite genocidal intent so as to hold him responsible for genocide as well as conspiracy to commit genocide. The Appeals Chamber recalls that the crimes of genocide and conspiracy to commit genocide both require genocidal intent as a part of the *mens rea* element,[1486] and in the absence of such a finding of genocidal intent, it is unnecessary to discuss the submissions of the Parties on the *actus reus* of conspiracy to commit genocide.[1487]

530. In light of the foregoing, the Appeals Chamber, Judge Niang dissenting, dismisses the Prosecution's ground of appeal 7 in its entirety.

### 7. Conclusion

531. The Appeals Chamber has dismissed all challenges regarding genocide.

## B. Conspiracy to Commit Genocide

### 1. Introduction

532. Count 2 alleges that **Popović**, **Beara**, **Nikolić**, Borovčanin, and **Pandurević** conspired to commit genocide, *i.e.* entered into an agreement to kill able-bodied Muslim Men from Srebrenica and to remove the remaining Muslim population of Srebrenica and Žepa from the RS, with the intent to destroy those Muslims.[1488] In considering this count, the Trial Chamber concluded that the only reasonable inference to be drawn from the evidence was that members of the BSF entered into an agreement and thus a conspiracy to commit genocide.[1489]

533. The Trial Chamber then found **Popović** and **Beara** criminally responsible for conspiracy to commit genocide.[1490] However, the Trial Chamber declined to enter convictions for conspiracy to commit genocide against them, concluding that "the full criminality of the Accused is accounted for

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1486 In order for the *mens rea* for conspiracy to commit genocide to be satisfied "the individuals involved in the agreement must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (*mens rea*)". *Nahimana et al.* Appeal Judgement, para. 894. Likewise, for genocide an accused must act "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such". *Munyakazi* Appeal Judgement, para. 141.

1487 The Appeals Chamber also considers that **Nikolić**'s arguments on the possible violation of his fundamental right to appeal, as resulting from the entering of a new conviction on appeal, is rendered moot. Nikolić's Response Brief, paras 111-122.

1488 Indictment, para. 34. See Trial Judgement, para. 877.

1489 Trial Judgement, para. 886.

1490 Trial Judgement, paras 1184, 1322, 2104-2105.

by a conviction for genocide and [...] a further conviction for the inchoate crime of conspiracy would be duplicative and unfair to the accused".[1491]

2. Prosecution's appeal (Ground 6)

(a) Arguments of the Parties

534. The Prosecution submits that the Trial Chamber erred in law in refusing to convict **Popović** and **Beara** for conspiracy to commit genocide in addition to the convictions for genocide, as it had no discretion to refuse such convictions.[1492] It argues that the entering of convictions for both crimes was necessary to fully reflect the culpability of **Popović** and **Beara**, and is neither duplicative nor unfair.[1493] The Prosecution specifically submits that each crime requires proof of a materially distinct element,[1494] and that it is the legal elements of the crimes that must be compared and not the evidence underlying the convictions.[1495] It finally submits that the Trial Chamber erroneously compared the legal elements of the crimes with the elements of the JCE mode of liability.[1496] In the alternative, the Prosecution submits that the Trial Chamber erred in fact when finding that the full criminality of **Popović** and **Beara** was encompassed by the genocide conviction.[1497] The Prosecution requests the Appeals Chamber to enter convictions for conspiracy to commit genocide against **Popović** and **Beara**.[1498]

535. **Popović** responds that the Trial Chamber correctly decided not to convict him of conspiracy to commit genocide, as cumulative convictions for both conspiracy to commit genocide and genocide are impermissible.[1499] **Popović** argues that the underlying acts and omissions are relevant to determining whether dual convictions are redundant where one crime is inchoate, since the substantive crime has not been prevented.[1500] **Popović** also submits that the assumption that the Trial Chamber has the flexibility to impose the punishment it deems most appropriate is inherent in the sentencing discretion of the Trial Chamber under Rule 87 of the Rules.[1501] Moreover, **Popović** argues that, even if the Trial Chamber's finding that he is guilty of conspiracy to commit genocide

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1491 Trial Judgement, para. 2127. See also Trial Judgement, Disposition, Popović and Beara sections.
1492 Prosecution's Appeal Brief, paras 227-228, 233, 235. See also Prosecution's Reply Brief, para. 100.
1493 Prosecution's Appeal Brief, paras 227-230, 234; Prosecution's Reply Brief, paras 96, 98.
1494 Prosecution's Appeal Brief, para. 230; Prosecution's Reply Brief, paras 96, 100. See also Prosecution's Reply Brief, paras 97-99.
1495 Prosecution's Appeal Brief, para. 231; Appeal Hearing, AT. 486-487 (6 Dec 2013), referring to *Gatete* Appeal Judgement, paras 259-264.
1496 Prosecution's Appeal Brief, paras 231-232.
1497 Prosecution's Appeal Brief, paras 227, 234. See also Prosecution's Appeal Brief, para. 232.
1498 Prosecution's Appeal Brief, para. 235; Prosecution's Reply Brief, para. 96.
1499 Popović's Response Brief, paras 10, 15, 21.
1500 Popović's Response Brief, paras 11-14. **Popović** further contends that the Trial Chamber appropriately exercised its discretion in following the *Musema* Trial Judgement especially as the law on this issue is unsettled. Popović's Response Brief, paras 10-11, 16-19.
1501 Popović's Response Brief, para. 18.

were correct, this finding adequately describes his full culpability with no corresponding conviction.[1502] **Popović** also submits that entering a conviction on appeal would violate his right to an appeal under Article 24(2) of the Statute, as well as the "elementary principle of fairness".[1503]

536. **Beara** did not file a response brief.

(b) Analysis

537. In relation to crimes under different statutory provisions, as the Trial Chamber recalled, cumulative convictions for the same conduct are permissible if each statutory provision involved has a materially distinct element not contained in the other.[1504] Further, the Appeals Chamber notes that the Trial Chamber correctly held that conspiracy to commit genocide and genocide involve different underlying acts or omissions and a materially distinct *actus reus*.[1505]

538. In this case, the Trial Chamber reasoned that – as **Popović**'s and **Beara**'s participation in the JCE to Murder with genocidal intent was the basis of the convictions for genocide as well as for inferring an agreement to commit genocide – "entering a conviction for the substantive offence of genocide renders redundant a conviction for conspiracy".[1506] The Trial Chamber also concluded that "the full criminality of the Accused is accounted for by a conviction for genocide".[1507] The Appeals Chamber, however, recalls "that a trial chamber is bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person".[1508] As conspiracy to commit genocide and genocide are distinct crimes, it was necessary to enter convictions against **Popović** and **Beara** for conspiracy to commit genocide in order to reflect their full culpability.[1509] The Appeals Chamber, Judge Niang dissenting, finds that by failing to do so, the Trial Chamber erred in law. As such, the Appeals Chamber need not address **Popović**'s argument regarding the Trial Chamber's sentencing discretion under Rule 87 of the Rules or the Prosecution's alternative argument.

539. In light of the Trial Chamber's error discussed above, the Appeals Chamber, Judge Pocar dissenting, recalls that it is established jurisprudence that a new conviction may be entered at the

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1502 Popović's Response Brief, paras 10, 20. **Popović** also points to his life sentence as evidence that his criminal conduct is reflected accurately.
1503 Appeal Hearing, AT. 535-536 (6 Dec 2013), referring to *Gatete* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar.
1504 *Karemera and Ngirumpatse* Appeal Judgement, para. 710; *Gatete* Appeal Judgement, para. 259 & fn. 630. See Trial Judgement, para. 2111 & fns 6103-6104.
1505 Trial Judgement, para. 2118 & fns 6115-6116. See *Karemera and Ngirumpatse* Appeal Judgement, para. 710; *Gatete* Appeal Judgement, para. 260 & fns 632-633.
1506 Trial Judgement, paras 2124-2126.
1507 Trial Judgement, para. 2127.
1508 *Gatete* Appeal Judgement, para. 261. See *Karemera and Ngirumpatse* Appeal Judgement, para. 711.
1509 See *Gatete* Appeal Judgement, para. 261.

appeal stage in appropriate circumstances.[1510] With respect to the present circumstances, the Appeals Chamber observes that conspiracy to commit genocide was clearly charged in the Indictment and that the Trial Chamber made explicit findings on each element of the crime. The Appeals Chamber, Judge Pocar dissenting, is thus able, if appropriate, to enter new convictions for this crime based solely on the findings of the Trial Chamber.[1511] The Appeals Chamber will now address the arguments of the Parties regarding the Trial Chamber's factual findings on the conspiracy to commit genocide before determining whether to enter new convictions.

### 3. Popović's appeal

540. **Popović** submits that the Trial Chamber erred in inferring that he participated in a conspiracy to commit genocide, as this inference was based entirely on circumstantial evidence and was not the only reasonable conclusion available from the evidence.[1512] In particular, he argues that the 14 July Meeting is insufficient evidence of a conspiracy as no reasonable trial chamber would have inferred that the meeting addressed the murder plan.[1513] **Popović** also contends that the Trial Chamber's inference of a conspiracy from the significant co-ordination in the murder operation is based on evidence that is "too circumstantial"[1514] and could lead a reasonable trial chamber to a "multitude of conclusions" which are consistent with his innocence.[1515] **Popović** argues that the Trial Chamber's errors amount to a miscarriage of justice.[1516]

541. The Prosecution replies that **Popović**'s contentions should be disregarded as they should have been made in his appeal brief and not in response to its appeal.[1517] Moreover, it submits that the Trial Chamber properly found that the only reasonable conclusion from the concerted and co-ordinated actions of **Popović** and others is that they entered into an agreement to commit genocide.[1518]

542. As a preliminary matter, the Appeals Chamber will address the Prosecution's submission that **Popović**'s arguments should be disregarded. In the present case, **Popović** was not convicted of conspiracy to commit genocide and the Prosecution argued in its appeal brief that the Appeals Chamber should enter such a conviction on appeal. The Appeals Chamber recalls that, according to paragraph 5 of the Practice Direction on Formal Requirements, if an appellant relies on a particular

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1510 *Đorđević* Appeal Judgement, para. 928; *Gatete* Appeal Judgement, para. 265.
1511 Trial Judgement, paras 1182-1184, 1320-1322. For the elements of the crime of conspiracy to commit genocide, see *Nahimana et al.* Appeal Judgement, para. 894.
1512 Popović's Response Brief, paras 2-9.
1513 Popović's Response Brief, paras 2, 4.
1514 Popović's Response Brief, paras 5, 7.
1515 Popović's Response Brief, para. 8.
1516 Popović's Response Brief, para. 2.
1517 Prosecution's Reply Brief, para. 91.
1518 Prosecution's Reply Brief, paras 91-95.

ground to reverse an acquittal, the respondent may support the acquittal on additional grounds in the respondent's brief. Accordingly, **Popović** has the right to present in his response brief, for the first time, arguments disputing the Trial Chamber's findings pertaining to the charges of conspiracy to commit genocide. The Prosecution's argument is therefore dismissed.

543. Regarding **Popović**'s submissions on whether the 14 July Meeting evidences a conspiracy, the Appeals Chamber notes that in discussing **Popović**'s responsibility for conspiracy to commit genocide, the Trial Chamber concluded that "at least by 13 July 1995, it is evident that **Popović** had entered into an agreement to commit genocide".[1519] The Trial Chamber also referred to its previous examination of evidence which addressed **Popović**'s participation in the plan to murder Bosnian Muslim men, noting that "**Popović** interacted and met with other participants",[1520] including at the 14 July 1995 Meeting.[1521] The Appeals Chamber considers that **Popović** has failed to demonstrate that the topic of this meeting had any significant bearing on the Trial Chamber's finding that an agreement was made to commit genocide, as evidence of the meeting primarily contributed to the overall finding that there was organisation and co-ordination involved in the killing operation. Thus, the Appeals Chamber is of the view that, regardless of the topic of the 14 July 1995 meeting, the Trial Chamber's finding on the formation of an agreement by at least 13 July 1995 would not have been affected.

544. The Appeals Chamber recalls that "a concerted agreement to commit genocide may be inferred from the conduct of the conspirators" and can be based on circumstantial evidence.[1522] Further, the concerted or co-ordinated action of a group of individuals can constitute evidence of an agreement.[1523] In inferring that an agreement to commit genocide existed, the Trial Chamber observed that: (1) "the men were not simply killed upon capture; rather a vast process was put into place";[1524] (2) the "evidence reveals a great deal of synchronization";[1525] (3) the separations, transportation, detentions, and killings were of such a large-scale that they were carried out by many people, and required significant resources;[1526] (4) certain aspects of the operation were often carried out in a strikingly similar manner across various locations;[1527] and (5) the murder operation was being co-ordinated at a high level.[1528] The Trial Chamber then concluded as follows:

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1519 Trial Judgement, para. 1184. See also Trial Judgement, paras 470, 885, 1102, 1104.
1520 Trial Judgement, para. 1166.
1521 Trial Judgement, fn. 3792.
1522 *Nahimana et al.* Appeal Judgement, para. 896. See *Karemera and Ngirumpatse* Appeal Judgement, para. 740; *Nzabonimana* Appeal Judgement, paras 392, 448; *Seromba* Appeal Judgement, para. 221.
1523 *Nahimana et al.* Appeal Judgement, para. 897. See *Nzabonimana* Appeal Judgement, para. 391.
1524 Trial Judgement, para. 882.
1525 Trial Judgement, para. 883.
1526 Trial Judgement, para. 883.
1527 Trial Judgement, para. 884.
1528 Trial Judgement, para. 884.

> In short, the Trial Chamber finds the organised and systematic manner in which the executions were carried out, over a number of days, and the targeting of victims, presupposes the existence of a concerted agreement to destroy the Muslims of Eastern Bosnia. The conduct of members [of] the Bosnian Serb Forces was not merely similar, it was concerted and coordinated. This level of similarity of purpose and conduct could not be achieved but by prior agreement. Consequently, the Trial Chamber finds that the only reasonable inference to be drawn from the evidence is that, at least by 13 July 1995, members of the Bosnian Serb Forces, including members of the VRS Main Staff and Security Organs entered into an agreement and thus a conspiracy to commit genocide.[1529]

545. **Popović**'s contention that the Trial Chamber inferred a conspiracy from the significant co-ordination in the murder operation is misconstrued as, in fact, the Trial Chamber relied on the "significant coordination" for the purpose of finding genocidal intent[1530] and inferred an agreement to commit genocide from other findings.[1531] In any event, **Popović** bases his argument on cross-references to other sections of his appeal brief, which the Appeals Chamber dismisses elsewhere.[1532] Furthermore, the alternate inferences or conclusions put forward by **Popović**, *i.e.* that the uniformity of the operation could also apply to a plan to "merely detain and screen prisoners"[1533] or "could also prove a coordinated effort to neutralize the threat that the prisoners posed to military operation",[1534] are wholly unconvincing. Thus, the Appeals Chamber, in reviewing the findings of the Trial Chamber, finds that **Popović** has failed to show that the Trial Chamber erred in concluding that the only reasonable inference was that there was an agreement to commit genocide.

546. Accordingly, the Appeals Chamber, Judge Niang dissenting, considers that it is appropriate to allow the Prosecution's ground of appeal 6, in part, to find **Popović** responsible for conspiracy to commit genocide (Count 2), and, Judge Pocar dissenting, to enter a conviction against **Popović** in this regard.

### 4. Beara's appeal (Ground 22)

547. **Beara** argues that the Trial Chamber erred in law when holding that conspiracy to commit genocide is a continuing crime in international law.[1535] **Beara** further argues that the Trial Chamber erroneously relied on this holding to find him guilty of conspiracy to commit genocide, in violation of the principle *nullum crimen sine lege* and in the absence of sufficient evidence.[1536] **Beara** contends that acts of commission of genocide should not be additionally used to imply membership

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1529 Trial Judgement, para. 886.
1530 Trial Judgement, para. 882.
1531 See *supra*, para. 544.
1532 See Popović's Response Brief, fn. 16, referring to Popović's Appeal Brief, paras 31-32, 181, 212-217, 266, 274, 279-280, 287, 312-324. See *supra*, para. 445; *infra*, paras 882, 920, 949, 952, 959-961, 1103-1108, 1114-1119, 1123-1133.
1533 Popović's Response Brief, para. 8.
1534 Popović's Response Brief, para. 8.
1535 Beara's Appeal Brief, intro before para. 238, paras 238-243; Beara's Reply Brief, para. 90.
1536 Beara's Appeal Brief, intro before para. 238, paras 238, 243.

in an agreement to commit genocide, *i.e.* the participants of a criminal agreement would be liable for conspiracy while those involved in the genocidal acts would be liable for genocide.[1537]

548. The Prosecution responds that the Trial Chamber correctly held that conspiracy to commit genocide is a continuing crime in international law.[1538] It further argues that the Trial Chamber correctly concluded that an individual can join a conspiracy to commit genocide after the initial agreement is made.[1539]

549. The Appeals Chamber recalls that the Trial Chamber found that "at least by 13 July 1995, members of the Bosnian Serb Forces, including members of the VRS Main Staff and Security Organs entered into an agreement and thus a conspiracy to commit genocide".[1540] In relation to **Beara**, the Trial Chamber noted the evidence of "the coordinated actions and unified framework of those who participated in the operation to murder the able-bodied Bosnian Muslim males from Srebrenica in July 1995, including **Beara**",[1541] found that he entered into an agreement to commit genocide and possessed genocidal intent, and therefore was criminally responsible for conspiracy to commit genocide.[1542] The Trial Chamber based this conclusion on a series of factual findings clearly showing, albeit circumstantially, that by the morning of 12 July 1995, when the plan to murder had been formulated, **Beara** was aware of and implicated in the plan to murder.[1543] These findings included **Popović**'s awareness of the plan to murder and that orders in respect of the operation were given by Mladić, in conjunction with **Beara**'s "responsibilities as Chief of Security for the VRS Main Staff, the subordinate relationship of **Popović** to him and the role played by members of the Security Branch from the beginning" as well as **Beara**'s subsequent actions in playing a key role in orchestrating the murder operation.[1544] Notably, in making these findings, the Trial Chamber observed that there was no direct evidence of **Beara**'s participation in the murder operation prior to 13 July 1995.[1545]

550. Based on the foregoing, the Appeals Chamber can see no basis in the Trial Chamber's findings to support **Beara**'s assumption that the Trial Chamber based his guilt for conspiracy to commit genocide on its holding that "conspiracy is a continuing crime and that, as such, an individual can join a conspiracy after the initial agreement is concluded", *i.e.* that he joined the

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1537 Beara's Reply Brief, para. 90.
1538 Prosecution's Response Brief (Beara), paras 243-250.
1539 Prosecution's Response Brief (Beara), para. 246. See Prosecution's Response Brief (Beara), paras 247-249.
1540 Trial Judgement, para. 886.
1541 Trial Judgement, para. 1322.
1542 Trial Judgement, para. 1322. See also Trial Judgement, paras 1320-1321.
1543 Trial Judgement, para. 1299. See also Trial Judgement, para. 1322, referring to Trial Judgement, paras 1060-1072, 1299-1302.
1544 Trial Judgement, para. 1299.
1545 Trial Judgement, para. 1299.

genocidal agreement subsequent to its formation.[1546] The Appeals Chamber therefore dismisses as irrelevant **Beara**'s arguments pertaining to whether conspiracy to commit genocide is a continuing crime in international law.

551. **Beara** seems to argue that, if the substantive offence of genocide is committed, any liability for conspiracy to commit genocide would be subsumed in the genocide conviction. **Beara** bases this argument on the *Musema* Trial Judgement and the civil law doctrine of merger.[1547] However, the Appeals Chamber recalls that cumulative convictions for conspiracy to commit genocide and genocide are permissible.[1548] Accordingly, **Beara**'s argument is dismissed.

552. **Beara** also presented oral arguments challenging the Trial Chamber's finding that he had genocidal intent – repeating his previous arguments on this issue.[1549] The Appeals Chamber recalls that it has dismissed these submissions on genocidal intent.[1550]

553. Finally, **Beara** contends that there is no direct or reliable evidence of his involvement at the agreement stage, and that the evidence does not support the drawing of an inference that he participated in the agreement as the only reasonable conclusion.[1551] **Beara** contends that the Trial Chamber based its finding of conspiracy to commit genocide solely on his participation in the JCE to Murder, and that evidence of his participation in the murder operation is insufficient to show that he entered into an agreement to commit genocide.[1552] In this respect, the Appeals Chamber recalls that "[w]hile [the] *actus reus* [of conspiracy to commit genocide] can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence. In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators".[1553]

554. The Appeals Chamber also recalls that the Trial Chamber inferred that an agreement to commit genocide existed based on the organised and systematic manner in which the murder plan was carried out and observed various factors in support of this inference.[1554] The Trial Chamber concluded that **Beara** entered into an agreement to commit genocide[1555] based on the evidence and the findings that: (1) he had heated exchanges with Witness Deronjić on where the remaining mass executions should be carried out demonstrating the cold and calculated nature of the plan;[1556]

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1546 Trial Judgement, para. 876. See also Trial Judgement, paras 870-875.
1547 Beara's Reply Brief, para. 90.
1548 See *supra*, para. 537.
1549 Appeal Hearing, AT. 536-539 (6 Dec 2013). See Appeal Hearing, AT. 172-179, 181-186 (3 Dec 2013). See also Appeal Hearing, AT. 256-262 (3 Dec 2013).
1550 See *supra*, paras 487-494.
1551 Beara's Appeal Brief, para. 243; Appeal Hearing, AT. 536, 539 (6 Dec 2013).
1552 Appeal Hearing, AT. 539 (6 Dec 2013).
1553 *Nahimana et al.* Appeal Judgement, para. 896. See *Seromba* Appeal Judgement, para. 221.
1554 See *supra*, para. 544; Trial Judgement, paras 882-886.
1555 Trial Judgement, para. 1322.
1556 Trial Judgement, para. 1060.

(2) key figures of the Security Branch, including **Beara**, met to discuss the murder operation during the 14 July Meeting;[1557] (3) **Beara** was at the centre of operations with **Popović**, and together they were responsible for overall planning and implementation – logistics, locations, personnel;[1558] (4) "[t]he meetings, acts, movements and whereabouts of **Popović**, **Beara** and **Nikolić** from the morning of 14 July onward evince the close cooperation and communication between the officers of the Security Branch as the plan unfolded";[1559] and (5) **Beara** made multiple contributions to the common plan, guiding and directing implementation at all phases.[1560] From these findings of the Trial Chamber and the evidence it reviewed, the Appeals Chamber concludes that a reasonable trier of fact could have inferred that the only reasonable conclusion was that **Beara** entered into an agreement to commit genocide. The Appeals Chamber therefore dismisses **Beara**'s argument.

555. Based on the foregoing, **Beara** has failed to show an error on the part of the Trial Chamber, and his ground of appeal 22 is therefore dismissed. Accordingly, the Appeals Chamber, Judge Niang dissenting, considers that it is appropriate to allow the Prosecution's ground of appeal 6, in part, to find **Beara** responsible for conspiracy to commit genocide (Count 2), and, Judge Pocar dissenting, to enter a conviction against **Beara** in this regard.

#### 5. Conclusion

556. The Appeals Chamber recalls its dismissal of the Prosecution's ground of appeal 7 in which it appeals against the Trial Chamber's acquittal of **Nikolić** for the crime of conspiracy to commit genocide.[1561]

557. The Appeals Chamber, Judge Niang dissenting, has granted the Prosecution's ground of appeal 6, found **Popović** and **Beara** responsible for conspiracy to commit genocide (Count 2), and, Judge Pocar dissenting, has entered new convictions against them in this regard. The Appeals Chamber will determine the impact of these findings, if any, on **Popović**'s and **Beara**'s sentences in the section of this Judgement on sentencing below.

### C. Crimes Against Humanity

#### 1. Introduction

558. The Trial Chamber found beyond reasonable doubt that there was a widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa,

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1557 Trial Judgement, para. 1061.
1558 Trial Judgement, para. 1068.
1559 Trial Judgement, para. 1069.
1560 Trial Judgement, para. 1300. See Trial Judgement, paras 1298-1302.
1561 See *supra*, paras 529-530.

commencing with the issuance of Directive 7. The Trial Chamber found that the attack included the following components: the strangulation of the enclaves through restrictions on humanitarian supplies; the gradual weakening and disabling of UNPROFOR; and a military assault on the enclaves culminating in the removal of thousands of people from Srebrenica and Žepa.[1562] In addition, the Trial Chamber found that the military assault, on its own, constituted a widespread and systematic attack against a civilian population.[1563] The Trial Chamber also found that all crimes alleged in the Indictment had a nexus with the widespread and systematic attack.[1564]

559. The Trial Chamber found that **Beara** and **Nikolić** met the knowledge requirement for crimes against humanity, and held them responsible for, *inter alia*, the crimes against humanity of extermination and persecution through the underlying acts of murder and cruel and inhumane treatment.[1565] The Trial Chamber also found that **Miletić** met the knowledge requirement for crimes against humanity, and held him responsible for, *inter alia*, the crimes against humanity of inhumane acts (forcible transfer) and persecution through the underlying acts of forcible transfer, cruel and inhumane treatment, and terrorising civilians.[1566]

560. **Beara**, **Nikolić**, and **Miletić** present challenges to the Trial Chamber's findings regarding crimes against humanity under Article 5 of the Statute. The Appeals Chamber will examine in turn the arguments pertaining to: the existence of a widespread and systematic attack on a civilian population; the Appellants' *mens rea* for crimes against humanity; extermination as a crime against humanity; and persecution as a crime against humanity.

### 2. Widespread or systematic attack directed against a civilian population

#### (a) Beara's appeal (Grounds 25, 26, and 27)

##### (i) Arguments of the Parties

561. **Beara** submits that the Trial Chamber erred in law and abused its discretion by finding, for the purposes of his conviction for extermination as a crime against humanity, that actions taken against military-aged Bosnian Muslim men in Potočari and the column of Bosnian Muslim men fleeing towards Tuzla formed part of a widespread and systematic attack against a civilian population.[1567] In particular, **Beara** argues that the actions against the men in Potočari and those heading towards Tuzla may have followed the legitimate military goals contained within Directive

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1562 Trial Judgement, para. 760. See Trial Judgement, paras 761-767, 769-777. See also Trial Judgement, para. 768.
1563 Trial Judgement, para. 775.
1564 Trial Judgement, para. 785. See Trial Judgement, paras 778-784.
1565 Trial Judgement, paras 1324-1326, 1331-1333, 1418-1419, 1422-1428. See also Trial Judgement, Disposition, Popović and Beara sections.
1566 Trial Judgement, paras 1719-1722, 1728-1731. See also Trial Judgement, Disposition, Miletić section.

7 and that the persons involved in the actions would have understood that they were aimed at combatants pursuant to legitimate goals stated in Directive 7.[1568] **Beara** argues that the focus of the Trial Chamber's finding with respect to extermination was limited to his participation in the large-scale murders of Bosnian Muslim males from Srebrenica as opposed to the totality of the population of the enclave, and therefore the Trial Chamber was legally required to show that the actions taken against these military-aged men were part of a wider attack against the civilian population of the enclave.[1569]

562. **Beara** further argues that the Trial Chamber gave insufficient weight to evidence of the BSF screening the men in Potočari for combatants or war criminals, which showed a reasonable possibility that the actions against those men were not part of an attack on the civilian population in the enclave.[1570] As for the column of men fleeing towards Tuzla, **Beara** first argues that it could not have been classified as civilian, because: (1) approximately one-third of it was armed and some persons were fully or partially dressed in military clothes, which does not necessarily mean that the remainder were in fact civilians or persons *hors de combat*; and (2) it was organised and led by formal members of an army division.[1571] **Beara** submits in this regard that combatants and persons *hors de combat* are not as a rule included as possible victims of crimes against humanity under Article 5 of the Statute.[1572] **Beara** further argues that the Trial Chamber unreasonably dismissed evidence of efforts to screen the members of the column for civilians.[1573] **Beara** submits that the VRS's actions towards the men in the column were taken as a "military response" to a legitimate military target.[1574] He also submits that extermination as a crime against humanity requires the victims to be civilians or have a predominantly civilian composition.[1575] **Beara** concludes that the Trial Chamber's errors constituted a miscarriage of justice invalidating the judgement.[1576]

563. The Prosecution responds that the Trial Chamber properly found that the crimes committed against the men separated at Potočari and the men captured from the column were part of the widespread and systematic attack against the Bosnian Muslim civilian populations of Srebrenica and Žepa.[1577] The Prosecution argues that Directive 7 contained a plan to attack these civilian

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1567 Beara's Appeal Brief, intros before paras 268, 277, 278, paras 268-270, 274, 276-279, 281.
1568 Beara's Appeal Brief, paras 271, 275-276, 279.
1569 Beara's Appeal Brief, paras 268-269. **Beara** premises the remainder of his arguments under his ground of appeal 25, seemingly in the alternative, on the assumption that the Trial Chamber nevertheless based its conclusions on the existence of a nexus between the general alleged attack on the population of the enclave and the actions taken against the military-aged men. Beara's Appeal Brief, para. 269.
1570 Beara's Appeal Brief, paras 272-273, 276, 279; Beara's Reply Brief, para. 96.
1571 Beara's Appeal Brief, paras 274, 276, 280. See Beara's Reply Brief, para. 97.
1572 Beara's Appeal Brief, para. 274.
1573 Beara's Reply Brief, para. 97.
1574 Beara's Appeal Brief, para. 280.
1575 Beara's Appeal Brief, para. 278.
1576 Beara's Appeal Brief, intros before paras 268, 277, paras 276, 281.
1577 Prosecution's Response Brief (Beara), paras 276-279, 283-288.

populations and that the indiscriminate murder of the Bosnian Muslim men cannot be considered part of a legitimate military operation.[1578] The Prosecution further argues that **Beara** fails to show that the Trial Chamber erred in not finding any "sincere intention on the part of the Bosnian Serb Forces to carry out a legitimate screening operation".[1579] According to the Prosecution, it is irrelevant whether the column itself constituted a civilian population or was a legitimate military target.[1580] The Prosecution finally notes that non-civilians are not excluded as possible victims of crimes against humanity under Article 5 of the Statute, and that the presence within the civilian population of non-civilians does not automatically deprive the population of its civilian character.[1581]

(ii) Analysis

564. The Trial Chamber found that the separation, transportation, detention, and execution of the men and boys who had sought refuge in Potočari were intrinsically linked to and formed part of the widespread and systematic attack against the civilian population. In reaching this conclusion, the Trial Chamber relied on a series of factors, including that: (1) the men and boys were predominantly civilian; (2) they had sought refuge as a direct consequence of the military attack against the enclave; (3) their separation was not based on their perceived military involvement; and (4) there was no genuine effort to screen for or limit the separations to war criminals.[1582] Similarly, the Trial Chamber found that the acts carried out against the men from the column constituted part of the continuing widespread and systematic attack against the civilian population of the Srebrenica enclave.[1583] This conclusion was based on the finding that the column formed and departed from Srebrenica as a consequence of the catastrophic humanitarian situation due to the restrictions of humanitarian aid and the VRS military assault on the enclave.[1584] The Trial Chamber also considered that the BSF vigorously pursued the column members with an ultimate aim of murder, and that they targeted all members of the column indiscriminately despite the evident presence of a large component of civilians amongst them.[1585] The Trial Chamber further took into consideration the immediate temporal and close geographical link between the acts carried out against the men from the column and the events in Srebrenica.[1586]

565. Concerning the screening of the men in Potočari, the Trial Chamber found that the efforts made were so sporadic and void of superior direction or supervision that one could not derive a

1578 Prosecution's Response Brief (Beara), paras 278-279, 281-282, 286-287.
1579 Prosecution's Response Brief (Beara), paras 280 (citing Trial Judgement, fn. 3453), 287.
1580 Prosecution's Response Brief (Beara), paras 281, 288.
1581 Prosecution's Response Brief (Beara), paras 281, 286-287.
1582 Trial Judgement, para. 779.
1583 Trial Judgement, paras 782-783.
1584 Trial Judgement, para. 782.
1585 Trial Judgement, para. 783. See also Trial Judgement, para. 1055.

sincere intention on the part of the BSF to carry out a legitimate screening operation.[1587] In making this finding, the Trial Chamber relied, in part, on the testimony of Prosecution Witness Johannes Rutten that, on 12 July 1995, men of all ages, including boys, were checked.[1588] The Trial Chamber also relied on the testimony of Witness Čelanović that **Beara** asked him on 12 or 13 July 1995 whether he had "any information on the people who had sinned in relation to the Serbian people" by committing crimes against them, and said that it would be good for the witness to ask for identification from the people who were brought into custody.[1589] Beyond disagreeing with the Trial Chamber's assessment and advancing his own alternative assessment of this evidence, **Beara** does not advance any argument to show that the Trial Chamber erred in its assessment of this evidence. Thus, **Beara** has failed to demonstrate any error in the Trial Chamber's consideration of, or conclusions regarding, the screening of the men in Potočari.

566. With regard to **Beara**'s argument that the Trial Chamber unreasonably dismissed evidence of efforts to screen the members of the column, the Appeals Chamber notes the Trial Chamber's finding that there was no evidence that the BSF screened those who were captured or surrendered to determine their perceived involvement in the Bosnian Muslim forces.[1590] In support of this finding, the Trial Chamber noted that all members of the column were targeted indiscriminately and no effort was made to determine whether or not they were civilians.[1591] **Beara** challenges the Trial Chamber's finding by pointing to another finding that "some women, young girls, and about a dozen boys who were younger than 15 years of age, were allowed to leave Sandići Meadow and get on the buses and trucks heading to ABiH-held territory".[1592] However, the Trial Chamber explained in this regard that "[t]he evidence that in a few instances, civilians were allowed to leave from Sandići does not take away the indiscriminate nature of the attack, especially in light of the massive numbers of victims involved".[1593] The Appeals Chamber therefore finds that **Beara** merely disagrees with the Trial Chamber's assessment of the evidence without showing that the Trial Chamber erred.

567. In support of his argument that the VRS's actions towards the men in the column were taken as a "military response" to a legitimate military target, **Beara** refers to parts of the trial record[1594] indicating that the Prosecution did not dispute that the column heading to Tuzla was a "military

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1586 Trial Judgement, para. 783.
1587 Trial Judgement, fn. 3453. See also Trial Judgement, para. 779.
1588 Johannes Rutten, T. 4853-4855 (30 Nov 2006).
1589 Zlatan Čelanović, T. 6628-6631 (31 Jan 2007).
1590 Trial Judgement, para. 783.
1591 Trial Judgement, para. 783.
1592 Trial Judgement, para. 385. See Beara's Reply Brief, para. 97 & fn. 138.
1593 Trial Judgement, fn. 2843.
1594 See Beara's Appeal Brief, para. 280 & fns 407-412.

column" or that some of its members had engaged in combat with the BSF,[1595] and that Witness Butler conceded that the column was a legitimate military target.[1596] The Appeals Chamber is not convinced by **Beara**'s arguments concerning the non-civilian character of the column of men fleeing towards Tuzla. The Appeals Chamber notes that, consistent with the evidence relied on by **Beara**, the Trial Chamber found that the column in question consisted partly of a military and armed component[1597] and that fighting between armed members of the column and VRS members occurred.[1598] Regarding **Beara**'s argument that one-third of the members of the column were armed and some persons were fully or partially dressed in military clothes, the Appeals Chamber notes that it is well-established that "the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".[1599] The Appeals Chamber further recalls that "the civilian population need only be predominantly civilian".[1600] It also follows that even if the column was organised and led by the ABiH, this would not necessarily alter the otherwise civilian nature of the column.[1601]

568. The Trial Chamber found that, once the men from the column were detained and in the custody of the VRS, it was "evident to all" that there was a large component of civilians.[1602] In making this finding, the Trial Chamber relied on contemporaneous video footage of men and boys from the column surrendering into VRS detention on 13 July 1995 near the Sandići Meadow.[1603] All of the individuals shown in the video appeared to be unarmed and wore civilian clothing, with the possible exception of one male person who wore a camouflage T-shirt, which the VRS asked him to remove. The persons shown surrendering into VRS custody included a boy and elderly men.[1604] In view of this evidence, the Appeals Chamber considers that a reasonable trier of fact could have found that "anyone who saw those men coming down from the hills or in the various locations where they were held could have been under no misapprehension [that they were soldiers

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1595 PW-113, T. 3382 (1 Nov 2006).

1596 Richard Butler, T. 20244-20246 (23 Jan 2008). See Beara's Appeal Brief, para. 280. **Beara** also relies on the following evidence: Ex. P00334, "Zvornik Brigade Interim Combat Report, signed by Pandurević, 18 July 1995", para. 1; Ex. P01212a, "Intercept"; Ex. P01248a, "Intercept"; Ex. 1D00374, "UNPROFOR, Srebrenica-Tuzla Update, 17 July 1995", para. 1.

1597 Trial Judgement, paras 270-271, 781.

1598 Trial Judgement, paras 378, 380-381. See Trial Judgement, paras 271, 781.

1599 *Šainović et al.* Appeal Judgement, para. 549; *Mrkšić and Šljivančanin* Appeal Judgement, para. 31, citing *Kordić and Čerkez* Appeal Judgement, para. 50. See also *Blaškić* Appeal Judgement, para. 113.

1600 *Mrkšić and Šljivančanin* Appeal Judgement, para. 25, affirming *Mrkšić et al.* Trial Judgement, para. 442.

1601 See Trial Judgement, paras 268, 270-271, 783.

1602 Trial Judgement, para. 783.

1603 Trial Judgement, fn. 2844, referring to Ex. P02011, "Video by Zoran Petrović, Studio B version", at 12:43-14:48.

1604 Ex. P02011, "Video by Zoran Petrović, Studio B version" at 12:30-14:35, 15:06-15:10. See also Ex. P02047, "Srebrenica Trial Video," at 02:50:00-02:52:56.

only]".[1605] Thus, the Appeals Chamber dismisses **Beara**'s argument that the VRS's actions towards the men in the column were taken as a "military response" to a legitimate military target.

569. With regard to **Beara**'s related submission that extermination as a crime against humanity requires the victims to be civilians or have a predominantly civilian composition, the Appeals Chamber reiterates that "there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be 'civilians'",[1606] or even be predominantly civilians,[1607] provided the acts form part of a widespread or systematic attack directed against a civilian population (the nexus requirement). The population targeted by the attack must be predominantly civilian,[1608] but there is no legal requirement that a certain proportion of the victims of the underlying crime be civilians.[1609] **Beara**'s submission is therefore rejected.

570. With respect to **Beara**'s argument concerning the nexus between the acts of extermination and the widespread and systematic attack on a civilian population, the Appeals Chamber recalls that the nexus requirement is fulfilled by an act which, by its nature or consequences, is objectively part of the attack, coupled with knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.[1610] As noted above, the Trial Chamber found that it was evident to all that the column contained a large component of civilians.[1611] Furthermore, the men detained from the column were killed in one murder operation starting on 12 July 1995 that targeted all the able-bodied Bosnian Muslim men of Srebrenica, including those men separated from their families at Potočari and detained at common locations in Bratunac and Zvornik.[1612] Thus, the Appeals Chamber considers that the evidence cited by **Beara**[1613] in no way establishes that a reasonable trier of fact could not have found that the killing of these men constituted part of the continuing widespread and systematic attack against the civilian population of the Srebrenica enclave.[1614] The Appeals Chamber notes in this regard that **Beara** advances no argument specific to the second prong of the nexus requirement regarding his knowledge.

571. The Appeals Chambers observes that, although the Trial Chamber found that Directive 7 contained both legitimate and illegitimate military goals,[1615] other factual findings belie **Beara**'s

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1605 Trial Judgement, para. 783.
1606 *Mrkšić and Šljivančanin* Appeal Judgement, para. 32.
1607 See *Mrkšić and Šljivančanin* Appeal Judgement, paras 36-37.
1608 See *supra*, para. 567.
1609 See *Martić* Appeal Judgement, para. 307; *Kunarac et al.* Appeal Judgement, paras 85, 91.
1610 *Mrkšić and Šljivančanin* Appeal Judgement, para. 41; *Kunarac et al.* Appeal Judgement, para. 99; *Tadić* Appeal Judgement, paras 248, 251, 271. For the *mens rea* of crimes against humanity, see *Kunarac et al.* Appeal Judgement, paras 102-103.
1611 Trial Judgement, para. 783.
1612 Trial Judgement, paras 1050-1051, 1055-1056, 1059, 1061, 1064.
1613 See Beara's Appeal Brief, para. 280 & fns 407-412.
1614 Trial Judgement, para. 783.
1615 Trial Judgement, paras 199, 762. See Beara's Appeal Brief, paras 271, 275.

argument that the actions against the men in Potočari and those in the column may have followed the legitimate military goals contained therein. In this regard, the Appeals Chamber recalls the Trial Chamber's findings on the indiscriminate nature of the actions taken against the column members and on the fact that the separation of men and boys, who had sought refuge in Potočari, was not based on their perceived military involvement or a genuine effort to screen for war criminals.[1616] The Appeals Chamber further recalls that the men and boys detained and separated in Potočari and those from the column were about to be sent to their death.[1617] The Appeals Chamber considers that the execution of detained combatants and civilians cannot be in pursuit of a legitimate military goal.[1618] Accordingly, the Appeals Chamber finds that **Beara** has failed to demonstrate that the Trial Chamber erred.

572. The Appeals Chamber therefore dismisses **Beara**'s grounds of appeal 25 through 27.

(b) Miletić's appeal

(i) Alleged errors regarding Directive 7 and attacks on Srebrenica and Žepa (Ground 3 in part)

573. The Trial Chamber found that Directive 7, drafted by **Miletić**, was issued by Radovan Karadžić in March 1995 and finalised no later than 17 March 1995 when it was forwarded to the Drina Corps.[1619] Directive 7 tasked the Drina Corps with creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[1620] The Trial Chamber found that in May and June 1995 the VRS sometimes randomly targeted the civilian populations of Srebrenica and Žepa, incurring casualties.[1621] Further, on 3 June 1995 the VRS took by force the DutchBat Observation Post ("OP") Echo at Zeleni Jadar, located in the south of the Srebrenica enclave.[1622] On 2 July 1995, the VRS issued the *Krivaja*-95 orders, consisting of one preparatory order and one combat order, both of which referred to Directive 7.[1623] The Trial Chamber found that these orders marked the commencement of the *Krivaja*-95 military operation on the enclaves, which included the VRS's military offensive on Srebrenica starting at approximately 3:00 a.m. on 6 July 1995.[1624] On 9 July 1995, Karadžić issued an order extending the

1616 See *supra*, para. 564.
1617 See *supra*, para. 564.
1618 See Common Article 3 of the Geneva Conventions of 12 August 1949 ("Common Article 3"); Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 89, pp. 311-314.
1619 Trial Judgement, paras 199-200, 1650.
1620 Trial Judgement, paras 199, 762; Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 10.
1621 Trial Judgement, para. 768.
1622 Trial Judgement, paras 208, 768.
1623 Trial Judgement, paras 244-245, 769.
1624 Trial Judgement, paras 249, 769.

offensive to include the capture of Srebrenica town ("Karadžić's 9 July Order").[1625] The VRS took Srebrenica town on 11 July 1995.[1626] The Trial Chamber found that the *Krivaja*-95 military operation, on its own, constituted a widespread and systematic attack against a civilian population, and further that the military operation formed part of the broader attack initiated against the civilian populations of Srebrenica and Žepa by Directive 7.[1627]

574. Under his ground of appeal 3, **Miletić** argues that the Trial Chamber erred in law and fact in linking Directive 7 to the attacks on the Srebrenica and Žepa enclaves. In his sub-ground of appeal 3.1, he alleges errors with regard to the timing of the widespread and systematic attack against the civilian population of the enclaves. In sub-ground of appeal 3.3, he challenges the link between Directive 7 and the *Krivaja*-95 military operation of July 1995. In sub-ground of appeal 3.4, he challenges the link between Directive 7 and the attack against the civilian population of the enclaves. **Miletić** submits that these errors invalidate his sentence.[1628] The Prosecution submits that **Miletić**'s arguments should be dismissed. The Appeals Chamber will address in turn each of these sub-grounds of appeal.

a. Alleged error in finding that the attack upon the civilian population commenced with Directive 7 (Sub-ground 3.1)

i. Arguments of the Parties

575. **Miletić** submits that the Trial Chamber erred in fact by holding that Directive 7 constituted the "launch" of an attack on the civilian population in the enclaves.[1629] He argues that an attack within the meaning of Article 5 of the Statute requires a sequence of acts of violence or mistreatment and, since the Trial Chamber did not establish that such acts began with Directive 7, it cannot be considered as constituting the launch of such an attack.[1630] He also submits that the Trial Chamber erred in law by not determining specifically and beyond reasonable doubt which actions were encompassed in the attack on the civilian population.[1631] Finally, **Miletić** notes that the acts of an accused constitute a crime against humanity only if they are part of a widespread and systematic

1625 Trial Judgement, paras 252, 769.
1626 Trial Judgement, paras 260, 769.
1627 Trial Judgement, para. 775.
1628 Miletić's Appeal Brief, paras 79-81 (referring to Trial Judgement, paras 1706, 1708-1715); Miletić's Reply Brief, paras 29, 39, 41, 47.
1629 Miletić's Appeal Brief, paras 80, 82, 88; Miletić's Reply Brief, paras 26, 29.
1630 Miletić's Appeal Brief, paras 82-85, 88; Miletić's Reply Brief, paras 26, 28-29. In this regard, **Miletić** argues that as Directive 7 was issued on 8 March 1995 it could not launch the military attack on Srebrenica in July 1995. Miletić's Appeal Brief, para. 85. He further argues that the evidence does not show any increase in violence and mistreatment by the BSF after Directive 7 was issued. Miletić's Appeal Brief, paras 86-88; Miletić's Reply Brief, para. 27; Appeal Hearing, AT. 425-426 (5 Dec 2013).
1631 Miletić's Appeal Brief, paras 79, 89; Miletić's Reply Brief, para. 29; Appeal Hearing, AT. 425-426 (5 Dec 2013).

attack, and submits that the Trial Chamber erred in law by not establishing when the attack on the civilian population became widespread and systematic.[1632]

576. The Prosecution responds that the Trial Chamber "reasonably found [that] the attack against the Bosnian Muslim civilian population of Srebrenica and Žepa *commenced* with Directive 7 and *culminated* with the physical removal of thousands of Bosnian Muslims from the enclaves",[1633] and that **Miletić** fails to show any error in the Trial Chamber's findings.[1634] The Prosecution further argues that it is irrelevant for **Miletić**'s conviction whether the attack on the civilian population began with the issuance of Directive 7.[1635]

ii. Analysis

577. The Appeals Chamber recalls that in order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population.[1636] The Trial Chamber explained the actions it considered to form part of the attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa ("Attack").[1637] The Trial Chamber also provided a detailed factual narrative of those actions.[1638] The Appeals Chamber therefore considers that **Miletić** has failed to demonstrate that the Trial Chamber erred in law by not determining specifically which actions were encompassed in the Attack.

578. **Miletić**'s factual argument regarding the "launch" of the Attack is premised on the understanding that the Trial Chamber held that the Attack itself came into existence when Directive 7 was issued. The Appeals Chamber considers that the Trial Chamber's findings regarding the relationship between Directive 7 and the Attack are not entirely clear. The Trial Chamber considered the issuance of Directive 7 to be the commencement of the Attack, characterised as widespread and systematic, but did not list Directive 7 as a component of the Attack.[1639] Later in the Trial Judgement, when recalling previous findings, the Trial Chamber listed Directive 7 as a constituent act of the Attack.[1640] Other findings indicate that Directive 7 contained the plan or policy of the Attack, and spelled out the means through which the Attack would be carried out.[1641] Furthermore, the Trial Chamber did not rely on Directive 7 in its explanation of why it considered

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1632 Miletić's Reply Brief, paras 26, 29.
1633 Prosecution's Response Brief (Miletić), para. 39 (emphasis in original); Appeal Hearing, AT. 463 (5 Dec 2013).
1634 Prosecution's Response Brief (Miletić), paras 40-42.
1635 Appeal Hearing, AT. 463-464 (5 Dec 2013).
1636 *Kunarac et al.* Appeal Judgement, para. 85.
1637 Trial Judgement, para. 760. For the purposes of **Miletić**'s sub-ground of appeal 3.1, the Appeals Chamber will use the term "Attack" to designate the attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa, excluding its qualification as "widespread and systematic".
1638 Trial Judgement, paras 766-784, with cross-references to other sections of the Trial Judgement.
1639 Trial Judgement, para. 760.
1640 Trial Judgement, para. 1085.

the Attack to be widespread and systematic.[1642] The Appeals Chamber understands the totality of the relevant findings to mean that the Trial Chamber considered Directive 7 to mark the commencement of the Attack in the sense that Directive 7 contained the plan or policy that would be implemented through other means, and that the Attack only became widespread and systematic subsequently.[1643] For the foregoing reasons, the Appeals Chamber dismisses **Miletić**'s allegations of a factual error.

579. Concerning **Miletić**'s argument that the Trial Chamber erred by not establishing when the Attack became widespread and systematic, the Appeals Chamber considers that it is unclear from **Miletić**'s submissions why this would constitute an error of law. The Appeals Chamber also observes that, while the Trial Chamber may not have identified a specific date at which point in time the Attack became widespread and systematic, it included in its discussion of the various components of the widespread and systematic attack the intentional shelling and sniping of the civilian populations in the enclaves from at least 25 May 1995.[1644] The Appeals Chamber therefore dismisses **Miletić**'s argument.

580. Accordingly, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 3.1.

b. Alleged error in finding that the military operation resulted from Directive 7 (Sub-ground 3.3)

i. Arguments of the Parties

581. **Miletić** submits that the Trial Chamber erred in fact by linking the *Krivaja*-95 military operation to Directive 7.[1645] **Miletić** argues that the Trial Chamber failed to properly examine Directives 7 and 7/1 and other relevant evidence establishing that there was no such link.[1646] In this regard, **Miletić** first submits that the Trial Chamber linked the *Krivaja*-95 military operation to Directive 7 based only on the *Krivaja*-95 orders.[1647] He also argues that the task assigned by Directive 7 of destroying the Bosnian Muslim forces within the enclaves could not be executed as it was contingent on the withdrawal of UNPROFOR, which never occurred.[1648] He contends that the

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1641 Trial Judgement, paras 762, 764, 766-767.
1642 See Trial Judgement, para. 760.
1643 **Miletić** does not present, within the present sub-ground of appeal, any discernible argument against the finding that Directive 7 contained the plan or policy of the Attack. See Miletić's Appeal Brief, para. 84.
1644 Trial Judgement, para. 768. See also Trial Judgement, paras 760-767, 769-785.
1645 Miletić's Appeal Brief, paras 80, 100-101, 112; Miletić's Reply Brief, para. 39; Appeal Hearing, AT. 424-425, 430 (5 Dec 2013). **Miletić** does not indicate the precise scope of the military attack to which he refers, but the Appeals Chamber understands it to concern the *Krivaja*-95 military operation as defined by the Trial Chamber. See *supra*, para. 573.
1646 Miletić's Appeal Brief, para. 101; Miletić's Reply Brief, para. 36; Appeal Hearing, AT. 429 (5 Dec 2013).
1647 Miletić's Appeal Brief, para. 101, referring to, *inter alia*, Trial Judgement, paras 244, 769.
1648 Miletić's Appeal Brief, paras 102-103.

task of separating the enclaves did not originate in Directive 7, as it appeared in other Drina Corps documents both before and after Directive 7.[1649] He further submits that Directive 7 is limited to the separation of the enclaves without envisaging their capture or disappearance.[1650] He argues that the tasks assigned to the Drina Corps in the *Krivaja*-95 orders of reducing the Srebrenica enclave to its urban core and creating the conditions for its elimination exceed the scope of Directive 7. He also argues that Directive 7 and the *Krivaja*-95 combat order use the expression "*Krivaja*-95" to designate different military operations.[1651] He submits that if the *Krivaja*-95 combat order was based on Directive 7 then it ought to have included the text of Directive 7 verbatim.[1652] Finally, he argues that the Trial Chamber neglected to consider evidence showing that the *Krivaja*-95 military operation was instead the consequence of the situation on the ground.[1653] **Miletić** submits that the Trial Chamber thus also erred in law by failing to analyse the evidence properly.[1654]

582. The Prosecution responds that the Trial Chamber reasonably found that the *Krivaja*-95 military operation constituted a step in Directive 7's plan to forcibly remove the Bosnian Muslim population.[1655]

ii. Analysis

583. The Appeals Chamber recalls the Trial Chamber's finding that Directive 7 specifically addressed Srebrenica and Žepa and that a similar strategy was implemented against both enclaves after the issuance of Directive 7.[1656] Finally, it found that the *Krivaja*-95 military operation formed part of the broader attack initiated against the civilian populations of Srebrenica and Žepa by Directive 7.[1657] It is clear from these findings as well as from the factual findings on which they rely[1658] that there is no foundation for **Miletić**'s assertion that the Trial Chamber linked the *Krivaja*-95 military operation to Directive 7 based only on the *Krivaja*-95 orders. The link was made on a much broader basis, including the plain text of Directive 7 and the similarity of the strategies against the enclaves.[1659]

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1649 Miletić's Appeal Brief, paras 102-103; Appeal Hearing, AT. 429 (5 Dec 2013).
1650 Miletić's Appeal Brief, paras 104, 107; Miletić's Reply Brief, para. 35; Appeal Hearing, AT. 429 (5 Dec 2013).
1651 Miletić's Appeal Brief, para. 105.
1652 Miletić's Appeal Brief, para. 106.
1653 Miletić's Appeal Brief, paras 101, 107-111; Miletić's Reply Brief, para. 38; Appeal Hearing, AT. 429-431 (5 Dec 2013).
1654 Miletić's Appeal Brief, paras 79, 111-112; Miletić's Reply Brief, para. 39.
1655 Prosecution's Response Brief (Miletić), paras 37-38, 50-58; Appeal Hearing, AT. 460-463 (5 Dec 2013).
1656 Trial Judgement, para. 773, referring to Trial Judgement, para. 199, Chapter III, Sections C.5 ("Restrictions of Convoys and Humanitarian Situation in the Enclaves"), D ("Military Attack on Srebrenica – *Krivaja*-95"), K ("Žepa").
1657 Trial Judgement, para. 775, referring to Trial Judgement, Chapter III, Sections D.1-3 (events regarding the military attack on Srebrenica from 28 June 1995 up until 11 July 1995), K.1-6 (events in Žepa in 1995 up until 25 July 1995).
1658 See *supra*, notes 1656-1657.
1659 See *supra*, para. 573.

584. Regarding **Miletić**'s formalistic attempt to separate the *Krivaja*-95 military operation from Directive 7's objective of destroying the Bosnian Muslim forces within the enclaves on the basis that UNPROFOR never withdrew as envisaged in Directive 7, the Appeals Chamber recalls the Trial Chamber's finding that "[d]irectives were general documents setting up objectives to be achieved, in contrast to orders that would specify concrete tasks".[1660] The Appeals Chamber considers that **Miletić** has failed to show that UNPROFOR's withdrawal was a necessary precondition of Directive 7 so as to prevent the realisation of the objective of destroying the Bosnian Muslim forces within the enclaves should the opportunity have presented itself.[1661] He has therefore not shown that the Trial Chamber erred.

585. In support of his argument that the task of separating the enclaves did not originate in Directive 7, **Miletić** points to Drina Corps documents, dated prior to and after Directive 7, which contain the task of isolating the Srebrenica enclave.[1662] He also points to testimony of Defence expert Witness Slobodan Kosovac indicating that the task of separating the enclaves of Srebrenica and Žepa had been ongoing for two years prior to the *Krivaja*-95 combat order.[1663] However, **Miletić** does not demonstrate that the Trial Chamber erred in not relying on this evidence for the purpose he suggests. In particular, the Appeals Chamber is not convinced that the presence in these other Drina Corps documents of a task similar to the objective of separating the enclaves laid down in Directive 7 means that the *Krivaja*-95 military operation was not linked to Directive 7.

586. The Appeals Chamber further observes that the arguments addressed in the two preceding paragraphs focus on the objectives contained in Directive 7 to separate the enclaves and destroy the Muslim forces within the enclaves, whereas the Trial Chamber's analysis focused on the separate objective in Directive 7 of creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa"[1664] and the objective in the *Krivaja*-95 combat order "to create conditions for the elimination of the enclaves".[1665] The Trial Chamber found that the latter objective referred to the former.[1666] **Miletić** asserts that the latter exceeds the former, but in support he only refers to evidence relating to the goal of separating the enclaves.[1667] As such, the evidence is irrelevant and his assertion is unsubstantiated. It is correct that

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1660 Trial Judgement, para. 115.

1661 See Trial Judgement, fn. 585, referring to, *inter alia*, Ex. P04535, Footage of St. Peter's Day on 12 July 1995, p. 7 of the transcript containing a speech by Živanović in which the attack on OP Echo is discussed in the context of preparation on the attack on Srebrenica. It was "tested what the expulsion of UNPROFOR with weapons looks like".

1662 Miletić's Appeal Brief, para. 103 & fns 145-146 and references cited therein.

1663 Miletić's Appeal Brief, para. 103 & fn. 144, referring to Slobodan Kosovac, T(F). 30113 (14 Jan 2009).

1664 Trial Judgement, paras 762-763.

1665 Trial Judgement, para. 769. See *supra*, para. 573. See also Ex. P00107, "Drina Corps Command Order 04/156-2, Operations Order No. 1 Krivaja-95, 2 July 1995", p. 3.

1666 Trial Judgement, paras 244-245, 769, 1306, 1994.

1667 See Miletić's Appeal Brief, para. 105 & fn. 151, referring to Milomir Savčić, T(F). 15319 (13 Sept 2007), Ex. 5D00759, "Report on Functioning of the VRS, by S. Kosovac, 2008", para. 156.

Directive 7 and the *Krivaja*-95 combat order use the expression "*Krivaja*-95" to designate different military operations.[1668] However, this is not a convincing challenge to the Trial Chamber's findings linking the *Krivaja*-95 military operation to Directive 7, especially considering that these findings are based on the similar content in both the *Krivaja*-95 combat order and Directive 7 regarding the fate of the enclaves, as well as the combat order's explicit reference to Directive 7.[1669]

587. **Miletić** bases his next argument – that if the *Krivaja*-95 combat order was based on Directive 7 then it ought to have included the text of Directive 7 verbatim – on certain evidence,[1670] without showing that the Trial Chamber erred in not relying on that evidence for the purpose he suggests. The Appeals Chamber observes in this regard that evidence concerning what ought to have happened in theory is of limited value for establishing what actually happened in practice. **Miletić**'s argument is dismissed.

588. As for **Miletić**'s submission that Directive 7 is limited to the separation of the enclaves without envisaging their capture or disappearance, the Appeals Chamber observes that while Directive 7 does not include the objective to capture Srebrenica or Žepa,[1671] it does include the objectives of creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa" and of "breaking up and destroying the Muslim forces in these enclaves and definitively liberating the Drina valley region".[1672] The Appeals Chamber therefore dismisses **Miletić**'s submission.

589. Regarding **Miletić**'s argument that the *Krivaja*-95 military operation was based on the situation on the ground rather than on Directive 7, the Appeals Chamber considers that, although **Miletić** points to evidence strongly indicating that the situation on the ground was a factor affecting the decision to attack the enclaves,[1673] he has failed to demonstrate that this evidence excludes the possibility that the *Krivaja*-95 military operation was *also* linked to Directive 7. In this regard, the Appeals Chamber notes that the Trial Chamber considered that the *Krivaja*-95 orders explicitly invoked Directive 7.[1674] For this reason, the Appeals Chamber dismisses **Miletić**'s argument that

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1668 Compare Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", pp. 10-12, with Ex. P00107, "Drina Corps Command Order 04/156-2, Operations Order No. 1 Krivaja-95, 2 July 1995", pp. 1, 3.

1669 Trial Judgement, paras 245, 769, 1306, 1994.

1670 See Miletić's Appeal Brief, para. 106 & fns 154-155, referring to Mirko Trivić, T(F). 11920 (22 May 2007), Milomir Savčić, T(F). 15318-15319 (13 Sept 2007), Ex. P00203, "Drina Corps Order for defence and active combat operations, Operative No. 7, signed by Milenko Živanović, 20 March 1995", pp. 5-6, para. 2.

1671 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995"; Trial Judgement, para. 769. See also Trial Judgement, para. 245.

1672 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", pp. 10-11.

1673 Miletić's Appeal Brief, paras 101, 107-111, referring, in particular, to Ex. 5DP00106, "Drina Corps Order No. 01/04-156-1 Preparatory Order No. 1, type-signed Milenko Živanović, 2 July 1995", para. 2, Ex. P00107, "Drina Corps Command Order 04/156-2, Operations Order No. 1 Krivaja-95, 2 July 1995", para. 2. See also Trial Judgement, paras 666, 668; Ex. P00114, "Order from the Drina Corps Command regarding Žepa, signed by Krstić, 13 July 1995", p. 1.

1674 Trial Judgement, para. 769. See also Trial Judgement, para. 244.

the *Krivaja*-95 military operation was not linked to Directive 7 but was instead the consequence of the situation on the ground as well as his contention that the Trial Chamber erred by neglecting to consider certain evidence in this regard.[1675]

590. The Appeals Chamber therefore dismisses **Miletić**'s sub-ground of appeal 3.3.

c. Alleged error in linking the attack on the civilian population to Directive 7 (Sub-ground 3.4)

i. Arguments of the Parties

591. **Miletić** submits that the Trial Chamber erred in fact by finding that the attack on the civilian population in the Srebrenica and Žepa enclaves fell under Directive 7.[1676] He further submits that the Trial Chamber erred in law by failing to properly analyse all the relevant evidence, and in particular Karadžić's 9 July Order.[1677] Among the components of this attack listed by the Trial Chamber, **Miletić** submits that the restrictions on humanitarian aid and on UNPROFOR convoys are unrelated to Directive 7, and could not be part of the attack, considering the situation in the enclaves.[1678] **Miletić** adds that the Trial Chamber erred in law by establishing an artificial link between Directive 7 and the attack and by failing to identify the incidents that would have targeted the civilian population prior to the *Krivaja*-95 military operation.[1679]

592. With regard to the VRS military operations against the enclaves prior to the *Krivaja*-95 military operation, **Miletić** argues that they were not a consequence of Directive 7 but rather a response to North Atlantic Treaty Organisation ("NATO") or ABiH actions.[1680] **Miletić** further argues that these VRS operations did not amount to a widespread and systematic attack on a civilian population, because the Trial Chamber: (1) found that they only occasionally targeted civilians and incurred civilian casualties; (2) did not identify any such incidents prior to the *Krivaja*-95 military operation; and (3) did not have enough evidence to conclude that the operations had civilian targets,

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1675 **Miletić** also argues that the Trial Chamber did not take into consideration Exhibit 5D01374, "RS MUP Public Security Centre Zvornik Report on the Condition of the Factory at Zeleni Jadar, signed by Dragomir Vasić, 12 June 1995". Miletić's Appeal Brief, para. 109. The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning. See *supra*, para. 306. The Appeals Chamber is not convinced that Exhibit 5D01374 is clearly relevant to the link between the military operation on the enclaves and Directive 7.

1676 Miletić's Appeal Brief, paras 80, 113-114, 127; Appeal Hearing, AT. 424-425 (5 Dec 2013).

1677 Miletić's Appeal Brief, paras 79, 113, 123-124, 127 (referring to, *inter alia*, Exs. P00033, P00849, "VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995"); Miletić's Reply Brief, para. 41.

1678 Miletić's Appeal Brief, paras 113, 115.

1679 Miletić's Reply Brief, paras 40, 47. See Miletić's Reply Brief, para. 37.

1680 Miletić's Appeal Brief, paras 116, 119-120; Miletić's Reply Brief, para. 45; Appeal Hearing, AT. 426-427 (5 Dec 2013).

considering that the ABiH used several buildings in Srebrenica for military purposes.[1681] **Miletić** further argues that the Trial Chamber seemingly included among the consequences of Directive 7 and in the attack on the civilian population the VRS's operation in Zeleni Jadar, thereby overlooking its legitimate military purpose and execution.[1682] Regarding the *Krivaja*-95 military operation, **Miletić** argues that it did not derive from Directive 7, and only began to target the civilian population of the enclaves after Karadžić's 9 July Order.[1683]

593. The Prosecution submits that the Trial Chamber correctly found that the BSF conducted a widespread and systematic attack against the Bosnian Muslim civilian population of the enclaves under Directive 7 and that **Miletić** fails to show that the attack only began with Karadžić's 9 July Order.[1684] The Prosecution further argues that the Trial Chamber reasonably found that the restrictions on humanitarian aid and on UNPROFOR convoys, the sniping and shelling of the enclaves, and the operation in Zeleni Jadar were part of the attack against the civilian population.[1685]

ii. Analysis

594. With regard to **Miletić**'s submission that the restrictions on humanitarian aid and on UNPROFOR convoys are unrelated to Directive 7, the Appeals Chamber addresses and dismisses this argument below.[1686] **Miletić**'s further submission that "taking into account the situation in the enclaves"[1687] these restrictions could not be part of the attack is a mere assertion unsupported by any references to the trial record and, accordingly, is dismissed.

595. The Appeals Chamber considers **Miletić**'s argument that the VRS military operations against the enclaves prior to the *Krivaja*-95 military operation were not a consequence of Directive 7 but rather a response to NATO or ABiH actions to be premised on a false alternative, as one cause does not exclude the other. **Miletić**'s submissions in this regard are therefore dismissed.

596. With regard to **Miletić**'s detailed submissions as to why the VRS military operations prior to the *Krivaja*-95 military operation would not amount to a widespread and systematic attack on a civilian population, the Appeals Chamber observes that the Trial Chamber did not rely on the VRS military operations prior to the *Krivaja*-95 military operation in isolation, but considered them in its

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1681 Miletić's Appeal Brief, paras 116-119; Miletić's Reply Brief, paras 42-44; Appeal Hearing, AT. 427-428 (5 Dec 2013).
1682 Miletić's Appeal Brief, paras 120-122; Miletić's Reply Brief, para. 46.
1683 Miletić's Appeal Brief, paras 123-126; Miletić's Reply Brief, paras 37-38, 41; Appeal Hearing, AT. 430 (5 Dec 2013).
1684 Prosecution's Response Brief (Miletić), paras 59-60, 71-73.
1685 Prosecution's Response Brief (Miletić), paras 61-70.
1686 See *infra*, paras 666-673.
1687 Miletić's Appeal Brief, para. 115.

general analysis of the different components of the widespread and systematic attack on the civilian populations of Srebrenica and Žepa.[1688] For this reason, **Miletić** has failed to demonstrate any error in the Trial Chamber's reliance on its finding that "before *Krivaja-95*, sometimes the civilian populations of Srebrenica and Žepa were randomly targeted and incurred casualties".[1689] The Trial Chamber based this finding on, *inter alia*, the evidence of several witnesses on the ground as well as reports that on 10 June 1995 a civilian was wounded by VRS sniper fire and that one woman was killed by a sniper bullet on 2 July 1995.[1690] **Miletić** is therefore incorrect in asserting that the Trial Chamber did not identify any incident in which the civilian population in the enclaves was targeted and suffered casualties prior to the *Krivaja*-95 military operation, which became a full-fledged military offensive on Srebrenica on 6 July 1995.[1691]

597. The Trial Chamber described certain military operations on the enclaves prior to the *Krivaja*-95 military operation, at times concluding that the BSF targeted civilians or civilian objects or fired indiscriminately on the enclaves.[1692] In reaching these conclusions, the Trial Chamber did not undertake a detailed analysis under the relevant laws of war. However, in light of the Appeals Chamber's observations in the preceding paragraph and its understanding of the Trial Chamber's analysis as to when the attack on the civilian population became widespread and systematic,[1693] the Appeals Chamber is not convinced that the absence of such analysis – for the purpose of determining that there was a widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa – amounts to an error in the present case, or would undermine the Trial Chamber's finding regarding the existence of such an attack.

598. With regard to the operation in Zeleni Jadar on 3 June 1995, the Appeals Chamber notes that the Trial Chamber briefly mentioned it in a factual finding within its analysis pertaining to the existence of a widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa.[1694] The Appeals Chamber is not persuaded that the operation in Zeleni Jadar had any determinative weight in the Trial Chamber's conclusion on this matter. In particular, the Trial Chamber focused on the VRS taking the DutchBat OP Echo at Zeleni Jadar rather than on the operation in Zeleni Jadar itself.[1695] The Appeals Chamber is further not persuaded

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1688 Trial Judgement, para. 768. See also Trial Judgement, paras 760-785.
1689 Trial Judgement, para. 768.
1690 Trial Judgement, para. 768, referring to, *inter alia*, Trial Judgement, para. 210. See Trial Judgement, fn. 596.
1691 See *supra*, para. 573.
1692 See Trial Judgement, para. 768, referring to Trial Judgement, paras 207 ("The Srebrenica enclave was shelled by the Bratunac Brigade on orders from the Drina Corps. Four shells were fired 'on the town of Srebrenica'. The Trial Chamber finds that this VRS attack constituted an indiscriminate attack on civilians.") (internal references omitted), 208, 210 ("There is evidence that sometimes the civilian population was also randomly targeted and incurred casualties."), 666.
1693 See *supra*, para. 578.
1694 Trial Judgement, para. 768.
1695 Trial Judgement, para. 768 ("Furthermore, while not targeted directly at the population of the Srebrenica enclave, the Trial Chamber notes that DutchBat, the UN force tasked to protect the civilian population of Srebrenica,

that the presence of military objectives behind the operation in Zeleni Jadar precludes the Trial Chamber from considering it as being an aspect of the widespread and systematic attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa.[1696] The Appeals Chamber further observes that the Trial Chamber's finding that "the disabling of the OPs, while illegal, could potentially be considered to have been reasonably necessary for the legitimate military aim of the operation" was made in the context of assessing whether **Pandurević** intended to carry out the common purpose of the JCE to Forcibly Remove.[1697] As such, this finding does not contradict the analysis of the Trial Chamber.

599. Finally, in light of its dismissal of **Miletić**'s other arguments under his ground of appeal 3,[1698] the Appeals Chamber is not persuaded by his argument that it was only with Karadžić's 9 July Order that the civilian population of the enclaves became the target of the *Krivaja*-95 military operation. The Trial Chamber found that Karadžić's 9 July Order authorised the VRS to capture Srebrenica town.[1699] **Miletić** does not point to any evidence indicating that it made the civilian population of the enclave the target of the *Krivaja*-95 military operation. Nor is it apparent on the face of the order.[1700] By contrast, Directive 7 tasked the Drina Corps with creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[1701] It is irrelevant that the crimes later committed against the population of the enclaves would not have been possible if the VRS had not captured the enclaves. **Miletić** has therefore failed to demonstrate that the Trial Chamber committed any error in this regard.

600. In light of the foregoing, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in: (1) linking the attack on the civilian population in the Srebrenica and Žepa enclaves to Directive 7; (2) failing to identify the incidents that would have targeted the civilian population prior to the *Krivaja*-95 military operation; and (3) failing to properly analyse all the relevant evidence. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 3.4.

d. Conclusion

601. The Appeals Chamber dismisses these aspects of **Miletić**'s ground of appeal 3.

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was attacked on 3 June 1995, when the VRS took over by force the DutchBat OP Echo at Zeleni Jadar, following orders from Živanović.").

1696 The Appeals Chamber notes the statement of Major General Milenko Živanović that "at the end of May, we started to carry out preparations and then took Zeleni Jadar and tested what the expulsion of UNPROFOR with weapons looks like". Ex. P04535, "Footage of St. Peter's Day on 12 July 1995", p. 7. See Trial Judgement, para. 136, fn. 585.

1697 Trial Judgement, para. 2000.

1698 See *supra*, paras 573-590; *infra*, paras 1513-1527.

1699 Trial Judgement, paras 252, 1666.

(ii) Alleged errors in relation to distinguishing legitimate military action from an attack on the civilian population (Ground 4)

602. **Miletić** submits that the Trial Chamber erred in law and fact by holding that all of the VRS military activity around the Srebrenica and Žepa enclaves in July 1995 constituted an attack on the civilian population, without making any distinction between a legitimate military action and a criminal attack on the civilian population.[1702] He submits that this distinction was of primary importance because it was only with Karadžić's 9 July Order that Srebrenica became the target of the attack on the civilian population.[1703] He argues that the Trial Chamber failed to establish whether and when an initially legal military operation subsequently degenerated into an attack on a civilian population.[1704] **Miletić** submits that it was necessary for the Trial Chamber to make this distinction in order to link him to criminal acts and to properly establish his individual criminal liability, including his knowledge of the attack on the civilian population.[1705] **Miletić** concludes that the error invalidates his sentence.[1706]

603. The Prosecution responds that the Trial Chamber distinguished between legitimate and unlawful actions and properly found that the former did not impact upon the unlawful nature of the attack on the Bosnian Muslim population in the enclaves.[1707] The Prosecution further argues that the Trial Chamber was not required to indicate when the attack became unlawful.[1708] Finally, the Prosecution argues that **Miletić** fails to show any error pertaining to his responsibility.[1709]

604. The Appeals Chamber considers that **Miletić** distorts the Trial Chamber's holdings by claiming that it did "not mak[e] a distinction between a legitimate military action and an attack on the civilian population" and held "that all of the military activity around the enclaves constituted an attack on the civilian population".[1710] The Trial Chamber found that there was a dual purpose in the *Krivaja-95* military operation, with legitimate military aims being one of its purposes.[1711] Furthermore, the Trial Chamber found that it was not necessary to speculate as to what military action on the part of the VRS might have been justified in relation to the enclaves in fulfilment of these legitimate military aims, considering the attack's "full-scale, indiscriminate and

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1700 Exs. P00033, P00849, "VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995".
1701 Trial Judgement, paras 199, 762; Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 10.
1702 Miletić's Appeal Brief, paras 128, 130-132; Miletić's Reply Brief, para. 50; Appeal Hearing, AT. 431 (5 Dec 2013).
1703 Miletić's Appeal Brief, para. 130.
1704 Miletić's Appeal Brief, paras 129-131.
1705 Miletić's Appeal Brief, paras 131-133; Miletić's Reply Brief, paras 48-50.
1706 Miletić's Appeal Brief, para. 133.
1707 Prosecution's Response Brief (Miletić), paras 76-77.
1708 Prosecution's Response Brief (Miletić), paras 74-75.
1709 Prosecution's Response Brief (Miletić), para. 78.
1710 Miletić's Appeal Brief, para. 132.

disproportionate" character.[1712] The Trial Chamber based this characterisation of the attack on its findings pertaining to the *Krivaja*-95 military operation.[1713] **Miletić** does not address this factual basis and consequently has failed to show any error in the Trial Chamber's characterisation. He has also failed to show any error in its reasoning.

605. With regard to the Trial Chamber's alleged failure to establish when the legitimate attack became illegal, the Appeals Chamber observes that the Trial Chamber did not find that an initially lawful operation subsequently became illegal. As recalled in the preceding paragraph, the Trial Chamber found that the *Krivaja*-95 military operation had a dual purpose, with legitimate military aims being one of its purposes. The Trial Chamber traced these purposes back to Directive 7, finding that "while the Directive contains legitimate military goals, it clearly denotes at the same time an illegal plan for an attack directed against a civilian population taking the form of measures aimed at forcing the populations of Srebrenica and Žepa to leave the enclaves".[1714] The Appeals Chamber recalls that the Trial Chamber found that Directive 7 was issued in March 1995 and was finalised no later than 17 March 1995 when it was forwarded to the Drina Corps.[1715] The Trial Chamber found that the *Krivaja*-95 military operation was carried out in early July 1995, following preparations in late June 1995.[1716] It is thus clear from the Trial Chamber's findings that it considered the illegal purpose or plan to have existed before the beginning of the *Krivaja*-95 military operation. The Appeals Chamber recalls in this regard that it has dismissed **Miletić**'s argument that it was only with Karadžić's 9 July Order that the civilian population of the enclaves became the target of the attack.[1717] **Miletić**'s argument thus rests on a faulty premise.

606. The Appeals Chamber therefore dismisses **Miletić**'s ground of appeal 4 in its entirety.

(iii) Alleged error regarding the passage of convoys and distribution of humanitarian aid (Ground 5)

607. **Miletić** argues that the Trial Chamber erred in fact in finding that there was a plan to restrict humanitarian aid and supplies to the enclaves and the re-supplying of UNPROFOR, that these restrictions constituted part of the attack against the civilian population, and that his acts were part of this plan.[1718] **Miletić** submits that these errors invalidate his sentence.[1719] The Prosecution

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1711 Trial Judgement, paras 774-775, 1486, 1996, 2000. See also Miletić's Appeal Brief, para. 128.
1712 Trial Judgement, para. 775. See also Miletić's Appeal Brief, para. 128.
1713 Trial Judgement, para. 775, referring to Trial Judgement, Chapter III, Sections D.1-3 (events regarding the military attack on Srebrenica from 28 June 1995 up until 11 July 1995), K.1-6 (events in Žepa in 1995 up until 25 July 1995). See Trial Judgement, paras 769-774. See also *supra*, para. 573.
1714 Trial Judgement, para. 762. See also Trial Judgement, paras 1996, 2000.
1715 See *supra*, para. 573.
1716 Trial Judgement, paras 242 *et seq.*
1717 See *supra*, para. 599.
1718 Miletić's Appeal Brief, paras 134-135, referring to Trial Judgement, paras 766-767.

submits that **Miletić**'s argument should be dismissed.[1720] The Appeals Chamber will address in turn each sub-ground under **Miletić**'s ground of appeal 5.

a. Disregarding international humanitarian law (Sub-ground 5.1)

608. **Miletić** challenges the Trial Chamber's findings that the restrictions placed upon the humanitarian convoys were in keeping with the plan established under Directive 7 and that they constituted part of the attack on the civilian population.[1721] **Miletić** argues that the Trial Chamber committed an error of law by not establishing whether each restriction was unjustified and illegal, considering that the evidence established widespread abuse of the convoys in contravention of the rules governing humanitarian aid.[1722] **Miletić** argues that, when assessing the policies of the Serb authorities, the Trial Chamber failed to consider that a portion of the humanitarian aid was used to supply the ABiH, that the international humanitarian organisations knew this, and that they were intentionally involved in supplying it.[1723] **Miletić** further argues that the Trial Chamber did not take into account the scope or the frequency of incidents in which articles that were strictly prohibited and could be used for military purposes were transported in UNPROFOR convoys and humanitarian convoys, and did not properly assess the distinct influence of these incidents upon the policy of the Serb authorities concerning the convoys.[1724] Finally, **Miletić** argues that the transport of munitions and the use of humanitarian aid for the needs of the ABiH "constituted an independent justification for the restrictions placed upon some of the convoys".[1725]

609. The Prosecution responds that the Trial Chamber's approach to addressing the convoys was correct and consistent with international humanitarian law, and that the Trial Chamber reasonably concluded that the convoy restrictions were the result of Directive 7.[1726]

610. The Appeals Chamber notes that the Trial Chamber found that, at least from June 1995 and as a result of the VRS restrictions of aid convoys in accordance with the plan set out in Directive 7, the aid supply decreased significantly, resulting in a very dire humanitarian situation in the Srebrenica and Žepa enclaves. The Trial Chamber also found that the VRS restricted the re-supply

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1719 Miletić's Appeal Brief, paras 134-135; Miletić's Reply Brief, para. 53.
1720 Prosecution's Response Brief (Miletić), paras 79-125.
1721 Miletić's Appeal Brief, paras 136, 143-144.
1722 Miletić's Appeal Brief, paras 135-140, 142-144; Miletić's Reply Brief, paras 52-53; Appeal Hearing, AT. 423-424, 482 (5 Dec 2013).
1723 Miletić's Appeal Brief, para. 140; Miletić's Reply Brief, para. 51.
1724 Miletić's Appeal Brief, para. 141.
1725 Miletić's Appeal Brief, paras 142, 144.
1726 Prosecution's Response Brief (Miletić), paras 79-88; Appeal Hearing, AT. 459-460 (5 Dec 2013). The Prosecution also asserts that the evidence cited by **Miletić** does not support his claim of co-operation between international organisations and the ABiH. Prosecution's Response Brief (Miletić), para. 86.

of UNPROFOR in accordance with the policy set out in Directive 7 and that these restrictions on humanitarian aid formed a component of the attack against the civilian population.[1727]

611. In reaching the conclusions noted in the preceding paragraph, the Trial Chamber took into account a considerable body of evidence pertaining to restrictions on humanitarian aid to the Srebrenica and Žepa enclaves.[1728] Notably, this included the finding that, on 7 June 1995, the VRS stopped a United Nations High Commissioner for Refugees ("UNHCR") convoy on its way to Žepa for a detailed search, after having found ammunition for infantry weapons.[1729] This is the only specific incident occurring in 1995 to which **Miletić** refers in support of his allegation that the Trial Chamber did not take into account the scope or frequency of incidents of UNPROFOR/humanitarian convoys carrying "articles that were strictly prohibited and could be used for military purposes".[1730] Furthermore, **Miletić**'s contention that the "incidents had a distinct influence on the passage of the convoys"[1731] is based on expert evidence that is either speculative[1732] or very general.[1733] In this regard, the Appeals Chamber observes that the restrictions which the Trial Chamber took into account included the blocking of numerous convoys with no indication that these convoys contained military articles.[1734] Regarding the alleged influence upon the policy of the Serb authorities, the Trial Chamber took into account that on several occasions Karadžić expressed concern to UNPROFOR that the ABiH was being supplied with fuel and other material through the aid convoys, and that Gvero stated on 20 April 1995 that UNPROFOR had sufficient fuel reserves and was supplying fuel to the ABiH in Srebrenica.[1735] The Appeals Chamber concludes that **Miletić** mischaracterises the evidence considered by the Trial Chamber.

612. The Appeals Chamber observes that the Trial Chamber clearly took into consideration that the ABiH appropriated some humanitarian aid coming into the enclaves.[1736] Specifically, the Trial

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1727 Trial Judgement, paras 766-767.

1728 Trial Judgement, fn. 2795, referring to Trial Judgement, Chapter III, Section C.5.

1729 Trial Judgement, para. 240, referring, in particular, to Ex. 5D01259, "Rogatica Brigade Regular Combat Report to the Drina Corps, signed by Rajko Kušić, 8 June 1995", para. 3.

1730 See Miletić's Appeal Brief, para. 141 & fns 237-238, and evidence referenced therein. *Cf.* Trial Judgement, fn. 730, and evidence referenced therein.

1731 Miletić's Appeal Brief, para. 141.

1732 Miletić's Appeal Brief, para. 141, referring to Richard Butler, T. 20532 (28 Jan 2008) ("[H]ad the UN completely demilitarised the Srebrenica enclave, and by extension the [Ž]epa enclave, I suspect that the VRS would have factored that into their calculations as to the issue of humanitarian aid. If they were comfortable with the fact that none of the aid that would have been going in could have had a potential military use, you know, it may very well have impacted their decision to allow that aid in.").

1733 Miletić's Appeal Brief, para. 141, referring to Slobodan Kosovac, T. 30194 (15 Jan 2009) ("No army in the world, including the Army of Republika Srpska, allows humanitarian aid to be transported together with weapons, military equipment, ammunition, and other things that can be used for military purposes.")

1734 See Trial Judgement, paras 231 ("at least four convoys carrying food, construction materials, humanitarian aid, and medical equipment were refused passage to Srebrenica"), 234 ("The Main Staff did not approve one truck of school supplies"), 236 ("the refusal of the VRS to allow into the enclave more than one convoy per week on average meant that less than 25% of the population's needs were met"), 241 ("One truck of school supplies [was] not approved."). See also Trial Judgement, paras 228-230, 232-233, 235, 237-240.

1735 Trial Judgement, para. 227.

1736 See Trial Judgement, para. 227 & fn. 668. See also Trial Judgement, para. 98.

Chamber found that in March 1995 food items, oil, and fuel were allotted from a consignment of humanitarian aid to the ABiH through UNHCR, and that this was the only source of supply for the ABiH in Srebrenica.[1737] The Trial Chamber further found that in May 1995, the ABiH obtained large quantities of food from humanitarian aid which arrived in the Srebrenica area through UNHCR and that this practice was known to the VRS Main Staff.[1738]

613. To support his contention that the international humanitarian organisations knew that humanitarian aid was used to supply the ABiH, **Miletić** relies on testimony from Prosecution Witness Joseph Kingori, a United Nations Military Observer ("UNMO"),[1739] that, with the UNHCR's knowledge, the ABiH received a small percentage of the incoming humanitarian aid.[1740] It is apparent that the Trial Chamber took this testimony into account.[1741] The Appeals Chamber considers that **Miletić** has failed to demonstrate that the UNHCR, much less any other international humanitarian organisation, knew that humanitarian aid was used for the needs of the ABiH.

614. With regard to his allegation that the international humanitarian organisations were in fact intentionally involved in supplying the ABiH with humanitarian aid, **Miletić** relies on testimonies from expert Witnesses Butler and Kosovac as well as Exhibit 5D01351.[1742] This exhibit is a work plan of the ABiH Supreme Command Staff for October 1993 which calls for "[c]oordination and cooperation with international humanitarian organisations to provide medicines, [medical supplies] and medical equipment, as well as foods for the needs of the [ABiH]".[1743] As such, it refers to the intentions of the ABiH in 1993, not the actions of international humanitarian organisations in 1995. Butler's testimony, which concerns the military implications of the ABiH siphoning humanitarian aid, is similarly beside the point.[1744] Finally, Kosovac could only surmise that "the cooperation of various humanitarian organisations with the Army of Bosnia-Herzegovina *looked very much* like actual logistical assistance being provided to the army".[1745] For the foregoing reasons, the Appeals Chamber dismisses **Miletić**'s allegation.

615. The Appeals Chamber observes that according to customary international law applicable both in international and non-international armed conflicts "[t]he parties to the conflict must allow

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1737 Trial Judgement, para. 197.

1738 Trial Judgement, para. 205, referring to Ex. 5D00955, "BiH Ministry of Defence document to the Tuzla Defence Secretariat, signed by Suljo Hasanović, 5 June 1995".

1739 Trial Judgement, paras 328, 1448.

1740 Miletić's Appeal Brief, para. 140 & fn. 233.

1741 Trial Judgement, fn. 570, referring to Joseph Kingori, T. 19481 (11 Jan 2008).

1742 Miletić's Appeal Brief, para. 140 & fns 234-236.

1743 Ex. 5D01351, "Work Plan of the Staff of the Supreme Command of the Army of the RBH for October 1993", pp. 13-14.

1744 Richard Butler, T. 20094 (21 Jan 2008) ("Obviously, the siphoning of humanitarian aid, or any such aid going into the enclave that was being appropriated by the military, the ABiH 28th Division, would substantially increase or at least maintain, you know, the ability of that unit to conduct military operations. So from a military standpoint, the VRS, you know, would see that as detrimental to their purposes.").

and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control".[1746] Accordingly, the Appeals Chamber is satisfied that the applicable international humanitarian law did not oblige the VRS to allow passage of consignments of humanitarian aid for the benefit of the ABiH, or of military equipment under the guise of humanitarian aid. Such consignments were deprived of their impartial character.[1747]

616. In light of this, the Appeals Chamber turns to examine whether the Trial Chamber erred in not analysing the legality of each restriction imposed on humanitarian aid to the enclaves. The Appeals Chamber recalls that the Trial Chamber relied on Directive 7's call for "the planned and unobtrusively restrictive issuing of permits" so as to "reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion".[1748] The Trial Chamber further found that the lapse of time between the issuing of Directive 7 and the increase of convoy restrictions corroborated the imposition of the convoy restrictions in accordance with Directive 7.[1749] Furthermore, the Appeals Chamber recalls that the restrictions which the Trial Chamber took into account included the blocking of numerous convoys without any indication that they contained military articles,[1750] and that even school supplies were blocked.[1751] Accordingly, the Appeals Chamber dismisses **Miletić**'s arguments. The Appeals Chamber finds that **Miletić** has failed to show any error in the Trial Chamber's reasoning or in the impugned findings.

617. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.1.

b. Judicial notice (Sub-ground 5.2)

618. **Miletić** submits that the Trial Chamber erred in law by taking judicial notice of facts essential to the case against him, thereby violating his rights under Articles 20(1) and 21(2) of the Statute by placing the burden of production of evidence concerning those facts on the Defence.[1752] **Miletić** argues that the Trial Chamber took judicial notice that there was a decrease in humanitarian

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1745 Slobodan Kosovac, T. 30202 (16 Jan 2009) (emphasis added).

1746 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 55, pp. 193-200. See also Article 23 of Geneva Convention IV; Article 70 of Additional Protocol I; Article 18 of Additional Protocol II.

1747 See *supra*, paras 610-612.

1748 Trial Judgement, para. 766.

1749 Trial Judgement, para. 767 & fn. 2796.

1750 See *supra*, note 1734 and accompanying text.

1751 See *supra*, note 1734.

1752 Miletić's Appeal Brief, paras 145-148, 150; Miletić's Reply Brief, paras 54-55; Appeal Hearing, AT. 420-421 (5 Dec 2013).

supplies to Srebrenica, while neglecting to consider evidence to the contrary.[1753] **Miletić** further argues that the noticed facts came out of the *Krstić* and *Blagojević and Jokić* cases, where humanitarian aid and the passage of the convoys were not part of the charges, and therefore were not adequately debated.[1754] **Miletić** submits that the task of the Defence became practically impossible because the relevant documents belonged to organisations which hesitated to disclose them.[1755] Finally, **Miletić** argues that by taking judicial notice of the fact that "[b]locking aid convoys was a part of the plan", the Trial Chamber assumed – contrary to Article 21(3) of the Statute – that a plan existed, and that by categorising **Miletić**'s acts under this plan, the Trial Chamber neglected to properly consider other reasons which led the Serb authorities to adopt measures related to the humanitarian access.[1756]

619. The Prosecution responds that the Trial Chamber properly took judicial notice of adjudicated facts related to the humanitarian aid and convoys.[1757] The Prosecution argues that the taking of judicial notice did not shift the ultimate burden of persuasion, that the adjudicated facts did not directly concern **Miletić**'s conduct, and that there is no legal requirement that adjudicated facts be beyond reasonable dispute.[1758] The Prosecution also argues that **Miletić** has not substantiated his contention that it was difficult to obtain evidence from international organisations.[1759] The Prosecution finally argues that the Trial Chamber's findings were not based solely on the adjudicated facts.[1760]

620. Regarding **Miletić**'s argument that the Trial Chamber placed the "burden of production of evidence" on him by judicially noticing facts essential to the case against him, the Appeals Chamber recalls that, under Rule 94(B) of the Rules,[1761] "judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution" and that facts "established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial".[1762] However, "judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused".[1763] By contrast, "other facts bearing less directly on the accused's

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1753 Miletić's Appeal Brief, para. 145.
1754 Miletić's Appeal Brief, para. 149; Appeal Hearing, AT. 420 (5 Dec 2013).
1755 Miletić's Appeal Brief, para. 151.
1756 Miletić's Appeal Brief, paras 145, 152; Appeal Hearing, AT. 420 (5 Dec 2013).
1757 Prosecution's Response Brief (Miletić), paras 89, 94; Appeal Hearing, AT. 457 (5 Dec 2013).
1758 Prosecution's Response Brief (Miletić), paras 90-92; Appeal Hearing, AT. 457 (5 Dec 2013).
1759 Prosecution's Response Brief (Miletić), para. 93.
1760 Prosecution's Response Brief (Miletić), paras 89, 94; Appeal Hearing, AT. 457-458 (5 Dec 2013).
1761 Rule 94(B) of the Rules provides that "at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from proceedings of the Tribunal relating to matters at issue in the current proceedings."
1762 *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, para. 16, citing *Karemera et al.* Decision on Judicial Notice, para. 42. See also *Lukić and Lukić* Appeal Judgement, para. 261.
1763 *Karemera et al.* Decision on Judicial Notice, para. 50.

criminal responsibility are left to the Trial Chamber's discretion".[1764] While the adjudicated facts to which **Miletić** points[1765] concern part of the charges against him,[1766] they do not concern his acts, conduct, or mental state.[1767] These adjudicated facts therefore fall within the Trial Chamber's discretion. **Miletić**'s arguments misconstrue the applicable law and fail to demonstrate that the Trial Chamber abused its discretion in taking judicial notice. This argument is dismissed.

621. In support of his argument that the Trial Chamber took judicial notice that there was a decrease in humanitarian supplies to Srebrenica without considering contrary evidence, **Miletić** relies on a UNHCR report.[1768] However, the Appeals Chamber notes that the Trial Chamber duly considered this evidence.[1769] Further, **Miletić** relies on testimony from Witness Egbers which does not support his claim that "food supplies in the warehouses of Srebrenica were not insubstantial".[1770] Finally, **Miletić** also refers to his sub-ground of appeal 5.5, which the Appeals Chamber dismisses below.[1771] Accordingly, **Miletić** has failed to demonstrate that the Trial Chamber neglected to consider any relevant evidence and his argument is dismissed.

622. Regarding **Miletić**'s argument that the adjudicated facts derived from cases where humanitarian aid and the passage of the convoys were not adequately debated, the Appeals Chamber recalls that there is no requirement that adjudicated facts be beyond reasonable dispute.[1772] The Appeals Chamber considers that a trial chamber may exercise its discretionary power to determine whether to take judicial notice of an adjudicated fact,[1773] even if the fact may have been less central to the charges in the previous proceedings of the Tribunal than in the current proceedings,[1774] so long as the adjudicated fact has been "established by the Trial Chamber [in the

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1764 *Karemera et al.* Decision on Judicial Notice, para. 51.

1765 Miletić's Appeal Brief, fns 245, 264, referring to *Popović et al.* Decision of 26 September 2006, Annex, Facts 48, 52-53, 55, 63-64.

1766 Indictment, paras 51, 75(a)(ii).

1767 "The Bosnian Serbs deliberately tried to limit access to the enclave by international aid convoys. DutchBat personnel were prevented from returning to the enclave by Bosnian Serb forces, and equipment and ammunition were also prevented from getting in." (Fact 48). "By early 1995, fewer and fewer supply convoys were making it through to the Srebrenica enclave." (Fact 52). "The already meagre resources of the civilian population dwindled further, and even the UN forces started running dangerously low on food, medicine, fuel, and ammunition." (Fact 53). "Eventually, the peacekeepers had so little fuel that they were forced to start patrolling the enclave on foot." (Fact 55). "Blocking aid convoys was a part of the plan." (Fact 63). "By mid-1995, the humanitarian situation of the Bosnian Muslim civilians and military personnel in the enclave was catastrophic." (Fact 64). See *Popović et al.* Decision of 26 September 2006, Annex.

1768 Miletić's Appeal Brief, fn. 249, referring to "P04145, p. 14". The Appeals Chamber observes that "14" is printed at the bottom of page 21 of the exhibit.

1769 See Trial Judgement, fns 675, 690, 701, 718-719, 733, 736, referring to Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 21.

1770 Miletić's Appeal Brief, para. 145, referring to Vincent Egbers, T(F). 2873-2874 (20 Oct 2006).

1771 See *infra*, paras 641-649.

1772 *Karemera et al.* Decision on Judicial Notice, para. 40.

1773 See *supra*, para. 620.

1774 See *Blagojević and Jokić* Appeal Judgement, para. 34.

previous proceedings] on the basis of evidence".[1775] **Miletić** has not demonstrated that the Trial Chamber abused its discretion. In addition, the Appeals Chamber notes that the relevant findings of the Trial Chamber are based not only on the adjudicated facts but also on other evidence.[1776] **Miletić**'s argument is dismissed.

623. The Appeals Chamber also dismisses, as unsupported by any reference to the trial record, **Miletić**'s argument that the task of the Defence became "practically impossible" because the organisations which had the relevant documents hesitated to disclose them. Similarly, the Appeals Chamber dismisses **Miletić**'s arguments specific to the adjudicated fact that "[b]locking aid convoys was a part of the plan", as he provides no support for his contention that it "had a determining influence on paragraphs 766 and 767 of the [Trial] Judgement".[1777] In fact, he does not demonstrate that the Trial Chamber relied on this adjudicated fact for a factual finding anywhere in the Trial Judgement. The Appeals Chamber therefore considers that **Miletić** has failed to demonstrate that the Trial Chamber erred in this regard.[1778]

624. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.2.

c. Humanitarian situation in the enclaves (Sub-ground 5.3)

625. **Miletić** submits that the Trial Chamber committed an error of law by linking the humanitarian situation in the Srebrenica and Žepa enclaves with Directive 7 and the attack upon the civilian population.[1779] **Miletić** argues that by making this link while noting the absence of conclusive evidence as to when the humanitarian situation in Srebrenica deteriorated, the Trial Chamber violated general principles of law as well as Article 21(3) of the Statute and Rule 87(A) of the Rules.[1780] **Miletić** also submits that the Trial Chamber made a clear factual error because the evidence showed that the precarious situation in Srebrenica resulted from poor management of the humanitarian aid within the enclave and did not establish any deterioration of the humanitarian

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1775 *The Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 11 (emphasis omitted).

1776 See Trial Judgement, fns 614-615, 671, 673-674, 679, 681, 686-687, 710.

1777 Miletić's Appeal Brief, para. 145. The Trial Chamber found that at least from June 1995 the aid supply decreased significantly, resulting in a very dire humanitarian situation in the Srebrenica and Žepa enclaves, and that this happened as a result of restrictions on aid convoys by the VRS in accordance with the plan set out in Directive 7. The Trial Chamber also found that the VRS restricted the re-supply of UNPROFOR in accordance with the policy set out in Directive 7 and that these restrictions on humanitarian aid formed a component of the attack against the civilian population. See Trial Judgement, paras 766-767.

1778 See *supra*, paras 608-617.

1779 Miletić's Appeal Brief, para. 156; Miletić's Reply Brief, paras 56-57.

1780 Miletić's Appeal Brief, paras 153-156; Miletić's Reply Brief, paras 56-57; Appeal Hearing, AT. 422-423 (5 Dec 2013).

situation in Žepa.[1781] The Prosecution responds that the Trial Chamber's findings were reasonable and grounded in the evidence, and that **Miletić** fails to demonstrate any error of law or of fact.[1782]

626. The Appeals Chamber will first examine **Miletić**'s legal challenge pertaining to the alleged absence of conclusive evidence as to when the humanitarian situation in Srebrenica deteriorated. The Trial Chamber found that:

> following the issuance of Directive 7, the humanitarian situation in the enclaves deteriorated. The evidence is not conclusive with regard to when the situation in the enclaves worsened. [...] However, in light of all the evidence before it, the Trial Chamber is convinced that at least from June the aid supply decreased significantly, resulting in a very dire humanitarian situation in the Srebrenica and Žepa enclaves. The Trial Chamber is satisfied that this happened as a result of restrictions of aid convoys by the VRS in accordance with the plan set out in Directive 7. The Trial Chamber is equally satisfied that the VRS restricted the re-supply of UNPROFOR in accordance with the policy set out in Directive 7. The Trial Chamber is further satisfied that these restrictions on humanitarian aid formed a component of the attack against the civilian population.[1783]

Thus, the Trial Chamber found that the humanitarian situation in the enclaves deteriorated sometime after the issuance of Directive 7[1784] and found that this occurred no later than June 1995. The Trial Chamber's reference to inconclusive evidence pertains only to its inability to determine whether the humanitarian situation in the enclaves deteriorated prior to June 1995. Furthermore, the Trial Chamber considered a substantial body of evidence indicating a deterioration of the humanitarian situation in the enclaves around this time.[1785] **Miletić** ignores the Trial Chamber's findings based on this evidence, while referring to evidence indicating that there were problems with the delivery of humanitarian aid to the enclaves in 1994.[1786] This evidence does not contradict the Trial Chamber's findings and neither does the relative dearth of evidence regarding convoy requests, responses, and notifications in April-July 1995.[1787] The Appeals Chamber therefore finds that **Miletić** has failed to show any error in the Trial Chamber's findings and has not demonstrated that the Trial Chamber violated any general principle of law, Article 21(3) of the Statute, or Rule 87(A) of the Rules.

627. The Appeals Chamber now turns to **Miletić**'s factual challenges. **Miletić** refers to evidence indicating that some humanitarian aid was unequally allocated, appropriated by certain individuals, sold on the market, or used for unintended purposes.[1788] The Appeals Chamber observes that this

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1781 Miletić's Appeal Brief, para. 156.
1782 Prosecution's Response Brief (Miletić), paras 79-80, 95-98; Appeal Hearing, AT. 458 (5 Dec 2013).
1783 Trial Judgement, para. 767 (internal references omitted).
1784 See *supra*, para. 573.
1785 Trial Judgement, paras 228-236.
1786 Miletić's Appeal Brief, para. 154 (referring to Ex. 5D00509, "Interim report on meeting with Ken Biser sent by the 2nd Corps Command of the BiH Army in Tuzla to Rasim Delić, signed by Sead Delić, 9 Dec 1994", p. 3); Miletić's Reply Brief, para. 56 (referring to Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 21).
1787 Trial Judgement, para. 218.
1788 Miletić's Appeal Brief, para. 156 & fn. 275, referring to Pieter Boering, T. 2033 (22 Sept 2006) ("Once I attended a banquet at the mayor's place that was like a four or five-star banquet while the rest of the population was

evidence either does not refer clearly to a specific time period or pertains to the years before 1995.[1789] The Appeals Chamber further considers that, although the Trial Chamber was aware of problems with the allocation of humanitarian aid occurring in May 1995,[1790] it also had before it a substantial body of evidence indicating that, by June 1995, restrictions on aid convoys contributed to a deterioration of the humanitarian situation.[1791] **Miletić** ignores the Trial Chamber's findings based on this evidence and as such has failed to show that no reasonable trier of fact could have reached this conclusion.

628. In support of his argument that the evidence did not establish any deterioration of the humanitarian situation in Žepa, **Miletić** relies on an ABiH document according to which "[a]t the time of the Chetniks' attack on Žepa on 9 July 1995, about 6,500 people lived in this area. They and the members of the 285th Ibr were well supplied with all types of foodstuffs".[1792] Notwithstanding this exhibit, the Trial Chamber considered evidence indicating a deterioration of the humanitarian situation in Žepa by June 1995.[1793] **Miletić** has failed to call into question the Trial Chamber's findings based on this evidence and has failed to show an error. This factual challenge is also dismissed.

629. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.3.

d. Distribution of humanitarian aid in June 1995 (Sub-ground 5.4)

630. **Miletić** submits that the Trial Chamber committed an error of law, in violation of Rule 87(A) of the Rules, and an error of fact when it held that the food supply of the enclaves decreased in June 1995 due to the restrictions implemented pursuant to Directive 7.[1794] **Miletić** argues that the Trial Chamber failed to properly consider a series of facts that contributed to the decrease in the number of convoys in June 1995 and which were unrelated to the restrictions implemented by the Serb authorities.[1795] The Prosecution responds that the Trial Chamber reasonably found that the

really suffering"), Ex. 1D00019, "ABiH General Staff Report to the ABiH Commander, 23 February 1995", p. 3, Ex. 5D00031, "BiH summary of criminal activities in protected areas, signed by Mežić, 12 January 1996", pp. 10-13, Joseph Kingori, T. 19480 (11 Jan 2008).

1789 See Ex. 5D00031, "BiH summary of criminal activities in protected areas, signed by Mežić, 12 January 1996", p. 10.

1790 See Trial Judgement, para. 205.

1791 See, in particular, Trial Judgement, paras 234-236.

1792 Miletić's Appeal Brief, para. 156 & fn. 276, citing Ex. 1D00019, "ABiH General Staff Report to the ABiH Commander, 23 February 1995", p. 5. The Appeals Chamber observes that the date of this exhibit appears to be erroneous, since it describes subsequent events.

1793 See, in particular, Trial Judgement, paras 240-241.

1794 Miletić's Appeal Brief, paras 157, 162; Miletić's Reply Brief, para. 63.

1795 Miletić's Appeal Brief, paras 158-162; Miletić's Reply Brief, paras 58-63; Appeal Hearing, AT. 481-482 (5 Dec 2013).

decrease in humanitarian aid in June 1995 was due to the VRS restrictions under Directive 7 and that **Miletić** fails to show otherwise.[1796]

631. The Appeals Chamber recalls that the Trial Chamber found that, at least from June 1995, the aid supply decreased significantly, resulting in a very dire humanitarian situation in the Srebrenica and Žepa enclaves and that this happened as a result of restrictions of aid convoys by the VRS in accordance with the plan set out in Directive 7.[1797] The Appeals Chamber will examine each of the facts to which **Miletić** refers in impugning the Trial Chamber's finding.

632. **Miletić** relies on Exhibit P04133 to argue that the UNHCR decided to suspend the convoys due to a crisis between UNPROFOR and the Serb authorities that broke out in May 1995.[1798] The exhibit is an UNPROFOR weekly situation report for 29 May to 4 June 1995, which indicates that the UNHCR had decided to suspend its convoys due to the security situation and the lack of UNPROFOR escorts.[1799] However, this evidence pertains to Sarajevo, not the enclaves.[1800] **Miletić**'s argument is therefore inapposite.

633. **Miletić** submits, relying on Exhibits 5D00229 and 5D01165, that an ABiH offensive launched on 15 June 1995 and involving forces from Srebrenica and Žepa exacerbated the lack of security for the passage of convoys.[1801] Exhibit 5D00229 is an ABiH order for the preparation of offensive combat operations, dated 17 June 1995 and sent to ABiH forces in Srebrenica and Žepa.[1802] This evidence pertains to the prospective involvement of these forces in the offensive and as such is insufficient to establish that it rendered the passage of convoys more difficult. In addition, Exhibit 5D01165 indicates that the offensive focused on lifting the blockade of Sarajevo,[1803] which is located to the west of the Srebrenica and Žepa enclaves, while the UNHCR convoys supplied these enclaves from Belgrade, through a northern route.[1804] The Appeals Chamber therefore considers that **Miletić** has failed to demonstrate that the Trial Chamber erred by not properly considering this evidence.

634. Relying on Exhibit P04145, **Miletić** argues that the UNHCR reduced the quantity of humanitarian aid for BiH, including the enclaves, in June 1995.[1805] The relevant part of this UNHCR report indicates that the target amount of aid for BiH as a whole diminished between May

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1796 Prosecution's Response Brief (Miletić), paras 99-102; Appeal Hearing, AT. 456, 458-460 (5 Dec 2013).
1797 Trial Judgement, paras 766-767.
1798 See Miletić's Appeal Brief, para. 158; Appeal Hearing, AT. 481 (5 Dec 2013).
1799 Ex. P04133, "UNPROFOR weekly situation report, 4 June 1995", p. 5, para. 14.
1800 Ex. P04133, "UNPROFOR weekly situation report, 4 June 1995", p. 4.
1801 Miletić's Appeal Brief, para. 158; Appeal Hearing, AT. 481 (5 Dec 2013).
1802 Ex. 5D00229, "ABiH General Staff Order to the 28th Division signed by Sulejman Budaković, 17 June 1995".
1803 Ex. 5D01165, "VRS Main Staff order to reinforce the Sarajevo-Romanija Corps on the north-western part of the front, type-signed Mladić, 15 June 1995", p. 1.
1804 Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 11.

and June 1995.[1806] It does not break the information down with regard to specific locations and as such does not establish how much the aid target diminished for the Srebrenica and Žepa enclaves, if at all. In any event, the Trial Chamber found that the actual deliveries only amounted to approximately 30 per cent of the aid targets set for June 1995 to Srebrenica and Žepa.[1807] **Miletić**'s argument is dismissed.

635. **Miletić** contends that the Trial Chamber did not properly assess the fact that at least one UNHCR convoy did not enter Srebrenica due to restrictions imposed by DutchBat.[1808] The Trial Chamber found that "[o]n one occasion in the second half of June 1995, UNHCR refused a DutchBat check and decided to return the convoy without delivering the aid".[1809] As it has not been shown that more than one convoy was stopped in this manner, the Appeals Chamber is not convinced that the Trial Chamber erred in its consideration of this incident.

636. **Miletić** further argues that the Trial Chamber did not properly assess the fact that a convoy bound for Srebrenica, approved for 14 June 1995, was cancelled for unknown reasons.[1810] The Appeals Chamber observes that a convoy for Srebrenica was indeed approved for 14 June 1995.[1811] However, in support of his argument that the reasons of the cancellation were unknown, **Miletić** relies on Exhibit P04136,[1812] which – if anything – suggests that the BSF was behind the cancellation.[1813] Furthermore, the Trial Chamber found that "[e]ven if permission for passage had been granted, convoys were regularly blocked by the VRS along the route and sent back".[1814] The Appeals Chamber therefore considers that **Miletić** has failed to show that the Trial Chamber failed to properly assess the relevant evidence.

637. Considering the Trial Chamber's finding on the VRS's regular approval and subsequent blocking of convoys,[1815] the Appeals Chamber further dismisses **Miletić**'s claims that the Trial Chamber did not properly assess the amount of humanitarian aid approved by the Serb authorities.[1816]

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1805 Miletić's Appeal Brief, para. 158; Appeal Hearing, AT. 481 (5 Dec 2013).
1806 Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 19.
1807 Trial Judgement, paras 234, 241. See also Trial Judgement, fn. 701.
1808 Miletić's Appeal Brief, para. 159.
1809 Trial Judgement, fn. 667.
1810 Miletić's Appeal Brief, para. 159.
1811 Trial Judgement, para. 234.
1812 Miletić's Appeal Brief, para. 159.
1813 Ex. P04136, "UN daily report from Akashi to Annan, 14 June 1995", para. 2 ("None of the UNHCR convoys to the enclaves have received clearances. The Srebrenica convoy has been cancelled. The Sarajevo convoy has not left Zenica. The BSA are demanding a 50-50 share of the aid to which UNHCR will not agree.").
1814 Trial Judgement, para. 228. See also Trial Judgement, para. 230.
1815 Trial Judgement, para. 228. See also Trial Judgement, para. 230.
1816 See Miletić's Appeal Brief, paras 160-161.

638. **Miletić** argues that the Trial Chamber's finding that the UNHCR reached only 30 per cent of its aid target for Žepa in June 1995 does not by itself imply that the humanitarian situation in Žepa had deteriorated.[1817] However, the Appeals Chamber is not convinced that the Trial Chamber based its conclusion of the "very dire humanitarian situation" in the Žepa enclave[1818] solely on this finding.[1819] In particular, the Appeals Chamber notes that, with respect to the situation in Žepa, the Trial Chamber found as follows:

> Between 7 March and 18 June, the VRS Main staff did not approve any fuel transportation to Žepa. The lack of fuel caused UKRCoy to stop using its generators, which affected its food storage capacity. At the end of May, the food supply situation had reached a 'critical point' according to UNPROFOR.[1820]

The Trial Chamber also took into consideration the incident in which ammunition was found in the convoy of 7 June 1995.[1821] This incident occurred after the food crisis in May 1995 and as such cannot have been its cause. The Trial Chamber also took into account the authorisation of one Žepa bound convoy for 14 June 1995.[1822] For the foregoing reasons, the Appeals Chamber dismisses all of **Miletić**'s arguments specific to the Žepa enclave.[1823]

639. Finally, **Miletić** argues that the delivery of humanitarian aid was difficult throughout BiH in June 1995 and so cannot be explained by the attitude of the BSF.[1824] In support of his argument, **Miletić** refers to information in Exhibit P04145 indicating the "monthly food target" and "actual food delivery" in June 1995 for different regions of BiH.[1825] The Appeals Chamber notes that, according to this exhibit and depending on the region, the "monthly food target" was either higher, lower, or approximately the same as the "actual food delivery". The Appeals Chamber is not privy to the reasons behind these variations and finds that they do not necessarily contradict the impugned finding. By contrast, with regard to Srebrenica in early July 1995 the Trial Chamber found that "the refusal of the VRS to allow into the enclave more than one convoy per week on average meant that less than 25% of the population's needs were met".[1826] **Miletić**'s argument is therefore dismissed.

640. Consequently, the Appeals Chamber finds that **Miletić** has failed to demonstrate any error in the impugned finding and dismisses his sub-ground of appeal 5.4.

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1817 Miletić's Appeal Brief, para. 161.
1818 Trial Judgement, para. 767.
1819 Trial Judgement, para. 241.
1820 Trial Judgement, para. 240 (internal references omitted), referring to Ukrainian Company of UNPROFOR ("UKRCoy").
1821 Trial Judgement, para. 240.
1822 Trial Judgement, para. 241 & fn. 734, referring to Ex. 5D01429, "VRS Main Staff notification to the Drina Corps and East Bosnia Corps concerning humanitarian convoys, type-signed Miletić, 12 June 1995", p. 1.
1823 See Miletić's Appeal Brief, para. 161.
1824 Miletić's Reply Brief, para. 60; Appeal Hearing, AT. 481-482 (5 Dec 2013).
1825 Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 19.
1826 Trial Judgement, para. 236.

e. Srebrenica's and DutchBat's medical supplies (Sub-ground 5.5)

641. **Miletić** submits that the Trial Chamber made a clear mistake of fact, having ruled that Srebrenica and DutchBat lacked adequate medical supplies during the Indictment period.[1827] **Miletić** argues that the Trial Chamber's conclusion was not adequately grounded in the evidence.[1828] The Prosecution responds that the Trial Chamber reasonably found that medical supplies in the enclaves were insufficient and that **Miletić** fails to show otherwise.[1829]

642. **Miletić** first impeaches the Trial Chamber's finding, based on evidence from Prosecution Witness PW-106, that the Srebrenica hospital "faced a shortage of essential medical supplies".[1830] In support of his argument, **Miletić** refers to evidence that PW-106 [REDACTED].[1831] The Appeals Chamber is not convinced that this evidence indicates that the Trial Chamber erred, considering in particular that [REDACTED][1832] and that PW-106 gave detailed evidence [REDACTED].[1833] **Miletić** also argues that contrary to PW-106's evidence, Exhibit 5D00053 shows that an adequate quantity of medical supplies reached the Srebrenica enclave in April 1995.[1834] This exhibit is an excerpt from a report of the Netherlands Institute for War Documentation ("NIOD Report"), on which the Trial Chamber based its finding that, "on 10 April the transport of medical supplies to DutchBat was resumed, after which the situation regarding medical stock improved".[1835] Despite this improvement, the Trial Chamber further found that "the re-supply was discontinued again at the end of April".[1836] More importantly, the context of the Trial Chamber's finding that the Srebrenica hospital faced a shortage of essential medical supplies indicates that the Trial Chamber found that this shortage related to March 1995.[1837] This would mean that the shortage concerned a period prior to the resumption of medical supplies on 10 April 1995. As such, **Miletić** has failed to demonstrate that Exhibit 5D00053 contradicts either the evidence of PW-106 or any finding of the Trial Chamber.

643. The Trial Chamber found, based on the evidence of Prosecution Witness Robert Franken, Deputy Commanding Officer of DutchBat,[1838] that the fuel shortage in combination with a shortage of medical supplies caused DutchBat to stop providing medical care to the civilian population in

1827 Miletić's Appeal Brief, paras 163, 169; Miletić's Reply Brief, paras 64-65.
1828 Miletić's Appeal Brief, paras 163-168; Miletić's Reply Brief, paras 64-65.
1829 Prosecution's Response Brief (Miletić), paras 103-108.
1830 Trial Judgement, para. 228 & fn. 677.
1831 Miletić's Appeal Brief, para. 164 & fn. 303, referring to "[REDACTED]; PW-106, 16 November 2006, T(F). 4050".
1832 See PW-106, T. 4050 (closed session) (16 Nov 2006).
1833 See, *e.g.*, PW-106, T. 4004-4005 (closed session) (16 Nov 2006).
1834 Miletić's Appeal Brief, para. 164.
1835 Trial Judgement, para. 232 & fn. 697.
1836 Trial Judgement, para. 232 & fn. 698, referring to Ex. P00510, "UNMO daily sitrep, 11 July 1995", p. 4.
1837 Trial Judgement, para. 228 & fn. 677.
1838 Trial Judgement, para. 264.

several villages in the Srebrenica enclave.[1839] **Miletić** argues that this finding was contradicted by the NIOD Report.[1840] This report indicates that on 27 April 1995, *i.e.* following the resumption of medical supplies on 10 April 1995, medical aid to the local population was resumed at full capacity.[1841] By contrast, the context of the Trial Chamber's finding indicates that the Trial Chamber found that Franken's testimony related to a period of time around March 1995.[1842] By ignoring the chronology of these pieces of evidence, **Miletić** has failed to demonstrate any contradiction between them. This argument is therefore dismissed.

644. **Miletić**, relying on another part of the NIOD Report, argues that the temporary cessation of DutchBat's medical activities was "entirely related to" the conflict between Médecins Sans Frontières ("MSF") and the Municipality of Srebrenica, which the Trial Chamber neglected to consider.[1843] The Appeals Chamber, however, considers that this contention is not supported by the evidence on which **Miletić** relies. In particular, the NIOD Report states that: "Low levels of supplies were *not the only reason* why humanitarian aid had to be limited. Solidarity with Médecins sans Frontières also played a role. MSF got into a conflict with the municipal council (Opstina) of Srebrenica at the end of March 1995".[1844] Considering that this evidence offers the conflict as only one reason why humanitarian aid had to be limited, the Appeals Chamber is not convinced that the Trial Chamber erred by not considering it.

645. **Miletić** also argues that Exhibit P00510, an UNMO situation report dated 11 July 1995 which formed the basis of the Trial Chamber's finding that "the re-supply was discontinued again at the end of April",[1845] is contradicted by Exhibits 5D00053 and 5D01446.[1846] However, Exhibit 5D00053, as mentioned above, relates to the medical situation in April 1995 and does not contradict Exhibit P00510, which concerns the situation *after* the end of April 1995.[1847] The relevant part of Exhibit 5D01446,[1848] also does not contradict Exhibit P00510 regarding the re-supply of DutchBat after the end of April. The Appeals Chamber therefore dismisses these arguments.

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1839 Trial Judgement, para. 229 & fn. 682, referring to Robert Franken, T. 2643-2644 (18 Oct 2006).
1840 Miletić's Appeal Brief, para. 165.
1841 Ex. 5D00053, "NIOD Report Chapter 4. The emergency stock", p. 4 & fn. 15. See also Robert Franken, T. 2644 (18 Oct 2006).
1842 Trial Judgement, para. 229. See also Robert Franken, T. 2643-2644 (18 Oct 2006).
1843 Miletić's Appeal Brief, para. 165, referring to Ex. 5D00052, "NIOD Report Chapter 3. The conflict between Médecins Sans Frontières and the Opstina", p. 1 ("Since the Field Dressing Station was working under the MSF flag, DutchBat also stopped its humanitarian activities at this point; only emergency aid was still provided.").
1844 Ex. 5D00052, "NIOD Report Chapter 3. The conflict between Médecins Sans Frontières and the Opstina", p. 1 (emphasis added; italics omitted from "Médecins sans Frontières" and "MSF").
1845 Trial Judgement, para. 232 & fn. 698, referring to Ex. P00510, "UNMO daily sitrep, 11 July 1995", p. 4.
1846 Miletić's Appeal Brief, para. 166 & fn. 314.
1847 Ex. P00510, "UNMO daily sitrep, 11 July 1995", p. 4 ("DutchBat can't give much help because their supplies have not been coming in since the end of April").
1848 5DPW-26, Ex. 5D01446, "confidential – 92 *bis* statement" (12 May 2009)" (confidential), p. 3 (attachment 2).

646. **Miletić** impugns the Trial Chamber's finding that there was a shortage of medical supplies in Potočari on 11 July 1995.[1849] He argues that the Trial Chamber took into account evidence from Witnesses L. Simić and Čelanović that does not support its finding.[1850] However, the Trial Chamber's main basis for its finding was evidence from Franken and an adjudicated fact, while the evidence of L. Simić and Čelanović served only as additional references.[1851] **Miletić** thus ignores the main basis for the Trial Chamber's finding and his argument is dismissed.

647. **Miletić** also argues that the Serb authorities' refusal to authorise UNPROFOR convoys transporting medical items cannot be ascribed to any plan of restrictions, but rather to DutchBat's exaggerated and groundless request for disproportionate quantities of medicines and other medical items.[1852] In support of this argument, he refers only to a portion of Exhibit 5D00053, which concerns divergent views between DutchBat and United Nations ("UN") officials regarding the quantity and usage of medical supplies.[1853] As such, **Miletić** has failed to demonstrate that this evidence had any impact on convoy authorisations by Serb authorities. His argument is dismissed.

648. Finally, **Miletić** argues that medical supplies were sufficient in July 1995.[1854] He relies on Exhibit P04145, a UNHCR report, and Exhibit 5D01446.[1855] This evidence provides inadequate support for his argument as it appears to indicate that the existing medical supplies were sufficient because the civilian population was on the verge of being evacuated. As such, **Miletić** fails to show that the evidence demonstrates the availability of medical supplies rather than a dwindling demand for such supplies.

649. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.5.

### f. UNPROFOR's fuel supply (Sub-ground 5.6)

650. **Miletić** submits that the Trial Chamber erred in fact when finding that UNPROFOR lacked adequate fuel within the enclaves.[1856] With regard to the Srebrenica enclave, **Miletić** argues that the Trial Chamber neglected to consider that on 13 July 1995 DutchBat was able to provide the Serb authorities with 30,000 litres of fuel, which it must have had available before the fall of the

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1849 Miletić's Appeal Brief, para. 166 & fn. 310, referring to Trial Judgement, para. 311.
1850 Miletić's Appeal Brief, para. 166 & fn. 311, referring to Trial Judgement, para. 311 & fn. 1036.
1851 Trial Judgement, fn. 1036, referring to "Robert Franken, T. 2511 (16 Oct 2006); *Popović et al.* Decision of 26 September 2006, Annex, Fact 125. See also Ljubisav Simić, Ex. 4D00606, "92 *ter* transcript", BT. 7611-7612, 7629 (15 Apr 2004); Zlatan Čelanović, T. 6676-6677 (31 Jan 2007)."
1852 Miletić's Appeal Brief, para. 168.
1853 See Miletić's Appeal Brief, para. 168 & fn. 316, referring to Ex. 5D00053, "NIOD Report Chapter 4. The emergency stock", p. 1.
1854 Miletić's Reply Brief, para. 64.
1855 Miletić's Reply Brief, fns 93, 95, referring to Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 7, 5DPW-26, Ex. 5D01446, "confidential – 92 *bis* statement" (12 May 2009)" (confidential), attachment 2.
1856 Miletić's Appeal Brief, paras 170, 174; Miletić's Reply Brief, para. 68.

enclave.[1857] Concerning the Žepa enclave, **Miletić** argues that the Trial Chamber neglected to consider that UKRCoy used considerable amounts of fuel and was even able to sell surplus fuel.[1858] The Prosecution responds that the Trial Chamber reasonably concluded that UNPROFOR did not have sufficient fuel in the enclaves, and that **Miletić** fails to show otherwise.[1859]

651. The Appeals Chamber first turns to **Miletić**'s argument regarding the Srebrenica enclave. He relies on Exhibit 5D01385 and evidence from Defence Witness Dragoslav Trišić.[1860] The Trial Chamber took this evidence into consideration[1861] and made the following relevant findings:

> Franken testified that "somebody in the UN" had decided that UNPROFOR would supply the fuel for the transportation of the Bosnian Muslim population out of Srebrenica. However, due to DutchBat's shortage of fuel, the VRS first provided the fuel which DutchBat had to replace later. The VRS was able to procure fuel itself and at some point on 12 July, a cistern carrying fuel came from the Drina Corps and was available for re-fueling of buses at Vihor's Transport Company's parking lot in Bratunac.[1862]

**Miletić** merely expresses his preference for one part of the evidentiary basis underpinning the Trial Chamber's findings without explaining why the finding should not stand on the basis of the remaining evidence. In particular, he has failed to demonstrate any error in the Trial Chamber's finding that the VRS first provided the fuel which DutchBat had to replace later. In addition, his contention that "the UNHCR convoy, which arrived on 13 July 1995, did not transport fuel"[1863] is a mere assertion unsupported by any reference to the trial record. Consequently, the Appeals Chamber is not convinced by **Miletić**'s inference that "DutchBat needed to have this quantity available before the fall of the enclave".[1864] For the foregoing reasons, **Miletić**'s argument is dismissed.

652. Regarding the Žepa enclave, the Appeals Chamber notes that the Trial Chamber found that UKRCoy members sold fuel there around March 1995.[1865] In reaching this finding, the Trial Chamber relied in part on the evidence of Prosecution Witness Louis Fortin to which **Miletić** refers.[1866] Again, **Miletić** merely expresses his preference for one part of the evidentiary basis

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1857 Miletić's Appeal Brief, paras 171-172, 174; Miletić's Reply Brief, para. 66.
1858 Miletić's Appeal Brief, paras 173-174; Miletić's Reply Brief, para. 67.
1859 Prosecution's Response Brief (Miletić), paras 109-111.
1860 See Miletić's Appeal Brief, para. 171 & fns 320, 322, referring to Ex. 5D01385, "Bratunac Brigade receipt for fuel, 13 July 1995", Dragoslav Trišić, T. 27077 (20 Oct 2008), T. 27111-27113 (21 Oct 2008).
1861 Trial Judgement, fn. 989, referring to Dragoslav Trišić, T. 27078-27079 (20 Oct 2008), T. 27111-27115 (21 Oct 2008), Ex. 4D00613, "Bratunac Brigade overview of fuel, 2 Aug 1995", p. 1, Ex. 5D01385, "Bratunac Brigade receipt for fuel, 13 July 1995", Ex. 5D01386, "Vihor Company receipt fuel, 14 July", Robert Franken, T. 2569-2570 (17 Oct 2006). The Appeals Chamber observes that the relevant part of the evidence at T. 27077 is recalled and confirmed at T. 27111.
1862 Trial Judgement, para. 301 (internal references omitted).
1863 Miletić's Appeal Brief, para. 172.
1864 Miletić's Appeal Brief, para. 172.
1865 Trial Judgement, para. 238.
1866 Trial Judgement, fn. 721, referring to, *inter alia*, Louis Fortin, T. 18269-18270 (27 Nov 2007). *Cf.* Miletić's Appeal Brief, fn. 326, referring to Louis Fortin, T. 18269 (27 Nov 2007).

underpinning the Trial Chamber's finding without explaining why the finding should not stand on the basis of the remaining evidence. In addition, the specific part of Fortin's testimony to which **Miletić** refers[1867] does not provide a clear source or timing for UKRCoy's alleged high usage of fuel. The Trial Chamber found that between 7 March and 18 June 1995, the VRS Main Staff did not approve any fuel transportation to Žepa and the lack of fuel caused UKRCoy to stop using its generators.[1868] **Miletić** has not demonstrated that the evidence pertaining to UKRCoy members selling fuel relates to the same time period as the Trial Chamber's finding that UKRCoy stopped using its generators due to a lack of fuel. Finally, by not addressing the question as to whom UKRCoy members were selling fuel, **Miletić** has failed to show that this motivated the Serb authorities to limit fuel deliveries to the enclave. The Appeals Chamber notes in this regard that, according to the relevant findings of the Trial Chamber, it was the ABiH which was concerned by the illegal trade in Žepa.[1869] The Appeals Chamber therefore considers that **Miletić** has failed to show any error with regard to the Žepa enclave.

653. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.6.

g. Role of the VRS in the procedure for approving humanitarian convoys (Sub-ground 5.7)

654. With respect to the procedure for approving humanitarian convoys, the Trial Chamber found:

> The procedure for approving humanitarian convoys was changed on 14 March 1995, when Karadžić ordered the formation of a State Committee for Cooperation with the United Nations and International Humanitarian Organisations. The Committee had its seat in Pale. Nikola Koljević, Vice-President of the Republika Srpska, was appointed president of the Committee. Colonel Đurđić from the Main Staff was a member of the Committee and in charge of coordinating the Committee's relations with the Ministry of Defence and the VRS Main Staff. One of the working bodies of the Committee was the Coordinating Body for Humanitarian Operations. According to the order establishing the Committee, permits for the movement of convoys and employees of the UN and humanitarian organisations on the territory of RS were to be issued by the Coordinating Body pursuant to Committee decisions.
>
> The Trial Chamber lacks the evidence necessary to fully understand and form a clear picture of the humanitarian convoy approval process as a whole. Consequently, only limited conclusions can be reached. Based on the evidence before it, the Trial Chamber finds that following the establishment of the State Committee, requests for humanitarian aid convoys had to be directed to the Committee for its consideration. The Committee reached its views on the requests and the Coordinating Body issued "permits" to the relevant requesting organization accordingly. The Coordinating Body also sent the convoy requests to the VRS Main Staff, accompanied by the Committee's views. Colonel Đurđić communicated the Committee's views to either Mladić or Milovanović, who in most cases approved.

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1867 Miletić's Appeal Brief, fn. 326, referring to Louis Fortin, T. 18269 (27 Nov 2007) ("I heard stories about high usage of fuel. They had nowhere to go basically, and their fuel usage was higher than units who were patrolling in other areas.").

1868 Trial Judgement, para. 240.

1869 Trial Judgement, para. 238.

> Subsequent to Milovanović's or Mladić's approval, the Main Staff sent a notification to the relevant subordinate units providing them detailed information on approved convoys, as it did for UNPROFOR convoys. Without such a notification from the Main Staff, a convoy was not allowed to pass. The humanitarian aid convoy notifications to subordinate units generally included a reference to the Coordinating Body and stated that the Main Staff "approved", "consented to", "concurred", or "agreed" with the Coordinating Body's "request", "approval", or "authorisation". These notifications were mainly signed by Milovanović or **Miletić**.
>
> The Trial Chamber has heard evidence that following the establishment of the State Committee, the VRS no longer had an input on the procedure for approval of humanitarian convoys but merely became the "executers [*sic*] of the committee's decisions". Based on the totality of the documentary and witness evidence adduced, the Trial Chamber, however, reaches a different conclusion. The Trial Chamber finds that even after the establishment of the State Committee, the Main Staff still had a substantive role in the process by which requests for humanitarian convoys were considered and approved or refused.[1870]

In reaching the last finding, the Trial Chamber noted the following four factors: (1) the procedure whereby the documents from the Committee and the convoy request were submitted to Milovanović or Mladić – the highest echelon of the Main Staff – for approval, which the Trial Chamber found evidenced a substantive role for the VRS; (2) the Defence expert witness testimony that according to the system in the RS, the VRS could always make a military assessment and "if there were any problems, it would intervene with the coordinating body"; (3) a 13 June 1995 order from Karadžić to the Main Staff, which the Trial Chamber reasoned would have been unnecessary if the Main Staff had no input on the approval of convoys; and (4) that the Main Staff notifications to subordinate units were framed in a language that signifies a decision-making role by the Main Staff in the process.[1871]

655. **Miletić** submits that by finding that the VRS had a substantive role in the humanitarian convoy approval process, the Trial Chamber committed errors of law and of fact.[1872] **Miletić** argues that the Trial Chamber's finding was made despite insufficient evidence, based on a distortion of the evidence, and contradicted other findings.[1873] **Miletić** presents specific arguments relating to the Trial Chamber's reliance on the factors listed above.[1874] The Prosecution responds that the Trial Chamber reasonably found that, even after the establishment of the State Committee, the VRS Main Staff had a substantive role in the approval or refusal of humanitarian convoys and that **Miletić** fails to show an error in this regard.[1875]

656. The Appeals Chamber first considers **Miletić**'s argument that since the Trial Chamber held that it lacked the evidence necessary for fully understanding the humanitarian convoy approval

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1870 Trial Judgement, paras 220-223 (internal references omitted).

1871 Trial Judgement, para. 223 (internal references omitted). The Appeals Chamber understands from the context of these considerations that "Milanović" was a clerical error and that the Trial Chamber intended to refer to Milovanović.

1872 Miletić's Appeal Brief, paras 175, 184-185; Miletić's Reply Brief, para. 70.

1873 Miletić's Appeal Brief, paras 175, 184-185; Miletić's Reply Brief, para. 69.

1874 Miletić's Appeal Brief, paras 175-181. See also Miletić's Appeal Brief, paras 182-183.

1875 Prosecution's Response Brief (Miletić), paras 112-119.

process, it ought to have found – pursuant to the principle of *in dubio pro reo* – that it could not determine the role of the VRS in this procedure.[1876] The Trial Chamber held that it lacked "the evidence necessary to fully understand and form a clear picture of the humanitarian convoy approval process as a whole. Consequently, only limited conclusions can be reached."[1877] The Appeals Chamber considers that the Trial Chamber's reference to a lack of evidence pertains only to its inability to *fully* understand and form a clear picture of the process *as a whole*. The holding does not imply that a reasonable trier of fact could not have made findings on specific aspects of the process, where the evidence allowed for such findings. Indeed, the Trial Chamber considered a substantial body of evidence relevant to the humanitarian convoy approval process and based its findings on the evidence before it.[1878] The Appeals Chamber considers that the Trial Chamber restricted its findings to the areas of the approval process which it was satisfied were proven. **Miletić** has not shown that by making these findings the Trial Chamber did not apply the standard of proof beyond reasonable doubt.[1879] The Appeals Chamber dismisses **Miletić**'s argument.

657. The Appeals Chamber now turns to **Miletić**'s arguments pertaining to the four factors noted by the Trial Chamber. **Miletić** does not clearly indicate any basis in the trial record for his assertion that the Trial Chamber neglected to consider that the documents from the Committee were sent to the Main Staff so that it might evaluate the military situation.[1880] The Trial Chamber noted that "the Defence expert witness testified that according to the system in the RS, the VRS could always make a military assessment and 'if there were any problems, it would intervene with the coordinating body'".[1881] The Appeals Chamber considers that this evidence, by itself, does not exclude the Main Staff's involvement in situations other than those when military assessment called for it. **Miletić**'s argument is dismissed.

658. **Miletić** argues that the Trial Chamber distorted Defence Witness Slavko Kralj's testimony when it concluded that Mladić and Milovanović approved the Committee's decisions "in most cases".[1882] The Trial Chamber found that "Colonel Đurđić communicated the Committee's views to either Mladić or Milovanović, who in most cases approved."[1883] The testimony of Kralj on which the finding is based was that "according to the *regular procedure*, [Colonel Đurđić] informed his superior officer, *in this case* either General Mladić or General Milovanović, who did not have any objections to this type of document. They simply approved it automatically".[1884] The Appeals

1876 Miletić's Appeal Brief, paras 175, 184; Miletić's Reply Brief, para. 69.
1877 Trial Judgement, para. 221.
1878 Trial Judgement, fns 639-658.
1879 See Trial Judgement, para. 9.
1880 Miletić's Appeal Brief, para. 176. See also Miletić's Appeal Brief, para. 177.
1881 Trial Judgement, para. 223.
1882 Miletić's Appeal Brief, para. 177.
1883 Trial Judgement, para. 221, referring to Slavko Kralj, T. 29299 (4 Dec 2008).
1884 Slavko Kralj, T. 29299 (4 Dec 2008) (emphasis added). See also Slavko Kralj, T. 29298 (4 Dec 2008).

Chamber considers that a reasonable trial chamber could have made the impugned finding based on this evidence. **Miletić**'s argument is therefore dismissed.

659. Regarding the third factor, **Miletić** argues that the Trial Chamber considered paragraph 3 of Karadžić's order (Exhibit P03051) out of context, failing to take into account other parts of this order as well as Exhibit 5D01429.[1885] The latter exhibit is a Main Staff notification to the Drina Corps and East Bosnia Corps concerning humanitarian convoys, dated 12 June 1995 and type-signed by **Miletić**, standing in for the Chief of Staff. It indicates that "we concur with the authorisation of the Coordinating Body" and that "we did not authorise" the transportation of certain items.[1886] Karadžić's order informs the Main Staff that a "positive opinion should be immediately given for all the notifications that arrived through the [Coordinating Body], referring to the weekly plan of deliveries of UNHCR from 10 to 17 June, that have already been examined by the Committee".[1887] Regarding implementation, the order states that the "authorised departments of [the Committee] will require new notifications".[1888] This does not show any error in the Trial Chamber's finding that there would have been no need for such an order if the Main Staff had no input on the approval of convoys.[1889]

660. Regarding the fourth factor, **Miletić** argues that "as the wording of the notifications does not make it possible to establish who made the decision, it cannot indicate the decision-making role of the Main Staff".[1890] **Miletić** bases his argument on the following finding of the Trial Chamber:

> The Trial Chamber notes that although at first sight, [certain humanitarian aid convoy notifications from the Main Staff to subordinate units indicating that certain items were not approved] may suggest that it was the decision of the Main Staff to refuse the items, the Trial Chamber has also seen evidence that on another occasion the refusal merely reflected the views of the State Committee. It has therefore not been established who made the final decision to refuse such items.[1891]

The Appeals Chamber considers that this narrow finding does not undermine the fourth factor, "that the Main Staff notifications to subordinate units are framed in a language that signifies a decision-making role by the Main Staff in the process".[1892]

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1885 Miletić's Appeal Brief, para. 178 & fns 335-338, referring to Ex. P03051, "Order from RS President to Supreme Headquarters of the VRS, signed by Karadžić, 13 June 1995", Ex. 5D01429, "VRS Main Staff notification to the Drina Corps and East Bosnia Corps concerning humanitarian convoys, type-signed Miletić, 12 June 1995".

1886 Ex. 5D01429, "VRS Main Staff notification to the Drina Corps and East Bosnia Corps concerning humanitarian convoys, type-signed Miletić, 12 June 1995", p. 1.

1887 Ex. P03051, "Order from RS President to Supreme Headquarters of the VRS, signed by Karadžić, 13 June 1995", p. 1. See also Trial Judgement, para. 223.

1888 Ex. P03051, "Order from RS President to Supreme Headquarters of the VRS, signed by Karadžić, 13 June 1995", p. 2.

1889 Trial Judgement, para. 223.

1890 Miletić's Appeal Brief, para. 179.

1891 Trial Judgement, fn. 651.

1892 Trial Judgement, para. 223.

661. Further, **Miletić** argues that the only document from the Coordinating Body admitted into evidence shows that, "despite the wording of the language of the Main Staff notifications, decisions were taken by the State Committee".[1893] In support of his argument, **Miletić** compares this document to a VRS Main Staff notification to the Drina Corps and the East Bosnia Corps regarding humanitarian aid convoys, signed by Milovanović and dated 19 May 1995.[1894] The Appeals Chamber notes that the Trial Chamber considered these two exhibits and observed that on this occasion "the refusal [to approve the transport of certain items] merely reflected the views of the State Committee".[1895] By ignoring this finding, **Miletić** has failed to show that the Trial Chamber erred. Furthermore, the Appeals Chamber rejects **Miletić**'s contention that since no other documents from the Coordinating Body were admitted into evidence "it cannot be ruled out that every one of the VRS notifications, despite the wording employed there, reflects the decisions of the State Committee".[1896] It is the task of the Trial Chamber to weigh the evidence and make findings beyond reasonable doubt on the basis of the evidence, not to draw inferences from documents that are not in evidence.[1897] For the same reason, the Appeals Chamber dismisses **Miletić**'s submission that the Trial Chamber's finding that "'[t]he Main Staff did not approve one truck of school supplies and the Swedish construction project for Srebrenica' lacks a proper basis, because it is not possible to determine who took the decision in the absence of the document from the Coordinating Body".[1898]

662. **Miletić**'s last argument regarding the fourth factor is that, contrary to what the Trial Chamber found, evidence shows that the Committee made decisions rather than issued opinions.[1899] According to the impugned finding, "[t]he Committee reached its views on the requests and the Coordinating Body issued 'permits' to the relevant requesting organization accordingly".[1900] The finding is based on Article 6 of the decision to form the Committee, published in the Official Gazette of the RS on 14 March 1995. **Miletić** relies on this same evidence to challenge the Trial Chamber's finding. Article 6 of that decision provides that "[p]ermits for the movement of convoys and employees of the UN and humanitarian organisations on the territory of Republika Srpska shall be issued by the Coordinating body for humanitarian operations, pursuant to Committee decisions".

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1893 Miletić's Appeal Brief, para. 180 & fns 342, 344, referring to Ex. 5D01308, "Fax from the VRS Coordinating Body for Humanitarian Aid re convoys, 17 May 1995".

1894 Miletić's Appeal Brief, para. 180 & fn. 343, referring to Ex. 5D00905, "VRS Main Staff notification to Drina Corps and East Bosnia Corps regarding humanitarian aid convoys, signed by Milovanović, 19 May 1995".

1895 Trial Judgement, fn. 651.

1896 Miletić's Appeal Brief, para. 180.

1897 See *Đorđević* Appeal Judgement, para. 448; *Halilović* Appeal Judgement, para. 128; *Kordić and Čerkez* Appeal Judgement, paras 762, 865; *Kupreškić et al.* Appeal Judgement, para. 30. See also *Đorđević* Appeal Judgement, para. 180.

1898 Miletić's Appeal Brief, fn. 345, referring to Trial Judgement, para. 234.

1899 Miletić's Appeal Brief, para. 181.

The Appeals Chamber can discern no error in the Trial Chamber's finding based on this evidence. The expression "reached its views" in the impugned finding is broad enough to encompass decision-making and other bodies besides the Committee may have had a role in the decision-making process.[1901] Indeed, the Trial Chamber made other findings on the role of the Main Staff in this regard.[1902] **Miletić**'s argument is therefore dismissed.

663. **Miletić** makes an additional argument that the Trial Chamber's finding – that after 28 April 1995 the Main Staff sent to its subordinate units two notifications of humanitarian convoys in which it did not make a reference to the Coordinating Body[1903] – was erroneous because those notifications do not concern humanitarian aid.[1904] However, the Appeals Chamber notes that this finding does not form part of the basis for the Trial Chamber's conclusion on the Main Staff's continuing substantive role in the process for approving or refusing humanitarian convoys.[1905] **Miletić** has not explained how the finding is relevant to his argument, and his argument is therefore dismissed.

664. Finally, **Miletić** argues that the Trial Chamber did not distinguish between "the VRS" and "the Serb authorities".[1906] The Appeals Chamber notes that **Miletić** provides only one specific example, a UN report (Exhibit 6D00200) which states that "UNHCR was forced to cancel some convoys to Gora[ž]de for security reasons while others were denied access by the Bosnian Serbs".[1907] The Trial Chamber found, based on this evidence, that "UNHCR was forced to cancel some convoys for Goražde due to security reasons and VRS restrictions".[1908] The Appeals Chamber considers that the terms "VRS" and "Bosnian Serbs" are not synonymous.[1909] However, the findings of the Trial Chamber that precede the impugned finding are replete with references to restrictions on humanitarian convoys implemented by the VRS.[1910] Noting that **Miletić** does not allege or show that the attribution of these restrictions to the VRS is erroneous in any of those

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1900 Trial Judgement, para. 221 & fn. 646, referring to Ex. 6D00007, "Official Gazette of RS, Year IV, Number 3, Decision on Forming a State Committee for Cooperation with the UN and International Humanitarian Organisations, signed by Karadžić, 14 March 1995", p. 2, Art. 6.

1901 The Appeals Chamber cannot draw the inference implied by **Miletić** that "Kekić" is the same person as "the boss" in Ex. 5D01405, "Intercept, 8 June 1995, 17:58 hours". Miletić's Appeal Brief, fn. 347. Even if that were the case, the Appeals Chamber could not infer on the basis of this exhibit that Kekić had an exclusive power to authorise convoys. Finally, the Appeals Chamber notes **Miletić**'s submission that this exhibit shows that "Kekic was the *main* person to authorize the convoys" (emphasis added).

1902 See Trial Judgement, paras 221-222.

1903 Trial Judgement, para. 224.

1904 Miletić's Appeal Brief, para. 182, referring to Ex. P02551, "VRS Main Staff notification to Military Post 7111 concerning movement of UN civilian observers, type-signed Miletić, 29 June 1995", Ex. P02661a, "VRS Main Staff notification to East Bosnia Corps, Drina Corps, Sarajevo-Romanija Corps and Herzegovina Corps, signed by Miletić, 26 July 1995".

1905 See Trial Judgement, paras 223-224.

1906 Miletić's Appeal Brief, para. 183.

1907 Miletić's Appeal Brief, para. 183, referring to Ex. 6D00200, "UN Daily Report, 6 July 1995", p. 2, para. 4.

1908 Trial Judgement, para. 233.

1909 See Trial Judgement, paras 88, 90.

1910 Trial Judgement, paras 228-231.

findings, the Appeals Chamber considers that he has failed to demonstrate his claim that the Trial Chamber did not distinguish between "the VRS" and "the Serb authorities".

665. Consequently, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 5.7.

h. Restrictions placed upon the convoys as part of a plan established under Directive 7 (Sub-ground 5.8)

666. **Miletić** submits that the Trial Chamber committed an error of law by not establishing beyond reasonable doubt the link between the restrictions placed upon the convoys and Directive 7.[1911] **Miletić** further contends that the Trial Chamber made a clear mistake of fact in holding that there was a VRS policy of restricting humanitarian aid to the enclaves and that the restrictions were in keeping with the plan established under Directive 7.[1912]

667. **Miletić** argues that the passage in Directive 7 asking the state and military authorities to reduce and limit supply to UNPROFOR and the distribution of humanitarian aid in the enclaves did not specifically address the Srebrenica and Žepa enclaves, but all of the enclaves, including Sarajevo, Goražde, and Bihać. **Miletić** further argues that the Trial Chamber neglected to consider this fact and thereby misinterpreted the passage as a policy with the ultimate aim of forcing the Bosnian Muslims to leave the enclaves, notwithstanding that forcing Bosnian Muslims to leave the Sarajevo, Goražde, and Bihać enclaves was never at issue. He also submits that the Trial Chamber neglected to consider the preceding passage of Directive 7, which referred to "the partial and hostile activities of certain individuals and of a portion of UNPROFOR and of certain humanitarian organizations".[1913] **Miletić** further contends that the Trial Chamber erred when it attributed the policy to the VRS, considering that Directive 7 was issued by the political authorities of the RS.[1914] In addition, he argues that the Trial Chamber's finding that the time between the issuance of Directive 7 and the increase in restrictions served to corroborate the link to Directive 7 was based on the erroneous assumption that the restrictions had increased.[1915] **Miletić** adds that contrary to the Trial Chamber's findings, evidence showed a progressive increase in the humanitarian aid delivered to Srebrenica and Žepa following Directive 7, which demonstrates that the aid was not restricted pursuant to Directive 7.[1916] **Miletić** contends that the Trial Chamber did not establish that the restrictions placed upon the convoys for Srebrenica and Žepa differed and were more severe than

1911 Miletić's Appeal Brief, para. 191; Miletić's Reply Brief, para. 72.
1912 Miletić's Appeal Brief, para. 191; Miletić's Reply Brief, para. 72.
1913 Miletić's Appeal Brief, para. 186.
1914 Miletić's Appeal Brief, para. 187.
1915 Miletić's Appeal Brief, para. 188; Miletić's Reply Brief, para. 71.
1916 Miletić's Reply Brief, para. 71; Appeal Hearing, AT. 482 (5 Dec 2013).

those imposed on the convoys bound for other destinations.[1917] Finally, **Miletić** argues that the Trial Chamber neglected to consider the legality of the restrictions and the numerous factors which provoked them, which were extraneous to Directive 7.[1918]

668. The Prosecution submits that the Trial Chamber reasonably found that the VRS imposed restrictions on humanitarian convoys pursuant to the criminal plan contained in Directive 7, and that **Miletić**'s irrelevant, undeveloped, and repetitive arguments fail to show that the Trial Chamber erred.[1919]

669. With regard to **Miletić**'s argument that the Trial Chamber neglected to consider that the Directive 7 passage on the restriction of aid concerned all enclaves, the Appeals Chamber recalls that the Trial Chamber found that:

> the plan to force the populations of Srebrenica and Žepa to leave the enclaves was set out in Directive 7. The Directive spelled out that this be done through, *inter alia*, "the planned and unobtrusively restrictive issuing of permits" so as to "reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will while at the same time avoiding condemnation by the international community and international public opinion". The Trial Chamber[] finds this constituted a clear policy on the part of the VRS to restrict aid to the enclaves with the ultimate aim to force the Bosnian Muslims to leave.[1920]

In other words, the Trial Chamber found that a policy to restrict aid directed to "the enclaves" was one means of forcing the Bosnian Muslims to leave the Srebrenica and Žepa enclaves. The Appeals Chamber considers that **Miletić** has failed to demonstrate that a reasonable trier of fact could not have come to this conclusion.[1921] The Appeals Chamber is further not convinced by **Miletić**'s submission that the Trial Chamber neglected to consider the reference in the preceding passage of Directive 7 to "the biased and hostile activities of certain individuals and parts of UNPROFOR and some humanitarian organisations",[1922] as it is not clearly relevant to the goal stated in the ensuing paragraph to "reduce and limit the logistics support of UNPROFOR *to the enclaves and the supply of material resources to the Muslim population*".[1923]

670. With regard to **Miletić**'s argument that the Trial Chamber erred in attributing to the VRS the policy of forcing Bosnian Muslims out of the enclaves because Directive 7 was issued by the RS

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1917 Miletić's Appeal Brief, para. 189.
1918 Miletić's Appeal Brief, para. 190.
1919 Prosecution's Response Brief (Miletić), paras 120-125. In particular, the Prosecution avers that the Trial Chamber reasonably found that the lapse in time between the issuance of Directive 7 in March 1995 and the significant decrease in aid in June 1995 corroborated the link between the two. Prosecution's Response Brief (Miletić), para. 123; Appeal Hearing, AT. 457-458 (5 Dec 2013).
1920 Trial Judgement, para. 766 (internal reference omitted).
1921 Miletić's Appeal Brief, para. 186. The Appeals Chamber observes that **Miletić** provides no support for his assertion that "forcing the Muslims to leave Sarajevo, Biha[ć] or Gora[ž]de was never at issue".
1922 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 14.
1923 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 14 (emphasis added). See *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

political authorities, the Appeals Chamber notes that the Trial Chamber was aware that Directive 7 was issued by the RS Supreme Command.[1924] The Appeals Chamber further notes that the impugned finding was immediately preceded by several other findings in which the Trial Chamber concluded that Directive 7 set out tasks for the VRS, which issued documents referring to Directive 7.[1925] Consequently, the Appeals Chamber is not convinced that **Miletić** has shown any error in the Trial Chamber's finding that it was "a clear policy on the part of the VRS to restrict aid to the enclaves with the ultimate aim to force the Bosnian Muslims to leave".[1926]

671. **Miletić**'s argument that there was an increase in the humanitarian aid delivered to Srebrenica and Žepa following Directive 7 disregards the fact that the Trial Chamber considered the evidence to which he refers[1927] and concluded that "UNHCR data show that between March and May the aid delivery was rather consistent".[1928] The Trial Chamber further found that "at least from June the aid supply decreased significantly".[1929] The Trial Chamber also expressly took into consideration the time lapse between the issuing of Directive 7 and the increase in convoy restrictions and found that it "corroborate[d] the imposition of the convoy restrictions in accordance with the policy set out in Directive 7".[1930] **Miletić** has not shown that the Trial Chamber erred in this regard. His argument is therefore dismissed.

672. The Appeals Chamber further dismisses, as undeveloped, **Miletić**'s assertion that the Trial Chamber did not establish that the restrictions placed upon the convoys for Srebrenica and Žepa differed and were more severe than those imposed on the convoys bound for other destinations. The assertion stands in a paragraph alone, with no support and no references.[1931] Finally, with regard to **Miletić**'s argument that the Trial Chamber neglected to consider the legality of the restrictions that were provoked by factors extraneous to Directive 7, the Appeals Chamber has already analysed the submissions to which he refers[1932] elsewhere, dismissing all of them.[1933]

673. The Appeals Chamber therefore dismisses **Miletić**'s sub-ground of appeal 5.8.

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1924 See, *e.g.*, Trial Judgement, fn. 2794.
1925 Trial Judgement, paras 762-765.
1926 Trial Judgement, para. 766.
1927 Trial Judgement, para. 231 & fn. 690, para. 237 & fn. 718, para. 241 & fn. 733, referring to Ex. P04145, "UNHCR Information Notes on former Yugoslavia, No. 7/95, July 1995", p. 21. The Appeals Chamber understands the reference to "P4145, p. 19" in footnotes 103-104 of Miletić's Reply Brief to be a clerical error, and that **Miletić** intended to refer to page 21 of the exhibit in question.
1928 Trial Judgement, para. 767 & fn. 2795.
1929 Trial Judgement, para. 767.
1930 Trial Judgement, fn. 2796. **Miletić**'s argument that this finding was based on an erroneous assumption is made by way of cross-reference to his sub-ground of appeal 5.4, which the Appeals Chamber has dismissed above. Miletić's Appeal Brief, para. 188 & fn. 365, referring to Miletić's Appeal Brief, paras 159, 161. See *supra*, paras 632-640.
1931 See Miletić's Appeal Brief, para. 189.
1932 See Miletić's Appeal Brief, para. 190 & fns 367-368, referring to Miletić's Appeal Brief, paras 136-144, 158-159, 161.
1933 See *supra*, paras 608-617, 631-640

i. Conclusion

674. The Appeals Chamber has dismissed **Miletić**'s ground of appeal 5 in its entirety.

3. *Mens rea* for crimes against humanity

(a) Beara's appeal (Grounds 8 in part and 24)

675. Under his ground of appeal 24, **Beara** submits that the Trial Chamber erred in law and abused its discretion by finding that he satisfied the knowledge requirement for the commission of a crime against humanity.[1934] In particular, **Beara** argues that the Trial Chamber failed to establish with sufficient precision his knowledge that his acts were part of a widespread or systematic attack against a civilian population.[1935] He further contends that, from the evidence adduced, the Trial Chamber could not have reasonably found that the knowledge requirement had been fulfilled.[1936] Specifically, **Beara** argues that the Trial Chamber erred by reaching its conclusion solely on the basis of his formal position as Chief of Security of the Main Staff of the VRS.[1937] **Beara** also argues that the civilian character of the targeted population is questionable due to the presence of combatants and persons *hors de combat* within it.[1938] **Beara** concludes that the Trial Chamber's errors constituted a miscarriage of justice which violated his right to a fair trial.[1939] Under his ground of appeal 8, **Beara** contends that the Trial Chamber erroneously relied on unclear evidence of Witness Milovanović to infer that **Beara** attended daily morning briefings of the Main Staff with Mladić, evidence which was used as proof of his knowledge that his acts were part of a widespread or systematic attack against a civilian population.[1940]

676. The Prosecution responds that the Trial Chamber correctly applied the law and properly found that **Beara** was aware of the widespread and systematic attack directed against the civilian populations of Srebrenica and Žepa and that he knew that his crimes formed part of that attack.[1941] The Prosecution further argues that the Trial Chamber did not rely solely on **Beara**'s formal position.[1942] Finally, the Prosecution submits that **Beara**'s argument regarding Milovanović's evidence should be dismissed as a mere assertion.[1943]

1934 Beara's Appeal Brief, intro before para. 259, paras 259, 262-267; Beara's Reply Brief, paras 93-94.
1935 Beara's Appeal Brief, paras 259-261; Beara's Reply Brief, paras 93-94.
1936 Beara's Appeal Brief, paras 262-267, 282; Beara's Reply Brief, paras 93-94.
1937 Beara's Appeal Brief, paras 263-266; Beara's Reply Brief, para. 93.
1938 Beara's Reply Brief, para. 94. See also Beara's Appeal Brief, para. 261.
1939 Beara's Appeal Brief, intro before para. 259, para. 262.
1940 Beara's Appeal Brief, para. 132.
1941 Prosecution's Response Brief (Beara), paras 268-270, 272-274.
1942 Prosecution's Response Brief (Beara), paras 268-269, 271, 274-275.
1943 Prosecution's Response Brief (Beara), para. 129.

677. The Appeals Chamber recalls that one requirement for a crime under Article 5 of the Statute is that the perpetrator must know that there is a widespread or systematic attack on a civilian population and that his or her acts constitute part of that attack,[1944] a requirement that the Trial Chamber recalled correctly with regard to **Beara**.[1945] In this regard, the Trial Chamber found that **Beara** had knowledge of the strategic goals of the RS and VRS's leadership to remove the Bosnian Muslim population from Srebrenica and Žepa and that his position required that he have intimate knowledge of documents reflecting those goals, including orders "passed to" subordinate security organs.[1946] Moreover, the Trial Chamber found that **Beara**, as Chief of the Security Administration, had to be apprised of the work of subordinate security organs.[1947] Ultimately, the Trial Chamber concluded that the knowledge requirement for the commission of a crime under Article 5 of the Statute had been met with regard to **Beara**.[1948]

678. The evidentiary bases for the Trial Chamber's legal finding were: (1) Milovanović's impugned testimony that the Chief of the Security Administration regularly attended daily meetings of the VRS Main Staff;[1949] (2) VRS Main Staff instructions from October 1994 stating in particular that security and intelligence organs at all levels must submit security and intelligence reports to their superior organs in the professional sense;[1950] and (3) Witness Boering's testimony indicating that **Beara** was seeking information about the ABiH in the Srebrenica enclave.[1951] The Trial Chamber further relied on its previous findings relating to **Beara**'s position as Chief of the Security Administration.[1952] Those findings were based, in most relevant parts, on the evidence of Witness Vuga, who testified that security organs had an obligation to regularly report to the superior security officer and that the chief of the VRS Security Administration oversaw the security organs.[1953]

679. In light of this evidence, the Appeals Chamber considers that **Beara** has failed to show that a reasonable trier of fact could not have relied on the impugned testimony to find that he attended morning briefings of the Main Staff with Mladić.[1954] However, the Appeals Chamber observes that while the Trial Chamber made the necessary legal finding with respect to the knowledge

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1944 *Šainović et al.* Appeal Judgement, para. 264; *Kordić and Čerkez* Appeal Judgement, paras 99-100; *Blaškić* Appeal Judgement, paras 124-126; *Kunarac et al.* Appeal Judgement, paras 85, 99, 103.
1945 Trial Judgement, para. 1323, referring to Trial Judgement, paras 751, 758.
1946 Trial Judgement, para. 1324.
1947 Trial Judgement, paras 1204, 1206.
1948 Trial Judgement, para. 1324.
1949 Trial Judgement, fn. 4319, referring to "Božo Milovanović, T. 12188-12189". The Appeals Chamber notes that these transcript pages refer to the evidence of Manojlo Milovanović.
1950 Trial Judgement, fn. 4319, referring to Ex. P02741, "Instruction on command and control over the Security and Intelligence organs of the VRS signed by Mladić, 24 October 1994", paras 4, 6.
1951 Trial Judgement, fn. 4319, referring to Pieter Boering, T. 1876-1877, 1902-1904 (19 Sept 2006), T. 2109-2111, 2121 (25 Sept 2006).
1952 Trial Judgement, fn. 4320, referring to Trial Judgement, paras 1200-1206.
1953 Trial Judgement, para. 1204 & fn. 3871 (referring to Petar Vuga, T. 23327-23329 (4 July 2008)), para. 1206 & fn. 3874 (referring to Peter Vuga, T. 23109 (1 July 2008)).
1954 Trial Judgement, para. 1203.

requirement, it does not appear to be based on any factual findings concerning **Beara**'s knowledge that his own acts comprised part of the attack on the Bosnian Muslim population from Srebrenica and Žepa. Nevertheless, considering that **Beara**'s convictions may be upheld if the finding is supported by other factual findings made by the Trial Chamber,[1955] which is clearly the case here,[1956] the Appeals Chamber dismisses his argument.

680. With regard to **Beara**'s challenge to the civilian character of the targeted population, the Appeals Chamber notes that it is unsupported by any references to the trial record and dismisses it.[1957]

681. Taking into account the foregoing, the Appeals Chamber finds that the Trial Chamber did not err in concluding that the knowledge requirement for the commission of a crime against humanity under Article 5 of the Statute had been satisfied with regard to **Beara**. The Appeals Chamber therefore dismisses **Beara**'s ground of appeal 8 in relevant part and his ground of appeal 24 in its entirety.

(b) Nikolić's appeal (Ground 8)

(i) Arguments of the Parties

682. **Nikolić** submits that the Trial Chamber erred in fact by finding that his acts of murder were clearly tied to the widespread and systematic attack on Srebrenica and that he knew this was the case.[1958] First, **Nikolić** argues that the Trial Chamber erred in considering the involvement of his Commander, **Pandurević**, in the military attack on Srebrenica as a basis of his *mens rea*, especially as it found that the attack on Srebrenica also involved legitimate military aims and that **Pandurević** intended exclusively to achieve the military objective of defeating the ABiH 28th Division forces in Srebrenica.[1959] **Nikolić** also argues that the Trial Chamber found that there were four components encompassed in the attack against the civilian population of Srebrenica, but that he only had partial knowledge of one of them, namely the planned military assault on the enclave.[1960]

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1955 *Bagosora and Nsengiyumva* Appeal Judgement, para. 671.

1956 See Trial Judgement, para. 1299 (**Beara** played a key role in orchestrating the murder operation), 1300 (having received orders "from the top" to kill all the Bosnian Muslim males housed in and around Bratunac, **Beara** identified locations, secured personnel and equipment and oversaw the execution of the murder plan at the individual killing sites), 1301 (**Beara**'s overarching responsibility for and participation in the killing operation). See also, *e.g.*, Trial Judgement, paras 1068, 1271, 1279, 1282, 1313-1314, 2164.

1957 See also *supra*, para. 567 & note 1599.

1958 Nikolić's Appeal Brief, para. 134, referring to Trial Judgement, paras 1418-1419.

1959 Nikolić's Appeal Brief, paras 134-136 (referring to, *inter alia*, Trial Judgement, paras 774, 2000); Nikolić's Reply Brief, paras 53, 55.

1960 Nikolić's Appeal Brief, para. 137; Nikolić's Reply Brief, paras 53, 55. See Nikolić's Appeal Brief, para. 134.

683. Second, **Nikolić** argues that the Trial Chamber erred in finding that he knew that the prisoners had come into VRS custody as a result of the attack on Srebrenica, as it ignored several pieces of evidence which showed that he did not know where they came from.[1961] Third, **Nikolić** contends that the Trial Chamber failed to consider evidence indicating his perception that the prisoners were affiliated with the ABiH and destined for a prisoner exchange.[1962] Finally, **Nikolić** submits that the Trial Chamber failed to take into account his limited involvement in the operation in comparison to other defendants, considering his low rank, his lack of knowledge of Directive 7, and his absence from Srebrenica during the relevant time period.[1963] **Nikolić** concludes that the Trial Chamber's errors occasioned a miscarriage of justice and that all his convictions for crimes against humanity should be quashed.[1964]

684. The Prosecution responds that the Trial Chamber reasonably relied on the military attack on Srebrenica and **Nikolić**'s awareness of it in its finding with regard to his *mens rea* for crimes against humanity.[1965] The Prosecution argues that **Nikolić** ignores relevant findings of the Trial Chamber in this regard,[1966] and fails to show that the Trial Chamber made unreasonable findings with regard to his knowledge of the prisoners' origin, status, and fate.[1967] The Prosecution finally argues that the Trial Chamber found that the other defendants with whom **Nikolić** compares himself also satisfied the same *mens rea* requirement.[1968]

(ii) Analysis

685. The Trial Chamber properly held that **Nikolić** could be held responsible for a crime against humanity under Article 5 of the Statute, "if his acts formed part of a widespread or systematic attack directed against a civilian population and if at the time he knew of that attack and that his acts comprise[d] part of it".[1969] The Trial Chamber found that **Nikolić** met this requirement, on the following basis:[1970]

> The Trial Chamber recalls its finding that there was a widespread and systematic attack directed against a civilian population with several components culminating in the military action against Srebrenica. **Nikolić**, as Chief of Security of the Zvornik Brigade, whose Commander took part in the attack on Srebrenica, knew of the military attack against the protected Srebrenica enclave. He

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1961 Nikolić's Appeal Brief, paras 138-139; Nikolić's Reply Brief, para. 55. See Nikolić's Appeal Brief, paras 134, 144.
1962 Nikolić's Appeal Brief, paras 134, 140-142; Nikolić's Reply Brief, para. 55.
1963 Nikolić's Appeal Brief, paras 134, 143-144; Nikolić's Reply Brief, paras 53-55.
1964 Nikolić's Appeal Brief, para. 145.
1965 Prosecution's Response Brief (Nikolić), para. 163.
1966 Prosecution's Response Brief (Nikolić), paras 163-165.
1967 Prosecution's Response Brief (Nikolić), para. 162, referring to Prosecution's Response Brief (Nikolić), paras 144-150.
1968 Prosecution's Response Brief (Nikolić), paras 162 (referring to Prosecution's Response Brief (Nikolić), paras 98-123), 166.
1969 Trial Judgement, para. 1417, referring to the applicable law set out in Trial Judgement, paras 751, 757-758.
1970 Trial Judgement, para. 1419.

> further knew that the Bosnian Muslim prisoners were transported from Bratunac to Zvornik. Therefore, he knew that these were prisoners who had come into the custody of the VRS as a result of the attack on the civilian enclave of Srebrenica. **Nikolić** saw that the Bosnian Muslim prisoners detained at the Grbavci School and executed at Orahovac were not only soldiers, but also civilians and that no distinction or selection was made in terms of those to be executed. **Nikolić**'s acts of murder are clearly tied to the attack on Srebrenica, and **Nikolić** knew that this was the case.[1971]

686. With regard to **Nikolić**'s first argument, the Appeals Chamber notes that the Trial Chamber's finding that **Nikolić** knew of the military attack against the Srebrenica enclave was based both on **Pandurević**'s involvement and on **Nikolić**'s role as Chief of Security of the Zvornik Brigade. **Nikolić** does not demonstrate any error in this finding. Furthermore, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have considered his knowledge of the military attack on Srebrenica, among other factors, when assessing whether he knew that his acts were part of a widespread or systematic attack against a civilian population. The Appeals Chamber notes that **Nikolić** has failed to substantiate his claim that the Trial Chamber found that he "only knew, in part, of the planned military assault on the enclaves, lacking knowledge of three out of four components".[1972] Finally, the Appeals Chamber recalls the Trial Chamber's finding that the military action against the Srebrenica and Žepa enclaves constituted, by itself, an illegal attack against a civilian population of a widespread and systematic nature, considering its full-scale, indiscriminate, and disproportionate character.[1973] For the foregoing reasons, the Appeals Chamber dismisses **Nikolić**'s first argument.

687. In support of his second argument, **Nikolić** refers to evidence which indicates that as of the evening of 13 July 1995 he knew that a large number of Bosnian Muslim prisoners were arriving in Zvornik from Bratunac.[1974] Contrary to **Nikolić**'s contention, this evidence does not demonstrate that he was unaware of their geographical origin. **Nikolić** has also failed to demonstrate that the Trial Chamber ignored this evidence, considering in particular its finding that he "knew that the Bosnian Muslim prisoners were transported from Bratunac to Zvornik".[1975] In addition, **Nikolić** himself refers to the Trial Chamber's finding that, in the morning of 14 July 1995, he met with **Beara** and **Popović** to discuss the details of the killing operation (the 14 July Meeting).[1976] Having discussed the details of the killing operation, **Nikolić** would have known of the connection to the events in Srebrenica. The Appeals Chamber concludes that **Nikolić** has failed to demonstrate that

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1971 Trial Judgement, para. 1418 (internal references omitted).
1972 Nikolić's Appeal Brief, para. 137. See *supra*, para. 558.
1973 Trial Judgement, para. 775.
1974 Nikolić's Appeal Brief, para. 139, referring to PW-168, T. 15830-15832 (closed session) (26 Sept 2007), Momir Nikolić, T. 33211-33212 (24 Apr 2009).
1975 Trial Judgement, para. 1418.
1976 Nikolić's Appeal Brief, para. 139, referring to Trial Judgement, para. 1404.

the Trial Chamber erred in finding that he knew that the prisoners had come into the custody of the VRS as a result of the attack on the Srebrenica enclave. **Nikolić**'s second argument is dismissed.[1977]

688. Within his third argument, **Nikolić** refers to findings of the Trial Chamber indicating that as of the evening of 13 July 1995 he knew that Mladić had ordered that the incoming Bosnian Muslim prisoners be shot.[1978] **Nikolić** further refers to evidence which indicates that he *thereafter* told others that he had been ordered to provide accommodation for people coming in for an exchange.[1979] Considering his prior knowledge of the fate of the prisoners, **Nikolić** has failed to show that he was under the impression that the prisoners were destined for a prisoner exchange. The Appeals Chamber recalls that the Trial Chamber found that "**Nikolić** saw that the Bosnian Muslim prisoners detained at the Grbavci School and executed at Orahovac were not only soldiers, but also civilians and that no distinction or selection was made in terms of those to be executed".[1980] The Appeals Chamber therefore dismisses the contention that **Nikolić** was under the impression that the prisoners were affiliated with the ABiH. Accordingly, the Appeals Chamber also dismisses his contention that the Trial Chamber failed to consider allegedly relevant evidence. **Nikolić**'s explanation of the civilian clothing and varying ages as reflecting the realities of the war in BiH is not supported by any references to the trial record and is dismissed as being unsubstantiated.[1981] The Appeals Chamber therefore dismisses **Nikolić**'s third argument.[1982]

689. With regard to **Nikolić**'s last argument, the Appeals Chamber considers that the degree of involvement of the other defendants is of no particular relevance. The question is whether **Nikolić** can demonstrate an error in the Trial Chamber's finding that he satisfied the *mens rea* requirement for crimes against humanity. In this regard, the Appeals Chamber considers that **Nikolić** has failed to demonstrate that his involvement was so limited that no reasonable trial chamber could have found that he knew at the time that his acts formed part of a widespread or systematic attack directed against a civilian population.[1983]

690. Consequently, the Appeals Chamber dismisses **Nikolić**'s ground of appeal 8 in its entirety.

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1977 See also *infra*, para. 996.
1978 Nikolić's Appeal Brief, para. 141, referring to Trial Judgement, paras 1345, 1354.
1979 Nikolić's Appeal Brief, paras 141 (referring to Trial Judgement, fn. 4400, Milorad Birčaković, T. 11120 (8 May 2007)), 142 (referring to Lazar Ristić, T. 10088-10089 (16 Apr 2007)).
1980 Trial Judgement, para. 1418. See also Trial Judgement, paras 1361-1365, 1404.
1981 See Nikolić's Appeal Brief, para. 142.
1982 See *infra*, para. 935.
1983 See *supra*, para. 685.

(c) Miletić's appeal

(i) Alleged error in finding that Miletić knew of the attack directed against the civilian population (Sub-ground 11.4)

691. **Miletić** submits that the Trial Chamber erred in fact by finding that he knew of the widespread and systematic attack against the civilian population.[1984] He argues that this conclusion rests on another erroneous finding that the attack upon the civilian population started with Directive 7.[1985] He further argues that, before he left the Main Staff, the objective of the military operations was to separate the enclaves, which did not entail an attack on the civilian population, and therefore he could not have known about the attack until he returned to the Main Staff.[1986] **Miletić** submits that the Trial Chamber did not take into account all of the relevant evidence.[1987] **Miletić** concludes that the Trial Chamber's error invalidates the Trial Judgement.[1988] The Prosecution responds that the Trial Chamber reasonably found that **Miletić**, the drafter of Directive 7, knew of the attack from its inception and that his acts formed part of it.[1989]

692. The Trial Chamber found that "**Miletić** was well familiar with the attack on the civilian population in the enclaves from its inception and [that] he had a broad overview of it so as to be fully aware of its widespread and systematic nature".[1990] It also found that considering **Miletić**'s acts – *i.e.* drafting Directive 7, serving as the Main Staff focal point for information concerning the attack on Srebrenica and Žepa, and monitoring the busing of the civilian population out of the enclaves – he "could not but know that they contributed to and formed part of the attack on a civilian population".[1991] In light of these findings, the Appeals Chamber is not convinced that the impugned finding "rests" upon the separate finding that the attack upon the civilian population started with Directive 7.

693. The Appeals Chamber considers that **Miletić** has failed to demonstrate why his absence from the Main Staff leads to the inference that he was not kept informed of the evolution of the objectives of the military operations. With regard to **Miletić**'s submission that the Trial Chamber did not take into account all of the relevant evidence, he refers to the same evidence as under his sub-ground of appeal 3.4.[1992] The Appeals Chamber recalls that it has dismissed under that ground

1984 Miletić's Appeal Brief, paras 348, 350-351. See Miletić's Appeal Brief, paras 336-337.
1985 Miletić's Appeal Brief, para. 348.
1986 Miletić's Appeal Brief, paras 349-350.
1987 Miletić's Appeal Brief, para. 351.
1988 Miletić's Appeal Brief, paras 336-337.
1989 Prosecution's Response Brief (Miletić), paras 240-241.
1990 Trial Judgement, para. 1719.
1991 Trial Judgement, para. 1719 & fn. 5213.
1992 Miletić's Appeal Brief, fn. 724, referring to Miletić's Appeal Brief, para. 247 & fns 525-526. *Cf.* Miletić's Appeal Brief, para. 123 & fns 203-205.

of appeal **Miletić**'s argument that it was only with Karadžić's 9 July Order that the civilian population of the enclaves became the target of the attack.[1993] The Appeals Chamber concludes that **Miletić** has failed to demonstrate any error in the Trial Chamber's factual finding or reasoning. Consequently, the Appeals Chamber dismisses his sub-ground of appeal 11.4.

(ii) Alleged error in finding that Miletić knew that his actions were part of an attack upon the civilian population (Sub-grounds 10.13 and 11.3)

694. **Miletić** submits that the Trial Chamber applied an erroneous standard and erred in law when it held that his actions comprised part of an attack directed against the civilian population.[1994] **Miletić** argues that his actions were legal, militarily legitimate, and undertaken in the normal course of his duties, which were unrelated to Srebrenica and Žepa and would have been accomplished even if there had been no attack upon a civilian population.[1995] He asserts in this regard that the Trial Chamber failed to establish that he knew of such an attack and that his actions comprised part of that attack.[1996] Finally, **Miletić** argues that since his actions were primarily related to his professional, legitimate, and regular duties, the Trial Chamber needed to determine his intention to be able to establish whether these actions were part of the attack on the civilian population.[1997] **Miletić** argues that these errors invalidate his convictions.[1998]

695. The Prosecution submits that the Trial Chamber applied the correct legal standard and reasonably found that **Miletić** knew his acts formed part of the widespread and systematic attack directed against the civilian population of Srebrenica and Žepa.[1999] The Prosecution argues that it is irrelevant that **Miletić** would have carried out similar duties in the absence of an attack against the civilian population or that his acts fell within his routine duties at the Main Staff.[2000] Finally, according to the Prosecution, the Trial Chamber was not required to establish **Miletić**'s intent to make his actions part of the attack upon the civilian population.[2001]

696. The Appeals Chamber observes that, contrary to **Miletić**'s submission, the Trial Chamber applied the correct knowledge standard for a crime against humanity,[2002] and further made the required findings, when it found that:

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1993 See *supra*, para. 599.
1994 Miletić's Appeal Brief, paras 263, 325, 328.
1995 Miletić's Appeal Brief, paras 325, 327-328, 332, 335-337, 346-347.
1996 Miletić's Appeal Brief, para. 326.
1997 Miletić's Appeal Brief, para. 327; Miletić's Reply Brief, paras 108-109.
1998 Miletić's Appeal Brief, paras 265, 337.
1999 Prosecution's Response Brief (Miletić), paras 228-229, 240, 242.
2000 Prosecution's Response Brief (Miletić), para. 229. See also Appeal Hearing, AT. 475 (5 Dec 2013).
2001 Prosecution's Response Brief (Miletić), para. 230.
2002 *Kunarac et al.* Appeal Judgement, para. 99. See Trial Judgement, para. 1719, referring to Trial Judgement, paras 751, 757-758.

> **Miletić**'s acts [...] were clearly tied to the attack and were such in nature that **Miletić** could not but know that they contributed to and formed part of that attack on a civilian population. Therefore, the Trial Chamber concludes that **Miletić** knew of the widespread and systematic attack against the civilian populations of Srebrenica and Žepa and he further knew that his acts formed part of that attack.[2003]

697. With regard to the argument that **Miletić**'s acts were carried out in the course of his regular duties, the Appeals Chamber observes that he merely postulates that he would have conducted his daily work in the same manner if an attack had not taken place, without showing that his actions were indeed of such a regular nature. The Appeals Chamber notes that the Trial Chamber found that:

> **Miletić** had full knowledge of [the restrictions of humanitarian aid and re-supply of UNPROFOR, the military attack on the enclaves, and the busing out of the civilians from Potočari and Žepa]: he drafted Directive 7, he was the focal point at the Main Staff for any information concerning the attack on Srebrenica and Žepa and monitored the busing out of the civilian population from the enclaves.[2004]

In light of these findings, there was no need for the Trial Chamber to inquire specifically into whether **Miletić**'s actions were carried out as part of his regular duties, his intentions in carrying out these acts, or whether that could raise reasonable doubt with regard to the existence of a nexus between his actions and the attack against the civilian population.

698. For the foregoing reasons, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber erred. Accordingly, the Appeals Chamber dismisses his sub-grounds of appeal 10.13 and 11.3.

### 4. Extermination (Beara's Ground 28)

#### (a) Arguments of the Parties

699. **Beara** submits that the Trial Chamber erred in law and in the exercise of its discretion in finding that he possessed the *mens rea* for extermination as a crime against humanity,[2005] arguing that he lacked the required intent for extermination or murder.[2006] **Beara** challenges the Trial Chamber's factual findings related to his presence at and role in the planning of the killing operations. Specifically, he avers that: (1) there is no evidence establishing his presence at, or role in, any events prior to 13 July 1995; (2) the Trial Chamber unreasonably inferred his involvement in the planning of the murder operation solely on the basis of his official position in the VRS and the conduct of his subordinates; (3) evidence related to his own orders and actions does not support the

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2003 Trial Judgement, para. 1719.

2004 Trial Judgement, fn. 5213, referring to Trial Judgement, paras 1649, 1661-1699.

2005 Beara's Appeal Brief, intro before para. 282, paras 282, 288.

2006 Beara's Appeal Brief, paras 282, 284. **Beara** also argues that the evidence did not establish that he knew about an attack on civilians in the enclaves or that he knew that any of his acts were part of such an attack. This submission is repetitive of his ground of appeal 24, which has been dealt with above. See *supra*, paras 675-681.

findings of the Trial Chamber; (4) the Trial Chamber considered unreliable witness testimonies in making findings that he was present at certain execution locations and made statements showing his intent and plan to murder; (5) the Trial Chamber based its finding on his reason for requesting the use of logistical equipment from the municipality of Zvornik on speculation rather than on evidence; and (6) the Trial Chamber accorded little or no weight to exculpatory evidence related to his intent, including certain intercepted conversations, his requests to screen detained men for war criminals, his efforts to transport the men out of the enclave, and his reasons for detaining the men.[2007]

700. The Prosecution responds that the Trial Chamber properly found that **Beara** had the *mens rea* for extermination.[2008] The Prosecution argues that, given the relevant evidence, it was not unreasonable for the Trial Chamber to infer that **Beara**'s role began on 12 July 1995 when he became aware of and implicated in the murder plan. It argues that his central involvement in the murder plan in the 13-16 July 1995 period supports the Trial Chamber's finding and that **Beara**'s challenge to his active participation in the murder plan prior to 13 July 1995 does not impact the verdict.[2009] Likewise, the Prosecution contends that **Beara**'s argument as to the lack of direct evidence of his orders concerning the murder operation does not impact his conviction through JCE liability.[2010] Finally, the Prosecution submits that **Beara**'s reference to the intercepted conversation of 1 August 1995 as exculpatory evidence is irrelevant.[2011]

(b) Analysis

701. The Trial Chamber found that **Beara** possessed the *mens rea* for extermination since he participated in the JCE to Murder, which involved large-scale murders as its common purpose or as a natural and foreseeable consequence.[2012] The Trial Chamber found that **Beara**'s contribution to the common purpose of the JCE to Murder was significant and that "his actions and words" demonstrated beyond any doubt that "he shared the intent to murder on a massive scale".[2013] The Appeals Chamber notes that this finding also fulfils the intent required for the crime of extermination.[2014]

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2007 Beara's Appeal Brief, paras 285-287. See Beara's Reply Brief, para. 101. See also Beara's Reply Brief, para. 100.

2008 Prosecution's Response Brief (Beara), para. 290. The Prosecution argues that **Beara**'s arguments should be summarily dismissed. Prosecution's Response Brief (Beara), paras 290-291, 295.

2009 Prosecution's Response Brief (Beara), para. 292.

2010 Prosecution's Response Brief (Beara), para. 293.

2011 Prosecution's Response Brief (Beara), para. 294.

2012 Trial Judgement, para. 1325.

2013 Trial Judgement, para. 1301.

2014 *Lukić and Lukić* Appeal Judgement, para. 536 ("The *mens rea* of extermination requires the intention of the perpetrator 'to kill on a large scale or to systematically subject a large number of people to conditions of living that would lead to their deaths'.").

702. It is clear that the Trial Chamber did not infer **Beara**'s role in the planning of the killing operation, or his involvement in events prior to 13 July 1995, based only on his position in the VRS hierarchy and the conduct of his subordinates. The Appeals Chamber notes that the Trial Chamber considered **Beara**'s position as Chief of Security for the VRS Main Staff in relation to, and in conjunction with, evidence that, as of the morning of 12 July 1995, **Popović** and M. Nikolić – both subordinates of **Beara** – were aware of the murder operation as well as the fact that the orders for the operation were given by Mladić.[2015] The Trial Chamber also took into account the role played by members of the Security Branch "from the beginning".[2016] The Appeals Chamber additionally notes the finding of the Trial Chamber that "[a]s officer in charge of the security organs in the VRS, **Beara** had to be apprised of the subordinate security organs' work to provide guidance and evaluate and monitor their work".[2017] In view of these findings, and in the absence of any contrary evidence, the Appeals Chamber finds that **Beara** has failed to show that a reasonable trier of fact could not have come to this conclusion. His argument is dismissed.

703. Turning to **Beara**'s contention that his own orders did not involve the killing operation, the Appeals Chamber considers that since **Beara** was convicted of the crime of extermination based on his participation in the JCE to Murder and not based on ordering, it is irrelevant whether his conduct amounted to the issuance of direct orders to murder.[2018] To the extent that **Beara** argues that evidence of his own actions militates against the Trial Chamber's finding that he shared the intent to kill, the Appeals Chamber finds no support for this contention in the references to which he cites.[2019] The argument is thus dismissed.

704. As to **Beara**'s argument that he was not present at meetings when "concrete organizational matters" were discussed, the Appeals Chamber notes that **Beara** refers to just one meeting on 14 July 1995. In this regard, the Trial Chamber accepted the evidence of PW-162/Davidović that he had a meeting with officers at the Bratunac SDS Offices about procuring construction machinery from the brickworks in Bratunac municipality ("Bratunac SDS Offices Meeting"), that **Beara** remained in another office during this time, and that the subject matter of this conversation was not discussed with **Beara**.[2020] However, the Trial Chamber found that soon after the Bratunac SDS Offices Meeting, **Beara** himself went to the brick factory in Bratunac where he had a confrontation with Witness Deronjić about the potential detention and killings of prisoners at the site.[2021] Thus,

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2015 Trial Judgement, paras 139, 1299.
2016 Trial Judgement, para. 1299.
2017 Trial Judgement, para. 1206.
2018 See also *infra*, paras 1843-1844.
2019 See Beara's Appeal Brief, para. 286, referring to his ground of appeal 23, which in relevant part, in para. 255, refers to Trial Judgement, paras 1257, 1267, 1278-1279.
2020 Trial Judgement, para. 1274.
2021 Trial Judgement, para. 1275.

even if **Beara** was not present during the Bratunac SDS Offices Meeting, a reasonable trier of fact could have found that "the evidence demonstrates **Beara**'s overarching responsibility for and participation in the killing operation carried out in pursuance of the common purpose" of the JCE to Murder.[2022] **Beara**'s argument therefore has no merit.

705. Regarding **Beara**'s contention that the Trial Chamber accorded little or no weight to exculpatory evidence of his "true intent", the Appeals Chamber recalls that it has upheld the Trial Chamber's finding that the evidence of BSF efforts to screen the men in Potočari did not indicate a legitimate screening operation.[2023] Hence, the Appeals Chamber is not persuaded that such evidence runs contrary to the Trial Chamber's finding that **Beara** had the intent to exterminate. With regard to **Beara**'s argument as to his efforts to organise transportation of the detained men out of the enclave, the Appeals Chamber has found that the Trial Chamber properly considered the evidence of his conversation with Čelanović on 13 July 1995 and that **Beara** has failed to demonstrate how the Trial Chamber's finding was unreasonable in light of the entirety of the evidence.[2024] With respect to **Beara**'s suggestion that the Trial Chamber accorded little or no weight to evidence showing that he detained the Bosnian Muslim men for exchange rather than execution, the Appeals Chamber notes that the finding that **Beara** relies upon concerns an intercepted conversation of 1 August 1995 regarding Bosnian Muslim men whom the VRS caught while crossing the Drina River.[2025] This finding concerns an incident that took place two weeks after the events of 13-16 July 1995 and thus has no direct relevance to his intent during this period.

706. Finally, as to **Beara**'s remaining contentions, the Appeals Chamber has dismissed those arguments for reasons set out in relation to other grounds of appeal.[2026]

707. In light of the foregoing, the Appeals Chamber dismisses **Beara**'s ground of appeal 28.

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2022 Trial Judgement, para. 1301.
2023 See *supra*, para. 565.
2024 See *infra*, para. 1208.
2025 Trial Judgement, para. 1291.
2026 In relation to the finding that **Beara** was present and played a role at meetings in the night of 13 July 1995 (and early morning of 14 July 1995), see *supra*, para. 481; *infra*, paras 1206 *et seq.* In relation to the finding that **Beara** was present at certain execution locations, see *infra*, paras 1258, 1260 *et seq.* In relation to the finding that **Beara** made statements showing his intent and plan to murder, see *infra*, paras 1209, 1223. Regarding **Beara**'s reason for requesting logistical equipment, see *infra*, paras 1266-1268. With regard to the intercepted conversations of 13 July 1995, see *infra*, paras 979-981; see also *supra*, para. 122. With regard to the intercepted conversation of 15 July 1995, see *supra*, para. 483.

## 5. Persecution

### (a) Persecution related to the JCE to Murder

#### (i) Beara's appeal (Ground 29)

##### a. Arguments of the Parties

708. **Beara** submits that the Trial Chamber erred in law in finding that he possessed the specific discriminatory intent required for the crime of persecution.[2027] He argues that the evidence before the Trial Chamber failed to establish that he possessed discriminatory intent or shared the aim of the discriminatory policy and consciously intended to discriminate.[2028] **Beara** avers that by basing its finding on his knowledge of the plan to murder members of a single ethnic group and his willing participation in that plan, the Trial Chamber erroneously applied the factors relevant to aiding and abetting persecution. He maintains that the Trial Chamber should have instead applied the legal standard for perpetration through JCE I, which requires proof that he shared the discriminatory intent of the JCE.[2029] **Beara** also argues that the Trial Chamber erred in basing its finding partly on his "limited use of pejorative language" given the Trial Chamber's own conclusion that his usage was only "mildly derogative" and not an "unusual" occurrence. Finally, he contends that the Trial Chamber disregarded the evidence of Defence Witness 2DPW-19 that he was not prejudiced against other ethnicities.[2030]

709. The Prosecution responds that the Trial Chamber properly found that **Beara** possessed discriminatory intent.[2031] The Prosecution submits that **Beara** confuses the elements of persecution with proof of those elements. Further, it argues that the fact that the evidence was sufficient to establish aiding and abetting liability does not mean it was insufficient to establish liability for committing persecution through the JCE to Murder.[2032] The Prosecution submits that the Trial Chamber took into account the evidence of 2DPW-19 and others that **Beara** did not display any signs of intolerance towards members of other ethnic groups. It also argues that **Beara** fails to show that the Trial Chamber's limited reliance on his pejorative language constituted an error.[2033]

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2027 Beara's Appeal Brief, intro before para. 289, para. 289. The Appeals Chamber notes that **Beara** also alleges errors of fact in this ground of appeal. See Beara's Appeal Brief, paras 290-291.

2028 Beara's Appeal Brief, para. 290; Beara's Reply Brief, paras 102-103.

2029 Beara's Appeal Brief, paras 289-291. See Beara's Reply Brief, para. 102. **Beara** reiterates his arguments made elsewhere in his appeal brief that the evidence does not establish that he possessed the requisite knowledge of such a plan or that he participated in formulating such a plan. Beara's Appeal Brief, paras 290-291. The Appeals Chamber has addressed and rejected these submissions. See *infra*, paras 969-981.

2030 Beara's Appeal Brief, para. 290.

2031 Prosecution's Response Brief (Beara), paras 296-299. See also Prosecution's Response Brief (Beara), para. 300.

2032 Prosecution's Response Brief (Beara), para. 297.

2033 Prosecution's Response Brief (Beara), para. 299.

b. Analysis

710. The Trial Chamber found that **Beara** acted with discriminatory intent on the basis of his "knowledge of the plan to murder a single ethnic group and his willing participation in that plan, and to some limited extent his use of pejorative language about Bosnian Muslims".[2034] Based on this finding, it held that "**Beara** participated in the JCE to Murder with the specific intent to discriminate on political, racial or religious grounds" and "thereby committed persecution as a crime against humanity through murder and cruel and inhumane treatment".[2035]

711. The Appeals Chamber first notes that the Trial Chamber correctly stated the relevant legal standard that "under the first category JCE, the accused must possess the intent required for the crime, including the specific intent, when relevant".[2036] With regard to the special intent required for the crime of persecution, the Trial Chamber noted that discriminatory intent may be inferred from an accused's knowing participation in a system or enterprise that discriminated on political, racial or religious grounds, and that the circumstances to be taken into consideration include the systematic nature of the crimes committed against a targeted group and the general attitude of the accused as demonstrated by his behaviour.[2037] The Appeals Chamber finds no error in these statements of the law.

712. The Trial Chamber clearly found that **Beara** shared the common discriminatory intent of the JCE to Murder; it did not merely find that **Beara** knowingly made a significant contribution to the crime. The Trial Chamber inferred **Beara**'s discriminatory intent predominantly from the dual considerations of his knowledge of the discriminatory purpose of the common plan coupled with his willing participation in the plan.[2038] The Trial Chamber found that **Beara** had "detailed knowledge of the killing operation itself" and that, as the most senior officer of the Security Staff, he "had perhaps the clearest overall picture of the massive scale and scope of the killing operation".[2039] Since the common plan to murder the able-bodied Bosnian Muslim males in and around Srebrenica was discriminatory in its very essence[2040] and given the findings of the Trial Chamber that "the heavy hand of the Security Branch was evident throughout [the implementation of the common plan]" and that "**Beara** was at the centre of the operations with **Popović**, and together they were responsible for overall planning and implementation", the Appeals Chamber considers that a reasonable trier of fact could have inferred **Beara**'s discriminatory intent from his knowledge of the

2034 Trial Judgement, para. 1331.
2035 Trial Judgement, para. 1331. See Trial Judgement, paras 1329-1330.
2036 Trial Judgement, para. 1022, referring to *Tadić* Appeal Judgement, para. 188.
2037 Trial Judgement, para. 969.
2038 Trial Judgement, para. 1331.
2039 Trial Judgement, para. 1313.
2040 Trial Judgement, para. 1050.

common plan and his willing participation in it.[2041] **Beara**'s argument as to the factors relied on by the Trial Chamber to infer his discriminatory intent thus fails.

713. Turning to **Beara**'s argument that the Trial Chamber erred by relying on his use of pejorative language about Bosnian Muslims, the Appeals Chamber observes that when considering whether an accused has the required intent for the crime of persecution, trial chambers are allowed to consider "the general attitude of the alleged perpetrator as demonstrated by his behaviour".[2042] The use of derogatory language in relation to a particular group – even where such usage is commonplace – is one aspect of an accused's behaviour that may be taken into account, together with other evidence, to determine the existence of discriminatory intent.[2043] In the present case, the Trial Chamber considered **Beara**'s use of the word "*balija*", a derogatory word for Muslims, in an intercepted conversation on 13 July 1995 with Lučić, the Deputy Commander of the Military Police Battalion of the 65th Protection Regiment, to refer to 400 Muslims who had been taken into detention in Konjević Polje.[2044] He then told Lučić to "[s]hove them all on the playground, who gives a fuck about them".[2045] Later in the conversation, in response to the information that some of the detained men were killing themselves, he stated, "[w]ell, excellent. Just let them continue, fuck it".[2046] Considering the use of such language in this context, a reasonable trier of fact could have found that **Beara** intended to discriminate. The Appeals Chamber thus finds no error in the Trial Chamber's limited reliance on **Beara**'s use of derogatory language as further evidence of his discriminatory intent.[2047]

714. As to **Beara**'s argument that the Trial Chamber disregarded the evidence of 2DPW-19, the Appeals Chamber observes that the Trial Chamber explicitly acknowledged that it had heard "evidence from witnesses that **Beara** did not display any signs of intolerance towards members of other ethnic groups", and specifically cited the testimony of 2DPW-19 and other witnesses in this regard.[2048] The Trial Chamber then provided its reasons for finding that **Beara** nonetheless acted with discriminatory intent.[2049] **Beara** merely asserts that the Trial Chamber either failed to give sufficient weight to the evidence of 2DPW-19 or failed to interpret this evidence in a particular manner, and his submission is therefore dismissed.

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2041 Trial Judgement, para. 1068. See Trial Judgement, paras 1060-1061, 1069, 1299, 1327-1328, 1330-1332.
2042 *Kvočka et al.* Appeal Judgement, para. 460.
2043 See, *e.g.*, *Kvočka et al.* Appeal Judgement, para. 461, finding that the Trial Chamber correctly found that the use of the word "*balijas*" by the accused Zoran Žigić towards Muslim detainees in the Omarska, Keraterm, and Trnopolje camps supported its conclusion that he had discriminatory intent in maltreating the detainees.
2044 Trial Judgement, para. 1257. See Ex. P01130a, "Intercept, 13 July 1995, 10:09 a.m."
2045 Trial Judgement, para. 1257.
2046 Trial Judgement, para. 1257.
2047 Trial Judgement, para. 1331.
2048 Trial Judgement, para. 1331 & fn. 4332.
2049 Trial Judgement, para. 1331. See *supra*, para. 712.

715. In light of the foregoing, the Appeals Chamber dismisses **Beara**'s ground of appeal 29.[2050]

(ii) Nikolić's appeal (Ground 9)

a. Arguments of the Parties

716. **Nikolić** submits that the Trial Chamber erred in law and fact when finding that he had the requisite *mens rea* for persecution.[2051] First, **Nikolić** argues that the Trial Chamber erred in law by failing to require that he *consciously* discriminated against the Bosnian Muslims.[2052] Second, **Nikolić** contends that the Trial Chamber erred in fact by establishing his discriminatory intent based on the finding that he was involved in the organisation and co-ordination of the large-scale murder of a single ethnic group.[2053] **Nikolić** argues in this regard that since he only learned of the arrival of "prisoners" in the context of the armed conflict between the VRS and the ABiH, the fact that they were all Bosnian Muslims does not show that he consciously singled them out as such.[2054]

717. Third, **Nikolić** submits that the Trial Chamber erred when finding that his "active participation in the detention, killing and reburial, the circumstances and manner of which plainly display discriminatory intent [...] is further proof of **Nikolić**'s intent".[2055] According to **Nikolić**, the Trial Chamber contravened the Tribunal's case law by inferring his discriminatory intent from the general context.[2056] **Nikolić** further argues that the Trial Chamber unreasonably disregarded his belated entry into, limited contribution to, and limited knowledge of the operation.[2057] In particular, **Nikolić** avers that he was "faced with a *fait accompli* when he was informed of the arrival of the prisoners and he did not exercise a conscious decision, selecting the Bosnian Muslims, to direct his acts against them on the basis of their ethnicity or religion".[2058] Furthermore, **Nikolić** argues that the Trial Chamber described the discriminatory nature of the murder operation with reference to incidents at execution sites without establishing that **Nikolić** knew about the incidents.[2059]

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2050 With respect to **Beara**'s argument that the Trial Chamber's reliance on "contentious" evidence in establishing his actions and state of mind undermines its conclusion that he had discriminatory intent, the Appeals Chamber notes that **Beara**'s arguments are made by way of cross-reference to other grounds of appeal. See Beara's Appeal Brief, para. 290 & fn. 450. The Appeals Chamber has dismissed the referenced grounds of appeal in their entirety in other parts of this Judgement and therefore finds that **Beara** has failed to demonstrate any error on the part of the Trial Chamber in this regard. See *supra*, paras 150, 181, 191, 229; *infra*, paras 839-840, 862, 924-926, 928, 930, 971-972, 981, 1203, 1205, 1208-1210, 1213, 1215, 1226-1230, 1256, 1259, 1265, 1268, 1272-1273, 1276, 1283-1284, 1291.

2051 Nikolić's Appeal Brief, para. 146.

2052 Nikolić's Appeal Brief, paras 146-148; Nikolić's Reply Brief, para. 56.

2053 Nikolić's Appeal Brief, paras 149-150.

2054 Nikolić's Appeal Brief, paras 149-150; Nikolić's Reply Brief, para. 57.

2055 Nikolić's Appeal Brief, para. 151, citing Trial Judgement, para. 1426.

2056 Nikolić's Appeal Brief, paras 151-152; Nikolić's Reply Brief, para. 58.

2057 Nikolić's Appeal Brief, paras 151, 153; Nikolić's Reply Brief, para. 58.

2058 Nikolić's Appeal Brief, para. 153; Nikolić's Reply Brief, para. 58.

2059 Nikolić's Appeal Brief, para. 154; Nikolić's Reply Brief, para. 58.

718. Finally, **Nikolić** argues that the Trial Chamber reasonably inferred that he may have acted out of blind dedication to the Security Service rather than shared the genocidal intent of others, but erred by failing to consider the same reasoning in assessing his *mens rea* for persecution since both crimes relate to the same factual basis and since the *mens rea* standards for genocide and persecution are intimately linked.[2060] **Nikolić** concludes that the Appeals Chamber should quash his conviction for persecution as a crime against humanity and lower his sentence.[2061]

719. The Prosecution responds that the Trial Chamber's finding that **Nikolić** specifically intended to discriminate was correct and reasonable and that his arguments should be dismissed.[2062] The Prosecution submits that the Trial Chamber reasonably found that his involvement in the crimes was significant and that his knowledge of the murder operation was broad.[2063] The Prosecution further avers that the Trial Chamber reasonably inferred **Nikolić**'s discriminatory intent from his participation in the underlying persecutory acts – detentions, killings, and reburial – in a patently discriminatory, large-scale murder operation.[2064] The Prosecution finally argues that **Nikolić**'s alleged "blind dedication to the Security Service" at most reflected his legally irrelevant motivation for participating in the murder operation.[2065]

b. Analysis

720. With regard to **Nikolić**'s first argument, the Appeals Chamber recalls that the *mens rea* for persecution requires the specific intent to discriminate on political, racial, or religious grounds.[2066] The Trial Chamber found that **Nikolić** participated in the killing operation with the specific intent to discriminate on political, racial, or religious grounds.[2067] It therefore applied the correct standard. **Nikolić**'s first argument is dismissed.

721. Concerning his second argument, the Trial Chamber found that **Nikolić**'s involvement in the organisation and co-ordination of the large-scale murder of a single ethnic group – the Bosnian Muslims – showed his discriminatory intent.[2068] **Nikolić** attempts to support his challenge to this finding with reference to his ground of appeal 8,[2069] which the Appeals Chamber has dismissed above.[2070] The Appeals Chamber recalls that it has dismissed **Nikolić**'s argument that the Trial

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2060 Nikolić's Appeal Brief, paras 155-156, referring to, *inter alia*, Trial Judgement, para. 1414.
2061 Nikolić's Appeal Brief, para. 157.
2062 Prosecution's Response Brief (Nikolić), paras 91-93, 139, 167-168, 171, 173.
2063 Prosecution's Response Brief (Nikolić), paras 94-113, 115-129, 139-145, 147-151.
2064 Prosecution's Response Brief (Nikolić), paras 168-170.
2065 Prosecution's Response Brief (Nikolić), paras 152-153.
2066 *Šainović et al.* Appeal Judgement, para. 579; *Stakić* Appeal Judgement, para. 328; *Kvočka et al.* Appeal Judgement, para. 460.
2067 Trial Judgement, para. 1426.
2068 Trial Judgement, para. 1426.
2069 See Nikolić's Appeal Brief, fn. 380.
2070 See *supra*, para. 690.

Chamber failed to consider evidence indicating that he was under the impression that the prisoners were destined for a prisoner exchange or that they encompassed only persons affiliated with the ABiH.[2071] Consequently, the Appeals Chamber considers that **Nikolić** has not demonstrated that he did not single the prisoners out as Bosnian Muslims and finds that **Nikolić** has failed to demonstrate any error in the Trial Chamber's finding. **Nikolić**'s second argument is dismissed.

722. With regard to **Nikolić**'s third argument, the Appeals Chamber recalls that the specific intent to discriminate on political, racial, or religious grounds in general can only be inferred from objective facts and the general conduct of an accused seen in its entirety.[2072] In this regard, the Appeals Chamber considers that the Trial Chamber did not find **Nikolić**'s discriminatory intent based on the general discriminatory nature of an attack characterised as a crime against humanity,[2073] but rather based on his active participation in the discriminatory detention, killing, and reburial as well as his involvement in the organisation and co-ordination of the large-scale murder of Bosnian Muslims.[2074] In doing so, the Trial Chamber committed no error of law.[2075] **Nikolić**'s arguments regarding his degree of involvement and knowledge are based on cross-references to other grounds of appeal, which the Appeals Chamber dismisses elsewhere.[2076] The Appeals Chamber further considers that questions such as who selected the prisoners or whether **Nikolić** was faced with a *fait accompli* are not determinative of whether he had discriminatory intent. Nor does the reasonableness of the impugned finding of the Trial Chamber depend on whether **Nikolić** heard specific discriminatory remarks.[2077] The Appeals Chamber concludes that **Nikolić** has failed to demonstrate that his knowledge and involvement were so limited that the Trial Chamber erred in finding that he participated in the killing operation with the requisite intent. **Nikolić**'s third argument is dismissed.

723. As for **Nikolić**'s final argument that the inference that he may have acted out of "blind dedication to the Security Service" is equally relevant to his *mens rea* for persecution as it is to his *mens rea* for genocide, the Appeals Chamber, Judge Niang dissenting, finds it to be unconvincing legally as well as factually. Legally, **Nikolić** bases his contention that the *mens rea* standards for genocide and persecution are "intimately linked" on a single trial authority,[2078] which in fact explicitly recognised the difference in the two *mens rea* standards.[2079] The Appeals Chamber recalls

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2071 See *supra*, para. 688.
2072 See *Kordić and Čerkez* Appeal Judgement, para. 715. See also *Šainović et al.* Appeal Judgement, para. 579.
2073 See Nikolić's Appeal Brief, para. 152, referring to *Kvočka et al.* Appeal Judgement, para. 460.
2074 Trial Judgement, para. 1426.
2075 See *Kvočka et al.* Appeal Judgement, para. 460; *Krnojelac* Appeal Judgement, paras 184-185.
2076 See Nikolić's Appeal Brief, fns 386-389. See also *supra*, paras 172, 186, 201, 212, 690; *infra*, paras 936, 1013, 1023, 1315, 1354, 1361, 1984, 2065, 2099.
2077 See Trial Judgement, fn. 3278.
2078 Nikolić's Appeal Brief, para. 156, referring to *Kupreškić et al.* Trial Judgement, para. 636.
2079 *Kupreškić et al.* Trial Judgement, para. 636.

that the specific intent required for persecution[2080] is different from that required for genocide, which is the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.[2081] Factually, **Nikolić** merely asserts that both persecution and genocide relate to "the exact same factual basis",[2082] without showing that the Trial Chamber based its respective findings on his *mens rea* for persecution and genocide on the same evidence. Thus, **Nikolić** has failed to demonstrate that no reasonable trial chamber could have failed to draw identical conclusions from his "blind dedication to the Security Service" when applying the two different *mens rea* standards to the facts. The Appeals Chamber therefore dismisses **Nikolić**'s final argument.

724. Consequently, the Appeals Chamber dismisses **Nikolić**'s ground of appeal 9 in its entirety.

(b) Persecution related to the JCE to Forcibly Remove

(i) Alleged errors concerning the *mens rea* of persecution

a. Alleged errors related to discriminatory intent (Miletić's Ground 19)

i. Arguments of the Parties

725. **Miletić** submits that the Trial Chamber erred in fact and law in finding that he had discriminatory intent.[2083] He argues that it was insufficient for the Trial Chamber to rely on Directive 7 to establish discriminatory intent for the military actions undertaken in the enclaves of Srebrenica and Žepa.[2084] **Miletić** contends that any document conceiving of military action against these enclaves could be understood as discriminatory since only Bosnian Muslims resided there.[2085] **Miletić** argues that discriminatory intent cannot be inferred from his acts within a war that pitted Bosnian Muslim forces against the BSF.[2086] **Miletić** further submits that the Trial Chamber failed to establish whether he contributed to the drafting of the discriminatory sentence in Directive 7 and whether he was aware of the sentence before Directive 7 was sent to subordinate units, noting further that the discriminatory portions of Directive 7 were not included in Directive 7/1.[2087] **Miletić** argues that, even if discriminatory intent was imputed to him on the basis of Directive 7, this would

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2080 See *supra*, para. 720.

2081 *Munyakazi* Appeal Judgement, para. 141; *Nahimana et al.* Appeal Judgement, para. 492. See also *Krstić* Appeal Judgement, para. 36.

2082 Nikolić's Appeal Brief, para. 156.

2083 Miletić's Appeal Brief, para. 407.

2084 Miletić's Appeal Brief, para. 403.

2085 Miletić's Appeal Brief, para. 403. In this regard, **Miletić** contends that Directive 7 never envisaged the capture of the enclaves, the concept of which is maintained in all options contained in Directive 7 that presume the existence of a Muslim population in the areas concerned. Miletić's Reply Brief, para. 130.

2086 Miletić's Appeal Brief, paras 403, 406.

2087 Miletić's Appeal Brief, para. 404; Miletić's Reply Brief, para. 131. **Miletić** also submits that discriminatory intent cannot be inferred from the overall discriminatory nature of an attack qualified as a crime against humanity. Miletić's Appeal Brief, para. 403.

only relate to forcible transfer and would not extend to acts of cruel and inhumane treatment or dissemination of terror.[2088] Finally, **Miletić** asserts that the discriminatory intent expressed by some members of the JCE cannot be imputed to all the members of the same JCE.[2089] **Miletić** submits that the errors of the Trial Chamber led to a miscarriage of justice, invalidating his conviction under Count 6.[2090]

726. The Prosecution submits that the Trial Chamber properly found that **Miletić** had discriminatory intent, based on his knowledge of the criminal plan set out in Directive 7.[2091] The Prosecution further submits that **Miletić** knew and accepted that the acts of inhumane treatment and terror specifically targeting the Bosnian Muslim civilians were intrinsic components of the plan in Directive 7.[2092] It adds that **Miletić**'s discriminatory intent is further proved by the circumstances following Directive 7's issuance.[2093]

ii. Analysis

727. The Appeals Chamber first notes that the Trial Chamber correctly stated that the crime of persecution requires each underlying act or omission to be committed with a specific intent to discriminate on political, racial, or religious grounds.[2094] It rightly noted that discriminatory intent may be inferred from an accused's knowing participation in a system or enterprise that discriminates on political, religious, or racial grounds, and the general attitude of the accused as demonstrated by his behaviour.[2095]

728. In the present case, the Trial Chamber based its finding of **Miletić**'s specific intent mainly on his knowledge of a written document, namely Directive 7.[2096] While it may be only on "rare occasions [that] it will be possible to establish such an intent on documents laying down a perpetrator's own *mens rea*",[2097] the Appeals Chamber considers that, in view of the plan to forcibly remove the Bosnian Muslim populations of Srebrenica and Žepa laid out in Directive 7,[2098] **Miletić**'s knowledge of the directive through his role in its drafting, and his contributions to the plan's implementation, as discussed below, this could have been one of those occasions. The Appeals Chamber observes, however, that the Trial Chamber based its finding that **Miletić** shared the specific intent to discriminate not only on his role in drafting Directive 7 and knowledge of its

2088 Miletić's Appeal Brief, para. 404.
2089 Miletić's Appeal Brief, para. 405.
2090 Miletić's Appeal Brief, para. 408.
2091 Prosecution's Response Brief (Miletić), paras 301-306.
2092 Prosecution's Response Brief (Miletić), para. 305.
2093 Prosecution's Response Brief (Miletić), para. 306.
2094 Trial Judgement, paras 968-969.
2095 Trial Judgement, para. 969.
2096 Trial Judgement, para. 1729. See Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995".
2097 *Kordić and Čerkez* Appeal Judgement, para. 715.

criminal objective, but also on "all other evidence before it", in particular the actual operation that took place to remove the Bosnian Muslim populations from Srebrenica and Žepa.[2099]

729. Furthermore, the Appeals Chamber notes that the instruction contained in Directive 7 "to create an unbearable situation of total insecurity with no hope of further survival or life" was directed not against military objectives, or even ABiH members living in the enclaves; it was aimed at the "inhabitants of Srebrenica and Žepa".[2100] The Appeals Chamber considers that a reasonable trier of fact could have found that Directive 7 provides evidence of **Miletić**'s discriminatory intent on the basis that it targeted the inhabitants of Srebrenica and Žepa because they were members of the Bosnian Muslim group. **Miletić**'s argument that discriminatory intent cannot be inferred from the general discriminatory nature of an attack is irrelevant in this instance since the Trial Chamber did not draw such an inference.

730. With regard to **Miletić**'s contention concerning the drafting of the discriminatory sentence contained in Directive 7, the Appeals Chamber finds elsewhere that the Trial Chamber established that **Miletić** was the "drafter" of Directive 7 in the broad sense of having a central role in the drafting process, which involved, *inter alia*, providing the underlying information in the section where the impugned portion of Directive 7 is found and finalising the form and language of the directive.[2101] In light of these findings, a reasonable trier of fact could have been satisfied that **Miletić** had full knowledge of the document.[2102] The Appeals Chamber considers that it was not necessary for the Trial Chamber to establish that **Miletić** actually wrote the discriminatory sentence in order to find that **Miletić** had full knowledge of the document and the plan to target the Bosnian Muslim population. As to **Miletić**'s argument that the Trial Chamber failed to establish whether he knew about the final version of Directive 7 before it was sent to the corps, the Appeals Chamber finds elsewhere that the Trial Chamber's conclusion about **Miletić**'s knowledge of the document before it was sent out is amply supported by its findings on **Miletić**'s role in the drafting process.[2103]

731. Turning to **Miletić**'s claim that his discriminatory intent could be inferred from Directive 7 only in relation to forcible transfer, the Appeals Chamber notes that the discriminatory sentence of Directive 7 calls for the forcible removal of the inhabitants of Srebrenica and Žepa through the creation of "an unbearable situation of total insecurity with no hope of further survival or life".[2104]

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2098 Trial Judgement, para. 762.
2099 Trial Judgement, para. 1729.
2100 Trial Judgement, paras 199, 762.
2101 See *infra*, paras 1502-1504.
2102 Trial Judgement, para. 1729. See also Trial Judgement, para. 1704.
2103 See *infra*, paras 1505-1510.
2104 Trial Judgement, para. 1086.

As discussed with regard to **Miletić**'s grounds of appeal 17 and 18 below, the Appeals Chamber considers that the Trial Chamber reasonably concluded on the basis of Directive 7 and its implementation that the intrinsic steps to achieving the goal of forcible removal of the Bosnian Muslim population included inflicting acts of cruel and inhumane treatment upon, and terrorising, the targeted group. **Miletić**'s argument therefore fails.

732. With regard to **Miletić**'s argument that his discriminatory intent cannot be inferred from the discriminatory views expressed by other members of the JCE to Forcibly Remove, the Appeals Chamber notes that the Trial Chamber did not impute **Miletić**'s discriminatory intent from the views and actions of others, but found such intent based on his personal role in and knowledge of Directive 7 and its subsequent implementation.[2105]

733. In relation to **Miletić**'s contention that none of his actions were directed against Bosnian Muslims on the basis of race, religion, or politics, but were geared solely towards contributing to VRS operations in the context of an ethnically-divided war, the Appeals Chamber reiterates that Directive 7 was targeted at "the inhabitants of Srebrenica and Žepa", not at military objectives in the enclaves or ABiH members. It considers that a reasonable trial chamber could have construed the plan contained in Directive 7 to be targeting the Bosnian Muslims because they belonged to a group identified as such.[2106] **Miletić** seems to be suggesting that the targeting of a particular group is not discriminatory so long as this act is done in furtherance of military goals. The argument is fallacious. So long as there is the intent to discriminate against a person on one of the listed grounds, specifically, race, religion, or politics, any additional motive of pursuing a military goal is irrelevant.[2107]

734. In light of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in finding that he had discriminatory intent. The Appeals Chamber therefore dismisses **Miletić**'s ground of appeal 19 in its entirety.

b. Alleged errors relating to terrorising civilians (Miletić's Ground 17)

i. Whether Miletić had the requisite intent

735. **Miletić** submits that the Trial Chamber erred in law in convicting him of persecution as a crime against humanity through terrorising civilians as it failed to establish that he had the specific

2105 Trial Judgement, para. 1729. See *supra*, paras 727 *et seq.*
2106 See Trial Judgement, para. 1729.
2107 *Nahimana et al.* Appeal Judgement, para. 985; *Stakić* Appeal Judgement, para. 327; *Blaškić* Appeal Judgement, para. 131. See also *Blaškić* Appeal Judgement, para. 165.

intent required for the crime of persecution through terrorising civilians.[2108] He argues that the Trial Chamber had to establish the intent to commit the underlying act *and* the intent to discriminate.[2109] **Miletić** further submits that the Trial Chamber erred in law by failing to establish his specific intent to spread terror beyond his intent to participate in the implementation of the common plan to forcibly remove the Bosnian Muslim civilian population from Srebrenica.[2110] **Miletić** submits that the error invalidates his conviction.[2111]

736. The Prosecution responds that the Trial Chamber reasonably found that **Miletić** had persecutory intent in terrorising the Bosnian Muslim civilians and by this act committed persecution through his participation in the JCE to Forcibly Remove.[2112]

737. The Appeals Chamber observes that the Trial Chamber correctly defined the crime of persecution as "an act or omission that: (1) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and (2) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics".[2113] The Appeals Chamber also notes, however, that the Trial Chamber incorporated the language used to establish the elements of the war crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – punishable under Article 3 of the Statute – into its findings for persecution through the underlying act of terrorising civilians.[2114] With respect to the underlying acts of "terrorising civilians", the Trial Chamber adopted the definition of "acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities with the intent to spread terror among the civilian population".[2115] The Trial Chamber also concluded that the purpose of spreading terror can be inferred from the circumstances – including the nature, manner, timing, and duration of the underlying acts.[2116]

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2108 Miletić's Appeal Brief, paras 379, 388-390.
2109 Miletić's Reply Brief, para. 122.
2110 Miletić's Appeal Brief, paras 388-390.
2111 Miletić's Appeal Brief, para. 379.
2112 Prosecution's Response Brief (Miletić), paras 284, 289-291, 293.
2113 Trial Judgement, para. 964 (internal references omitted), referring to, *inter alia*, *Nahimana et al.* Appeal Judgement, para. 985; *Stakić* Appeal Judgement, para. 327, *Blaškić* Appeal Judgement, para. 131.
2114 Trial Judgement, para. 998; *infra*, note 2115. See *D. Milošević* Appeal Judgement, paras 31, 33-35, 37; *Galić* Appeal Judgement, paras 102-104; *Blagojević and Jokić* Trial Judgement, paras 589-592, 611-614 (finding that "terrorising the civilian population" is similar to the war crime of unlawfully inflicting terror upon civilians). See also *D. Milošević* Appeal Judgement, para. 30; *Galić* Appeal Judgement, paras 86-98, 101.
2115 Trial Judgement, para. 979. See Trial Judgement, paras 977-978, where the Trial Chamber considered Article 51(2) of Additional Protocol I, Article 13(2) of Additional Protocol II, and the *Galić* Appeal Judgement which dealt with the war crime of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" punishable under Article 3 of the Statute.
2116 Trial Judgement, para. 980, referring to, *inter alia*, *D. Milošević* Appeal Judgement, para. 37, *Galić* Appeal Judgement, para. 104.

738. The Appeals Chamber reiterates that persecution as a crime against humanity does not require that the underlying acts are crimes under international law.[2117] A trial chamber does not need to establish the elements of the underlying acts, including the *mens rea*, even when the underlying act also constitutes a crime under international law. With respect to the *mens rea*, all that is required is establishing that the underlying act was deliberately carried out with discriminatory intent. In light of the above, the Appeals Chamber considers that **Miletić**'s submissions are based on a misunderstanding of the applicable law on persecution. Accordingly, the Appeals Chamber dismisses **Miletić**'s arguments that the Trial Chamber erred in not establishing that he had the requisite intent for the crime of terror.

739. Turning to the question of whether **Miletić** had discriminatory intent, the Appeals Chamber emphasises that terrorising civilians was an inherent component of the implementation of the JCE to Forcibly Remove in the sense that these acts were intrinsic steps toward the realisation of the common purpose.[2118] In concluding that **Miletić** shared the intent of the JCE to Forcibly Remove,[2119] the Trial Chamber relied on its findings that: (1) Directive 7 laid out a plan to create "an unbearable situation of total insecurity" for the Bosnian Muslim populations of Srebrenica and Žepa, with the ultimate aim of forcing them out of the enclaves;[2120] (2) terrorising and subjecting the Bosnian Muslim population in Srebrenica to cruel and inhumane treatment were inherent components of implementing this plan and were thus some of the steps taken towards the fulfilment of the common purpose of the JCE to Forcibly Remove;[2121] (3) **Miletić** participated in the combat readiness analysis briefing of 29 and 30 January 1995 at the Main Staff ("Briefing") which resulted in Directive 7, was centrally involved in drafting Directive 7, was "well acquainted with the final text of Directive 7", kept a secure copy of the text at the Main Staff, and thus had full knowledge, from the early stages, of the common plan by the means set out in Directive 7;[2122] and (4) **Miletić** played a "pivotal role" in the plan to forcibly remove, making "continuous contributions at all stages", and was the "hub" of information at the Main Staff, receiving and distributing information to and from the main actors throughout the operation and using "his unique position of knowledge to inform and advise", enabling the successful implementation of the plan.[2123] Finally, the Appeals Chamber notes that the Trial Chamber found that Directive 7 and the JCE to Forcibly Remove targeted the Bosnian Muslim population,[2124] and that **Miletić** knew of the widespread and systematic attack against the civilian populations of Srebrenica and Žepa and knew that his acts

2117 *Nahimana et al.* Appeal Judgement, para. 985; *Brđanin* Appeal Judgement, para. 296; *Kvočka et al.* Appeal Judgement, para. 323.
2118 See *supra*, para. 43. See Trial Judgement, paras 1087, 1728.
2119 Trial Judgement, para. 1717.
2120 Trial Judgement, paras 199, 762, 1086.
2121 Trial Judgement, paras 1086-1087. See *supra*, para. 43.
2122 Trial Judgement, paras 199, 1648-1649, 1653, 1704-1705.
2123 Trial Judgement, para. 1716.

formed part of that attack.[2125] Accordingly, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in establishing his discriminatory intent for persecution through the underlying act of terrorising civilians.[2126]

ii. Whether Miletić intended to terrorise civilians

740. **Miletić** contends that the Trial Chamber erred in fact in finding that he played a role in disseminating terror.[2127] In his submission, he was "wholly unacquainted" with the incidents identified by the Trial Chamber as amounting to terrorisation since: (1) the actions were not envisaged under the common plan to forcibly remove; (2) his whereabouts on 25 May 1995 were not established and he did not know about the decision to shell Srebrenica; and (3) he had no knowledge of Karadžić's 9 July Order, or any other actions which "resulted directly" from that order, including the shelling of inhabitants in Srebrenica, the conditions in Potočari, or the statements made by Mladić at the Hotel Fontana.[2128] **Miletić** reiterates that he was not involved in any act of shelling of or sniping at the enclaves, including the VRS shelling of Srebrenica on 25 May 1995 ("25 May Shelling"), and that there is no evidence of his knowledge of such acts.[2129]

741. The Prosecution submits that **Miletić** knew about the 25 May Shelling since he received this information from the Drina Corps and incorporated it into the Main Staff report.[2130] It argues that the Trial Chamber reasonably found that **Miletić** had full knowledge of the situation in Srebrenica and the criminal plan.[2131]

742. The Appeals Chamber recalls that persecution is an act or omission carried out *deliberately* with the intention to discriminate on one of the listed grounds, specifically race, religion, or politics (the *mens rea*).[2132] The Trial Chamber was thus required to establish that **Miletić** intended the acts of terrorising civilians. The Appeals Chamber understands **Miletić**'s challenge to the Trial Chamber's findings about his "role in disseminating terror"[2133] is in fact a challenge of whether a reasonable trier of fact could have established that he intended the acts of terrorising civilians as found by the Trial Chamber.

743. Turning, therefore, to the question of whether the Trial Chamber erred in fact in finding that **Miletić** intended to terrorise civilians, the Appeals Chamber notes the Trial Chamber's findings that

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2124 Trial Judgement, para. 1729.
2125 Trial Judgement, para. 1719.
2126 Trial Judgement, para. 1730. See Trial Judgement, para. 1729.
2127 Miletić's Appeal Brief, p. 117, para. 395.
2128 Miletić's Appeal Brief, paras 391-395; Miletić's Reply Brief, para. 126.
2129 Miletić's Reply Brief, paras 126-127.
2130 Prosecution's Response Brief (Miletić), para. 293.
2131 Prosecution's Response Brief (Miletić), para. 293. See Prosecution's Response Brief (Miletić), para. 292.
2132 See *supra*, para. 737.

the terrorising of the Bosnian Muslim population in Srebrenica was an intrinsic step toward implementing the plan to forcibly remove and was thus one of the steps towards the fulfilment of the common purpose of the JCE to Forcibly Remove.[2134] Given **Miletić**'s central participation in the drafting process of Directive 7, which laid out the plan to forcibly remove,[2135] and his pivotal role in the implementation of the plan,[2136] the Appeals Chamber finds that a reasonable trier of fact could have concluded that **Miletić**, as a participant in the JCE to Forcibly Remove, possessed the required intent for these particular underlying acts of persecution.[2137]

744. Further, to the extent that **Miletić** disputes his ongoing knowledge of the acts of terrorising civilians throughout the implementation of the common plan to forcibly remove, the Appeals Chamber notes that the shelling of Srebrenica on 25 May 1995 was reported by the Bratunac Brigade to the Drina Corps, and was included in the Main Staff report of that day.[2138] **Miletić** studied all the reports from every corps,[2139] and was considered to be the best-informed officer in regard to the combat situations of the VRS.[2140] The Appeals Chamber therefore finds that a reasonable trier of fact could have found that he had full knowledge of the situation in the Srebrenica and Žepa enclaves before, during, and after the attack,[2141] which the Appeals Chamber understands to include the 25 May 1995 shelling of Srebrenica and other instances of shelling and sniping preceding the fall of Srebrenica. Thus, it is immaterial whether **Miletić** was present at the Main Staff on the day of the shelling or was himself involved in drafting or approving the Main Staff report recording the event.

745. Finally, with respect to **Miletić**'s contention that he had no personal knowledge of Karadžić's 9 July Order,[2142] the Appeals Chamber notes that the Trial Chamber found that **Miletić** had full knowledge of the situation in the Srebrenica and Žepa enclaves during the entire attack and maintained his co-ordinating role throughout the implementation of the plan.[2143] **Miletić** merely requests that the Appeals Chamber accept his alternative interpretation of the evidence without identifying any error on the part of the Trial Chamber. Further, bearing in mind that Directive 7 tasked the Drina Corps with creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa", the Appeals Chamber cannot

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2133 Miletić's Appeal Brief, p. 117.
2134 Trial Judgement, paras 1086-1087. See *supra*, para. 43.
2135 Trial Judgement, paras 199, 762-765, 1086, 1648, 1651, 1653, 1704.
2136 Trial Judgement, para. 1716.
2137 Trial Judgement, para. 1730.
2138 Trial Judgement, para. 207 & fns 577-578.
2139 Trial Judgement, paras 113, 1625.
2140 Trial Judgement, para. 1714.
2141 Trial Judgement, para. 1715. See Trial Judgement, paras 1712, 1719.
2142 The Appeals Chamber recalls that on 9 July 1995, Karadžić issued an order authorising the VRS to capture Srebrenica town. See Trial Judgement, paras 252, 769. See also *supra*, para. 573.
2143 Trial Judgement, para. 1715.

discern any relevance in **Miletić**'s awareness of Karadžić's 9 July Order for establishing his participation in the JCE to Forcibly Remove.[2144] It follows that **Miletić**'s alleged lack of awareness of Karadžić's 9 July Order would not contradict that he knew that acts of terrorising civilians were occurring.

746. In light of the above, the Appeals Chamber dismisses ground 17 of **Miletić**'s appeal.

c. Alleged errors relating to cruel and inhumane treatment (Miletić's Ground 18)

i. Arguments of the Parties

747. **Miletić** submits that the Trial Chamber erred in law by failing to establish that he possessed the intent for cruel and inhumane treatment.[2145] **Miletić** argues that the actions referred to by the Trial Chamber as constituting cruel and inhumane treatment concerned the detention conditions and the suffering of the people gathered in Potočari caused by the separation of the men from the others.[2146] He submits that this separation of the men was not anticipated under the JCE to Forcibly Remove, but could only be a consequence of the JCE to Murder since the Trial Chamber found that the men's detention constituted part of the plan to kill them, and their separation was in turn related to the detention.[2147]

748. **Miletić** also submits that the Trial Chamber erred in fact in finding that he was responsible for committing persecution through cruel and inhumane treatment.[2148] He argues that he was "completely unaware" of the actions identified by the Trial Chamber as amounting to cruel and inhumane treatment.[2149] In his submission, all of these actions related to the conditions of detention and the separation of the men in Potočari and there is no evidence linking him to these events.[2150]

749. The Prosecution responds that the Trial Chamber reasonably found that the Bosnian Muslims in Potočari were subjected to cruel and inhumane treatment and that this formed part of the JCE to Forcibly Remove in which **Miletić** participated.[2151] It further submits that the Trial Chamber properly found that **Miletić** possessed discriminatory intent in relation to the cruel and

2144 See *supra*, para. 599; *infra*, para. 1490.
2145 Miletić's Appeal Brief, paras 396, 398-399.
2146 Miletić's Appeal Brief, para. 397.
2147 Miletić's Appeal Brief, para. 397. See also Miletić's Reply Brief, paras 128-129.
2148 Miletić's Appeal Brief, para. 402. See Miletić's Appeal Brief, para. 399.
2149 Miletić's Appeal Brief, paras 400-401.
2150 Miletić's Appeal Brief, para. 401.
2151 Prosecution's Response Brief (Miletić), paras 294-295. In this regard, the Prosecution further contends that **Miletić**'s argument that all the acts of cruel and inhumane treatment were committed in furtherance of the JCE to Murder is contradicted by the Trial Chamber's findings. Prosecution's Response Brief (Miletić), paras 294-296.

inhumane treatment of the Bosnian Muslim civilians.[2152] The Prosecution contends that, in any event, **Miletić** had the requisite *mens rea* for cruel and inhumane treatment.[2153]

ii. Analysis

750. The Trial Chamber found that by 12 July 1995 there were two JCEs in existence in and around Srebrenica: a JCE to forcibly remove the Bosnian Muslim populations from the Srebrenica and Žepa enclaves, and a JCE to murder the able-bodied Bosnian Muslim men from Srebrenica.[2154] **Miletić** was found by the Trial Chamber to only be a member of the JCE to Forcibly Remove.[2155] The Trial Chamber was satisfied that through his participation in the JCE to Forcibly Remove, **Miletić** committed acts of cruel and inhumane treatment and that these acts amounted to the crime of persecution.[2156] The acts of cruel and inhumane treatment established by the Trial Chamber included the "horrific and inhumane conditions" and "physical assaults" inflicted upon the Bosnian Muslims detained in Potočari as well as the "forced and painful separation process" of the men from their families.[2157] The Trial Chamber held that acts of cruel and inhumane treatment formed an intrinsic part of the common plan to forcibly remove the Bosnian Muslim population from the enclaves, as steps toward the realisation of the common purpose.[2158]

751. The Appeals Chamber dismisses, in accordance with the law on persecution as a crime against humanity, **Miletić**'s arguments that the Trial Chamber erred in not establishing the requisite intent for cruel and inhumane treatment.[2159] As for **Miletić**'s remaining arguments that he did not play a role in the instances of cruel and inhumane treatment, the Appeals Chamber recalls that persecution is an act or omission carried out *deliberately* with the intention to discriminate on one of the listed grounds, specifically race, religion, or politics (the *mens rea*).[2160] The Trial Chamber was thus required to establish that **Miletić** intended the acts of cruel and inhumane treatment that occurred in Potočari, as established by the Trial Chamber. In applying the law to the facts, the Appeals Chamber will now examine whether no reasonable trier of fact could have established **Miletić**'s intent in respect of the cruel and inhumane treatment.

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2152 Prosecution's Response Brief (Miletić), para. 297. See Prosecution's Response Brief (Miletić), paras 294, 299-300.
2153 Prosecution's Response Brief (Miletić), para. 298.
2154 Trial Judgement, paras 1050, 1072, 1085, 1087.
2155 Trial Judgement, paras 1047, 1084, 1603, 1716-1718.
2156 Trial Judgement, paras 1728, 1730-1731.
2157 Trial Judgement, para. 994. See also Trial Judgement, para. 992, referring to Trial Judgement, paras 917-918.
2158 Trial Judgement, paras 1086-1087, 1728.
2159 See *supra*, paras 737-739.
2160 See *supra*, para. 737.

752. The Trial Chamber found that subjecting the "20,000 to 30,000 people gathered in Potočari for safety [to] a situation and atmosphere marked by panic, fear and despair"[2161] and to "horrific and inhumane conditions, as well as physical assaults" constituted the infliction of cruel and inhumane treatment.[2162] The Trial Chamber also found that the conditions and atmosphere in Potočari were coercive to such an extent that the only option for the Bosnian Muslim women, children, and the elderly was to leave.[2163] The "[c]onditions of compulsion" included the fearful and oppressive atmosphere leading up to the busing of the women, children, and the elderly, as well as the intimidating circumstances of the forced busing itself.[2164] The Trial Chamber was satisfied that the cruel and inhumane treatment meted out was part of the conditions which ultimately compelled the departure of the Bosnian Muslims.[2165] Since the Trial Chamber established that this cruel and inhumane treatment was deliberately inflicted on those civilians gathered at Potočari as a means of implementing the JCE to Forcibly Remove,[2166] the Appeals Chamber considers that a reasonable trier of fact could have found that **Miletić**, as a willing participant in the JCE to Forcibly Remove,[2167] possessed the required intent for these particular underlying acts of persecution.[2168]

753. The Trial Chamber also found that the "intolerable conditions" of detention and the "physical and verbal abuse, including severe beatings", to which the Bosnian Muslim men were subjected while detained in Potočari, amounted to cruel and inhumane treatment.[2169] The Trial Chamber further found that the Bosnian Muslims separated and detained at Potočari were subject to "horrific and inhumane conditions, as well as physical assaults" and "a forced and painful separation process", which inflicted serious mental harm on the men of Srebrenica, constituting cruel and inhumane treatment.[2170] While the Trial Chamber found that generally, "the detention of the men [was a] part of the JCE to Murder",[2171] the totality of the Trial Chamber's findings establish that the separation and detention process in Potočari was not solely a part of the JCE to Murder but also done in furtherance of the JCE to Forcibly Remove.[2172] For example, the Trial

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2161 Trial Judgement, para. 992. See Trial Judgement, para. 994.
2162 Trial Judgement, para. 994.
2163 Trial Judgement, para. 917. See also Trial Judgement, para. 921.
2164 Trial Judgement, paras 917-918. See Trial Judgement, para. 992.
2165 Trial Judgement, para. 921.
2166 Trial Judgement, paras 1086-1087, 1728.
2167 Trial Judgement, paras 1716-1718.
2168 See Trial Judgement, para. 1730.
2169 Trial Judgement, paras 993-994.
2170 Trial Judgement, para. 994.
2171 Trial Judgement, para. 1088.
2172 See, *e.g.*, Trial Judgement, paras 319 ("the Bosnian Serb Forces [...] started separating the Bosnian Muslim men from their families and did not allow them to board the buses"), 323 (describing the forcible transportation process on 13 July 1995 in which "Bosnian Muslim men were again separated from their families"), 918 ("As they boarded the buses, the women, children and the elderly of Srebrenica also faced a forced and painful separation from their men."), 992-994 (describing, *inter alia*, the cruel and inhumane treatment of the men detained at Potočari), 1086 & fn. 3547 (describing the implementation of the JCE to Forcibly Remove as including "cruel and inhumane treatment of people gathered at Potočari" and that "all these acts were intrinsic steps to the ultimate aim to force the Bosnian Muslim populations out of the enclaves"). See also *infra*, para. 1689.

Chamber noted that the BSF separated the men from their families in Potočari to facilitate the forcible transfer of the latter out of the enclaves.[2173] Finally, the Trial Chamber explicitly included the infliction of cruel and inhumane treatment committed against the men in Potočari during the separation and detention process as within the "intrinsic steps to the ultimate aim to force the Bosnian Muslim populations out of the enclaves" as laid out in Directive 7.[2174]

754. Thus, the Appeals Chamber considers that **Miletić**'s arguments are based on an incorrect premise that the Trial Chamber found that the separation and detention of the men at Potočari was not a part of the JCE to Forcibly Remove. The Appeals Chamber understands the Trial Chamber's findings to mean that inflicting acts of cruel and inhumane treatment on the Bosnian Muslim civilian population, including the men separated and detained at Potočari, was a means to achieve the common purpose of the JCE to Forcibly Remove.[2175] The Trial Chamber based its finding regarding the common purpose largely on Directive 7 which outlined the plan to create "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[2176] The Appeals Chamber understands that the Trial Chamber interpreted this language as expressing an intention to deliberately commit acts of cruel and inhumane treatment on the civilian populations in Srebrenica and Žepa in order to accomplish the plan of forcibly removing the Bosnian Muslim population from the enclaves. Since **Miletić** drafted Directive 7, a reasonable trier of fact could have found that he had full knowledge of the measures envisaged to carry out the common plan to forcibly remove the Bosnian Muslim civilians from Srebrenica and Žepa.[2177]

755. As the Trial Chamber established that this cruel and inhumane treatment was deliberately inflicted on the men separated from their families and detained at Potočari as a means of implementing the JCE to Forcibly Remove,[2178] the Appeals Chamber considers that a reasonable trier of fact could have found that **Miletić**, as a contributing member of the JCE to Forcibly Remove,[2179] possessed the required intent for these particular underlying acts of persecution.[2180]

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2173 See Trial Judgement, paras 319, 323, 918, 994.

2174 Trial Judgement, para. 1086 & fn. 3547 (referring to, *inter alia*, Trial Judgement, paras 992-994), fn. 3548 referring to, *inter alia*, Trial Judgement, Chapter IV, Section B.2.(b), describing, *inter alia*, the "measures aimed at forcing the populations of Srebrenica and Žepa to leave the enclaves" as set out in Directive 7. See Trial Judgement, para. 762.

2175 See *supra*, para. 43.

2176 Trial Judgement, para. 1086.

2177 Trial Judgement, para. 1704. See Trial Judgement, paras 1086-1087. See also Trial Judgement, paras 1712, 1715, 1719; *supra*, para. 744; *infra*, paras 1498-1510.

2178 Trial Judgement, paras 1086-1087 & fn. 3547, para. 1728 & fn. 5225, referring to, *inter alia*, Trial Judgement, paras 994-995.

2179 Trial Judgement, paras 1716-1718.

2180 See Trial Judgement, para. 1730.

756. In conclusion, **Miletić** has failed to show any error in the Trial Chamber's findings that the JCE to Forcibly Remove was implemented in part by these acts of cruel and inhumane treatment and that, by participating in this JCE, he intended such acts.[2181]

757. In light of the foregoing, the Appeals Chamber dismisses ground 18 of **Miletić**'s appeal in its entirety.

(ii) Alleged errors concerning the *actus reus* of persecution (Miletić's Ground 16)

a. Arguments of the Parties

758. **Miletić** submits that the Trial Chamber erred in convicting him of persecution as a crime against humanity through terrorising civilians as it failed to properly establish the elements constituting terrorising.[2182] He argues that the Trial Chamber erred in law by considering as the *actus reus* of terrorising civilians shelling and sniping directed at the civilian population of Srebrenica in the months preceding the fall of Srebrenica.[2183] **Miletić** contends that the Trial Chamber failed to identify these incidents, with the exception of the 25 May Shelling, which meant that it was impossible for the Trial Chamber to determine whether the primary purpose of these acts was the spreading of terror among the civilian population.[2184] With regard to the 25 May Shelling, **Miletić** submits that the Trial Chamber failed to find that the primary objective of this shelling was to sow terror among the civilian population.[2185] He further argues that the shelling did not constitute the terrorising of civilians since it was an isolated act, was not "massive" or long-lasting, apparently caused no damage, and was a response to a NATO bombardment.[2186]

759. The Prosecution responds that the Trial Chamber correctly found that the instances of sniping and shelling by the VRS in the months prior to the fall of Srebrenica together with the terrorising of the civilian population during the July attack and in Potočari constituted persecution by terrorising civilians.[2187] In its view, the Trial Chamber was not required to find that every instance of shelling and sniping amounted to persecution by terrorising civilians or constituted the

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2181 Trial Judgement, para. 1730. The Trial Chamber also found that the experience suffered by the "few men who ultimately survived the executions" amounted to cruel and inhumane treatment. Trial Judgement, para. 994. In the view of the Appeals Chamber, it is clear that any such act was solely a consequence of the JCE to Murder, and that the Trial Chamber did not establish that **Miletić** intended this act of cruel and inhumane treatment. Although it may have been preferable for the Trial Chamber to specify for which acts of cruel and inhumane treatment **Miletić** was found responsible, the totality of the Trial Chamber's findings amply establish that his liability for persecution extended only to those acts which fell within the common plan to forcibly remove the civilian population of Srebrenica. See Trial Judgement, paras 1728, 1730.

2182 Miletić's Appeal Brief, para. 379. See also Miletić's Reply Brief, para. 123.

2183 Miletić's Appeal Brief, paras 384, 386. See also Miletić's Appeal Brief, para. 387; Miletić's Reply Brief, paras 121, 124.

2184 Miletić's Appeal Brief, paras 385-386. See also Miletić's Appeal Brief, para. 380.

2185 Miletić's Appeal Brief, paras 382-383.

2186 Miletić's Appeal Brief, paras 381-382; Miletić's Reply Brief, para. 125.

2187 Prosecution's Response Brief (Miletić), paras 283, 285.

crime of terror, or that their primary objective was to spread terror.[2188] The Prosecution maintains that, in any event, the Trial Chamber properly found that the primary purpose of the BSF's actions was to spread terror among the civilian population in Srebrenica and Potočari.[2189]

b. Analysis

760. The Trial Chamber found that through his participation in the JCE to Forcibly Remove, **Miletić** committed persecution through, *inter alia*, the underlying act of terrorising civilians.[2190] The underlying acts included "instances of shelling and sniping directed at the civilian population of Srebrenica" in the months preceding the fall of Srebrenica,[2191] namely the 25 May Shelling,[2192] the "increasing shelling and sniping into the enclaves" from about May continuing until the VRS attack in July 1995,[2193] and shelling during the VRS attack on the Srebrenica enclave from 6 to 9 July 1995.[2194] The Trial Chamber also relied on the finding that the situation in Srebrenica on 10 July 1995 was "tense with heavy shelling"[2195] and that the shelling of the DutchBat Bravo Company compound in Srebrenica, in which thousands of people sought protection, continued on 11 July 1995 despite the fact that the ABiH members had already left the town.[2196] Finally, the Trial Chamber considered the instances of shelling alongside the "fearful and oppressive atmosphere" the BSF had created in Potočari, the "sombre and menacing mood during the meetings at the Hotel Fontana" at some of which civilian representatives were present, and Mladić's comments to the Bosnian Muslims that "they could 'either survive or disappear'".[2197] After considering the nature, manner, timing, and duration of the acts, the Trial Chamber was "satisfied that their primary purpose was to spread terror among the civilian population".[2198]

761. The Appeals Chamber recalls that the Trial Chamber correctly stated that the crime of persecution requires an act or omission that "discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law".[2199] The Trial Chamber correctly stated that "[n]ot every denial of a human right is serious enough to constitute a crime against humanity"[2200] and that "acts or omissions need to be of equal gravity to the crimes listed in Article 5 [of the Statute] whether considered in isolation or in conjunction with other

2188 Prosecution's Response Brief (Miletić), paras 286-287, 289.
2189 Prosecution's Response Brief (Miletić), paras 283, 288.
2190 Trial Judgement, para. 1731. See Trial Judgement, paras 1728, 1730.
2191 Trial Judgement, para. 996.
2192 Trial Judgement, fn. 3289, referring to, *inter alia*, Trial Judgement, para. 207.
2193 Trial Judgement, fn. 3289, referring to, *inter alia*, Trial Judgement, para. 210.
2194 Trial Judgement, fn. 3289, referring to, *inter alia*, Trial Judgement, paras 249-251.
2195 Trial Judgement, para. 996.
2196 Trial Judgement, para. 996. See Trial Judgement, para. 917.
2197 Trial Judgement, para. 997.
2198 Trial Judgement, para. 998. See Trial Judgement, paras 996-997.
2199 Trial Judgement, para. 964. See *supra*, para. 737.
2200 Trial Judgement, para. 966 & fn. 3234, referring to, *inter alia*, *Nahimana et al.* Appeal Judgement, para. 985.

acts".[2201] It also correctly stated that "[i]t is not required that acts or omissions underlying persecution be considered crimes under international law".[2202]

762. To establish the *actus reus* of persecution in the present case, the Trial Chamber was required to establish that the underlying acts of terrorising civilians: discriminated in fact, denied or infringed upon a fundamental right laid down in international customary or treaty law,[2203] and were "of equal gravity to the crimes listed in Article 5 whether considered in isolation or in conjunction with other acts."[2204] In this regard, the Appeals Chamber notes that the Trial Chamber found that the BSF discriminated against Bosnian Muslim civilians,[2205] and that "the terrorising of civilians [...] is of equal gravity to the crimes listed in Article 5 and constitutes a gross denial of fundamental rights, *inter alia*, the right to security."[2206]

763. The Appeals Chamber also recalls that after having considered the nature, manner, timing and duration of the acts of terrorising civilians, the Trial Chamber indicated that it was "satisfied that their primary purpose was to spread terror among the civilian population".[2207] The Appeals Chamber considers that the law, as set out above, did not require the Trial Chamber to establish that spreading terror was the primary purpose of the underlying acts of terrorising civilians. The Appeals Chamber therefore considers that **Miletić**'s submissions in this respect are based on a misunderstanding of the applicable law on persecution. Nevertheless, on the facts of the present case, the Appeals Chamber considers that the primary purpose of the underlying acts may have been relevant to the gravity of the acts in question. In this regard it reiterates that "the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity".[2208] The Appeals Chamber will consider **Miletić**'s arguments in so far as they are relevant to the question of whether the Trial Chamber established the *actus reus* of persecution.

764. The Appeals Chamber observes that, apart from the 25 May Shelling, which the Appeals Chamber considers below, the Trial Chamber did not make findings on the specific incidents of shelling and sniping of the civilian population in the months preceding the fall of Srebrenica. Instead it was satisfied generally that there were instances of shelling and sniping directed at the

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2201 Trial Judgement, para. 966 & fn. 3235, referring to, *inter alia*, *Nahimana et al.* Appeal Judgement, paras 985-988, *Brđanin* Appeal Judgement, para. 296, *Simić* Appeal Judgement, para. 177, *Blaškić* Appeal Judgement, paras 135, 139, 154-155, 160.

2202 Trial Judgement, para. 966 & fn. 3233, referring to, *inter alia*, *Nahimana et al.* Appeal Judgement, para. 985, *Brđanin* Appeal Judgement, para. 296, *Kvočka et al.* Appeal Judgement, paras 323, 325. See also *supra*, para. 738.

2203 *Nahimana et al.* Appeal Judgement, para. 985.

2204 *Nahimana et al.* Appeal Judgement, paras 985-988; *Brđanin* Appeal Judgement, para. 296; *Simić* Appeal Judgement, para. 177; *Blaškić* Appeal Judgement, paras 135, 139, 154-155, 160.

2205 Trial Judgement, paras 999, 1004. See Trial Judgement, paras 255, 265, 917, discussing the shelling of locations where Bosnian Muslim civilians were present. See also Trial Judgement, para. 998.

2206 Trial Judgement, para. 998. See Trial Judgement, para. 981.

2207 Trial Judgement, para. 998.

2208 *Nahimana et al.* Appeal Judgement, para. 987.

civilian population of Srebrenica,[2209] based mainly on the experiences of witnesses on the ground in the relevant time frame.[2210] The Appeals Chamber is satisfied that the Trial Chamber established that numerous incidents of shelling and sniping of the civilian population of Srebrenica occurred in the months preceding the attack on Srebrenica. Further, although the exact dates of such incidents have not been established, their occurrence within a general time frame provides sufficient specificity so as to permit a determination of their gravity.[2211]

765. As to whether these incidents are of sufficient gravity to constitute underlying acts of persecution, the Appeals Chamber notes that the Trial Chamber referred to Witness M. Nikolić's evidence that the sniping of civilians was "one of the segments which was conducive to the creation of a difficult life for people living in the enclave, by preventing them from doing their everyday works and duties".[2212] The shelling and sniping caused numerous injuries to civilians, damaged civilian objects, and forced civilians to leave their homes or other places of shelter.[2213] The Trial Chamber found that the actions taken against civilians in Srebrenica and Potočari, including these incidents of shelling and sniping, "caused extensive trauma and psychological damage".[2214] In light of this, and bearing in mind that VRS forces were operating pursuant to the instruction contained in Directive 7 to "create an unbearable situation of total insecurity" for the inhabitants of Srebrenica and Žepa,[2215] the Appeals Chamber finds no error in the Trial Chamber's conclusion that the incidents of shelling and sniping of the civilian population in Srebrenica in the months prior to the fall of the enclave were of sufficient gravity.[2216]

766. With regard to the 25 May Shelling, the Trial Chamber found that four shells were fired by the Bratunac Brigade "on the town of Srebrenica", a UN-designated "safe area" for civilian residents,[2217] and that "this VRS attack constituted an indiscriminate attack on civilians".[2218] The Appeals Chamber finds no merit in **Miletić**'s assertion that the 25 May Shelling did not constitute the terrorising of civilians since it was an isolated act, was not "massive" or long-lasting, apparently caused no damage, and was a response to a NATO bombardment.[2219] The Appeals Chamber

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2209 Trial Judgement, para. 996, referring to, *inter alia*, Trial Judgement, paras 207, 210.

2210 See Trial Judgement, para. 210 & fns 594-598, referring to, *inter alia*, Robert Franken, T. 2440-2441 (16 Oct 2006), Cornelius Nicolai, T. 18461 (29 Nov 2007), Momir Nikolić, T. 32965-32966 (21 Apr 2009), Joseph Kingori, T. 19366-19369 (10 Jan 2008), T. 19475 (11 Jan 2008), PW-106, T. 3939-3940 (15 Nov 2006), Pieter Boering, T. 1895-1896 (19 Sept 2006). *Cf. supra*, para. 596.

2211 It is therefore unnecessary to address **Miletić**'s related argument that the Trial Chamber's findings on the use of terror as an inherent component of the implementation of the JCE to Forcibly Remove would be undermined if no acts of terrorising civilians occurred prior to the attack on Srebrenica. See Miletić's Appeal Brief, para. 387.

2212 Trial Judgement, para. 210, citing M. Nikolić, T. 32966 (21 Apr 2009).

2213 Trial Judgement, paras 210, 996. See *supra*, paras 764-765.

2214 Trial Judgement, para. 998. See Trial Judgement, paras 996-997.

2215 Trial Judgement, paras 762-765.

2216 Trial Judgement, para. 981. See also *supra*, para. 760.

2217 Trial Judgement, para. 207. See Trial Judgement, paras 93, 761.

2218 Trial Judgement, para. 207.

2219 See *supra*, note 2186.

reiterates that "it is not necessary that every individual act underlying the crime of persecution [...] be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together".[2220] The Trial Chamber therefore correctly considered the 25 May Shelling alongside the other incidents of shelling and sniping of the civilian population in Srebrenica in the months preceding the fall of the enclave.[2221] The Appeals Chamber therefore dismisses **Miletić**'s arguments concerning the gravity of the 25 May Shelling.

767. Based on the foregoing, the Appeals Chamber dismisses ground 16 of **Miletić**'s appeal in its entirety.

### 6. Forcible transfer

#### (a) Alleged error in finding that the men who crossed the Drina River were forcibly transferred (Miletić's Sub-ground 6.2)

##### (i) Arguments of the Parties

768. **Miletić** contends that the Trial Chamber erred in law by finding that the movement across the Drina River of able-bodied men from the Žepa enclave constituted forcible transfer as a crime against humanity.[2222] **Miletić** submits that the Trial Chamber erred in failing to establish the civilian status of these men.[2223] He argues that they were enemy combatants engaged in fighting and perceived as such, and therefore cannot be combined with the civilian population of Žepa.[2224] Consequently, according to **Miletić**, the acts against these men were not a part of the attack on the civilian population and cannot constitute a crime against humanity.[2225] **Miletić** submits that the Trial Chamber's error invalidates his sentence for forcible transfer as a crime against humanity.[2226]

769. The Prosecution agrees with **Miletić**'s request to be acquitted of forcible transfer in relation to the able-bodied men who crossed the Drina River, considering that the Trial Chamber made no finding that there were any civilians among them.[2227] The Prosecution concedes that the Trial Chamber failed to consider that forcing the combatants from the Žepa enclave was lawful under international humanitarian law.[2228] However, the Prosecution submits that an acquittal on this

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2220 *Nahimana et al.* Appeal Judgement, para. 987.
2221 Trial Judgement, para. 996 & fn. 3289.
2222 Miletić's Appeal Brief, paras 193, 202, referring to Trial Judgement, para. 958.
2223 Miletić's Appeal Brief, para. 199.
2224 Miletić's Appeal Brief, paras 199-201.
2225 Miletić's Appeal Brief, paras 199, 201-202.
2226 Miletić's Appeal Brief, para. 193. See also Miletić's Appeal Brief, para. 203.
2227 Prosecution's Response Brief (Miletić), paras 126, 129.
2228 Prosecution's Response Brief (Miletić), paras 126, 128-129.

ground should not result in a reduction in **Miletić**'s sentence as it only concerns a few hundred victims out of a total of tens of thousands.[2229]

(ii) The Trial Chamber's findings

770. The Trial Chamber found that in the aftermath of the UN Security Council's declaration of Žepa as a safe area in 1993, the enclave was never completely demilitarised.[2230] After weeks of fighting and negotiating,[2231] representatives of the ABiH and the VRS signed an agreement, which provided for the withdrawal from Žepa of civilians and ABiH troops ("24 July 1995 Agreement").[2232] Following the signature, major fighting ceased.[2233] Transportation of Bosnian Muslim civilians and wounded from Žepa began on 25 July 1995[2234] and the last bus of civilians left Žepa on 27 July 1995.[2235] While this transportation took place, the able-bodied men of Žepa began to flee the enclave into the nearby woods[2236] and on 27 July 1995 when the transportation was complete, approximately 1,500 ABiH soldiers remained in the woods.[2237] The Trial Chamber noted evidence that fighting continued in the Žepa area after the transportation of Bosnian Muslim civilians and wounded.[2238] Following the 24 July 1995 Agreement, negotiations continued between the ABiH and the VRS with regard to the fate of the able-bodied Bosnian Muslim men remaining in the Žepa enclave.[2239] Eventually, a number of them fled by crossing the Drina River into Serbia.[2240] The Trial Chamber referred to evidence indicating that approximately 800-1,000 soldiers crossed the river around 1-2 August 1995.[2241]

771. With regard to the nexus between the men crossing the Drina River into Serbia and the widespread and systematic attack on a civilian population, the Trial Chamber found that "the flight of the men from Žepa, some across the Drina River, was the direct result and continuation of the attack against the civilian populations of Srebrenica and Žepa".[2242] The Trial Chamber further found that the able-bodied men, both civilian and military, fled the Žepa enclave because it was the only option left for them to survive and thus they had no other genuine choice.[2243] The Trial Chamber found in this regard that the military and those participating in hostilities would have been

2229 Prosecution's Response Brief (Miletić), para. 129.
2230 Trial Judgement, para. 666.
2231 See Trial Judgement, paras 665-707.
2232 Trial Judgement, paras 703-704.
2233 Trial Judgement, para. 708.
2234 Trial Judgement, para. 711.
2235 Trial Judgement, paras 719-721.
2236 Trial Judgement, paras 784, 955.
2237 Trial Judgement, paras 729-730.
2238 Trial Judgement, paras 724, 955.
2239 Trial Judgement, paras 725-731, 734.
2240 See Trial Judgement, paras 734-738, 784, 958-960, 962.
2241 Trial Judgement, paras 734-738.
2242 Trial Judgement, para. 784.
2243 Trial Judgement, paras 955-956.

well aware of the reports of mass killings after the fall of Srebrenica, and therefore fled for their lives rather than as a military choice.[2244] The Trial Chamber concluded that the movement across the Drina River of able-bodied men from the Žepa enclave amounted to forcible transfer.[2245]

(iii) Analysis

772. The Appeals Chamber recalls that one of the elements of the nexus requirement for crimes against humanity is "the commission of an act which, by its nature or consequences, is objectively part of the attack".[2246] The Trial Chamber's finding that "the flight of the men from Žepa, some across the Drina River, was the direct result and continuation of the attack against the civilian populations of Srebrenica and Žepa" was based on the following two considerations: (1) the men had faced the same living conditions and the same military attacks as the others in the enclave; and (2) the VRS had consistently refused to permit any able-bodied man – civilian or soldier – to be transferred out of the enclave together with the rest of the population.[2247] The Appeals Chamber observes that the Trial Chamber's reasoning covers both civilians and non-civilians.

773. The Trial Chamber's factual findings, as recalled above, show that approximately one week passed between the fall of Žepa and the departure of civilians on buses, on one hand, and the crossing of the Drina River by able-bodied men from the Žepa enclave, on the other hand. Meanwhile, the able-bodied men of Žepa, including the soldiers, fled from the enclave into the surrounding woods. Furthermore, there were negotiations between the warring sides as to the fate of the men and evidence indicates that fighting continued in the Žepa area. The Appeals Chamber notes that the Trial Chamber found that there were civilians among the able-bodied men fleeing Žepa[2248] but made no such finding specifically with regard to the men crossing the Drina River.[2249] Indeed, the Trial Chamber referred to evidence indicating that there may not have been any civilians among the men who crossed the Drina River.[2250] The Appeals Chamber recalls that there is no requirement nor is it an element of a crime against humanity that the victims of the underlying crime be civilians or predominantly civilians, provided the acts form part of a widespread or systematic attack directed against a civilian population.[2251] In the case of the men who crossed the Drina River, it is unclear from the Trial Chamber's findings whether these men included any civilians at all.

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2244 Trial Judgement, para. 956.
2245 Trial Judgement, paras 958, 962. See also Trial Judgement, paras 890-895, 910-913, 959-961.
2246 *Mrkšić and Šljivančanin* Appeal Judgement, para. 41.
2247 Trial Judgement, para. 784.
2248 Trial Judgement, paras 955-956.
2249 Trial Judgement, paras 732-738 & fn. 2728.
2250 Trial Judgement, para. 732, para. 736 & fn. 2723, para. 737 & fn. 2727.
2251 See *supra*, para. 569.

774. In light of the passage of time since the departure of civilians from Žepa, the ensuing events, and, especially, the absence of findings that any civilians crossed the Drina River,[2252] the Appeals Chamber is of the view that no reasonable trier of fact could have reached, as the only reasonable inference, the conclusion that the nexus requirement was met. The Appeals Chamber therefore finds that the Trial Chamber erred. While remaining cognisant of the fact that **Miletić** was convicted for forcible transfer as a crime against humanity, not as a war crime, the Appeals Chamber further notes that forcible displacement of enemy soldiers is not prohibited under international humanitarian law.[2253]

775. The Appeals Chamber therefore grants sub-ground 6.2 of **Miletić**'s appeal. As a result, sub-grounds 1.2, 6.1, and 10.12 of **Miletić**'s appeal, which also concern his liability for the men who crossed the Drina River, are moot. The Appeals Chamber reverses his convictions for the forcible transfer of the men who crossed the Drina River under Counts 6 and 7.[2254]

(b) Alleged error in relation to the distinction between civilians and soldiers in the column (Miletić's Ground 7)

(i) Arguments of the Parties

776. **Miletić** submits that the Trial Chamber committed an error of law when holding that the actions directed against the civilians in the column constituted a crime against humanity, which invalidates his conviction under Count 7 (forcible transfer as a crime against humanity).[2255] First, he challenges the Trial Chamber's distinction between civilians and combatants within the column, arguing that: (1) the decision to form the column was made by the Bosnian Muslim authorities; (2) the column consisted of the 28th Division of the ABiH, which was a legitimate military objective; (3) the civilians who joined the column became combatants as they joined an armed unit and took part in combat; (4) the civilians were not separated from the soldiers in the column, in violation of international humanitarian law; and (5) the column itself had military objectives and presented a military threat to the Serbs.[2256] Second, **Miletić** submits that the Trial Chamber neglected to establish beyond reasonable doubt a link between the actions committed against the column and the attack against the civilian population.[2257] According to **Miletić**, the BSF acted in the belief that the column consisted of members of the 28th Division, a legitimate military objective, and therefore the

2252 See *supra*, para. 773.
2253 *Cf.* Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 129, pp. 457-462.
2254 Trial Judgement, paras 1002-1004, 1720-1722, 1728-1731, 2108, Disposition, Miletić section.
2255 Miletić's Appeal Brief, para. 212, referring to Trial Judgement, paras 928-930.
2256 Miletić's Appeal Brief, paras 204-209, 212; Appeal Hearing, AT. 432-434 (5 Dec 2013). See also Appeal Hearing, AT. 480-481 (5 Dec 2013).
2257 Miletić's Appeal Brief, paras 209-210, 212.

acts cannot constitute a crime against humanity.[2258] Finally, **Miletić** submits that the Trial Chamber violated the principle of the presumption of innocence by including in the attack upon the civilian population his actions that fell within his ordinary responsibilities.[2259]

777. The Prosecution responds that the fact that a decision was taken to form the column does not contradict the finding of the Trial Chamber that the civilians in the column fled because of fear for their lives caused by the actions of the BSF prior to the formation of the column.[2260] The Prosecution further argues that **Miletić**'s arguments that the Trial Chamber erred in distinguishing between the military and civilian components of the column are misguided in law and in fact.[2261]

778. **Miletić** replies that the Prosecution's argument that the forcible transfer was caused by the actions of the BSF prior to the formation of the column was raised for the first time in the Prosecution's Response Brief and was not the theory that the Prosecution set out in the Indictment and maintained during trial.[2262] Moreover, he argues that he was prevented from presenting his defence on the issue because the Defence was interrupted by the Presiding Judge when it attempted to cross-examine the first witness as to the formation of the column, rendering the trial unfair.[2263] Finally, **Miletić** asserts that he did not see the column and therefore did not know and could not have known that there were civilians in it.[2264]

(ii) Analysis

779. At the outset, the Appeals Chamber considers it necessary to clarify a key aspect of **Miletić**'s argument. **Miletić** submits that the Trial Chamber erred when holding that the actions against the civilians in the column constituted a crime against humanity.[2265] In this regard, **Miletić** refers to the Trial Chamber's findings on the forcible transfer of the civilian component of the column.[2266] In other words, what **Miletić** really argues is that the Trial Chamber erred when holding that the actions against the civilian component of the column amounted to forcible transfer.

780. The Appeals Chamber observes that the Trial Chamber found that "[t]he factors that contributed to and constituted the plan to forcibly displace the Bosnian Muslim population were already in place by the evening of 11 July when the column began to move out of the Srebrenica

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2258 Miletić's Appeal Brief, paras 210-211.
2259 Miletić's Appeal Brief, para. 212; Appeal Hearing, AT. 434 (5 Dec 2013). See also Miletić's Appeal Brief, para. 210.
2260 Prosecution's Response Brief (Miletić), paras 130-132; Appeal Hearing, AT. 465 (5 Dec 2013).
2261 Prosecution's Response Brief (Miletić), paras 130, 133-140; Appeal Hearing, AT. 464-465 (5 Dec 2013).
2262 Miletić's Reply Brief, paras 73-74, referring to Indictment, para. 48(e).
2263 Miletić's Reply Brief, para. 73, referring to Miletić's Appeal Brief, para. 19. See Miletić's Reply Brief, para. 4, referring to PW-110, T. 813-814, 819 (private session) (25 Aug 2006).
2264 Miletić's Reply Brief, para. 75.
2265 Miletić's Appeal Brief, paras 209, 212.

enclave".[2267] The Trial Chamber further held that it was the military attack on the Srebrenica enclave which compelled the departure of the population from Srebrenica, including the civilian men who later formed the civilian component of the column.[2268] The Appeals Chamber observes that while the Trial Chamber held that the acts carried out against these men in the column constituted part of a widespread and systematic attack against the civilian population of the Srebrenica enclave,[2269] the Trial Chamber relied on the prior acts that caused these civilians to leave Srebrenica – in particular the military attack on the enclave – to hold that the crime of forcible transfer was committed against the civilian part of the column.[2270] **Miletić** fails to recognise the distinction between the *prior* acts against the *enclave*, which formed the basis of the impugned holding, and the *ensuing* acts against the *column*, on which the impugned holding was not based.

781. With regard to the impugned holding it is therefore irrelevant if the column was a legitimate military target, if the civilians in the column could be considered as combatants, if their proximity to the soldiers was in violation of international humanitarian law, if the column itself had military objectives and presented a military threat, or if the acts against the column fell within **Miletić**'s ordinary responsibilities. His argument on the link between the attack against the civilian population and the acts directed against the column is similarly beside the point. With regard to the distinction between the military and the civilian component of the column, the Trial Chamber held that the civilians were subjected to forcible transfer, as they had no other choice but to leave, while the members of the military component were not, as they had the choice to stay and fight, to surrender or to retreat.[2271] It is therefore irrelevant to the impugned holding whether **Miletić** or the BSF could distinguish between civilians and combatants within the column. It is also irrelevant to the impugned holding whether the decision regarding how to flee, namely in a column, was made by Bosnian Muslim authorities, as it does not affect the Trial Chamber's finding that the civilians had to flee. Consequently, the Appeals Chamber dismisses all of these arguments.

782. **Miletić**'s submission that the Prosecution's argument that the forcible transfer was caused by the acts of the BSF prior to the formation of the column was neither set out in the Indictment nor maintained during the trial is based on paragraph 48(e) of the Indictment under Count 6 (persecution as a crime against humanity).[2272] The Appeals Chamber recalls in this regard "that it is Count 7, and not Count 6, which is relevant to **Miletić**'s impugned conviction for inhumane acts

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2266 Miletić's Appeal Brief, para. 204 & fn. 405, para. 212 & fn. 430, referring to Trial Judgement, paras 928-930. See also Miletić's Reply Brief, paras 73-74.
2267 Trial Judgement, para. 926.
2268 Trial Judgement, paras 926, 929.
2269 Trial Judgement, para. 783.
2270 See Trial Judgement, paras 926-931.
2271 Trial Judgement, paras 926-930.
2272 See Miletić's Reply Brief, para. 74 & fn. 107.

(forcible transfer) as a crime against humanity".[2273] The Appeals Chamber therefore dismisses this submission.

783. With regard to **Miletić**'s argument that he was prevented by the Presiding Judge from presenting his defence on the formation of the column, the Appeals Chamber notes that whereas the right to cross-examine a witness is provided for in Article 21(4)(e) of the Statute, the Trial Chamber has control over the examination of witnesses under Rule 90(F) of the Rules. The Appeals Chamber observes that during the relevant cross-examination, the Presiding Judge commented that events in Orahovac and Bratunac had little relevance to **Miletić**.[2274] However, he also stated that his comment should not be taken as any kind of interference and that counsel for **Miletić** should feel free to ask questions.[2275] Furthermore, the Appeals Chamber notes that counsel's question related to the formation of the column and whether a decision was made in that regard.[2276] As shown above, these issues are irrelevant to the present ground of appeal. Accordingly, the Appeals Chamber dismisses this argument.

784. In light of the above, the Appeals Chamber dismisses **Miletić**'s ground of appeal 7.

### 7. Conclusion

785. The Appeals Chamber has granted sub-ground 6.2 of **Miletić**'s appeal and consequently has reversed his convictions under Counts 6 and 7 for persecution and forcible transfer, respectively, as crimes against humanity in connection with the forcible transfer of the men who crossed the Drina River. The impact of these findings, if any, on **Miletić**'s sentence will be considered in the section of this Judgement on sentencing below.

786. The Appeals Chamber has dismissed all other challenges to the Trial Chamber's findings regarding crimes against humanity.

## D. Murder as a Violation of the Laws or Customs of War (Beara's Appeal)

787. The Trial Chamber found that from 12 July until late July 1995, the BSF killed several thousand Bosnian Muslim men who had surrendered or been captured from the column of men retreating from the Srebrenica enclave or who had been separated from their families at Potočari.[2277] It found that the victims of these killings did not take an active part in hostilities at the time that

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2273 See *supra*, para. 39.
2274 PW-110, T. 819 (private session) (25 Aug 2006).
2275 PW-110, T. 819-820 (private session) (25 Aug 2006).
2276 PW-110, T. 814 (private session) (25 Aug 2006).
2277 Trial Judgement, paras 793-795.

they were killed and this was apparent to those involved.[2278] **Beara** was found guilty of murder as a violation of the laws or customs of war (Count 5).[2279]

1. Alleged errors in finding that victims were not taking an active part in hostilities (Ground 31)

788. **Beara** submits that the Trial Chamber committed an error of law and of fact in finding that he is guilty of murder of Bosnian Muslim men from Potočari and members of the column of men heading for Tuzla.[2280] **Beara** avers that the Trial Chamber erred in law by finding beyond reasonable doubt that all the alleged victims of the killing operations were in fact the victims of murder under the meaning of Article 3 of the Statute.[2281] He argues that proving that a victim was not actively taking part in hostilities at the time of his or her death is a crucial element for a murder conviction[2282] and contends that the Trial Chamber erred by listing persons as victims who were in fact taking an active part in hostilities at the time they were killed.[2283] Consequently, **Beara** asserts that the Trial Chamber erroneously applied a distinctly new and broader definition of murder, in violation of the principle of legality.[2284]

789. **Beara** also submits that the Trial Chamber erred in fact since the evidence did not allow for a conclusion beyond reasonable doubt that all the victims were not taking an active part in hostilities when they were killed or that the alleged attackers could have reasonably known in each instance that those being killed were not combatants.[2285] **Beara** submits that the Trial Chamber disregarded or did not give enough weight to evidence establishing that the Srebrenica enclave was never fully demilitarised, that armed conflict between the BSF and the Bosnian Muslim forces was ongoing at the time, that it was therefore reasonable to presume that armed combatants were hiding amongst the civilians in the enclave, and that the BSF's actions were aimed at the legitimate military goal stated in Directive 7, *i.e.* inflicting loss on the enemy.[2286] **Beara** further argues that the finding that all of the victims were being detained at the time of their murder rests largely on evidence erroneously relied upon by the Trial Chamber.[2287]

790. With regard to the column of Bosnian Muslim men, **Beara** argues that since it was partly comprised of and led by Bosnian Muslim forces, many of the men were armed, some were dressed

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2278 Trial Judgement, para. 796.
2279 Trial Judgement, paras 1327, 2105.
2280 Beara's Appeal Brief, intro before para. 303, para. 306. See Beara's Reply Brief, para. 105.
2281 Beara's Appeal Brief, paras 306, 308. See Beara's Appeal Brief, paras 303-305; Beara's Reply Brief, para. 105.
2282 Beara's Appeal Brief, para. 304.
2283 Beara's Appeal Brief, para. 307. See Beara's Appeal Brief, para. 306.
2284 Beara's Appeal Brief, intro before para. 303. See Beara's Appeal Brief, paras 303-305, 308.
2285 Beara's Appeal Brief, para. 307; Beara's Reply Brief, para. 106.
2286 Beara's Appeal Brief, paras 306, 308; Beara's Reply Brief, para. 106. **Beara** also refers to attempts either he or the VRS made to separate combatants and "known war criminals" from the rest of the population in the enclave. Beara's Appeal Brief, para. 307.

in army uniforms, and others dressed in civilian clothes may have been combatants, it could not be concluded beyond reasonable doubt that the persons in the column were not combatants.[2288] In addition, he claims that forensic experts testified that it could not be concluded beyond reasonable doubt that all the victims whose bodies were exhumed were in fact civilians or that they had not been taking part in the hostilities at the time of their death.[2289] **Beara** refers to an interim combat report indicating that some men from the column lost their lives due to combat activity[2290] and to the incident where "the prisoners [who] took the machine gun and tried to escape" from the Kravica Warehouse were killed.[2291] **Beara** also contests the Trial Chamber's finding that he knew that the victims were not taking an active part in the hostilities when the murders were committed and contends that this is not the only reasonable inference available from the evidence.[2292]

791. Finally, **Beara** argues that the Trial Chamber's failure to establish the actual or approximate number of victims allegedly executed in some incidents violated his rights and raises doubt as to the correctness of its findings in regard to the circumstances surrounding their deaths.[2293]

792. The Prosecution responds that **Beara**'s submissions should be summarily dismissed.[2294] It asserts that **Beara**'s argument that the murders were part of legitimate military operations is not only incorrect but also irrelevant to his conviction. The Prosecution contends that **Beara**'s submission that forensic evidence suggests some of the victims may have died in combat ignores the numerous sources of evidence establishing that the victims were murdered outside of combat. It further argues that it was reasonable for the Trial Chamber to conclude that it was apparent to the perpetrators that the detained victims were taking no active part in hostilities.[2295]

793. The Appeals Chamber notes that the Trial Chamber correctly set out the legal criteria for the crime of murder punishable under Article 3 of the Statute, including that the victim must not have been taking an active part in the hostilities when he or she was killed and that the perpetrator knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.[2296]

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2287 Beara's Reply Brief, para. 106.
2288 Beara's Appeal Brief, para. 306; Beara's Reply Brief, para. 106.
2289 Beara's Appeal Brief, para. 307; Beara's Reply Brief, para. 106.
2290 Beara's Reply Brief, para. 106, referring to Ex. P00334, "Zvornik Brigade Interim Combat Report, signed by Pandurević, 18 July 1995".
2291 Beara's Reply Brief, para. 106.
2292 Beara's Appeal Brief, para. 306.
2293 Beara's Reply Brief, para. 106.
2294 Prosecution's Response Brief (Beara), para. 309.
2295 Prosecution's Response Brief (Beara), para. 311.
2296 Trial Judgement, para. 743, referring to, *inter alia*, *Boškoski and Tarčulovski* Appeal Judgement, para. 66, *Čelebići* Appeal Judgement, para. 420.

794. The Trial Chamber was satisfied that since the Bosnian Muslim men from the column or who had been separated from their families at Potočari had been killed after their surrender or capture and during the period of their detention, they were not taking an active part in hostilities at the time the crimes were committed.[2297] The Appeals Chamber sees no error in this approach. It recalls that Common Article 3 protects *all* persons taking no active part in hostilities, including those placed *hors de combat* through detention.[2298] Thus, even if some of these victims had been participating actively in hostilities prior to their detention, as soon as they were detained by the BSF, they would have ceased to be taking an active part in hostilities and thus would have come under the protection of Common Article 3.[2299]

795. The Appeals Chamber therefore finds that the Trial Chamber did not err in law – and did not apply a broader definition of murder as a violation of the laws or customs of war – in finding that the Bosnian Muslim men who had surrendered or been captured from the column of men retreating from the Srebrenica enclave or who had been separated at Potočari were victims of murder under Article 3 of the Statute, as at the time they were killed they were *hors de combat*.[2300]

796. Turning to **Beara**'s factual challenges to the evidence relied on by the Trial Chamber, the Appeals Chamber notes that the Trial Chamber fully considered all the evidence before it, including eyewitness testimony and Prosecution expert reports, as well as forensic evidence, before determining that the victims were not participating in hostilities, but were in detention when they were murdered.[2301] In terms of the exhumation reports,[2302] the Trial Chamber reasoned that when they were considered together with other evidence it was satisfied with the reliability of the conclusions in relation to the cause of death reached in the Prosecution expert reports.[2303] The Appeals Chamber recalls that it is for a trial chamber to consider whether the evidence taken as a whole is reliable or credible, and to accept or reject the fundamental features of that evidence.[2304] With respect to the contention that the Trial Chamber could not have concluded beyond reasonable doubt that persons listed as being killed were victims of murder, as opposed to persons targeted due to their involvement in combat activities,[2305] **Beara** refers generally to the testimony of "forensic experts called by both the Prosecution and the Defence" but ignores the Trial Chamber's

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2297 Trial Judgement, paras 747, 795-796. See *supra*, para. 787.

2298 Common Article 3; *Đorđević* Appeal Judgement, para. 747; *Karadžić* Hostage-Taking Decision, paras 16-17, 19-21; *Čelebići* Appeal Judgement, para. 420.

2299 Common Article 3(1) protects "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by [...] detention". See *Đorđević* Appeal Judgement, para. 747. See also *Karadžić* Hostage-Taking Decision, paras 16-17, 19-21.

2300 See *Đorđević* Appeal Judgement, para. 548; *Kvočka et al.* Appeal Judgement, para. 261.

2301 Trial Judgement, para. 747, referring to Trial Judgement, paras 272-599.

2302 See *supra*, paras 294-302.

2303 Trial Judgement, para. 619.

2304 *Đorđević* Appeal Judgement, para. 395; *Naletilić and Martinović* Appeal Judgement, paras 485, 517; *Kupreškić et al.* Appeal Judgement, para. 31.

consideration of the evidence, reasoning, and determination. **Beara** simply provides an alternative interpretation of the evidence, which cannot suffice to demonstrate an error. The Appeals Chamber emphasises that even if the evidence demonstrated that the Srebrenica enclave was never fully demilitarised, that there had been combat activity shortly before the executions began, and that ABiH members were hiding amongst the civilians in the enclave,[2306] a reasonable trier of fact could still have reached, as the only reasonable inference, the Trial Chamber's conclusion that all the persons killed were detained in the hands of the BSF at the moment of their deaths and hence were victims of murder under Article 3 of the Statute.

797. With regard to the column of Bosnian Muslim men, the Appeals Chamber notes that **Beara** misrepresents the Trial Chamber's findings in arguing that "the attack on this column could not have been qualified as murder".[2307] Contrary to **Beara**'s contention, the Trial Chamber did not count as victims those men who were killed during combat with the BSF while the column was proceeding.[2308] This argument is thus dismissed.

798. In respect of **Beara**'s argument that the Trial Chamber erred by counting "the prisoners [who] took the machine gun and tried to escape" from the Kravica Warehouse as murder victims, the Appeals Chamber notes that **Beara** misrepresents the Trial Chamber's finding regarding this incident at the Kravica Warehouse in which a Bosnian Muslim prisoner took a rifle from a soldier, shot and killed him before another soldier grabbed the rifle and in the process burnt his hand. The Trial Chamber found that only one Bosnian Muslim prisoner took a BSF soldier's rifle and killed him.[2309] It concluded that this incident took place prior to the full scale execution of more than 1,000 Bosnian Muslim prisoners detained in the warehouse.[2310] The Appeals Chamber finds that **Beara**'s misrepresentation of the Trial Chamber's findings warrants the argument's dismissal.

799. **Beara**'s argument that the Trial Chamber's failure to establish the actual or approximate number of victims in various instances violates his rights and raises doubt as to the correctness of its findings in relation to the killings is dismissed as a mere undeveloped assertion.

800. The Trial Chamber found that **Beara** knew that the Bosnian Muslim men were not taking an active part in the hostilities at the time the murders were committed.[2311] It is therefore irrelevant

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2305 The Trial Chamber considered these factors in its reasoning. See generally *supra*, paras 303-307.
2306 See, *e.g.*, Trial Judgement, paras 98, 101, 268-271.
2307 Beara's Appeal Brief, para. 306. See also Beara's Reply Brief, para. 106.
2308 Trial Judgement, paras 383-398, 794. See *supra*, para. 787.
2309 Trial Judgement, para. 433.
2310 Trial Judgement, paras 444, 1520, 1527, 1533.
2311 Trial Judgement, para. 1327. See generally Trial Judgement, paras 407, 1262 (finding that **Beara** saw vehicles with detained Bosnian Muslim men in Bratunac on 13 July 1995), 1257, 1278, 1315 (finding that **Beara** discussed the situation of the prisoners), 1266, fn. 4163 (finding that **Beara** discussed where the Bosnian Muslim men should be

whether **Beara** knew that these persons were civilians, combatants or, as he suggests, "known war criminals".[2312] Once he knew that they were detained – irrespective of their involvement in hostilities prior to their capture or surrender – a reasonable trier of fact could have concluded that **Beara** knew that they were not taking an active part in the hostilities.[2313] The Appeals Chamber accordingly dismisses **Beara**'s argument to the contrary.

801. In light of the foregoing, the Appeals Chamber dismisses **Beara**'s ground of appeal 31.

### 2. Alleged errors related to Beara's *mens rea* for murder (Ground 32)

802. **Beara** argues that the Trial Chamber erred as a matter of law and abused its discretion by failing to consider the totality of the evidence in finding that he possessed the requisite *mens rea* for murder pursuant to Article 3 of the Statute.[2314] The Prosecution responds that **Beara**'s ground of appeal 32 should be dismissed as repetitive.[2315]

803. The Appeals Chamber observes that the only arguments supporting **Beara**'s ground of appeal 32 are those he seeks to incorporate by reference to his ground of appeal 19 relating to his intent to commit genocide. The Appeals Chamber recalls that it has considered and dismissed all of the arguments advanced in that ground of appeal.[2316] The Appeals Chamber therefore dismisses **Beara**'s ground of appeal 32 in relation to his *mens rea* for murder under Article 3 of the Statute.

### 3. Conclusion

804. The Appeals Chamber has dismissed all challenges regarding murder as a violation of the laws or customs of war.

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detained, and ultimately executed), paras 1279, 1299 (finding that **Beara** oversaw and co-ordinated the detention of prisoners).

2312 Beara's Appeal Brief, para. 307.

2313 See *Karadžić* Hostage-Taking Decision, para. 22.

2314 Beara's Appeal Brief, intro before para. 309, para. 309. See also Beara's Reply Brief, para. 107.

2315 Prosecution's Response Brief (Beara), para. 312.

2316 See *supra*, paras 479-486.

# IX. INDIVIDUAL CRIMINAL RESPONSIBILITY

## A. Joint Criminal Enterprise to Murder

805. The Trial Chamber found that **Popović**, **Beara**, and **Nikolić** were participants in the JCE to Murder whereas **Pandurević** was not.[2317] **Miletić** was not charged with participation in the JCE to Murder.[2318] The Trial Chamber also found that **Popović**, **Beara**, and **Nikolić** were responsible for certain "opportunistic" killings pursuant to JCE III.[2319] In the following section, the Appeals Chamber will examine the Appellants' arguments with respect to: (1) the existence and implementation of the plan to murder; (2) their *mens rea*; (3) the scope of the JCE to Murder; (4) their respective contributions to the JCE to Murder;[2320] and (5) their responsibility pursuant to JCE III.

### 1. The existence and implementation of the plan to murder

806. The Trial Chamber concluded that the plan to murder Bosnian Muslim men already existed on 12 July 1995, noting that during the 12 July Conversation at 10:00 a.m.,[2321] and immediately before the third meeting at the Hotel Fontana in the morning of 12 July 1995 between the representatives of VRS, DutchBat, and Bosnian Muslims gathered in Potočari ("Third Hotel Fontana Meeting"), security personnel, including **Popović**, Witness M. Nikolić, the Chief of Security and Intelligence in the Bratunac Brigade, and Witness Kosorić, Assistant Chief of Staff for Intelligence of the Drina Corps, discussed the planned execution of the Bosnian Muslim men from Potočari.[2322] The Trial Chamber found that the separation of the Bosnian Muslim men that started later that day marked the commencement of the implementation of the plan to murder.[2323] It also concluded that the conditions in which the Bosnian Muslim men were detained in Potočari stood as further evidence that a plan to kill was in progress.[2324] Finally, the Trial Chamber found that the plan to murder subsequently expanded to include the males captured from the column on 13 July 1995.[2325] The following sections will address various challenges to these and related findings submitted by **Popović**, **Beara**, and **Nikolić**.

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2317 Trial Judgement, paras 1047, 1168, 1302, 1392, 1979.
2318 See Indictment, para. 90.
2319 Trial Judgement, paras 1169, 1304, 1393.
2320 This section will be followed by the Prosecution's appeal.
2321 See *supra*, para. 216, defining the 12 July Conversation.
2322 Trial Judgement, paras 1051, 1097. See Trial Judgement, paras 280, 1091.
2323 Trial Judgement, para. 1052.
2324 Trial Judgement, para. 1053.
2325 Trial Judgement, paras 1055-1056.

(a) Alleged errors in finding that the plan to murder existed on 12 July 1995

807. The Trial Chamber relied on Witness M. Nikolić's evidence about the 12 July Conversation to conclude that the plan to murder Bosnian Muslim men in Potočari existed before the Third Hotel Fontana Meeting.[2326] It found that during this conversation **Popović** told M. Nikolić that the able-bodied men within the crowd of Bosnian Muslim civilians in Potočari would be separated, temporarily detained in Bratunac, and killed shortly thereafter.[2327] The Trial Chamber found that M. Nikolić's evidence about the 12 July Conversation was reliable on the basis that its content remained consistent, despite much cross-examination, since first relayed in M. Nikolić's Statement of Facts and Acceptance of Responsibility dated 6 May 2003 ("Statement of Facts").[2328]

(i) Popović's appeal

808. **Popović** submits that the plan to murder did not exist prior to the Third Hotel Fontana Meeting.[2329] He denies having the 12 July Conversation[2330] and disputes the Trial Chamber's findings about its content[2331] as they were based on M. Nikolić's contested evidence.[2332] Specifically, **Popović** alleges that the Trial Chamber: (1) based its evaluation of M. Nikolić's credibility on a selective reading of the transcript;[2333] (2) based its findings on the Statement of Facts which contained glaring misinformation;[2334] (3) overlooked glaring inconsistencies between the Statement of Facts and M. Nikolić's testimony;[2335] and (4) relied upon insufficient evidence to corroborate M. Nikolić's testimony about the content of the 12 July Conversation.[2336]

809. The Prosecution responds that summary dismissal is warranted.[2337] It submits that the Trial Chamber correctly supported its findings with respect to M. Nikolić's credibility,[2338] reasonably relied on the Statement of Facts, and did not overlook inconsistencies with M. Nikolić's testimony at trial.[2339] The Prosecution further submits that the Trial Chamber properly relied on circumstantial evidence to corroborate M. Nikolić's evidence, although corroboration was not required.[2340]

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2326 Trial Judgement, paras 280, 1051, 1097.
2327 Trial Judgement, paras 280, 1051.
2328 Trial Judgement, paras 281-282.
2329 Popović's Appeal Brief, para. 34; Popović's Reply Brief, para. 42.
2330 Popović's Appeal Brief, paras 36, 39. See Popović's Appeal Brief, paras 91, 99, 106-107.
2331 Popović's Appeal Brief, paras 38-39.
2332 Popović's Appeal Brief, para. 36.
2333 Popović's Appeal Brief, paras 40-45.
2334 Popović's Appeal Brief, paras 47-49.
2335 Popović's Appeal Brief, paras 50-64. See Popović's Reply Brief, para. 44.
2336 Popović's Appeal Brief, paras 122-126.
2337 Prosecution's Response Brief (Popović), paras 49-59.
2338 Prosecution's Response Brief (Popović), paras 50-51, 53-55. See Prosecution's Response Brief (Popović), paras 32-42; Appeal Hearing, AT. 107-109 (2 Dec 2013).
2339 Prosecution's Response Brief (Popović), para. 56.
2340 Prosecution's Response Brief (Popović), para. 59.

810. **Popović**'s challenge to the finding on the 12 July Conversation is rooted in his contention that M. Nikolić is not credible. The Appeals Chamber recalls that it has already dismissed challenges to M. Nikolić's general credibility,[2341] and will therefore only address **Popović**'s credibility challenges specific to the 12 July Conversation.

a. Alleged errors in evaluating M. Nikolić's credibility

811. The Trial Chamber supported its finding that M. Nikolić remained consistent as to the subject matter discussed during the 12 July Conversation by referring to M. Nikolić's cross-examination,[2342] and questions put to him by a member of the Bench.[2343] **Popović** challenges the use of the underlying evidence to support the finding that M. Nikolić was consistent.[2344]

812. **Popović** argues that M. Nikolić's use of the expression "said a minute ago" during cross-examination undermines the conclusion that he was consistent.[2345] The Appeals Chamber observes that M. Nikolić used this expression after his cross-examination resumed following a court recess when the Prosecution read the section of the Statement of Facts about the 12 July Conversation into the record and asked him to confirm it.[2346] M. Nikolić, referring to his testimony before the break, responded "[y]es. What you have just quoted, I said a minute ago as part of the explanation that I provided in response to your question."[2347] The Appeals Chamber finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have interpreted M. Nikolić's adoption of the language of the Statement of Facts as being consistent with his testimony before the recess.[2348]

813. **Popović** then argues that testimony, elicited during his and **Pandurević**'s cross-examination of M. Nikolić, about M. Nikolić's purported conversation with Kosorić, was taken out of context. He asserts that M. Nikolić's testimony about Kosorić's presence during the 12 July Conversation was inconsistent with his testimony in the *Trbić* case.[2349] The Appeals Chamber notes that the Trial Chamber acknowledged that M. Nikolić's "description was not clear throughout as to who was present at precisely which point of time" and attributed it "to the circumstances in which the

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2341 See *supra*, para. 178.

2342 Trial Judgement, fn. 927, referring to, *inter alia*, Momir Nikolić, T. 32917-32919 (21 Apr 2009) (Prosecution's cross-examination); T. 33042 (22 Apr 2009) (**Popović**'s cross-examination); T. 33329-33330 (28 Apr 2009) (**Pandurević**'s cross-examination).

2343 Trial Judgement, fn. 927, referring to, *inter alia*, Momir Nikolić, T. 32904 (21 Apr 2009).

2344 Popović's Appeal Brief, paras 43-45. See Appeal Hearing, AT. 70 (2 Dec 2013).

2345 See Popović's Appeal Brief, para. 43. The Appeals Chamber notes that **Popović** refers to the Prosecution's cross-examination in his submission but the footnote refers to the wrong pages of the transcript (T. 33320-33322). However, in light of the Prosecution's submissions, it seems that the nature of this mistake is clerical and the proper reference should have been T. 32920-32921. The Appeals Chamber will proceed with this understanding.

2346 Momir Nikolić, T. 32920 (21 Apr 2009).

2347 Momir Nikolić, T. 32920-32921 (21 Apr 2009).

2348 Momir Nikolić, T. 32918-32921 (21 Apr 2009).

2349 Popović's Appeal Brief, para. 44.

meetings occurred and the passage of time".[2350] It nevertheless concluded that M. Nikolić remained consistent as to the subject matter discussed during the 12 July Conversation.[2351] The Appeals Chamber finds that **Popović** has merely expressed his disagreement with the Trial Chamber's assessment of M. Nikolić's evidence rather than demonstrating how the Trial Chamber erred. **Popović**'s argument is therefore dismissed.

814. **Popović** also challenges the Trial Chamber's reference to the part of the transcript where one Judge paraphrased the section of the Statement of Facts concerning the 12 July Conversation to provide context for her subsequent question to M. Nikolić.[2352] The question did not relate directly to the 12 July Conversation and M. Nikolić was neither asked to, nor did he, adopt the Judge's summary.[2353] Consequently, that passage cannot be treated as a positive indication that M. Nikolić remained consistent as to the subject matter discussed. However, the Appeals Chamber finds that in light of the other evidence that supports the finding, the Trial Chamber's reference to this part of the transcript is better qualified as superfluous rather than erroneous.

815. With respect to **Popović**'s assertion that the Trial Chamber failed to give a reasoned opinion for its evaluation of M. Nikolić's evidence,[2354] the Appeals Chamber observes the detailed reasons the Trial Chamber gave for when and why it chose to believe M. Nikolić's account.[2355] **Popović** refers to the Trial Chamber's conclusion that "[t]he instances where he qualified his role are not related to any of the critical aspects of his evidence and are not of relevance to this case" and claims that it is unclear what aspects of M. Nikolić's evidence were critical and how any part of his evidence was not relevant.[2356] He, however, ignores the Trial Chamber's clarification in the subsequent paragraphs, in particular where it states that "on issues of significance it has considered his credibility on each point individually, taking into account various factors including the specific context and nature of the evidence and whether there is any corroboration".[2357] **Popović** also ignores the three pages of analysis and support for the credibility finding specific to the 12 July Conversation, which the Trial Chamber deemed was an issue of significance.[2358] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that the Trial Chamber erred in failing to give a reasoned opinion and dismisses his arguments accordingly.

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2350 Trial Judgement, para. 282.
2351 Trial Judgement, para. 282.
2352 See Momir Nikolić, T. 32904 (21 Apr 2009).
2353 Momir Nikolić, T. 32904 (21 Apr 2009).
2354 Popović's Appeal Brief, para. 46.
2355 See Trial Judgement, para. 53.
2356 See Popović's Appeal Brief, para. 46, citing Trial Judgement, para. 52.
2357 Trial Judgement, para. 53. See also Trial Judgement, paras 48-52.
2358 Trial Judgement, paras 281-288.

b. Whether the Trial Chamber erred in relying on the Statement of Facts

816. **Popović** submits that the Trial Chamber erred in relying on the Statement of Facts, the misleading character of which was acknowledged by M. Nikolić in his testimony.[2359] The Appeals Chamber notes that **Popović** raised this argument in his final brief[2360] and that it was duly considered by the Trial Chamber, which acknowledged that it has "considered [M. Nikolić's] evidence in the totality of the circumstances in which it was given"[2361] and nevertheless relied on some portions of the Statement of Facts.[2362] The Appeals Chamber considers that **Popović** has failed to demonstrate that no reasonable trier of fact could have relied on the Statement of Facts and thus dismisses his argument accordingly.

c. Whether the Trial Chamber overlooked inconsistencies between the Statement of Facts and M. Nikolić's testimony

817. **Popović** submits that the Trial Chamber overlooked "glaring" contradictions between the Statement of Facts and M. Nikolić's testimony.[2363] He avers, *inter alia*, that M. Nikolić: (1) only gave **Popović**'s "prognosis" that the separation and screening of Bosnian Muslim males in Potočari would be carried out following the 12 July Conversation;[2364] (2) gave a chronology of events that did not coincide with the Trial Chamber's findings;[2365] (3) did not testify that **Popović** told him that separated men would be killed, but rather that it was his conclusion from the events that unfolded after the 12 July Conversation and **Popović**'s alleged words that "all [the] balij[a] have to be killed";[2366] and (4) testified that the screening of separated men would be carried out but that this information was absent in his Statement of Facts.[2367] As a consequence, **Popović** posits, the Trial Chamber ignored reasonable inferences pointing to his innocence.[2368]

818. The Appeals Chamber notes that the relevant part of M. Nikolić's testimony giving rise to **Popović**'s challenges reads as follows:

> Popović answered that probably the Muslim forces or, rather, the civilians, women and children, and people who are not fit for military service, that this whole population would be transported to the Muslim-controlled territory which implied the town of Kladanj. He also said that the so-called screening would be carried out in order to separate able-bodied men, to identify those who had committed or who are suspected of committing war crimes, et cetera. [...] After all this, something happened that was absolutely never planned nor did I grasp from my conversation with

2359 Popović's Appeal Brief, paras 47-49. See also Appeal Hearing, AT. 70 (2 Dec 2013).
2360 Popović's Final Brief, paras 296-297.
2361 Trial Judgement, para. 50. See Trial Judgement, paras 49 & fn. 72.
2362 See, *e.g.*, Trial Judgement, paras 52, 280-281, 1051, 1097.
2363 Popović's Appeal Brief, paras 52, 64. See Appeal Hearing, AT. 70 (2 Dec 2013).
2364 Popović's Appeal Brief, paras 52-53.
2365 Popović's Appeal Brief, paras 60-61.
2366 Popović's Appeal Brief, paras 52, 62-63.
2367 Popović's Appeal Brief, paras 52, 54-59.
2368 Popović's Appeal Brief, para. 64.

> Mr. Popović that something could happen. Except in the first convoy, our -- not only able-bodied men were separated, but all, all men who were in Potočari were separated from their families and put on bus -- actually, first detained in Potočari. Therefore, I asked Mr. Popović what was going to happen to these men because, to be honest, not even then I [...] could understand why these men were being set aside. [...] I was given a simple answer, Popović told me in his usual way of putting things: All the balija have to be killed. That was, in a nutshell, my conversation with Popović.[2369]

819. The Appeals Chamber observes that M. Nikolić subsequently clarified this testimony in adopting the language of the Statement of Facts where the separation and transport of the *non* able-bodied population was presented in definite terms, and confirmed that he first realised that the Bosnian Muslim men would be killed during the 12 July Conversation.[2370] Further, M. Nikolić clarified that his statement that **Popović** had "told [him] that ... the able-bodied Muslim men within the crowd of Muslim civilians would be separated from the crowd [...] and killed shortly thereafter"[2371] did not arise from **Popović** saying "they will be killed" but rather that he had drawn this conclusion from **Popović**'s answer that "all the balijas had to be killed" to the question as to the fate of the captured men and witnessing the subsequent separation of men who were not of military age.[2372] The Appeals Chamber finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have found M. Nikolić's testimony and the Statement of Facts compatible in this regard and could have referred to both of them.[2373]

820. Finally, with respect to the argument that M. Nikolić's reference to the screening of Bosnian Muslim men in his testimony conflicted with the Statement of Facts, the Appeals Chamber notes that the Trial Chamber observed that more details were revealed during M. Nikolić's testimony since it was the first time the 12 July Conversation was "the subject of intense scrutiny, given that one of the other alleged participants—**Popović**—was an Accused in the trial".[2374] The Appeals Chamber further observes that the Trial Chamber accepted M. Nikolić's interpretation of **Popović**'s words that "all the balija have to be killed" as proof that the plan to murder existed on 12 July 1995. The Appeals Chamber understands that the Trial Chamber considered that M. Nikolić's reference to the screening of Bosnian Muslim men in his testimony was additional information clarifying the Statement of Facts, rather than conflicting information, and finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have reached this conclusion.

821. On the basis of the foregoing, the Appeals Chamber finds that **Popović** has failed to demonstrate that the Trial Chamber erred in overlooking contradictions between the Statement of

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2369 Momir Nikolić, T. 32917-32918 (21 Apr 2009).
2370 See Trial Judgement, fn. 3581, referring to Momir Nikolić, T. 32920-32921 (21 Apr 2009). See also Momir Nikolić, T. 33034-33035 (22 Apr 2009).
2371 See Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", p. 2.
2372 See Momir Nikolić, T. 33328 (28 Apr 2009).
2373 See Trial Judgement, para. 280.
2374 Trial Judgement, para. 282.

Facts and M. Nikolić's testimony and that it ignored reasonable inferences pointing to his innocence.[2375] The Appeals Chamber dismisses **Popović**'s arguments accordingly.

d. Alleged error with respect to corroboration of M. Nikolić's testimony

822. **Popović** submits that the evidence underpinning the Trial Chamber's finding on the 12 July Conversation does not corroborate M. Nikolić's evidence about the subject matter of that conversation.[2376] The Trial Chamber found that M. Nikolić's account in this respect was corroborated by the evidence which places **Popović** at Hotel Fontana with M. Nikolić before the Third Hotel Fontana Meeting, and **Popović**, Kosorić, and M. Nikolić at the Hotel Fontana after it,[2377] as well as subsequent events.[2378] The Appeals Chamber finds that no reasonable trier of fact could have found that this evidence corroborates the *subject matter* of the 12 July Conversation, namely the plan to murder.[2379] However, the Appeals Chamber recalls that there is no legal requirement that the testimony of a single witness on a material fact, even an accomplice, be corroborated before it can be accepted as evidence.[2380] What matters is the reliability and credibility accorded to the testimony.[2381] In this regard, the Appeals Chamber notes that the Trial Chamber explicitly considered M. Nikolić's evidence about the 12 July Conversation and concluded that it was reliable.[2382] The Appeals Chamber also recalls that it has dismissed **Popović**'s challenges to M. Nikolić's credibility as it related to the 12 July Conversation.[2383] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that a reasonable trier of fact could not have concluded that the plan to murder existed before the Third Hotel Fontana Meeting took place, even if based solely on M. Nikolić's evidence. Accordingly, **Popović**'s argument is dismissed.

(ii) Beara's appeal (Ground 6 in part)

823. **Beara** submits that the Trial Chamber erroneously found a plan to murder existed based solely on M. Nikolić's Statement of Facts. He argues that the Trial Chamber failed to give proper weight to the evidence of Kosorić, which was in direct conflict with that of M. Nikolić.[2384] The

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2375 Popović's Appeal Brief, para. 64.
2376 Popović's Appeal Brief, paras 122-126; Appeal Hearing, AT. 73, 156 (2 Dec 2013).
2377 Trial Judgement, para. 285, referring to Ex. P02047, "Srebrenica Trial Video", 01.42.50, Ex. P01936, "Video stills taken from the Srebrenica Trial Video", p. 29, PW-109, T. 14589-14591 (closed session) (31 Aug 2007), Pieter Boering, T. 1976-1977 (21 Sept 2006).
2378 Trial Judgement, para. 286.
2379 See Trial Judgement, para. 285; *supra*, para. 807.
2380 *Lukić and Lukić* Appeal Judgement, paras 128, 375; *Nchamihigo* Appeal Judgement, para. 48. See *Nizeyimana* Appeal Judgement, paras 135, 246; *Đorđević* Appeal Judgement, paras 819, 858.
2381 *Čelebići* Appeal Judgement, para. 506. See *Nizeyimana* Appeal Judgement, para. 135; *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Đorđević* Appeal Judgement, paras 781, 819.
2382 See Trial Judgement, para. 287.
2383 See *supra*, paras 812-815.
2384 Beara's Appeal Brief, para. 61; Beara's Reply Brief, para. 31.

Prosecution responds that **Beara** fails to show that the Trial Chamber erred in relying on M. Nikolić's evidence.[2385]

824. The Appeals Chamber notes that the Trial Chamber considered M. Nikolić's credibility and concluded that "[h]aving assessed his evidence on this point carefully and in totality, the Trial Chamber accepts it as reliable".[2386] In accepting M. Nikolić's evidence, the Trial Chamber rejected the evidence of Kosorić, finding him to be a reluctant witness and his evidence unreliable.[2387] The Appeals Chamber finds that **Beara** has failed to demonstrate how the Trial Chamber erred in its evaluation of M. Nikolić's evidence and dismisses this aspect of his ground of appeal 6 accordingly.

(b) Alleged errors concerning the separation process

825. The Trial Chamber found that at the Third Hotel Fontana Meeting, for the first time, Mladić announced that all the Bosnian Muslim men in Potočari would be separated to be screened for war crimes but that he gave no details as to the logistics of the exercise. It also found that the forecasted separation that started later in the day on 13 July 1995 marked the commencement of the implementation of the plan to murder.[2388] The Trial Chamber considered the evidence of DutchBat members that some VRS officers had made efforts to screen prisoners and to check their identities against a list of alleged war criminals, but ultimately concluded that the efforts were sporadic and void of superior direction or supervision.[2389] It found that the initial steps of separation and detention were carried out by various components of the BSF including, *inter alia*, M. Nikolić and Mendeljev "Mane" Đurić, Commander of the 1st Company of the Jahorina Recruits of the MUP.[2390]

(i) Popović's appeal

826. **Popović** submits that the Trial Chamber erred in concluding that the screening process did not raise reasonable doubt as to the existence of a plan to murder.[2391] He submits that the Trial Chamber disregarded evidence showing that the sole purpose of separating and detaining the Bosnian Muslim men on 12 and 13 July 1995 was to screen for war criminals.[2392] He argues that the Trial Chamber's own findings and the evidence show that a vast screening and interrogation process was carried out by a wide circle of both police and military officers, who would not have conducted it without an order from their superiors.[2393] **Popović** asserts that the fact that a majority

2385 Prosecution's Response Brief (Beara), para. 78.
2386 Trial Judgement, para. 283. See also Trial Judgement, para. 287.
2387 Trial Judgement, para. 288.
2388 Trial Judgement, para. 1052.
2389 Trial Judgement, paras 320, 323, 1052 & fn. 3453.
2390 Trial Judgement, paras 181, 320, 1054. See also Trial Judgement, fn. 457.
2391 Popović's Appeal Brief, para. 72. See Appeal Hearing, AT. 70-71 (2 Dec 2013).
2392 Popović's Appeal Brief, title before para. 65, para. 67. See Appeal Hearing, AT. 70 (2 Dec 2013).
2393 Popović's Appeal Brief, paras 66-67.

of the detainees were subsequently killed does not prove that the plan to murder existed on 12 and 13 July 1995, but only demonstrates that the screening process was interrupted on 14 July 1995.[2394]

827. Further, **Popović** argues that if the plan to murder already existed: (1) the separation would not have been carried out with DutchBat members and UNMO present and Mladić would not have permitted video recording of refugees in Potočari, including some of the separated men, as it would have been evidence implicating the VRS and Mladić himself;[2395] and (2) the BSF would not have drafted a list of war criminals on 12 July 1995, and screened for war criminals on 12 or 13 July 1995, if it had already been decided that all the Bosnian Muslim men in Potočari would be killed.[2396] He also submits that the Trial Chamber ignored the difficulties encountered when carrying out the screening, as many people from Srebrenica were destroying their identification documents ("IDs").[2397]

828. **Popović** submits that the Trial Chamber ignored the fact that M. Nikolić's *viva voce* testimony and other evidence gave rise to a reasonable inference favourable to **Popović** that the purpose of separating the men was to screen for suspected war criminals.[2398] **Popović** also submits that the Trial Chamber misconstrued the evidence in finding that Mladić gave no details about the logistics of separating and screening the Bosnian Muslim men in Potočari for war crimes. **Popović** asserts that this implied that Mladić was concealing some insidious plan which caused the Trial Chamber to disregard the screening process as "sporadic" and "patchy".[2399] Finally, **Popović** submits that the Trial Chamber misapplied the evidence and unreasonably found that "all" Bosnian Muslim men were separated in Potočari, detained in Bratunac, and ultimately killed in mass executions.[2400]

829. The Prosecution responds that: (1) the Trial Chamber did not ignore evidence linking the separation process to the screening for war criminals;[2401] (2) none of the findings or evidence **Popović** cites show that on 12 and 13 July 1995 the screening for war criminals was the sole purpose of the separation and detention of the Bosnian Muslim men;[2402] (3) the only reasonable interpretation of M. Nikolić's evidence is that **Popović** intended that Bosnian Muslim males would

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2394 Popović's Appeal Brief, para. 68. See Popović's Reply Brief, para. 43.
2395 Popović's Appeal Brief, para. 69.
2396 Popović's Appeal Brief, para. 70. See Appeal Hearing, AT. 70 (2 Dec 2013).
2397 Popović's Appeal Brief, para. 71.
2398 Popović's Appeal Brief, para. 73.
2399 Popović's Appeal Brief, para. 79.
2400 Popović's Appeal Brief, title before para. 158, paras 158-162. See Popović's Reply Brief, para. 43; Appeal Hearing, AT. 70 (2 Dec 2013).
2401 Prosecution's Response Brief (Popović), para. 44. See also Prosecution's Response Brief (Popović), paras 106-107.
2402 Prosecution's Response Brief (Popović), para. 48.

be separated and killed;[2403] and (4) the Trial Chamber did not find that all Bosnian Muslim men were separated in Potočari, detained in Bratunac, and ultimately killed in mass executions.[2404]

830. With respect to the existence and scale of the screening and interrogation process, the Appeals Chamber notes Witness Rutten's testimony about interrogations carried out on 13 July 1995, and about seeing the screening process of military-aged men taking place in different places on several days.[2405] Additionally, Prosecution Witnesses PW-112, Ahmo Hasić, and PW-111 confirmed that some Bosnian Muslim men were interrogated in various places.[2406] While the Trial Chamber referred to the evidence of Rutten, PW-112, Hasić, and PW-111 in its findings,[2407] some of the passages **Popović** cites were not included in the Trial Judgement.[2408] The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[2409] The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[2410] There is no basis to conclude that the Trial Chamber disregarded them, however, because nothing in this evidence points to the process being aimed at identifying prisoners from the BSF's list of suspected war criminals. Indeed, nowhere in his testimony did Rutten suggest that screening or interrogation had anything to do with an effort to identify war criminals.[2411] Rather, it was his opinion that the reason for the interrogations was to "find out whether there were any Muslim soldiers among the men".[2412] Rutten was struck by the superficial nature of the BSF's screening stressing, *inter alia*, that people whose age or physical condition clearly ruled out their combatant status – including boys as young as 12 years old – passed through it and were detained.[2413] Similarly, the issue of searching for war criminals did not appear in the evidence of

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2403 Prosecution's Response Brief (Popović), para. 45. See also Prosecution's Response Brief (Popović), paras 46-47.

2404 Prosecution's Response Brief (Popović), para. 70.

2405 Johannes Rutten, T. 4857 (30 Nov 2006); T. 5264 (7 Dec 2006).

2406 PW-112, T. 3221-3222 (30 Oct 2006); Ahmo Hasić, T. 1225-1226 (6 Sept 2006); PW-111, T. 6991 (7 Feb 2007).

2407 See Trial Judgement, paras 284, 319-320, 323, 325-326, 329-331, 385, 390, 408, 427.

2408 See, *e.g.*, Johannes Rutten, T. 5264 (7 Dec 2006); PW-112, T. 3200-3204 (30 Oct 2006); Ahmo Hasić, T. 1225-1226 (6 Sept 2006). Notwithstanding some omissions, the Appeals Chamber notes that the evidence of Borovčanin identified in **Popović**'s submissions (Ex. P02853, "Transcript of OTP Interview of Borovčanin, 11 and 12 Mar 2002", pp. 10-11) was specifically considered by the Trial Chamber. See Trial Judgement, paras 320, 1507. Similarly, the Trial Chamber referred to the testimony of Johannes Rutten, T. 4857-4858 (30 Nov 2006), Trial Judgement, para. 326, that of PW-112, T. 3222 (30 Oct 2006), Trial Judgement, para. 390, and PW-111, T. 6991 (7 Feb 2007), Trial Judgement, para. 427.

2409 *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

2410 *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

2411 See, *e.g.*, Johannes Rutten, T. 4899 (30 Nov 2006).

2412 Johannes Rutten, T. 4860 (30 Nov 2006).

2413 See Johannes Rutten, T. 4853-4855 (30 Nov 2006).

Borovčanin,[2414] PW-112, or Hasić. Only PW-111 testified that two of the Bosnian Muslim men were questioned about "some villages and some Serb soldiers who were killed".[2415]

831. Further, **Popović** does not specify which part of M. Nikolić's *viva voce* testimony gave rise to a reasonable inference that the purpose of separating the men was to screen for war criminals.[2416] **Popović**'s argument is thus dismissed as an undeveloped assertion.[2417]

832. Turning to **Popović**'s argument that the Trial Chamber ignored the aggravation caused by many people from Srebrenica destroying their IDs, the Appeals Chamber recalls that on both 12 and 13 July 1995, before entering the White House, the Bosnian Muslim men were made to leave behind their personal belongings, including identity cards and passports[2418] and that the BSF set this pile of documents on fire.[2419] **Popović**'s argument in this respect therefore fails.

833. The Appeals Chamber likewise finds no merit in **Popović**'s submissions, based entirely on speculation, that the mere existence of video recordings of refugees and of Mladić's involvement in the separation process raise doubt as to the existence of the plan to murder. As to **Popović**'s argument regarding the creation of a list of suspected war criminals, he fails to demonstrate that, by relying on evidence showing both that the murder operation had already been discussed during the 12 July Conversation and that any screening efforts made by the BSF were of a sporadic and patchy character, a reasonable trier of fact could not have found that the plan to murder existed.

834. The Appeals Chamber further notes the factors the Trial Chamber took into account that suggested that at the time the Bosnian Muslim men were being detained their fate had already been decided. These factors included: (1) the unbearable detention conditions, including the lack of basic necessities; (2) the total disregard for their safety and well-being; (3) the destruction of surrendered IDs and a ban on registration; and (4) Đurić's revealing comment that "the men didn't need the passports anymore".[2420] Moreover, in the evening of 13 July 1995 Mladić issued an order mandating secrecy, that is, preventing the entry of all uninvited individuals to the area of combat operations, with specific mention of all local and foreign journalists, except for the ones from the

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2414 Ex. P02853, "Transcript of OTP Interview of Borovčanin, 11 and 12 Mar 2002", pp. 10-11, stating that members of the Bratunac Brigade's military police arrived to Potočari with the intention to carry out screening for Muslim men of fighting age.

2415 PW-111, T. 6991 (7 Feb 2007).

2416 Popović's Appeal Brief, para. 73.

2417 The Appeals Chamber recalls that it has already dismissed **Popović**'s arguments related to M. Nikolić's interpretation of the meaning of **Popović**'s words "all the balijas have to be killed" (see *supra*, para. 819; Popović's Appeal Brief, paras 55, 57, referring to Momir Nikolić, T. 32919 (21 Apr 2009); T. 33033-33035 (22 Apr 2009)) and the consistency of M. Nikolić's testimony and the Statement of Facts with respect to the existence of the plan to murder on 12 July 1995 (see *supra*, para. 821).

2418 Trial Judgement, para. 331. See Trial Judgement, para. 325.

2419 Trial Judgement, paras 331, 1053.

2420 Trial Judgement, para. 1053. See *infra*, para. 841.

VRS Main Staff, as well as issuing a ban on giving information, "particularly on prisoners of war, evacuated civilians, escapees and similar" ("13 July Order").[2421]

835. In light of the above and the deference afforded to the Trial Chamber in the assessment of evidence, the Appeals Chamber finds that **Popović** has failed to show that no reasonable trier of fact could have concluded that the screening process did not raise a reasonable doubt as to the existence of the plan to murder.

836. Regarding **Popović**'s submission concerning the Trial Chamber's alleged misinterpretation of evidence, the Appeals Chamber first considers that **Popović**'s theory that the Trial Chamber's finding implied an insidious plan is entirely speculative. Second, the Appeals Chamber finds that **Popović** has failed to substantiate how this purportedly false interpretation of the evidence caused the Trial Chamber to disregard the screening process as sporadic and patchy. **Popović**'s argument is therefore dismissed.

837. Regarding **Popović**'s submission that the Trial Chamber misapplied the evidence, and thus erred, in finding that "all" Muslim men in Potočari were separated, detained, and ultimately killed, the Appeals Chamber notes that the Trial Chamber found that "[t]he Bosnian Muslim men were separated in Potočari, detained in Bratunac and ultimately killed in mass executions".[2422] Even assuming that this wording suggests that *all* Bosnian Muslim men were separated and subsequently killed, a conclusion that is contradicted by some evidence pointed out by **Popović**,[2423] the Appeals Chamber observes that **Popović** does not elaborate on how this alleged error of fact had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice.[2424] **Popović**'s argument is therefore dismissed.

(ii) Beara's appeal (Grounds 6 and 8 both in part)

838. **Beara** submits that the Trial Chamber erred in finding that the separation process in Potočari marked the commencement of the implementation of the plan to murder the Bosnian Muslim men from Srebrenica.[2425] He argues that this finding is unsupported by evidence and that other reasonable conclusions could be made.[2426] **Beara** asserts in this respect that the Trial Chamber failed to reconcile its finding with the testimonies of DutchBat witnesses, and to fully analyse BSF

2421 Trial Judgement, para. 1057.
2422 Trial Judgement, para. 287.
2423 See Popović's Appeal Brief, paras 159-161 and the evidence referred therein.
2424 The Appeals Chamber notes that even accepting **Popović**'s submission that some of the Bosnian Muslim men from Potočari survived, their number was rather minimal when compared with the number of men who were separated and subsequently executed. See Popović's Appeal Brief, paras 160-161 and the evidence referred to therein.
2425 Beara's Appeal Brief, paras 60-61, 129; Beara's Reply Brief, paras 31, 51.
2426 Beara's Appeal Brief, paras 61, 129. See also Beara's Reply Brief, para. 51.

efforts to check the identity of the detained men.[2427] The Prosecution responds that **Beara**'s submissions amount to a mere attempt to substitute his own evaluation of the evidence for that of the Trial Chamber and warrant dismissal.[2428]

839. The Trial Chamber considered DutchBat members' evidence about efforts to screen the Bosnian Muslim prisoners and to check their identities against a list of alleged war criminals, but concluded that the BSF did not intend to carry out a legitimate screening operation.[2429] The Trial Chamber also considered the detention conditions of the Bosnian Muslim men in Potočari and the surrounding circumstances as further support for the impugned finding.[2430] The Appeals Chamber finds that other evidence **Beara** refers to in his reply brief as allegedly contradicting the impugned finding[2431] does not demonstrate that the Trial Chamber erred.

840. Consequently, the Appeals Chamber finds that **Beara** has failed to demonstrate that no reasonable trier of fact could have concluded that the separation process in Potočari marked the commencement of the implementation of the plan to murder the Bosnian Muslim men from Srebrenica. The relevant portions of **Beara**'s grounds of appeal 6 and 8 addressed here are thus dismissed.

(c) Alleged error in considering the detention conditions as further evidence of the plan to murder

841. The Trial Chamber concluded that the conditions in which the Bosnian Muslim men were detained in Potočari stood as further evidence that a plan to kill was in progress.[2432] It found that:

> The men were detained in unbearably cramped conditions and deprived of basic necessities with a total disregard for their safety and well being. Surrendered identification documents were burned and there was a ban on registration. The words of Mane Đurić to Leendert van Duijn that "the men didn't need the passports anymore" further demonstrate that a murder operation was in motion.[2433]

(i) Popović's appeal

a. Whether the Trial Chamber erred in relying on M. Nikolić's evidence

842. **Popović** challenges the Trial Chamber's finding that in the 12 July Conversation, he, M. Nikolić, and Kosorić discussed locations that could be used for detention and killings.[2434] **Popović** attacks M. Nikolić's credibility by pointing to purported contradictions in his evidence as

2427 Beara's Appeal Brief, para. 61; Beara's Reply Brief, para. 31.
2428 Prosecution's Response Brief (Beara), paras 76-78.
2429 Trial Judgement, paras 320, 323, 1052 & fn. 3453. See *supra*, para. 825.
2430 Trial Judgement, para. 1053. See *supra*, para. 834.
2431 See Beara's Reply Brief, para. 31, referring to Johannes Rutten, T. 4853-4860 (30 Nov 2006), Ahmo Hasić, T. 1225 (6 Sept 2006), PW-111, T. 6991 (7 Feb 2007), PW-112, T. 3222 (30 Oct 2006).
2432 Trial Judgement, para. 1053.
2433 Trial Judgement, para. 1053 (internal references omitted).

to whether M. Nikolić suggested locations.[2435] **Popović** argues that a discussion about detention facilities could not take place before the number of the separated men and the screening results were known.[2436] **Popović** also submits that on 12 July 1995 "the refugees from Srebrenica" were the responsibility of the civilian authorities, not the military, and that Deronjić was the only person authorised to determine and discuss the logistics of the screening process, including the civilian detention sites in the Bratunac area.[2437] He points out in this respect that the Trial Chamber: (1) selectively assessed the document appointing Deronjić as the Civilian Commissioner for the "Serbian Municipality of Srebrenica" ("Karadžić Directive"), disregarding the fact that Karadžić assigned all authority with respect to Bosnian Muslim civilians and combatants from Srebrenica to Deronjić;[2438] and (2) disregarded Witness Boering's testimony that during the Third Hotel Fontana Meeting, Mladić introduced the individuals from the civilian authorities as being responsible for screening male refugees.[2439] **Popović** also argues that further support can be found in PW-162/Davidović's evidence, in **Beara**'s appearance at the Bratunac SDS Offices on 13 July 1995, and in the statement M. Nikolić gave to the Commission of the Government of the RS on 17 September 2004 ("2004 Statement").[2440]

843. The Prosecution responds that **Popović** fails to show any error in the Trial Chamber's reasoned analysis and acceptance of key aspects of M. Nikolić's testimony.[2441] The Prosecution submits that the terms of the Karadžić Directive implicitly limited Deronjić's ability to make binding decisions for any military organs.[2442] It asserts that while Deronjić was involved in matters related to the Bosnian Muslim prisoners, they were not the exclusive responsibility of the civilian authorities in Bratunac.[2443]

844. With respect to the alleged inconsistencies in M. Nikolić's evidence, the Appeals Chamber first notes that in the *Trbić* case, M. Nikolić testified that during the 12 July Conversation **Popović** and Kosorić mentioned the locations where the Bosnian Muslim men were to be detained and executed,[2444] whereas in this case he testified that he suggested them.[2445] In this respect, the Appeals

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2434 Popović's Appeal Brief, paras 74-78, 80-88; Popović's Reply Brief, para. 42. See Appeal Hearing, AT. 71-72 (2 Dec 2013).
2435 Popović's Appeal Brief, paras 74-75.
2436 Popović's Appeal Brief, para. 77.
2437 Popović's Appeal Brief, paras 78, 80-88; Popović's Reply Brief, para. 42; Appeal Hearing, AT. 71 (2 Dec 2013).
2438 Popović's Appeal Brief, para. 81, referring to, *inter alia*, Ex. P00010, "Republika Srpska Presidential Directive 01-1340/95 (01-1350/95)". See Popović's Appeal Brief, paras 82-83.
2439 Popović's Appeal Brief, paras 80, 83. See Appeal Hearing, AT. 71 (2 Dec 2013).
2440 Popović's Appeal Brief, paras 84-87. See Appeal Hearing, AT. 71 (2 Dec 2013).
2441 Prosecution's Response Brief (Popović), para. 30. See also Prosecution's Response Brief (Popović), paras 39-42; Appeal Hearing, AT. 121 (2 Dec 2013).
2442 Prosecution's Response Brief (Popović), para. 69.
2443 Prosecution's Response Brief (Popović), paras 68-69.
2444 Ex. P04482, "Transcript of M. Nikolić's testimony before the BiH State Court in the *Trbić* case, 1 Sept 2008", p. 29.

Chamber observes that in this case, M. Nikolić incriminates himself by admitting to having played a more active role in the murder operation, a factor that the Trial Chamber found increased the reliability of his evidence.[2446] Second, regarding **Popović**'s submission that M. Nikolić contradicted himself within the present case, the Appeals Chamber notes that on one day M. Nikolić testified that he suggested locations for both detention *and* execution, whereas his testimony the following day only mentioned detention.[2447] The Appeals Chamber does not consider that these discrepancies are capable of showing that no reasonable trier of fact could have concluded that M. Nikolić remained consistent as to the subject matter discussed during the 12 July Conversation.[2448] The Appeals Chamber thus finds that **Popović**'s arguments fail.

845. The Appeals Chamber also finds that **Popović**'s assertion that a conversation about detention facilities was not possible at that time is speculative.

846. Regarding **Popović**'s claim that the refugees in Potočari were within the exclusive competence of civilian authorities, the Appeals Chamber notes that the Karadžić Directive placed on Deronjić a duty to "ensure that all civilian and military organs treat all citizens who participated in combat against the [VRS] as prisoners of war, and ensure that the civilian population can freely choose where they will live or move to".[2449] It also specified that "[d]ecisions of the civilian commissioner shall be binding for all civilian authority organs in the Serbian Municipality of Srebrenica".[2450] The Trial Chamber did not specifically refer to these aspects of the Karadžić Directive.[2451] Moreover, M. Nikolić, referring to the Karadžić Directive in his 2004 Statement, confirmed that "[t]he civilian authorities played a special and central role in the planning, decision-making and organisation of the forced relocation of the civilians from Potočari".[2452] He also described Deronjić as "[t]he person responsible for the transport of women and children and all people who acquired the status of prisoners by their arrival to Potočari".[2453] Finally, the Appeals Chamber notes Boering's testimony that, at the Third Hotel Fontana Meeting, Mladić introduced

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2445 Momir Nikolić, T. 32922 (21 Apr 2009).
2446 Trial Judgement, para. 284. See *supra*, para. 184.
2447 See Momir Nikolić, T. 32922 (21 Apr 2009); T. 33047 (22 Apr 2009). See Popović's Appeal Brief, para. 75.
2448 See Trial Judgement, para. 282.
2449 Ex. P00010, "Republika Srpska Presidential Directive 01-1340/95 (01-1350/95)", para. 4. See also Ex. P00011, "Republika Srpska Presidential Directive 01-1341/95 (01-1351/95)" (Karadžić ordered: (1) the establishment of the Public Security Station in Srebrenica specifying that "[a]ll citizens who participated in combat activities against the Serb Army will be treated as prisoners of war and in accordance with the Law and international conventions. Others will be free to choose their place of residence or place of emigration"; and (2) "[e]stablish close cooperation with Miroslav Deronjić, the Civilian Commissioner for the municipality of Serb Srebrenica, as well as with other bodies and organisations in this area").
2450 Ex. P00010, "Republika Srpska Presidential Directive 01-1340/95 (01-1350/95)", para. 5.
2451 See Trial Judgement, para. 262.
2452 Ex. P04477, "M. Nikolić Statement to RS Commission on Srebrenica document, 27 Sept 2004", para. 5.
2453 Ex. P04477, "M. Nikolić Statement to RS Commission on Srebrenica document, 27 Sept 2004", para. 14.

the individual from the civilian authorities as being responsible for screening male refugees for criminal behaviour.[2454]

847. The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[2455] The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[2456] The Appeals Chamber observes in this regard that the Karadžić Directive, as well as the evidence of M. Nikolić and Boering referred to above, suggest that the civilian authorities were officially assigned a role in the transport and screening of the Bosnian Muslim men and ensuring their treatment as prisoners of war. However, the Trial Chamber's findings describing the events unfolding on the ground at the time unequivocally negate **Popović**'s theory that civilian authorities were given exclusive responsibility for Bosnian Muslim men. Even accepting the testimony that Srbislav Davidović, the President of the Bratunac Municipality Executive Board,[2457] a civilian authority, questioned the former Chief of the Bratunac Police Station[2458] as support for **Popović**'s claim,[2459] the Appeals Chamber notes that the detention of Bosnian Muslim men shortly after the Third Hotel Fontana Meeting was carried out by the BSF, including VRS and MUP members, rather than by civilian authorities.[2460] Further, while Deronjić's key role in decisions concerning the Bosnian Muslim prisoners is evidenced by participation in a series of meetings about the logistics of the murder operation on 13 and 14 July 1995[2461] and by M. Nikolić's evidence that he was "the key person who participated in the passing of all decisions and was aware of all developments concerning the civilian population and the prisoners who had been separated in Potočari",[2462] **Popović** fails to present any evidence showing that Deronjić could issue binding instructions to the VRS members heavily involved in the separation, detention, and murder of the Bosnian Muslim men.[2463] The Trial Chamber's findings thus show that actions taken by various BSF members demonstrate, at a minimum, a complementary exercise of authority, irrespective of whether they had any basis for it in any official decision of the RS authorities.

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2454 Pieter Boering, T. 1968-1969, 1973 (21 Sept 2006).

2455 *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

2456 *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

2457 Trial Judgement, para. 289.

2458 See Trial Judgement, para. 391.

2459 See Popović's Appeal Brief, para. 84, referring to Zlatan Čelanović, T. 6696-6697 (31 Jan 2007). **Popović** also refers to PW-162/Srbislav Davidović's evidence to support his claim, but does not provide any references his testimony. See Popović's Appeal Brief, paras 84-85. The Appeals Chamber therefore dismisses **Popović**'s arguments in this respect.

2460 Trial Judgement, paras 319-321. The Appeals Chamber recalls its previous findings on **Popović**'s challenges regarding the separation process. See *supra*, para. 835.

2461 See Trial Judgement, para. 1271. See also *infra*, paras 939, 941.

848. For the foregoing reasons, the Appeals Chamber finds that **Popović** has failed to demonstrate that Deronjić's official authority over the prisoners was so clearly relevant to the ultimate finding that the lack of discussion by the Trial Chamber on this issue equates to disregard. **Popović**'s arguments are thus dismissed.

b. Whether the Trial Chamber erred with respect to other relevant evidence

849. **Popović** challenges the Trial Chamber's findings underlying its conclusion that the detention conditions in Potočari further evidenced that a plan to kill was in progress.[2464] He asserts that a multitude of other reasonable conclusions could be drawn.[2465] First, he submits that the cramped conditions do not prove that the prisoners were destined for murder and argues that the BSF used any premises available.[2466] Second, he highlights that the prisoners got water, bread, and some medical treatment but that given the scarcity of resources the VRS gave priority to the most vulnerable refugees.[2467] Third, **Popović** submits that the Trial Chamber's finding that there was a total disregard for the safety and well-being of the Bosnian Muslim prisoners in Potočari is neither properly explained nor supported by the evidence. He asserts that none of the prisoners detained in Potočari were killed or suffered serious bodily harm and argues that there is no evidence that the persons who were killed in Potočari were detained there.[2468] Fourth, **Popović** submits that the absence of registration of prisoners in Potočari did not indicate that they would be killed. He argues that the BSF tried to establish the identity of the detainees but their IDs were unreliable or unavailable.[2469] Fifth, **Popović** challenges the credibility of Prosecution Witness Leendert Van Duijn's testimony that Đurić told him that the Bosnian Muslim men "didn't need the passports anymore".[2470] He argues that in his 1995 statement to the Prosecution, Van Duijn did not identify Đurić as the speaker. **Popović** also points out that the Trial Chamber never established the language of communication between Van Dujin and the Serb soldier found by the Trial Chamber to be Đurić.[2471] Finally, **Popović** asserts that if the plan to murder existed on 12 July 1995 before 10:00 a.m., the separated men would not have been detained in Potočari or Bratunac but sent directly to the execution sites.[2472]

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2462 Ex. P04477, "M. Nikolić Statement to RS Commission on Srebrenica document, 27 Sept 2004", para. 5.
2463 See, *e.g.*, Trial Judgement, paras 272-361, 383-396, 406, 450-451, 457, 464-468.
2464 Popović's Appeal Brief, paras 163-168; Popović's Reply Brief, para. 57.
2465 Popović's Reply Brief, para. 57.
2466 Popović's Appeal Brief, para. 163. See Popović's Reply Brief, para. 57.
2467 Popović's Appeal Brief, para. 164.
2468 Popović's Appeal Brief, para. 165.
2469 Popović's Appeal Brief, para. 166.
2470 Popović's Appeal Brief, para. 167. See Trial Judgement, para. 1053.
2471 Popović's Appeal Brief, para. 167.
2472 Popović's Appeal Brief, para. 168.

850. The Prosecution responds that it was within the Trial Chamber's discretion to infer that the circumstances under which the prisoners were held indicated a plan to kill rather than a plan to detain. It argues that **Popović** merely asserts that the Trial Chamber failed to interpret evidence in a particular manner and as such his arguments warrant summary dismissal.[2473]

851. The Trial Chamber found that the conditions in which the Bosnian Muslim men were detained were further support that the plan to murder was in progress. The Trial Chamber took into account the *cumulative* weight of several factors including the unbearably cramped conditions, the deprivation of basic necessities, the total disregard for their safety and well-being, the burning of surrendered IDs, and the ban on registration.[2474]

852. Regarding **Popović**'s challenge to the Trial Chamber's finding that the cramped conditions of detention were indicative of the existence of the plan to murder the Bosnian Muslim men, the Appeals Chamber notes that approximately 300 or 400 prisoners were held on 13 July 1995 in the White House and on its balcony, with some men even sitting in front of it.[2475] It also observes that Witness Kingori, an UNMO,[2476] complained to Mladić about the overcrowding of the White House but was ignored.[2477] The Appeals Chamber acknowledges that cramped conditions alone, particularly given the logistical challenges the BSF faced, might not be sufficient to establish that the plan to murder was in progress. However, **Popović** has failed to demonstrate that no reasonable trier of fact could have relied on the cramped conditions as one of several factors establishing the existence and implementation of the plan to murder.

853. With respect to the Trial Chamber's finding that prisoners detained at Potočari were deprived of basic necessities and that this deprivation indicated the existence of the plan to murder them,[2478] contrary to **Popović**'s assertions,[2479] the Trial Chamber found that hardly any food was distributed, that insufficient water was supplied, and that the evidence about the availability of medical treatment was conflicting.[2480] Moreover, the Appeals Chamber notes that no food, water, or sanitary facilities were provided to the prisoners.[2481] Not only was the amount of food handed over, on Mladić's orders, to Bosnian Muslim civilians in Potočari by Bosnian Serb civilian authorities "a drop in the sea", but after a Serbian television station had filmed the food distribution, some members of the BSF took the food back.[2482] The Appeals Chamber thus finds that **Popović** has

2473 Prosecution's Response Brief (Popović), para. 43. See also Appeal Hearing, AT. 124 (2 Dec 2013).
2474 Trial Judgement, para. 1053. See *supra*, para. 841.
2475 Trial Judgement, para. 329.
2476 See Trial Judgement, para. 328.
2477 Trial Judgement, para. 330.
2478 See *supra*, para. 841.
2479 Popović's Appeal Brief, para. 164. See *supra*, para. 849.
2480 See Trial Judgement, paras 330, 401 & fns 1402-1404.
2481 Trial Judgement, para. 330.
2482 Trial Judgement, para. 310.

failed to demonstrate that no reasonable trier of fact could have relied on the deprivation of basic necessities as one of several factors establishing the existence of the plan to murder.

854. Turning to **Popović**'s next challenge, the Appeals Chamber first notes that the Trial Chamber found that "[t]he men were detained in unbearably cramped conditions and deprived of basic necessities with a total disregard for their safety and well being".[2483] **Popović**'s arguments suggest that he considers the phrase "total disregard" to be distinct from the first part of the sentence. The Appeals Chamber, however, considers that this is inconsistent with the plain reading of the Trial Judgement which suggests that this "total disregard" must be read in conjunction with the cramped conditions and deprivation of basic necessities.

855. The Appeals Chamber will nevertheless consider the substance of his arguments. In this regard, it notes that, although this finding was not clearly referenced, several findings showing the disregard for the safety and well-being of the Bosnian Muslim prisoners can be found in an earlier part of the Trial Judgement.[2484] Even assuming – as **Popović** submits – that the Bosnian Muslim men killed on 13 July 1995 near the DutchBat compound and the White House[2485] were not detained in Potočari, the Appeals Chamber notes that throughout the day on 12 July 1995, the DutchBat received disconcerting reports about the mistreatment of the prisoners held in the White House.[2486] The Trial Chamber also noted that Kingori saw a Bosnian Muslim man being taken behind the White House and then heard a gun being fired.[2487] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have considered the total disregard for the detainees' safety and well-being as one of several elements establishing the existence of the plan to murder.

856. With respect to the Trial Chamber's findings that there was a ban on registering Bosnian Muslim men held as prisoners, and more specifically that the BSF prevented DutchBat attempts to register them,[2488] the Appeals Chamber notes that **Popović** does not challenge them directly, but instead focuses on the problems the BSF purportedly encountered in registering the prisoners themselves.[2489] The evidence **Popović** refers to does not show that the BSF made any efforts to register the prisoners. The Appeals Chamber also finds **Popović**'s assertion about the impossibility of carrying out the registration of prisoners due to the unreliability and unavailability of their IDs

2483 Trial Judgement, para. 1053. See *supra*, para. 841.
2484 See, *e.g.*, Trial Judgement, paras 326-328, 330.
2485 See Trial Judgement, paras 354-361.
2486 Trial Judgement, para. 326.
2487 Trial Judgement, para. 328.
2488 Trial Judgement, paras 327, 1053 & fn. 3455.
2489 See Popović's Appeal Brief, para. 166.

speculative.[2490] **Popović** has thus failed to demonstrate that no reasonable trier of fact could have treated the ban on registration as one of several elements establishing the existence of the plan to murder beyond reasonable doubt.

857. The Appeals Chamber thus finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that detention conditions in Potočari further evidenced that a plan to kill was in progress.

858. Regarding **Popović**'s challenge to the credibility of Van Duijn's account of his conversation with Đurić, the Appeals Chamber notes that in his statement given to the Prosecution on 25 October 1995, Van Duijn referred to his interlocutor in this conversation as "one of the soldiers", whereas when appearing before the Tribunal he identified the soldier as Đurić.[2491] Van Duijn explained that "later on in the process, the story about the passports and the 'White House' was more focused on in detail".[2492]

859. Recalling that deference ought to be given to the Trial Chamber's assessment of witness credibility[2493] the Appeals Chamber observes the following. First, the evidence **Popović** challenges is not contradictory; one is simply more specific than the other. Second, no part of the trial record that **Popović** refers to suggests that either the language used or the potential miscommunications were raised during the trial. As a consequence, he has failed to show that no reasonable trier of fact could have refrained from expressly entering any finding on this issue.[2494]

860. Finally, the Appeals Chamber finds **Popović**'s assertion that if the plan to murder existed before 10:00 a.m. on 12 July 1995 the separated men would have been sent directly to the execution sites to be entirely speculative and incapable of showing that the Trial Chamber erred.

(ii) Beara's appeal (Ground 6 in part)

861. **Beara** challenges the Trial Chamber's conclusion regarding the detention conditions. He argues that the Trial Chamber relied on circumstantial evidence but "failed to appreciate the totality of the situation", and that there is no evidence showing another possible manner of detaining

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2490 See Popović's Appeal Brief, para. 166, referring to Mevludin Orić, T. 889-890 (28 Aug 2006), Leendert Van Duijn, T. 2352-2357 (28 Sept 2006). See also *supra*, para. 832.

2491 Leendert Van Duijn, T. 2357-2360 (28 Sept 2006).

2492 Leendert Van Duijn, T. 2360 (28 Sept 2006).

2493 See *Đorđević* Appeal Judgement, paras 319, 819; *Lukić and Lukić* Appeal Judgement, paras 86, 235, 363; *Kanyarukiga* Appeal Judgement, para. 121. See also *supra*, para. 131.

2494 The Appeals Chamber emphasises in this regard that the Trial Judgement contains numerous examples of the interactions between the international personnel and the Bosnian Serbs without any explicit determination which language was used in these interactions. See Trial Judgement, paras 291, 316, 320-321, 326-327, 340. See also Trial Judgement, para. 329, referring to the presence of Miki, the interpreter, standing with Van Duijn and Kingori outside the White House.

prisoners or civilians.[2495] The Prosecution responds that **Beara**'s challenge to the Trial Chamber's inference should be summarily dismissed.[2496]

862. The Appeals Chamber finds **Beara**'s claim that no other manner of detaining the prisoners was possible under the circumstances to be an undeveloped assertion. The Appeals Chamber thus finds that **Beara** has failed to show that no reasonable trier of fact could have reached, as the only reasonable inference, the Trial Chamber's conclusion. The portion of **Beara**'s ground of appeal 6 addressed here is thus dismissed.

(d) Alleged errors regarding the expansion and implementation of the plan to murder

863. The Trial Chamber found that the murder operation to kill the Bosnian Muslim males from in and around Srebrenica began with the separation of Bosnian Muslim men from the women and children in Potočari on 12 July 1995 and expanded to include the men captured from the column on 13 July 1995.[2497]

864. The Trial Chamber also found that in the afternoon of 13 July 1995, the killings began and that by nightfall, over 1,000 Bosnian Muslim males had been executed.[2498] To support this finding, it referred to the killings at: (1) the Kravica Warehouse where at least 1,000 Bosnian Muslim men were killed; (2) the Cerska Valley where approximately 150 Bosnian Muslim men were killed; and (3) Jadar River where 15 Bosnian Muslim men were killed.[2499] The Trial Chamber then found that the events at the Sandići Meadow, where ten to 15 Bosnian Muslim men were shot on site when the buses to transport them for execution ran out,[2500] "illustrated that the destiny of the Bosnian Muslim men was predetermined already".[2501] The Trial Chamber also found that on 13 July 1995, approximately 22 Bosnian Muslim men, who had been detained at the Luke School were taken to a meadow at Rašića Gaj and shot.[2502]

865. The Trial Chamber found that the 13 July Order was direct evidence of the plan to murder.[2503] It was satisfied that the 13 July Order "had a singular and nefarious purpose – to set conditions of secrecy necessary to carry out a plan to commit mass murder" and that the "repeated references to 'combat' conditions in this context were nothing more than a frail attempt to disguise

2495 Beara's Appeal Brief, para. 62.
2496 Prosecution's Response Brief (Beara), para. 79.
2497 Trial Judgement, paras 1050, 1052, 1055-1056, 1072.
2498 Trial Judgement, para. 1059.
2499 Trial Judgement, fn. 3465. See Trial Judgement, paras 794.3-4. See also *supra*, para. 301.
2500 Trial Judgement, paras 794.3, 1059.
2501 Trial Judgement, para. 1059.
2502 Trial Judgement, para. 794.3.
2503 Trial Judgement, para. 1057. See *supra*, para. 834.

the true nature of the imminent operation".[2504] It found that the 13 July Order was "clear evidence of a premeditated, calculated effort to put measures in place to ensure the planned killings could be carried out covertly without any unwanted interference".[2505]

866. Several conversations were intercepted on 13 July 1995 including, *inter alia*, at 10:09 a.m., 11:25 a.m., and finally at 6:29 p.m.[2506] The Trial Chamber found that in the 10:09 a.m. Intercept **Beara** instructed Lučić, the Deputy Commander of the Military Police Battalion of the 65th Protection Regiment, to "[s]hove them all on the playground, who gives a fuck about them", and when informed that the prisoners were killing themselves, he remarked "[y]ou mean they're doing it amongst themselves? [...] Well, excellent. Just let them continue, fuck it".[2507] The Trial Chamber also considered the 11:25 a.m. Intercept in which **Beara** was heard saying "sending four buses, two trucks, and one trailer truck to Kasaba to transport Muslim prisoners", and that "[t]hey will be dispatched to the camp in Batkovići village, where they will be 'sorted' into war criminals and normal soldiers".[2508] The Trial Chamber concluded "that this conversation was deliberately misleading as to the fate which awaited these Bosnian Muslim males and an attempt to mask their true intentions".[2509] The Trial Chamber did not refer to the 6:29 p.m. Intercept between Živanović,[2510] Drina Corps Commander, and an officer who requested a list of war criminals from Srebrenica, Žepa, and Goražde.[2511]

867. The Trial Chamber also made several findings about the events in the following days. It found that the 14 July Meeting concerned the organisation and co-ordination of the murder operation.[2512] It also found that **Popović** instructed Dragan Jokić, the Zvornik Brigade Duty Officer at the Standard Barracks, not to record anything concerning the Bosnian Muslim prisoners or to speak of them over the radio ("Popović Instruction").[2513]

(i) Popović's appeal

868. **Popović** not only disputes the existence of the plan to murder Bosnian Muslim males in Potočari on 12 July 1995, but submits that the Trial Chamber erred in finding that the plan

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2504 Trial Judgement, para. 1058. See Trial Judgement, para. 1057.
2505 Trial Judgement, para. 1058.
2506 Ex. P01130a, "Intercept, 13 July 1995, 10:09 a.m." ("10:09 a.m. Intercept"); Ex. 7D2D00642, "Intercept, 13 July 1995, 11:25 a.m." (see *supra*, para. 474, defining the 11:25 a.m. Intercept); Ex. P01144a, "Intercept, 13 July 1995, 6:29 p.m." ("6:29 p.m. Intercept"); Richard Butler, T. 20123-20124 (22 Jan 2008).
2507 Trial Judgement, para. 1257.
2508 Trial Judgement, para. 1258.
2509 Trial Judgement, para. 1259.
2510 Both **Popović** and the Prosecution seem to be in agreement that "Zile" referred to in this intercept was in fact General Živanović. Popović's Appeal Brief, para. 201 (referring to Richard Butler, T. 20123-20125 (22 Jan 2008)); Prosecution's Response Brief (Popović), paras 106, 121.
2511 Ex. P01144a, "Intercept, 13 July 1995, 6:29 p.m."; Richard Butler, T. 20123-20124 (22 Jan 2008).
2512 Trial Judgement, para. 472. See *supra*, para. 344, defining the 14 July Meeting.
2513 Trial Judgement, paras 1062, 1122, fn. 3472.

expanded to include the men captured from the column on 13 July 1995.[2514] According to **Popović**, any plan or decision to kill all captured Bosnian Muslim men did not come into existence until 14 July 1995 when the Orahovac killings began.[2515] **Popović** challenges the evidence the Trial Chamber relies on to support these and the related findings. In this regard, he submits that: (1) the 13 July Order did not evidence the plan to murder;[2516] (2) the Trial Chamber made erroneous findings about the Popović Instruction;[2517] (3) the Trial Chamber's findings are not plausible under military doctrine;[2518] (4) the limited number of people whom the Trial Chamber found knew about the plan undermines its existence;[2519] (5) a substantial body of evidence belies that any plan to kill existed before the Orahovac killings started on 14 July 1995;[2520] and (6) the Trial Chamber erred in finding that several executions took place on 13 July 1995 and that these executions corroborated the existence of the plan to murder and the plan's expansion.[2521] The Appeals Chamber will discuss these submissions in turn.

a. Whether the Trial Chamber erred in its interpretation of the 13 July Order

869. **Popović** submits that by embellishing the plain meaning of the 13 July Order, the Trial Chamber unreasonably construed it as evidence of the plan to murder.[2522] He argues that the Trial Chamber's findings and evidence about combat operations on 12 and 13 July 1995 show that the order accorded with legitimate military practice.[2523] He also asserts that the 13 July Order: (1) affected the Konjević Polje-Bratunac Road, but did not mention the Zvornik area where the majority of prisoners were transported, killed, and buried;[2524] and (2) did not affect the brigade commanders, the members of the Main Staff, or the Drina Corps Command, who were not banned from divulging the information the 13 July Order aimed to protect.[2525] **Popović** also emphasises that removing prisoners from the main Milići-Zvornik Road and accommodating them indoors was

2514 Popović's Appeal Brief, para. 169. See Popović's Appeal Brief, paras 170, 215; Appeal Hearing, AT. 73-75 (2 Dec 2013).
2515 Popović's Appeal Brief, paras 193-194. See Popović's Appeal Brief, para. 34; Popović's Reply Brief, paras 54-58.
2516 Popović's Appeal Brief, paras 171-178; Appeal Hearing, AT. 74 (2 Dec 2013).
2517 Popović's Appeal Brief, paras 179-180; Popović's Reply Brief, para. 52; Appeal Hearing, AT. 74-75 (2 Dec 2013).
2518 Popović's Appeal Brief, paras 181-193, 284; Popović's Reply Brief, paras 53-54, 70.
2519 Popović's Appeal Brief, paras 187-192.
2520 Popović's Appeal Brief, paras 56, 186, 193-196, 198-202; Popović's Reply Brief, paras 54-59. See Popović's Appeal Brief, paras 34, 65-68, 70; Appeal Hearing, AT. 75 (2 Dec 2013).
2521 Popović's Appeal Brief, paras 203-214; Popović's Reply Brief, paras 56, 62-68. See Popović's Appeal Brief, para. 54; Appeal Hearing, AT. 75 (2 Dec 2013).
2522 Popović's Appeal Brief, paras 171-173, 175; Popović's Reply Brief, para. 50; Appeal Hearing, AT. 74 (2 Dec 2013).
2523 Popović's Appeal Brief, paras 171-174. See Appeal Hearing, AT. 74 (2 Dec 2013).
2524 Popović's Reply Brief, para. 50.
2525 Popović's Appeal Brief, para. 173; Popović's Reply Brief, para. 51. See Popović's Appeal Brief, para. 174.

aimed at protecting them from an attack by the ABiH and in fact revealed the VRS's intent to keep them alive.[2526]

870. The Prosecution responds that **Popović** seeks to substitute his own evaluation of the evidence for that of the Trial Chamber and as such his arguments warrant summary dismissal.[2527] It submits that the Trial Chamber rightly found that references to combat conditions in the 13 July Order were only a frail attempt to disguise the true nature of the imminent murder operation.[2528]

871. The Appeals Chamber does not consider either the ongoing combat in the Bratunac area on 12 and 13 July 1995,[2529] or **Popović**'s suggestion that it was common military practice to issue orders limiting access of non-combat personnel to the combat area and retaining secrecy of communication to be of any consequence to the issue. Considering the specific reference in the 13 July Order to the secrecy of all the communication to the media "particularly on prisoners of war, evacuated civilians, escapees and similar"[2530] alongside other evidence that the plan to murder the Bosnian Muslim men was in force,[2531] the Appeals Chamber finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have found that this order was a step towards facilitating the planned murder operation, even if it was not its only purpose.

872. Regarding his argument that the 13 July Order did not mention the Zvornik area, the Appeals Chamber observes that although the 13 July Order only specifically mentioned setting up roadblocks in the Bratunac area, it also directed its recipients to prevent the entry of all uninvited individuals – including "all local and foreign journalists, except the journalists of the [VRS Main Staff Press Centre]" – to "the area of combat operations in the wider areas of Srebrenica and Žepa".[2532] Moreover, the 13 July Order was addressed to various units active in the area, including the Zvornik Brigade.[2533] **Popović** also fails to provide evidence supporting his assertion that the ban introduced by the 13 July Order did not apply to the recipient commanders, but only to their subordinates.

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2526 Popović's Appeal Brief, paras 176-178.
2527 Prosecution's Response Brief (Popović), paras 89-92.
2528 Prosecution's Response Brief (Popović), para. 91. See also Prosecution's Response Brief (Popović), paras 90, 92.
2529 See Trial Judgement, paras 376-382. See also Trial Judgement, paras 1449-1451.
2530 Ex. 5DP00035, "VRS Main Staff order on prevention of leakage of military secrets, type-signed Mladić, 13 July 1995", para. 5.
2531 See *supra*, paras 822, 841, 851-853, 855-856.
2532 Ex. 5DP00035, "VRS Main Staff order on prevention of leakage of military secrets, type-signed Mladić, 13 July 1995", paras 1-4.
2533 Ex. 5DP00035, "VRS Main Staff order on prevention of leakage of military secrets, type-signed Mladić, 13 July 1995", p. 1.

873. By concluding that the 13 July Order "had a singular and nefarious purpose – to set conditions of secrecy necessary to carry out a plan to commit mass murder",[2534] the Trial Chamber precluded the possibility that it may have also served to ensure successful combat operations against armed Bosnian Muslim males in the area. The Appeals Chamber finds that **Popović** has nonetheless failed to demonstrate that a reasonable trier of fact could not have relied on the 13 July Order as evidence of the plan to murder.

874. Finally, the Appeals Chamber considers that **Popović**'s loosely-related argument that Bosnian Muslim prisoners were removed from the Milići-Zvornik Road and detained in order to protect them, which revealed the VRS's intent to keep them alive,[2535] is speculative and insufficient to demonstrate an error in the Trial Chamber's findings on the existence of the plan to murder.

b. Alleged errors pertaining to the Popović Instruction

875. **Popović** submits that the Trial Chamber made erroneous findings about the Popović Instruction.[2536] He argues that the Trial Chamber overlooked a 13 July 1995 VRS Main Staff order that was forwarded to the Zvornik Brigade, in which Drina Corps commanders and some brigades were ordered to use secure channels to communicate information about captured or blocked groups ("VRS Main Staff Order").[2537] **Popović** asserts that evidence about the Popović Instruction is not credible because: (1) there was no need for him to repeat an order that was already sent on 13 July 1995; (2) had he indeed given it, he would have sent it to the Commander of the Zvornik Brigade who would have in turn issued it to all his subordinates and not to Jokić; and (3) had he indeed given it, he would also have banned the use of telephone and radio-relay communication, including the secure lines.[2538]

876. The Prosecution responds that the Popović Instruction did not merely replicate the VRS Main Staff Order. It submits that the Trial Chamber reasonably found that **Popović** had prohibited the recording of details concerning Bosnian Muslim prisoners or speaking of them over the radio.[2539]

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2534 Trial Judgement, para. 1058. See *supra*, para. 865.
2535 Popović's Appeal Brief, paras 176-178.
2536 Popović's Appeal Brief, paras 179-180; Appeal Hearing, AT. 74 (2 Dec 2013).
2537 Popović's Appeal Brief, para. 179, referring to Ex. P00045, "VRS Main Staff Order to the Drina Corps type-signed Milan Gvero, 13 July 1995".
2538 Popović's Appeal Brief, para. 180; Popović's Reply Brief, para. 52. See Appeal Hearing, AT. 74-75 (2 Dec 2013). **Popović** refers to "two reports regarding the prisoners on 13 July" to support his argument but has not identified them. Popović's Reply Brief, para. 52.
2539 Prosecution's Response Brief (Popović), para. 94.

877. The Appeals Chamber notes that the Trial Chamber accepted PW-168's testimony that on 15 July 1995, Jokić informed him of the Popović Instruction.[2540] Regarding **Popović**'s argument concerning the VRS Main Staff Order, the Appeals Chamber notes that this document instructed the use of secure channels for communication about captured or blocked groups, and stressed the duty to prevent unnecessary conversations that might result in confidential information or VRS intentions and activities being leaked to the enemy.[2541] The Appeals Chamber recalls that the Trial Chamber is not required to refer to every piece of evidence in its reasoning. Without an indication that a particular piece of evidence has been completely disregarded, the Appeals Chamber will presume that the Trial Chamber has evaluated all the evidence presented to it.[2542] The Appeals Chamber finds that since the VRS Main Staff Order was aimed at preventing information from leaking to the enemy whereas the Popović Instruction sought to prevent the creation of any record of the Bosnian Muslim prisoners, including for exclusive use by the VRS, the former was not of a character that its absence from the discussion on the Popović Instruction in the Trial Judgement would show its disregard.

878. The Appeals Chamber also finds **Popović**'s arguments regarding the impracticality of giving the Popović Instruction to Jokić and lack of reference to all means of communication to be entirely speculative and incapable of showing that the Trial Chamber erred.

879. The Appeals Chamber thus finds that **Popović** has failed to demonstrate that the Trial Chamber erred in relying on Jokić's account of the Popović Instruction.

c. Whether the Trial Chamber's findings are plausible under military doctrine

880. **Popović** submits that the plan to murder Bosnian Muslim men could not have existed on 12 or even on 13 July 1995 without extensive preparations and resolving the most basic logistics.[2543] He asserts that the Trial Chamber's conclusion about his and the Security Branch's respective roles in the murder operation ignores that he had neither the authority to issue orders – without which any co-ordination was impossible – nor the manpower, ammunition, vehicles, or fuel to carry out the operation.[2544] He argues that since the resources required were only at the disposal of the units' commanders, the plan's logistics would have to have been determined and ordered by the highest military authority and conveyed to the commanders of the subordinate units.[2545] According to

2540 Trial Judgement, paras 1062, 1122. See *supra*, para. 867.
2541 Ex. P00045, "VRS Main Staff Order to the Drina Corps type-signed Milan Gvero, 13 July 1995", para. 7.
2542 See *infra*, note 2661.
2543 Popović's Appeal Brief, paras 181, 190. See Popović's Appeal Brief, paras 182-189; Popović's Reply Brief, para. 54.
2544 Popović's Appeal Brief, para. 185. See Popović's Appeal Brief, para. 284; Popović's Reply Brief, paras 53, 70. See *infra*, para. 1074.
2545 Popović's Appeal Brief, para. 182.

**Popović**, VRS rules permitted a unit commander to delegate authority to another officer, but doing so would require informing all members of the delegating commander's unit and all his subordinate units.[2546] In this regard, **Popović** emphasises that there is no evidence that Mladić, Živanović, or Krstić delegated their authority to him.[2547]

881. The Prosecution responds that the Trial Chamber properly assessed the roles of **Popović** and the Security Branch in the murder operation.[2548] It submits that **Popović** merely repeats his trial arguments but fails to show that the Trial Chamber erred.[2549]

882. The Appeals Chamber notes that the Trial Chamber found that the murder operation was conducted on the orders of Mladić,[2550] whose authority in the implementation is clear from the testimony of some of the main actors involved.[2551] The Trial Chamber's findings show that regardless of whether military rules vested them with the formal authority to issue orders to VRS unit commanders, VRS Security Sector officers, including **Popović**, were in fact using the resources of several Drina Corps units, including manpower, ammunition, fuel, and vehicles, to pursue and co-ordinate the murder operation.[2552] **Popović** concentrates on what should have ordinarily occurred instead of analysing the facts as they happened in the specific circumstances. His argument thus fails.

d. Whether the number of people that knew of the plan undermines its existence

883. **Popović** argues that if the plan to murder Bosnian Muslim men existed on 12 or even 13 July 1995 more people would have been mobilised to implement it.[2553] **Popović** emphasises that the Trial Judgement only identified two people who knew about the plan to murder on 12 July 1995: Kosorić, Assistant Chief of Staff for Intelligence in the Drina Corps,[2554] and himself, who in turn allegedly confided that secret only to M. Nikolić.[2555] He submits that no reasonable trial chamber could have concluded that a mass murder planned by the highest echelons of the military could be carried out by informing only two medium ranking subordinates with no command authority.[2556] With respect to 13 July 1995, **Popović** further emphasises that only two individuals

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2546 Popović's Appeal Brief, para. 183.
2547 Popović's Appeal Brief, para. 184. Živanović was the Drina Corps Commander until 13 July 1995 when Krstić succeeded him. Trial Judgement, para. 136.
2548 Prosecution's Response Brief (Popović), paras 95-97.
2549 Prosecution's Response Brief (Popović), para. 96.
2550 Trial Judgement, paras 1071-1072, 1299, 1412, 1960. See also Trial Judgement, paras 1154, 1380, 1905.
2551 See Trial Judgement, paras 470, 1345, 1861, 1910.
2552 See, *e.g.*, Trial Judgement, paras 1107, 1111-1112, 1118-1121, 1125-1127, 1129-1130, 1132-1134, 1153-1154, 1345.
2553 See Popović's Appeal Brief, paras 187-190.
2554 Trial Judgement, para. 1051.
2555 Popović's Appeal Brief, para. 188.
2556 Popović's Appeal Brief, para. 189. See Popović's Appeal Brief, paras 187-188.

from the Zvornik Brigade – Obrenović, Chief of Staff and Deputy Commander,[2557] and **Nikolić** – were allegedly informed about the plan to murder and that no evidence suggests that either of them issued orders or instructions connected to the executions. **Popović** points out in this respect that the military policemen, whom Obrenović assigned to **Nikolić** to allegedly assist in the plan to murder, were not informed that the prisoners would be killed.[2558] Rather, **Popović** refers to the evidence of several witnesses showing, *inter alia*, that the policemen were told to protect the prisoners and that they indeed did protect them from an aggressive crowd.[2559]

884. The Prosecution responds that the commanders of the units participating in the murder operation knew about their soldiers' involvement therein. It stresses that the direct participants do not need to be aware of the other aspects of the operation or even of the overall murder plan.[2560]

885. The Appeals Chamber notes that in time, the plan to murder was communicated to key actors whose assistance was needed, including to Obrenović and Deronjić, President of the Bratunac SDS.[2561] Whether lower ranking soldiers, even direct participants in the implementation of the plan to murder, were informed about their roles is immaterial provided that they were under the command of and/or were used by a person who possessed such knowledge. The Appeals Chamber notes in this respect that Obrenović assigned a platoon of military police to **Nikolić** with full knowledge that the soldiers would be used to assist in the murder operation.[2562] **Popović**'s argument is thus dismissed.

e. Whether the evidence belies the existence of a plan before 14 July 1995

886. **Popović** argues that a substantial body of evidence belies the existence of a plan before the Orahovac killings began on 14 July 1995.[2563] He submits that if the plan to murder indeed existed: (1) prisoners detained on 12 July 1995 would have been killed on 13 July 1995;[2564] (2) prisoners who arrived at the Grbavci School on 13 July 1995 would have been killed the same night or the following morning;[2565] (3) Prosecution Witness Milomir Savčić, Commander of the 65th Protection Regiment, would have known about the plan and would not have issued an order on 13 July 1995 to treat all prisoners according to the rules, to make a list of prisoners, and to request food and medical

2557 Trial Judgement, para. 147.
2558 Popović's Appeal Brief, para. 191.
2559 Popović's Appeal Brief, para. 192.
2560 Prosecution's Response Brief (Popović), para. 95.
2561 See Trial Judgement, paras 470, 1060, 1345, 1354.
2562 See Trial Judgement, paras 471, 1345. See also Trial Judgement, para. 1063.
2563 Popović's Appeal Brief, paras 193-194. See Popović's Appeal Brief, para. 34; Popović's Reply Brief, paras 54-58; Appeal Hearing, AT. 75 (2 Dec 2013).
2564 Popović's Appeal Brief, para. 186.
2565 Popović's Appeal Brief, para. 193.

assistance;[2566] and (4) the measures taken on 14 July 1995 with respect to the busing of the prisoners to Zvornik (preventing them from watching the direction of travel and obstructing their view upon arrival) would have been unnecessary, as the prisoners would not have survived long enough to inform others.[2567]

887. Similarly, **Popović** asserts that evidence of the screening for war criminals shows that no plan existed on 13 July 1995.[2568] To support his assertion **Popović** refers to the evidence of Witness Čelanović, a Desk Officer for Legal, Religious, and Moral Affairs in the Bratunac Brigade,[2569] who testified that in either the night of 12 July 1995 or the morning of 13 July 1995, **Beara** instructed him to: (1) check the IDs of those taken into custody to see whether they were on a list of war criminals; and (2) inform the security organs of those identified.[2570] **Popović** also refers to the 6:29 p.m. Intercept.[2571]

888. **Popović** further supports his contention that no plan existed on 13 July 1995 by referring to a communication Tolimir, Assistant Commander for Intelligence and Security in the VRS Main Staff,[2572] sent at 10:30 p.m. on 13 July 1995, informing Gvero that 800 prisoners could be accommodated in Sjemeč.[2573] **Popović** also refers to the 11:25 a.m. Intercept which he claims the Trial Chamber misconstrued.[2574] He avers that the fact that **Beara** informed his interlocutor about sending vehicles to Nova Kasaba to transport prisoners to Batković, clearly shows that a plan to kill did not exist at that time.[2575] **Popović** asserts that this interpretation of the 11:25 a.m. Intercept is corroborated by Defence Witness Ljubomir Mitrović's testimony that on 13 July 1995, preparations were being made to accommodate 1,300 prisoners in Batković.[2576]

889. The Prosecution responds that **Popović**'s claim that the plan to murder could not have existed until the Orahovac killings started on 14 July 1995 is unsustainable, and that he failed to show that the Trial Chamber's conclusions in this respect were unreasonable.[2577]

890. The Appeals Chamber finds **Popović**'s argument that the plan to murder could not have existed either on 13 or 14 July 1995 since the Bosnian Muslim men were not killed immediately

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2566 Popović's Appeal Brief, para. 200.
2567 Popović's Appeal Brief, para. 202.
2568 Popović's Appeal Brief, para. 56. See Popović's Appeal Brief, paras 65-68, 70.
2569 Trial Judgement, para. 391.
2570 Popović's Appeal Brief, para. 198.
2571 Popović's Appeal Brief, para. 201, referring to, *inter alia*, Ex. P01144a, "Intercept, 13 July 1995, 6:29 p.m", Richard Butler, T. 20123-20124 (22 Jan 2008).
2572 Trial Judgement, para. 105.
2573 Popović's Appeal Brief, para. 199.
2574 Popović's Appeal Brief, para. 195.
2575 Popović's Appeal Brief, paras 194-195; Popović's Reply Brief, para. 59. See Popović's Appeal Brief, para. 197. See also *supra*, para. 866.
2576 Popović's Appeal Brief, para. 196. See Popović's Appeal Brief, para. 197.
2577 Prosecution's Response Brief (Popović), paras 101-103.

after their capture but remained in detention to be speculative and incapable of showing that a reasonable trier of fact could not have reached the Trial Chamber's findings in this respect.

891. With respect to the evidence of individuals who were guarding prisoners, including Savčić[2578] and lower ranking soldiers, who testified that their personal conviction or direct orders were to guard and protect the detained Bosnian Muslim men,[2579] the Appeals Chamber finds that whether they were informed about their roles is immaterial provided that they were under the command of and/or were used by a person who possessed such knowledge. Similar considerations apply to **Popović**'s speculative argument, based on the fact that the prisoners in the buses heading towards Zvornik on 14 July 1995 were prevented from watching the direction of travel and had their view obstructed upon arrival. Even assuming, *arguendo*, that the guards in the buses were not informed as to the fate awaiting the prisoners, this fact does not negate the existence of the plan to murder if they were used by a person who possessed such knowledge. The Appeals Chamber thus considers that **Popović**'s arguments are not capable of showing that the Trial Chamber erred in concluding that the plan to murder existed prior to 14 July 1995.

892. Turning to **Popović**'s argument that evidence of the screening for war criminals shows that the plan to murder did not exist until 14 July 1995, the Appeals Chamber first recalls that it has already dismissed several of **Popović**'s similar arguments.[2580] The Appeals Chamber emphasises that the Trial Chamber considered the screening efforts and found that they were "not capable of raising a reasonable doubt as to the existence of a plan to kill Bosnian Muslim males from Srebrenica".[2581]

893. With respect to **Beara**'s conversation with Čelanović in the night of 12 July 1995 or the morning of 13 July 1995, the Appeals Chamber notes: (1) the 11:25 a.m. Intercept in which **Beara** conveyed intentionally misleading information suggesting that the prisoners would be sent to a detention camp;[2582] and (2) the conversation between Čelanović and **Beara** in the evening of 13 July 1995 in which the literal interpretation of **Beara**'s suggestion that prisoners would be sent to a detention camp was implicitly rejected by the Trial Chamber and considered to fall within this same pattern of lies.[2583] The Appeals Chamber observes that, although the Trial Chamber noted the subject matter of this conversation between **Beara** and Čelanović in the night of 12 July 1995 or the morning of 13 July 1995, it did not regard it as an obstacle to reaching its conclusion on **Beara**'s

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2578 See Milomir Savčić, T. 15249-15250 (12 Sept 2007).

2579 See, *e.g.*, Dragoje Ivanović, T. 14560-14561 (30 Aug 2007); PW-143, T. 6547-6548 (private session) (30 Jan 2007); PW-142, T. 6451 (29 Jan 2007). See also Stanoje Birčaković, T. 10764-10765 (1 May 2007).

2580 See *supra*, para. 835.

2581 Trial Judgement, fn. 3453. See *supra*, para. 825.

2582 Trial Judgement, para. 1259. See *supra*, para. 866. See also *infra*, para. 896. The 11:25 a.m. Intercept is analysed in more detail below.

2583 See *infra*, para. 987.

*mens rea*.[2584] The Appeals Chamber is thus persuaded that the Trial Chamber interpreted **Beara**'s reference to the prisoners in the conversation between 12 and 13 July 1995 as deliberately misleading. The Appeals Chamber considers that **Beara** has failed to demonstrate that the Trial Chamber erred in this regard.

894. With respect to the 6:29 p.m. Intercept,[2585] the Appeals Chamber observes that, even if the unidentified person who asked Živanović for a list of war criminals was a high ranking VRS officer, **Popović** has not identified any evidence from which one could reasonably infer that this particular officer knew of the murder operation. Considering this, the extensive body of evidence showing that the plan to murder existed at that time, and the broad discretion afforded to the Trial Chamber's factual findings, the Appeals Chamber dismisses **Popović**'s arguments regarding the 6:29 p.m. Intercept.

895. Regarding Tolimir's communication in the evening of 13 July 1995, personally informing Gvero that if all the prisoners in the Srebrenica area could not be adequately accommodated, space for 800 prisoners had been arranged in Sjemeč where they could be used for agricultural work,[2586] the Appeals Chamber finds that even if Tolimir was genuine in his communication, **Popović** has failed to demonstrate that when this evidence is considered alongside the abundance of evidence supporting the existence of the plan to murder at that time,[2587] no reasonable trier of fact could have reached the Trial Chamber's conclusion.

896. With regard to **Popović**'s challenge to the Trial Chamber's evaluation of the 11:25 a.m. Intercept, the Appeals Chamber considers that the Trial Chamber provided ample reasoning for its conclusion that **Beara** was deliberately attempting to convey misleading information.[2588] It examined the distinctive features of the 11:25 a.m. Intercept which rendered its evidentiary value ambiguous, noting, *inter alia*, that it was in summary form and therefore did not provide the actual content of the conversation and that the other participant in the conversation was not identified.[2589] The Trial Chamber also referred to the 10:09 a.m. Intercept, in which **Beara** is reported to have shown disregard for the prisoners even when told that they were killing themselves.[2590] Further, although the Trial Chamber acknowledged that there was some evidence of preparations being made for the arrival of prisoners in Batković, it nevertheless stressed that these preparations were futile. Notably, the prisoners in question never reached Batković and were

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2584 See Trial Judgement, para. 1299, referring to, *inter alia*, Trial Judgement, para. 1256.
2585 See *supra*, para. 866.
2586 Trial Judgement, para. 466.
2587 See, *e.g.*, *supra*, paras 822, 841, 851-853, 855-856.
2588 See *supra*, para. 866. See also *infra*, paras 979, 986-987.
2589 Trial Judgement, para. 1259.
2590 Trial Judgement, para. 1257. See *supra*, para. 866. See also *infra*, para. 979.

instead detained in various locations and executed.[2591] Finally, it placed the 11:25 a.m. Intercept in the context of the secret nature of the killing operation and **Beara**'s knowledge of the vulnerability of phone conversations to interception.[2592] The Appeals Chamber finds that **Popović** merely disagrees with the Trial Chamber's evaluation of this evidence without demonstrating any error. His challenge in this respect is therefore dismissed.

897. Regarding the fact that on 13 July 1995, Milenko Todorović, Chief of Security of the East Bosnia Corps, informed Mitrović of the Commission for Exchange of Prisoners and Bodies of the East Bosnia Corps, that preparations were being carried out in Batković for the arrival of 1,300 Bosnian Muslim soldiers, the Appeals Chamber notes that the Trial Chamber specifically considered this evidence.[2593] It finds that, given the wealth of evidence supporting the Trial Chamber's finding,[2594] **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that the plan to murder existed at that time.

898. Based on the foregoing, **Popović**'s argument is dismissed.

f. Whether the 13 July 1995 killings corroborate the plan's existence and expansion

899. **Popović** submits that the Trial Chamber erred when it relied on the 13 July 1995 killings to corroborate the existence of the plan to murder and its expansion to the captured men from the column.[2595] In this regard, he submits that there is no reliable evidence that: (1) the Jadar River and Rašića Gaj killings ever took place;[2596] (2) the Cerska Valley killings occurred on 13 July 1995;[2597] and (3) the Sandići Meadow and Kravica Warehouse killings were part of the plan to murder.[2598] The Appeals Chamber will analyse each of these killings in turn.

i. The Jadar River killings

900. **Popović** submits that there was no reliable evidence that the Jadar River killings ever took place.[2599] First, he argues that PW-112, the only witness to the event, often wavered regarding his membership and role in the ABiH, and was pressured by the ABiH to falsely state that he survived the execution in Karakaj, a location which would make his story more believable.[2600] **Popović**

2591 Trial Judgement, para. 1259.
2592 Trial Judgement, para. 1259.
2593 See Trial Judgement, para. 590 & fn. 2148.
2594 See, *e.g.*, *supra*, paras 822, 841, 851-853, 855-856.
2595 Popović's Appeal Brief, para. 203. See Appeal Hearing, AT. 75 (2 Dec 2013).
2596 Popović's Appeal Brief, paras 203-207.
2597 Popović's Appeal Brief, paras 203, 208-210.
2598 Popović's Appeal Brief, paras 211-214.
2599 Popović's Appeal Brief, para. 204; Popović's Reply Brief, para. 62.
2600 Popović's Appeal Brief, para. 204.

asserts that PW-112's account is unrealistic as it was not possible for the heavily-bleeding witness to cross 100 kilometres on foot within two days.[2601] Second, **Popović** argues that, even if the Jadar River killings took place, PW-112's testimony disproves that they were carried out as part of the common purpose of the JCE to Murder, as more than 16 of the many prisoners in the custody of the BSF would have been shot.[2602] Finally, **Popović** emphasises that, despite a thorough search, no physical evidence of the killings was found at the Jadar River bank.[2603]

901. The Prosecution responds that the Trial Chamber reasonably relied on PW-112's evidence.[2604] Further, the Prosecution submits that the fact that PW-112 only testified about the 16 executions he actually witnessed does not mean that those were the only killings perpetrated.[2605] Finally, it argues that there is no requirement that PW-112's testimony be corroborated.[2606]

902. The Appeals Chamber notes that PW-112 was subjected to extensive cross-examination, which included questions about his alleged membership in the ABiH and the alleged pressure put on him to give a false statement.[2607] Having had the benefit of hearing the witness's testimony on these matters, the Trial Chamber decided to rely on his account. **Popović** clearly disagrees with the Trial Chamber's evaluation of PW-112's credibility; however, he has failed to show how the Trial Chamber erred. With respect to **Popović**'s assertion that the distance of travel between the execution site and Tuzla undermines the credibility of PW-112's account, the Appeals Chamber finds that **Popović** has failed to substantiate his claim as to the incredibility of PW-112 reaching Gradina Clinical Centre in Tuzla on 16 July 1995,[2608] even if walking and wounded.[2609] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have relied on PW-112's testimony.

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2601 Popović's Appeal Brief, para. 204; Popović's Reply Brief, para. 62. See *infra*, note 2609.
2602 Popović's Appeal Brief, para. 205; Popović's Reply Brief, para. 63.
2603 Popović's Appeal Brief, para. 206; Popović's Reply Brief, para. 63.
2604 Prosecution's Response Brief (Popović), paras 109-110.
2605 Prosecution's Response Brief (Popović), para. 111.
2606 Prosecution's Response Brief (Popović), para. 111 & fn. 462.
2607 See PW-112, T. 3225-3226, 3236-3237, 3239-3240 (private session), 3242-3247 (partly private session), 3255 (private session), 3262 (30 Oct 2006).
2608 The Appeals Chamber notes that the Trial Judgement mentioned the Gradina Clinical Centre in Zvornik. See Trial Judgement, para. 408. PW-112's testimony is, however, that the hospital to which he was admitted was in Tuzla. See PW-112, T. 3238-3239 (private session), 3244-3245 (30 Oct 2006). Similarly, the Trial Judgement found that PW-112 was admitted to the hospital on 15 July 1995. See Trial Judgement, para. 408. The Appeals Chamber notes that the references cited by the Trial Chamber do not support this finding, and that PW-112's testimony clearly shows he reached the hospital in Tuzla on 16 July 1995. See PW-112, T. 3280 (30 Oct 2006).
2609 See PW-112, T. 3277-3281, 3290-3291 (30 Oct 2006); Ex. P01470, "Map"; Ex. 7DP02109, "Map of the Drina Corps Area of Responsibility"; Ex. 7D00064, "Map of Zvornik". The Appeals Chamber notes that according to PW-112 the execution took place on the bank of Jadar River above Konjević Polje on 13 July 1995 around noon. See PW-112, T. 3278 (30 Oct 2006); Ex. P01470, "Map". On 14 July 1995, he met up with the column of Bosnian Muslims near the Drinjaca River, PW-112, T. 3277-3279 (30 Oct 2006). The straight line distance between Drinjaca River and the ABiH held territory is no more than 25 kilometres. Tuzla is 20-25 kilometres further. Given that PW-112 reached the Tuzla hospital on 16 July 1995 and being aware that the column did not always travel in a straight line, the Appeals Chamber nevertheless considers that **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that PW-112's account was credible.

903. The Appeals Chamber considers that the fact that PW-112 did not testify as to murders of other prisoners, does not necessarily mean that they never took place. Indeed, the Trial Chamber found that around the same time as the Jadar River killings, the BSF also killed Bosnian Muslim men in their custody in several nearby locations, including Bratunac,[2610] Potočari,[2611] Cerska Valley,[2612] Sandići Meadow,[2613] Rašića Gaj,[2614] and Kravica.[2615]

904. Finally, as to **Popović**'s submission that no trace of the Jadar River killings was found, the Appeals Chamber recalls that nothing prohibits a trial chamber from relying on credible witness testimony uncorroborated by physical evidence.[2616] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that, based on PW-112's evidence, no reasonable trier of fact could have found that Jadar River killings took place. **Popović**'s challenges with regard to the Jadar River killings are thus dismissed.

ii. The Rašića Gaj killings

905. **Popović** submits that the Trial Chamber erred in finding that the purported Rašića Gaj killings were part of the common purpose when, based on the evidence, a reasonable alternative conclusion was that they never took place.[2617] He argues that the testimony of Prosecution Witness PW-118 is not corroborated and that no trace of the executions in the form of physical evidence has ever been found. With respect to the two people whom PW-118 named as individuals allegedly killed at Rašića Gaj, **Popović** asserts that, although the Trial Chamber concluded that they were not identified, it failed to note that "they are not on the Srebrenica Missing List".[2618] **Popović** thus posits that they either survived or never existed.[2619]

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2610 Trial Judgement, paras 450-457, 460-463, 794 (finding that killings were perpetrated by BSF near the Vuk Karadžić school between 12 and 15 July 1995 and the Bratunac Brigade Headquarters sometime on or after 13 July 1995).

2611 Trial Judgement, paras 354-361, 794 (finding that killings were perpetrated on 13 July 1995 by the BSF near the Dutchbat compound and the White House).

2612 Trial Judgement, paras 414, 794.

2613 Trial Judgement, paras 421-423, 794.

2614 Trial Judgement, paras 351-353, 794.

2615 Trial Judgement, paras 424-449, 794 (finding that killings were perpetrated between 13 and 14 July 1995 by the BSF at the Kravica Warehouse and near the Kravica Supermarket).

2616 See *Nizeyimana* Appeal Judgement, para. 135; *Bizimungu* Appeal Judgement, para. 241; *Đorđević* Appeal Judgement, fn. 2505; *Šainović et al.* Appeal Judgement, para. 1114; *Gatete* Appeal Judgement, para. 138.

2617 Popović's Reply Brief, para. 64. See Popović's Appeal Brief, para. 207.

2618 Popović's Appeal Brief, para. 207; Popović's Reply Brief, para. 64, referring to Ex. P03159a (confidential). *Cf.* Popović's Appeal Brief, para. 161.

2619 Popović's Appeal Brief, para. 207.

906. The Prosecution responds that the Trial Chamber did not require physical evidence from a gravesite to corroborate PW-118's account, and that it was aware that the remains of the two persons identified by PW-118 had not yet been located.[2620]

907. The Trial Chamber was well aware that the evidence regarding the identity of two individuals identified by PW-118 as victims is not supported by documentary evidence, specifically noting that their names do not appear on the 2009 ICMP List of Deceased. Nevertheless, it decided to rely on PW-118's account to establish that approximately 22 Bosnian Muslim men were killed at Rašića Gaj.[2621] **Popović** fails to demonstrate how the fact that the two names given by PW-118 were not on a list of people reported missing would render the Trial Chamber's assessment of PW-118's credibility erroneous. Further, even if no physical trace of the Rašića Gaj killings was found, the Appeals Chamber reiterates that nothing prohibits a trial chamber from relying on credible uncorroborated witness testimony.[2622] The Appeals Chamber thus finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have relied on PW-118's testimony to establish that the Rašića Gaj killings took place.

iii. The Cerska Valley killings

908. At the outset, the Appeals Chamber recalls that it has dismissed **Popović**'s argument that the Trial Chamber improperly relied on PW-120's Rule 92 *bis* evidence in its findings regarding the Cerska Valley killings.[2623] It also recalls that it has dismissed **Beara**'s similar challenge to the finding that on 13 July 1995, members of the BSF killed approximately 150 Bosnian Muslim men in the Cerska Valley.[2624]

909. As his alternative submission, **Popović** asserts that PW-120's recollection of the date of the execution was questionable, emphasising that the *Krstić* Trial Judgement, based on the exact same evidence, stated that the timing of this execution was imprecise in his testimony.[2625] The Prosecution disputes this contention.[2626]

910. The *Krstić* Trial Judgement, which reads in relevant part that "[PW-120's] testimony as to the fact (if not the precise timing) of the execution at Cerska Valley is corroborated by physical evidence"[2627] does not call into question the precision of the witness's testimony. To the contrary, the *Krstić* Trial Chamber simply acknowledged that the aerial photos – the physical evidence said

2620 Prosecution's Response Brief (Popović), para. 113.
2621 Trial Judgement, fn. 1199.
2622 See *supra*, note 2616.
2623 See *supra*, para. 110.
2624 See *supra*, para. 301.
2625 Popović's Appeal Brief, paras 208, 210.
2626 Prosecution's Response Brief (Popović), para. 117.

to corroborate this testimony – do not permit a more precise determination of when the execution occurred.[2628] The physical evidence, not the testimony, was the impediment to a more precise conclusion with respect to the time. The Appeals Chamber therefore considers **Popović**'s argument to be devoid of merit.

iv. The Sandići Meadow and Kravica Warehouse killings

911. **Popović** submits that the Trial Chamber made unreasonable inferences based on the Sandići Meadow and Kravica Warehouse killings, which he asserts were not part of the plan to murder.[2629]

912. With respect to the Sandići Meadow killings, **Popović** challenges the Trial Chamber's conclusion that once the vehicles used to transport the Bosnian Muslim prisoners from the Sandići Meadow to the Kravica Warehouse ran out, the BSF killed the rest of the prisoners at the meadow.[2630] He submits that the Trial Chamber, relying on the deaths of those ten Bosnian Muslim men, unreasonably inferred that by then all the prisoners were destined for execution. In this regard, he points to evidence showing that the majority of the prisoners travelled on foot from the Sandići Meadow to the Kravica Warehouse. **Popović** argues that these facts signify that, of all the Bosnian Muslim prisoners from the Sandići Meadow, only ten were retained there and selected to be killed due to some specific reasons not established during trial. He concludes that, though illegal, the Sandići Meadow killings do not prove the existence of a plan to kill all Bosnian Muslim men, positing that if such a plan did exist, more than ten of the thousands of prisoners would have been retained and killed.[2631]

913. With respect to the Kravica Warehouse killings, **Popović** submits that the Trial Chamber erroneously inferred that they were part of the common plan to murder able-bodied males from Srebrenica.[2632] He argues that this is not the only reasonable conclusion, as substantial evidence indicates that even after the Kravica Warehouse killings took place, the plan to execute all the Bosnian Muslim prisoners did not exist.[2633] **Popović** asserts that but for the "burnt-hands" incident, in which one Bosnian Muslim prisoner seized a weapon and killed a guard,[2634] the Kravica Warehouse killings would not have happened. **Popović** asserts that the fact that the equipment used

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2627 *Krstić* Trial Judgement, para. 202.
2628 *Krstić* Trial Judgement, para. 202.
2629 Popović's Appeal Brief, paras 211, 213. See also Popović's Reply Brief, para. 54.
2630 Popović's Appeal Brief, para. 213.
2631 Popović's Appeal Brief, para. 213; Popović's Reply Brief, para. 67.
2632 Popović's Appeal Brief, para. 211.
2633 Popović's Appeal Brief, paras 211-212.
2634 See *supra*, para. 798.

to bury the victims was not secured until after the Kravica Warehouse killings proves that they were not planned in advance.[2635]

914. Finally, **Popović** challenges the Trial Chamber's calculation of the number of prisoners detained at the Sandići Meadow, Nova Kasaba, and a third undetermined place.[2636] He submits that the Trial Chamber erred in concluding that 6,000 Bosnian Muslim prisoners were detained by 5:30 p.m. on 13 July 1995 and in basing this conclusion on an intercepted communication whose interlocutors were unknown, thereby raising questions about the authenticity of the relayed information. He argues that, although the intercept refers to 1,500 to 2,000 prisoners detained at each of the three locations, the Trial Chamber unreasonably rounded this number up when reaching the final total.[2637]

915. The Prosecution responds that the Trial Chamber reasonably found that the Sandići Meadow and the Kravica Warehouse killings were part of the JCE to Murder and that the evidence **Popović** refers to does not undermine this finding.[2638] It submits that nothing supports **Popović**'s claim that the Trial Chamber made inconsistent findings that the prisoners at the Sandići Meadow were shot when the buses ran out, and that prisoners also marched from there on foot.[2639] Finally, the Prosecution submits that the Trial Chamber acted within its discretion in finding that around 6,000 prisoners were detained on 13 July 1995. In any event, it argues that **Popović** has failed to show any impact of the Trial Chamber's alleged error on the verdict.[2640]

916. The Trial Chamber acknowledged that the prisoners detained at the Sandići Meadow were taken on 13 July 1995 to the Kravica Warehouse both on foot and by bus.[2641] Those prisoners who were ordered to form a column and march to the Kravica Warehouse arrived between 3:00 and 5:00 p.m.[2642] Other prisoners were taken by bus. PW-111, who reached the Kravica Warehouse by bus, was among the first to arrive.[2643] According to Prosecution Witness PW-100, buses were taking prisoners to the Kravica Warehouse until the late afternoon or early evening when only ten to 15 prisoners were left at the Sandići Meadow.[2644] Only then, when the guards were told that no more buses would arrive, were the remaining prisoners shot on site.[2645] The Appeals Chamber considers that **Popović** has failed to show that no reasonable trier of fact could have interpreted the

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2635 Popović's Reply Brief, para. 56.
2636 Popović's Appeal Brief, para. 214.
2637 Popović's Appeal Brief, para. 214; Popović's Reply Brief, para. 68.
2638 Prosecution's Response Brief (Popović), paras 120-121.
2639 Prosecution's Response Brief (Popović), para. 122.
2640 Prosecution's Response Brief (Popović), para. 123.
2641 Trial Judgement, para. 426.
2642 Trial Judgement, para. 426. See also Trial Judgement, paras 424-425.
2643 Trial Judgement, para. 427.
2644 PW-100, T. 14830 (5 Sept 2007). See Trial Judgement, para. 421 & fn. 1498.
2645 Trial Judgement, para. 421.

circumstances of the killing of the last ten to 15 prisoners, including the unavailability of a convenient way of transporting them and the fact that the full-scale execution of prisoners in the Kravica Warehouse was about to start,[2646] as showing that the murder operation was already in motion.[2647] **Popović**'s argument is thus dismissed.

917. Regarding the evidence that, in **Popović**'s submission, indicates that even after the Kravica Warehouse killings, the decision to execute the Bosnian Muslim prisoners did not exist, the Appeals Chamber recalls that it already dismissed his claims in this regard and finds that no new argument is made in the present challenge.[2648]

918. With respect to **Popović**'s assertion that the executions would not have happened but for the "burnt-hands" incident, the Appeals Chamber notes that the Trial Chamber's findings in this regard only show that the full-scale execution followed the "burnt-hands" incident.[2649] Moreover, the executions were carried out over a long period of time with members of the BSF periodically entering the Kravica Warehouse, shooting, and throwing hand grenades through the windows throughout the night between 13 and 14 July 1995.[2650] This methodical killing, coupled with the fact that at least 1,000 people were killed,[2651] is at odds with **Popović**'s characterisation of the killing as incidental to the intended quelling of an act of resistance. Even if the "burnt-hands" incident triggered the mass execution in the Kravica Warehouse, its scale and duration support the Trial Chamber's finding that the fate of the prisoners had already been decided and their executions were merely moved forward.[2652] For the same reason, the Appeals Chamber is not persuaded that the fact that burial equipment was only mobilised after the Kravica Warehouse killings shows that the Trial Chamber erred in finding that the killings were part of the common plan to murder.[2653] **Popović**'s argument is thus dismissed.

919. Finally, with regard to **Popović**'s challenge to the number of prisoners detained in the Bratunac area on 13 July 1995, the Appeals Chamber first observes that the Trial Chamber's conclusion that "approximately 6,000 Bosnian Muslim prisoners were detained" is accompanied by a footnote to the intercepted communication that referred to 1,500 to 2,000 men at each of three

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2646 See *infra*, para. 918.
2647 See Trial Judgement, para. 1059.
2648 See *supra*, paras 894-895. The Appeals Chamber notes that "Ex. 1D01436", the third piece of evidence **Popović** cites to support his submission (see Popović's Appeal Brief, fn. 290), is not included in the trial record.
2649 See Trial Judgement, paras 444, 1527, 1533.
2650 See Trial Judgement, paras 428-430, 435-436, 1533.
2651 Trial Judgement, para. 443.
2652 See Trial Judgement, para. 445.
2653 Trial Judgement, para. 438.

locations.[2654] **Popović**'s challenge to this intercept's credibility is limited to pointing out that the interlocutors are unknown. This, in the Appeals Chamber's view, does not, as such, demonstrate that the information contained therein is devoid of authenticity. Second, even assuming that the expression "approximately" does not sufficiently cover the possible range of 4,500-6,000 of prisoners that can be deduced from this piece of evidence, the Appeals Chamber finds that **Popović** has failed to demonstrate any impact this potential inaccuracy could have on his conviction or sentence. **Popović**'s argument in this respect is thus dismissed.

920. The Appeals Chamber thus finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that the Sandići Meadow and Kravica Warehouse killings were part of the plan to murder.

g. Conclusion

921. Based on the foregoing, the Appeals Chamber finds that **Popović** has failed to show that the Trial Chamber erred regarding the expansion and implementation of the plan to murder and dismisses his argument accordingly.

(ii) Beara's appeal (Ground 6 in part)

a. Alleged error in finding that all detained men were targeted for execution

922. **Beara** submits that the Trial Chamber erred in finding that all detained men were targeted for execution. He argues that there were legitimate military reasons to detain the Bosnian Muslim men from the column who were trying to break from the encirclement. He asserts in this respect that the Trial Chamber completely disregarded evidence that the retreating column was a military threat to Zvornik town and that it did not take into account the military effort to capture enemy prisoners.[2655]

923. The Prosecution responds that the Trial Chamber did not disregard evidence that some actions against the column might have been justified militarily, noting that this was not even disputed. It argues that it was nevertheless reasonable for the Trial Chamber to conclude that the execution of all captured Bosnian Muslim men was the ultimate aim.[2656]

924. The Appeals Chamber considers that ascertaining whether there were legitimate military reasons to capture and detain the Bosnian Muslim men in the column may have been relevant, had

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[2654] Trial Judgement, para. 383 & fn. 1296. See Popović's Appeal Brief, para. 214. Although **Popović** refers to paragraph 323, the Appeals Chamber finds this to be a typographical error and will proceed with the understanding that he meant to refer to paragraph 383 of the Trial Judgement.

[2655] Beara's Appeal Brief, para. 63.

the vigorous pursuit of the column by the BSF been the sole basis for the Trial Chamber's finding that all the Bosnian Muslim men detained in the Bratunac area on 13 July 1995 were targeted for execution. This, however, is not the case. The Trial Chamber found that by 13 July 1995, thousands of Bosnian Muslim men, including those separated in Potočari and a large number from the column who had surrendered to or been captured by the BSF, were detained in the Bratunac area.[2657] The Trial Chamber found that the detention conditions in the Bratunac area were similar to those in Potočari, which it had previously found to be evidence that a plan to kill was in progress.[2658] In concluding that the detention conditions were further evidence that all the Bosnian Muslim men detained in the Bratunac area were targeted for execution,[2659] the Trial Chamber detailed the conditions in four locations: (1) prisoners at the Sandići Meadow were told to drop their belongings in a pile and hand over their money; (2) prisoners at Konjević Polje were searched and their belongings were taken from them; (3) prisoners at the Nova Kasaba Football Field were not given any food or water and had to throw their belongings in a large pile which was set alight after they were transported away, having been told as they began boarding buses that they would no longer need their belongings; and (4) prisoners at the Vuk Karadžić School were neither asked their names nor interviewed, but were told to leave their bags, including food, outside.[2660] Based on the foregoing, the Appeals Chamber finds that **Beara** has failed to demonstrate that a reasonable trier of fact could not have concluded that all Bosnian Muslim men detained in the Bratunac area on 13 July 1995 were targeted for execution.

925. With respect to **Beara**'s argument that the Trial Chamber disregarded evidence, the Appeals Chamber reiterates that unless there is an indication that the Trial Chamber completely disregarded a particular piece of evidence, it is presumed that the Trial Chamber evaluated all the evidence before it. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[2661] For the reasons set out above, the Appeals Chamber considers that **Beara** has failed to demonstrate that the Trial Chamber erred as the evidence showing whether there were legitimate military reasons to capture and detain the Bosnian Muslim men was not clearly relevant to determining whether all the Bosnian Muslim men detained in the Bratunac area on 13 July 1995 were targeted for execution.

926. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

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2656 Prosecution's Response Brief (Beara), para. 81.
2657 Trial Judgement, para. 1056.
2658 Trial Judgement, paras 1053, 1056. See also *supra*, para. 862.
2659 Trial Judgement, para. 1056.
2660 Trial Judgement, para. 1056 & fn. 3462.
2661 *Đorđević* Appeal Judgement, fn. 2527; *Šainović et al.* Appeal Judgement, fns 3289, 4205; *Kvočka et al.* Appeal Judgement, para. 23.

b. Whether the Trial Chamber erred in its interpretation of the 13 July Order

927. **Beara** submits that the Trial Chamber's conclusion – that the reference to "combat" in Mladić's 13 July Order was simply an attempt to disguise the true nature of an imminent killing operation – is an erroneous inference that is not based on any evidence.[2662] He further submits that the Trial Chamber erred in going beyond the plain meaning of the words used in the 13 July Order and by failing to recognise other inferences which could be drawn from the evidence, such as the existence of legitimate military reasons. He asserts that these errors resulted in a miscarriage of justice.[2663] The Prosecution responds that **Beara**'s attempt to substitute his evaluation of the evidence for that of the Trial Chamber should be summarily dismissed.[2664]

928. The Appeals Chamber observes that although **Beara** asserts that the Trial Chamber's error in finding that the repeated references to "combat" conditions in the 13 July Order were nothing more than a frail attempt to disguise the true nature of the imminent operation[2665] resulted in a miscarriage of justice, he does not substantiate this argument. Further, the Appeals Chamber recalls its earlier finding concerning **Popović**'s challenges to the Trial Chamber's reliance on the 13 July Order as evidence of the plan to murder.[2666] Accordingly, even if the Trial Chamber overreached in concluding that the singular purpose of the 13 July Order was to set out conditions of secrecy necessary to carry out the plan to murder (since the order may have *also* served to ensure successful combat operations),[2667] **Beara** has not demonstrated that the Trial Chamber's assessment of the 13 July Order resulted in a miscarriage of justice. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

c. Whether the Kravica Warehouse, Cerska Valley, and Jadar River killings were premeditated

929. **Beara** challenges the Trial Chamber's reliance on "the massiveness of the killings of 13 July to support a premeditated nature of the events".[2668] He submits that neither the Kravica Warehouse, Cerska Valley, and Jadar River killings, nor the time when they took place, support the Trial Chamber's conclusion about their premeditation.[2669] The Prosecution responds that **Beara**'s

2662 Beara's Appeal Brief, para. 64. See *supra*, para. 834, defining the 13 July Order.
2663 Beara's Appeal Brief, para. 65.
2664 Prosecution's Response Brief (Beara), para. 82.
2665 Trial Judgement, para. 1058. See *supra*, paras 834, 865.
2666 See *supra*, para. 873.
2667 See *supra*, para. 873.
2668 Beara's Appeal Brief, para. 66.
2669 Beara's Appeal Brief, para. 66.

arguments should be summarily dismissed as misrepresenting the Trial Judgement and failing to show that the Trial Chamber's interpretation was unreasonable.[2670]

930. The Trial Chamber found that the murder operation and efforts to ensure that it could be carried out covertly without any unwanted interference were premeditated.[2671] The Trial Chamber also found that the events at the Sandići Meadow, namely that when the buses to transport the men for execution ran out, an order came for the remaining men to be shot on site, illustrated that the destiny of the Bosnian Muslim men was predetermined.[2672] While it found that implementation of the plan to murder meant that the fate of these Bosnian Muslim men was predetermined, the Trial Chamber did not – contrary to **Beara**'s submissions – enter a finding that specific events such as the Kravica Warehouse, Cerska Valley, and Jadar River killings were premeditated. The Appeals Chamber notes that there was no need for the Trial Chamber to find that these killings were premeditated. Just as the common purpose may materialise without prior planning,[2673] so too may the crimes committed in furtherance of this common purpose, such as the Kravica Warehouse, Cerska Valley, and Jadar River killings. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

(iii) Nikolić's appeal (Ground 23)

931. **Nikolić** submits that the Trial Chamber erred by unreasonably inferring that the 14 July Meeting concerned the organisation and co-ordination of the murder operation, thereby rejecting the equally reasonable inference that it concerned the arrival of prisoners for exchange.[2674] In support, **Nikolić** argues that the Trial Chamber failed to consider the testimonies of Witnesses M. Birčaković, Perić, and Lazar Ristić that establish his belief that the prisoners were being brought to Zvornik to be exchanged.[2675] **Nikolić** also claims that the Trial Chamber erred in basing its finding on the 14 July Meeting's content on: (1) his facilitation of the transportation of prisoners to the Zvornik area, as this was consistent with his belief that the prisoners were to be exchanged;[2676] and (2) the Security Branch's role, as he was of insufficient importance for **Popović** and **Beara** to fully disclose to him the criminal plan.[2677] Lastly, **Nikolić** emphasises that this evidence must be

2670 Prosecution's Response Brief (Beara), para. 83.
2671 Trial Judgement, paras 1058, 1067 ("the mass executions following the fall of Srebrenica were planned and organised as part of a wide scale, premeditated killing operation").
2672 Trial Judgement, para. 1059.
2673 *Tadić* Appeal Judgement, para. 227.
2674 Nikolić's Appeal Brief, para. 373. See Nikolić's Reply Brief, para. 167. See also *supra*, para. 344, defining the 14 July Meeting.
2675 Nikolić's Appeal Brief, paras 375-378. See Appeal Hearing, AT. 305 (4 Dec 2013).
2676 Nikolić's Appeal Brief, paras 379-381.
2677 Nikolić's Appeal Brief, paras 382-383. See also Nikolić's Reply Brief, paras 168-169.

considered in light of the Trial Chamber's unreasonable and erroneous finding that in the night of 13 July 1995 he had knowledge of the murder operation.[2678]

932. The Prosecution responds that the Trial Chamber reasonably found that **Nikolić** knew of the planned murder operation on 13 July 1995 and from that moment worked closely with **Popović** and **Beara** to implement it.[2679] In particular, the Prosecution submits that **Nikolić** fails to show that the Trial Chamber unreasonably found that the 14 July Meeting concerned the murder operation.[2680]

933. In the absence of direct evidence of what was discussed at the 14 July Meeting, the Trial Chamber found, based on circumstantial evidence, that the meeting concerned the organisation and co-ordination of the murder operation.[2681] The Trial Chamber inferred this from: (1) the timing of the 14 July Meeting, particularly **Nikolić**'s conversations with **Popović** and Obrenović regarding the murder operation on the previous evening;[2682] (2) the prior and subsequent actions of the 14 July Meeting participants, notably the fact that after the meeting **Popović** and **Nikolić** immediately facilitated the transportation of prisoners from Bratunac to Zvornik, where the prisoners were killed;[2683] and (3) the authority of the participants, including **Nikolić**'s position as the Chief of Security in the Zvornik Brigade and the role of the Security Branch in the murder operation.[2684]

934. At the outset, the Appeals Chamber notes that **Nikolić**'s arguments supporting his assertion under this ground of appeal rely to a significant extent on his arguments that the Trial Chamber erred in finding that he had knowledge of the murder operation in the evening of 13 July 1995. As will be discussed below, these challenges do not succeed.[2685]

935. The Appeals Chamber considers that, while the Trial Chamber did not specifically discuss the evidence of Perić and Ristić regarding **Nikolić**'s purported belief about an exchange of prisoners,[2686] it does not necessarily follow that the Trial Chamber failed to consider their evidence.[2687] The Appeals Chamber finds that, in view of the Trial Chamber's finding that *all* the

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2678 Nikolić's Appeal Brief, para. 374; Nikolić's Reply Brief, para. 166.
2679 Prosecution's Response Brief (Nikolić), paras 130-132. See also Prosecution's Response Brief (Nikolić), paras 134-135, 171.
2680 Prosecution's Response Brief (Nikolić), paras 133, 172-173.
2681 Trial Judgement, para. 472.
2682 Trial Judgement, paras 470, 472 & fns 1716, paras 1104, 1345, 1356. See *infra*, para. 940.
2683 Trial Judgement, paras 472 & fn. 1716, paras 474, 1107-1108, 1358. See also Trial Judgement, paras 527, 1359-1362, 1364-1365.
2684 Trial Judgement, paras 472, 1068. See also Trial Judgement, paras 1069-1070.
2685 See *infra*, paras 1013, 1023.
2686 See Slavko Perić, T. 11375-11376 (11 May 2007); Lazar Ristić, T. 10088-10089 (16 Apr 2007). The Appeals Chamber notes that the Trial Chamber considered the evidence of M. Birčaković. Trial Judgement, fn. 4400, referring to Milorad Birčaković, T. 11120 (8 May 2007).
2687 See *supra*, para. 925.

participants of the meeting, including **Nikolić**, had been informed about the murder operation,[2688] the evidence based on communications with **Nikolić** on 14 July 1995 was not so clearly relevant to the Trial Chamber's finding that its absence from the Trial Judgement would show its disregard.

936. Based on the foregoing, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have concluded, as the only reasonable inference, that the 14 July Meeting concerned the organisation and co-ordination of the murder operation. **Nikolić**'s ground of appeal 23 is therefore dismissed.

### 2. Alleged errors pertaining to the *mens rea*

937. The Trial Chamber found that **Popović**, **Beara**, and **Nikolić** shared the intent to carry out the common purpose of the JCE to Murder.[2689] It found that **Popović** and **Beara** were aware of the plan to murder by the morning of 12 July 1995, whereas **Nikolić** became aware of it not later than in the evening of 13 July 1995.[2690] The Trial Chamber found that between the evening of 13 July 1995 and the morning of 14 July 1995, in order to organise the detention and execution of the thousands of prisoners who at the time were being held in Bratunac, a series of phone calls were made, messages were conveyed, and meetings took place.[2691]

938. The Trial Chamber's findings about two phone calls made between 7:00 and 8:00 p.m. on 13 July 1995 are of particular relevance. First, **Popović** called **Nikolić**, asking him to prepare for prisoners coming to Zvornik from Bratunac, and telling him that he and **Beara** would organise the operation and that the prisoners would be shot pursuant to Mladić's order ("Popović-Nikolić Conversation").[2692] Then, the Nikolić-Obrenović Conversation took place with **Nikolić** telling Obrenović that **Popović** had called and relaying the information from **Popović** about the travel of the prisoners from Bratunac and that on Mladić's order they were to be shot.[2693] **Nikolić** also said in the Nikolić-Obrenović Conversation that **Popović** would "send somebody to convey verbally information concerning this".[2694] **Nikolić**, who was then at the Kitovnice IKM, asked Obrenović to be relieved of his Kitovnice IKM duty and insisted that, in order to carry out the task requested of him, he "should be 'given' the Commander of the Zvornik Brigade's Military Police Miomir Jasikovac and at least a military police platoon".[2695] The Trial Chamber concluded that **Nikolić** was

2688 See Trial Judgement, paras 1104, 1271.
2689 Trial Judgement, paras 1168, 1302, 1392.
2690 Trial Judgement, paras 1166, 1299, 1389, 1393.
2691 Trial Judgement, paras 468, 470, 1104, 1271, 1345.
2692 Trial Judgement, paras 470, 1104, 1345.
2693 Trial Judgement, paras 470, 1104, 1345. See *supra*, para. 518, defining the Nikolić-Obrenović Conversation.
2694 Trial Judgement, para. 1345.
2695 Trial Judgement, para. 1345. See Trial Judgement, para. 470.

indeed released from duty at the Kitovnice IKM.[2696] The Trial Chamber relied primarily on PW-168's evidence to support these findings.[2697]

939. The Trial Chamber found that sometime after 8:00 p.m. on 13 July 1995, **Beara** arrived at the Bratunac SDS Offices and argued with Deronjić about whether the prisoners should be killed in Bratunac, before leaving angrily ("Beara-Deronjić Argument").[2698] To support this finding the Trial Chamber relied on, *inter alia*, the Borovčanin Interview[2699] and the evidence of Witnesses M. Nikolić and Deronjić.[2700]

940. The Trial Chamber found that around 8:30 p.m. on 13 July 1995, in the centre of Bratunac, **Beara** ordered M. Nikolić to go to Zvornik and tell **Nikolić** that thousands of Bosnian Muslims held in Bratunac would be sent to Zvornik to be detained and executed.[2701] M. Nikolić went to the Standard Barracks in Zvornik and from there was taken to the Kitovnice IKM where **Nikolić** was on duty.[2702] M. Nikolić conveyed the information to **Nikolić** who responded that he would relay **Beara**'s order to his command.[2703] ("M. Nikolić-Nikolić Conversation") The Trial Chamber relied primarily on Witness M. Nikolić's evidence to support these findings.[2704]

941. The Trial Chamber also found that **Beara** subsequently returned to the Bratunac SDS Offices where he continued to meet several individuals until the early morning hours of 14 July 1995 to organise the logistics of the murder operation, including identifying the locations for the killings and burials as well as arranging the transportation and equipment.[2705] This included a further argument with Deronjić about whether the prisoners should be killed in Bratunac.[2706] To support these findings the Trial Chamber relied on, *inter alia*, the evidence of Witnesses M. Nikolić, PW-161, and PW-170.[2707]

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2696 Trial Judgement, paras 1345, 1349.
2697 See Trial Judgement, paras 470, 1104, 1345. See also Trial Judgement, paras 1346-1347, 1349-1350 (finding that PW-168's evidence was corroborated by other evidence).
2698 Trial Judgement, para. 1270. *Cf.* Trial Judgement, paras 1264, 1266.
2699 See *supra*, para. 93, defining the Borovčanin Interview.
2700 Trial Judgement, paras 1264-1266, 1269-1271.
2701 Trial Judgement, paras 1266, 1354.
2702 Trial Judgement, para. 1354.
2703 Trial Judgement, paras 1266, 1354 & fn. 4393
2704 Trial Judgement, paras 468, 1266, 1269, 1354 & fn. 4393.
2705 Trial Judgement, para. 1271.
2706 Trial Judgement, paras 1266, 1270.
2707 See Trial Judgement, paras 468, 1266-1269, 1271.

(a) Popović's appeal

(i) Whether the Trial Chamber's finding on Popović's knowledge was based exclusively on PW-168's evidence

942. **Popović** disputes that he had knowledge about the scope of the plan and submits that the Trial Chamber's finding that he knew the plan had expanded to include the men captured from the column is "based exclusively on" PW-168's evidence about the Popović-Nikolić Conversation.[2708] **Popović** also submits that the Trial Chamber erred by basing its conclusions about the expansion of the plan to murder on the unreliable evidence provided by Deronjić, M. Nikolić, and PW-168.[2709]

943. The Prosecution submits that **Popović**'s challenges are unfounded and that removing the Popović-Nikolić Conversation and **Beara**'s dispute with Deronjić from the analysis would have no impact on his conviction or sentence.[2710]

944. The Trial Chamber found that **Popović** was aware of the plan to murder by the morning of 12 July 1995 and that as it expanded in scope and scale in the days that followed, he "helped establish a framework according to which the plan could be executed".[2711] In this regard, the Trial Chamber found that **Popović** "had knowledge of the operation along the Konjević Polje Road to capture and detain Bosnian Muslims, and that he went along that road at some time on 13 July".[2712] The Trial Chamber indicated that in making this finding it noted: (1) **Popović**'s discussion with M. Nikolić on 12 July 1995 concerning the plan to transfer the women and kill the men;[2713] (2) Dragomir Vasić's summary of the meeting he attended with **Popović**, Mladić, and Krstić in the morning of 13 July 1995;[2714] (3) the operation on the Konjević Polje-Bratunac Road involving M. Nikolić, Mirko Janković, Commander of the Bratunac Military Police Platoon,[2715] and Mile Petrović, a member of the military police;[2716] and (4) **Popović**'s own presence around Konjević Polje on 13 July 1995.[2717] The Appeals Chamber thus finds no merit in **Popović**'s submission that the Trial Chamber based its finding of his knowledge exclusively on PW-168's evidence about the Popović-Nikolić Conversation.[2718]

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2708 Popović's Appeal Brief, paras 238-239.
2709 Popović's Appeal Brief, para. 215.
2710 Prosecution's Response Brief (Popović), paras 124-125.
2711 Trial Judgement, para. 1166.
2712 Trial Judgement, para. 1102.
2713 Trial Judgement, fn. 3601. See also Trial Judgement, paras 280-288, 1097.
2714 Trial Judgement, paras 1100, 1102 & fn. 3601. See *infra*, para. 1056.
2715 Trial Judgement, para. 1101.
2716 Trial Judgement, fn. 3601. See also Trial Judgement, para. 1101, finding that Mile Petrović was a member of the military police and that M. Nikolić went with Janković and Petrović along the Konjević Polje-Bratunac Road in a DutchBat armoured personnel carrier.
2717 Trial Judgement, fn. 3601. See also Trial Judgement, para. 1102 & fn. 3600.
2718 See Popović's Appeal Brief, para. 239. See also Trial Judgement, paras 470, 1104, 1345.

945. Further, the Appeals Chamber observes that when entering its legal findings concerning **Popović**'s responsibility, the Trial Chamber recalled several factual findings, then concluded that "[b]ased on the abundant evidence before it, the Trial Chamber is satisfied beyond reasonable doubt that **Popović** made a significant contribution to the JCE to Murder and that he shared the intent to carry out the common purpose".[2719] The Appeals Chamber observes that the Trial Chamber relied on findings concerning the Popović-Nikolić Conversation to conclude that **Popović** enlisted VRS members to assist in the murder operation, including **Nikolić**, on 13 July 1995.[2720] The Appeals Chamber is of the view that the analysis of **Popović**'s role in this regard is more appropriately dealt with in the context of **Popović**'s contribution to the JCE to Murder and will analyse it there.[2721]

(ii) Alleged error in relying on the evidence of PW-168

946. **Popović** disputes the Trial Chamber's findings about the Popović-Nikolić Conversation and the Nikolić-Obrenović Conversation by advancing several arguments that attack the credibility of PW-168's testimony,[2722] upon which the Trial Chamber relied to support the impugned findings. **Popović** submits that PW-168 invented the Popović-Nikolić Conversation after having seen M. Nikolić's witness statement.[2723] **Popović** argues that PW-168 lied by implicating him in order to diminish Obrenović's ultimate responsibility.[2724] This, he argues, is the reason why PW-168 denied that Obrenović received any order related to the prisoners and instead testified that **Nikolić** only conveyed to Obrenović *information* that, on Mladić's order, **Popović** and **Beara** were bringing the prisoners to execute them.[2725] **Popović** asserts that PW-168 lied when testifying that, based on information received from **Nikolić**, Obrenović believed that no Zvornik Brigade resources would be needed since **Popović** and **Beara** would bring in troops for the task.[2726] **Popović** submits that only Obrenović, personally or through his subordinates, could authorise the use of Zvornik Brigade resources and ask the Ministry of Defence to mobilise civilian resources to secure the detention sites.[2727]

947. **Popović** also disputes PW-168's testimony concerning Obrenović's presence in the Standard Barracks on 14 July 1995 and submits that the Trial Chamber unreasonably concluded that Obrenović's presence there would not implicate him in the events that day.[2728] **Popović** submits that

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2719 Trial Judgement, para. 1168.
2720 Trial Judgement, para. 1166 & fn. 3785, referring to Trial Judgement, para. 1104.
2721 See *infra*, paras 1073-1198.
2722 Popović's Appeal Brief, paras 239-255. See *supra*, paras 141-142. See also Appeal Hearing, AT. 76-77 (private session) (2 Dec 2013)
2723 Popović's Appeal Brief, paras 223-225.
2724 Popović's Appeal Brief, paras 223-225, 233.
2725 Popović's Appeal Brief, paras 224, 231.
2726 Popović's Appeal Brief, para. 232.
2727 Popović's Appeal Brief, paras 232, 237.
2728 Popović's Appeal Brief, para. 244. See Popović's Appeal Brief, paras 245-246.

the Trial Chamber disregarded evidence establishing Obrenović's presence in the Zvornik Brigade's Command on 14 July 1995 because it came through Rule 92 *quater* statements and argues that the Trial Chamber's reasoning for doing so – namely that the statements "have not been tested on the point or are mostly circumstantial" – is cryptic.[2729] **Popović** further submits that the Trial Chamber disregarded other relevant evidence.[2730]

948. The Prosecution responds that the Trial Chamber acted within its discretion in considering the weight and relevance of conflicting evidence and submits that **Popović**'s arguments warrant dismissal as he fails to show that the Trial Chamber erred.[2731]

949. At the outset, the Appeals Chamber observes that as it has already dismissed several of **Popović**'s general challenges to the Trial Chamber's assessment of PW-168's credibility,[2732] the present analysis will only address those arguments specific to **Popović**'s *mens rea* with respect to the JCE to Murder. In this regard, **Popović** advances two main lines of argument, namely that: (1) PW-168's testimony cannot be relied upon because he sought to minimise Obrenović's responsibility; and (2) Obrenović was at the Standard Barracks on 14 July 1995. **Popović**'s submissions in this regard focus on Obrenović's responsibility for the crimes in question without demonstrating that the Trial Chamber erred in relying on PW-168's evidence. The Appeals Chamber recalls that it is incumbent upon an appellant to demonstrate how the purported error had any impact on the Trial Chamber's findings so as to amount to a miscarriage of justice. Regardless of whether Obrenović's involvement or responsibility in mobilising resources was greater than PW-168's testimony might suggest is a factor that was considered when assessing PW-168's overall credibility.[2733] **Popović** has failed to show how Obrenović's purported involvement or responsibility undermines the Trial Chamber's findings concerning his own contribution to the JCE to Murder. Similarly, **Popović** has failed to demonstrate how his personal contribution to the JCE to Murder and ultimately his conviction would be affected if he were to succeed in establishing that Obrenović was at the Standard Barracks on 14 July 1995. Accordingly, this aspect of **Popović**'s argument is dismissed.

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2729 Popović's Appeal Brief, para. 247. See Popović's Appeal Brief, paras 249-251.
2730 Popović's Appeal Brief, paras 252-254, referring to the evidence of Witnesses S. Milošević and Zoran Jovanović.
2731 Prosecution's Response Brief (Popović), paras 136-158.
2732 See *supra*, para. 142.
2733 See *supra*, paras 139-142.

(iii) Military plausibility of PW-168's testimony

950. **Popović** also contests PW-168's testimony on the basis that it is not plausible in light of established VRS military organisation and the VRS chain of command.[2734] He posits that if Mladić had ordered the transportation of the prisoners to the Zvornik area, along with their detention and subsequent execution, Mladić would have: (1) either issued this order to his immediate subordinate or directly to the relevant brigade commanders; (2) done so either through a secure communication line or through a courier; (3) not used four intermediaries (**Beara**, **Popović**, M. Nikolić, and **Nikolić**) to convey the information to Obrenović; and (4) known that such an operation would require the use of Zvornik Brigade resources and issued orders accordingly.[2735] **Popović** asserts that the Trial Chamber erred in discounting the evidence of expert Witnesses Landry and Butler regarding Obrenović's acts and conduct after his purported conversation with **Nikolić** about the prisoners.[2736]

951. The Prosecution responds that **Popović**'s arguments are speculative and stresses that what should have happened according to military doctrine does not change what in fact happened.[2737] It emphasises that PW-168's account of the Nikolić-Obrenović Conversation was corroborated by other witness testimonies and documentary evidence as well as the events that this conversation set in motion.[2738] The Prosecution further asserts that the Trial Chamber was correct in rejecting Landry's evidence.[2739]

952. The Appeals Chamber finds that **Popović**'s assertions of what Mladić would have done pursuant to established VRS military organisation and the VRS chain of command – had he ordered the transportation of the prisoners to the Zvornik area, along with their detention and subsequent execution – are speculative. In this regard, the Appeals Chamber reiterates that the task of weighing and assessing evidence lies primarily with the Trial Chamber[2740] and that as the trier of fact, it is best placed to assess the evidence in its entirety.[2741] The Appeals Chamber finds that **Popović** has not demonstrated that, when considered in light of the entirety of the evidence, a reasonable trier of fact could not have reached the Trial Chamber's conclusion.

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2734 Popović's Appeal Brief, paras 228-230, 232, 266-268.

2735 Popović's Appeal Brief, para. 230. Similarly, **Popović** submits that, if **Nikolić** had informed Obrenović about the operation to transport thousands of prisoners to detain and execute them, an officer of Obrenović's calibre would have informed both his superiors and subordinates in light of the increased security risk to the local population and the troops on the frontline. Popović's Appeal Brief, paras 266-267.

2736 Popović's Appeal Brief, para. 265.

2737 Prosecution's Response Brief (Popović), paras 144-145.

2738 Prosecution's Response Brief (Popović), para. 145.

2739 Prosecution's Response Brief (Popović), paras 146-147 & fn. 591.

2740 *Đorđević* Appeal Judgement, para. 17 (citing *Kupreškić et al.* Appeal Judgement, para. 30); *Šainović et al.* Appeal Judgement, para. 23; *Setako* Appeal Judgement, para. 154.

2741 *Đorđević* Appeal Judgement, para. 395; *Limaj et al.* Appeal Judgement, para. 88; *Kordić and Čerkez* Appeal Judgement, para. 21 & fn. 12.

953. Turning to **Popović**'s submission concerning the evidence of Landry and Butler, the Appeals Chamber observes that the Trial Chamber found that both of these witnesses "strayed well beyond the purview of an expert witness in providing these particular pieces of evidence".[2742] In particular, the Trial Chamber found that the part of Landry's testimony in question was "purely speculative and not founded on any military expertise", as it was "premised on a hypothesis as to how a military person should react in the extraordinary circumstances where he is given insufficient information about an operation to murder prisoners".[2743] Similarly, the Trial Chamber found that Butler's testimony concerned **Nikolić**'s acts and whereabouts, which "are factual matters for the Trial Chamber's determination and not issues falling within his expertise or upon which the Trial Chamber has need of expert opinion".[2744] **Popović** has failed to show any error in respect of these findings. Accordingly, his arguments concerning the military plausibility of PW-168's testimony are dismissed.

(iv) Whether the Trial Chamber erred in relying on M. Nikolić's evidence

954. **Popović** contests the credibility of M. Nikolić's account of the events in the evening of 13 July and the morning of 14 July 1995.[2745] In particular, **Popović** advances several arguments that dispute M. Nikolić's evidence that he was at the Bratunac SDS Offices, during the Beara-Deronjić Argument.[2746] **Popović** avers that Deronjić testified that "he was almost certain that [M. Nikolić] was not present at the meeting with Beara" and that, when Deronjić asked M. Nikolić about it in the United Nations Detention Unit ("UNDU"), the latter acknowledged that he was not present at the meeting but subsequently got the gist of the conversation from **Beara**. In this regard, **Popović** asserts that the Trial Chamber erroneously accepted M. Nikolić's account, rather than Deronjić's, without being clear about what circumstances and evidence it considered in doing so.[2747]

955. **Popović** also submits that, based on the Trial Chamber's findings, **Beara** must have appeared in the Bratunac SDS Offices shortly after he sent M. Nikolić to inform the Zvornik Brigade that the prisoners would be transported to the Zvornik sector where they would be killed.[2748] He argues in this respect that: (1) the time required for M. Nikolić's trip to Zvornik makes it impossible for him to have been at the meeting at the Bratunac SDS Offices;[2749] and (2) **Beara** would have had no reason to go to the Bratunac SDS Offices to discuss killing prisoners in Bratunac only minutes after he sent M. Nikolić to inform the Zvornik Brigade that the prisoners

2742 Trial Judgement, para. 1355.
2743 Trial Judgement, para. 1355.
2744 Trial Judgement, para. 1355.
2745 Popović's Appeal Brief, paras 216-220.
2746 Popović's Appeal Brief, paras 217, 219-220.
2747 Popović's Appeal Brief, para. 218.
2748 Popović's Appeal Brief, paras 216, 219.
2749 Popović's Appeal Brief, para. 219.

would be transported to the Zvornik sector.[2750] Finally, **Popović** submits that, even if the plan to murder existed at that time, nothing in this evidence indicates that the murder operation was carried out with significant co-ordination.[2751]

956. The Prosecution responds that the Trial Chamber reasonably relied on M. Nikolić's evidence about the Beara-Deronjić Argument and highlights that his evidence was highly self-incriminatory and corroborated in different parts by other witnesses.[2752] The Prosecution asserts that summary dismissal is warranted, as **Popović**'s conviction is not affected by whether M. Nikolić was actually present.[2753] The Prosecution also emphasises that it was not impossible for M. Nikolić to have attended the meeting in the Bratunac SDS Offices and that the sequence of events **Popović** sets out is wrong.[2754]

957. The Appeals Chamber recalls the Trial Chamber's finding that:

> there is an abundance of mutually corroborative evidence which places **Beara** [...] at a series of meetings which took place in the [Bratunac] SDS offices during the evening of 13 July, continuing until the early morning hours of 14 July. The Trial Chamber is further satisfied that the subject-matter of the meetings was the logistics of the planned murder operation, including the location for the killings and burial as well as transportation and equipment.[2755]

The Trial Chamber based this conclusion on the evidence of several witnesses, notably Deronjić, with whom **Beara** met to discuss the murder operation, and M. Nikolić, whose accounts were partially corroborated by Borovčanin, PW-161, and Prosecution Witness PW-170.[2756]

958. The Appeals Chamber finds that, even if the Trial Chamber had erred in accepting M. Nikolić's evidence that he was present during the Beara-Deronjić Argument over that of Deronjić,[2757] **Popović** has failed to demonstrate that this had any impact on his conviction or sentence. Regardless of whether M. Nikolić was present during the Beara-Deronjić Argument or whether he subsequently learned of its subject matter from **Beara**, no reasonable doubt is raised as to the fact that the murder operation was discussed during the meeting – a fact supported by an abundance of other evidence.[2758] **Popović**'s argument is thus dismissed.

959. Next, **Popović** challenges M. Nikolić's evidence that around 8:30 p.m. on 13 July 1995, **Beara** sent M. Nikolić to inform the Zvornik Brigade that the prisoners would be transported to the

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2750 Popović's Appeal Brief, para. 220.
2751 Popović's Appeal Brief, para. 221.
2752 Prosecution's Response Brief (Popović), paras 126-127. See also Prosecution's Response Brief (Popović), paras 128, 130.
2753 Prosecution's Response Brief (Popović), para. 128.
2754 Prosecution's Response Brief (Popović), paras 131-133.
2755 Trial Judgement, para. 1271 (internal references omitted).
2756 Trial Judgement, paras 1263-1271.
2757 Trial Judgement, para. 1271 & fn. 4166.
2758 See Trial Judgement, paras 1263-1265, 1267-1268, 1270-1271.

Zvornik sector where they would be killed. The Appeals Chamber considers **Popović**'s claim – that, based on the chronology of events, **Beara** must have appeared in the Bratunac SDS Offices shortly after he allegedly sent M. Nikolić to the Zvornik Brigade – to be speculative.[2759] It notes that, according to Deronjić, **Beara** arrived at his Bratunac SDS office shortly after his conversation with Karadžić around 8:00 p.m., but left angrily after the Beara-Deronjić Argument, the subject of which was whether the prisoners should be killed in Bratunac.[2760] **Popović**'s argument that **Beara** would have no reason to send M. Nikolić to Zvornik that evening thus fails.

960. Finally, the Appeals Chamber does not find any merit in **Popović**'s assertion that nothing in the aforementioned aspects of M. Nikolić's evidence indicates that the plan to murder was carried out with significant co-ordination.[2761] Such co-ordination is emphasised in the Trial Chamber's findings that:

> the men were not simply killed upon capture; rather, a vast process was put into place. The men from Potočari were separated from the rest of the population, detained in the area, moved by bus to Bratunac, and again detained in various locations.[2762]

The Appeals Chamber therefore dismisses **Popović**'s argument in this regard.

(v) Whether the Trial Chamber erred in relying on Deronjić's evidence

961. **Popović** asserts that as the party most responsible for the prisoners, Deronjić embellished his story.[2763] The Prosecution responds that **Popović**'s assertion with no citation to or discussion of any evidence warrants summary dismissal.[2764] The Appeals Chamber finds that **Popović**'s challenge to the credibility of Deronjić's evidence is an undeveloped assertion. As such it is dismissed.

(vi) Whether the Trial Chamber's findings about the events in the evening of 13 July and the morning of 14 July 1995 are contradictory

962. **Popović** argues that there are serious logical inconsistencies in the accounts PW-168, Deronjić, and M. Nikolić gave of the events of 13 July 1995.[2765] First, **Popović** submits that M. Nikolić gave **Nikolić** fewer details about the murder operation than **Popović** had given to **Nikolić** over the phone in the Popović-Nikolić Conversation and that, if this conversation had occurred, **Popović** would not have needed to send anyone to personally convey the exact same

2759 See Popović's Appeal Brief, paras 216, 219.
2760 Trial Judgement, para. 1264. See also Trial Judgement, para. 1265.
2761 See Popović's Appeal Brief, para. 221.
2762 Trial Judgement, para. 882.
2763 Popović's Appeal Brief, para. 222.
2764 Prosecution's Response Brief (Popović), para. 134.
2765 See Popović's Appeal Brief, paras 233-235, 256-264. See also Appeal Hearing, AT. 77 (2 Dec 2013).

information. In this regard, **Popović** also suggests that if he had spoken with **Nikolić**, he would have known that **Nikolić** was at the Kitovnice IKM and would have told **Beara** to send M. Nikolić there and not to the Standard Barracks.[2766]

963. Second, **Popović** asserts that according to the Trial Chamber's findings, he would have known the prisoners' destination before **Beara** or any of his superiors themselves knew, which is not possible.[2767] To illustrate this point, he contrasts PW-168's evidence that **Popović** conveyed Mladić's order that the prisoners were to be killed in the Zvornik sector to **Nikolić** between 7:00 and 8:00 p.m. with Deronjić's evidence that **Beara** told Deronjić about the order from his "boss" to execute the prisoners in Bratunac shortly after 8:00 p.m.[2768] **Popović** posits that, although **Beara**'s "boss" was not identified, it was Mladić, as it would be unlikely that **Beara** meant Tolimir or Karadžić.[2769] **Popović** then reasons that, had the Trial Chamber found that Mladić was the "boss", it would give rise to illogical implications, including that between 7:00 and 8:00 p.m. he already knew that Mladić ordered the execution of the prisoners in Zvornik.[2770] **Popović** further argues that it would also mean that he knew about Mladić's order before Mladić himself did and reasons that "[o]therwise, Mladić would not send **Beara** to kill prisoners in Bratunac".[2771]

964. Finally, **Popović** asserts that M. Nikolić's evidence that decisions were made and changed constantly does not reconcile inconsistencies in the Trial Judgement.[2772] He points out that it is not clear who changed the decisions.[2773] **Popović** also posits that since M. Nikolić was sent to Zvornik and therefore was not in Bratunac between 8:30 p.m. and midnight on 13 July 1995, he could not have known that the decisions had been changed, and if they had changed, the message he was sent to convey would have changed as well.[2774]

965. The Prosecution responds that the accounts PW-168, Deronjić, and M. Nikolić gave of the events on 13 July 1995 can be reconciled and asserts that the Trial Chamber considered minor inconsistencies between the time estimates PW-168 and M. Nikolić provided.[2775] Further, the Prosecution emphasises that M. Nikolić provided additional information to **Nikolić** in the M. Nikolić-Nikolić Conversation, as compared to what **Nikolić** received from **Popović** during the

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2766 Popović's Appeal Brief, para. 234.
2767 Popović's Reply Brief, para. 69.
2768 Popović's Appeal Brief, paras 256-259; Popović's Reply Brief, para. 69.
2769 Popović's Appeal Brief, paras 257-258.
2770 Popović's Appeal Brief, para. 259. The Appeals Chamber notes that, although **Popović** refers to Bratunac in his brief, this is inconsistent with the rest of his line of argument. The Appeals Chamber therefore considers the reference to Bratunac to be a typographical error and Zvornik to be correct.
2771 Popović's Appeal Brief, para. 259.
2772 Popović's Appeal Brief, paras 260-264.
2773 Popović's Appeal Brief, para. 261.
2774 Popović's Appeal Brief, para. 263.
2775 Prosecution's Response Brief (Popović), paras 155-157.

Popović-Nikolić Conversation.[2776] It also asserts that M. Nikolić's route to the Standard Barracks, rather than directly to the Kitovnice IKM to meet **Nikolić**, is not implausible given that **Nikolić** was already expected to be at the Standard Barracks to make preparations for the arrival of prisoners.[2777]

966. The Appeals Chamber observes that, in the M. Nikolić-Nikolić Conversation, M. Nikolić stated that he provided **Nikolić** with practical information regarding the number and time of the prisoners' arrival,[2778] which was not included in what **Nikolić** had previously mentioned to Obrenović.[2779] The Appeals Chamber thus finds no merit in **Popović**'s assertion that, if the Popović-Nikolić Conversation had occurred, it would have been unnecessary to send someone to personally convey the exact same information. **Popović**'s argument in this regard fails.

967. Turning to **Popović**'s second argument, the Appeals Chamber observes that it is contingent upon **Popović**'s own interpretation of the evidence that when **Beara** referred to his "boss", he meant Mladić. In this regard, the Appeals Chamber observes that **Beara**'s words differed slightly between the two witness accounts; according to Deronjić, **Beara** said his orders were "from the top",[2780] whereas M. Nikolić testified that **Beara** said that he had received the orders from "his boss".[2781] The Appeals Chamber also observes that the Trial Chamber highlighted two points about Deronjić's evidence, namely that: (1) he did not know who exactly **Beara** was referring to; and (2) the fact that **Beara** did not specify any names suggested that he intended to remain discrete on the identity of the individual(s) who entrusted him with this order.[2782] The Appeals Chamber finds that **Popović**'s speculation cannot undermine the Trial Chamber's factual findings based on the evidence before it.

968. With respect to **Popović**'s final challenge, the Appeals Chamber first observes that the excerpt of M. Nikolić's evidence is cited out of context. **Popović** quotes M. Nikolić's evidence that "the decisions...were changed and made every ten minutes...And as for the status of these prisoners, they made different decisions every half an hour".[2783] The Trial Chamber, however, relied upon a much longer passage that made it clear that the changing of decisions was a "situation that prevailed on the 11th, 12th, and the 13th"[2784] – not simply the evening of 13 July 1995 as **Popović** suggests. The Appeals Chamber notes that nothing in the Trial Chamber's findings suggests that M. Nikolić received information – about the changing decisions regarding the

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2776 Prosecution's Response Brief (Popović), para. 149. See Prosecution's Response Brief (Popović), para. 155.
2777 Prosecution's Response Brief (Popović), para. 150.
2778 Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", p. 6. See also *infra*, para. 1010.
2779 PW-168, T. 15830-15832 (closed session) (26 Sept 2007). See also *infra*, para. 1010.
2780 Trial Judgement, para. 1264, citing Ex. P03139a (confidential), BT. 6447, 6449.
2781 Trial Judgement, para. 1266, citing Momir Nikolić, T. 32943 (21 Apr 2009).
2782 Trial Judgement, fn. 4117.
2783 Popović's Appeal Brief, para. 260, referring to Trial Judgement, para. 1266.

prisoners – between 8:30 p.m. and midnight on 13 July 1995 as opposed to learning about it subsequently. The Appeals Chamber therefore finds that **Popović** has failed to demonstrate that a reasonable trier of fact could not have relied on M. Nikolić's evidence in this regard.

(b) Beara's appeal

(i) Alleged errors in finding that Beara was aware of and implicated in the plan to murder by the morning of 12 July 1995 (Grounds 6, 8, and 15 all in part)

969. **Beara** submits that there is no evidence that supports the finding that he was aware of, and implicated in, the plan to murder by the morning of 12 July 1995 and asserts that this finding is based on pure speculation because of his rank and position.[2785] He adds that the Trial Chamber drew impermissible inferences from circumstantial evidence.[2786] He also asserts that the Trial Chamber failed to give a reasoned opinion for this important finding.[2787] In this regard, **Beara** argues that the Trial Chamber failed to provide any evidence that he knew that his subordinates were discussing the plan to murder in front of the Hotel Fontana on 12 July 1995 and that there was no evidence that he met with any of them before 13 July 1995 in order to have been informed of the purported plan on 12 July 1995.[2788]

970. The Prosecution responds that **Beara**'s arguments should be summarily dismissed.[2789] It submits that the Trial Chamber reasonably inferred that **Beara** was aware of, and implicated in, the murder operation by the morning of 12 July 1995 and that **Beara** failed to show that this inference was erroneous.[2790]

971. Regarding **Beara**'s assertion that the Trial Chamber's finding that he was aware of, and implicated in, the plan to murder by the morning of 12 July 1995 was unsupported by the evidence and based only on his rank and position, the Appeals Chamber observes that the Trial Chamber in fact relied on a body of circumstantial evidence that **Beara** ignored in his submissions. The Appeals Chamber reiterates that a trial chamber may rely on either direct or circumstantial evidence to underpin its findings.[2791] The body of circumstantial evidence supporting the impugned finding included **Beara**'s rank and position in the sense that the Trial Chamber considered his

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2784 Trial Judgement, fn. 4142, citing Momir Nikolić, T. 33182 (21 Apr 2009). See Trial Judgement, para. 1266.
2785 Beara's Appeal Brief, paras 108, 138, 177-178. See Beara's Reply Brief, paras 47, 70.
2786 Beara's Appeal Brief, intro before para. 128.
2787 Beara's Appeal Brief, para. 178.
2788 Beara's Appeal Brief, para. 178. See also Appeal Hearing, AT. 187 (3 Dec 2013). **Beara** argues that he could not be found to have been a participant in the JCE to Murder until the meeting with Deronjić at 8:00 p.m. on 13 July 1995.
2789 Prosecution's Response Brief (Beara), paras 106, 133, 173.
2790 Prosecution's Response Brief (Beara), paras 106, 173. See also Appeal Hearing, AT. 226 (3 Dec 2013).
2791 *Đorđević* Appeal Judgement, para. 348; *Galić* Appeal Judgement, para. 218. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 99.

responsibilities as Chief of Security for the VRS Main Staff and the fact that he was superior to **Popović** in the professional chain of command.[2792] This was then considered alongside a series of findings about the plan to murder and about its participants, with whom **Beara**, by virtue of his rank and position, was in regular contact during the relevant time.[2793] In particular, the Trial Chamber considered that by the morning of 12 July 1995, the plan to murder had been formulated, the Security Branch of the VRS had been tasked with a central co-ordinating role in its implementation, and **Beara**'s subordinates, including **Popović** and M. Nikolić, were aware of the plan. The Trial Chamber also considered that Mladić gave orders with respect to the murder operation.[2794] **Beara**'s argument that the Trial Chamber's finding was based only on his rank and position is thus without merit. Further, **Beara** has not substantiated his argument that the Trial Chamber drew impermissible inferences from the evidence nor has he asserted any other reasonable inferences that can be arrived at based on the circumstantial evidence. Accordingly, these aspects of **Beara**'s grounds of appeal 6, 8, and 15 are dismissed.

972. Regarding **Beara**'s assertion that the Trial Chamber failed to give adequate reasons for the impugned finding, the Appeals Chamber reiterates that a trial chamber's duty to provide a reasoned opinion does not require the trial chamber to articulate every step of its reasoning.[2795] As set out above, the Trial Chamber relied upon a body of circumstantial evidence which included, *inter alia*, a series of findings about the formation, initial stages, and implementation of the plan to murder and about its participants, with whom **Beara** was in regular contact between 11 and 14 July 1995.[2796] **Beara**'s choice to ignore this body of circumstantial evidence has effectively undermined his argument that the Trial Chamber failed to give a reasoned opinion as he has failed to show that the Trial Chamber's discussion is insufficient. Accordingly, this aspect of **Beara**'s ground of appeal 15 is dismissed.

(ii) Alleged errors in finding that Beara knew of the common purpose of the JCE to Murder (Grounds 6, 7, and 8 all in part)

973. **Beara** submits that the Trial Chamber's conclusion that he knew of the plan to murder was erroneously inferred on the sole basis of the security organs' general operating procedures.[2797] He contends that the Trial Chamber erred in finding that the "heavy hand of the Security Branch was

2792 Trial Judgement, para. 1299.
2793 See Trial Judgement, para. 1299, fns 4271 (referring to findings about the formation, initial stages and implementation of the plan), 4273 (referring to findings about **Beara**'s conduct from 11 July until 14 July 1995).
2794 Trial Judgement, para. 1299.
2795 *Nizeyimana* Appeal Judgement, para. 62; *Đorđević* Appeal Judgement, fn. 940; *Šainović et al.* Appeal Judgement, paras 325, 378, 392, 461, 490.
2796 See Trial Judgement, fns 4271, 4273.
2797 Beara's Appeal Brief, para. 133; Beara's Reply Brief, para. 52.

evident in the killing operation".[2798] Specifically, he submits that the Trial Chamber wrongfully inferred that he was familiar with the acts and intent of others on the basis of his position without referring to any direct, reliable evidence of conversations between him and other members of the Security Branch.[2799] **Beara** also argues that the Trial Chamber committed an error of fact in its finding that the Security Branch operated in a highly co-ordinated manner.[2800] He posits that the three instances relied upon by the Trial Chamber in this regard do not provide a basis for that finding.[2801] **Beara** submits in this regard that "the alleged meetings that were the predomina[nt] bas[e]s for the Trial [Chamber]'s erroneous conclusion did not occur".[2802] He also emphasises that there is no direct evidence supporting such a conclusion with respect to his personal involvement in the Security Branch.[2803]

974. **Beara** also disputes the Trial Chamber's treatment of two intercepted conversations from 13 July 1995. He submits that the Trial Chamber relied on the flawed 10:09 a.m. Intercept, while failing to accept the 11:25 a.m. Intercept.[2804] He submits that the Trial Chamber ignored the plain meaning of his remarks in the 11:25 a.m. Intercept and instead used circumstantial evidence to find that he was deliberately attempting to mislead any potential listeners.[2805] **Beara** further submits that the connection made by the Trial Chamber between that intercepted conversation and Mladić's Sandići Meadow Speech is unsupported and speculative at best.[2806] He asserts that the Trial Chamber failed to reconcile the 10:09 a.m. Intercept and the 11:25 a.m. Intercept in a fair and reasonable manner.[2807] He also argues that the Trial Chamber failed to give any reasoned opinion explaining the contradiction between its interpretation of the 11:25 a.m. Intercept and its approach to other intercepted communications, where **Beara** was found to have been speaking openly despite his purported knowledge of the vulnerability of phone conversations to interception.[2808] He concludes that the most reasonable conclusion available to the Trial Chamber was to accept the plain words of the 11:25 a.m. Intercept or, failing that, to acknowledge that the plain words should at least provide reasonable doubt as to his *mens rea*.[2809]

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2798 Beara's Appeal Brief, para. 67.
2799 Beara's Appeal Brief, para. 67.
2800 Beara's Appeal Brief, paras 68, 70.
2801 Beara's Appeal Brief, paras 68-69.
2802 Beara's Reply Brief, para. 33.
2803 Beara's Appeal Brief, para. 68.
2804 Beara's Appeal Brief, para. 81. See *supra*, para. 866.
2805 Beara's Appeal Brief, paras 122, 134. See Beara's Appeal Brief, para. 81.
2806 Beara's Appeal Brief, paras 123, 135.
2807 Beara's Appeal Brief, para. 81.
2808 Beara's Appeal Brief, paras 123, 134; Beara's Reply Brief, para. 49.
2809 Beara's Appeal Brief, para. 124. See Beara's Appeal Brief, para. 81.

975. The Prosecution responds that the Trial Chamber properly found that the Security Branch was heavily involved in the killing operation and that **Beara** was at the centre of that operation.[2810] It submits that the Trial Chamber was entitled to rely on evidence of close co-ordination between members of the Security Branch and **Beara**'s mere assertions and misrepresentations of the Trial Judgement should be summarily dismissed.[2811] Equally, the Prosecution contends that **Beara** fails to show that the Trial Chamber's conclusion that the 11:25 a.m. Intercept did not reflect a genuine intent to transfer prisoners to a detention camp was unreasonable.[2812]

976. The Appeals Chamber recalls that it has already dismissed **Beara**'s argument that the Trial Chamber relied "solely" upon his position in concluding that he had knowledge of the killing operation.[2813] In this regard, the Appeals Chamber emphasises the following findings on **Beara**'s overseeing role within the Security Branch: (1) as Chief of the Security Administration he oversaw the security organs of the VRS and of the Main Staff military police;[2814] (2) in the professional chain of command he was superior to **Popović** and M. Nikolić,[2815] who were aware of the plan to murder as of the morning of 12 July 1995;[2816] **Popović** also attended the Third Hotel Fontana Meeting during which Mladić announced that all Bosnian Muslim men in Potočari would be separated to be screened for war crimes that same morning;[2817] (3) he had to be apprised of the subordinate security organs' work in order to provide guidance and to evaluate and monitor their work; and (4) he would send instructions to the subordinate security organs, including instructions regarding the arrest and the detention of prisoners of war.[2818] The Trial Chamber also referred to evidence that showed **Beara**'s "key role in orchestrating the murder operation by planning, coordinating and overseeing the detention, transportation, execution and burial of the able-bodied Bosnian Muslim males".[2819]

977. The Appeals Chamber also notes that the Trial Chamber did in fact rely on concrete examples of conversations between **Beara** and other members of the Security Branch.[2820] **Beara**'s challenges in this respect, insofar as they are not considered under his other grounds of appeal, are undeveloped and as such warrant dismissal. The Appeals Chamber recalls the Trial Chamber's

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2810 Prosecution's Response Brief (Beara), para. 84.
2811 Prosecution's Response Brief (Beara), paras 85, 93, 130.
2812 Prosecution's Response Brief (Beara), para. 118. See Prosecution's Response Brief (Beara), paras 93, 111, 117, 131, 227.
2813 See *supra*, paras 480, 971.
2814 Trial Judgement, para. 1204.
2815 Trial Judgement, para. 1205.
2816 Trial Judgement, paras 1051-1052, 1299. See *supra*, para. 825.
2817 Trial Judgement, para. 289.
2818 Trial Judgement, para. 1206.
2819 Trial Judgement, para. 1299, referring to Trial Judgement, paras 1253-1258, 1262-1268, 1271.
2820 Trial Judgement, para. 1300.

findings and its own rulings on **Beara**'s challenges thereto regarding: (1) the 14 July Meeting;[2821] (2) the meeting between **Popović** and himself in the Standard Barracks on 15 July 1995;[2822] and (3) his and **Popović**'s presence at the Kula School in Pilica on 16 July 1995.[2823]

978. **Beara**'s assertion that the meetings that were the predominant bases[2824] for the Trial Chamber's conclusion that the Security Branch worked in a highly co-ordinated manner did not occur is not supported by any references to the trial record. The Appeals Chamber therefore finds that, insofar as it is not addressed under other grounds of appeal, this argument is dismissed as an undeveloped assertion. The Appeals Chamber notes that these three examples of co-ordinated actions between members of the Security Branch do not form an exhaustive list of the "meetings, acts, movements and whereabouts of **Popović**, **Beara** and **Nikolić** from the morning of 14 July onward", demonstrating the close co-operation and communication between the officers of the Security Branch.[2825] Moreover, as stated above, the Trial Judgement does in fact contain references to **Beara**'s acts, meetings, and whereabouts supporting his role in the co-ordinated action of the Security Branch.[2826] Accordingly, the Appeals Chamber finds that **Beara** has failed to show that the Trial Chamber erred in finding that the Security Branch operated in a highly co-ordinated manner.

979. With regard to **Beara**'s challenge to the Trial Chamber's treatment of the intercepts, the Appeals Chamber notes that the Trial Chamber provided extensive reasoning for its conclusion that, in the 11:25 a.m. Intercept, **Beara** was deliberately attempting to mislead the listener. It examined the distinctive features of the 11:25 a.m. Intercept which rendered its evidentiary value ambiguous, noting its summary form and that the other participant in the conversation is not identified.[2827] The Trial Chamber also referred to the 10:09 a.m. Intercept in which **Beara** is reported as giving instructions to "[s]hove them all on the playground, who gives a fuck about them", and when informed that the prisoners were killing themselves, remarking "[y]ou mean they're doing it amongst themselves? [...] Well, excellent. Just let them continue, fuck it".[2828] The Appeals Chamber recalls that it has already dismissed **Beara**'s challenges to the reliability of the 10:09 a.m. Intercept.[2829] Further, the Trial Chamber stressed that the prisoners in question never reached Batković and were subsequently detained in various locations and executed. Finally, the

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2821 See Trial Judgement, paras 472, 1106, 1272; *infra*, paras 1251-1259. See also *supra*, para. 344, defining the 14 July Meeting.
2822 See Trial Judgement, paras 1123, 1284. See *supra*, para. 392; *infra*, paras 1274-1278.
2823 See Trial Judgement, paras 1125, 1287. See *infra*, paras 1285-1289.
2824 Beara's Reply Brief, para. 33.
2825 Trial Judgement, para. 1069. See also Trial Judgement, para. 1068 & fn. 3497, referring to Trial Judgement, paras 1105-1135, 1272-1288, 1345-1371.
2826 See *supra*, para. 977.
2827 Trial Judgement, para. 1259. See *supra*, paras 482, 866, 896.
2828 Trial Judgement, paras 1257, 1259. See *supra*, paras 866, 896.
2829 See *supra*, para. 122.

Trial Chamber placed the 11:25 a.m. Intercept in the context of the secret nature of the killing operation and **Beara**'s knowledge of the vulnerability of phone conversations to interception.[2830]

980. The Appeals Chamber notes that of this abundance of mutually reinforcing evidence, **Beara** cites just one example as support for his challenge – the link drawn by the Trial Chamber between the language used in the 11:25 a.m. Intercept and Mladić's Sandići Meadow Speech.[2831] The Appeals Chamber acknowledges that when viewed in isolation, the similarity in rhetoric used by **Beara** and Mladić may not decisively support the Trial Chamber's finding. Nonetheless, the Appeals Chamber finds that **Beara** has failed to demonstrate that no reasonable trier of fact could have relied upon it as a factor underpinning a finding based on circumstantial evidence. The Appeals Chamber finds that **Beara** has failed to show that no reasonable trier of fact could have found, as the only reasonable conclusion, that in the 11:25 a.m. Intercept, **Beara** was deliberately attempting to mislead the listener. **Beara**'s argument that the 11:25 a.m. Intercept raises reasonable doubt as to his knowledge of the common purpose of the JCE to Murder is thus dismissed.

981. In light of the above, the relevant portions of **Beara**'s grounds of appeal 6, 7, and 8 addressed here are dismissed.

(iii) Alleged errors in finding that Beara shared the intent to carry out the common purpose (Ground 16)

982. **Beara** submits that the Trial Chamber erred in finding that he shared the intent to carry out the common purpose to murder.[2832] In support, **Beara** first notes that the Trial Chamber concluded that the forecasted separation process in Potočari and the Third Hotel Fontana Meeting marked the commencement of the implementation of the plan to murder.[2833] **Beara** points out that the Trial Chamber supported this conclusion with the alleged conversations in front of the Hotel Fontana on 12 July 1995 between M. Nikolić, **Popović**, and Kosorić and emphasises that he was not present or involved in any of them.[2834] He submits that the first mention of his involvement is the alleged 13 July 1995 conversation with Deronjić,[2835] and that since Deronjić's testimony was "untested, untrustworthy and previously determined as false", it was unreasonable for the Trial Chamber to rely on it as proof of his *mens rea* for the JCE to Murder.[2836]

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2830 Trial Judgement, para. 1259.
2831 Trial Judgement, para. 1259.
2832 Beara's Appeal Brief, intro before para. 189, para. 189.
2833 Beara's Appeal Brief, para. 190.
2834 Beara's Appeal Brief, paras 190-191. See Beara's Reply Brief, para. 72.
2835 See Appeal Hearing, AT. 187, 203 (3 Dec 2013). See also Beara's Appeal Brief, para. 194.
2836 Beara's Appeal Brief, para. 191.

983. **Beara** also argues that the Trial Chamber did not give sufficient weight to credible evidence,[2837] including: (1) the 11:25 a.m. Intercept, in which it is "clear that Beara's intent was that prisoners should be transferred in prisoner's camps";[2838] and (2) Čelanović's testimony confirming that they spoke in the night of 13 July 1995, and that during their conversation **Beara** told Čelanović that the Muslim men from Bratunac were to be transferred to Kladanj in the morning.[2839] **Beara** argues that, even though the Trial Chamber generally accepted Čelanović's testimony, it "failed or otherwise refused" to accept his evidence about **Beara**'s intent.[2840]

984. Finally, **Beara** identifies two inferences that he submits were not the only reasonable ones based on the evidence: (1) that he must have been involved in the murder plan solely because of the involvement of other security organ officers;[2841] and (2) that he or members of the security organ perpetrated the crimes in Srebrenica rather than Vasić and the MUP forces.[2842] With regard to the latter argument, **Beara** further submits that the Trial Chamber erroneously disregarded two Zvornik, Public Security Centre ("CJB") documents.[2843] **Beara** also submits that the Trial Chamber disregarded PW-168's evidence identifying **Pandurević** as an interlocutor in an intercepted conversation from 15 July 1995. **Beara** asserts that this conversation shows that the killings of Bosnian Muslim prisoners "were not a clandestine operation operated by others but by members of the Zvornik Brigade".[2844]

985. The Prosecution responds that **Beara**'s arguments should be dismissed.[2845] It asserts that **Beara** was involved in the murder plan from its commencement on 12 July 1995 and that he merely attempts to substitute his evaluation of the evidence for that of the Trial Chamber.[2846] It also submits that **Beara**'s *mens rea* is not negated by the 11:25 a.m. Intercept, the conversation with Čelanovic, or by the evidence implicating Vasić and **Pandurević**.[2847]

986. The Appeals Chamber observes that **Beara** repeats many arguments he advances elsewhere in his brief but with few, if any, additional arguments. In this regard, the Appeals Chamber first

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2837 Beara's Appeal Brief, intro before para. 189. See Appeal Hearing, AT. 207 (3 Dec 2013).

2838 Beara's Appeal Brief, para. 192, referring to Ex. 7D2D00642, "Intercept, 13 July 1995, 11:25 a.m.". See Beara's Reply Brief, para. 73. See also Appeal Hearing, AT. 206-207 (3 Dec 2013), referring to Ex. 7D2D00064. The Appeals Chamber considers the reference to be an error and Ex. 7D2D00642 to be the correct reference. Appeal Hearing, AT. 228 (3 Dec 2013).

2839 Beara's Appeal Brief, para. 193.

2840 Beara's Appeal Brief, para. 193. See Beara's Reply Brief, para. 73. See also Appeal Hearing, AT. 254 (3 Dec 2013).

2841 Beara's Appeal Brief, para. 194.

2842 Beara's Appeal Brief, para. 196. See Beara's Reply Brief, para. 74. See also Appeal Hearing, AT. 165-166 (2 Dec 2013); AT. 203-205 (3 Dec 2013) (submitting that Vasić and the MUP were responsible).

2843 Beara's Appeal Brief, para. 195. See Appeal Hearing, AT. 203-205 (3 Dec 2013).

2844 Beara's Appeal Brief, para. 197. See Beara's Reply Brief, para. 74.

2845 Prosecution's Response Brief (Beara), paras 190-198.

2846 Prosecution's Response Brief (Beara), paras 191-192.

2847 Prosecution's Response Brief (Beara), paras 193-194. See also Appeal Hearing, AT. 228-229 (3 Dec 2013).

recalls that it has dismissed **Beara**'s challenges in which he disputed the Trial Chamber's reliance on the involvement of other security organ officers to establish his involvement in the murder operation.[2848] The Appeals Chamber emphasises that this was not the only factor taken into account by the Trial Chamber in reaching its conclusion.[2849] It is also clear that the Trial Chamber was well aware that **Beara** did not participate in the conversations in front of Hotel Fontana on 12 July 1995 but that it established his knowledge of the murder plan through inferences from other evidence.[2850] **Beara** has failed to show that no reasonable trier of fact could have reached this conclusion given that he was not physically present at the conversations in front of Hotel Fontana. Second, the Appeals Chamber has dismissed **Beara**'s other challenges in which he disputes the Trial Chamber's reliance on Deronjić's evidence, among other evidence, to establish **Beara**'s whereabouts and actions on 13 July 1995.[2851] Third, the Appeals Chamber has already rejected **Beara**'s argument that the Trial Chamber misinterpreted the 11:25 a.m. Intercept.[2852]

987. Turning to the arguments about Čelanović's testimony, the Appeals Chamber observes that the Trial Chamber analysed in detail his evidence concerning the meeting he had with **Beara** in Bratunac at dusk on 13 July 1995. It noted that, according to Čelanović, **Beara** told him in reference to the Bosnian Muslim prisoners held in Bratunac that "I guess they're going to Kladanj tomorrow".[2853] Nevertheless, the Trial Chamber did not regard this as an obstacle in reaching its conclusion on **Beara**'s *mens rea*.[2854] The Appeals Chamber considers that it would have been preferable for the Trial Chamber to have explicitly, rather than implicitly, rejected the literal interpretation of this conversation, as it had done in rejecting – as a deliberate attempt to convey misleading information – a suggestion made by **Beara** *earlier* that day, in the 11:25 a.m. Intercept, that prisoners would be exchanged.[2855] However, under the circumstances, the Appeals Chamber considers that the Trial Chamber interpreted **Beara**'s reference to the prisoners in the conversation at dusk in a similar manner and that **Beara** has failed to demonstrate that its implicit rejection of the literal interpretation invalidates the Trial Judgement.

988. With respect to **Beara**'s assertion that, based on two CJB documents,[2856] the Trial Chamber could have inferred that Vasić and the MUP forces perpetrated the crimes in Srebrenica rather than holding him and members of the Security Branch responsible, the Appeals Chamber notes that the

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2848 See *supra*, paras 973, 976-978, 981.
2849 See *supra*, para. 480.
2850 Trial Judgement, para. 1299. See Trial Judgement, paras 1051-1052, 1204-1206, 1253-1258, 1262-1268, 1271.
2851 See *infra*, para. 1209.
2852 See *supra*, paras 979-980.
2853 Trial Judgement, para. 1262.
2854 See Trial Judgement, para. 1299, referring to, *inter alia*, Trial Judgement, para. 1262.
2855 See Trial Judgement, paras 1258-1259. See *supra*, paras 866, 979-980.
2856 Beara's Appeal Brief, para. 195, referring to Ex. P00060, "CJB Zvornik Report, 13 July 1995", Ex. P00886, "Document from the Zvornik CJB to the RS MUP, type-signed Vasić, 13 July 1995".

Trial Chamber found that the MUP was *also* implicated in the murder operation.[2857] As will be discussed in more detail below,[2858] Vasić and the MUP forces co-operated extensively with the VRS in implementing the plan to murder, which was "an operation steadily organised and directed by the Security Branch of the VRS".[2859] In this regard, the Appeals Chamber recalls that, since **Beara** voluntarily participated in the common plan to murder able-bodied Bosnian Muslim males,[2860] he can be held responsible for crimes he did not physically commit provided he nevertheless intended this result.[2861] The Appeals Chamber therefore finds no merit in **Beara**'s assertion that evidence of Vasić and the MUP forces' involvement in these crimes contradicts the Trial Chamber's conclusion on his *mens rea*.

989. Similarly, the Appeals Chamber considers that **Beara** has failed to demonstrate how evidence suggesting the involvement of **Pandurević** and the Zvornik Brigade in the crimes necessarily contradicts the Trial Chamber's finding regarding his *mens rea*.[2862] In concentrating on the role of one unit, **Beara** ignores the wealth of other Trial Chamber's findings demonstrating the involvement of the VRS and its Security Branch in the murder operation.[2863] Again, the mere fact that the killings were perpetrated by others does not undermine the Trial Chamber's conclusion on his *mens rea*.

990. For the reasons set out above, the Appeals Chamber dismisses **Beara**'s ground of appeal 16 in its entirety.

(c) Nikolić's appeal

(i) Whether the Trial Chamber erred in specifying the common purpose of the JCE to Murder and in finding that he had knowledge thereof (Ground 7 in part)

991. **Nikolić** submits that the Trial Chamber erred in law and fact when identifying and specifying the common purpose of the JCE to Murder and in finding that he had the requisite *mens rea* for that mode of liability.[2864] He posits that this combined error resulted in a miscarriage of justice which warrants the Appeals Chamber's intervention to quash his conviction.[2865]

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2857 Trial Judgement, paras 1065, 1072.
2858 See *infra*, note 3064, para. 1056.
2859 Trial Judgement, para. 1070. See Trial Judgement, paras 1051, 1057-1058, 1061, 1064-1069, 1071-1072.
2860 Trial Judgement, paras 1299-1302.
2861 *Vasiljević* Appeal Judgement, para. 119.
2862 See Beara's Appeal Brief, paras 197-198, referring to Ex. P02232, "Draft English Translations covering 11 to 20 July 1995–Tactical Intercepts Notebook for 1 July to 24 Nov 1995", pp. 13-14, PW-168, T. 17126 (closed session) (30 Oct 2007).
2863 See Trial Judgement, paras 1051, 1057-1058, 1061, 1064-1072.
2864 Nikolić's Appeal Brief, para. 120.
2865 Nikolić's Appeal Brief, para. 133.

992. First, **Nikolić** argues that the Trial Chamber violated its obligation to "specify the common criminal purpose in terms of both the criminal goal intended and its scope" and offered different specifications throughout.[2866] He claims that the Prosecution alleged throughout the trial proceedings that the common purpose of the JCE to Murder was to kill *all* the able-bodied men from Srebrenica.[2867] Moreover, according to **Nikolić**, the expansion of the scope of the plan alleged by the Prosecution – from targeting the Bosnian Muslim men separated in Potočari to include the men captured from the column fleeing Srebrenica – illustrates that the alleged common purpose was to kill *all* the able-bodied men from Srebrenica, as the men in Potočari and those in the column comprised all the men in Srebrenica.[2868] Second, **Nikolić** argues that no reasonable trial chamber could have found that he knew of a common purpose to murder *all* the able-bodied men from Srebrenica on the basis of the evidence before it. Specifically, he submits that he was not aware that the men came from the Srebrenica enclave and that in his mind, they could have originated from any pocket of conflict in BiH; nor was he aware of the scope of the murder operation to the extent that he could possibly know it targeted *all* the able-bodied men from Srebrenica.[2869]

993. The Prosecution responds that the Trial Chamber's specification of the common purpose of the JCE – to murder "the able-bodied men from Srebrenica" – was sufficient in law.[2870] The Prosecution also contends that **Nikolić** misinterprets the scope of the common purpose when he describes it as a plan to kill *all* the able-bodied men from Srebrenica.[2871] Accordingly, the Prosecution contends that **Nikolić**'s challenges to the Trial Chamber's finding that he knew the common purpose of the JCE to Murder are irrelevant, as they rely on his misinterpretation.[2872]

994. The Appeals Chamber first notes that **Nikolić**'s challenge to the Trial Chamber's factual finding that he knew the common purpose of the JCE to Murder is partly premised on his submission that the alleged common purpose was to murder *all* the able-bodied Muslim men from Srebrenica. The Appeals Chamber recalls that "indictments must be read as a whole",[2873] and notes the abundance of references in the Indictment to the common purpose of the JCE to Murder as being "to murder the able-bodied men from Srebrenica".[2874] Moreover, the Appeals Chamber is unconvinced that the fact that the Indictment refers to the plan to murder as encompassing the men

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2866 Nikolić's Appeal Brief, paras 121, 123; Nikolić's Reply Brief, para. 48.

2867 In support, **Nikolić** cites the Indictment, the Prosecution's Opening Statement, the Rule 98 *bis* submissions, and the Prosecution's Final Brief, where the Prosecution submitted that the able-bodied men from Srebrenica were targeted. Nikolić's Appeal Brief, para. 122; Nikolić's Reply Brief, para. 47.

2868 Nikolić's Reply Brief, para. 47.

2869 Nikolić's Appeal Brief, paras 124-129; Nikolić's Reply Brief, paras 49-51.

2870 Prosecution's Response Brief (Nikolić), para. 83. See also Prosecution's Response Brief (Nikolić), paras 84-87.

2871 Prosecution's Response Brief (Nikolić), para. 83.

2872 Prosecution's Response Brief (Nikolić), para. 89.

2873 See *supra*, para. 37 & note 130.

2874 Indictment, paras 28-29, 38-44, 90, 96, 98.

in the column[2875] indicates that the common purpose is pleaded as the murder of *all* the able-bodied Bosnian Muslim men. Assuming, *arguendo*, that **Nikolić**'s contention is correct that the men at Potočari and the men in the column together comprised all the able-bodied Bosnian Muslim men from Srebrenica,[2876] there is nothing in the Indictment that indicates that the common purpose was pleaded to include murder of *all* men in the column.[2877] The men referred to are those who surrendered or were captured.[2878] The Appeals Chamber thus finds that irrespective of some ambiguity caused by at times inconsistent ways of referring to the exact scope of the common purpose, the Indictment, when read as a whole, is nevertheless sufficiently clear to put **Nikolić** on notice that the common purpose of the JCE to Murder was pleaded as being "to kill the able-bodied men from Srebrenica". The Appeals Chamber also emphasises that, prior to his final brief,[2879] during the Rule 98 *bis* submissions – after the Prosecution had presented its case – **Nikolić** himself described the common purpose of the plan as being "to kill the able-bodied men from Srebrenica that were captured or surrendered after the fall of Srebrenica on 11 July 1995".[2880] Based on the foregoing, the Appeals Chamber rejects **Nikolić**'s submission that the common purpose of the JCE to Murder, as pleaded in the Indictment, was to kill *all* the able-bodied Muslim men from Srebrenica.

995. The Trial Chamber proceeded on the basis that the common purpose of the JCE to Murder was to kill the able-bodied men from in and around Srebrenica. It found that:

> Over a period of a few days in July 1995, the Bosnian Serb Forces executed several thousand Bosnian Muslim males from in and around Srebrenica in a large scale, systematic operation. The operation began on 12 July with the separation of the Bosnian Muslim men from the women and children gathered at Potočari. These men were subsequently detained in the White House and then various places in Bratunac. Organised mass killings began on 13 July in the Bratunac area at the Kravica Warehouse (where at least 1,000 men were killed), and continued between 14 and 16 July in the Zvornik area at Orahovac (between 800 and 2,500 men killed), Petkovci (over 800 men killed), Kozluk (over 1,000 men killed) and Pilica (between 1,000 and 2,000 men killed).[2881]

The Appeals Chamber notes that the temporal and geographic limits of the goal are clearly identified and specified, as are the general identities of the intended victims.[2882] The Appeals Chamber finds that **Nikolić** has failed to highlight any error in the Trial Chamber's identification or

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2875 See Indictment, paras 27-29.

2876 In this regard, the Appeals Chamber notes that **Nikolić** fails to provide any references to the trial record to substantiate his claim. See Nikolić's Reply Brief, para. 47.

2877 See Indictment, para. 29. See also Trial Judgement, paras 1055, 1056.

2878 Indictment, para. 29.

2879 See Nikolić's Final Brief, paras 1136-1142.

2880 Nikolić's Rule 98 *bis* Submissions, T. 21282 (14 Feb 2008). See also Nikolić's Rule 98 *bis* Submissions, T. 21261-21262, 21267, 21276-21277 (14 Feb 2008).

2881 Trial Judgement, para. 1050.

2882 The Appeals Chamber has previously held that "the Chamber must [...] specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims)". *Brđanin* Appeal Judgement, para. 430.

specification of the common purpose beyond his claim that the common purpose was to kill *all* the able-bodied Muslim men from Srebrenica, a claim the Appeals Chamber has rejected as unfounded.

996. With regard to **Nikolić**'s argument that no reasonable trial chamber could have found that he knew of a common purpose to murder *all* the able-bodied men from Srebrenica due to his lack of knowledge of their geographical origin, the Appeals Chamber notes that the Trial Chamber found, in its delineation of the common purpose of the JCE to Murder, that "the Bosnian Serb forces executed several thousand Bosnian Muslim males from *in and around* Srebrenica", in other words, from Srebrenica and its environs.[2883] The Trial Chamber also found that **Popović** had informed **Nikolić** that Bosnian Muslim prisoners were coming from Bratunac and that they were to be shot.[2884] The Appeals Chamber considers that the geographical origin of the prisoners is irrelevant to the Trial Chamber's finding that **Nikolić** knew of the common purpose of the JCE to Murder because, as he acknowledges,[2885] he was aware that they were coming from the direction of Bratunac. The Appeals Chamber considers that this falls under the geographical rubric of "in and around" Srebrenica.[2886]

997. In light of the foregoing, the Appeals Chamber finds that **Nikolić** has failed to show that the Trial Chamber erred when identifying and specifying the common purpose of the JCE to Murder or in finding that he knew of that common purpose. The relevant portions of **Nikolić**'s ground of appeal 7 considered here are therefore dismissed.

(ii) Whether the Trial Chamber erred in relying on PW-168's evidence (Sub-grounds 14.1 and 14.2)

a. Arguments of the Parties

998. **Nikolić** submits that through the "wholly erroneous" assessment of PW-168's credibility[2887] and failure to appropriately consider the evidence, the Trial Chamber unreasonably found that the following conversations took place in the evening of 13 July 1995: (1) the Popović-Nikolić Conversation, in which **Popović** informed **Nikolić** that Bosnian Muslim prisoners were being brought from Bratunac to Zvornik to be detained and then executed;[2888] and (2) the Nikolić-Obrenović Conversation, in which **Nikolić** informed Obrenović of this order.[2889]

2883 Trial Judgement, para. 1050 (emphasis added).
2884 Trial Judgement, para. 1345. See also Trial Judgement, para. 1389.
2885 Nikolić's Appeal Brief, para. 125; Nikolić's Reply Brief, para. 50.
2886 The Appeals Chamber notes that Bratunac is located just a few kilometres from Srebrenica. See, *e.g.*, Ex. 7DP02109, "Map of the Drina Corps Area of Responsibility".
2887 Nikolić's Appeal Brief, paras 186, 215-216, 225, 241; Nikolić's Reply Brief, para. 79.
2888 Nikolić's Appeal Brief, paras 216-224; Nikolić's Reply Brief, paras 81-83.
2889 Nikolić's Appeal Brief, paras 225-235; Nikolić's Reply Brief, paras 84-91.

999. **Nikolić** advances several arguments to support his assertion that no reasonable trial chamber could have found that the Popović-Nikolić Conversation took place.[2890] **Nikolić** first submits that this telephone call was not intercepted even though contemporaneous conversations using the same means were.[2891] He further argues that two security officers would never share information related to a killing operation on an open line and without using code words.[2892] Second, **Nikolić** argues that there would be no reason for **Popović** to inform his low ranking subordinate that the killing operation was approved by the entire chain of command and that **Beara** and himself were responsible for bringing the prisoners to Zvornik.[2893] Third, referring to the M. Nikolić-Nikolić Conversation,[2894] **Nikolić** argues that there would be no reason for **Popović** to send M. Nikolić to provide the same or even less information than **Nikolić** would already have had.[2895] Fourth, **Nikolić** asserts that the Trial Chamber failed to consider Witness Landry's evidence of "the only plausible scenario from a military perspective".[2896] Fifth, **Nikolić** submits that the Trial Chamber failed to attribute weight to M. Nikolić's testimony that in the M. Nikolić-Nikolić Conversation, he was "quite taken aback" by **Beara**'s order and responded that he would have to inform his command.[2897] Sixth, **Nikolić** argues that the decision to transport the prisoners to Zvornik to be executed was only made much later that night, if not on the following morning, and that therefore **Popović** could not have informed him on the early evening of 13 July 1995 of this decision.[2898] Finally, **Nikolić** submits that in rejecting Defence Witness Dragan Stojkić's evidence denying the existence of the Popović-Nikolić Conversation the Trial Chamber failed to consider parts of Stojkić's and **Pandurević**'s evidence.[2899]

1000. **Nikolić** also raises several arguments to support his assertion that no reasonable trial chamber could have found that the Nikolić-Obrenović Conversation took place.[2900] He first submits that since the Popović-Nikolić Conversation did not take place, PW-168's account of the Nikolić-Obrenović Conversation is a fabrication.[2901] Second, **Nikolić** argues that the Trial Chamber failed to consider evidence that invalidates PW-168's account of the Nikolić-Obrenović Conversation,[2902] namely that: (1) the only reasonable inference left by Obrenović's failure to mention to Živanović, the Drina Corps Commander, "a manifestly unlawful order", communicated

2890 Nikolić's Appeal Brief, para. 216; Nikolić's Reply Brief, para. 83.
2891 Nikolić's Appeal Brief, para. 217; Nikolić's Reply Brief, para. 82; Appeal Hearing, AT. 288-290, 302 (private session) (4 Dec 2013).
2892 Nikolić's Appeal Brief, para. 217; Nikolić's Reply Brief, para. 82.
2893 Nikolić's Appeal Brief, para. 218.
2894 See Trial Judgement, paras 1266, 1354; *supra*, para. 940, defining the M. Nikolić-Nikolić Conversation.
2895 Nikolić's Appeal Brief, para. 219; Nikolić's Reply Brief, para. 82.
2896 Nikolić's Appeal Brief, para. 220.
2897 Nikolić's Appeal Brief, para. 221; Nikolić's Reply Brief, para. 82.
2898 Nikolić's Appeal Brief, para. 222; Nikolić's Reply Brief, para. 81.
2899 Nikolić's Appeal Brief, para. 223.
2900 Nikolić's Appeal Brief, paras 225, 241.
2901 Nikolić's Appeal Brief, para. 226; Nikolić's Reply Brief, para. 84.

to him by his subordinate, is that he did not know of this order when he spoke to Živanović;[2903] and (2) PW-168 was evasive and "waivered" in his evidence in this regard.[2904] Third, **Nikolić** claims that the Trial Chamber failed to take into consideration Landry's evidence.[2905] **Nikolić** further argues that the Trial Chamber failed to consider PW-168's claim that Obrenović met with Jasikovac and authorised the latter to assist **Nikolić** without informing Jasikovac that the prisoners were to be killed.[2906]

1001. Fourth, **Nikolić** submits that the Trial Chamber erred in finding that the Nikolić-Obrenović Conversation is corroborated, and more specifically that it and the M. Nikolić-Nikolić Conversation are mutually corroborative and reliable,[2907] on the basis that: (1) no reasonable trial chamber could have concluded that the M. Nikolić-Nikolić Conversation took place; (2) had **Nikolić** informed Obrenović of the transfer and execution of the prisoners between 7:00 and 8:00 p.m., it is inconceivable that **Nikolić** would have subsequently told M. Nikolić that he would have to inform his command; (3) had **Popović** already informed **Nikolić** of the order he could not have been surprised when receiving the same information from M. Nikolić; and (4) had **Popović** already informed **Nikolić** by phone, it is impossible that **Popović** would subsequently dispatch M. Nikolić in wartime conditions to convey the same, or less, information.[2908]

1002. Fifth, **Nikolić** points out that PW-168 testified that the Nikolić-Obrenović Conversation took place over a secure line, knowing that the conversation's contents could never be challenged.[2909] Sixth, **Nikolić** submits that the Trial Chamber failed to consider that Obrenović did not order **Nikolić** to report to him upon his return to the Zvornik Brigade Command on 15 July 1995, when **Nikolić** was the acting Brigade Duty Officer.[2910] Lastly, **Nikolić** argues that the Trial Chamber's unreasonable finding that the Nikolić-Obrenović Conversation took place must be considered together with the fact that the decision to kill the prisoners was not made until later.[2911]

1003. The Prosecution responds that **Nikolić** fails to establish any error committed by the Trial Chamber.[2912] The Prosecution submits that **Nikolić**'s arguments challenging the occurrence of the

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2902 Nikolić's Appeal Brief, para. 227.
2903 Nikolić's Appeal Brief, paras 228, 230-231; Nikolić's Reply Brief, para. 85; Appeal Hearing, AT. 303 (private session) (4 Dec 2013). During the Appeal Hearing, **Nikolić** added that Obrenović did not attempt to contact **Pandurević** nor the VRS Main Staff. Appeal Hearing, AT. 302 (private session) (4 Dec 2013).
2904 Nikolić's Appeal Brief, para. 229.
2905 Nikolić's Appeal Brief, paras 232-233; Nikolić's Reply Brief, para. 87.
2906 Nikolić's Appeal Brief, para. 234; Nikolić's Reply Brief, para. 86.
2907 Nikolić's Appeal Brief, para. 236; Nikolić's Reply Brief, paras 89-90.
2908 Nikolić's Appeal Brief, paras 237-238. See *infra*, para. 1014.
2909 Nikolić's Appeal Brief, para. 239. See Appeal Hearing, AT. 271-272 (private session) (3 Dec 2013), AT. 302 (private session) (4 Dec 2013).
2910 Nikolić's Appeal Brief, para. 240; Nikolić's Reply Brief, para. 86.
2911 Nikolić's Reply Brief, para. 91. See Appeal Hearing, AT. 302 (private session) (4 Dec 2013).
2912 Prosecution's Response Brief (Nikolić), paras 177, 182, 211.

Popović-Nikolić and Nikolić-Obrenović Conversations on the grounds of military plausibility are speculative and unsubstantiated.[2913] Further, the Prosecution argues that in the Nikolić-Obrenović Conversation M. Nikolić did provide more specific information than **Popović** in the Popović-Nikolić Conversation and the Trial Chamber reasonably found that M. Nikolić's impression that he was the first to give this information to **Nikolić** was merely a supposition.[2914] The Prosecution also submits that the Trial Chamber correctly assessed and dismissed Landry's evidence.[2915] Next, the Prosecution posits that **Nikolić** misrepresents the evidence in his arguments regarding the timing of the decision to transfer the prisoners.[2916] It argues that **Nikolić**'s argument regarding Witness Stojkić's evidence is based on evidence that was reasonably rejected by the Trial Chamber.[2917] Finally, the Prosecution submits that a significant body of corroborating evidence supports PW-168's account of the Nikolić-Obrenović Conversation.[2918]

b. Analysis

1004. At the outset, the Appeals Chamber recalls that it has already dismissed **Nikolić**'s claim that the Trial Chamber's assessment of PW-168's credibility was "wholly erroneous".[2919] Furthermore, the Appeals Chamber has already dismissed similar arguments challenging the Trial Chamber's rejection of Landry's evidence as speculative.[2920]

1005. The Appeals Chamber notes **Nikolić**'s arguments concerning the military plausibility of the Popović-Nikolić Conversation regarding in particular: (1) the choice of communication and the availability of other means of communication; (2) the fact that this conversation was not intercepted while others were; and (3) the information that ordinarily would or would not have been shared on an open line. The Appeals Chamber considers these arguments to be speculative and incapable of casting into doubt the Trial Chamber's factual findings. In a similar vein, the Appeals Chamber considers **Nikolić**'s assertion that PW-168 conveniently testified that the Nikolić-Obrenović Conversation took place over a secure line with the knowledge that its contents could not be challenged to be speculative and unsubstantiated and as such warrants dismissal.

1006. Similarly, the Appeals Chamber notes **Nikolić**'s arguments regarding the military plausibility of the Popović-Nikolić Conversation and the Nikolić-Obrenović Conversation on the basis of what information officers of various ranks would or would not share with each other.

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2913 Prosecution's Response Brief (Nikolić), paras 212-213, 223.
2914 Prosecution's Response Brief (Nikolić), para. 215.
2915 Prosecution's Response Brief (Nikolić), paras 208-210.
2916 Prosecution's Response Brief (Nikolić), paras 213, 311.
2917 Prosecution's Response Brief (Nikolić), para. 213.
2918 Prosecution's Response Brief (Nikolić), para. 223.
2919 See *supra*, para. 171.
2920 See *supra*, paras 375, 953.

**Nikolić** concentrates on what should have ordinarily occurred instead of analysing the facts as they happened in the specific circumstances. **Nikolić**'s arguments are therefore incapable of casting doubt on the Trial Chamber's factual findings.

1007. Regarding **Nikolić**'s assertion that the Trial Chamber failed to consider that PW-168 was evasive and "waivered" in his evidence regarding the Nikolić-Obrenović Conversation, the Appeals Chamber notes that the Trial Chamber specifically considered PW-168's credibility, finding that "[PW-168] impressed as a frank and honest witness [...][who] gave straightforward answers and was neither evasive nor defensive".[2921] The Appeals Chamber finds that the references **Nikolić** gives to PW-168's testimony do not show that the Trial Chamber erred in assessing this witness's credibility.

1008. Likewise, the Appeals Chamber observes that the Trial Chamber specifically considered Witness Stojkić's evidence that **Nikolić** remained at the Kitovnice IKM throughout the night of 13 July until the morning of 14 July 1995 and found that "Stojkić was either mistaken or he was untruthful" in his testimony.[2922] Moreover, the evidence of **Pandurević** pointed out by **Nikolić** does not show that Stojkić was in Zvornik on 13 July 1995.[2923] **Nikolić** has failed to identify any error in the Trial Chamber's assessment of Stojkić's evidence.

1009. The Appeals Chamber notes that the Trial Chamber considered that PW-168's account of the Nikolić-Obrenović Conversation was supported by a substantial body of corroborating evidence.[2924] Irrespective of whether this evidence corroborates all the details of the substance of the Nikolić-Obrenović Conversation, in particular the fact that **Nikolić** already knew that the prisoners were to be murdered, the Appeals Chamber recalls that "nothing prohibits a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary or whether to rely on uncorroborated, but otherwise credible, witness testimony".[2925] Accordingly, the Appeals Chamber finds that **Nikolić** has failed to show that no reasonable trier of fact could have relied on PW-168's account of the conversation, even if uncorroborated, in establishing the substance of the Nikolić-Obrenović Conversation.

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2921 Trial Judgement, para. 42.
2922 Trial Judgement, para. 1349 & fn. 4380.
2923 See Vinko Pandurević, T. 31722-31723 (18 Feb 2009).
2924 See Trial Judgement, paras 1266, 1269, 1349 & fn. 4380, para. 1350 & fns 4382, 4386-4387, paras 1351, 1354 & fn. 4393.
2925 *D. Milošević* Appeal Judgement, para. 215. See *supra*, note 2616.

1010. In addition, the Appeals Chamber observes that M. Nikolić provided **Nikolić** with more information than what **Nikolić** had previously mentioned to Obrenović.[2926] As a consequence, the Appeals Chamber considers **Nikolić**'s arguments regarding the plausibility of the Popović-Nikolić Conversation and the Nikolić-Obrenović Conversation based on the details communicated in the Nikolić-Obrenović Conversation and the M. Nikolić-Nikolić Conversation to be without merit.

1011. Further, the Trial Chamber explicitly considered M. Nikolić's evidence that **Nikolić** was surprised upon being told of **Beara**'s order and concluded that this was M. Nikolić's impression and as such "[did] not detract from the overall consistency of the evidence".[2927] **Nikolić** has failed to show that the Trial Chamber erred in this regard. In addition, the Appeals Chamber observes that **Nikolić** misrepresents the Trial Chamber's findings in claiming that **Popović** dispatched M. Nikolić to the Kitovnice IKM.[2928]

1012. Similarly, the Appeals Chamber considers that **Nikolić**'s assertion that the decision to transport the prisoners to Zvornik was made late in the night of 13 July or in the morning of 14 July 1995 misrepresents the evidence.[2929] M. Nikolić testified that "the decisions, what to do and how to do things were changed and made every ten minutes, as far as I know. Instructions were pouring in. Orders were pouring in."[2930] The Trial Chamber accepted that the evidence showed that "[d]ecisions were made and changed constantly, due to the chaotic situation in Bratunac at that time".[2931] The Appeals Chamber accordingly dismisses **Nikolić**'s argument that as the decision to kill the prisoners was made after the Popović-Nikolić Conversation allegedly occurred, the Trial Chamber's finding that the Popović-Nikolić Conversation in fact took place was erroneous.

1013. For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have concluded that the Popović-Nikolić Conversation and the Nikolić-Obrenović Conversation took place as PW-168 described. The Appeals Chamber dismisses **Nikolić**'s sub-grounds of appeal 14.1 and 14.2.

(iii) Alleged error in relying on evidence of M. Nikolić (Ground 20 in part)

1014. **Nikolić** submits that the Trial Chamber erred when finding, on the basis of a "wholly erroneous" assessment of M. Nikolić's credibility in light of the totality of the evidence, that the

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2926 Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", p. 6; PW-168, T. 15830-15832 (closed session) (26 Sept 2007). See *supra*, para. 966.

2927 Trial Judgement, para. 1354. M. Nikolić testified that "[w]hether [**Nikolić**] had any other knowledge or not, I cannot say". Momir Nikolić, T. 33212 (24 Apr 2009).

2928 See Nikolić's Appeal Brief, paras 219, 238; Trial Judgement, paras 1266, 1354.

2929 Nikolić's Appeal Brief, para. 222. See Trial Judgement, paras 468, 1266 & fn. 4142, para. 1271. See also *infra*, para. 1021.

2930 Momir Nikolić, T. 33182 (24 Apr 2009).

2931 Trial Judgement, para. 1266 & fn. 4142.

M. Nikolić-Nikolić Conversation occurred.[2932] In particular, in addition to several arguments attacking M. Nikolić's overall credibility,[2933] **Nikolić** argues that the Trial Chamber failed to consider the evidence of Witnesses Mile Janjić, Nebojša Jeremić, and Stevo Kostić and erred in dismissing the evidence of Witness S. Milošević, all of which contradicts M. Nikolić's claim that in the evening of 13 July 1995 he left Bratunac and travelled to the Kitovnice IKM to meet with **Nikolić**.[2934] **Nikolić** submits that the Trial Chamber failed to consider M. Nikolić's retraction of evidence he had previously given in the *Blagojević and Jokić* case regarding his visit to the Kitovnice IKM.[2935] **Nikolić** asserts that the Trial Chamber failed to consider the contradictions in M. Nikolić's own evidence, namely that he informed **Nikolić** of the prisoners' arrival in the evening of 13 July 1995, while claiming that the decision to transfer the prisoners to Zvornik was taken only in the morning of 14 July 1995.[2936] Finally, he argues that the Trial Chamber failed to consider numerous "glaring" contradictions between the evidence of M. Nikolić and PW-168 regarding **Nikolić**'s knowledge of the murder operation on 13 July 1995 and thus erred in finding that "the core of the evidence of both witnesses is substantially similar".[2937]

1015. The Prosecution responds that **Nikolić**'s arguments should be summarily dismissed.[2938] It argues that the evidence of Janjić, Jeremić, and Kostić does not contradict M. Nikolić's evidence regarding the M. Nikolić-Nikolić Conversation.[2939] The Prosecution also submits that the Trial Chamber considered S. Milošević's evidence and concluded that it did not cast doubt on the M. Nikolić-Nikolić Conversation.[2940] The Prosecution submits that the inconsistencies between M. Nikolić's evidence in this case and in the *Blagojević and Jokić* case are minor and do not render his evidence unreliable.[2941] It further submits that M. Nikolić does not contradict himself in his evidence regarding the timing of the decision to transfer the prisoners to Zvornik.[2942] Finally, it argues that the alleged contradictions between M. Nikolić's and PW-168's evidence are not substantive and do not render defective the Trial Chamber's findings regarding the substantial similarity of their evidence.[2943]

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2932 Nikolić's Appeal Brief, para. 340.
2933 See *supra*, para. 182.
2934 Nikolić's Appeal Brief, paras 344-346; Nikolić's Reply Brief, paras 152-154.
2935 Nikolić's Appeal Brief, para. 347; Nikolić's Reply Brief, para. 155.
2936 Nikolić's Appeal Brief, para. 348; Nikolić's Reply Brief, para. 155, referring to Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", paras 6, 10, Momir Nikolić, T. 32944-32945 (21 Apr 2009); T. 33180 (24 Apr 2009).
2937 Nikolić's Appeal Brief, paras 349-351; Nikolić's Reply Brief, paras 156-158.
2938 Prosecution's Response Brief (Nikolić), paras 304, 309-310, 312-313.
2939 Prosecution's Response Brief (Nikolić), para. 305. See also Prosecution's Response Brief (Nikolić), para. 306.
2940 Prosecution's Response Brief (Nikolić), paras 307-309.
2941 Prosecution's Response Brief (Nikolić), para. 310.
2942 Prosecution's Response Brief (Nikolić), para. 311.
2943 Prosecution's Response Brief (Nikolić), paras 313-316.

1016. At the outset, the Appeals Chamber recalls that it has already considered **Nikolić**'s challenges to M. Nikolić's credibility and has dismissed his assertion that the Trial Chamber erred in its assessment thereof.[2944]

1017. The Appeals Chamber notes that the Trial Chamber did not refer to the portions of the testimonies of Janjić, Jeremić, and Kostić to which **Nikolić** refers. In this regard the Appeals Chamber reiterates that a trial chamber is not required to cite every piece of evidence on the record.[2945] There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[2946]

1018. Janjić testified that he saw M. Nikolić in Bratunac between 10:00 p.m. and *midnight* on 13 July 1995 while M. Nikolić's evidence was that he returned to Bratunac *around midnight*.[2947] Second, Jeremić testified that, while he was on duty at the gate of the Standard Barracks, there were many officers coming in and out and he would not necessarily be able to say which individuals came or went while he was at his post.[2948] Jeremić also testified that he did not think that there were any members of the Military Police at the Standard Barracks on the day that he was on duty, and that he did not remember seeing any VRS members who were not from the Zvornik Brigade arrive and leave while he was on duty but admitted that it was possible.[2949] Further, Jeremić testified that he did not know who M. Nikolić was and would not have been able to recognise him.[2950] Thus, Jeremić's testimony does not necessarily contradict M. Nikolić's testimony that he was escorted to the Kitovnice IKM building by one of the persons at the gate.[2951] Finally, Kostić testified that he was at the Standard Barracks on 14 July 1995, that Jeremić was on duty at the gate of the Standard Barracks from the evening of 13 July 1995 for 24 hours, and that there was no one else there.[2952] Kostić, however, gave no further specific details about the evening of 13 July 1995 as he was at the Karakaj Bridge that night.[2953] The Appeals Chamber thus finds that the testimonies of Janjić, Jeremić, and Kostić are not clearly relevant to the Trial Chamber's finding that the M. Nikolić-Nikolić Conversation occurred. The Appeals Chamber therefore finds that **Nikolić** has failed to demonstrate that the Trial Chamber disregarded this evidence.

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2944 See *supra*, para. 186.

2945 *Nizeyimana* Appeal Judgement, para. 176; *Đorđević* Appeal Judgement, para. 483; *Šainović et al.* Appeal Judgement, para. 1004.

2946 See *supra*, note 2661.

2947 The Appeals Chamber notes that in footnote 892 of his appeal brief **Nikolić** does not refer to the testimony of Witness Janjić but rather to the Prosecution's summary of it (T. 17931 (20 Nov 2007)). At the same time, it is observed that Witness Janjić confirmed its accuracy (Mile Janjić, T. 17932-17935 (20 Nov 2007).

2948 Nebojša Jeremić, T. 26100, 26104-26105 (23 Sept 2008).

2949 Nebojša Jeremić, T. 26092, 26110-26111 (23 Sept 2008).

2950 Nebojša Jeremić, T. 10455 (24 Apr 2007).

2951 Momir Nikolić, T. 33224 (24 Apr 2009).

2952 Stevo Kostić, T. 26007 (22 Sept 2008).

2953 Stevo Kostić, T. 26004 (22 Sept 2008).

1019. The Appeals Chamber also notes that the Trial Chamber expressly considered S. Milošević's evidence that he was at the Standard Barracks in the evening of 13 July 1995 and did not see M. Nikolić there that evening. The Trial Chamber noted that S. Milošević was evasive in his testimony on this point and concluded that his evidence lacked credibility. The Trial Chamber also considered that there was evidence suggesting that S. Milošević was not constantly at his post at the Standard Barracks.[2954] The Appeals Chamber further notes that the Trial Chamber found the essence of M. Nikolić's account of the M. Nikolić-Nikolić Conversation to be corroborated by the evidence of PW-168 about the Nikolić-Obrenović Conversation and the fact that **Nikolić** was on duty at the IKM that evening.[2955] In this context, the Appeals Chamber recalls that a trial chamber is afforded deference in assessing the various factors that affect a witness's credibility.[2956] Thus, the Appeals Chamber considers that **Nikolić** has failed to demonstrate that no reasonable trial chamber could have found M. Nikolić's evidence to be more reliable than that of S. Milošević.[2957] Finally, the Appeals Chamber finds **Nikolić**'s argument regarding S. Milošević not having any reason to lie to be speculative at best and considers that it does not cast doubt on the Trial Chamber's findings based on the evidence before it.[2958] The Appeals Chamber thus finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have rejected S. Milošević's testimony regarding M. Nikolić's visit on 13 July 1995.

1020. The Appeals Chamber recalls that, while a trial chamber cannot completely disregard all inconsistencies in a witness's testimony, a trial chamber is not required to provide every detail of its assessment of minor inconsistencies in the testimony of witnesses.[2959] In particular, the Appeals Chamber recalls that it is within the discretion of a trial chamber to evaluate it and to consider whether the evidence as a whole is credible.[2960]

1021. The Appeals Chamber considers that the contradiction between M. Nikolić's testimony in the *Blagojević and Jokić* case and his testimony in this case regarding whether he entered the Kitovnice IKM building, regardless of its cause, was not of a nature that could amount to a discernible error in the Trial Chamber's nuanced assessment of the overall credibility of M. Nikolić.[2961] Similarly, the Appeals Chamber finds that it does not invalidate the Trial Chamber's findings regarding the M. Nikolić-Nikolić Conversation. It follows that the fact that this minor inconsistency was not discussed in the Trial Judgement does not show the Trial Chamber's

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2954 Trial Judgement, para. 1354 & fn. 4393.
2955 Trial Judgement, para. 1354, fn. 4393.
2956 See *supra*, para. 20. See also *Šainović et al.* Appeal Judgement, para. 658; *Lukić and Lukić* Appeal Judgement, para. 112; *supra*, para. 131.
2957 See Trial Judgement, para. 1269, fn. 4393.
2958 See Nikolić's Appeal Brief, para. 346.
2959 See *supra*, note 2661.
2960 *Haradinaj et al.* Appeal Judgement, para. 129. See *supra*, note 2661.
2961 See Momir Nikolić, T. 33251-33252 (27 Apr 2009); Trial Judgement, paras 48-53, 1269.

disregard for this evidence. The Appeals Chamber also sees no contradiction in M. Nikolić's evidence regarding the timing of the decision to transfer the prisoners to Zvornik, considering M. Nikolić's evidence regarding the chaotic situation in which instructions and orders were pouring in and decisions were repeatedly changed.[2962] Indeed, the Appeals Chamber recalls its previous finding that it considers that **Nikolić**'s assertion – that the decision to transport the prisoners to Zvornik was made late in the night of 13 July or in the morning of 14 July 1995 – misrepresents the evidence.[2963] For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that the Trial Chamber erred in failing to consider the inconsistencies in M. Nikolić's evidence.

1022. Regarding the alleged discrepancies between M. Nikolić's and PW-168's evidence, the Appeals Chamber recalls its finding that the references to the trial record **Nikolić** provided do not show that the Trial Chamber erred in finding that the core of their evidence was substantially similar.[2964]

1023. For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have found that the M. Nikolić-Nikolić Conversation occurred. The portions of **Nikolić**'s ground of appeal 20 discussed here are therefore dismissed.

(iv) Alleged errors in finding that Nikolić shared the intent to carry out the common purpose (Ground 7 in part)

1024. **Nikolić** argues that no reasonable trial chamber could have found that he shared the intent to carry out the common purpose to kill *all* the able-bodied Bosnian Muslim men from Srebrenica.[2965] He contends that the Trial Chamber ignored the equally reasonable inference that he was used as a tool by JCE members to perform specific, limited tasks in blind dedication to the Security Service. To support his argument he points out that, if he had truly shared the intent to carry out the common purpose to kill *all* the able-bodied Bosnian Muslim men from Srebrenica, then: (1) **Beara** and **Popović** would have involved him to a far greater extent; and (2) he would have continued to contribute to the murder operation on 15 and 16 July 1995, and he would not have left for a combat mission in September 1995 during the reburial operation.[2966] **Nikolić** submits that this error resulted

2962 See Trial Judgement, para. 1266 & fn. 4142.
2963 See Nikolić's Appeal Brief, para. 348; Nikolić's Reply Brief, para. 155 (*cf.* Trial Judgement, paras 468, 1266 & fn. 4142, para. 1271). See *supra*, para. 1012.
2964 See *supra*, para. 185.
2965 Nikolić's Appeal Brief, para. 130.
2966 Nikolić's Appeal Brief, paras 130-132; Nikolić's Reply Brief, para. 52.

in a miscarriage of justice which warrants the Appeals Chamber's intervention to quash his conviction.[2967]

1025. The Prosecution responds that **Nikolić**'s arguments rely on the false premise regarding the common purpose of the plan to murder, and that the Trial Chamber's finding that he shared the intent to carry out the common purpose was reasonable.[2968]

1026. The Appeals Chamber recalls that it has rejected above the argument that the common purpose of the JCE to Murder was to kill *all* the able-bodied Bosnian Muslim men from Srebrenica.[2969] As such, **Nikolić**'s arguments, which are entirely contingent on this claim, are rejected.

1027. As for **Nikolić**'s argument that he acted out of "blind dedication", the Appeals Chamber emphasises that it has in the past clearly held that motive must be distinguished from intent[2970] and that the subordinate position of an accused is legally irrelevant to determining individual criminal responsibility.[2971]

1028. Accordingly, the Appeals Chamber finds that **Nikolić** has failed to show that no reasonable trier of fact could have found that he shared the intent to carry out the common purpose of the JCE to Murder. The relevant portions of **Nikolić**'s ground of appeal 7 considered here are thus dismissed. In light of the above dismissal of **Nikolić**'s argument that he did not know the common purpose of the JCE to Murder,[2972] the Appeals Chamber dismisses **Nikolić**'s ground of appeal 7 in its entirety.

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2967 Nikolić's Appeal Brief, para. 133.

2968 Prosecution's Response Brief (Nikolić), paras 89-90. See Prosecution's Response Brief (Nikolić), para. 152.

2969 See *supra*, para. 994.

2970 *Kvočka et al.* Appeal Judgement, paras 367, 416. See *Đorđević* Appeal Judgement, para. 887. See also *Ndindiliyimana et al.* Appeal Judgement, para. 219; *Limaj et al.* Appeal Judgement, para. 109.

2971 *Boškoski and Tarčulovski* Appeal Judgement, para. 52. Insofar as **Nikolić** relies on the *Krnojelac* Appeal Judgement within this ground of appeal (see Nikolić's Reply Brief, para. 52), the Appeals Chamber observes that in the *Krnojelac* case, it merely stated that an assertion by the Trial Chamber in that case that "the Prosecution has [not] excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent" was to be interpreted as holding that the Prosecution had not established intent beyond reasonable doubt. As such it did not go against the distinction between the motive and intent. See *Krnojelac* Appeal Judgement, para. 103:

> The Appeals Chamber does not construe the Trial Chamber's assertion in the Judgment that "the Prosecution has [not] excluded the reasonable possibility that the Accused was merely carrying out the orders given to him by those who appointed him to the position of warden of the KP Dom without sharing their criminal intent" to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive, for example the execution of an order, would be incompatible with the intent to participate in the joint criminal enterprise. The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established the intent beyond all reasonable doubt.

See also *Krnojelac* Appeal Judgement, para. 100 ("shared criminal intent does not require the co-perpetrator's personal satisfaction or enthusiasm or his personal initiative in contributing to the joint enterprise").

2972 See *supra*, para. 997.

### 3. Alleged errors pertaining to the scope of the JCE to Murder

1029. The Trial Chamber found that the BSF killed several thousand Bosnian Muslim men in locations across the Bratunac and Zvornik areas.[2973] The Trial Chamber also concluded that it did not have evidence in respect of each killing site to determine whether the physical perpetrators of these killings were themselves members of the JCE.[2974] Consequently, the Trial Chamber "consider[ed] whether each killing formed part of the common purpose, even when the crimes were committed by persons outside the JCE or by unknown members of the JCE".[2975]

1030. The Trial Chamber also found that in times of imminent threat of war or a state of war, the Armed Forces, commonly referred to as the BSF, consisted of two components: the VRS and the civilian police forces of the RS MUP, referred to as MUP forces.[2976]

1031. The VRS consisted of six geographically-based corps, which included the Drina Corps and the Sarajevo-Romanija Corps.[2977] The Main Staff exercised command and control over these corps and General Mladić was the Commander.[2978] **Beara** was the Main Staff's Chief of the Administration for Security.[2979] **Popović**, the Drina Corps Chief of Security, was subordinate to **Beara** along the professional chain of command.[2980] **Popović** was also subordinate to Krstić who was promoted from Drina Corps Chief of Staff to Drina Corps Commander on 13 July 1995.[2981] Similarly, **Nikolić**, Zvornik Brigade Chief of Security, was in turn subordinate to **Popović** along the professional chain of command.[2982] **Popović**, **Beara**, and **Nikolić** were all found to be participants in the JCE to Murder.[2983]

1032. MUP forces consisted of a Public Security Department and a State Security Department. MUP forces also had units that participated in combat activities: Special Police Brigades ("SBP"), who were directly subordinate to the Office of the Minister, and Special Police Units ("PJP") who were organised at the regional level.[2984] The CJBs were part of the Public Security Department of the MUP.[2985] In the Drina region, the PJPs were organised in the CJB.[2986] Vasić, the Head of the

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2973 Trial Judgement, paras 794, 1050.
2974 Trial Judgement, paras 1065, 1074.
2975 Trial Judgement, para. 1074.
2976 Trial Judgement, para. 102.
2977 Trial Judgement, para. 103.
2978 Trial Judgement, paras 103-104.
2979 Trial Judgement, para. 1202.
2980 Trial Judgement, para. 1090.
2981 Trial Judgement, paras 136-137.
2982 Trial Judgement, paras 1337-1338.
2983 Trial Judgement, paras 1168, 1302, 1392.
2984 Trial Judgement, para. 174.
2985 Trial Judgement, para. 175. See also Ex. 4D00459, "Diagram – Police Forces Staff".
2986 Trial Judgement, para. 182.

Zvornik CJB[2987]/Head of Police Forces Staff,[2988] was originally based in Zvornik, but around the time of the fall of Srebrenica had an office in the police station in Bratunac.[2989] The Trial Chamber found that Borovčanin, Deputy Commander of the SBP of the MUP,[2990] was not a member of the JCE to Murder.[2991]

1033. The Trial Chamber found that where the BSF's Supreme Commander had assigned MUP forces to combat operations, they were to be "re-subordinated to the commander of the VRS unit in whose area of responsibility they were performing combat tasks".[2992] It, however, found that the re-subordinated MUP forces would remain under the direct command of a commander who is a MUP member, would retain their organisation and would not be split up.[2993] One such instance of re-subordination of MUP forces occurred on 11 July 1995 when Borovčanin and the MUP unit placed under his command were re-subordinated to Krstić of the VRS's Drina Corps.[2994]

1034. The Trial Chamber found that there was abundant evidence "to establish that [the murder operation] was a coordinated effort reaching from the VRS Commander and some members of the Main Staff through the Drina Corps, the MUP and down to the Zvornik and Bratunac Brigades and Battalions thereof".[2995] It found that "[w]hile the evidence does not permit an exact determination as to who were participants and who were perpetrators, it is clear that individual units from across the VRS worked together in the implementation of the common purpose [of the JCE to Murder]".[2996]

(a) Whether the Kravica Warehouse, Cerska Valley, and Jadar River killings were committed in furtherance of the common purpose (Beara's Ground 17 in part)

1035. The Trial Chamber found that the Kravica Warehouse, Cerska Valley, and Jadar River killings fell within the scope of the JCE to Murder.[2997] The Trial Chamber relied on the following parallels between the killings to find that they were part of the common plan: (1) the units involved, namely the Bratunac Brigade; (2) the method and means used to carry out the killings; (3) the time frame within which they occurred; and (4) the fact that the victims of the killings at Bratunac and

2987 Trial Judgement, paras 182, 289.
2988 Trial Judgement, fn. 432.
2989 Trial Judgement, fn. 432, finding that, although the Staff was originally located at the Zvornik CJB sometime around the fall of Srebrenica, it was transferred to the police station in Bratunac and that during this period Vasić shared an office with the Chief of the Bratunac SJB.
2990 Trial Judgement, para. 1434.
2991 Trial Judgement, para. 1541.
2992 Trial Judgement, para. 184, referring to Ex. P00422, "Law on the Implementation of the Law on Internal Affairs During an Imminent Threat of War or a State of War", Art. 14.
2993 Trial Judgement, para. 184.
2994 Trial Judgement, paras 185, 256, 1435. See also Trial Judgement, paras 184, 1434.
2995 Trial Judgement, para. 1065.
2996 Trial Judgement, para. 1065.
2997 Trial Judgement, paras 1074-1077.

Zvornik had all come from Srebrenica and been either taken into custody at Potočari or captured from the column.[2998]

(i) General challenges to findings related to the Kravica Warehouse, Cerska Valley, and Jadar River killings

1036. **Beara** disputes the Trial Chamber's findings concerning the scope of the common purpose of the JCE to Murder and submits that the Trial Chamber's conclusions in this regard were unreasonable.[2999] With respect to the Kravica Warehouse, Cerska Valley, and Jadar River killings, **Beara** submits that the Trial Chamber did not conduct a case-by-case evaluation to determine whether these killings were part of the common purpose, which he asserts is required by the jurisprudence of the Tribunal.[3000] **Beara** also avers that despite some common traits, such as being directed against the men from Srebrenica, the differing methods and organisation show that the killings in these three sites were not part of the same plan. In this regard, he asserts that inconsistencies in the evidence undermine the Trial Chamber's conclusion that the method and means of these killings put them within the scope of the common purpose.[3001]

1037. The Prosecution responds that **Beara**'s arguments should be dismissed as he fails to show that the Trial Chamber erred.[3002] It asserts that **Beara** seeks to substitute his evaluation of the evidence for that of the Trial Chamber, while ignoring other relevant factual findings and evidence.[3003]

1038. The Trial Chamber examined each killing site, including the Kravica Warehouse, the Cerska Valley, and the Jadar River, to determine whether they formed part of the common plan.[3004] The Trial Chamber concluded that the killings in these three sites were part of the common plan based on their shared elements with the other mass killings and clearly set out the factors it considered with respect to these killings.[3005] The Appeals Chamber reiterates that it is incumbent upon an appellant claiming an error of law to explain how the error invalidates the decision. **Beara**'s submissions fail to explain how the fact that the Trial Judgement discusses the killings in these three sites collectively is an error that invalidates the decision. **Beara**'s argument that the Trial Chamber failed to assess the killings on a case-by-case basis is therefore dismissed.

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2998 Trial Judgement, para. 1074.
2999 Beara's Appeal Brief, paras 199, 203; Beara's Reply Brief, para. 77. See also Appeal Hearing, AT. 201-203 (3 Dec 2013).
3000 Beara's Reply Brief, para. 76 & fn. 65, referring to *Brđanin* Appeal Judgement, para. 410.
3001 Beara's Appeal Brief, para. 201.
3002 Prosecution's Response Brief (Beara), paras 199-202, 204.
3003 Prosecution's Response Brief (Beara), para. 200.
3004 Trial Judgement, paras 1074-1080.
3005 See *supra*, para. 1035.

(ii) The Kravica Warehouse killings

1039. **Beara** submits that the Kravica Warehouse killings were incidental and not planned as a part of the JCE to Murder.[3006] **Beara** further asserts that, as there was no evidence of his direct participation in the murder operation prior to the meetings held in the evening of 13 July 1995, his conviction with respect to the "Kravica murders" that occurred "that day earlier" should be quashed.[3007] The Prosecution responds that **Beara** repeats his trial arguments without showing an error.[3008]

1040. The Appeals Chamber first observes that **Beara** does not develop his argument that the killings were incidental nor does he provide any references to support it.[3009] The Appeals Chamber further observes that following a detailed discussion, the Trial Chamber rejected the argument that the Kravica Warehouse killings would not have happened if not for the "burnt-hands" incident.[3010] **Beara** has failed to demonstrate that no reasonable trier of fact could have concluded that the Kravica Warehouse killings were part of the common plan.[3011] **Beara**'s argument is dismissed accordingly.

1041. With respect to **Beara**'s submission that there was no evidence of his direct participation in the murder operation prior to the evening of 13 July 1995, the Appeals Chamber recalls that it has already dismissed his challenges to the Trial Chamber's finding that *by the morning of 12 July 1995* he was aware of and implicated in the plan to murder and he played a key role in orchestrating the murder operation by planning, co-ordiating, and overseeing the detention, transportation, execution, and burial of the able-bodied Bosnian Muslim males *from that point onward.*[3012] The Appeals Chamber notes that the killings in Kravica took place between 13 and 14 July 1995,[3013] well after the point at which the Trial Chamber found that **Beara**'s involvement in the murder operation began.[3014] His argument is thus dismissed.

(iii) The Cerska Valley killings

1042. **Beara** submits that the Trial Chamber erred in finding that approximately 150 Muslim men were killed in Cerska Valley on 13 July 1995.[3015] The Prosecution responds that **Beara** fails to

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3006 Beara's Appeal Brief, para. 199.
3007 Appeal Hearing, AT. 203 (3 Dec 2013).
3008 Prosecution's Response Brief (Beara), para. 200.
3009 Beara's Appeal Brief, para. 199.
3010 Trial Judgement, paras 1516-1536. See *supra*, paras 798, 918.
3011 Trial Judgement, para. 445.
3012 See *supra*, paras 971-972, 986-990; Trial Judgement, para. 1299.
3013 The Appeals Chamber recalls that killings occurred in two places in Kravica. Trial Judgement, paras 435, 449, 794.
3014 Trial Judgement, para. 1299.
3015 Beara's Appeal Brief, para. 200; Beara's Reply Brief, para. 77.

show how the evidence he refers to disturbs the Trial Chamber's finding concerning the Cerska Valley killings.[3016] The Appeals Chamber recalls that it has dismissed **Beara**'s other challenges to the evidence that underpins these findings and finds that no new arguments are presented in this challenge.[3017] **Beara**'s argument is dismissed accordingly.

(iv) The Jadar River killings

1043. The Trial Chamber found that on 13 July 1995, there was "a single operation [...] which resulted in the surrender or capture of many hundreds of Bosnian Muslims from the column".[3018] It found that the custodial sites along the Bratunac-Konjević Polje Road were not distinct sites with separate forces responsible for each, but rather "a single geographic area [...] where different units of the Bosnian Serb Forces, blended together, and had joint custody of the prisoners".[3019] On that day PW-112, two other Bosnian Muslim men from the column, and a boy of approximately 15 years of age were captured along the Bratunac-Konjević Polje Road near Konjević Polje by MUP forces.[3020] PW-112 was taken to a warehouse near the banks of the Jadar River, where he and other Bosnian Muslim men were beaten and detained by other BSF members – including Nenad Deronjić.[3021] The Trial Chamber found that Deronjić was a member of the MUP forces, but was unable to find that he was a Bratunac police officer and a member of the 2nd PJP Company from Zvornik.[3022] Later that day, the BSF transported the Bosnian Muslim men to the banks of the Jadar River and killed 15 of the 16.[3023] PW-112 was the only survivor.[3024]

1044. **Beara** contends that the Trial Chamber erred in law in finding that the Jadar River killings fell within the common purpose of the JCE to Murder.[3025] He submits that the Jadar River killings were not proven beyond reasonable doubt as PW-112's testimony was "evasive and suspicious" and there was no forensic evidence.[3026] **Beara** also submits that since the Jadar River killings were "committed by police [they] cannot be a part of the common purpose".[3027] **Beara** points out that, although MUP forces were part of the BSF, the Trial Chamber also concluded "that the evidence does not permit an exact determination as to who were participants and who were perpetrators in

3016 Prosecution's Response Brief (Beara), para. 202.
3017 See *supra*, paras 295, 301.
3018 Trial Judgement, para. 1548.
3019 Trial Judgement, para. 1548.
3020 Trial Judgement, para. 390.
3021 Trial Judgement, para. 408.
3022 Trial Judgement, para. 408 & fn. 1435. See *supra*, para. 1032.
3023 Trial Judgement, para. 1074 & fn. 3512, referring to Trial Judgement, paras 408-409. See Trial Judgement, para. 794 & fn. 2867, referring to Trial Judgement, paras 408-409.
3024 Trial Judgement, paras 408-409.
3025 Beara's Appeal Brief, intro before para. 199.
3026 Beara's Reply Brief, para. 78.
3027 Beara's Appeal Brief, para. 199.

the common purpose".[3028] In this regard, he argues that where the principal perpetrator is not a member of the JCE a link must be established to enter a conviction.[3029]

1045. The Prosecution responds that **Beara**'s challenge lacks merit since MUP forces together with the VRS executed several thousand Bosnian Muslim men from in and around Srebrenica.[3030] It submits that "in the totality of the circumstances" it was appropriate for the Trial Chamber to link the Jadar River killings to Mladić either directly or through close co-operation.[3031]

1046. The Appeals Chamber notes that **Beara** has not provided an explanation or references to substantiate his assertions that the Trial Chamber's finding was not supported by forensic evidence and that PW-112's testimony was evasive and suspicious. His arguments are thus dismissed.

1047. Next, the Appeals Chamber recalls that the Trial Chamber relied on four parallels between the Jadar River killings and the other killings to find that they were part of the common plan.[3032] As **Beara** challenges the Trial Chamber's reliance on the first of these four parallels, namely the units involved,[3033] the Appeals Chamber will begin by examining the findings that underpin the Trial Chamber's conclusion that the Bratunac Brigade was involved in the Jadar River killings.

1048. In its discussion on the perpetrators of the Jadar River killings,[3034] the Trial Chamber specifically referred to the MUP forces' involvement, whereas references to the VRS, and in particular the Bratunac Brigade, are notably absent.[3035] The absence of specific references to the VRS leaves open the possibility that the BSF members identified as the principal perpetrators were drawn exclusively from the MUP forces.[3036] The Appeals Chamber therefore finds that no reasonable trier of fact could have concluded, based on these findings alone, that the Bratunac Brigade was involved in the Jadar River killings. In so doing, the Trial Chamber committed an error of fact. The Appeals Chamber will now consider whether this error occasioned a miscarriage of justice.

1049. The Appeals Chamber recalls the Trial Chamber's observation that it lacked the evidence to determine whether the physical perpetrators of the Jadar River killings, or those of the other

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3028 Beara's Reply Brief, para. 78. See also Beara's Appeal Brief, para. 199.
3029 Appeal Hearing, AT. 201-203 (3 Dec 2013), referring to *Brđanin* Appeal Judgement, paras 412-413, *Martić* Appeal Judgement, para. 181, *Krajišnik* Appeal Judgement, para. 235.
3030 Prosecution's Response Brief (Beara), para. 203.
3031 Appeal Hearing, AT. 239-244 (3 Dec 2013), referring to, *inter alia*, Trial Judgement, paras 365, 376-390, 408, 1029-1030, 1074, 1449-1453, 1458.
3032 Trial Judgement, para. 1074. See *supra*, para. 1035.
3033 Trial Judgement, para. 1074.
3034 See *supra*, para. 1035.
3035 Trial Judgement, paras 408-409.
3036 See *supra*, paras 1030-1033, setting out the components of the BSF and the relationship between MUP forces and the VRS.

killings, were themselves members of the JCE to Murder.[3037] Consequently, even when the killings were committed by persons outside the JCE or by unknown members of the JCE, the Trial Chamber considered whether the killing formed part of the common purpose.[3038] As noted above, the Trial Chamber relied on the Bratunac Brigade's involvement to find that the Jadar River killings were part of the common plan.[3039] Without this solitary reference to the VRS's Bratunac Brigade, the link between the Jadar River killings and the JCE to Murder, whose only named individuals were VRS members,[3040] is no longer readily apparent from the reasons the Trial Chamber provided.

1050. The Appeals Chamber reiterates that JCE members can incur liability for crimes committed in furtherance of the common plan either where the principal perpetrator of the crime is a JCE member,[3041] or where the crime can be imputed to at least one JCE member and that this member – when using the principal perpetrators – acted in accordance with the common objective.[3042] Where the principal perpetrator is not found to be a JCE member, factors indicative of this link between the principal perpetrator and a JCE member include "evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime".[3043] The Appeals Chamber observes that the Trial Chamber's findings do not allow for the conclusion that members of the MUP forces, as such, could be considered to be members of the JCE to Murder.[3044] Thus, **Beara** can only incur liability for the Jadar River killings if a link can be established showing that one member of the JCE used MUP forces to commit these killings.

1051. The Appeals Chamber recalls the Trial Chamber's finding that MUP forces assigned to combat operations were to be re-subordinated to the VRS commander in the area where they were performing combat tasks.[3045] However, as re-subordination applied only to MUP forces assigned to combat operations and not to all MUP forces,[3046] this provision alone is insufficient to conclude that all MUP forces present in the area when the murder operation was being implemented were under VRS control or, more specifically that MUP forces involved in the Jadar River killings were under

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3037 Trial Judgement, para. 1074. See *supra*, para. 1034. See also Trial Judgement, para. 1065.

3038 Trial Judgement, para. 1074. See *supra*, para. 1029.

3039 See *supra*, paras 1035, 1047.

3040 Trial Judgement, paras 1168 (**Popović**), 1302 (**Beara**), 1392 (**Nikolić**). See *infra*, para. 1052.

3041 See *Krajišnik* Appeal Judgement, para. 236; *Kvočka et al.* Appeal Judgement, para. 99, referring to *Tadić* Appeal Judgement, paras 191-192.

3042 *Đorđević* Appeal Judgement, para. 165; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, paras 225, 235; *Brđanin* Appeal Judgement, paras 410, 413.

3043 *Krajišnik* Appeal Judgement, para. 226. See *supra*, note 3042.

3044 Finding that members of the MUP forces, as such, could be considered to be members of the JCE to Murder would conflict with the Trial Chamber's other findings. See *e.g.*, Trial Judgement, paras 1434, 1541 (finding that co-Accused Borovčanin, Deputy Commander of the SBP of the RS MUP and Commander of a joint force of MUP units which was sent to Bratunac, was not a member of the JCE to Murder). See also *infra*, paras 1408-1410, discussing the plurality of persons.

3045 Trial Judgement, para. 184, referring to Ex. P00422, "Law on the Implementation of the Law on Internal Affairs During an Imminent Threat of War or a State of War", Art. 14. See *supra*, para. 1033.

VRS control. For this reason, the Appeals Chamber will consider whether the factual findings in the Trial Judgement, as a whole, warrant the conclusion that the interaction of the JCE members in the implementation of the common criminal objective can serve as a basis for establishing a link between the Jadar River killings and a member of the JCE to Murder.

1052. In this regard, the Appeals Chamber notes that in addition to finding that **Popović**, **Beara**, and **Nikolić** were participants in the JCE to Murder,[3047] the Trial Chamber also made several findings with respect to Mladić. It found that the plan to murder "emanated from the highest echelons of the VRS Main Staff, including Mladić, the Commander of the VRS"[3048] and was satisfied that "Mladić was a central, driving force behind the plan to murder and its implementation."[3049] In reaching this conclusion, the Trial Chamber noted that it was clear from the evidence that "such an operation, on a massive scale, involving the participation of a multitude of VRS members from the Main Staff down, could not have been undertaken absent the authorisation and order of VRS Commander Mladić".[3050] The Trial Chamber went on to note that, "[g]iven his role in the military structure and his acts and words at the time, including his direct involvement in critical components of the operation, any alternative conclusion is inconceivable".[3051] It emphasised that Mladić's "imprint – through rhetoric, threats, speeches, orders and physical presence – appears on an ongoing basis at critical junctures of this murder enterprise".[3052] The Appeals Chamber is satisfied that the only reasonable inference from the above-mentioned findings is that Mladić was also a member of the JCE to Murder.

1053. The Appeals Chamber reiterates that the existence of the link between the principal perpetrator of a crime and a member of the JCE is a matter to be assessed on a case-by-case basis.[3053] This, however, does not mean that the Jadar River killings should not be viewed in the context of the murder operation as a whole. Accordingly, the Appeals Chamber recalls the parallels between the Trial Chamber's findings about the Jadar River killings and those of the other killings.[3054] It first notes the Trial Chamber's finding that the method and means used to carry out the Jadar River killings, namely that the victims were lined up and fired upon, is similar to those at other killing sites.[3055] Second, the Appeals Chamber observes the temporal and geographic

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3046 Trial Judgement, para. 184. See *supra*, para. 1033.
3047 Trial Judgement, paras 1168, 1302, 1392. See *supra*, para. 1031.
3048 Trial Judgement, para. 1072.
3049 Trial Judgement, para. 1071.
3050 Trial Judgement, para. 1071. See also Trial Judgement, para. 1299 ("[T]he Trial Chamber has found that the orders with respect to this operation were given by Mladić").
3051 Trial Judgement, para. 1071.
3052 Trial Judgement, para. 1071 (internal references omitted).
3053 *Đorđević* Appeal Judgement, para. 165; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, paras 410, 413.
3054 See *supra*, para. 1047.
3055 Trial Judgement, paras 408 (Jadar River killings), 412 (Cerska Valley killings), 484, 487 (Orahovac killings).

proximity of the Jadar River killings to the other killings in the murder operation. In this regard, the Trial Chamber found that the Jadar River was one of 14 crime sites that all fell within a limited geographic area,[3056] which itself was within the Drina Corps' area of responsibility.[3057] It also found that the 15 men killed at the Jadar River on 13 July 1995 were among those killed in the first days of a murder operation that would result in the execution of several thousand Bosnian Muslim men from in and around Srebrenica before the end of the month.[3058]

1054. Turning to the perpetrators, the Appeals Chamber notes that in addition to the general co-operation between the VRS and MUP forces,[3059] a great deal of synchronisation was required to effectuate the separation, transportation, detention, and killing of Bosnian Muslim men on such a large scale.[3060] This synchronisation is evident in the Trial Chamber's findings concerning the tasks undertaken by the units operating in the Bratunac and Zvornik areas between 12 and 17 July 1995, namely that: (1) VRS and MUP forces assisted in the transportation of Bosnian Muslims out of Potočari and the separation and detention of the able-bodied Bosnian Muslim men;[3061] (2) VRS and MUP forces guarded the Bosnian Muslim men transported from Bratunac;[3062] and (3) in the days that followed, assorted VRS units were mobilised to guard, transport, and execute the Bosnian Muslim men.[3063] This synchronisation is equally evident in the Trial Chamber's findings about the presence and actions of VRS and MUP forces operating near the Jadar River on 12 and 13 July 1995.[3064] In this regard, the Appeals Chamber emphasises the Trial Chamber's conclusion

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3056 Trial Judgement, paras 351-353 (Rašica Gaj killings), 408-409 (Jadar River killings), 410-414 (Cerska Valley killings), 421-423 (Sandići Meadow killings), 424-445 (Kravica Warehouse killings), 479-488 (Orahovac killings), 499-500 (Petkovci Dam killings), 517-520 (Kozluk Killings), 527-531 (Kula School killings), 532-541 (Pilica Area Killings), 565-569 (Baljkovica killings), 570-577 (Milići Hospital killings), 578-583 (Snagovo killings), 584-589 (killings of the Branjevo Military Farm survivors). The Appeals Chamber excludes the Trnovo killings from this calculation of crime sites. See *infra*, paras 1058 *et seq.*

3057 Trial Judgement, paras 302-305 (BSF took control of Potočari), 362 (area of responsibility of Bratunac Brigade), 469 (area of responsibility of Zvornik Brigade). See also Ex. 7DP02109, "Map of the Drina Corps Area of Responsibility".

3058 Trial Judgement, paras 793-794, 1050. See also Trial Judgement, paras 664, 1059, 1064.

3059 Trial Judgement, paras 104 (finding that the Main Staff, the highest operative body of the VRS, operated in co-operation with the MUP), 1065 (finding that the murder operation was a co-ordinated effort reaching from the VRS Commander and some members of the Main Staff through the Drina Corps, the MUP, and down to the Zvornik and Bratunac Brigades and the battalions thereof).

3060 See Trial Judgement, para. 883.

3061 Trial Judgement, paras 316, 319, 342, 1054, finding that the VRS forces included the Drina Corps Military Police, the 10th Sabotage Detachment, the 65th Protection Regiment's Military Police, the Bratunac Brigade 2nd and 3rd Battalions, the Bratunac Brigade Military Police and that the MUP forces included "MUP members with German Shepherd dogs", and members of the Jahorina Recruits.

3062 Trial Judgement, para. 1063, finding that the VRS's Bratunac Brigade and MUP were involved.

3063 Trial Judgement, para. 1064, finding that the VRS units involved included members of the Bratunac Brigade, the Zvornik Brigade Battalions, the Zvornik Brigade Military Police, and the 10th Sabotage Detachment.

3064 Trial Judgement, paras 365, 377, 386, 1435 (finding that MUP units were deployed to cover various sections of the Bratunac-Konjević Polje Road on 12 and 13 July 1995); 365, 376 (finding that VRS and other MUP units were involved in blocking the column at various locations in the Bratunac area, including around Konjević Polje and Nova Kasaba on 12 and 13 July 1995); 389, 395 (finding that some Bosnian Muslim men from the column captured along the Bratunac-Konjević Polje road were taken to a warehouse in Konjević Polje guarded by military policemen; transported first to the Nova Kasaba Football Field and then to Bratunac by military police; and ultimately handed over to MUP members who were awaiting them at the Vuk Karadžić School in Bratunac); fn. 1242 (one MUP squad was located around Konjević Polje). See also Ex. P00148, "Document from the Command of the Drina Corps Intelligence Dept. to

that the capture and detention of the Bosnian Muslim men on 13 July 1995 was the result of a "single operation" in a "single geographic area".[3065] Finally, with respect to forces involved in the Jadar River killings, the Trial Chamber found that: (1) MUP forces captured PW-112; (2) BSF members, "at least one of whom was an MUP member", guarded PW-112 and two other Bosnian Muslim men who were captured along the Bratunac-Konjević Polje Road;[3066] and (3) four BSF members interrogated these three Bosnian Muslim men at another location.[3067]

1055. Turning to the involvement of the members of the JCE to Murder, the Appeals Chamber first notes the Trial Chamber's findings about **Popović**'s and Mladić's proximity to the area on 13 July 1995, namely that: (1) **Popović** knew of the operation along the Konjević Polje Road to capture and detain Bosnian Muslims, and that he had gone along Konjević Polje Road at some time that day;[3068] and (2) Mladić shouted to the hundreds of Bosnian Muslim men who had surrendered or been captured in the area of the Nova Kasaba-Konjević Polje Road and were being detained at the Nova Kasaba Football Field before being transported to Bratunac.[3069]

1056. The Appeals Chamber also observes that meetings held on 13 July 1995 in Bratunac could demonstrate that this synchronisation of VRS and MUP units was, at least in part, organised by members of the JCE to Murder.[3070] Mladić and **Popović** attended the first of these meetings which was held in the morning of 13 July 1995 at the Bratunac Brigade Headquarters.[3071] Notably, Krstić, to whom Borovčanin and a unit of MUP forces had recently been re-subordinated,[3072] and a MUP forces member, Vasić, also attended.[3073] The co-operation between the VRS and MUP forces is evident from Vasić's summary of the meeting, which in relevant part reads:

> At the meeting with General MLADIĆ this morning we were informed that the VRS/Army of the Republika Srpska/ was continuing operations towards Žepa and leaving all other work to the MUP, as follows:
>
> 1. Evacuation of the remaining civilian population from Srebrenica to Kladanj (about 15,000) by bus. We urgently need 10 tons of petrol;
>
> 2. Killing of about 8,000 Muslim soldiers whom we blocked in the woods near Konjević Polje. Fighting is going on. This job is being done solely by MUP units;

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the Main Staff Intelligence and Security Sector signed by Tolimir, 12 July 1995", stating that the MUP forces in Konjević Polje were tasked with controlling the Bratunac-Konjević Polje Road.

3065 Trial Judgement, para. 1548. See *supra*, para. 1043.

3066 Trial Judgement, para. 390.

3067 Trial Judgement, para. 390.

3068 Trial Judgement, para. 1102.

3069 Trial Judgement, paras 392-395.

3070 See Trial Judgement, para. 289, finding that Mladić, **Popović**, and Vasić attended the Third Hotel Fontana Meeting.

3071 Trial Judgement, para. 1100.

3072 Trial Judgement, paras 185, 1435. See *supra*, para. 1033.

3073 Trial Judgement, para. 1100.

> 3. Securing all key buildings in the town of Srebrenica and controlling entry and exit of people and goods at three checkpoints set up;
>
> 4. Send the Srbinje or Doboj special detachment to Konjević Polje. [3074]

Although the Trial Chamber found that the reference to the "killing of about 8,000 Muslim soldiers [....] blocked in the woods near Konjević Polje" was discussed in a military context,[3075] this document clearly demonstrates Mladić's, and less directly **Popović**'s, involvement in the organisation of the VRS and MUP forces operating in the area when the victims of the Jadar River killings were captured.[3076] Similarly, the Trial Chamber's finding that a series of meetings were held at the Bratunac SDS Offices that same evening demonstrates **Beara**'s involvement in the organisation of VRS and MUP forces.[3077] The Appeals Chamber takes particular note of M. Nikolić's evidence that: (1) at the time of the meetings, **Beara** and Vasić were seen at the Bratunac SDS Offices;[3078] (2) the "killing operation was openly discussed";[3079] and (3) "it was decided that the Bosnian Muslim men in and around Bratunac should continue 'to be guarded by elements of the Bratunac Brigade Military Police, various civilian MUP forces and armed volunteers from Bratunac town'".[3080]

1057. The Appeals Chamber therefore concludes that, based on the circumstantial evidence discussed above,[3081] the only reasonable inference to be drawn is that MUP forces involved in apprehending, transporting, detaining, and ultimately killing the Bosnian Muslim men at Jadar River were working in close co-operation with the VRS units under Mladić's command.[3082] The Appeals Chamber is satisfied that, in light of the close co-operation between the VRS and MUP forces in the lead up to the Jadar River killings and in the implementation of the common purpose, a a link can be established at least to Mladić, who was a member of the JCE to Murder. The Appeals Chamber thus considers that the Trial Chamber's error did not result in a miscarriage of justice. **Beara**'s submission is dismissed accordingly.

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3074 Trial Judgement, fn. 3594; Ex. P00886, "Document from the Zvornik CJB to the RS MUP, type-signed Vasić, 13 July 1995", p. 1. See *supra*, para. 944.

3075 Trial Judgement, para. 1100 & fn. 3595.

3076 See Trial Judgement, para. 365, fn. 3594; Ex. P00886, "Document from the Zvornik CJB to the RS MUP, type-signed Vasić, 13 July 1995".

3077 Trial Judgement, para. 1271.

3078 Trial Judgement, para. 1266.

3079 Trial Judgement, para. 1266.

3080 Trial Judgement, para. 406. See Trial Judgement, para. 1266. The Appeals Chamber notes that in paragraph 406 the Trial Chamber indicates that this meeting was held at the Bratunac Brigade Headquarters, however on review of the evidence on which it relies (Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", p. 6) it is clear that this meeting took place at the Bratunac SDS Office.

3081 See *supra*, paras 1031-1033 (setting out the VRS and MUP forces chain of command), 1054 (identifying specific VRS units involved and setting out the synchronisation between the VRS and MUP forces in the area at the relevant time), 1055-1056 (setting out Mladić's, **Beara**'s, and/or **Popović**'s proximity to the area and involvement in the organisation of VRS and MUP forces in the area at the relevant time).

3082 See also Trial Judgement, para. 133, finding that Mladić would issue orders regarding the disposition of the Military Police Battalion of the 65th Protection Regiment and that **Beara** would make proposals to Mladić as to its use.

(b) Whether the Trnovo killings were committed in furtherance of the common purpose

1058. The Trial Chamber found that the Trnovo killings fell within the scope of the JCE to Murder.[3083] The Trial Chamber considered that it was not presented with evidence: (1) indicating that the six men were detained in the Drina Corps' zone of responsibility; (2) shedding light on the men's journey from Srebrenica to the Trnovo area; or (3) indicating that there was any VRS Main Staff involvement in the six men coming into the custody of the Scorpions Unit. In this regard, it concluded that any inference that there was co-ordination with the VRS Main Staff was speculation.[3084] The Trial Chamber then considered the fact that the Trnovo killings occurred in July 1995, after the fall of Srebrenica, and that the victims were Bosnian Muslim men from Srebrenica. The Trial Chamber concluded that "[e]ven without evidence as to how the men arrived at this location or into the custody of the Scorpions [...] it [was] an unreasonable inference that within the same relative time period, in an adjoining area, there was a separate, distinct murder operation targeting precisely the same victims".[3085]

(i) Beara's appeal (Ground 17 in part) and Popović's appeal

1059. **Beara** submits that the Trial Chamber committed an error of law in relation to the findings concerning the Trnovo killings.[3086] He argues that the Trnovo killings were not part of the common purpose of the JCE to Murder, as it was not proven that the Scorpions Unit was a member of the JCE, that there was any link between the perpetrators and the participants in the JCE to Murder, or that there were territorial or temporal connections with other murders within the JCE.[3087] **Popović** presents a similar challenge.[3088]

1060. The Prosecution responds that these arguments should be dismissed as the Trial Chamber properly found that the Trnovo killings were part of the murder plan, given the identical time frame of the killings and the identity of the victims.[3089] It submits that, although **Beara** and **Popović** challenge the impugned finding by referring to the Judge Kwon Dissent, he fails to show how the Majority erred.[3090] According to the Prosecution, whether the members of the Scorpions Unit were members of the JCE to Murder is irrelevant as it avers that what matters in a first category JCE is

3083 Trial Judgement, para. 1080.
3084 Trial Judgement, para. 1079.
3085 Trial Judgement, para. 1080.
3086 Beara's Appeal Brief, intro before para. 199.
3087 Beara's Appeal Brief, para. 202; Beara's Reply Brief, para. 80. See also Appeal Hearing, AT. 201-203 (3 Dec 2013).
3088 Popović's Appeal Brief, paras 450-451.
3089 Prosecution's Response Brief (Beara), paras 199, 205, 209; Prosecution's Response Brief (Popović), para. 300.
3090 Prosecution's Response Brief (Beara), para. 205; Prosecution's Response Brief (Popović), para. 300.

whether the crime in question forms part of the common purpose, which must be assessed on a "case-by-case basis" and may be inferred from a variety of factors.[3091]

1061. The Prosecution avers that the deployment of the Scorpions Unit in the Trnovo area, *i.e.* in the area of responsibility of the Sarajevo-Romanija Corps, in late June through the end of July 1995, alongside units of the MUP forces, constitutes evidence of close co-ordination of the Scorpions Unit with MUP forces during the relevant time period.[3092] It points out that all six Trnovo victims were last seen in the Drina Corps' area of responsibility, along the route of the column between Bratunac and Nova Kasaba, that the BSF, including various units of the MUP forces, were stationed along the Bratunac-Konjević Polje Road to capture the men from the column, and that many Bosnian Muslim men from the column were captured by or surrendered to the BSF in this area.[3093]

1062. The Prosecution further identifies several findings that, it posits, illustrate the reasonableness of the Trial Chamber's conclusion, namely that the BSF continued to search the terrain for ABiH soldiers "following the biggest known killings", that Bosnian Serb units in places such as Nezuk and Snagovo captured and killed smaller groups of Bosnian Muslim men fleeing from Srebrenica in the column, and that the four Bosnian Muslim men reported missing from Srebrenica who survived the Branjevo Military Farm execution were captured, interrogated on 23 July 1995 by the Zvornik Brigade Military Police, and then killed.[3094]

a. Whether the members of the Scorpions Unit were members of the JCE

1063. At the outset, the Appeals Chamber observes that the Scorpions Unit was not included in the military and civilian structures of the RS,[3095] as it was a unit of the Serbian MUP.[3096] Further, the

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3091 Prosecution's Response Brief (Beara), para. 206; Prosecution's Response Brief (Popović), para. 301.

3092 Prosecution's Response Brief (Beara), paras 206, 208; Prosecution's Response Brief (Popović), para. 301. See Appeal Hearing, AT. 245 (3 Dec 2013). The Prosecution gives other examples of co-ordination from which "it is reasonable to infer that the Trnovo victims, too, were captured or surrendered in this area to the Bosnian Serb Forces, who then handed them over to the Scorpions Unit". Prosecution's Response Brief (Beara), para. 207; Prosecution's Response Brief (Popović), para. 302.

3093 Prosecution's Response Brief (Beara), para. 207; Prosecution's Response Brief (Popović), para. 302. See also Appeal Hearing, AT. 244-245 (3 Dec 2013).

3094 Prosecution's Response Brief (Beara), para. 208; Prosecution's Response Brief (Popović), para. 303.

3095 See Trial Judgement, paras 102-190.

3096 See Ex. P03794, "RS MUP dispatch indicating Serbian MUP (Kajman, Plavi & Skorpion) detachment operating in BiH, type-signed Ljubiša Borovčanin, Deputy Commander Special Police Brigade, 1 July 1995"); Trial Judgement, fn. 2164 (referring to the Indictment which alleges that "[s]ometime in July or August 1995, after the fall of the Srebrenica enclave, a Serbian MUP unit call Scorpions, working with the VRS and/or RS MUP, summarily executed six Muslims from Srebrenica near the town of Trnovo in Bosnia and Herzegovina"), para. 1049. See also Indictment, para. 112, indicating that "[a]ll of the entities referred to in the preceding five paragraphs, except Number 12, the 'Scorpions' unit, were units of the VRS or the RS Ministry of Interior, all legally organised and existing under the relevant laws of the RS, and under the command of individuals lawfully appointed under the relevant laws of the RS". The Trial Judgement refers to the MUP in countries neighbouring the BiH such as the RSK MUP, Serbian MUP which should not be confused with the RS MUP. See Trial Judgement, paras 185, 256 (discussing a mixed company of MUP forces that included RSK MUP, Serbian MUP and RS MUP forces), fns 2704 (citing an exhibit that refers to "the

Trial Chamber did not address the question of whether the members of the Scorpions Unit were themselves members of the JCE to Murder, nor did it enter findings that would suggest that they were. The Appeals Chamber therefore considers that the Trial Chamber's findings do not allow for the conclusion that the members of the Scorpions Unit could also be considered members of the JCE.

b. Whether there was a link between the Scorpions Unit and a JCE member

1064. Given that the Trial Chamber's findings do not allow for the conclusion that members of the Scorpions Unit were themselves members of the JCE,[3097] for **Beara** and **Popović** to be found responsible for the Trnovo killings, a link must be established between the members of the Scorpions Unit and a member of the JCE to Murder.[3098]

1065. The Appeals Chamber observes that the Trial Chamber considered that the fact that killings occurred in July 1995, after the fall of Srebrenica, and that the victims were Bosnian Muslim men from Srebrenica, were sufficient to link the Trnovo killings to the common purpose of the JCE to Murder.[3099] The Prosecution correctly points out that the principal perpetrator of a given crime need not be a member of the JCE and that it must be determined whether the crime in question forms part of the common purpose.[3100] The Appeals Chamber reiterates that:

> to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.[3101]

The Appeals Chamber does not consider the Trial Chamber's finding[3102] to satisfy this requirement. The Appeals Chamber, Judge Niang dissenting, therefore finds that the Trial Chamber's failure to further elaborate on this link amounts to a failure to provide a reasoned opinion. In view of the Trial Chamber's error of law, the Appeals Chamber will consider whether the factual findings in the Trial Judgement as a whole would allow a reasonable trier of fact to establish a link between the members of the Scorpions Unit and a member of the JCE to Murder.

1066. Although insufficient on their own to establish a link, the Appeals Chamber notes that the Trnovo killings share certain features with other crimes committed in furtherance of the common

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forces of the Serbian MUP"), 2718 (discussing an intercept in which "**Beara** was discussing the activities of the Serbian MUP").

3097 See *supra*, para. 1063.

3098 See *supra*, para. 1050; *Krajišnik* Appeal Judgement, paras 225-226; *Brđanin* Appeal Judgement, paras 413, 430.

3099 Trial Judgement, para. 1080.

3100 Prosecution's Response Brief (Beara), para. 206. See Appeal Hearing, AT. 245 (3 Dec 2013).

3101 *Brđanin* Appeal Judgement, para. 413. See *supra*, note 3042.

3102 Trial Judgement, para. 1080.

plan, namely that the victims were Bosnian Muslim men from Srebrenica, the killings occurred "in July 1995, after the fall of Srebrenica",[3103] and the victims were lined up and shot with automatic rifles.[3104]

1067. As previously discussed,[3105] one way to establish the required link would be to demonstrate that in the lead up to the Trnovo killings, the Scorpions Unit co-operated with the VRS, either directly or through the MUP forces, with respect to the custody or control of the prisoners killed in Trnovo. In this regard, the Prosecution asserts it is reasonable to infer that the Bosnian Muslim men killed in Trnovo were captured by or surrendered to the BSF who then handed them over to the Scorpions Unit.[3106] The Appeals Chamber observes, however, that the Trial Chamber, having considered and rejected similar arguments, concluded that "[a]ny inference that there was coordination with the VRS Main Staff is speculation".[3107] In reaching this conclusion, the Trial Chamber rejected the Prosecution's arguments that: (1) the Bosnian Muslim men were arrested in the Drina Corps' zone of responsibility; (2) the logistics of their transport would have required VRS Main Staff involvement; and (3) the Scorpions Unit would have been unable to take any actions without orders from the BSF and the MUP in Trnovo.[3108] The Trial Chamber also took into consideration that it was not presented with evidence: (1) indicating that the six men were detained in the Drina Corps' zone of responsibility; (2) shedding light on the men's journey from Srebrenica to the Trnovo area; or (3) indicating that there was any VRS Main Staff involvement in the six men coming into the custody of the Scorpions Unit.[3109] The Appeals Chamber is not persuaded that the Trial Chamber's conclusion – that to infer co-ordination between the Scorpions Unit and the VRS Main Staff would be speculative – is undermined by either the evidence that the six Trnovo victims were last seen along the route of the column between Bratunac and Nova Kasaba,[3110] or that other Bosnian Muslim men from the column were captured by or surrendered to the BSF stationed along the Bratunac-Konjević Polje Road.[3111]

1068. In submitting that the Scorpions Unit and MUP forces were closely co-ordinated during the relevant time period,[3112] the Prosecution relies on evidence that demonstrates that: (1) the Scorpions Unit was deployed in Trnovo from late June through at least the end of July 1995; (2) on 1 July 1995, Borovčanin reported on activities on the Trnovo battlefield, including on an attack

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3103 Trial Judgement, para. 1080.
3104 Trial Judgement, para. 597. See *supra*, para. 1053.
3105 See *supra*, para. 1054.
3106 Prosecution's Response Brief (Beara), para. 207.
3107 Trial Judgement, para. 1079.
3108 Trial Judgement, para. 1078.
3109 Trial Judgement, para. 1079.
3110 Prosecution's Response Brief (Beara), para. 207, referring to Ex. P03159a (confidential).
3111 Trial Judgement, paras 377-383, 386.
3112 Prosecution's Response Brief (Beara), para. 206. See Appeal Hearing, AT. 245 (3 Dec 2013), referring to the Scorpions Unit as "part of Bosnian Serb MUP forces working together with the VRS in Trnovo in July 1995".

involving the Scorpions Unit; (3) Borovčanin was in Trnovo on the Sarajevo front until he was re-subordinated on 10 July 1995; (4) a mixed company of joint Republic of Serbian Krajina ("RSK"), Serbian and RS MUP forces was among the units under Borovčanin's command when he was re-subordinated and that during the night of 10 July 1995 this mixed company was to withdraw from the Trnovo battlefield and assemble in front of the Public Security Station ("SJB") in Bratunac by noon the following day; and (5) upon arrival in Bratunac, Borovčanin was to report to Krstić.[3113] This circumstantial evidence suggests that Borovčanin worked with the Scorpions Unit and the VRS Sarajevo-Romanija Corps while he was in Trnovo. However, when considered alongside the Trial Chamber's finding that the only evidence about the whereabouts of the mixed company of joint RSK, Serbian, and RS MUP forces after re-subordination was that they did not arrive in Bratunac,[3114] the Appeals Chamber is not persuaded that the only reasonable inference available was that Borovčanin continued to co-ordinate with the Scorpions Unit after he was re-subordinated on 10 July 1995. The Appeals Chamber further emphasises that the killings were committed in Trnovo, which although only 150 kilometres from Zvornik,[3115] falls within the area of responsibility of the Sarajevo-Romanija Corps,[3116] rather than the area of responsibility of the Drina Corps like the other crimes.[3117] Finally, with respect to the Prosecution's argument that the BSF continued to search for ABiH soldiers and to capture and kill smaller groups of Bosnian Muslim men fleeing from Srebrenica even after the mass killings were complete,[3118] the Appeals Chamber considers that although it demonstrates the continued implementation of the murder operation, it is of limited relevance in showing a link between the Scorpions Unit and a JCE member. The Appeals Chamber, Judge Niang dissenting, therefore considers that a reasonable trier of fact could not have established a link between the members of the Scorpions Unit and a member of the JCE to Murder.

1069. In light of these considerations, the Appeals Chamber, Judge Niang dissenting, considers that a reasonable trier of fact could not have concluded that the members of the JCE were responsible for the Trnovo killings. The Appeals Chamber, Judge Niang dissenting, therefore grants in part **Beara**'s ground of appeal 17 and **Popović**'s appeal in this regard, and reverses their convictions under the following counts to the extent they concern the Trnovo killings: Count 1 (genocide); Count 3 (extermination as a crime against humanity); Count 5 (murder as a violation of the laws or customs of war); and Count 6 (persecution as a crime against humanity).

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3113 Prosecution's Response Brief (Beara), fn. 837, referring to Ex. P03248, "Stipulation on Trnovo", para. 1, Ex. P03794, "RS MUP dispatch indicating Serbian MUP (Kajman, Plavi & Skorpion) detachment operating in BiH, type-signed Ljubiša Borovčanin, Deputy Commander Special Police Brigade, 1 July 1995", p. 1, Ex. P00094, "Dispatch with RS Ministerial Order to MUP units, 10 July 1995" (sent from the office of the Minister, type-signed by Tomislav Kovač as "Headquarters Commander"). See Trial Judgement, para. 1434.

3114 Trial Judgement, fn. 4567.

3115 Trial Judgement, para. 597.

3116 Trial Judgement, para. 597. See also Trial Judgement, para. 103; *supra*, para. 1031.

3117 See *supra*, note 3057.

3118 See Prosecution's Response Brief (Beara), para. 208.

(ii) Nikolić

1070. For the reasons set out above,[3119] the Appeals Chamber, Judge Niang dissenting, also, *proprio motu*, reverses **Nikolić**'s convictions under the following counts to the extent they concern the Trnovo killings: Count 1 (genocide); Count 3 (extermination as a crime against humanity); Count 5 (murder as a violation of the laws or customs of war); and Count 6 (persecution as a crime against humanity).

4. Contribution (first category JCE)

1071. The Trial Chamber found that while the murder operation implicated personnel and units from the Main Staff to the corps and the brigades, the "heavy hand of the Security Branch" was evident throughout; **Beara** was at the centre of the operations with **Popović**, and together they were responsible for overall planning and implementation – logistics, locations, and personnel. It noted that together in Zvornik, **Beara**, **Popović**, and **Nikolić** translated the murder plan into actions, engaging various members and units of the VRS as and where necessary.[3120]

1072. The Trial Chamber also found that **Popović**, **Beara**, and **Nikolić** each made a significant contribution to the JCE to Murder.[3121] The following section will address the various challenges that they advance concerning this and related findings the Trial Chamber made with regard to their respective contributions to the common purpose of the JCE to Murder.

(a) Popović's appeal

1073. In reaching the conclusion that **Popović** made a significant contribution to the JCE to Murder,[3122] the Trial Chamber emphasised that **Popović** figured prominently in various aspects of the implementation of the plan to murder. In this regard it referred to, *inter alia*, its earlier findings about **Popović**: (1) enlisting VRS members to assist in the murder operation; (2) being present at all but one of the locations in the Zvornik area where large-scale detentions and executions were carried out, including being present as the Orahovac killings took place; and (3) organising the Bosnian Muslim prisoners' transportation to detention sites immediately prior to their execution and his "on-site" co-ordination of the logistics for two of the mass executions, *i.e.* the Kozluk Killings and Pilica Area Killings.[3123] The following section will address **Popović**'s challenges to the Trial Chamber's findings underpinning the conclusion about his contribution.

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3119 See *supra*, paras 1065, 1068.
3120 Trial Judgement, para. 1068.
3121 Trial Judgement, paras 1168, 1302, 1392.
3122 Trial Judgement, para. 1168.
3123 Trial Judgement, para. 1166 & fns 3789, 3791.

(i) Alleged error in finding that Popović had a co-ordinating role in the murder operation

1074. **Popović** submits that the Trial Chamber erred in finding that he had a co-ordinating role in the operation to murder and bury Bosnian Muslim prisoners in Orahovac, Ročević, and Pilica/Branjevo.[3124] He argues that he was not authorised to co-ordinate the operation and in fact did not co-ordinate it.[3125] **Popović** also submits that the Trial Chamber erred in using its finding on his co-ordinating role in one location to establish his co-ordinating role in other locations, as each charge must be proved separately.[3126]

1075. **Popović** submits that an alternative and reasonable explanation for his presence in the Zvornik area was that, as the sole officer within the security organ of the Drina Corps and the one singularly responsible for counter-intelligence activities, he was required to carry out non-delegable tasks related to combat operations occurring in the Zvornik area.[3127]

1076. The Prosecution responds that **Popović** merely repeats arguments made at trial concerning the scope of his formal authority which were considered and rejected by the Trial Chamber.[3128] The Prosecution submits that the Trial Chamber reasonably assessed all of the evidence, including his role in relation to each execution site and his overarching role across these related incidents.[3129]

1077. The Appeals Chamber notes that the extensive body of evidence places **Popović** directly in the centre of the murder and burial operation in several locations.[3130] Thus, whether **Popović**'s actual conduct was in accordance with his formal authority in the VRS would not alter the fact that he played a co-ordinating role in the murder and burial operation. Similar considerations apply to his argument regarding his counter-intelligence duties.

1078. The Appeals Chamber also observes that the operation to murder and bury Bosnian Muslim men in July 1995 was conducted in several locations over several days.[3131] The Trial Chamber reached its conclusions on **Popović**'s role in the killings and burials in the Pilica area partly by analysing the body of circumstantial evidence.[3132] His role in the Orahovac killings and Kozluk Killings formed one component of the circumstantial evidence used by the Trial Chamber.[3133] The Appeals Chamber finds that while his co-ordinating role in the Orahovac killings and Kozluk

3124 Popović's Appeal Brief, para. 284.
3125 Popović's Appeal Brief, para. 284; Popović's Reply Brief, para. 70.
3126 Popović's Appeal Brief, para. 284; Popović's Reply Brief, para. 110.
3127 Popović's Appeal Brief, para. 280.
3128 Prosecution's Response Brief (Popović), paras 164, 232-234.
3129 Prosecution's Response Brief (Popović), paras 163, 244.
3130 See *infra*, paras 1108, 1143, 1154.
3131 See Trial Judgement, paras 479-490 (killings and burials in Orahovac from 13-16 July 1995), 517-522 (killings and burials in Kozluk from 15-16 July 1995), 527-547 (killings and burials in the Pilica area from 14-17 July 1995). See generally Trial Judgement, paras 793-794.
3132 See Trial Judgement, paras 1134-1142.

Killings, which formed part of the same operation,[3134] when considered in isolation may not conclusively prove his role in the Pilica Area Killings, **Popović** has failed to demonstrate that no reasonable trier of fact could consider such evidence in the entire body of circumstantial evidence. **Popović**'s arguments are thus dismissed.

(ii) Alleged error in finding that Popović's 16 July 1995 fuel request was related to the murder operation

1079. The Trial Chamber noted that: (1) at 1:58 p.m. on 16 July 1995, the Zvornik Brigade duty officer told his Drina Corps counterpart that **Popović** urgently required 500 litres of fuel to be delivered to Pilica "or else the work he's doing will stop"; and (2) at 2:00 p.m. on 16 July 1995, a note was made in the Duty Officer's Notebook that "**Popović** requested a bus with a full tank and 500 litres of D2".[3135] After satisfying itself that the requested fuel was delivered on 16 July 1995 to Pilica, the Trial Chamber concluded that **Popović**'s request for fuel and its delivery was related to the operation of executing and burying the prisoners.[3136] The Trial Chamber based this conclusion on the fact that the request was made on the same day as the Pilica Area Killings and that the following day the bodies were buried at the Branjevo Military Farm.[3137]

1080. **Popović** submits that the Trial Chamber erred in finding that a request for fuel to be delivered to Pilica on 16 July 1995 was related to the operation to execute and bury the prisoners.[3138] He argues that since the request was sent at 2:00 p.m. and the fuel was delivered in the evening, it could not have been intended for use during the Pilica Area Killings that were completed by 3:00 or 4:00 p.m.[3139] Further, **Popović** claims that, contrary to the Trial Chamber's finding, it is clear from Defence Witness Branko Bogičević's testimony that he left Zvornik with the fuel destined for Pilica at 7:00 p.m.[3140] He further submits that the Trial Chamber erred in finding that the reference to the words "Zvornik is solved" in a conversation intercepted on 16 July 1995 at 7:12 p.m. ("7:12 p.m. Intercept")[3141] was a reference to the *delivery* of fuel, suggesting instead that it could refer to the *dispatch* of fuel.[3142]

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3133 See Trial Judgement, para. 1134.
3134 Trial Judgement, para. 1134.
3135 Trial Judgement, para. 1126, citing, *inter alia*, Ex. P00377, "Zvornik Brigade Duty Officer Logbook".
3136 Trial Judgement, paras 1129-1130. See also Trial Judgement, para. 1128.
3137 Trial Judgement, para. 1130.
3138 Popović's Reply Brief, para. 101. See Appeal Hearing, AT. 80 (2 Dec 2013). See also Popović's Appeal Brief, para. 340.
3139 Popović's Reply Brief, para. 102; Appeal Hearing, AT. 80 (2 Dec 2013). See also Popović's Appeal Brief, para. 336.
3140 Popović's Appeal Brief, para. 338.
3141 Ex. P01199a, "Intercept of conversation between Bašević and Y, 16 July 1995, 19:12 hours".
3142 Popović's Appeal Brief, para. 339.

1081. **Popović** next challenges the Trial Chamber's finding that the fuel request was related to the burial of prisoners.[3143] He argues that if the fuel delivered on 16 July 1995 was indeed for the burials, it would have been unnecessary for the engineering machines that were used to carry out the operation on 17 July 1995 to refuel on that same day at the Zvornik gas station.[3144]

1082. Finally, **Popović** advances the argument that the Trial Chamber failed to acknowledge that he did not necessarily make the request for fuel personally. He argues that as the Assistant Commander of the Drina Corps, he would need to request the fuel directly from his command instead of making such a request through the Zvornik Brigade.[3145]

1083. The Prosecution responds that **Popović** merely repeats his extensive trial submissions regarding the timing of fuel requests without showing any error and, as such, his arguments should be dismissed.[3146] It also submits that **Popović** fails to illustrate how the Trial Chamber's appraisal of Bogičević's evidence has any impact on its findings.[3147] Similarly, the Prosecution argues that whether the fuel referred to in the 7:12 p.m. Intercept had merely been dispatched at that point does not impact the Trial Chamber's finding.[3148]

1084. At the outset, regarding **Popović**'s argument that the Trial Chamber erred in failing to acknowledge that the request for fuel was not necessarily made by him personally, the Appeals Chamber considers that, whether **Popović**'s actual conduct was in accordance with his formal authority in the VRS would not alter the fact that the intercepted conversation from 1:58 p.m. on 16 July 1995 and the note in the Duty Officer's Notebook made at 2:00 p.m. that day clearly indicate **Popović** was the authority requesting the delivery.[3149] **Popović** has failed to show that no reasonable trier of fact could have relied on this evidence. His argument is thus dismissed.

1085. The Appeals Chamber notes that **Popović**'s request for fuel to be delivered to Pilica was forwarded by the Zvornik Brigade to the Drina Corps at 1:58 p.m. on 16 July 1995.[3150] At that time, the killings at the Branjevo Military Farm were still ongoing and did not finish until 3:00 or 4:00 p.m.[3151] Further, the fuel was requested to be sent "immediately, otherwise [**Popović**'s] work will stop".[3152]

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3143 Popović's Appeal Brief, para. 340.
3144 Popović's Appeal Brief, para. 337; Popović's Reply Brief, para. 101; Appeal Hearing, AT. 80 (2 Dec 2013).
3145 Appeal Hearing, AT. 80 (2 Dec 2013).
3146 Prosecution's Response Brief (Popović), para. 225. See also Appeal Hearing, AT. 141 (2 Dec 2013).
3147 Prosecution's Response Brief (Popović), paras 226-227.
3148 Prosecution's Response Brief (Popović), para. 228.
3149 See *supra*, para. 1079.
3150 Ex. P01189a, "Intercept, 16 July 1995, 13:58 hours"; Trial Judgement, para. 533.
3151 See Trial Judgement, para. 536.
3152 Ex. P01189a, "Intercept, 16 July 1995, 13:58 hours".

1086. Regarding the timing of the fuel delivery, the Trial Chamber found that "Bogičević initially stated that he left for Pilica at 7 p.m., but this was not evident from the logbook and his testimony on this point was not clear"[3153] and concluded that "[n]o finding can be made on the evidence as to the time of the delivery".[3154] The Appeals Chamber notes Bogičević's testimony in which he estimated that he left for Pilica with the fuel at 7:00 p.m. on 16 July 1995.[3155] The logbook of the vehicle Bogičević used to bring the fuel to Pilica does not contain an entry which specifies the time of his departure,[3156] but indicates that the vehicle returned to the Standard Barracks in Zvornik at 9:30 p.m.[3157] Nevertheless, assuming, *arguendo*, that the Trial Chamber should have characterised Bogičević's evidence as clear regarding when he left for Pilica with fuel and, consequently, should have found that the reference to Zvornik in the 7:12 p.m. Intercept was a reference not to the *delivery* but to the *dispatch* of fuel,[3158] the Trial Chamber's conclusion that the fuel was delivered to Pilica on 16 July 1995 would still remain unchanged.

1087. The Appeals Chamber turns now to the burial of the killed prisoners.[3159] The Trial Chamber found that, on 16 July 1995, the bodies of victims killed in the Pilica Cultural Centre were loaded onto two trucks, and that, on 17 July 1995, Prosecution Witness Milenko Tomić transported two truckloads of corpses from the Pilica Cultural Centre to the Branjevo Military Farm and that same morning the burials started at the Branjevo Military Farm.[3160] Regarding whether the petrol delivered on 16 July 1995 was in fact used to support the burial operation the Appeals Chamber notes that the machines used in the burial operation were issued petrol from other sources on 17 July 1995.[3161] However, the Appeals Chamber is mindful that, although the fuel actually arrived in Pilica after the killings were completed, **Popović**'s request was made while the killings at the Branjevo Military Farm were ongoing and before 500 prisoners in the Pilica Cultural Centre were murdered. Moreover, in light of the location where the fuel was requested to be delivered, the urgent nature of the request, and the reference to **Popović**'s work otherwise stopping, the Appeals Chamber finds that a reasonable trier of fact could have concluded that the fuel was requested to implement the plan to murder. It is of no legal consequence that the requested fuel may not have been ultimately used in the burial operation.

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3153 Trial Judgement, para. 1129.
3154 Trial Judgement, fn. 3689.
3155 Branko Bogičević, T. 22389-22391 (18 June 2008).
3156 Ex. P00295, "Zvornik Brigade July 1995 Vehicle work log book", p. 2.
3157 Ex. P00295, "Zvornik Brigade July 1995 Vehicle work log book", p. 2. The Appeals Chamber notes that according to Bogičević the drive to Pilica took approximately 30-35 minutes and that he spent around 1 hour to 90 minutes in Pilica. Branko Bogičević, T. 22365, 22367 (18 June 2008).
3158 See Trial Judgement, para. 1128 (finding that the reference to Zvornik was a reference to the delivery of fuel); Ex. P01199a, "Intercept of conversation between Bašević and Y, 16 July 1995, 19:12 hours".
3159 Trial Judgement, para. 550.
3160 Trial Judgement, paras 542-547.
3161 Trial Judgement, fn. 3691.

1088. In light of the above, the Appeals Chamber finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that his request for fuel and its delivery was related to the operation of executing and burying the prisoners. His arguments are therefore dismissed.

(iii) Alleged errors in linking intercepts to the murder operation

1089. In analysing an intercepted conversation between **Popović** and Rašić at 9:16 p.m. on 16 July 1995 ("9:16 p.m. Intercept"),[3162] the Trial Chamber noted that:

> In the first half of the intercept, **Popović** relays information from the Zvornik Brigade Interim Combat Report of 16 July, signed by **Pandurević** and containing information on combat operations in the area as well as **Pandurević**'s decision to open a corridor so that the civilian population may be evacuated. The conversation shifts from this topic when **Popović** states "well, that's not even important ... I'll come there tomorrow so tell the General ... I've finished the job". **Popović** made this call from the Standard Barracks at 9.16 p.m., and by 10:33 p.m., he had left.[3163]

It concluded that, taking into account all of the evidence and **Popović**'s activities in the days leading up to this conversation, the only reasonable interpretation of this evidence is that the reference to "the job" is a reference to the killing operation.[3164]

1090. The Trial Chamber also noted that:

> In the space of a few minutes around midday on 17 July, three telephone conversations were intercepted, all of which concern a message to be passed on to **Popović**. In the first conversation, at 12:42 p.m., Major Golić tells General Krstić that **Popović** is in Zvornik, but is expected to be back at the IKM that afternoon. Krstić states "Listen, Golić, find this **Popović** chap and have him report to the IKM [...] find him and have him report immediately". Two minutes later, Trbić, a security officer at the Zvornik Brigade, says that **Popović** "went there, to, towards that task" and that the task was north of Trbić. Five minutes later, an unknown interlocutor says to Trbić "It's changed again [...] if you get in touch with him, let him finish that work [...] And have him come /here/ immediately [...] So, let him finish that work that he's doing, and have him report immediately here". Later, at 4:22 p.m., **Popović** tells an unknown interlocutor whom he refers to as "boss", that "everything's OK, that job is done ... everything's been brought to an end, no problems [...] I'm at the base ... at the base [...]. Can I just take a little break, take a little break, take a shower and then I'll think again later ... basically, that all gets an A ... an A ... the grade is an A, everything's OK".[3165]

The Trial Chamber concluded that in light of all the evidence before it concerning **Popović**'s acts and whereabouts in the days preceding this conversation, the "job" that **Popović** was referring to in the latter intercept is the operation to kill and bury Bosnian Muslim males in Zvornik during the period of 13-17 July 1995.[3166]

1091. **Popović** submits that the Trial Chamber erred in finding that a series of intercepted conversations from 17 July 1995, and especially the intercept from 17 July 1995 at 4:22 p.m. in

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3162 Ex. P01201a, "Intercept of conversation between Popović and Rašić, 16 July 1995, 21:16 hours".
3163 Trial Judgement, para. 1138 (internal references omitted). See Trial Judgement, para. 1136.
3164 Trial Judgement, para. 1138.
3165 Trial Judgement, para. 1142 (internal references omitted).
3166 Trial Judgement, para. 1142. See also Trial Judgement, para. 1167.

which **Popović** says that the "job is done" ("4:22 p.m. Intercept"),[3167] referred to the operation to murder and bury Bosnian Muslim men.[3168] He argues that a reasonable alternative conclusion was that these intercepts related to the security aspect of the operation of closing the corridor in the VRS lines which were still open in the afternoon of 16 July 1995 for the column of armed Bosnian Muslim males.[3169] To support his assertion **Popović** points to, *inter alia*, Defence Witness Ljubo Rakić's testimony about the 9:16 p.m. Intercept, the transcript of the 4:22 p.m. Intercept which suggests that intercept operators failed to capture many words which were necessary to give context to the conversation, and the fact that not a single witness saw **Popović** at any of the burial sites.[3170] Accordingly, **Popović** submits that the Trial Chamber should have adopted the interpretation of evidence most favourable to him.[3171]

1092. The Prosecution responds that **Popović** fails to substantiate his argument that there was more than one reasonable interpretation of the intercepts.[3172] It argues that **Popović**'s theory was rejected by the Trial Chamber and that **Popović** merely repeats his argument without showing any error.[3173] The Prosecution acknowledges that some parts of the intercepts were inaudible or incomplete. However, it stresses that their contents were corroborated by, and consistent with, the large body of evidence placing **Popović** at the heart of the operation to kill and bury Bosnian Muslim males in the Zvornik area between 13 and 17 July 1995.[3174] The Prosecution further submits that the Trial Chamber was not bound to specifically refer to Rakić's evidence about the 9:16 p.m. Intercept, as the witness was not sure whether he had been party to the conversation.[3175]

1093. The Appeals Chamber notes that the Trial Chamber considered a series of conversations that were intercepted between 16 and 17 July 1995.[3176] The Appeals Chamber notes that a reasonable trier of fact could have concluded that the 9:16 p.m. Intercept[3177] shows that throughout

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3167 Ex. P01224a, "Intercept of conversation between Popović and Y, 17 July 1995, 16:22 hours".

3168 Popović's Appeal Brief, paras 341, 343, 349. See Popović's Appeal Brief, paras 344-345; Appeal Hearing, AT. 80 (2 Dec 2013).

3169 Popović's Appeal Brief, paras 346-348, 350; Popović's Reply Brief, paras 103, 105.

3170 Popović's Appeal Brief, paras 342-349; Popović's Reply Brief, paras 103-104; Appeal Hearing, AT. 80-81 (2 Dec 2013).

3171 Popović's Appeal Brief, para. 350; Popović's Reply Brief, para. 103.

3172 Prosecution's Response Brief (Popović), para. 231.

3173 Prosecution's Response Brief (Popović), para. 229. See also Appeal Hearing, AT. 141-142 (2 Dec 2013).

3174 Prosecution's Response Brief (Popović), para. 230.

3175 Prosecution's Response Brief (Popović), para. 231.

3176 The Appeals Chamber notes that these include intercepts from conversations on 16 July 1995 at 4:43 p.m. (Ex. P01225f, "Intercept of conversation between X and Y, 16 July 1995, 16:43 hours"), 16 July 1995 at 9:16 p.m. (Ex. P01201a, "Intercept of conversation between Popović and Rašić, 16 July 1995, 21:16 hours"), 17 July 1995 at 12:42 p.m. (Ex. P01218a, "Intercept of conversation between Golić and Zlatar 1, 17 July 1995, 12:42 hours"), 17 July 1995 at 12:44 p.m. (Ex. P01219a (confidential)), 17 July 1995 at 4:43 p.m. (Ex. P01220a (confidential)), and 17 July 1995 at 4:22 p.m. (Ex. P01224a, "Intercept of conversation between Popović and Y, 17 July 1995, 16:22 hours"). See *supra*, paras 1089-1090.

3177 The Appeals Chamber notes that the 9:16 Intercept (Ex. P01201a, "Intercept of conversation between Popović and Rašić, 16 July 1995, 21:16 hours") reads, in part, as follows:

the conversation, **Popović** refers to two distinct activities – the inspection of the military situation in the Zvornik Brigade area of responsibility, as referred to in the Zvornik Brigade interim combat report, and the "job".[3178] The transition between discussing the two activities, occurring after **Popović** declares "well, that's not even important", is accompanied by a distinction between two locations, as **Popović** announces that "in general, there weren't any major problems. But up there, there were horrible problems and that thing the commander sent, it was just the right thing."[3179] Moreover, the timing of the intercept largely coincides with the conclusion of the executions of between 1,000 and 2,000 prisoners in Pilica/Branjevo and the burials that started the following day.[3180] Finally, the Pilica Area Killings were preceded by similar killing operations carried out in Orahovac and Kozluk.[3181]

1094. **Popović** submits that in reaching its conclusion, the Trial Chamber disregarded the testimony of Rakić, duty officer of the Drina Corps and the interlocutor in this conversation,[3182] who testified that the "job" referred to touring the area of Baljkovica.[3183] The Appeals Chamber reiterates that, where the Trial Chamber did not refer to a witness's evidence "even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual finding".[3184]

1095. The Appeals Chamber notes that Rakić was not entirely certain that this conversation took place, he merely concluded that "[i]t is possible that such a conversation took place. I cannot be fully certain, though. It's been 13 years since; however, it is very likely that it actually took place".[3185] Further, although he was very clear about his understanding of **Popović**'s words "I've finished the job", Rakić was less clear when asked about his understanding of some other parts of

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Popović: I was just up there. Rašić: Yes. Popović: I was with the boss personally. Rašić: Yes. Popović: Here where I am ... you know where I am? Rašić: I know. Popović: Well, you got his interim report. Rašić: All of it. Popović: It's all just like he wrote it ... I was there on the spot and saw for myself he had received some numbers ... well, that's not even important ... I'll come there tomorrow so tell the General ... I've finished the job. Rašić: You finished? Popović: I finished everything. Rašić: Good. Popović: I'll come there tomorrow when I'm sure that that's all been taken care of, you know. Rašić: Good. Popović: After I bring a transport from there. Rašić: Right. Popović: Well, in general, there weren't any major problems. But up there, there were horrible problems and that thing the commander sent, it was just the right thing. Rašić: Good.

3178 See Trial Judgement, para. 1138.

3179 Ex. P01201a, "Intercept of conversation between Popović and Rašić, 16 July 1995, 21:16 hours", p. 1.

3180 Trial Judgement, paras 532-547, 550, 1124.

3181 See Trial Judgement, paras 475-488, 504-520.

3182 The Appeals Chamber notes that the 9:16 p.m. Intercept identifies the two speakers as **Popović** and "Rašić". See Ex. P01201a, "Intercept of conversation between Popović and Rašić, 16 July 1995, 21:16 hours", p. 1. However, the Trial Chamber accepted that **Popović** in fact had this conversation with Ljubo Rakić. See, *e.g.*, Trial Judgement, fn. 5630; Ljubo Rakić, T. 22185-22186 (16 June 2008).

3183 See Ljubo Rakić, T. 22189-22190 (16 June 2008).

3184 *Haradinaj et al.* Appeal Judgement, para. 129; *Krajišnik* Appeal Judgement, para. 353; *Kvočka et al.* Appeal Judgement, para. 23.

3185 Ljubo Rakić, T. 22185 (16 June 2008).

this intercept. He only "presumed" the meaning of **Popović**'s words "I'll come there tomorrow when I'm sure that that's all been taken care of, you know".[3186] Finally, he could not remember any details about the "transport from there" to which **Popović** referred.[3187] The Appeals Chamber considers that these factors call into question the overall probative value of Rakić's testimony about the 9:16 p.m. Intercept. In light of these deficiencies in Rakić's evidence, the Appeals Chamber considers that, while it would have been preferable that the Trial Chamber had given its reasons for rejecting Rakić's evidence about the 9:16 p.m. Intercept, his testimony was not of a character that its absence from the Trial Judgement would show its disregard.

1096. The Appeals Chamber also notes that only words of one interlocutor, **Popović**, were transcribed in the 4:22 p.m. Intercept.[3188] Even though, for this reason, the wording of the intercept is not *per se* conclusive as to what is meant by the "job" and the missing parts could have shed more light on this issue, the inference drawn by the Trial Chamber that it constituted a reference to the killing operation was based on the *totality* of the evidence concerning "**Popović**'s acts and whereabouts in the days preceding this conversation".[3189] The Appeals Chamber notes that the Trial Judgement does not contain any reference to the testimony of any witness seeing **Popović** present at any of the burial sites. However, the Appeals Chamber recalls in this regard its findings on **Popović**'s challenges to the Trial Chamber's conclusions concerning his role in the Orahovac killings, Kozluk Killings, and Pilica Area Killings.[3190] It also highlights that the Trial Chamber's interpretation of the 9:16 p.m. Intercept, as discussed above,[3191] gives further support to its conclusion.

1097. **Popović** advances an alternative theory as to the meaning of the "job" referred to in the conversations intercepted on 16 and 17 July 1995. However, in doing so, he has failed to demonstrate that the Trial Chamber erred. **Popović** ignores the wealth of evidence supporting the Trial Chamber's conclusion. As stated above, neither the absence of a discussion of Rakić's evidence about the 9:16 p.m. Intercept, nor the fact that the 4:22 p.m. Intercept was incomplete, demonstrate that a reasonable trier of fact could not have concluded that **Popović** was referring to the operation to murder the Bosnian Muslim men. The Appeals Chamber therefore dismisses his argument.

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3186 Ljubo Rakić, T. 22189-22190 (16 June 2008).
3187 Ljubo Rakić, T. 22190 (16 June 2008).
3188 Ex. P01224a, "Intercept of conversation between Popović and Y, 17 July 1995, 16:22 hours".
3189 Trial Judgement, para. 1142.
3190 See *infra*, paras 1108, 1143, 1154.
3191 See *supra*, paras 1093-1095.

(iv) Alleged errors in finding that Popović directed the Orahovac killings

1098. The Trial Chamber found that:

> In the afternoon of 14 July, an officer whom PW-101 described as "a lieutenant colonel or a colonel at the most" was present at the field near Orahovac while executions of those detained in the Grbavci School were taking place. PW-101 testified that **Drago Nikolić** and this other officer directed the men who were escorting the prisoners from the truck at the execution site, not yelling at them but simply directing them as to what to do. As the executions took place, a young boy emerged from the pile of corpses calling for his father. The "lieutenant colonel or colonel" asked the soldiers what they were waiting for and said "Just finish him off"; however the soldiers disobeyed. According to PW-101, the "lieutenant colonel or colonel" was tall, had a moustache, was good-looking and well-built. He was wearing an officer's uniform displaying rank insignia and had a pistol.[3192]

It concluded that the officer directing the Orahovac killings with **Nikolić** was **Popović**.[3193]

1099. **Popović** submits that the Trial Chamber erred in finding that he: (1) was the "lieutenant colonel or colonel" who directed the Orahovac killings on 14 July 1995; (2) ordered the soldiers to kill a young boy who survived the Orahovac killings; and (3) did not raise a reasonable doubt that he was in Zvornik in the evening of 14 July 1995.[3194]

1100. **Popović** argues that the Trial Chamber's conclusions were based on the testimony of PW-101 who did not identify the "lieutenant colonel" allegedly present at the Orahovac killings as **Popović**, and that no method of identification was attempted.[3195] **Popović** contests the circumstantial evidence used by the Trial Chamber to conclude that the "lieutenant colonel" identified was him, arguing that, even taken cumulatively, it is incapable of establishing his identity beyond reasonable doubt.[3196] Additionally, he emphasises that although Prosecution Witness PW-110 testified that Gojko Simić was in charge of the Orahovac killings, the Trial Chamber found that **Popović** directed them.[3197]

1101. **Popović** also advances a theory that the Orahovac killings were carried out upon an order given immediately before they started.[3198] He refers to evidence showing that on 14 July 1995, Mladić was briefly present in Grbavci School speaking to the man who subsequently stated that the

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3192 Trial Judgement, para. 1111 (internal references omitted).
3193 Trial Judgement, para. 1112. See also Trial Judgement, para. 1111.
3194 Popović's Appeal Brief, paras 288, 290. See Appeal Hearing, AT. 78 (2 Dec 2013). See also *supra*, para. 346; Appeal Hearing, AT. 79 (2 Dec 2013).
3195 Popović's Appeal Brief, para. 289; Appeal Hearing, AT. 78 (2 Dec 2013).
3196 Popović's Appeal Brief, para. 298. See Appeal Hearing, AT. 78 (2 Dec 2013).
3197 Popović's Appeal Brief, paras 288, 290, 297. See Popović's Appeal Brief, paras 305-308.
3198 Popović's Appeal Brief, para. 285.

prisoners were to be moved to Batković.[3199] He points out that the transportation of the prisoners to the execution site began shortly thereafter.[3200]

1102. The Prosecution responds that the Trial Chamber's findings were not based solely on PW-101's evidence, and that **Popović** ignores that the conclusion was based upon the cumulative and mutually corroborative weight of the evidence.[3201] With regard to PW-110's testimony, it points out that **Popović** merely advances an alternative theory argued at trial without demonstrating any error of the Trial Chamber.[3202] The Prosecution also submits that **Popović**'s theory that Mladić or another high ranking officer must have ordered the Orahovac killings is speculative and ultimately irrelevant.[3203]

1103. The Appeals Chamber observes that the Trial Chamber relied upon several pieces of circumstantial evidence in reaching its finding that the "lieutenant colonel" seen by PW-101 in Orahovac was **Popović**, notably: (1) **Popović**'s participation in the transportation of prisoners from Bratunac to the Grbavci school; (2) the 14 July Meeting; (3) a request for machinery made in the early afternoon of 14 July 1995 in relation to work being done by **Popović** and **Beara**; (4) the rank **Popović** held at the time; and (5) PW-101's description of the "lieutenant colonel" in conjunction with the lack of evidence suggesting that any other high ranking officer was present at the execution site at that time.[3204] The Appeals Chamber considers that the component pieces of circumstantial evidence on the issue of identification are to be considered in relation to all other pieces of circumstantial evidence bearing on the issue, and not in isolation.[3205] Whereas the assessment of an evidentiary factor in a vacuum might fail to establish an essential matter, the weight of all relevant evidence taken together can conclusively prove the same matter beyond reasonable doubt.[3206] As a result, **Popović**'s argument that none of the circumstantial evidence considered by the Trial Chamber is by itself capable of proving that the lieutenant colonel in question was **Popović** cannot be accepted as a valid challenge to the Trial Chamber's identification finding.

1104. **Popović**'s submission that even cumulatively the circumstantial evidence is insufficient to support the Trial Chamber's finding is an undeveloped assertion and, therefore, the Appeals Chamber dismisses this argument.

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3199 Popović's Appeal Brief, paras 285, 287. See Popović's Appeal Brief, para. 286, referring to other evidence that Mladić may have been in Orahovac based on a "Puch" vehicle having been seen in Orahovac.
3200 Popović's Appeal Brief, paras 285, 287.
3201 Prosecution's Response Brief (Popović), paras 165-167, 169-171.
3202 Prosecution's Response Brief (Popović), para. 191.
3203 Prosecution's Response Brief (Popović), para. 172.
3204 Trial Judgement, para. 1112.
3205 See *Limaj et al.* Appeal Judgement, para. 153.
3206 See *Limaj et al.* Appeal Judgement, para. 153.

1105. The Appeals Chamber notes PW-110's testimony assuming that G. Simić was in charge of the executions at Lazete 2, one of the execution sites in Orahovac.[3207] **Popović** submits that "[s]ince Gojko Simić stopped the executions in Lazete 2 and ordered the men to Lazete 1, clearly he was also in charge of the subsequent executions there".[3208] He concludes that "[c]learly a lieutenant-colonel did not direct these executions especially if an ordinary soldier could undertake the responsibility".[3209] The Appeals Chamber finds **Popović**'s submission to be speculative at best. The Appeals Chamber recalls in this respect the testimony of PW-101, who saw the lieutenant colonel, and its findings on **Popović**'s challenges to PW-101's credibility.[3210]

1106. Concerning the evidence placing Mladić in Orahovac on 14 July 1995,[3211] Prosecution Witness Mevludin Orić testified that "some time" after Mladić spoke to the "man with the sunglasses" and left the sports hall, the prisoners were told to prepare themselves to leave for Batković.[3212] In fact, they were taken for execution.[3213] **Popović** speculates that the execution order was thus given immediately before the execution of prisoners began. However, the Appeals Chamber considers that, even if his argument is accepted, **Popović** has failed to show how his criminal responsibility is affected by the timing of Mladić's purported order to execute the prisoners.

1107. Finally, the Appeals Chamber recalls that it has upheld the Trial Chamber's findings rejecting **Popović**'s alibi for 14 July 1995,[3214] and has dismissed his challenge to the Trial Chamber's finding that he ordered the soldiers to kill a young boy who survived the execution.[3215]

1108. Based on the above, the Appeals Chamber finds that **Popović** has failed to demonstrate that no reasonable trier of fact could have concluded that he directed the Orahovac killings on 14 July 1995.

(v) Alleged errors in relation to Popović's presence and conduct in Ročević

1109. The Trial Chamber found that around 9:00 or 10:00 a.m. on 15 July 1995, Witness Aćimović met **Popović** in front of the Ročević School.[3216] It concluded that subsequently **Popović**:

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3207 See Trial Judgement, fns 1761, 2175; PW-110, T. 717-718 (private session) (24 Aug 2006); T. 731-732 (private session) (25 Aug 2006).
3208 Popović's Appeal Brief, para. 297.
3209 Popović's Appeal Brief, para. 297.
3210 See *supra*, paras 193-194.
3211 Mevludin Orić, T. 947-948 (29 Aug 2006). See also PW-169, T. 17337 (1 Nov 2007); Stanoje Birčaković, T. 10768-10769 (1 May 2007).
3212 Mevludin Orić, T. 947-948 (29 Aug 2006).
3213 Mevludin Orić, T. 953-956 (29 Aug 2006).
3214 See *supra*, para. 351.
3215 See *supra*, paras 193-194.
3216 Trial Judgement, paras 511, 1118.

(1) shouted at Aćimović, asking him why he had not brought men as ordered; (2) threatened Aćimović that he would be held responsible for not following the order; (3) asked Aćimović about suitable execution sites and pressured him to ask the soldiers in the schoolyard to find volunteers willing to participate in the executions; (4) called the Standard Barracks, requesting that trucks be sent to Ročević; (5) was angry when only a single truck arrived and said that the prisoners would all have to be killed near the school; (6) attempted to source additional trucks by engaging civilian drivers; and (7) attempted to find volunteers to participate in the executions.[3217]

1110. **Popović** submits that the Trial Chamber erred in finding that during the conversation held in the morning of 15 July 1995 he enlisted Aćimović's help to execute the prisoners.[3218] **Popović** denies ever seeing Aćimović prior to trial.[3219] As such, he challenges the ambiguity and logic of the findings as well as Aćimović's credibility.[3220] He further submits that the Trial Chamber entered erroneous findings because it did not take into account all the evidence regarding the purported conversation between himself and Aćimović in the morning of 15 July 1995.[3221]

a. Whether the Trial Chamber erred in entering ambiguous findings

1111. The Trial Chamber found Aćimović's description of his 15 July 1995 encounter with **Popović** to be reliable after considering the testimonies of both Aćimović and Prosecution Witness Dragan Jović,[3222] in combination with those of other witnesses present. In particular, it considered the corroborating evidence of **Popović**'s presence in Ročević as well as the subsequent acts of Aćimović and others.[3223]

1112. **Popović** argues that the Trial Chamber's finding regarding the 15 July 1995 encounter is ambiguous and suffers from a lack of reasoning.[3224] Specifically, he submits that none of the three Prosecution witnesses present in Ročević on 15 July 1995, namely Witnesses Veljko Ivanović, Jović, and PW-174 saw him there[3225] and that the only witness who saw anyone speaking to Aćimović near the Ročević School, Jović, gave a description that did not match **Popović** as he had a moustache, was of a smaller stature, and drove a Golf.[3226] **Popović** then contends that the Trial Chamber "committed the classic error of *post hoc ergo propter hoc*" with regard to its consideration

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3217 Trial Judgement, paras 511-514, 1118-1120.
3218 Popović's Appeal Brief, para. 309. See Popović's Appeal Brief, para. 351.
3219 Popović's Appeal Brief, para. 310.
3220 See Popović's Appeal Brief, paras 309, 316-328, 332-335.
3221 Popović's Appeal Brief, para. 315. See Popović's Appeal Brief, paras 329-331.
3222 Trial Judgement, para. 511 & fns 1869, 1873-1874.
3223 Trial Judgement, para. 511.
3224 See Popović's Appeal Brief, paras 316-328.
3225 Popović's Appeal Brief, para. 318 (referring to Witnesses V. Ivanović, Jović, and PW-174); Popović's Reply Brief, paras 84-85, 87; Appeal Hearing, AT. 81 (2 Dec 2013). See Popović's Appeal Brief, paras 329-331.
3226 Popović's Appeal Brief, para. 317; Popović's Reply Brief, paras 84, 88. See Popović's Appeal Brief, para. 274.

of "the subsequent acts of Aćimović and others" as supporting its finding.[3227] Finally, **Popović** argues that Aćimović's testimony is at odds with those of V. Ivanović and Jović, whose separate testimonies were similar and therefore undermined Aćimović's credibility.[3228]

1113. The Prosecution responds that the Trial Chamber "cited Jović's evidence alongside Aćimović's, but nonetheless found that Aćimović met **Popović** outside the school".[3229] It argues that the finding that **Popović** was present is not disturbed by evidence that other witnesses present in Ročević did not interact with him and could not testify as to his presence.[3230] The Prosecution asserts that corroboration of Aćimović's evidence was not legally required and that the subsequent actions of Aćimović were consistent with his account of the events.[3231]

i. Popović's presence in Ročević

1114. The Appeals Chamber first recalls that in finding Aćimović's evidence of **Popović**'s presence in Ročević to be reliable, the Trial Chamber referred to Jović's testimony.[3232] The Trial Chamber specifically noted that Jović testified that "he saw Aćimović talking to a 'rather big' man with a shaven, round face".[3233] The Appeals Chamber also notes that Jović further testified that the man talking to Aćimović "was of a powerful stature like Sreco",[3234] "well shaven",[3235] and "left in his jeep".[3236]

1115. The Appeals Chamber observes that, according to the findings of the Trial Chamber, in July 1995 **Popović** had a moustache, and was generally known to drive a dark blue Golf.[3237] At the same time, the Appeals Chamber recalls that:

> it is not necessary for testimonies that corroborate each other to be identical in all aspects or describe the same facts in the same way. Corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is incompatible with the description given in another credible testimony.[3238]

1116. The Appeals Chamber first notes that Jović describes the man's appearance in terms such as "powerful stature" and "rather big", which could reasonably depend on a subjective understanding

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3227 Popović's Appeal Brief, para. 319; Appeal Hearing, AT. 81, 156 (2 Dec 2013).
3228 Popović's Appeal Brief, para. 320; Appeal Hearing, AT. 81 (2 Dec 2013). See Popović's Appeal Brief, paras 321-328.
3229 Prosecution's Response Brief (Popović), para. 200 (internal reference omitted).
3230 Prosecution's Response Brief (Popović), para. 200.
3231 Prosecution's Response Brief (Popović), para. 200 & fn. 769, paras 201-202.
3232 See Trial Judgement, para. 511 & fn. 1873.
3233 Trial Judgement, para. 511, fn. 1869.
3234 Dragan Jović, T. 18056 (21 Nov 2007).
3235 Dragan Jović, T. 18058 (21 Nov 2007).
3236 Dragan Jović, T. 18056 (21 Nov 2007). Jović described a military jeep (a Campagnola) as being present at the scene where the conversation between Aćimović and the man took place. Dragan Jović, T. 18055 (21 Nov 2007).
3237 Trial Judgement, paras 1112, 1116. See Trial Judgement, paras 474, 1108.
3238 *Šainović et al.* Appeal Judgement, para. 946. See *Nizeyimana* Appeal Judgement, para. 96; *Bizimungu* Appeal Judgement, para. 327; *Đorđević* Appeal Judgement, para. 797; *Gatete* Appeal Judgement, para. 205.

that does not specifically exclude **Popović**. Second, the terms "shaven" or "well shaven" could reasonably refer to a closely shaved face with a moustache or having a beard cut close to the skin, which could reasonably include the description of **Popović** at the relevant time. Finally, the fact that the individual left in a military jeep cannot be seen as a factor weighing strongly against the Trial Chamber's conclusion that the individual was **Popović**, especially as it is a reasonable possibility that **Popović** could have driven other vehicles during the relevant time. It follows, therefore, that **Popović** has failed to demonstrate that a reasonable trier of fact could not have treated this part of Jović's evidence as corroborating Aćimović's testimony and as supporting its finding that the man talking to Aćimović was **Popović**.

1117. The Appeals Chamber notes that two other witnesses, V. Ivanović and PW-174, were present in Ročević on 15 July 1995 but did not see **Popović**. V. Ivanović had only seen **Popović** once during his military career,[3239] and on 15 July 1995 he arrived in Ročević between 12:00 and 12:15 p.m.[3240] and did not enter the school where **Popović** was allegedly staying.[3241] Prosecution Witness PW-174 arrived in Ročević between 12:00 and 1:00 p.m. and testified that "Srećo was there and some other men with him, but I don't know who they were".[3242] None of this evidence is *per se* sufficient to contradict the evidence of Aćimović or call into question the Trial Chamber's finding on **Popović**'s presence in Ročević. On the other hand, neither witness could conclusively say that the man talking to Aćimović was **Popović**. The Trial Chamber stated that "combined with that of other witnesses present, particularly the corroboration as to **Popović**'s presence"[3243] but does not refer to any specific witness or provide a reference to the evidence it considered. The Appeals Chamber finds that, without more, it is not clear whether the Trial Chamber considered that the evidence of V. Ivanović and PW-174 corroborated Aćimović's testimony.

1118. Finally, regarding **Popović**'s argument that the Trial Chamber erred by considering the events that unfolded in Ročević on 15 July 1995 as *corroboration* of Aćimović's testimony, the Appeals Chamber observes in this respect that, although the subsequent acts of Aćimović and others were not incompatible with **Popović**'s presence in Ročević, they are equally not incompatible with the alternative theory that he was not there.[3244] Neither the Trial Chamber's findings describing the process of acquiring the Zvornik Brigade's logistical assistance in preparing the executions of prisoners in Ročević, nor its conclusions on the subsequent Kozluk Killings, include any element

3239 Veljko Ivanović, T. 18215 (private session) (26 Nov 2007).
3240 Veljko Ivanović, T. 18183 (private session) (26 Nov 2007). See *infra*, para. 1132.
3241 Veljko Ivanović, T. 18183-18184 (private session) (26 Nov 2007). See Veljko Ivanović, T. 18214 (private session) (26 Nov 2007).
3242 PW-174, T. 32705 (private session) (23 Mar 2009).
3243 Trial Judgement, para. 511.
3244 See Trial Judgement, paras 512-520.

independently supporting Aćimović's version about **Popović**'s involvement.[3245] The Appeals Chamber thus finds that no reasonable trier of fact could have considered the events that unfolded in Ročević on 15 July 1995 as *corroboration* of Aćimović's testimony.

1119. Notwithstanding the Trial Chamber's error in considering events that unfolded in Ročević on 15 July 1995 as corroboration of Aćimović's testimony and the uncertainty as to whether it similarly considered the evidence of other witnesses present in corroboration, the Appeals Chamber considers that a reasonable trial chamber could have accepted Aćimović's testimony even without corroboration.[3246] The Appeals Chamber therefore finds that **Popović** has failed to show that the Trial Chamber erred in accepting Aćimović's testimony on his presence in Ročević.

ii. Reliance on Aćimović's evidence over that of Jović and V. Ivanović

1120. The Trial Chamber made the following assessment about Aćimović's credibility:

> throughout his testimony Aćimović sought to downplay his own involvement in the events at Ročević. The Trial Chamber believes that due to this motivation, Aćimović was not always truthful in his account of events nor fully forthcoming. It is further of the opinion that the inconsistencies uncovered between parts of Aćimović's testimony and other evidence before the Trial Chamber in most instances arise from his attempt to minimise his own responsibility, perhaps even to himself. However, the Trial Chamber does not agree [...] that this renders Aćimović's evidence unreliable in its entirety. Many aspects of his evidence are consistent with other evidence and some is specifically corroborated.[3247] Further, several points were credibly adhered to despite intensive cross-examination. Therefore, the Trial Chamber considers that *it must examine his evidence carefully on each salient issue in order to determine what weight, if any, to attribute to it and has accordingly done so in the analysis which follows.*[3248]

1121. **Popović** submits that the Trial Chamber was obliged to explicitly state and give reasons for its acceptance of Aćimović's evidence over that of Jović and V. Ivanović.[3249] **Popović** points out that the Trial Chamber accepted the evidence of Jović and V. Ivanović over that of Aćimović on the topic of who issued an order to transport the prisoners from Ročević to the execution site and, in doing so, noted Aćimović's motivation to diminish his own responsibility.[3250] As it relates to his presence in Ročević and his conversation with Aćimović, **Popović** submits that the Trial Chamber did not explain why it relied on Aćimović's evidence over that of Jović and V. Ivanović, given that the testimonies of the latter two were similar and substantially undermined Aćimović's credibility.[3251] **Popović** also contends that the Trial Chamber "distorted" parts of V. Ivanović's testimony.[3252]

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3245 See Trial Judgement, paras 508-520, 1117-1121.
3246 See *infra*, paras 1139-1142.
3247 *E.g.*, Mitar Lazarević, Dragan Jović, Veljko Ivanović (footnote in original).
3248 Trial Judgement, para. 506 (emphasis added).
3249 Popović's Appeal Brief, para. 320. See Appeal Hearing, AT. 81 (2 Dec 2013).
3250 Popović's Appeal Brief, para. 320. See Trial Judgement, para. 513.
3251 Popović's Appeal Brief, para. 320; Popović's Reply Brief, para. 87.
3252 Popović's Appeal Brief, paras 321-322.

1122. The Prosecution responds that the Trial Chamber carefully considered Aćimović's evidence and credibility, specifically noting the instances where it accepted the testimonies of other witnesses over Aćimović's.[3253]

1123. The Appeals Chamber notes that the Trial Chamber found that Aćimović downplayed his role in the events and therefore his evidence was not credible on two issues, namely whether Aćimović: (1) recruited volunteers to participate in the execution;[3254] and (2) ordered the drivers to transport prisoners to the execution site.[3255] At the same time, the Trial Chamber did not specifically discuss several other discrepancies between the evidence of Aćimović, on one hand, and Jović and/or V. Ivanović on the other. This, however, does not automatically mean that such discrepancies were disregarded by the Trial Chamber. The Appeals Chamber emphasises in this regard that both the testimonies of Jović and V. Ivanović are extensively referred to throughout the Trial Judgement in the findings relating to the events in Ročević. It recalls in this respect that where the Trial Chamber does not refer to a witness's evidence, "even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings".[3256] This principle, however, should be read through the prism of the right of an accused to a reasoned opinion under Article 23(2) of the Statute and Rule 98 *ter*(C) of the Rules.[3257] A reasoned opinion ensures that the accused can exercise his right of appeal and that the Appeals Chamber can understand and review the findings of the Trial Chamber as well as its evaluation of the evidence.[3258]

a- Jović's evidence

1124. The Appeals Chamber notes three instances identified by **Popović** in which the accounts of Aćimović and Jović substantially differ, namely whether:[3259] (1) Aćimović arrived in Ročević by himself or was driven there by Jović;[3260] (2) Aćimović met **Popović** outside the school and subsequently went with him to the office or whether **Popović** was absent during Aćimović's arrival;[3261] and (3) Jović saw Aćimović's argument with **Popović** in the school building that day.[3262]

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3253 Prosecution's Response Brief (Popović), paras 203-205, 209, 217.
3254 Trial Judgement, para. 511 & fn. 1874.
3255 Trial Judgement, para. 513 & fn. 1881.
3256 *Haradinaj et al.* Appeal Judgement, para. 129; *Krajišnik* Appeal Judgement, para. 353; *Kvočka et al.* Appeal Judgement, para. 23.
3257 See *Haradinaj et al.* Appeal Judgement, para. 128 and references cited therein; *Hadžihasanović and Kubura* Appeal Judgement, para. 13.
3258 *Karemera and Ngirumpatse* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 128; *Nchamihigo* Appeal Judgement, para. 165; *Limaj et al.* Appeal Judgement, para. 81. See *Bizimungu* Appeal Judgement, para. 18.
3259 See Popović's Appeal Brief, para. 331.
3260 See Srećko Aćimović, T. 12957, 12970-12971 (private session) (20 June 2007); Dragan Jović, T. 18051-18052 (21 Nov 2007).
3261 See Srećko Aćimović, T. 12957-12958 (20 June 2007); Dragan Jović, T. 18052-18054 (21 Nov 2007).

1125. The discrepancies in the evidence cited by **Popović** do not go to the core of the case against him and can reasonably be considered as relatively peripheral. As such they are not of a character that would require the Trial Chamber to discuss them in the Trial Judgement.[3263]

1126. The Appeals Chamber is therefore of the opinion that, having the benefit of observing the demeanour of both witnesses in court, it was within the Trial Chamber's discretion to regard these discrepancies as not affecting Aćimović's credibility. The Appeals Chamber is guided in this respect by the consideration that it does not lightly overturn findings of fact reached by a trial chamber, which is in a better position to assess witnesses' reliability and credibility and determine the probative value of the evidence presented at trial.[3264] Moreover, the Appeals Chamber recalls that a trial chamber can reasonably accept certain parts of a witness's testimony and reject others[3265] and finds that there is no discernible error on the part of the Trial Chamber in failing to explicitly state why it found Aćimović's testimony on his meeting with **Popović** on 15 July 1995 more probative than Jović's.

b- V. Ivanović's evidence

1127. **Popović**, in submitting that the Trial Chamber failed to give a reasoned opinion on its acceptance of Aćimović's evidence over V. Ivanović's, alleges that the Trial Chamber distorted portions of V. Ivanović's evidence.[3266] Specifically, he argues that the Trial Chamber misrepresented testimony relating to the origin of the order to the Zvornik Brigade to supply ammunition to Ročević as well as testimony that established the exact time when V. Ivanović arrived there with this ammunition.[3267] **Popović** asserts that the proper reading of V. Ivanović's evidence shows that Aćimović's account is not credible.[3268]

1128. The Prosecution responds that the Trial Chamber did not distort the evidence on who ultimately ordered V. Ivanović to bring ammunition to Ročević.[3269] It concedes that the Trial Chamber misstated V. Ivanović's time of arrival at the Ročević School, but argues that **Popović**

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3262 See Srećko Aćimović, T. 12968-12970 (private session) (20 June 2007); Dragan Jović, T. 18054 (21 Nov 2007).
3263 See *supra*, para. 306.
3264 See *supra*, para. 20.
3265 *Nizeyimana* Appeal Judgement, paras 17, 93, 108; *Šainović et al.* Appeal Judgement, paras 294, 336, 342; *Lukić and Lukić* Appeal Judgement, para. 92; *Setako* Appeal Judgement, para. 48.
3266 Popović's Appeal Brief, paras 321-328; Appeal Hearing, AT. 81 (2 Dec 2013).
3267 Popović's Appeal Brief, paras 321-322; Popović's Reply Brief, paras 92-93. **Popović** argues the importance of the timing V. Ivanović arrived in Ročević in terms of what Aćimović's evidence "would mean", *i.e.* that **Popović** came to Ročević to kill the prisoners without ammunition and without men, who would carry out the execution, in the full knowledge that Aćimović already refused to provide his soldiers for this task. Popović's Appeal Brief, paras 323-325. See Appeal Hearing, AT. 81 (2 Dec 2013). The Appeals Chamber finds this argument to be entirely speculative.
3268 Popović's Appeal Brief, paras 321-328.
3269 Prosecution's Response Brief (Popović), para. 210.

fails to demonstrate that this error had a material impact on the Trial Chamber's findings as to **Popović**'s involvement in the Kozluk Killings.[3270]

1129. Regarding the issue of the origins of the order to supply ammunition, the Trial Chamber accepted the evidence of Aćimović, who testified that it was **Popović** who called the Zvornik Brigade requesting that trucks be sent to Ročević.[3271] The Trial Chamber also found that V. Ivanović, who subsequently arrived in Ročević with a truck with ammunition, received the order concerning delivery of ammunition "from a man called Pantić".[3272] More precisely, V. Ivanović gave evidence that the order was relayed by Pantić, but ultimately emanated from Aćimović who had called the Zvornik Brigade.[3273] In this respect, the Appeals Chamber finds that the Trial Chamber's findings do not reveal any misrepresentation of the evidence and that this clarification shows a potential contradiction between the testimonies of Aćimović and V. Ivanović on this point.

1130. The Appeals Chamber considers that V. Ivanović's account, if accepted, would lead necessarily to the conclusion that Aćimović sought to conceal his involvement in securing both the trucks and ammunition for the execution. Such a conclusion is strengthened by the fact that Aćimović was found to be motivated to diminish his own responsibility.[3274] Noteworthy in this regard is the fact that the Trial Chamber relied extensively on V. Ivanović's testimony in its findings on the events of 15 July 1995 without questioning his credibility.[3275] The Appeals Chamber thus considers that, in view of the Trial Chamber's declaration to apply a careful approach to Aćimović's evidence, it would have been preferable for the Trial Chamber to discuss the contradictions between the evidence of V. Ivanović and Aćimović on this salient issue and as to any resulting impact on the credibility of Aćimović's description of events.[3276]

1131. At the same time, the Appeals Chamber recalls that the Trial Chamber, having the benefit of observing the demeanour of both witnesses in court, should be afforded deference in assessing and weighing their evidence.[3277] The Appeals Chamber also bears in mind that even if a trial chamber does not refer to contradictory evidence, it is presumed that it assessed the evidence and rejected it.[3278] Although it would have been preferable that the Trial Chamber had given its reasons for rejecting V. Ivanović's testimony of who made the call ordering the ammunition to be brought to

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3270 Prosecution's Response Brief (Popović), para. 211.
3271 Trial Judgement, paras 512, 1119.
3272 Trial Judgement, para. 517.
3273 Veljko Ivanović, T. 18176-18177 (26 Nov 2007).
3274 Trial Judgement, para. 506. As stated before, the reading of the Trial Judgement reveals that Aćimović tried to minimise his role in the murder operation and on at least one occasion tried to shift responsibility to **Popović**. See *supra*, para. 1123.
3275 Trial Judgement, paras 517-519.
3276 Trial Judgement, para. 506.
3277 See *supra*, para. 1126.
3278 See *supra*, note 2661.

Ročević, **Popović** has failed to demonstrate that its decision to prefer Aćimović's evidence in this respect over that of V. Ivanović was one that a reasonable trier of fact could not have made.

1132. Regarding the time of V. Ivanović's arrival in Ročević with ammunition, the Appeals Chamber notes that there seems to be a miscalculation on the part of the Trial Chamber when it noted that V. Ivanović's arrival was "around" 11:00 a.m.[3279] Nonetheless, the Appeals Chamber considers this to be a minor discrepancy, as: (1) the Trial Chamber found that **Popović** was in Ročević from approximately 9:00 or 10:00 a.m. until at least some time after V. Ivanović's arrival there with ammunition; and (2) as noted above, the fact that V. Ivanović did not see **Popović** on this occasion does not necessarily contradict Aćimović's evidence that **Popović** was present.[3280] **Popović** has further failed to show that the Trial Chamber's miscalculation on V. Ivanović's arrival time in Ročević resulted in an error warranting appellate intervention.

1133. In sum, **Popović** has failed to demonstrate any ambiguity in the Trial Chamber's findings or any misrepresentation of evidence sufficient for a conclusion to be drawn that the Trial Chamber failed to give a reasoned opinion in its acceptance of Aćimović's evidence on **Popović**'s presence in Ročević on 15 July 1995.

b. Whether the Trial Chamber erred in disregarding evidence

1134. **Popović** submits that the Trial Chamber disregarded Witness Todorović's evidence that **Popović** was sitting in his Golf car in front of the 10th Sabotage Unit's compound in Dragasevac near Vlasenica between 10:00 and 11:00 a.m. on 15 July 1995.[3281] The Prosecution responds that even if this evidence is accepted, it can be reconciled with Aćimović's evidence that **Popović** was also at the Ročević School on 15 July 1995.[3282]

1135. The Appeals Chamber notes Todorović's testimony that he did not personally see **Popović** in Dragasevac on 15 July 1995, but assumed that he had been present based on what he was told by the gatekeeper and on his own recognition of **Popović**'s Golf car which was parked there. Specifically, Todorović testified that:

> Mr. **Popović**'s Golf was parked there all the time. [...] The gate-keeper told us that Officer **Popović** was outside. This person who was working, providing security for the base, I suppose

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3279 The Trial Judgement suggests that V. Ivanović arrived at the Ročević School "at around 11 a.m.". Trial Judgement, fn. 1896. However, V. Ivanović testified that he arrived at the Standard Barracks at 11:00 or 11:15 a.m., then he set out for Ročević and "arrived pretty soon" thereafter. Veljko Ivanović, T. 18176-18177 (26 Nov 2007). He also testified that he arrived at the Ročević School between "12:00, quarter past 12:00". Veljko Ivanović, T. 18183 (private session) (26 Nov 2007).

3280 See *supra*, para. 1117.

3281 Popović's Appeal Brief, paras 329-330; Popović's Reply Brief, paras 95-97; Appeal Hearing, AT. 82 (2 Dec 2013).

3282 Prosecution's Response Brief (Popović), para. 216.

> that he must have seen his car and he must have assumed that he was there. [...] I saw the car but I did not see him personally getting out of the car or talking to anybody. That I didn't see. [...] I don't know whether it was him or not. Maybe he had a driver. Maybe there was another officer. But it was his car. Definitely his car. And he was the one who used this car most often. [...] I'm not making any speculations. What I'm saying is that it was possible that he was there because that was his car but I personally didn't see him.[3283]

1136. The Appeals Chamber first observes that the Trial Chamber did not refer to this evidence in the Trial Judgement. The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[3284] The Appeals Chamber also recalls that there may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[3285]

1137. The Appeals Chamber notes that Todorović's conclusion that **Popović** was in Dragasevac between 10:00 and 11:00 a.m. on 15 July 1995 is based solely on hearsay and his own assumption that no one else would be using **Popović**'s Golf car. The Appeals Chamber thus considers that, while it would have been preferable that the Trial Chamber had given its reasons for rejecting Todorović's evidence, his testimony was not of a character that its absence from the Trial Judgement would show its disregard.

1138. Based on the foregoing, the Appeals Chamber finds that **Popović** has failed to demonstrate that the Trial Chamber disregarded Todorović's evidence.

c. Whether the Trial Chamber erred in assessing Aćimović's credibility

1139. With respect to the events at Ročević, **Popović** attacks Aćimović's credibility. In particular, he asserts that Aćimović invented the story about two night-coded telegrams from an unknown sender,[3286] his two responses thereto, and his telephone conversations with **Popović** on 14 July 1995 and with **Nikolić** on 15 July 1995, culminating in his alleged argument with **Popović** in Ročević on 15 July 1995 to protect both himself and his superior, Obrenović.[3287] **Popović** submits in this regard that Aćimović did not mention that **Popović** pressured him to assign people to execute the prisoners in his first two interviews with the Prosecution and only fabricated his story after Obrenović was arrested.[3288] **Popović** again emphasises that Aćimović concealed: (1) that he ordered Jović and V.

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3283 Dragan Todorović, T. 14013-14027 (21 Aug 2007).

3284 *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

3285 *Đorđević* Appeal Judgement, para. 864; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.

3286 **Popović** also asserts, presumably as an alternative, that Aćimović lied to avoid disclosing the name of the person who sent him two telegrams ordering him to execute prisoners. Popović's Appeal Brief, paras 332, 334.

3287 Popović's Appeal Brief, paras 334-335. See Popović's Appeal Brief, para. 326; Appeal Hearing, AT. 81-82 (2 Dec 2013).

3288 Popović's Appeal Brief, para. 335.

Ivanović to transport the prisoners to the execution site; and (2) his order to deliver ammunition to Ročević.[3289] **Popović** contends that the decision to execute prisoners was made by Obrenović on 15 July 1995 around 11:00 a.m. when the ammunition was sent to Ročević and that only Obrenović was authorised at that time to order the delivery of ammunition to Ročević.[3290]

1140. The Prosecution responds that the evidence does not support **Popović**'s alternative theory that the order to kill prisoners in Ročević was given on 15 July 1995 around 11.00 a.m. The Prosecution also responds that in this respect Aćimović's evidence was corroborated by Prosecution Witness Mitar Lazarević.[3291]

1141. The Appeals Chamber recalls its previous observation that it appears that the Trial Chamber rejected V. Ivanović's evidence concerning who ordered him to deliver ammunition to Ročević, and decided to rely on Aćimović's account instead.[3292] Even assuming that Obrenović, as an acting commander, had to approve the request for ammunition that was sent to Ročević on 15 July 1995, and in fact did so, it would not be incompatible with **Popović**'s presence there and does not show that it was Obrenović who gave the order to execute the prisoners. The Appeals Chamber notes in this regard that Aćimović's evidence on the order to execute the prisoners held in Ročević, sent by telegram from the Zvornik Brigade Command in the early hours of 15 July 1995, is corroborated by M. Lazarević's evidence.[3293] It also notes that the Trial Chamber was aware of Aćimović's attempts to downplay his own involvement in the events in Ročević in its assessment of his credibility.[3294] The Appeals Chamber finds **Popović**'s allegation – that Aćimović "invented" his story – to be unconvincing and considers that **Popović** only provides his own interpretation of the evidence without showing an error on the part of the Trial Chamber in its assessment of the evidence.

1142. Finally, the Appeals Chamber notes that in his first interview given to the Prosecution, Aćimović did not mention his meeting with **Popović** on 15 July 1995; his explanation being that the interviewers did not jog his memory about it.[3295] It is also clear that Aćimović confirmed **Popović**'s presence in Ročević on 15 July 1995, including the pressure **Popović** placed on him to proceed with the execution of prisoners, during the second interview he gave to the Prosecution.[3296] Aćimović was cross-examined on the above-mentioned discrepancies between his statements given before his testimony.[3297] The Trial Chamber emphasised that it evaluated Aćimović's evidence in its totality,

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3289 Popović's Appeal Brief, para. 333.
3290 Popović's Appeal Brief, paras 326, 334.
3291 Prosecution's Response Brief (Popović), paras 207, 213.
3292 See *supra*, paras 1129-1131.
3293 Trial Judgement, para. 510, referring to, *inter alia*, Mitar Lazarević, T. 13374-13379 (27 June 2007).
3294 See *supra*, para. 1123.
3295 Srećko Aćimović, T. 12998-12999 (21 June 2007). See also Srećko Aćimović, T. 13000 (21 June 2007).
3296 See Srećko Aćimović, T. 12999-13000 (21 June 2007).
3297 See Srećko Aćimović, T. 12992 (21 June 2007) - T. 13157 (22 June 2007) (partly in private session).

including "the extensive cross-examination conducted".[3298] The Appeals Chamber recalls that the Trial Chamber should be afforded deference in assessing various factors that affect a witness's credibility.[3299] The Appeals Chamber therefore finds that **Popović** has failed to demonstrate any error in how the Trial Chamber dealt with Aćimović's explanation for these discrepancies in his statements given to the Prosecution.

d. Conclusion

1143. In sum, the Appeals Chamber considers that **Popović** has failed to show that no reasonable trier of fact could have relied on Aćimović's evidence to support its finding that **Popović** enlisted Aćimović's assistance to execute Bosnian Muslim prisoners held in the Ročević School.

(vi) Alleged error in finding that Popović co-ordinated logistics for the Pilica Area Killings

1144. The Trial Chamber made a series of findings that placed **Popović** at the Branjevo Military Farm and in Pilica on 16 July 1995 co-ordinating logistics "on-site" for the mass executions.[3300]

1145. **Popović** submits that the Trial Chamber made an error resulting in a miscarriage of justice in finding that he co-ordinated logistics on-site for the Pilica Area Killings.[3301] In particular, he challenges the Trial Chamber's findings identifying him as the "lieutenant colonel" who: (1) joined eight members of the 10th Sabotage Detachment at the Standard Barracks; (2) continued with them to the Branjevo Military Farm but left when the buses with the prisoners began to arrive; (3) returned to Branjevo at 3:00 or 4:00 p.m. and ordered the soldiers from the 10th Sabotage Detachment to go to the Pilica Cultural Centre to execute about 500 Bosnian Muslim prisoners detained there; (4) left with some soldiers from Bratunac who volunteered; (5) instructed Prosecution Witness Dražen Erdemović and the other 10th Sabotage Detachment members to go to the Pilica café; (6) was told by Radenko Tomić that everything was finished; and (7) announced at the Pilica café "[w]ho remained alive, has remained alive".[3302]

1146. As to the identity of the "lieutenant colonel" at the execution site, **Popović** submits that Erdemović – who testified that he saw a "lieutenant colonel" – could not identify this officer and failed to recognise him in a photo line-up.[3303] **Popović** submits that the Trial Chamber disregarded

3298 Trial Judgement, para. 506.
3299 See *supra*, para. 20. See also *Šainović et al.* Appeal Judgement, para. 658; *Lukić and Lukić* Appeal Judgement, para. 112.
3300 Trial Judgement, paras 535, 540-541, 1131-1135, 1166 & fn. 3791.
3301 Popović's Appeal Brief, paras 270, 275, 282; Appeal Hearing, AT. 77-78 (2 Dec 2013).
3302 Popović's Appeal Brief, paras 271, 351; Popović's Reply Brief, para. 98; Appeal Hearing, AT. 78-80 (2 Dec 2013).
3303 Popović's Appeal Brief, paras 270, 273, 275; Appeal Hearing, AT. 80 (2 Dec 2013).

the fact that Erdemović's description of the "lieutenant colonel" did not match him "at all"[3304] and erroneously concluded that Erdemović's failure to recognise him as the "lieutenant colonel" in a photo line-up was due to trauma.[3305] **Popović** also argues that the evidence used by the Trial Chamber – to bolster its inference that the "lieutenant colonel" was, in fact, him – was either unreliable or highly circumstantial and that the evidence only placed him in the surrounding area.[3306] Particularly, **Popović** argues that none of the several pieces of circumstantial evidence upon which the Trial Chamber based its findings are individually capable of proving beyond reasonable doubt that the "lieutenant colonel" seen by Erdemović was, in fact, him.[3307] As an alternative and reasonable explanation for his presence in the Zvornik area, **Popović** submits that, as the sole officer within the Security Organ of the Drina Corps responsible for counter-intelligence, he was required to be present and to carry out his tasks related to combat taking place in that area.[3308]

1147. The Prosecution responds that **Popović** ignores the fact that the Trial Chamber's conclusion positively identifying **Popović** as the "lieutenant colonel" was based on the totality of mutually reinforcing pieces of evidence.[3309] It also submits that the weight attributed to Erdemović's description of the "lieutenant colonel" was a matter of discretion for the Trial Chamber.[3310] The Prosecution argues that the Trial Chamber carefully considered the fact that Erdemović failed to recognise **Popović** in a photo line-up, but found that this did not raise a reasonable doubt as to its conclusion.[3311] The Prosecution further responds that **Popović**'s argument that he was bound to his counter-intelligence duties and could only have been in the Zvornik area in relation to legitimate combat activities was rejected during trial and that **Popović** fails to show any error in this regard by the Trial Chamber.[3312]

1148. The Appeals Chamber notes that the Trial Chamber did not refer to any direct evidence placing **Popović** in Branjevo or at the Pilica Café on 16 July 1995.[3313] While **Popović** denies being present at the Kula School when transportation of the prisoners to the execution site at the Branjevo Military Farm began, he does so without advancing any argument on appeal, and his submission in this respect necessarily fails.[3314] The Appeals Chamber recalls that it has dismissed **Popović**'s

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3304 Popović's Appeal Brief, para. 274. See Popović's Reply Brief, para. 100; Appeal Hearing, AT. 79-80 (2 Dec 2013).
3305 Popović's Appeal Brief, para. 275.
3306 Popović's Appeal Brief, paras 271-272, 281-282.
3307 Popović's Appeal Brief, paras 276-279, 284; Popović's Reply Brief, paras 98-99.
3308 Popović's Appeal Brief, para. 280.
3309 Prosecution's Response Brief (Popović), paras 220-221, 224; Appeal Hearing, AT. 140 (2 Dec 2013).
3310 Prosecution's Response Brief (Popović), para. 222. See also Appeal Hearing, AT. 140-141 (2 Dec 2013).
3311 Prosecution's Response Brief (Popović), paras 222-223.
3312 Prosecution's Response Brief (Popović), paras 232-234. See also Appeal Hearing, AT. 143-144 (2 Dec 2013).
3313 Trial Judgement, para. 1134.
3314 See Popović's Appeal Brief, para. 277.

challenges to the findings that he had a co-ordinating role in the Orahovac killings and Kozluk Killings.[3315]

1149. In the absence of direct evidence, the Trial Chamber based its finding that **Popović** was the "lieutenant colonel" seen on 16 July 1995 by Erdemović on several pieces of circumstantial evidence. These were: (1) **Popović**'s rank at that time; (2) **Popović**'s presence at the Kula School just as transportation of the prisoners to the execution site at the Branjevo Military Farm began; (3) **Popović**'s co-ordinating role in the twin killing operations at Orahovac and Kozluk; (4) **Popović**'s presence in the Pilica area at 4:40 p.m.; (5) **Popović**'s communications within the Zvornik Brigade regarding requests for fuel on 16 July 1995; and (6) the lack of evidence that any other lieutenant colonel was present in the area at the relevant time.[3316]

1150. In assessing such evidence generally, the Trial Chamber explained that "[l]ike all elements of a crime, the identification of the Accused must be proved by the Prosecution beyond reasonable doubt. Where questions relating to the identity of the Accused arise, they must be determined in light of all the relevant available evidence".[3317] The Appeals Chamber agrees and further considers that each piece of circumstantial evidence on the issue of identification is to be considered in relation to all other evidence bearing on the issue, and not in isolation.[3318] Whereas the assessment of an evidentiary factor in a vacuum might fail to establish an essential matter, the weight of all relevant evidence taken together can conclusively prove the same matter beyond reasonable doubt.[3319] The Appeals Chamber therefore dismisses **Popović**'s argument that no single piece of circumstantial evidence was individually capable of proving that the "lieutenant colonel" was **Popović**.

1151. **Popović**'s main challenge, however, is to the Trial Chamber's assessment of Erdemović's evidence. In this regard, the Trial Chamber recognised that "identification evidence can be particularly liable to error and that, even where a witness appears to be honest, the Trial Chamber must be convinced that his or her evidence is objectively reliable before it will be sufficient to establish a positive identification".[3320] Factors relied upon by the Trial Chamber included "the circumstances in which each witness claimed to have observed the Accused; the length of the observation; the familiarity of the witness with the Accused prior to the identification; and the

3315 See *supra*, paras 1108, 1143.
3316 Trial Judgement, para. 1134.
3317 Trial Judgement, para. 54.
3318 See *supra*, para. 1103.
3319 See *supra*, para. 1103.
3320 Trial Judgement, para. 55.

description given by the witness of his or her identification of the Accused".[3321] With this in mind, the Appeals Chamber considers the relevant part of Erdemović's testimony:

> A. Not long after that, Brano and Zoran came out with a military person, and from what I could see of his rank insignia on his chest, he was a lieutenant-colonel. And then another two policemen, military policemen, came out of the building together with him. Q. Can you describe the person that you believed was a lieutenant-colonel? A. He was quite tall, corpulent, greyish hair. His face had strong features in this area, and he was wearing a uniform of the [VRS]. Q. Do you remember any facial hair? A. No, he didn't have a beard or a moustache. Q. Do you remember any eyeglasses? A. No, I cannot remember exactly, but I don't believe so.[3322]

Erdemović's description of the "lieutenant colonel" does not appear to be fully consistent with the description of **Popović** given by the Trial Chamber which specifically found that in July 1995, **Popović** had a moustache.[3323] At the same time, the Appeals Chamber notes that, although Erdemović's description of the "lieutenant colonel" is not discussed anywhere in the Trial Judgement, the Trial Chamber is not required to refer to every part of a witness's testimony or every piece of evidence in its reasoning. Without an indication that a particular piece of evidence has been completely disregarded, the Appeals Chamber will presume that the Trial Chamber has evaluated all the evidence presented to it.[3324] Failure to discuss inconsistent or contradictory evidence is not necessarily indicative of disregard. The Appeals Chamber reiterates in this regard that "[c]onsidering the fact that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of the Trial Chamber to evaluate it and to consider whether the evidence as a whole is credible, without explaining its decision in every detail".[3325]

1152. The Appeals Chamber notes that the Trial Chamber specifically acknowledged that Erdemović did not identify **Popović** as the "lieutenant colonel" in a photo line-up conducted in December 1998, quoting the traumatic circumstances in which Erdemović met **Popović** and the significant passage of time, as sufficient justification for Erdemović's failure to do so.[3326] The Appeals Chamber, Judge Robinson dissenting, considers that the detailed description of the "lieutenant colonel" given by Erdemović at trial in 2007 was not "clearly relevant" to the overall finding.[3327] It is clear that the Trial Chamber accepted – as a factor not raising any reasonable doubt to its final conclusion – that more than three years after the traumatic events, and certainly at the point when he testified before the Tribunal, Erdemović's recollection of the "lieutenant colonel" simply did not match **Popović**.

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3321 Trial Judgement, para. 55.
3322 Dražen Erdemović, T. 10966 (4 May 2007).
3323 See Trial Judgement, para. 1112.
3324 See *supra*, note 2661.
3325 *Kvočka et al.* Appeal Judgement, para. 23 (internal references omitted). See *supra*, note 2960.
3326 Trial Judgement, para. 1135 & fn. 3707, referring to Ex. 2D00571, "Stipulation between OTP and Popović".
3327 See *supra*, para. 306 & notes 840-841.

1153. The Trial Chamber referred to the substantial body of circumstantial identification evidence that supports the finding that **Popović** is the "lieutenant colonel" seen at the execution site. Its findings show that **Popović** was not only present in the area on 16 July 1995, but that he was, at least to a certain extent, involved in the murder and burial operation (*e.g.* **Popović**'s request for fuel to be delivered to Pilica on 16 July 1995).[3328] They place **Popović** in a co-ordinating role with regard to similar killing operations in Orahovac and Kozluk.[3329] Finally, if one accepts Erdemović's recognition of the rank of the "lieutenant colonel", the Appeals Chamber, Judge Robinson dissenting, considers that the absence of evidence placing any other officer of this rank other than **Popović** in the area further strengthens the Trial Chamber's inference. Although none of these findings is decisive by itself, their mutual weight supports the Trial Chamber's conclusion.

1154. The Appeals Chamber recalls that it can only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision,[3330] and that in determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a trial chamber.[3331] The Appeals Chamber, Judge Robinson dissenting, finds that, under the present circumstances, the Trial Chamber's decision not to discuss the description of the "lieutenant colonel" given by Erdemović did not result in a miscarriage of justice. The Appeals Chamber, Judge Robinson dissenting, also finds that **Popović** has failed to show that no reasonable trier of fact could have reached, as the only reasonable inference, the Trial Chamber's conclusion that the "lieutenant colonel" was in fact **Popović**. The Appeals Chamber, Judge Robinson dissenting, thus dismisses **Popović**'s challenges in this regard.

(vii) Alleged errors concerning the Milići Prisoners

1155. The Trial Chamber relied on the finding that **Popović** "played a central role in arranging for the murder of ten wounded Bosnian Muslim prisoners" to support its conclusions about his contribution to the JCE to Murder.[3332] The Milići Prisoners were found to have been at the Milići Hospital on 14 July 1995 before being transferred to the Zvornik Hospital and eventually to the Zvornik Brigade Medical Centre located at the Standard Barracks.[3333] The last information about the Milići Prisoners before they "disappeared" was that they had been placed in **Popović**'s custody.[3334] The Trial Chamber relied on this evidence as well as evidence about **Popović**'s

3328 See *supra*, para. 1088.
3329 See *supra*, paras 1108, 1143.
3330 See *supra*, para. 19.
3331 See *supra*, para. 20.
3332 Trial Judgement, para. 1167.
3333 Trial Judgement, paras 570, 572, fn. 5710.
3334 Trial Judgement, paras 794.16 (finding that the Milići Prisoners were taken away and "disappeared"), 1156 (finding that the Milići Prisoners were placed in **Popović**'s custody).

involvement in the mass executions in the Zvornik area in July 1995 to find that **Popović** "killed or facilitated the killing of the ten wounded Bosnian Muslim prisoners from Milići Hospital".[3335]

a. Alleged errors in finding that the Milići Prisoners were in Popović's custody

1156. **Popović** submits that the Trial Chamber erred in finding that the Milići Prisoners were last seen, or were placed, in his custody and challenges the assessment and interpretation of the evidence that underpins this finding.[3336] In this regard he asserts that the Trial Chamber: (1) misconstrued the content of two intercepted conversations; (2) erred in its assessment of the vehicle logbook; (3) erred in its assessment of PW-168's credibility; and (4) improperly interpreted PW-168's evidence.[3337]

i. Alleged misinterpretation of the content of the 23 July Intercepts

1157. The Trial Chamber used two intercepted conversations from 23 July 1995 to support its conclusion that "**Pandurević** sought guidance on the issue of [the Milići Prisoners] and was told that **Popović** would arrive to sort the matter out": (1) one from 8:00 a.m. ("8:00 a.m. Intercept"); and (2) one from 8:05 a.m. ("8:05 a.m. Intercept") (collectively, "23 July Intercepts").[3338]

1158. **Popović** submits that the Trial Chamber erred in arriving at the abovementioned conclusion, and asserts that the Trial Chamber misconstrued the content of the 23 July Intercepts in two ways.[3339] First, he argues that the 8:00 a.m. Intercept suggests that **Pandurević** was told that **Popović** would merely convey a message from the Drina Corps Command to **Pandurević** regarding what should be done with both the Milići Prisoners *and* other prisoners held by the Zvornik Brigade.[3340] Second, he asserts that by interpreting the 8:05 a.m. Intercept to mean that **Popović** would come "to sort the matter out" the Trial Chamber erroneously implied that he had a proactive role in the fate of the Milići Prisoners which connotes a greater level of culpability.[3341]

1159. The Prosecution responds that the Trial Chamber reasonably relied on the 23 July Intercepts.[3342] It argues that the finding that **Popović** would arrive in Zvornik "to sort the matter out" was reasonable, based on the evaluation of all the relevant evidence and not only the

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3335 Trial Judgement, para. 1156. See Trial Judgement, para. 577.
3336 Popović's Appeal Brief, paras 360, 386.
3337 Popović's Appeal Brief, paras 357-386.
3338 Trial Judgement, para. 573, referring to Ex. P01309a, "Intercept, 23 July 1995, 08:00 hours", Ex. P01310a, "Intercept, 23 July 1995, 08:05 hours".
3339 Popović's Appeal Brief, paras 361-365; Appeal Hearing, AT. 82 (2 Dec 2013).
3340 Popović's Appeal Brief, paras 361-365; Popović's Reply Brief, para. 117.
3341 Popović's Appeal Brief, para. 361; Popović's Reply Brief, para. 116. See also Appeal Hearing, AT. 157 (2 Dec 2013).
3342 Prosecution's Response Brief (Popović), para. 256.

intercepts, and was not a misquotation.[3343] Further, the Prosecution asserts that the presence of other prisoners in the Standard Barracks does not disturb the Trial Chamber's findings.[3344]

1160. The Appeals Chamber observes that in addressing **Popović**'s responsibility with respect to the Milići Prisoners, the Trial Chamber limited its analysis of the 23 July Intercepts to the Milići Prisoners,[3345] whereas in addressing **Pandurević**'s responsibility, its analysis included references to prisoners in general, including the Milići Prisoners.[3346] However, the Appeals Chamber considers that whether **Pandurević**'s inquiry related to the wounded *and* other prisoners or whether it was only limited to the Milići Prisoners has no impact on the Trial Chamber's finding that in the 8:00 a.m. Intercept "**Pandurević** sought guidance on the issue of wounded prisoners".[3347] The Appeals Chamber further notes that **Popović** does not explain how limiting the discussion to only the Milići Prisoners had any impact on his conviction or sentence. His argument is therefore dismissed.

1161. Turning to **Popović**'s challenge of the Trial Chamber's use of the expression "**Popović** would arrive to sort the matter out",[3348] the Appeals Chamber observes that this expression is different from that used in the 8:05 a.m. Intercept, which reads "to say what needs to be done".[3349] Even if the language used in the 8:05 a.m. Intercept, when read in isolation, does not permit a definitive conclusion that **Popović** would arrive to deal with the prisoners personally, the Trial Chamber's interpretation of the 8:05 a.m. Intercept is supported by evidence from two other sources, namely: (1) the testimony of PW-168 who heard that "Colonel **Popović** would come *to deal* with the problem of [the] wounded";[3350] and (2) the evidence of **Pandurević** who accepted the interpretation of the intercept suggested to him by the Prosecution that **Popović** would come and "*deal* with [this] problem with the wounded and the prisoners".[3351] While **Popović** provides an alternative interpretation of the evidence, he has failed to demonstrate that, based on the totality of the evidence before it, the Trial Chamber erred in its interpretation of the 8:05 a.m. Intercept[3352] or, by implication, in concluding that he had a proactive role in the fate of the Milići Prisoners.

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3343 Prosecution's Response Brief (Popović), para. 256. See Appeal Hearing, AT. 142-143 (2 Dec 2013).
3344 Prosecution's Response Brief (Popović), paras 258-259.
3345 Trial Judgement, para. 1153.
3346 Trial Judgement, para. 1903.
3347 See Popović's Appeal Brief, paras 363-364; Popović's Reply Brief, para. 117.
3348 Trial Judgement, paras 573, 1153.
3349 See Trial Judgement, para. 1904; Ex. P01310a, "Intercept, 23 July 1995, 08:05 hours".
3350 See Trial Judgement, para. 1904 & fn. 5724, referring to PW-168, T. 15915 (closed session) (27 Sept 2007).
3351 See Trial Judgement, para. 1153 & fn. 3761, para. 1904 & fn. 5724, referring to Vinko Pandurević, T. 32262 (27 Feb 2009).
3352 Trial Judgement, paras 573, 1153.

ii. Alleged errors with respect to Popović's vehicle log

1162. The Trial Chamber found that "[o]n 23 July, the vehicle log for a car assigned to **Popović** recorded that this car travelled from Vlasenica to Zvornik".[3353] As an alternative to arguments advanced with respect to his alibi,[3354] **Popović** refers to this finding and submits that the Trial Chamber erroneously implied that he was not in the car that day.[3355] He points out that the timing of this trip coincided with the Drina Corps' decision to move the prisoners from the Zvornik Brigade to Batković.[3356] He asserts that one could infer that this constitutes proof that he immediately left Vlasenica after the intercepted conversations were completed and conveyed to **Pandurević** instructions related to this decision to move prisoners and thus could not be responsible "for the deaths of the [Milići Prisoners]".[3357]

1163. The Prosecution responds that the mere fact that **Popović** may have left Vlasenica immediately after the intercepted conversations does not in any way prove that he did not facilitate the deaths of the Milići Prisoners.[3358] The Prosecution also disputes **Popović**'s assertion that in finding that his vehicle traveled from Vlasenica to Zvornik, the Trial Chamber implied that **Popović** was not in it.[3359]

1164. The Appeals Chamber considers that **Popović** has failed to identify any finding in which the Trial Chamber purportedly implied that **Popović** was not in his car on 23 July 1995. The Appeals Chamber considers that this misrepresentation of factual findings warrants dismissal of his argument. It also considers that the alternative theory of events that **Popović** proposes is entirely speculative. His argument is therefore dismissed.

iii. Alleged errors in relying on PW-168's testimony

1165. PW-168 and **Pandurević** offer different accounts of the fate of the Milići Prisoners.[3360] PW-168 testified that sometime after 23 July 1995 the duty officer informed him "that the wounded prisoners were driven away very early in the morning".[3361] According to PW-168, later that same day, **Pandurević** informed Obrenović that "**Popović** had arrived with an order from Mladić for the

3353 Trial Judgement, para. 1155.
3354 In his reply, **Popović** clarifies that he never submitted that he travelled to Zvornik to convey any message regarding either the prisoners or the wounded and his arguments were aimed to show that the Trial Chamber constructed its findings as to his responsibility in the way the most damaging to him. Popović's Reply Brief, paras 112, 118. See *supra*, paras 354-362; *infra*, para. 1198.
3355 Popović's Appeal Brief, paras 366-367. See Popović's Reply Brief, para. 119; Appeal Hearing, AT. 82 (2 Dec 2013).
3356 Popović's Appeal Brief, para. 367. See Popović's Appeal Brief, para. 364.
3357 Popović's Appeal Brief, para. 367.
3358 Prosecution's Response Brief (Popović), para. 261.
3359 Prosecution's Response Brief (Popović), para. 260.
3360 Trial Judgement, fn. 3763.

injured Bosnian Muslim men to be liquidated".[3362] **Pandurević** on the other hand testified that "on 24 July, Obrenović reported to him that these wounded prisoners were taken to Batković detention centre, in Bijelina".[3363]

1166. **Popović** avers that **Pandurević**'s account was true and asserts that Obrenović was implicated in the Milići Prisoners' murder, and that PW-168 was motivated to incriminate **Popović**.[3364] To support his challenge to PW-168's credibility, **Popović** submits that the witness lied when testifying that Obrenović did not learn of the Milići Prisoners until 20 July 1995.[3365] Further, **Popović** identifies several aspects of PW-168's testimony concerning the events of 14 to 20 July 1995 that he asserts conflict with other witness testimonies as well as other evidence on the trial record.[3366] In particular, he submits that the Trial Chamber disregarded evidence of two witnesses, whose testimonies contradicted that of PW-168,[3367] namely Prosecution Witnesses Dr. Jugoslav Gavrić, Director of the Zvornik Hospital at the time,[3368] and Dr. Zoran Begović, Chief of the Zvornik Brigade Medical Centre.[3369] **Popović** asserts that these witnesses' testimonies reveal that between the evening of 14 July and the morning of 15 July 1995: (1) the Milići Prisoners had already been transferred from the Zvornik Hospital to the Standard Barracks; (2) Obrenović arranged this transfer and their further medical treatment; and (3) Obrenović knew the fate of the Milići Prisoners when they were transferred to the Standard Barracks.[3370] **Popović** asserts that Obrenović's involvement in the Milići Prisoners' transfer to the Standard Barracks and their treatment by the Zvornik Hospital doctors is also supported by a document sent by the Assistant Chief of Staff for Recruitment and Personnel of the Zvornik Brigade on 14 July 1995, requesting the mobilisation of seven conscripts to secure the Zvornik Medical Centre.[3371]

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3361 Trial Judgement, paras 574, 1154.
3362 Trial Judgement, paras 574, 1154, 1380, 1905.
3363 Trial Judgement, paras 575, 1906.
3364 Popović's Appeal Brief, para. 368; Popović's Reply Brief, paras 113, 116. See also Appeal Hearing, AT. 82 (2 Dec 2013).
3365 Popović's Appeal Brief, paras 370-385; Popović's Reply Brief, paras 113-114.
3366 Popović's Appeal Brief, paras 368-385.
3367 Popović's Appeal Brief, paras 370-372, 375-376.
3368 Popović's Appeal Brief, para. 370. The Appeals Chamber notes that in his oral submissions **Popović** submits that the Trial Chamber disregarded the testimony of Witness Novaković, citing to paragraph 370 of his appeal brief which referred to his submission on the alleged disregard of the evidence of Witness Gavrić. Appeal Hearing, AT. 82-83 (2 Dec 2013). Given that the details of the argument made by **Popović** during the Appeal Hearing appear to describe the evidence of Witness Gavrić rather than that of Witness Novaković, the Appeals Chamber considers this submission to contain a mistake.
3369 Popović's Appeal Brief, para. 371; Appeal Hearing, AT. 84 (2 Dec 2013).
3370 Popović's Appeal Brief, paras 370-385; Popović's Reply Brief, paras 113-114. See Appeal Hearing, AT. 84 (2 Dec 2013).
3371 Popović's Appeal Brief, para. 374, referring to Ex. 7D00099, "Request for mobilisation, 14 July 1995". See Appeal Hearing, AT. 82 (2 Dec 2013).

1167. The Prosecution responds that **Popović** fails to demonstrate an error in the Trial Chamber's assessment of PW-168's evidence.[3372] It argues that the date the Milići Prisoners were transferred to the Standard Barracks is neither material to the events on or around 23 July 1995, nor contradictory to PW-168's evidence that Obrenović became aware of the Milići Prisoners in custody at the Standard Barracks only around 20 July 1995.[3373] The Prosecution also disputes **Popović**'s assertion that Obrenović was involved in the Milići Prisoners' murder.[3374]

a- Whether the Milići Prisoners were transferred to the Standard Barracks around 20 July 1995

1168. The Trial Chamber found that the Milići Prisoners were at the Milići Hospital on 14 July 1995 before being transferred to the Zvornik Hospital and eventually to the Zvornik Brigade Medical Centre located at the Standard Barracks.[3375] Part of **Popović**'s challenge to PW-168's credibility turns on a determination as to when the Milići Prisoners were transferred to the Standard Barracks.[3376] The Appeals Chamber notes that the Trial Chamber's formulations with respect to the date the Milići Prisoners were transferred to the Standard Barracks differ slightly in different parts of the Trial Judgement. In the first discussion about the Milići Prisoners, the Trial Chamber found that they were transported from the Milići Hospital to the Zvornik Hospital on 14 July 1995 and that after remaining there for "more than one day" they were transferred to the Standard Barracks.[3377] In discussing **Pandurević**'s individual criminal responsibility, the Trial Chamber specified that the Milići Prisoners were transferred to the Standard Barracks around 20 July 1995.[3378]

1169. **Popović** relies on Gavrić's testimony to support his contention that the Milići Prisoners were transferred to the Standard Barracks between the evening of 14 July and the morning of 15 July 1995.[3379] He also relies on an entry made in the Duty Officer's Notebook early in the morning of 16 July 1995 noting the death of Aziz Bećirović, who was brought to the Zvornik Hospital together with the Milići Prisoners.[3380] **Popović** argues that this information would be

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3372 Prosecution's Response Brief (Popović), paras 246, 251.
3373 Prosecution's Response Brief (Popović), para. 249.
3374 Prosecution's Response Brief (Popović), para. 248.
3375 Trial Judgement, paras 570, 572, fn. 5710.
3376 Popović's Appeal Brief, paras 370, 377-378, 383-384; Popović's Reply Brief, para. 114.
3377 Trial Judgement, paras 570, 572. In reaching its finding on the time spent by the Milići Prisoners at the Zvornik Hospital, the Trial Chamber referred to the evidence of Witness Radivoje Novaković who testified that "I do not know how long the wounded stayed [in the Zvornik Hospital] but I am convinced it was more than one day." Radivoje Novaković, Ex. P02480, "92 *ter* statement" (6 Mar 2003), para. 2.
3378 Trial Judgement, para. 1899.
3379 Popović's Appeal Brief, para. 370. See Appeal Hearing, AT. 82-84 (2 Dec 2013).
3380 Popović's Appeal Brief, para. 377. See Appeal Hearing, AT. 84 (2 Dec 2013).

meaningless to the Zvornik Brigade if the Milići Prisoners had not yet been transferred to the Standard Barracks.[3381]

1170. The Trial Chamber relied on PW-168's testimony and, to a certain extent, on the evidence of Prosecution Witness Radivoje Novaković[3382] and **Pandurević**[3383] to support its finding that the Milići Prisoners were transferred to the Standard Barracks around 20 July 1995.[3384] The Trial Chamber did not refer to Gavrić's testimony that he was told that the Milići Prisoners were taken from the Zvornik Hospital the morning after they arrived.[3385]

1171. The Appeals Chamber reiterates that where the Trial Chamber did not refer to a witness's evidence, even if it contradicts the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[3386] Given that PW-168's testimony about the exact timing of the Milići Prisoners' transfer to the Standard Barracks is partially corroborated, the Appeals Chamber considers that the Trial Chamber assessed and weighed Gavrić's testimony, but found that his evidence did not prevent it from arriving at its eventual finding.

1172. Further, with respect to **Popović**'s submission that the 16 July 1995 entry in the Duty Officer's Notebook conflicts with the finding that the transfer occurred around 20 July 1995, the Appeals Chamber considers that **Popović** has not demonstrated that, when considered in light of the entirety of the evidence, a reasonable trier of fact could not have come to this conclusion. Instead, he simply seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing that the Trial Chamber erred.

1173. Consequently, the Appeals Chamber considers that **Popović** has failed to demonstrate that the Trial Chamber erred in finding that the Milići Prisoners were transferred to the Standard Barracks around 20 July 1995.

b- Evidence of Obrenović's purported role in the transfer and treatment of the Milići Prisoners

1174. **Popović** advances a number of arguments to support his assertion that Obrenović was involved in the transfer of the Milići Prisoners to the Standard Barracks and in their further treatment, and consequently that the Trial Chamber ought not to have relied on PW-168's testimony

3381 Popović's Appeal Brief, para. 378. See Appeal Hearing, AT. 84 (2 Dec 2013).
3382 Ex. P02480, "92 *ter* statement" (6 Mar 2003), para. 2.
3383 Vinko Pandurević, T. 31169 (10 Feb 2009).
3384 Trial Judgement, fns 2092, 5710. See *supra*, note 3377.
3385 Jugoslav Gavrić, T. 9116-9117 (21 Mar 2007).
3386 See *supra*, note 2661.

to the contrary.[3387] **Popović** bases his main line of argument on the differences between the testimonies of Witnesses Begović and PW-168.

1175. Begović testified, *inter alia*, that Obrenović came to see the medical team regarding the Milići Prisoners "the first day or the day after" their arrival at the Standard Barracks,[3388] and that Obrenović said that "the surgeons from the Zvornik medical centre would be coming"[3389] and chose the room in which the Milići Prisoners would be accommodated.[3390] Begović also testified that Obrenović told him not to register the Milići Prisoners in the Zvornik Brigade Infirmary Logbook ("Infirmary Logbook").[3391]

1176. PW-168 on the other hand testified, *inter alia*, that Obrenović was not involved in arranging visits by Zvornik Hospital surgeons or determining where the wounded would be situated.[3392] PW-168 testified that Obrenović only became aware of the Milići Prisoners at the Standard Barracks around 20 July 1995.[3393] With respect to the "professional details" about whether Obrenović told Begović not to register the Milići Prisoners in the Infirmary Logbook, PW-168 testified that he could not remember but concluded his response by saying "I don't know. I don't believe so."[3394]

1177. The Trial Chamber addressed the differing accounts on the Infirmary Logbook issue. The Trial Judgement, which refers to Begović's testimony, states that "Obrenović also informed Dr. Begović that it was not necessary to register the patients in the logbook and that any medical records that were created would travel with the prisoners once they left the infirmary at the Standard Barracks".[3395] A few lines down, referring to PW-168's testimony, the Trial Judgement states that "[o]ther evidence suggests that Obrenović may not have raised the issue of registering the patients with Begović".[3396] The Appeals Chamber interprets the first sentence quoted above as the Trial Chamber's finding on this issue and considers that the second sentence merely acknowledges the existence of evidence to the contrary, without undermining this finding. Although the language used in the Trial Judgement could have been clearer, the Appeals Chamber considers that this finding could be construed as an acceptance of Begović's evidence in this regard. **Popović** has thus failed to show that this incident was not taken into account by the Trial Chamber in its

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3387 Popović's Appeal Brief, paras 371-372, 374-385; Popović's Reply Brief, paras 113, 115-116. See Appeal Hearing, AT. 82, 84 (2 Dec 2013).
3388 Ex. P02481, "92 *ter* statement" (2 Apr 2003), para. 8. See Zoran Begović, T. 9140 (21 Mar 2007).
3389 Zoran Begović, T. 9144 (21 Mar 2007). See Zoran Begović, T. 9134, 9155-9156 (21 Mar 2007).
3390 Zoran Begović, T. 9142 (21 Mar 2007).
3391 Zoran Begović, T. 9144 (21 Mar 2007). See Zoran Begović, T. 9134, 9155-9156 (21 Mar 2007).
3392 PW-168, T. 16736-16738 (closed session) (22 Oct 2007).
3393 PW-168, T. 15912-15913 (closed session) (27 Sept 2007).
3394 PW-168, T. 16737-16738 (closed session) (22 Oct 2007).
3395 Trial Judgement, fn. 5713.
3396 Trial Judgement, fn. 5713.

consideration of PW-168's credibility. The Appeals Chamber also considers that **Popović**'s theory that Obrenović was implicated in the Milići Prisoners' murder – based on his decision not to register them in the Infirmary Logbook[3397] – is entirely speculative.

1178. The difference between Begović's and PW-168's testimonies concerning the Milići Prisoners' registration was the only one that the Trial Chamber explicitly discussed.[3398] It did not enter findings detailing the practical arrangements concerning the prisoner transfer and treatment. The Appeals Chamber recalls that the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count and it is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[3399] The Appeals Chamber therefore considers that **Popović** has failed to show that the Trial Chamber disregarded aspects of Begović's testimony that were relevant to the ultimate issue of his responsibility.

1179. With respect to the document sent by the Zvornik Brigade on 14 July 1995, requesting seven conscripts to secure the Zvornik Brigade Medical Centre, the Appeals Chamber notes that the request relates only to the Zvornik Brigade Medical Centre and does not mention the transfer of prisoners.[3400] The Appeals Chamber therefore considers that **Popović** has failed to demonstrate that the Trial Chamber erred in not considering this request as affecting the credibility of PW-168.

1180. In a less direct argument suggesting Obrenović's involvement in the transfer of the Milići Prisoners, the Appeals Chamber notes that **Popović** refers to patients Redžo Mustafić and Azim Baramović who went missing,[3401] before he concludes that on 14 July 1995 "some non-medical person or authority" decided to leave Aziz Bećirović at the Zvornik Hospital, to send ten of the 18 Muslim patients to the Standard Barracks and to send the rest to some still unknown place.[3402]

1181. The section of the Trial Judgement discussing the Milići Prisoners notes that "[a]s previously stated, Aziz Bećirović, passed away at the Zvornik Hospital. The remains of another patient, Redžo Mustafić, have been identified in a grave at Liplje. As of November 2007, the other nine wounded Bosnian Muslim men were still missing".[3403] **Popović** submits that the inclusion of Mustafić as one of the Milići Prisoners proves that they were not all sent to the Standard Barracks

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3397 Popović's Appeal Brief, para. 376; Popović's Reply Brief, para. 113.
3398 See *supra*, para. 1177.
3399 *Hadžihasanović and Kubura* Appeal Judgement, para. 13. See also *Bizimungu* Appeal Judgement, paras 263, 296.
3400 Ex. 7D00099, "Request for mobilisation, 14 July 1995".
3401 Popović's Appeal Brief, paras 379-383.
3402 Popović's Appeal Brief, para. 383.
3403 Trial Judgement, para. 576 (internal references omitted).

from the Zvornik Hospital.[3404] In this regard, he argues that since Mustafić's remains were found at Liplje, the secondary grave linked to the primary grave at the Petkovci Dam, Mustafić was killed on 15 July 1995.[3405] The Prosecution responds that Mustafić was not in the group of Milići Prisoners and concedes that he was killed at Petkovci on 15 July 1995.[3406]

1182. The Appeals Chamber finds that the Trial Chamber erroneously counted Mustafić among the Milići Prisoners. In this regard it notes that Mustafić was not named in the Indictment,[3407] that the Parties seem to be in agreement that he was killed at Petkovci on 15 July 1995, and that the Trial Chamber does not refer to any evidence showing that Mustafić was indeed a patient at the Zvornik Hospital. Nevertheless, **Popović** has failed to demonstrate how the Trial Chamber's error in this regard supports his challenge to PW-168's credibility or had any impact on his conviction or sentence. **Popović**'s arguments in this respect are thus dismissed.

1183. With respect to Azim Baramović, **Popović** points out that he was treated in the Zvornik Hospital at 11:00 a.m. on 14 July 1995 and subsequently sent to the Standard Barracks, but that no evidence shows that he ever reached his final destination.[3408] **Popović** asserts that since Obrenović was involved in all arrangements surrounding the Milići Prisoners' transfer to the Standard Barracks, he was the "only one who would have been able to explain their fate".[3409] The Appeals Chamber observes that the Indictment only covers the 11 wounded prisoners who were transported from Milići to Zvornik on 14 July 1995.[3410] The relevant evidence indicates that Azim Baramović was not among the Milići Prisoners brought to the Zvornik Hospital in the afternoon of 14 July 1995, before sunset, as his medical examination in the Zvornik Hospital took place on 14 July 1995 at 11:00 a.m.[3411] The Appeals Chamber therefore considers that this submission neither proves that Obrenović was involved in the transfer of the Milići Prisoners to the Standard Barracks, nor affects the Trial Chamber's findings on PW-168's credibility. **Popović**'s arguments are therefore dismissed.

c- Evidence purported to implicate Obrenović in the Milići Prisoners' murder

1184. With regard to **Popović**'s theory suggesting that Obrenović knew the fate of some other Bosnian Muslim patients from the Zvornik Hospital, the Appeals Chamber considers it to be

3404 Popović's Appeal Brief, paras 380-382; Popović's Reply Brief, para. 115.
3405 Popović's Appeal Brief, paras 380-381.
3406 Prosecution's Response Brief, para. 250 & fn. 931.
3407 See Indictment, para. 30.15, identifying the 11 alleged victims by name.
3408 Popović's Appeal Brief, para. 379. See Appeal Hearing, AT. 85 (2 Dec 2013).
3409 Popović's Appeal Brief, para. 379.
3410 Indictment, para. 30.15.

entirely speculative. PW-168's testimony about Obrenović's conduct in July 1995 was carefully considered by the Trial Chamber. It found that PW-168 "impressed as a frank and honest witness. He gave straightforward answers and was neither evasive nor defensive. Further, his memory of events was – for the most part – a solid one."[3412] It concluded that overall PW-168 was "a credible witness".[3413] Deference should be given to a trial chamber's assessment of the appropriate weight and credibility to be accorded to the testimony of a witness.[3414] The Appeals Chamber also recalls in this regard its previous findings on **Popović**'s general challenges to PW-168's credibility.[3415] Consequently, based on the arguments presented above, the Appeals Chamber considers that **Popović** has failed to show a discernible error of the Trial Chamber in its assessment of PW-168's credibility.

iv. Alleged errors in interpreting PW-168's evidence

1185. As an alternative to arguments advanced with respect to his alibi,[3416] **Popović** submits that the Trial Chamber erred by finding that the Milići Prisoners were last seen in his custody, or that they were placed in his custody, based on the selective interpretation of an excerpt of PW-168's evidence.[3417] **Popović** advances three arguments to support this contention. First, he asserts that "there is no evidence that the [wounded] prisoners had been in the custody of Drago Nikolić and that Popović took them from him".[3418] **Popović** argues that the part of PW-168's testimony that the Trial Chamber used to reach its conclusion was ambiguous and allowed for two possible interpretations – one of which would exonerate him.[3419] Next, he emphasises that PW-168's evidence, when considered in its entirety, fails to "corroborate" the Trial Chamber's finding, as it indicates that [REDACTED] Mladić's order to **Nikolić** – which shows that **Popović**'s role was limited to conveying a message.[3420] Further, **Popović** points out that there is no evidence that anyone saw the Milići Prisoners in his custody. Ultimately, he concludes that, contrary to the principle *in dubio pro reo*, the Trial Chamber construed the evidence in the way most harmful to him.[3421]

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3411 Radivoje Novaković, T. 9052 (20 Mar 2007); Ex. 1DP01891 (confidential), p. 21. See also Jugoslav Gavrić, T. 9115 (21 Mar 2007).
3412 Trial Judgement, para. 42.
3413 Trial Judgement, para. 42.
3414 *Đorđević* Appeal Judgement, paras 319, 781, 819; *Lukić and Lukić* Appeal Judgement, para. 86. See *supra*, para. 20.
3415 See *supra*, paras 141-142.
3416 In his reply, **Popović** clarifies that his appeal brief should not be seen as suggesting that he did anything related to the Milići Prisoners, including conveyance of any order related to them. Popović's Reply Brief, para. 112. See *supra*, paras 354-362; *infra*, para. 1198.
3417 Popović's Appeal Brief, paras 357, 360.
3418 Popović's Appeal Brief, para. 359.
3419 Popović's Appeal Brief, para. 358.
3420 Popović's Appeal Brief, para. 359.
3421 Popović's Appeal Brief, para. 360.

1186. The Prosecution responds that **Popović**'s responsibility for the fate of the Milići Prisoners was not only based on PW-168's evidence but was supported by a wealth of other evidence.[3422] It notes that the accuracy of the translation of PW-168's testimony was verified and that the "complete interpretation" supports the Trial Chamber's finding.[3423] The Prosecution also submits that PW-168 did not adopt [REDACTED] in his oral testimony, and that **Popović** merely advances a version of facts contrary to that found by the Trial Chamber rather than showing an error in the Trial Chamber's reasoning.[3424]

1187. The Trial Chamber relied on the 23 July Intercepts[3425] and PW-168's testimony[3426] to support the finding that "the ten wounded prisoners [...] were last seen in the custody of **Popović**".[3427] When discussing **Popović**'s individual criminal responsibility, the Trial Chamber cited the same evidence and found that "[the Milići Prisoners] were placed in the custody of **Popović** around 23 July".[3428] The Appeals Chamber recalls that the 23 July Intercepts indicate that **Popović** would arrive to "say what needs to be done" with regard to the Milići Prisoners.[3429] With respect to PW-168's testimony, the Appeals Chamber notes that the Trial Judgement stated that "Obrenović was also informed by **Pandurević** that **Popović** had arrived with an order from Mladić for the injured Bosnian Muslim men to be liquidated."[3430] The Trial Chamber also added that PW-168 testified that "the men were taken 'from **Nikolić** and driven away'".[3431] It noted, however, that:

> It is unclear whether this is a mistake in the transcript and that it should read "by Drago Nikolić", or whether the prisoners were in the care of **Nikolić** and were handed over to **Popović**. In a memo from [the Conference and Language Services Section ('CLSS')], it was confirmed that the English interpretation "from Drago Nikolić" is correct, but CLSS also stated that the original in BCS is ambiguous and could also be construed to mean "[...] that the wounded were taken by Drago Nikolić."[3432]

1188. Considering PW-168's further testimony that he did not know who took the prisoners, the Appeals Chamber finds that **Popović** has failed to demonstrate any error in this regard.[3433]

1189. Turning to **Popović**'s arguments concerning the use of [REDACTED],[3434] the Appeals Chamber notes that the relevant part reads that [REDACTED].[3435]

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3422 Prosecution's Response Brief (Popović), paras 247, 252, 254.
3423 Prosecution's Response Brief (Popović), para. 253.
3424 Prosecution's Response Brief (Popović), paras 254-255.
3425 Trial Judgement, para. 573.
3426 Trial Judgement, para. 574.
3427 Trial Judgement, para. 577.
3428 Trial Judgement, para. 1156. See Trial Judgement, paras 1153-1154.
3429 See *supra*, para. 1161.
3430 Trial Judgement, para. 574. See Trial Judgement, para. 1154.
3431 Trial Judgement, para. 1905. See Trial Judgement, fn. 2102.
3432 Trial Judgement, fn. 5728.
3433 See Trial Judgement, para. 1905 & fn. 5728, referring to PW-168, T. 15915 (closed session) (27 Sept 2007).

1190. PW-168 did not use [REDACTED] in his examination-in-chief before the Tribunal. When presented with his statement during cross-examination, PW-168 accepted [REDACTED] but at the same time qualified it, stressing that **Popović** "conveyed the order".[3436] Moreover, when asked why he did not mention **Popović** [REDACTED] during examination-in-chief, he replied that "I believe I explained this event in similar terms".[3437] Regardless of any potential difference in meaning, what is relevant is that neither [REDACTED] nor "conveyed the order" call into question the Trial Chamber's conclusion, based on all the evidence taken together, that **Popović**'s involvement with the Milići Prisoners extended beyond merely relaying Mladić's order. PW-168 admitted that he did not know who took the Milići Prisoners from **Nikolić** without, however, explicitly excluding any scenario.[3438]

1191. Finally, with respect to **Popović**'s challenge to the Trial Chamber's use of the expression "last seen in the custody of **Popović**",[3439] the Appeals Chamber notes that the Trial Chamber does not refer to any evidence that the Milići Prisoners were at any time *seen* in the custody of **Popović** by anyone.[3440] In light of the fact, however, that in the other part of its judgement, the Trial Chamber used more precise language of the Milići Prisoners being "placed in the custody of **Popović**",[3441] the Appeals Chamber will proceed under the assumption that the "last seen in the custody of **Popović**" language was no more than the unfortunate use of a figure of speech in one part of the Trial Judgement and as such should be construed to mean "placed in the custody of **Popović**".

1192. For the reasons set out above, the Appeals Chamber considers that **Popović** has failed to show that the Trial Chamber improperly interpreted PW-168's evidence. **Popović**'s arguments in this respect are thus dismissed.

v. Conclusion

1193. The Appeals Chamber recalls that it has dismissed the arguments in which **Popović** challenges the Trial Chamber's finding that the Milići Prisoners were placed in his custody. It therefore considers that **Popović** has failed to show that the Trial Chamber erred in this respect and dismisses his contention accordingly.

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3434 See Popović's Appeal Brief, para. 359.
3435 [REDACTED]
3436 PW-168, T. 16732 (closed session) (22 Oct 2007).
3437 PW-168, T. 16732 (closed session) (22 Oct 2007).
3438 See PW-168, T. 15915 (closed session) (27 Sept 2007).
3439 Trial Judgement, para. 577.
3440 See Popović's Appeal Brief, para. 360.
3441 See Trial Judgement, para. 1156.

b. Alleged errors on Popović's involvement in the killing of the Milići Prisoners

1194. **Popović** submits that the Trial Chamber erred by concluding that he either killed, facilitated, or arranged the killing of the Milići Prisoners.[3442] **Popović** further develops this submission in his reply, where he asserts that the Trial Chamber's holding is unclear and inconsistent in describing his level of culpability.[3443]

1195. **Popović** only develops this argument in his reply brief, making it difficult for the Prosecution to respond.[3444] However, the Appeals Chamber considers that the interests of justice would be served by addressing the argument developed in **Popović**'s reply brief.[3445]

1196. Turning to the merits, the Appeals Chamber notes that in concluding that "**Popović** killed or facilitated the killing of the ten wounded Bosnian Muslim prisoners from Milići Hospital",[3446] the Trial Chamber characterised **Popović**'s conduct in two different ways. One way in which he directly killed the prisoners, and the alternative in which his involvement was less direct. Elsewhere in the Trial Judgement, however, the Trial Chamber does not rely on **Popović** killing the Milići Prisoners himself. With respect to **Popović**'s contribution to the first category JCE to Murder, the Trial Chamber refers to the "central role [he played] in arranging for the murder of ten wounded Bosnian Muslim prisoners from the Standard Barracks".[3447] Similarly, when assessing the aggravating circumstances in the context of determining **Popović**'s sentence, the Trial Chamber considered that "**Popović** demonstrated [...] his commitment to completing the murder operation by his involvement in the execution of the patients from the Milići Hospital around 23 July".[3448]

1197. The use of the phrase "killed or facilitated the killing of" is problematic because it suggests that the Trial Chamber was unable to establish beyond reasonable doubt that **Popović** "killed" the Milići Prisoners – as required.[3449] Nevertheless, when read in the context of the Trial Judgement as a whole, it is evident that the Trial Chamber did not in fact consider that **Popović** himself killed the Milići Prisoners. In this regard the Appeals Chamber recalls that neither the findings with respect to **Popović**'s contribution to the JCE to Murder nor the findings concerning the aggravating circumstances in sentencing relied on **Popović** killing the Milići Prisoners himself.[3450] The Appeals

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3442 Popović's Appeal Brief, para. 386; Popović's Reply Brief, para. 111.
3443 Popović's Reply Brief, para. 111.
3444 See *Martić* Appeal Judgement, para. 229.
3445 See *Kambanda* Appeal Judgement, paras 98-99. See also *M. Jokić* Judgement on Sentencing Appeal, para. 54.
3446 Trial Judgement, para. 1156.
3447 Trial Judgement, para. 1167. See also Trial Judgement, para. 1380, stating that "these ten wounded prisoners were ultimately taken by **Popović** and that he arranged for their murder".
3448 Trial Judgement, para. 2159. The Appeals Chamber notes that there is no citation for this conclusion.
3449 *Mrkšić and Šljivančanin* Appeal Judgement, para. 325; *Halilović* Appeal Judgement, para. 125; *Ntagerura et al.* Appeal Judgement, para. 174.
3450 Trial Judgement, paras 1167, 2159. See *supra*, para. 1196.

Chamber therefore finds that while it was erroneous for the Trial Chamber's conclusion to include an alternative that **Popović** personally killed the Milići Prisoners, the Trial Chamber did not rely on this alternative in its subsequent findings. **Popović**'s argument in this regard is thus dismissed, as the Trial Chamber's error could not invalidate its judgement.

(viii) Alleged error concerning the Bišina killings[3451]

1198. The Appeals Chamber recalls that it has considered and dismissed **Popović**'s submissions concerning his alibi on 23 July 1995.[3452] The Appeals Chamber thus considers that **Popović** has failed to show that no reasonable trier of fact could have concluded that he was involved in, and present during, the Bišina killings.

(b) Beara's appeal (Grounds 6, 7, 8, and 15 all in part)

1199. The Trial Chamber found that **Beara** made significant contributions to the common purpose of the JCE to Murder, and it made several findings concerning those contributions including, *inter alia*, that: (1) he played a key role in orchestrating the murder operation; (2) he played a pivotal and high-level role in the murder operation; (3) his reach extended across VRS and civilian authorities; (4) he was implicated in identifying locations, in securing personnel and equipment, and in overseeing the effective execution of the plan at individual killing sites; (5) he interacted with participants in the killing operation; and (6) he was omnipresent in the Zvornik area – the scene of mass killings.[3453] **Beara** raises several arguments challenging these and related findings under his grounds of appeal 6,[3454] 7,[3455] 8,[3456] and 15.[3457] The following section addresses **Beara**'s arguments as they relate to the six above-mentioned key findings.

(i) Beara's key role in orchestrating the murder operation (Grounds 6, 8 and 15 all in part)

1200. The Trial Chamber found that from the morning of 12 July 1995 onwards **Beara** played a key role in orchestrating the murder operation by planning, co-ordinating, and overseeing the detention, transportation, execution, and burial of able-bodied Bosnian Muslim males.[3458] In making this finding, the Trial Chamber made specific references to, *inter alia*, several meetings that **Beara**

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3451 Although **Popović** was not indicted for crimes relating to the Bišina killings, the Trial Chamber accepted the evidence concerning **Popović**'s involvement in them and found it to be corroborative of the Trial Chamber's findings on his involvement in the killing operation. Trial Judgement, paras 1152, 1166 & fn. 3793.

3452 See *supra*, paras 354-362.

3453 Trial Judgement, paras 1299-1300.

3454 Beara's Appeal Brief, intro before para. 59, paras 79-80, 82-98, 102-107, 109-115; Beara's Reply Brief, paras 38-43, 45-46.

3455 Beara's Appeal Brief, intro before para. 116, para. 127; Beara's Reply Brief, para. 50.

3456 Beara's Appeal Brief, intro before para. 128, paras 128, 130-131, 137, 139; Beara's Reply Brief, para. 51.

3457 Beara's Appeal Brief, intro before para. 175, paras 175-177, 179-188; Beara's Reply Brief, para. 71.

3458 Trial Judgement, para. 1299.

had with other participants in the murder operation between the evening of 10 July 1995 and the early morning hours of 14 July 1995.[3459]

1201. **Beara** disputes this finding under his grounds of appeal 6, 15 and, albeit indirectly, 8.[3460] He generally asserts that it is based on unreliable evidence.[3461] Specifically, he challenges the Trial Chamber's underlying findings that he: (1) was in Pribićevac and Bratunac on 11 July 1995;[3462] (2) was in Potočari on 12 July 1995;[3463] (3) had meetings in Bratunac, in connection with the murder operation, in the evening of 13 July 1995;[3464] and (4) was in Orahovac on 14 July 1995, where he had a role in the murder operation.[3465]

a. Beara's presence in Pribićevac and Bratunac on 11 July 1995

1202. Under his ground of appeal 6, **Beara** contests the findings that he was present at the Pribićevac IKM and in front of the Bratunac Brigade Headquarters on 11 July 1995. Moreover, **Beara** contends that even if he was there, there is no evidence that proves that it was connected to the planning or the co-ordinating of the detention, transportation, execution, or burial of the Bosnian Muslim men. He concludes that the Trial Chamber erred by relying on evidence that was vague, uncorroborated, and concerned events that had transpired before a plan was found to have emerged, in order to prove his involvement in the plan to murder.[3466] The Prosecution responds that **Beara** fails to show that the Trial Chamber erred in finding that he was already in the region on 11 July 1995. It also points out that the Trial Chamber found that **Beara**'s involvement in the JCE to Murder began on 12 July 1995, not on 11 July 1995.[3467]

1203. The Appeals Chamber observes that **Beara** misinterprets the Trial Chamber's findings by considering them in isolation. The Trial Chamber relied on the impugned findings: (1) to conclude that there was no direct evidence before it to support a finding that **Beara** participated in the murder operation prior to 13 July 1995;[3468] and (2) after discussing the awareness of **Beara**'s subordinates of the plan to murder by 12 July 1995, to conclude that "from that point onward" **Beara** played a key role in orchestrating the murder operation.[3469] When read in context, the Trial Chamber in fact referred to the impugned findings to support exactly the premise that **Beara** argues. Namely, that before 12 July 1995, no evidence before it proved **Beara** was connected to the planning or the co-

3459 Trial Judgement, fn. 4273, referring to Trial Judgement, paras 1253-1258, 1262-1268, 1271.
3460 Beara's Appeal Brief, paras 109, 111, 130, 176.
3461 Beara's Appeal Brief, paras 109, 176.
3462 Beara's Appeal Brief, para. 110.
3463 Beara's Appeal Brief, paras 79-80.
3464 Beara's Appeal Brief, paras 111-114.
3465 Beara's Appeal Brief, paras 94 (contesting presence in Orahovac), 130 (contesting role in killing operation).
3466 Beara's Appeal Brief, para. 110.
3467 Prosecution's Response Brief (Beara), para. 107.
3468 Trial Judgement, para. 1299 & fn. 4269, referring to Trial Judgement, paras 1251-1256.

ordinating of the detention, transportation, execution, or burial of the Bosnian Muslim men. With respect to **Beara**'s remaining arguments, the Appeals Chamber recalls that it is incumbent upon an appellant to demonstrate how the purported error had any impact on the Trial Chamber's findings so as to amount to a miscarriage of justice. In this regard, **Beara** has failed to demonstrate how the Trial Chamber's finding about his role in orchestrating the murder operation *from the morning of 12 July 1995* and ultimately his conviction would be affected if he were to succeed in establishing his claim. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

b. Beara's presence in Potočari on 12 July 1995

1204. Under his ground of appeal 6, **Beara** submits that the Trial Chamber erred in finding that he was present in Potočari on 12 July 1995.[3470] He argues that this conclusion is based solely on the Borovčanin Interview which he asserts is unsworn, untested, and uncorroborated. **Beara** claims that the Trial Chamber failed to analyse or provide a rationale for preferring the Borovčanin Interview over Witness Trišić's testimony and further claims that Deronjić did not corroborate the Borovčanin Interview.[3471] The Prosecution responds that **Beara**'s mere assertion that the Trial Chamber erred should be summarily dismissed.[3472]

1205. The Appeals Chamber observes that, although the Trial Chamber referred to the impugned finding to support its ultimate conclusion that **Beara** played a key role in orchestrating the murder operation,[3473] it was but one in a series of findings that the Trial Chamber relied upon.[3474] **Beara** has failed to demonstrate how any error in this regard would have any impact on his conviction or sentence. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

c. Beara's presence and conduct in Bratunac in the evening of 13 July 1995

1206. Under his ground of appeal 6, **Beara** submits that the only reasonable conclusion to draw from Witness Čelanović's testimony about his purported meeting with **Beara** in Bratunac in the evening of 13 July 1995 is that **Beara** was not participating in the murder operation in any way.[3475] **Beara** also nominally challenges the Trial Chamber's reliance on the Borovčanin Interview and the evidence of Deronjić,[3476] and M. Nikolić to support its findings relating to his presence and conduct

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3469 Trial Judgement, para. 1299 & fn. 4273, referring to Trial Judgement, paras 1253-1254.
3470 Beara's Appeal Brief, para. 79; Beara's Reply Brief, para. 47.
3471 Beara's Appeal Brief, para. 80.
3472 Prosecution's Response Brief (Beara), para. 92.
3473 Trial Judgement, para. 1299 & fn. 4273, indicating that the Trial Chamber relied upon the impugned finding in para. 1255.
3474 Trial Judgement, para. 1299 & fn. 4273, indicating that the Trial Chamber also relied upon findings in paras 1253-1254, 1256-1258, 1262-1268, 1271. See *infra*, paras 1206-1217.
3475 Beara's Appeal Brief, paras 111-112.
3476 See also Appeal Hearing, AT. 158-159 (2 Dec 2013); AT. 253, 256 (3 Dec 2013).

in Bratunac in the evening of 13 July 1995.[3477] In addition, **Beara** avers that the Trial Chamber completely disregarded PW-161's testimony that he had two meetings with **Beara** at the Bratunac SDS Offices in the evening of 13 July and in the early hours of 14 July 1995, during which matters relating to the burial of dead bodies were discussed, which cannot support the Trial Chamber's finding.[3478] **Beara** posits that the Trial Chamber could have reasonably concluded that the machinery discussed was unconnected to planning or executing the murder operation, but was needed to bury dead bodies that resulted from legitimate combat operations. **Beara** further contends that "vast evidence [...] that Muslims from the column were killed during legitimate combat engagements during the breakthrough of the column" supports this alternate conclusion. He finally asserts that this conclusion is also supported by PW-161's testimony that public utilities employees gathered dead bodies from the woods, and that dead bodies in Ravni Buljim, Kamenica, and Pobudje were also buried in the Glogova mass grave.[3479]

1207. The Prosecution responds that **Beara**'s attempt to substitute his own evaluation of the evidence of Čelanović and PW-161 for that of the Trial Chamber, and that his mere assertion that the Trial Chamber should not have relied upon the evidence of Deronjić, M. Nikolić, and Borovčanin should be summarily dismissed.[3480]

1208. With regard to Čelanović's testimony, the Appeals Chamber notes that the Trial Chamber considered it singly[3481] and in the context of other evidence[3482] bearing on **Beara**'s participation in planning, co-ordinating, and overseeing the detention, transportation, execution, and burial of the able-bodied Bosnian Muslim males from 12 July 1995 onwards. The Appeals Chamber finds that **Beara** has failed to demonstrate that, when considered in light of the entirety of the evidence, a reasonable trier of fact could not have reached this conclusion. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

1209. As for **Beara**'s contention that the Borovčanin Interview and the evidence of Deronjić and M. Nikolić are "uncorroborated, unsworn and suspect testimonies",[3483] the Appeals Chamber observes that he simply identifies the paragraphs in the Trial Judgement that contain the disputed evidence and asserts that the Trial Chamber unreasonably relied on it. The Appeals Chamber finds

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3477 Beara's Appeal Brief, para. 113. **Beara** does not clearly identify the finding he challenges. Instead, he merely states that "the Trial Chamber erred in its conclusion in paragraph 1299". The Appeals Chamber observes that only the finding that **Beara** played a key role in orchestrating the murder operation, by planning, co-ordinating, and overseeing the detention, transportation, execution, and burial of able-bodied Bosnian Muslim males relies on paragraphs 1263-1266 that **Beara** identifies as containing the evidence he disputes. See Trial Judgement, fn. 4273.

3478 Beara's Appeal Brief, para. 114. See *supra*, note 3477.

3479 Beara's Appeal Brief, para. 114.

3480 Prosecution's Response Brief (Beara), paras 108-109. See also Appeal Hearing, AT. 227 (3 Dec 2013).

3481 Trial Judgement, para. 1262.

3482 Trial Judgement, para. 1299 & fn. 4273.

3483 Beara's Appeal Brief, para. 113.

that **Beara**'s failure to develop his arguments reduces this aspect of his ground of appeal 6 to a mere undeveloped assertion and dismisses it accordingly.

1210. Regarding the testimony of PW-161,[3484] the Appeals Chamber is of the view that the distinction between dead bodies remaining from legitimate combat operations and those remaining from the murder operation is only relevant to the Trial Chamber's finding that **Beara** played a key role co-ordinating and overseeing the burial of able-bodied Bosnian Muslim males if the machinery was used *exclusively* for the burial of dead bodies remaining from legitimate combat operations. As will be shown below, the Trial Chamber's findings indicate that this was not the case.

1211. The Trial Chamber relied on PW-161's testimony that he saw **Beara** at the Bratunac SDS Offices where on 13 July 1995 around 9:30 p.m., **Beara** asked him about the availability of machinery and manpower and told him to go to Milići, where there were many dead bodies that needed to be buried and that around 1:00 or 2:00 a.m. on 14 July 1995, **Beara** ordered him to go with a military policeman to find a burial location.[3485] The Appeals Chamber notes the Trial Chamber's findings about **Beara**'s knowledge of the operation at the time of these encounters with PW-161. First, **Beara** was found to be aware of and implicated in the plan to murder.[3486] Second, **Beara** met M. Nikolić in Bratunac about half an hour before he met with PW-161.[3487] During this encounter, **Beara** ordered M. Nikolić to inform **Nikolić** that thousands of Bosnian Muslims were held in Bratunac and would be sent to Zvornik that evening and told M. Nikolić that they should be detained in the Zvornik area and executed.[3488] Third, throughout the evening of 13 July 1995, **Beara** was found to have "actively participated in the organisation and coordination of the transport of the prisoners from Bratunac to Zvornik and was fully aware of the ultimate purpose – to execute them".[3489]

1212. The Appeals Chamber also notes the Trial Chamber's findings about the implementation of the murder operation including, *inter alia*, that: (1) by 5:30 p.m. on 13 July 1995 approximately 6,000 Bosnian Muslim prisoners were detained in the Bratunac area;[3490] (2) by nightfall over 1,000 Bosnian Muslim males had been executed in the Bratunac area,[3491] including at the Kravica Warehouse; (3) excavators were brought to the Kravica Warehouse to load the dead bodies on

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3484 See Beara's Appeal Brief, para. 114 & fns 161-162.
3485 Trial Judgement, para. 1267.
3486 Trial Judgement, para. 1299, finding that by 12 July 1995 **Beara** was aware of and implicated in the plan to murder.
3487 Trial Judgement, para. 1266, finding that **Beara** met M. Nikolić in the centre of Bratunac on 13 July 1995 at 8:30 p.m. See Trial Judgement, para. 1269. See also Trial Judgement, para. 1267, finding that, according to PW-161, **Beara** met with PW-161 at the Bratunac SDS Offices on 13 July 1995 around 9:00 p.m.
3488 Trial Judgement, para. 1266. See Trial Judgement, para. 1269.
3489 Trial Judgement, para. 1271.
3490 Trial Judgement, para. 1056.
3491 Trial Judgement, para. 1059.

14 and 15 July 1995; (4) in the morning of 14 July 1995, graves were prepared in Glogova and over the next three days further pits were dug while trucks arrived with dead bodies;[3492] and (5) dead bodies from the Kravica Warehouse were buried in the mass grave in Glogova.[3493] Importantly, the Trial Chamber found that the plan to murder the Bosnian Muslim men included the prisoners meant to be detained temporarily in the Kravica Warehouse, but that the plan with respect to these prisoners was moved forward in time as a result of an unexpected incident and they were killed on the spot.[3494]

1213. The Appeals Chamber reiterates that as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence, it is to be presumed that the Trial Chamber evaluated all of the evidence presented to it. Disregard may be shown when the Trial Chamber fails to address evidence which is clearly relevant to the finding.[3495] The Appeals Chamber considers that, regardless of whether there may have been a need to bury dead bodies remaining from legitimate combat operations, **Beara** made his inquiries and gave orders with respect to the burial operation at a time when there was undoubtedly a need to bury bodies remaining from the murder operation. The Appeals Chamber therefore finds that **Beara** has failed to demonstrate that PW-161's testimony concerning dead bodies resulting from legitimate combat operations was so clearly relevant to the Trial Chamber's finding that **Beara** played a key role co-ordinating and overseeing the burial of able-bodied Bosnian Muslim males, that no explicit mention of it would indicate disregard. This aspect of **Beara**'s ground of appeal 6 is dismissed accordingly.

d. Alleged errors in finding that Beara was in Orahovac on 14 July 1995

1214. Under his ground of appeal 6, **Beara** submits that no reasonable trial chamber would have found that he was in Orahovac on 14 July 1995 and challenges the weight accorded to the evidence relied upon to support this finding.[3496] In this regard, **Beara** argues that Witness Nada Stojanović's 92 *quater* statement is untested, unreliable, and uncorroborated.[3497] Ultimately, **Beara** contends that this error invalidates the Trial Judgement because the finding supported the overall conclusion that he played a key role in overseeing the detention, transportation, execution, and burial of Bosnian Muslim males.[3498] The Prosecution responds that the Trial Chamber reasonably rejected **Beara**'s challenge to Stojanović's credibility and found her evidence reliable and corroborated.[3499]

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3492 Trial Judgement, para. 438.
3493 Trial Judgement, paras 438-439.
3494 Trial Judgement, para. 445.
3495 See *supra*, note 2661.
3496 Beara's Appeal Brief, paras 91, 94; Beara's Reply Brief, para. 41.
3497 Beara's Appeal Brief, paras 91-94; Beara's Reply Brief, para. 41.
3498 Beara's Appeal Brief, para. 94; Beara's Reply Brief, para. 41.
3499 Prosecution's Response Brief (Beara), para. 99.

1215. At the outset, the Appeals Chamber observes that the Trial Chamber does not specifically rely on the impugned finding to support its conclusion that **Beara** played a key role in overseeing the detention, transportation, execution, and burial of able-bodied Bosnian Muslim males.[3500] However, insofar as it is relevant, the Appeals Chamber reiterates that the assessment and weighing of evidence are in the domain of the Trial Chamber.[3501] In this regard, the Appeals Chamber notes that Stojanović's evidence was corroborated and that the Trial Chamber considered and rejected **Beara**'s challenge to the reliability of Stojanović's statement.[3502] The Appeals Chamber finds that **Beara** simply disagrees with the Trial Chamber's evaluation of the evidence and has failed to demonstrate that no reasonable trier of fact could have relied on Stojanović's evidence to conclude that he was in Orahovac on 14 July 1995. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

1216. Under his ground of appeal 8, **Beara** submits that the Trial Chamber erred in finding that he had a role in the Orahovac killings on 14 July 1995 as there is no evidence that he co-operated with M. Nikolić and others, or that he had a co-ordinating role.[3503] The Prosecution responds that the Trial Chamber properly found that **Beara** played a co-ordinating role in the Orahovac killings and contends that **Beara**'s mere assertions should be summarily dismissed.[3504]

1217. The Appeals Chamber observes that the impugned finding, which is made in the section of the Trial Judgement which concerns **Popović**'s, not **Beara**'s, liability,[3505] was not relied upon to support any findings related to **Beara**'s guilt. As **Beara**'s conviction does not rely on the impugned finding, the Appeals Chamber dismisses this part of **Beara**'s ground of appeal 8 accordingly.

(ii) Alleged errors in finding that Beara played a pivotal role in the murder operation (Grounds 6 and 15 both in part)

1218. The Trial Chamber found that **Beara**'s arrival on 13 July 1995 at the Bratunac SDS Offices with orders "from the top" to kill all the Bosnian Muslim males housed in and around Bratunac illustrated that he played a pivotal and high-level role in the murder operation. It noted that **Beara** arrived shortly after Deronjić and Karadžić's discussion about prisoners and that a call was to be

3500 Trial Judgement, para. 1299 & fn. 4273.
3501 See *supra*, para. 1126.
3502 Trial Judgement, para. 1277. See Trial Judgement, para. 1277 & fn. 4193 (referring to PW-168, T. 15844-15846, 15853-15857 (closed session) (26 Sept 2007)), para. 1276 & fn. 4192 (referring to Ex. P00377, "Zvornik Brigade Duty Officer Notebook, 29 May to 27 July 1995", p. 128. The Trial Chamber found that the entry referred to Orahovac).
3503 Beara's Appeal Brief, para. 130, referring to Trial Judgement, para. 1112.
3504 Prosecution's Response Brief (Beara), para. 128. See also Prosecution's Response Brief (Beara), para. 127.
3505 Trial Judgement, para. 1112 ("[t]he Trial Chamber has evidence before it that **Popović**, in cooperation with **Beara** and **Nikolić**, played a co-ordinating role in the operation at Orahovac that day"); Trial Judgement, Chapter V, Section B.3(c).

made on that very subject between Karadžić and Mladić.[3506] In reaching this conclusion, the Trial Chamber relied on its earlier findings that from the evening of 13 July until the early morning of 14 July 1995, **Beara** was in the Bratunac area generally and, in particular, was at a series of meetings held at the Bratunac SDS Offices where the logistics of the planned murder operation, including the location for the killings and burials as well as transportation and equipment were discussed.[3507] The Beara-Deronjić Argument occurred during one of these meetings.[3508]

1219. Under his ground of appeal 15, **Beara** submits that the Trial Chamber erroneously based its conclusion about his contribution to the common purpose of the JCE to Murder on the Beara-Deronjić Argument.[3509] Under his ground of appeal 6, he also challenges the Trial Chamber's finding about the Beara-Deronjić Argument during which he purportedly told Deronjić that he had orders from the top to "kill all" the Bosnian Muslim males who were being held in schools and buses in Bratunac.[3510] **Beara** submits that these findings are unreasonable insofar as they rely on untested testimony that was deemed not credible and was not corroborated by any other credible testimony.[3511]

1220. In particular, **Beara** contends that the Trial Chamber based the conclusion regarding the *contents* of the purported conversations – and in particular the words "kill all"[3512] – solely on Deronjić's unreliable Rule 92 *quater* statement.[3513] **Beara** further submits that the Trial Chamber erroneously found that the purported conversations were corroborated by: (1) the transcript of an intercepted conversation between Karadžić and Deronjić from around 8:00 p.m. on 13 July 1995 ("Karadžić Intercept"), which **Beara** argues neither corroborates the existence of the purported meeting nor discusses the killings;[3514] (2) the Borovčanin Interview, which **Beara** stresses was neither tested under cross-examination nor given under oath;[3515] (3) M. Nikolić's testimony, which **Beara** asserts is "unreliable and tainted";[3516] and (4) PW-170's testimony, the "quality" of which **Beara** disputes as corroborating evidence since PW-170 did not indicate that **Beara** was at the meeting.[3517] With respect to the Borovčanin Interview, **Beara** further asserts that the Trial Chamber erred in relying on it to confirm what Deronjić stated as "Borovčanin was not present when the

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3506 Trial Judgement, para. 1300.
3507 Trial Judgement, paras 1264, 1270-1271.
3508 Trial Judgement, paras 1264-1266, 1271; *supra*, para. 939.
3509 Beara's Appeal Brief, intro before para. 175, para. 179. See also Appeal Hearing, AT. 187-188, 191, 253 (3 Dec 2013).
3510 Beara's Appeal Brief, intro before para. 59, para. 82. See Appeal Hearing, AT. 189, 194 (3 Dec 2013), submitting that Deronjić's evidence that **Beara** was in his office was uncorroborated as were the words "kill all".
3511 Beara's Appeal Brief, paras 82, 179. See Appeal Hearing, AT. 188-190, 194 (3 Dec 2013). See also Appeal Hearing, AT. 158-159 (2 Dec 2013).
3512 Appeal Hearing, AT. 189, 193-194 (3 Dec 2013).
3513 Beara's Appeal Brief, para. 83.
3514 Beara's Appeal Brief, para. 86. See Trial Judgement, para. 1264.
3515 Beara's Appeal Brief, para. 84; Appeal Hearing, AT. 193 (3 Dec 2013).
3516 Beara's Appeal Brief, paras 84-85. See Appeal Hearing, AT. 194 (3 Dec 2013).

discussion between – allegedly between Beara and Deronjić occurred", nor did Borovčanin "say that he overheard Beara ever using the [words] 'kill all'".[3518] With respect to M. Nikolić's testimony, **Beara** asserts that the Trial Chamber failed to fulfil its own cautionary guideline and to provide a reasonable rationale for accepting his testimony that he was present at the purported 13 July 1995 meeting between **Beara** and Deronjić, despite the fact that Deronjić acknowledged and confirmed that M. Nikolić was not there.[3519]

1221. The Prosecution responds that mutually corroborative evidence, including the evidence of Deronjić, Borovčanin, M. Nikolić, PW-161, and PW-170 as well as intercept evidence support the Trial Chamber's conclusion.[3520] It asserts that **Beara**'s attempt to substitute his own evaluation of the evidence for that of the Trial Chamber as well as his deconstruction of the Trial Chamber's findings, warrant summary dismissal.[3521]

1222. The Trial Chamber relied upon a transcript of Deronjić's previous testimony which was admitted pursuant to Rule 92 *quater* of the Rules to support the impugned finding.[3522] The evidence of a person who is objectively unable to testify before a trial chamber may be admitted in written form pursuant to Rule 92 *quater* of the Rules even if the evidence goes directly to the accused's acts and conduct.[3523] However, in order for a statement admitted pursuant to Rule 92 *quater* of the Rules to support a conviction, it must be corroborated.[3524] The Appeals Chamber reiterates in this regard that findings that are indispensable for a conviction must not rest solely or decisively on untested evidence.[3525] These findings must be sufficiently corroborated;[3526] the stronger the corroborative evidence, the less likely that the untested evidence will be decisive. An appeal based on the sufficiency of the corroboration therefore necessarily challenges the weight the Trial Chamber attached to the untested evidence in light of the trial record as a whole.[3527]

1223. The Trial Chamber found that Deronjić's untested evidence admitted pursuant to Rule 92 *quater* of the Rules was not only corroborated by the Karadžić Intercept, the Borovčanin

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3517 Appeal Hearing, AT. 195 (3 Dec 2013).
3518 Appeal Hearing, AT. 194 (3 Dec 2013).
3519 Beara's Appeal Brief, para. 85; Beara's Reply Brief, para. 38.
3520 Prosecution's Response Brief (Beara), paras 95, 174; Appeal Hearing, AT. 218-219 (3 Dec 2013). See also Appeal Hearing, AT. 220 (3 Dec 2013).
3521 Prosecution's Response Brief (Beara), paras 95, 174. See also Prosecution's Response Brief (Beara), para. 189.
3522 See Trial Judgement, paras 1264, 1270-1271. See also *supra*, paras 86-87, 90.
3523 *Lukić and Lukić* Appeal Judgement, para. 565 and references cited therein.
3524 *Lukić and Lukić* Appeal Judgement, para. 570; *Haradinaj et al.* Appeal Judgement, fn. 252; *Haraqija and Morina* Contempt Appeal Judgement, paras 61-62.
3525 *Đorđević* Appeal Judgement, para. 807; *Haraqija and Morina* Contempt Appeal Judgement, paras 61-62, 64; *Prlić et al.* November 2007 Appeal Decision, paras 52-53, 58-59. See *supra*, para. 96.
3526 *Popović et al.* Decision of 14 December 2007, para. 48; *Prlić et al.* November 2007 Appeal Decision, paras 58-59; *Martić* Decision of 14 September 2006, para. 20. See *Đorđević* Appeal Judgement, para. 807.
3527 *Kordić and Čerkez* Appeal Judgement, para. 274.

Interview, and M. Nikolić's evidence, but also by the testimonies of PW-161 and PW-170.[3528] At the outset, the Appeals Chamber notes that **Beara**'s submission that "Borovčanin was not present when the discussion [...] allegedly between Beara and Deronjić occurred",[3529] is no more than an undeveloped assertion and, as such, warrants dismissal. Next, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Deronjić's evidence about the existence and contents of the series of meetings, as well as **Beara**'s presence, is corroborated by: (1) Borovčanin's evidence that he saw **Beara** and Deronjić at the Bratunac Brigade Headquarters around 8:00 p.m. and overheard them arguing about whether prisoners should be brought to Bratunac;[3530] and (2) M. Nikolić's evidence that he saw **Beara** in the centre of Bratunac around 8:30 p.m., and sometime afterwards he saw **Beara** and Deronjić at the Bratunac SDS Offices and overheard them arguing about the fate of the prisoners.[3531] Notably, both Borovčanin and M. Nikolić specify that the source of the disagreement during the Beara-Deronjić Argument was whether prisoners should be moved from Bratunac. Borovčanin stated that Deronjić supported the idea, but that **Beara** did not.[3532] M. Nikolić further elaborated that Deronjić was concerned that the prisoners posed a security threat and did not want them to be killed in or around Bratunac and that the "killing operation was openly discussed".[3533] Finally, with respect to **Beara**'s contention that the Trial Chamber erred in relying on the Borovčanin Interview to corroborate Deronjić's evidence – because Borovčanin did not say that he overheard **Beara** ever use the words "kill all" – the Appeals Chamber recalls that testimonies need not be identical to be corroborative and therefore finds no merit in this submission.[3534]

1224. With respect to the Karadžić Intercept showing that Karadžić gave Deronjić instructions about what to do with the thousands of prisoners in Bratunac, just before a series of meetings where the fate of those same prisoners was discussed,[3535] the Appeals Chamber finds that, although when viewed in isolation the Karadžić Intercept may be insufficient to corroborate Deronjić's evidence, **Beara** has failed to demonstrate that a reasonable trier of fact could not have relied on it as one among several pieces of corroborating evidence.

1225. The Appeals Chamber notes the final pieces of this body of evidence – the evidence of PW-161 and PW-170 – and observes that both of these witnesses testified under oath and were

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3528 Trial Judgement, paras 1264-1271.
3529 Appeal Hearing, AT. 194 (3 Dec 2013).
3530 Trial Judgement, paras 1265, 1270.
3531 Trial Judgement, paras 1266, 1270.
3532 Trial Judgement, para. 1265. See Ex. P02853, "Transcript of OTP Interview of Borovčanin, 11 and 12 Mar 2002", pp. 83, 92.
3533 Trial Judgement, para. 1266. See Momir Nikolić, Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", p. 6; Momir Nikolić, T. 32941-32942, 32944 (21 Apr 2009).
3534 See *supra*, para. 1115 & fn. 3238.
3535 Trial Judgement, paras 1264, 1270. See Ex. P01149a (confidential).

cross-examined by **Beara**.[3536] Although these witnesses do not attest to these specific exchanges between **Beara** and Deronjić, they both testified to having attended meetings with **Beara**, Deronjić, or M. Nikolić, during which the burial operation was discussed, on the same evening. PW-161 testified to having attended two meetings in the Bratunac SDS Offices: (1) on 13 July 1995 around 9:30 p.m., in which **Beara** and two VRS officers were in Deronjić's own office, but Deronjić was absent; and (2) upon returning to the Bratunac SDS Offices around 1:00 or 2:00 a.m. on 14 July 1995, in which **Beara** was present and ordered him to find a burial location.[3537] PW-170 testified that he reported to the Bratunac SDS Offices around 9:00 or 9:30 p.m. on 13 July 1995, and therein saw Deronjić and two uniformed officers, but not **Beara**.[3538] PW-170 also testified that upon returning to the Bratunac SDS Offices sometime after midnight he saw Deronjić and two uniformed officers and that M. Nikolić was present either at the first or second meeting.[3539]

1226. **Beara** challenges the Borovčanin Interview on the basis that it is untested and unsworn, but fails to develop this argument any further.[3540] The Appeals Chamber recalls that it has dismissed **Beara**'s other challenges to the Borovčanin Interview and has found no new argument in this challenge.[3541] The Appeals Chamber further notes that a trial chamber takes into account whether evidence has been tested through cross-examination or given under oath when assessing the weight to be attached to the evidence in light of the trial record as a whole.[3542] In this assessment, where one piece of untested evidence is being used to corroborate another piece of untested evidence, a trial chamber must exercise caution to ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence.[3543] In the present case, the Borovčanin Interview was but one among several pieces of evidence – much of which was tested through cross-examination or given under oath – that corroborate Deronjić's untested evidence.[3544] The Appeals Chamber therefore finds that **Beara** has failed to demonstrate that a reasonable trier of fact could not have relied on the Borovčanin Interview.

1227. With respect to the reliability of M. Nikolić's evidence, the Appeals Chamber recalls that it has dismissed **Beara**'s challenge to his overall credibility[3545] and will thus only consider whether

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3536 See PW-161, T. 9354-9558 (23-27 March 2007); PW-170, T. 17847-17919 (closed session) (19 Nov 2007). **Beara** challenges PW-161's evidence in another part of his Appeal Brief. See *infra*, para. 1239.

3537 Trial Judgement, para. 1267. See PW-161, T. 9362, 9366, 9369-9370 (23 Mar 2007); T. 9433-9434 (26 Mar 2007); T. 9485-9488 (27 Mar 2007).

3538 Trial Judgement, para. 1268. See Ex. P02960 (confidential), BT. 7873, 7900-7901.

3539 Trial Judgement, para. 1268. See PW-170, T. 17861-17862 (closed session) (19 Nov 2007); PW-170, Ex. P02960 (confidential), BT. 7875-7876, 7901-7902.

3540 Beara's Appeal Brief, para. 84.

3541 See *supra*, paras 190-191.

3542 See *supra*, para. 1222.

3543 See *supra*, para. 96.

3544 See *supra*, paras 1223-1225.

3545 See *supra*, paras 179-181.

the Trial Chamber erred in relying on the evidence to corroborate that of Deronjić.[3546] In this regard, the Appeals Chamber observes that, while the Trial Chamber acknowledged the need to exercise caution when attributing weight to M. Nikolić's evidence, it was also of the view that his evidence had probative value and merited consideration where relevant.[3547] The Appeals Chamber finds that **Beara** has failed to show that no reasonable trier of fact could have accepted M. Nikolić's evidence with respect to the series of meetings on the basis that it was consistent, highly self-incriminatory (adding to its reliability), and corroborated by the evidence of PW-161, PW-170, Borovčanin, and Deronjić.[3548]

1228. Turning to **Beara**'s contention that the Trial Chamber failed to provide a reasonable rationale for preferring M. Nikolić's testimony over Deronjić's, the Appeals Chamber observes that the Trial Chamber considered the contradictory evidence, but "having considered *all the circumstances and evidence*, [...] accept[ed] Momir Nikolić's version that he was present at the meeting".[3549] As the Appeals Chamber has previously observed, witnesses testify about what they see or hear from a particular vantage point at the time of the events.[3550] It is for the Trial Chamber to evaluate inconsistencies in a witness's evidence or discrepancies between the evidence of several witnesses, to consider whether the evidence taken as a whole is reliable and credible, and ultimately to accept or reject the fundamental features of the evidence.[3551] In the present case, the Appeals Chamber notes that the Trial Chamber acknowledged that the body of evidence it relied upon contained certain inconsistencies as well as some discrepancies as to what was discussed and who participated in the meetings, but found that the subject matter remained essentially the same, as did the fact that **Beara** was present and actively involved in these discussions.[3552] The Appeals Chamber finds that **Beara** has failed to show that the weight attached to M. Nikolić's evidence regarding the contents of the 13 July 1995 meeting would materially change if, as **Beara** argues, M. Nikolić's evidence was based on information subsequently learned from **Beara** rather than from being present at the meeting, as the Trial Chamber found. The Appeals Chamber therefore finds that **Beara** has failed to demonstrate that a reasonable trier of fact could not have relied on M. Nikolić's evidence as one among several pieces of evidence that corroborate Deronjić's evidence.

1229. In light of this analysis, the Appeals Chamber finds that the Trial Chamber's conclusion that **Beara** was present at a series of meetings where the murder operation was discussed did not rest decisively on untested evidence. Rather, the Trial Chamber relied on a body of *mutually*

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3546 See Trial Judgement, para. 1270.
3547 Trial Judgement, paras 51, 53.
3548 See Trial Judgement, paras 1266, 1269.
3549 Trial Judgement, para. 1270 & fn. 4166 (emphasis added).
3550 See *Karera* Appeal Judgement, para. 173.
3551 *Nizeyimana* Appeal Judgement, para. 174; *Munyakazi* Appeal Judgement, para. 71. See *supra*, para. 137.
3552 Trial Judgement, para. 1271 & fn. 4167.

corroborating evidence, which included the Karadžić Intercept and evidence given by PW-161, PW-170, and M. Nikolić. Moreover, the Trial Chamber's finding was further supported by evidence, albeit untested, given by Deronjić and Borovčanin.[3553] Accordingly, the Appeals Chamber dismisses this aspect of **Beara**'s ground of appeal 6.

1230. The Appeals Chamber observes that the only arguments supporting **Beara**'s ground of appeal 15 are those he seeks to incorporate by reference to his ground of appeal 6. For the reasons set out above in relation to his ground of appeal 6,[3554] the Appeals Chamber therefore also dismisses this aspect of **Beara**'s ground of appeal 15.

(iii) Alleged errors concerning Beara's reach across VRS and civilian authorities (Ground 15 in part)

1231. The Trial Chamber determined that **Beara** played a key role in co-ordinating and facilitating the transportation, execution, and burial of the prisoners with local civilian authorities, the Bratunac Brigade, and the Zvornik Brigade.[3555] It then relied on this conclusion to support two findings related to **Beara**'s contribution to the JCE to Murder: (1) that from the morning of 12 July 1995 onwards, **Beara** played a key role in orchestrating the murder operation by planning, co-ordinating, and overseeing the detention, transportation, execution, and burial of the able-bodied Bosnian Muslim males;[3556] and (2) that **Beara**'s reach extended across various components of the VRS and to relevant civilian authorities.[3557]

1232. **Beara** argues that the Trial Chamber erred as a matter of law and abused its discretion in the application of the JCE standard.[3558] In challenging the finding that he significantly contributed to the common purpose to murder by co-ordinating various components of the VRS and relevant civilian authorities, **Beara** submits, *inter alia*, that the Trial Chamber ignored all credible testimony and inferences that conflicted with this conclusion.[3559] He further submits that this finding is not supported by any direct evidence.[3560] The Prosecution responds that **Beara**'s argument should be summarily dismissed.[3561]

1233. The Appeals Chamber observes that not only has **Beara** failed to develop his arguments, he also makes broad assertions without clearly identifying the evidence he challenges. Notably **Beara**

3553 See *supra*, paras 1222-1223.
3554 See *supra*, paras 1222-1229.
3555 Trial Judgement, para. 1271.
3556 Trial Judgement, para. 1299 & fn. 4273.
3557 Trial Judgement, para. 1300 & fn. 4276.
3558 Beara's Appeal Brief, intro before para. 175.
3559 Beara's Appeal Brief, intro before para. 175, para. 180.
3560 Beara's Appeal Brief, para. 180.
3561 Prosecution's Response Brief (Beara), para. 174.

asserts that "certain civilian authorities falsely accused [him] because of their own involvement in the crimes", but only provides a vague reference to his own earlier submissions.[3562] In this regard, the Appeals Chamber recalls that it has considered and dismissed the arguments advanced under his grounds of appeal 5, 6, and 8, and has not found any new arguments in this challenge.[3563] **Beara** makes a similarly vague, and entirely unreferenced, assertion that the Trial Chamber's conclusions cannot be corroborated by the evidence from "this close-knit circle of friends".[3564] The Appeals Chamber therefore finds that the combination of **Beara**'s failure to develop his arguments and failure to provide specific references to the trial record warrant dismissal of his submissions. With regard to **Beara**'s submission that the Trial Chamber's finding was erroneous simply because it was not supported by direct evidence, the Appeals Chamber reiterates that where circumstantial evidence has satisfied a trial chamber beyond reasonable doubt, nothing prevents it from relying on this circumstantial evidence to support a finding.[3565]Accordingly, this aspect of **Beara**'s ground of appeal 15 is dismissed.

(iv) Beara's implication in various aspects of executing the plan (Ground 15 in part)

1234. The Trial Chamber found that **Beara** was implicated in identifying locations, securing personnel and equipment, and overseeing the effective execution of the plan at the individual killing sites.[3566]

1235. **Beara** challenges the findings of fact that underlie this conclusion by contesting the Trial Chamber's reliance on evidence given by Čelanović, Deronjić, M. Nikolić, Stojanović, PW-104, PW-161, PW-162/Davidović, and PW-168, which he generally asserts are unreliable.[3567] The Appeals Chamber recalls that it has dismissed **Beara**'s previous challenges relevant to these witnesses' credibility[3568] and will thus only address the reasonableness of the Trial Chamber's reliance on the evidence relating to the impugned finding.

a. Whether Beara was implicated in identifying locations

1236. As part of his challenge to the impugned finding, **Beara** asserts that the Trial Chamber erroneously based the conclusion that he was involved in identifying the brick factory as a potential

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3562 Beara's Appeal Brief, para. 180 & fn. 238, referring simply to grounds of appeal 5, 6, and 8 without providing specific references to any of the over 90 paragraphs of argumentation contained within these three grounds of appeal. See Beara's Appeal Brief, paras 37-115, 128-139.

3563 See *supra*, para. 191; *infra*, paras 1257-1259, 1265, 1268, 1273, 1278, 1284, 1291.

3564 Beara's Appeal Brief, para. 180.

3565 See *supra*, note 2791.

3566 Trial Judgement, para. 1300.

3567 Beara's Appeal Brief, paras 181-187. See also Appeal Hearing, AT. 253-254, 256 (3 Dec 2013), challenging the evidence of Witnesses Čelanović and Deronjić.

3568 See *supra*, paras 91, 150, 181, 191, 390.

location to be used during the murder operation solely on Deronjić's unreliable statement.[3569] **Beara** also submits that Deronjić's statement is not corroborated as critical issues for conviction should be. He posits in this regard that since the Trial Chamber found that identifying locations was a critical component of his contribution to the JCE to Murder, this lack of corroboration constituted an error that occasioned a miscarriage of justice.[3570]

1237. The Prosecution responds that the Trial Chamber did not base its conclusion that **Beara** identified locations solely on Deronjić's evidence placing **Beara** at the brick factory on 14 July 1995, and highlights a number of findings implicating **Beara** in identifying locations.[3571] The Prosecution contends that **Beara** fails to address the other evidence the Trial Chamber relied upon, and fails to show why no reasonable trial chamber could have reached this conclusion.[3572]

1238. The Appeals Chamber observes that, although the Trial Chamber considered identifying locations to be a component of **Beara**'s contribution to the JCE to Murder, it did not specifically rely on its findings about the brick factory to support this conclusion.[3573] Instead, the Trial Chamber relied on several other findings,[3574] none of which **Beara** addresses in the present challenge. The Appeals Chamber therefore finds that **Beara** has failed to demonstrate how the alleged errors about the brick factory had any impact on the findings about his contribution to the JCE to Murder. Accordingly, the Appeals Chamber dismisses this aspect of **Beara**'s ground of appeal 15.

b. Whether Beara was implicated in securing equipment and personnel

1239. As part of his challenge to the impugned finding, **Beara** submits that the Trial Chamber erroneously based the finding that he secured personnel and equipment for the murder operation on conversations about machinery used in burials.[3575] **Beara** contends that, even if he did have these conversations, as testified to by PW-161, PW-162/Davidović, and PW-104, the Trial Chamber failed to find or rely on any direct evidence to establish that they related to the burial of executed prisoners rather than ABiH members killed in legitimate combat operations.[3576] In this regard **Beara** repeats his earlier argument that PW-161 testified that the machinery referenced in this conversation was used to bury bodies from the woods near Ravni Buljim, Kamenica, and Pobudje

3569 Beara's Appeal Brief, intro before para. 175, para. 181. See also Appeal Hearing, AT. 158-159 (2 Dec 2013); AT. 253, 256 (3 Dec 2013).
3570 Beara's Appeal Brief, para. 181.
3571 Prosecution's Response Brief (Beara), paras 175-176.
3572 Prosecution's Response Brief (Beara), para. 177.
3573 Trial Judgement, para. 1300 & fn. 4277, referring to Trial Judgement, para. 1271, which states that it relies on the "evidence above". The Appeals Chamber considers this to mean the evidence discussed in Chapter V, Section B.4(c)(ii)(b), namely paragraphs 1255-1270. The impugned findings about the brick factory are in paragraph 1275 of the Trial Judgement.
3574 Trial Judgement, paras 1257, 1264, 1266.
3575 Beara's Appeal Brief, paras 182-184.
3576 Beara's Appeal Brief, para. 182. See also Trial Judgement, paras 1267, 1273-1274, 1278.

in the mass grave in Glogova.[3577] **Beara** then refers to M. Nikolić's testimony that PW-161 had lied when he testified that **Beara** was involved in burials in Glogova, and thereafter asserts that it is unreasonable to rely only on those parts of PW-161's and M. Nikolić's testimonies that favour conviction while disregarding parts that support his acquittal.[3578] **Beara** asserts that it is speculative to rely on PW-162/Davidović's testimony about the Bratunac SDS Offices Meeting in the morning of 14 July 1995, since this witness testified that **Beara** was not even in the room while he and the officers discussed the status of construction machinery.[3579] Finally, **Beara** seeks to incorporate his previous challenges to the Trial Chamber's reliance on the testimonies of PW-104, PW-161, and PW-162/Davidović and their alleged identification of **Beara**.[3580]

1240. The Prosecution responds that the Trial Chamber reasonably relied upon several mutually corroborating pieces of evidence to conclude that **Beara** contributed to securing personnel and equipment.[3581] It also opposes **Beara**'s argument that he was merely overseeing the burial of casualties from legitimate combat operations.[3582] The Prosecution contends that the Trial Chamber properly assessed PW-161's credibility, and asserts that his testimony is consistent with the testimonies other witnesses gave.[3583] The Prosecution also argues that the Trial Chamber was entitled to rely upon PW-162/Davidović's testimony as further evidence of **Beara**'s role in the murder operation.[3584] The Prosecution contends that **Beara**'s repetition of his trial argument that PW-104 was unreliable, without showing any error, should be summarily dismissed.[3585]

1241. The Appeals Chamber is unconvinced by **Beara**'s submission that the Trial Chamber erroneously based the finding that he was implicated in securing personnel and equipment for the murder operation on conversations about machinery used for burials. It is similarly unconvinced by his submission that the Trial Chamber erred in reaching this conclusion without direct evidence establishing that the bodies buried resulted from the murder operation rather than from legitimate combat operations. The Appeals Chamber recalls that at the time **Beara** made his inquiries and gave orders, he would have known of the need to secure equipment to bury dead bodies that resulted from implementing the murder plan.[3586] It is therefore irrelevant to the final conclusion that some bodies resulting from legitimate combat operations also needed to be buried as there is a

3577 Beara's Appeal Brief, para. 184. See *supra*, para. 1206.
3578 Beara's Appeal Brief, para. 184.
3579 Beara's Appeal Brief, para. 183.
3580 Beara's Appeal Brief, para. 182. See *supra*, paras 389, 1206; *infra*, para. 1267.
3581 Prosecution's Response Brief (Beara), paras 178-179.
3582 Prosecution's Response Brief (Beara), para. 183. See also Appeal Hearing, AT. 227-228 (3 Dec 2013).
3583 Prosecution's Response Brief (Beara), para. 180.
3584 Prosecution's Response Brief (Beara), para. 181.
3585 Prosecution's Response Brief (Beara), para. 182.
3586 See *supra*, para. 1213.

wealth of circumstantial evidence establishing that the machinery was needed to bury the bodies of the murder operation's victims.[3587]

1242. Turning to the challenged testimonies, the Appeals Chamber first recalls that it has already considered and dismissed **Beara**'s arguments challenging the testimonies of PW-104, PW-161, and PW-162/Davidović.[3588] The Appeals Chamber therefore dismisses the present arguments that he seeks to incorporate by reference for the same reasons set out in the section on identification evidence.[3589] Similarly, the Appeals Chamber observes that the only arguments supporting **Beara**'s challenge to the Trial Chamber's reliance on PW-104's testimony are those which he seeks to incorporate by reference to another section in his brief.[3590] The Appeals Chamber therefore dismisses these arguments for the same reasons set out in the section below.[3591]

1243. With respect to **Beara**'s argument that it was unreasonable for the Trial Chamber to selectively rely on PW-161's and M. Nikolić's testimonies, the Appeals Chamber reiterates that it is open to a reasonable trier of fact to accept some but reject other parts of a witness's testimony.[3592] In the present case, the Appeals Chamber observes that the Trial Chamber considered the conflicting accounts about **Beara**'s involvement in the burial of bodies in Glogova and concluded that PW-161's account, which was based on first-hand knowledge rather than speculation (as was the case with M. Nikolić's evidence), was reliable.[3593] The Appeals Chamber finds that **Beara** merely asserts that the Trial Chamber should have relied on certain parts of PW-161's and M. Nikolić's testimonies without showing that it erred.

1244. Regarding the reliance on PW-162/Davidović's testimony, the Trial Chamber found that from the evening of 13 July until the morning of 14 July 1995, **Beara** communicated regularly with PW-161 about the logistics of the burial operation.[3594] For example, **Beara** asked PW-161 about the availability of machinery and manpower, told PW-161 to go to Milići where there were many bodies that needed to be buried, and ordered PW-161 to go with a military policeman to find a burial location.[3595] **Beara** resolved a problem with machinery needed for digging graves in Glogova on the same morning that PW-162/Davidović: (1) was asked by **Beara** to go into a second office at the Bratunac SDS Offices where there were some people who wanted to talk to him; (2) was asked by the officers in the second office which companies in Bratunac had construction equipment;

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3587 See *supra*, para. 1213.
3588 See *supra*, paras 191, 389-390.
3589 See *supra*, para. 390.
3590 Beara's Appeal Brief, para. 182.
3591 See *infra*, para. 1268.
3592 See *supra*, note 3265.
3593 Trial Judgement, para. 1273 & fn. 4176.
3594 Trial Judgement, paras 1267, 1273.
3595 Trial Judgement, para. 1267.

(3) told the officers that the brick works had a ULT loader excavator, and the utilities company had a SKIP, a small machine used for digging; and (4) called the brick factory and promised the officers that the machinery would be available.[3596] More specifically, in the morning of 14 July 1995, when the ULT excavator sent to Glogova was unable to dig the graves properly, PW-161 reported this to **Beara**. A yellow backhoe arrived after **Beara** promised PW-161 he would send one.[3597] Notably, both the operator and the backhoe were from the brick works in Bratunac.[3598] The Appeals Chamber thus considers that **Beara** has failed to demonstrate that, in view of the evidence about **Beara**'s actions before and after the meeting at the Bratunac SDS Offices, a reasonable trier of fact could not have relied on PW-162/Davidović's testimony.

1245. Accordingly, this aspect of **Beara**'s ground of appeal 15 is dismissed.

c. Whether Beara was implicated in overseeing the effective execution of the plan at individual killing sites

1246. As part of his challenge to the impugned finding, **Beara** submits that the Trial Chamber erroneously based its conclusion that he oversaw the effective execution of the plan to murder at the individual killing sites on unreliable and circumstantial evidence.[3599] He avers that, in some instances, the evidence presented at trial actually refutes the Trial Chamber's conclusion.[3600] **Beara** first supports his argument by referring to his purported meeting with Čelanović in Bratunac in the evening of 13 July 1995.[3601] He maintains that, even if this conversation with Čelanović occurred, it speaks against the conclusion that he was overseeing executions, as the plain meaning of his evidence – that prisoners will be transferred to a prisoner camp in the morning – proves that he did not have knowledge of or involvement in, nor did he contribute to, any plan to murder.[3602] **Beara** goes on to submit that the allegations against him should not be used as proof beyond reasonable doubt that he contributed to the JCE to Murder, since Čelanović's testimony contradicts M. Nikolić's testimony that he met **Beara** in Bratunac on 13 July 1995 and was told that the prisoners should be detained in the Zvornik area and executed.[3603] Second, **Beara** submits that the

3596 Trial Judgement, paras 1273-1274.
3597 Trial Judgement, para. 1273.
3598 Trial Judgement, para. 1273 & fn. 4177. See also *supra*, paras 1211-1212.
3599 Beara's Appeal Brief, intro before para. 175, para. 185; Beara's Reply Brief, para. 71.
3600 Beara's Appeal Brief, para. 185.
3601 Beara's Appeal Brief, para. 185. The Appeals Chamber notes that, although **Beara** refers to paragraph 1259 of the Trial Judgement to support his arguments challenging Čelanović's evidence, this paragraph contains no references to Čelanović. The Prosecution refers to paragraph 1262 of the Trial Judgement when responding to arguments about **Beara**'s conversation with Čelanović concerning prisoners. Prosecution's Response Brief (Beara), para. 185, fn. 746. The Appeals Chamber therefore considers the reference to paragraph 1259 to be a typographical error and paragraph 1262 to be the correct reference.
3602 Beara's Appeal Brief, para. 185. See also Appeal Hearing, AT. 254 (3 Dec 2013).
3603 Beara's Appeal Brief, para. 186.

Trial Chamber erred in concluding that he was present in Orahovac on 14 July 1995.[3604] He asserts that the evidence given by Stojanović and PW-168, and relied on by the Trial Chamber to support this finding, is "unreliable and untrustworthy" and therefore cannot be relied upon to conclude that he contributed to the JCE to Murder.[3605]

1247. The Prosecution argues that **Beara**'s attempt to deconstruct the evidence, reading the testimonies of Čelanović, Stojanović, and PW-168 in isolation from the totality of the evidence, should be dismissed.[3606] It asserts that **Beara** fails to show that the Trial Chamber erred.[3607]

1248. The Appeals Chamber reiterates that the task of weighing and assessing evidence lies primarily with a trial chamber and it will only interfere where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[3608] In the present instance, **Beara** repeats previous challenges to the Trial Chamber's assessment of the evidence given by Čelanović, M. Nikolić, Stojanović, and PW-168, but provides scant support for his arguments and fails to develop them.

1249. Additionally, the Appeals Chamber recalls that it has considered and dismissed similar arguments in **Beara**'s previous challenge to Čelanović's evidence concerning their encounter in Bratunac in the evening of 13 July 1995, and observes that it has not found any new argument in this challenge.[3609] With regard to the purported contradiction between Čelanović's testimony and that of M. Nikolić, the Appeals Chamber reiterates that it will defer to a trial chamber's judgement on the resolution of disparities between different witnesses' accounts.[3610] In the present instance, the Appeals Chamber finds that **Beara** has failed to demonstrate that no reasonable trier of fact could have made the impugned finding. This aspect of the argument therefore fails.

1250. The Appeals Chamber finds that **Beara**'s mere assertion that the evidence of Stojanović and PW-168 is unreliable and untrustworthy is insufficient to demonstrate that the Trial Chamber erred. Further, the Appeals Chamber recalls that it has considered and dismissed similar arguments in **Beara**'s previous challenge to the Trial Chamber's reliance on Stojanović's evidence to find that **Beara** was present in Orahovac[3611] as well as his general challenge to PW-168's credibility.[3612] As

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3604 Beara's Appeal Brief, para. 187, referring to Trial Judgement, para. 1277.
3605 Beara's Appeal Brief, para. 187.
3606 Prosecution's Response Brief (Beara), para. 184.
3607 Prosecution's Response Brief (Beara), paras 185-186.
3608 See *supra*, para. 20; notes 2740, 3264.
3609 See *supra*, paras 1206-1208.
3610 See *Nizeyimana* Appeal Judgement, para. 174; *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Renzaho* Appeal Judgement, para. 355; *Gacumbitsi* Appeal Judgement, para. 70. See also *supra*, para. 131.
3611 See *supra*, paras 1214-1215.
3612 See *supra*, paras 143-150.

he has developed no new arguments in this challenge, this aspect of **Beara**'s ground of appeal 15 is dismissed.

(v) Alleged errors on Beara's interaction with participants in the killing operation (Grounds 6 and 15 both in part)

1251. The Trial Chamber found that **Beara** interacted with participants in the killing operation including **Popović** and **Nikolić**.[3613] To support this conclusion, the Trial Chamber relied on its findings concerning the 14 July Meeting, namely that **Popović**, **Beara**, and **Nikolić** met at the Standard Barracks around 8:00 a.m. on 14 July 1995 and discussed the organisation and co-ordination of the murder operation.[3614] The Trial Chamber relied primarily on Witness M. Birčaković's testimony to support the findings about the 14 July Meeting.[3615]

1252. Under his ground of appeal 15, **Beara** challenges the Trial Chamber's finding that he significantly contributed to the common purpose to murder.[3616] **Beara** disputes the related finding that he interacted and met with other participants in the killing operation,[3617] which he asserts is based on the purported 14 July Meeting.[3618] **Beara** submits that the Trial Chamber erroneously concluded that the plan to murder was discussed at this meeting "without any direct evidence or corroboration".[3619]

1253. Under his ground of appeal 6, **Beara** sets out a more detailed challenge to the Trial Chamber's finding regarding the 14 July Meeting.[3620] He asserts that the Trial Chamber erroneously based this conclusion solely on M. Birčaković's uncorroborated testimony and argues that it disregarded the vehicle logbook which he claims contradicts M. Birčaković's account.[3621] **Beara** further submits that the Trial Chamber erred in finding that during this purported meeting, the details of the killing operation were discussed.[3622] He argues that the Trial Chamber unreasonably reached this conclusion without the support of any evidence.[3623]

1254. The Prosecution responds that the Trial Chamber based the finding that **Beara** interacted with other participants in the murder operation on an abundance of mutually corroborative

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3613 Trial Judgement, para. 1300.
3614 Trial Judgement, paras 472, 1272. See *supra*, para. 867.
3615 Trial Judgement, fns 4168-4169, 4171.
3616 Beara's Appeal Brief, intro before para. 175.
3617 See Trial Judgement, para. 1300.
3618 Beara's Appeal Brief, para. 188. The Appeals Chamber notes that although **Beara** refers to a meeting on 13 July 1995, he subsequently cites paragraph 1300 of the Trial Judgement, in which the 14 July Meeting is discussed. The Appeals Chamber therefore considers the reference to 13 July 1995 to be a typographical error.
3619 Beara's Appeal Brief, para. 188.
3620 Beara's Appeal Brief, paras 87-89.
3621 Beara's Appeal Brief, paras 87, 89; Beara's Reply Brief, para. 39.
3622 Beara's Appeal Brief, paras 88, 115.
3623 Beara's Appeal Brief, paras 88-89.

evidence.[3624] With respect to the 14 July Meeting, the Prosecution submits that the Trial Chamber was entitled to rely upon M. Birčaković's testimony and to conclude that the killing operation was discussed at the meeting in light of the timing and the position and actions of its participants.[3625]

1255. The Appeals Chamber notes that M. Birčaković testified that in the morning of 14 July 1995, he drove an Opel Rekord from the Standard Barracks to the Kitovnice IKM where he picked up **Nikolić**, who was supposed to attend a meeting with **Beara** and **Popović**, and that when they returned to the Standard Barracks about half an hour later, **Nikolić** attended the meeting.[3626] When confronted with the Opel Rekord's vehicle logbook,[3627] M. Birčaković testified that it "do[es] not reflect the reality of where the vehicle went and how it went. [...] For example [...] it doesn't say that I went to the [Kitovnice IKM] on that day. Although, on that day, I did go to the [Kitovnice IKM]."[3628]

1256. As a preliminary matter, the Appeals Chamber observes that part of **Beara**'s ground of appeal 6 challenges a finding concerning the 14 July Meeting that is in the section of the Trial Judgement concerning **Nikolić**'s liability, not his.[3629] The Appeals Chamber emphasises that, although this finding mirrors the one relied on to establish **Beara**'s guilt, the Trial Chamber does not formally rely on this specific finding when discussing **Beara**'s responsibility.[3630] Consequently, the Appeals Chamber dismisses this part of **Beara**'s ground of appeal 6.

1257. Regarding **Beara**'s argument that the Trial Chamber disregarded the vehicle logbook, the Appeals Chamber notes that while disregard may be shown when a trial chamber fails to address evidence which is clearly relevant to the finding,[3631] in this case, albeit without explanation, the Trial Chamber cites the evidence **Beara** asserts it disregarded.[3632] The Appeals Chamber has previously held that where a trial chamber does not refer to a witness's evidence that contradicts its finding it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[3633] The same presumption applies equally in the present case, where the Trial Chamber has gone one step further and identified the potentially conflicting evidence. Notably, although the Trial Chamber does not explicitly state that

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3624 Prosecution's Response Brief (Beara), para. 187.
3625 Prosecution's Response Brief (Beara), para. 96.
3626 Milorad Birčaković, T. 11014-11015 (7 May 2007); T. 11090-11091 (8 May 2007).
3627 Ex. P00296, "Vehicle Logbook for Opel Rekord P-4528", p. 4.
3628 Milorad Birčaković, T. 11052-11053 (7 May 2007).
3629 Beara's Appeal Brief, para. 115, referring to Trial Judgement, para. 1404.
3630 See Trial Judgement, paras 1272 (findings related to 14 July Meeting which concern **Beara**'s liability), 1404 (findings related to 14 July Meeting which concern **Nikolić**'s liability).
3631 See *supra*, note 2661.
3632 Trial Judgement, para. 1272 & fn. 4169, referring to, *inter alia*, Ex. P00296, "Vehicle Logbook for Opel Rekord P-4528", p. 4.

the vehicle logbook did not prevent it from arriving at its actual finding, the presumption that this evidence was assessed and weighed can be deduced from the Trial Chamber's reference to the logbook. Accordingly, the Appeals Chamber dismisses this aspect of **Beara**'s ground of appeal 6.

1258. With respect to **Beara**'s submissions that the Trial Chamber erred in relying on M. Birčaković's uncorroborated testimony, the Appeals Chamber reiterates that nothing prohibits a trial chamber from relying on uncorroborated evidence.[3634] The Appeals Chamber finds that **Beara** has failed to demonstrate that, having determined that M. Birčaković was credible in his testimony that **Beara** attended the 14 July Meeting,[3635] no reasonable trier of fact could have relied on M. Birčaković's uncorroborated account. Accordingly, the Appeals Chamber dismisses these aspects of **Beara**'s ground of appeal 6.

1259. Finally, with respect to the 14 July Meeting's subject matter, the Appeals Chamber notes that under his ground of appeal 6, **Beara** argues that there is *no* evidence,[3636] while under his ground of appeal 15, he asserts that there is *no direct* evidence in this regard.[3637] The Appeals Chamber further observes that **Beara** offers no arguments concerning the circumstantial evidence the Trial Chamber relied on to conclude that this meeting concerned the organisation and co-ordination of the killing operation.[3638] With respect to his argument that no evidence supports the impugned finding, the Appeals Chamber finds that **Beara** misrepresents the evidence and ignores relevant factual findings. With respect to his argument that no direct evidence supports the impugned findings, the Appeals Chamber finds that **Beara** has failed to explain why the conviction should not stand on the circumstantial evidence. Accordingly, these aspects of **Beara**'s grounds of appeal 6 and 15 are dismissed.

(vi) Alleged errors in finding that Beara was omnipresent in the Zvornik area (Grounds 6, 7, 8, and 15 all in part)

1260. The Trial Chamber relied on **Beara**'s omnipresence in the Zvornik area – the scene of mass killings – to ultimately conclude that he significantly contributed to the common purpose of the JCE to Murder.[3639] In concluding that **Beara** was omnipresent, the Trial Chamber referred to

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3633 *Haradinaj et al.* Appeal Judgement, para. 129; *Krajišnik* Appeal Judgement, para. 353; *Kvočka et al.* Appeal Judgement, para. 23.
3634 *Haradinaj et al.* Appeal Judgement, para. 219 and references cited therein. See *supra*, note 2616.
3635 See Trial Judgement, para. 1221.
3636 Beara's Appeal Brief, paras 88-89.
3637 Beara's Appeal Brief, para. 188.
3638 Trial Judgement, para. 472.
3639 Trial Judgement, para. 1300 & fn. 4280.

findings establishing his presence at several locations in the Zvornik area, including in Petkovci and at the Standard Barracks.[3640]

1261. **Beara** disputes some of the Trial Chamber's findings that underlie this conclusion in his grounds of appeal 6, 7, and 8.[3641] Specifically, **Beara** denies that he: (1) went to the brick factory in Bratunac in the morning of 14 July 1995;[3642] (2) attended a briefing at the Standard Barracks in the afternoon of 14 July 1995;[3643] (3) was present in Petkovci on 14 July 1995 overseeing and co-ordinating the detention, transportation, execution, and burial of the prisoners detained there;[3644] (4) met **Popović** at the Standard Barracks in the evening of 15 July 1995;[3645] and (5) discussed the killing operation in Pilica on 16 July 1995.[3646] Finally, under his ground of appeal 15, **Beara** challenges the Trial Chamber's reliance on the Duty Officer's Notebook entry that refers to him going to "Orovoc, Petkovci, Rocevic, Pilica".[3647]

a. Beara's presence at the brick factory in Bratunac on 14 July 1995

1262. The Trial Chamber found that **Beara** went to the brick factory in Bratunac in the morning of 14 July 1995. It found that Deronjić was informed that **Beara** was looking at the brick factory as a potential site to detain and kill prisoners and that this prompted Deronjić to drive there to tell **Beara** that there could be no detention and no killings.[3648] The Trial Chamber relied on Deronjić's Rule 92 *quater* statement to support the findings about the brick factory.[3649]

1263. Under his ground of appeal 6, **Beara** submits that the Trial Chamber erred in finding that he went to the brick factory in Bratunac and that he was looking for it in order to place prisoners there with the intention of killing them.[3650] **Beara** contends that these findings are based solely on Deronjić's uncorroborated 92 *quater* statement, which "was previously considered false and inconsistent, as well as unreliable".[3651] The Prosecution responds that the Trial Chamber was entitled to rely on Deronjić's evidence which was corroborated by PW-162/Davidović.[3652] In his

3640 Trial Judgement, fn. 4280, referring to Trial Judgement, paras 1272-1288.
3641 Beara's Appeal Brief, intro before para. 59, paras 90, 95-98, 102-105, intro before para. 116, para. 127, intro before para. 128, paras 128, 131, 137.
3642 Beara's Appeal Brief, para. 90, referring to Trial Judgement, para. 1275.
3643 Beara's Appeal Brief, para. 95.
3644 Beara's Appeal Brief, para. 97.
3645 Beara's Appeal Brief, paras 102-104, 128, 131.
3646 Beara's Appeal Brief, paras 105, 127, 137.
3647 Beara's Appeal Brief, para. 188.
3648 Trial Judgement, para. 1275.
3649 Trial Judgement, para. 1275 & fns 4185-4188.
3650 Beara's Appeal Brief, para. 90.
3651 Beara's Appeal Brief, para. 90. See also Appeal Hearing, AT. 158-159 (2 Dec 2013).
3652 Prosecution's Response Brief (Beara), para. 98.

reply, **Beara** submits that PW-162/Davidović's evidence is "unreliable and not corroborated by any credible evidence".[3653]

1264. The Appeals Chamber observes that only Deronjić's evidence supports the Trial Chamber's findings about the brick factory.[3654] Ordinarily, it is within the discretion of a trial chamber to rely on uncorroborated but otherwise credible evidence.[3655] However, since Deronjić's evidence was admitted pursuant to Rule 92 *quater* of the Rules and therefore was not subjected to cross-examination, the Trial Chamber could only rely on this evidence to support findings that were not indispensable for **Beara**'s conviction.[3656]

1265. In this regard, the Trial Chamber relied on the findings about the brick factory to support two conclusions, namely: (1) **Beara**'s omnipresence in the Zvornik area as a constituent element of **Beara**'s contribution to the JCE to Murder;[3657] and (2) **Beara**'s "personal visits to the various execution [sites] and the extensive logistical challenges he faced throughout [...] [from which] he had a very personal view of the staggering number of victims destined for execution", which was relied upon as one element establishing his specific intent for genocide.[3658] The Appeals Chamber considers that these ultimate conclusions would remain unaffected had the Trial Chamber not referred to the impugned findings about **Beara**'s presence at the brick factory. In this regard, the Appeals Chamber observes that ultimately no prisoners were brought to the brick factory, nor was it used as an execution site. It further notes that the brick factory is in fact located in Bratunac and therefore not in the Zvornik area.[3659] In light of the above, the Appeals Chamber is of the view that the impugned findings required no corroboration, as they were not indispensable for a conviction. **Beara**'s argument that the Trial Chamber erred in relying on uncorroborated evidence therefore fails. Further, as an error with regard to the reliability of Deronjić's evidence would not have any impact on **Beara**'s conviction or sentence for these same reasons, the Appeals Chamber also dismisses this aspect of **Beara**'s ground of appeal 6.

b. Whether Beara attended a briefing in the Standard Barracks on 14 July 1995

1266. The Trial Chamber found that sometime after 3:00 p.m. on 14 July 1995, PW-104 attended a briefing at the Standard Barracks during which **Beara** said that "[w]e have a lot of prisoners and it is very hard for us to control them. They are at various locations in the Zvornik municipality. We

3653 Beara's Reply Brief, para. 40.
3654 Trial Judgement, para. 1275 & fns 4185-4188. See *supra*, para. 1262.
3655 See *supra*, note 2616.
3656 See *supra*, para. 1222.
3657 Trial Judgement, para. 1300 & fn. 4280.
3658 Trial Judgement, para. 1313 & fn. 4303.
3659 Trial Judgement, paras 362, 469, 1260, 1275.

have to get rid of them. I expect assistance from the municipality", which PW-104 interpreted to mean that **Beara** sought the municipality's help in burying bodies ("14 July Briefing").[3660]

1267. Under his ground of appeal 6, **Beara** challenges the Trial Chamber's findings with respect to the 14 July Briefing,[3661] and in particular its reliance on PW-104's testimony, which he contends was speculative and unreliable.[3662] He asserts that the Trial Chamber failed to consider that PW-104: (1) could not remember the briefing's precise date or time; and (2) confirmed that when he saw **Beara** in connection with the proceedings before the Tribunal, **Beara** did not resemble the person who had introduced himself as "Beara" and attended the 14 July Briefing.[3663] The Prosecution responds that **Beara**'s arguments should be summarily dismissed, as he merely repeats his trial arguments without showing that the Trial Chamber erred in rejecting them.[3664]

1268. The Appeals Chamber notes that, in reaching the impugned finding,[3665] and contrary to **Beara**'s submissions, the Trial Chamber specifically considered PW-104's testimony that he did not remember the precise date or time of this briefing[3666] and the fact that the person who introduced himself during the 14 July Briefing as "Colonel Beara" did not resemble recent images of **Beara**.[3667] **Beara** has failed to show that no reasonable trier of fact could have relied on PW-104's evidence with respect to the 14 July Briefing.[3668] The Appeals Chamber thus dismisses this aspect of **Beara**'s ground of appeal 6.

c. Alleged error in finding that Beara was in Petkovci on 14 July 1995

1269. The Trial Chamber found that **Beara** was present in Petkovci on 14 July 1995 overseeing and co-ordinating the detention, transportation, execution, and burial of the prisoners detained there.[3669] The Trial Chamber relied on the testimonies of Prosecution Witnesses Marko Milošević, Ostoja Stanišić, and PW-168 to support this finding.[3670]

1270. Under his ground of appeal 6, **Beara** submits that the Trial Chamber erred in arriving at this conclusion, and that since the Trial Chamber used it to show his omnipresence in the Zvornik area,

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3660 Trial Judgement, para. 1278.

3661 Beara's Appeal Brief, intro before para. 59, para. 95. The Appeals Chamber notes that **Beara** does not identify the specific finding that he challenges, but simply refers to the Trial Chamber's "finding in paragraph 1278". The language in the rest of **Beara**'s submissions on this point suggests that he challenges both the existence of the meeting and the subject matter discussed. The Appeals Chamber will proceed with this understanding.

3662 Beara's Appeal Brief, paras 95-96.

3663 Beara's Appeal Brief, paras 95-96; Beara's Reply Brief, para. 42.

3664 Prosecution's Response Brief (Beara), para. 97.

3665 Trial Judgement, para. 1278.

3666 Trial Judgement, para. 1278 & fn. 4199.

3667 Trial Judgement, para. 1225.

3668 The Appeals Chamber recalls that it has dismissed **Beara**'s challenge to the Trial Chamber's reliance on PW-104's evidence for the purpose of identification. See *supra*, paras 389-390.

3669 Trial Judgement, para. 1279 & fns 4204-4212.

it is an error of fact that invalidates the Trial Judgement.[3671] **Beara** argues in this respect that there is a conflict in the evidence that could not be reconciled to sustain a finding beyond reasonable doubt that he was in the vicinity of Petkovci.[3672] Specifically, he contends that the part of PW-168's testimony upon which the Trial Chamber relied was hearsay evidence purportedly from Stanišić, who did not confirm relaying this information in his testimony.[3673]

1271. The Prosecution responds that **Beara** fails to show an error, and that the Trial Chamber's finding was not based only on PW-168's testimony as it also reasonably relied on the testimonies of M. Milošević and Stanišić.[3674]

1272. The Appeals Chamber draws an important distinction between testimony that conflicts and testimony that simply does not confirm a particular fact. Although Stanišić's evidence does not directly confirm PW-168's testimony that Stanišić told Obrenović that "Beara had brought prisoners to the school in Petkovci, and the last group that was brought there had been executed there by that school and the bodies remained lying around there",[3675] Stanišić did testify that he was aware that prisoners had been brought to the school in Petkovci[3676] and that prisoners' bodies had been left in the area.[3677] Importantly, the Trial Chamber acknowledged this distinction.[3678] The Appeals Chamber therefore considers that although Stanišić's evidence on this point does not specifically confirm PW-168's testimony, it is nonetheless fully compatible with it. On review of the references the Trial Chamber cited,[3679] and since **Beara** does not provide any direct references to the trial record,[3680] the Appeals Chamber dismisses **Beara**'s mere assertion of a conflict.

1273. The Appeals Chamber therefore considers that **Beara** has failed to demonstrate that no reasonable trier of fact could have concluded that he was present in Petkovci on 14 July 1995 overseeing and co-ordinating the detention, transportation, execution, and burial of the prisoners detained there. Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

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3670 Trial Judgement, fns 4204-4212.
3671 Beara's Appeal Brief, paras 97-98.
3672 Beara's Reply Brief, para. 43.
3673 Beara's Appeal Brief, para. 97.
3674 Prosecution's Response Brief (Beara), para. 101 & fn. 421; Appeal Hearing, AT. 224 (3 Dec 2013).
3675 PW-168, T. 15897-15898 (closed session) (27 Sept 2007).
3676 Ostoja Stanišić, T. 11601, 11604-11605 (16 May 2007).
3677 Ostoja Stanišić, T. 11610-11611 (16 May 2007).
3678 See Trial Judgement, para. 1279 & fn. 4212.
3679 Trial Judgement, fns 4205, 4212, referring to Ostoja Stanišić, T. 11601, 11604-11605, 11610-11611 (16 May 2007); T. 11703-11705, 11725-11726 (17 May 2007); PW-168, T. 15[8]97-15898 (closed session) (27 Sept 2007).
3680 Beara's Appeal Brief, para. 97 & fn. 140, para. 98 & fn. 141, referring to Trial Judgement, paras 1279, 1300.

d. Whether Beara attended a meeting in the Standard Barracks on 15 July 1995

1274. The Trial Chamber found that **Beara** met **Popović** at the Standard Barracks sometime after 6:30 p.m. on 15 July 1995.[3681] In reaching this conclusion, the Trial Chamber: (1) accepted PW-165's testimony that he was at the Standard Barracks in the evening of 15 July 1995, saw a group of men, and was told at the time that two of the men were **Popović** and **Beara**; (2) found further corroboration in PW-165's subsequent identification of one of these men as **Popović**;[3682] and (3) considered other circumstantial evidence that placed **Beara** in the area at the time.[3683]

1275. Under his ground of appeal 6, **Beara** submits that the impugned finding is based on unreliable and uncorroborated evidence given by PW-165, who did not actually see **Beara**'s face and was only told by an unknown person that **Beara** was going to be present at that location.[3684] **Beara** asserts in this respect that the Trial Chamber erroneously found that he was present at the Standard Barracks despite having noted that PW-165's evidence was insufficient to identify him.[3685] The Prosecution responds that the Trial Chamber discussed in detail and rejected **Beara**'s challenge to PW-165's credibility. It submits that **Beara**'s argument warrants summary dismissal as an attempt to substitute his own evaluation of the evidence for that of the Trial Chamber.[3686]

1276. The Appeals Chamber observes that the only support **Beara** offers to sustain his assertion that PW-165's evidence is unreliable is to point out that PW-165 did not see **Beara**'s face and instead relied on what he heard from a third person. The Appeals Chamber reiterates that a trial chamber may rely on evidence, including hearsay evidence, provided it is reliable and credible.[3687] Rather than demonstrating how PW-165's evidence was so devoid of reliability and credibility that relying on it would be unreasonable, **Beara** simply seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. Consequently, this aspect of **Beara**'s arguments fails. The Appeals Chamber further recalls that it has considered and dismissed similar arguments in **Beara**'s challenge to the Trial Chamber's reliance on PW-165's evidence for the purpose of identification,

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3681 Trial Judgement, para. 1284 in conjunction with paras 1227-1228, referring to para. 1123 where the Trial Chamber first makes this finding in the section concerning **Popović**'s liability.

3682 Trial Judgement, para. 1123 & fn. 3672, para. 1228.

3683 Trial Judgement, paras 1227-1228.

3684 Beara's Appeal Brief, intro before para. 59, paras 102-104; Beara's Reply Brief, para. 45.

3685 Beara's Appeal Brief, para. 103.

3686 Prosecution's Response Brief (Beara), para. 103.

3687 See *Bizimungu* Appeal Judgement, paras 180, 236; *Šainović et al.* Appeal Judgement, para. 846; *Aleksovski* Decision on Admissibility of Evidence, para. 15. See also *Nizeyimana* Appeal Judgement, para. 95; *Đorđević* Appeal Judgement, paras 229, 397; *Lukić and Lukić* Appeal Judgement, para. 577.

and has not found any new argument in this challenge.[3688] Accordingly, this aspect of **Beara**'s ground of appeal 6 is dismissed.

1277. Under his ground of appeal 8, **Beara** submits that the Trial Chamber erred by making an impermissible inference from circumstantial evidence which resulted in the erroneous finding that he met **Popović** at the Standard Barracks sometime after 6:30 p.m. on 15 July 1995.[3689] **Beara** asserts that the inference drawn by the Trial Chamber was not the only reasonable conclusion.[3690] The Prosecution responds that **Beara** has failed to articulate any error and that his mere assertions should be summarily dismissed.[3691]

1278. The Appeals Chamber recalls that it will only vacate a factual inference on which a conviction relies if no reasonable trial chamber could have come to the conclusion that this was the only reasonable inference.[3692] The Appeals Chamber further recalls that it is incumbent upon an appellant to present clearly and in detail any alternative inference he wishes the Appeals Chamber to consider,[3693] as well as to explain how the alleged error has caused a miscarriage of justice.[3694] The Appeals Chamber finds that **Beara** has failed to provide an alternative inference for consideration.[3695] Moreover, although **Beara** nominally submits that the impugned finding was relied on "as crucial proof of [his] contribution to a JCE to murder",[3696] the Appeals Chamber finds that this undeveloped, unreferenced assertion does not sufficiently demonstrate how the Trial Chamber's alleged error would have caused a miscarriage of justice. Accordingly, this aspect of **Beara**'s ground of appeal 8 is dismissed.

e. Alleged errors in interpreting the 11:11 a.m. Intercept

1279. The Trial Chamber found that an intercepted conversation between **Beara**, Milorad Trbić, and Slobodan Cerović at 11:11 a.m. on 16 July 1995 ("11:11 a.m. Intercept")[3697] was a coded and cryptic reference to the killing operation.[3698] The relevant part of the 11:11 a.m. Intercept reads as follows:

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3688 See *supra*, paras 391-392. The Appeals Chamber notes that **Beara** does not explain how the Trial Chamber's finding that circumstantial evidence corroborated PW-165's testimony was erroneous. See Trial Judgement, para. 1228.
3689 Beara's Appeal Brief, intro before para. 128, paras 128, 131; Beara's Reply Brief, para. 51.
3690 Beara's Appeal Brief, paras 128, 131.
3691 Prosecution's Response Brief (Beara), paras 125-128.
3692 *Đorđević* Appeal Judgement, paras 296, 406, 700, 857; *Šainović et al.* Appeal Judgement, para. 995; *Stakić* Appeal Judgement, para. 219. See also *supra*, para. 20.
3693 *Stakić* Appeal Judgement, para. 219 & fn. 472 and references cited therein. See *Strugar* Appeal Judgement, paras 21, 150. See also *Đorđević* Appeal Judgement, paras 109, 728.
3694 See *supra*, para. 19.
3695 See Beara's Appeal Brief, intro before para. 128, paras 128, 131.
3696 Beara's Appeal Brief, para. 131.
3697 Ex. P01187a, "Intercept, 16 July 1995, 11:11 hours".
3698 Trial Judgement, para. 1285.

> C: Hey, listen to me. Triage has to be done today...?...taken prisoners. X: Yes. C: ... X: To do triage. C: Triage has to be done on the prisoners. [...] C: So, he told me...?... he got instructions from above. B: Yes. C: To do triage on those (he's interrupted). B: I don't want to talk about it on the phone.[3699]

1280. The Trial Chamber also considered another intercepted conversation at 7:48 p.m. that same day ("7:48 p.m. Intercept").[3700] In the 7:48 p.m. Intercept, "triage" is used when Đurđić stated that "we agreed here today for UNPROFOR/to transport/them from Potočari to Bratunac to a designated place and then from there to take the shortest road to Ljubovija along the right bank. And where will the selection and triage be done to see who goes to Belgrade and who to Tuzla".[3701] After considering several of **Beara**'s arguments related to the use of the word "triage", the Trial Chamber ultimately held that since the conversations related to different matters and locations, it could not be concluded that by analogy their content should be interpreted in the same way.[3702]

1281. Under his grounds of appeal 6, 7,[3703] and 8, **Beara** challenges the Trial Chamber's finding that the 11:11 a.m. Intercept was a coded and cryptic reference to the killing operation.[3704] He asserts that a reasonable alternative would have been to interpret the term "triage" in the 11:11 a.m. Intercept, used in this discussion about prisoners in Pilica, as a medical reference, as it was understood in the 7:48 p.m. Intercept.[3705] More specifically, **Beara** submits that the Trial Chamber erred by: (1) failing to consider the 7:48 p.m. Intercept; (2) concluding that the 11:11 a.m. Intercept and the 7:48 p.m. Intercept related to different matters and locations and thus cannot be interpreted in the same way;[3706] (3) making a finding in this respect that is not supported by either credible or direct evidence;[3707] (4) basing this finding only on the participants' identities and the word "triage";[3708] (5) making an inference that did not favour him when a favourable inference was available;[3709] and (6) failing to give reasons to support the conclusion about the two intercepts.[3710]

1282. The Prosecution responds that **Beara**'s arguments about the word "triage" in the 11:11 a.m. Intercept under his grounds of appeal 6,[3711] 7,[3712] and 8[3713] should be dismissed. It points out that

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3699 Ex. P01187a, "Intercept, 16 July 1995, 11:11 hours"; Trial Judgement, para. 1285. The Appeals Chamber notes that the Trial Chamber identified "C" as Cerović, "X" as Trbić, and "B" as **Beara**.

3700 Ex. P01200a, "Intercept, 16 July 1995, 19:48 hours" in which a certain Đurđić and a certain Jelena talked about organising the transportation of the Bosnian Muslim wounded from Bratunac and Potočari.

3701 Trial Judgement, fn. 4242; Ex. P01200a, "Intercept, 16 July 1995, 19:48 hours".

3702 Trial Judgement, para. 1285 & fns 4240 (referring to Beara's Final Brief, paras 310-313), 4242.

3703 Beara's Appeal Brief, para. 127 & fns 172-173. The Appeals Chamber notes that, although **Beara** refers to paragraph 1286 this paragraph does not discuss the evidence he challenges, paragraph 1285 on the other hand does. The Appeals Chamber therefore considers the reference to paragraph 1286 to be a typographical error.

3704 Beara's Appeal Brief, paras 105, 127, 137.

3705 Beara's Appeal Brief, paras 106-107, 127, 137; Beara's Reply Brief, paras 46, 50.

3706 Beara's Appeal Brief, para. 106.

3707 Beara's Appeal Brief, intro before para. 59, paras 105, 137.

3708 Beara's Appeal Brief, para. 127.

3709 Beara's Appeal Brief, intro before paras 116, 128, para. 106; Beara's Reply Brief, paras 46, 50-51.

3710 Beara's Appeal Brief, paras 107, 127.

3711 Prosecution's Response Brief (Beara), paras 104, 110.

3712 Prosecution's Response Brief (Beara), paras 121-122.

the Trial Chamber considered and rejected **Beara**'s argument that the word "triage" was used to genuinely discuss the wounded and sick, and that **Beara** merely attempts to substitute his own evaluation of the evidence for that of the Trial Chamber.[3714] The Prosecution also submits that the Trial Chamber properly applied the correct evidentiary standard for circumstantial evidence.[3715]

1283. The Appeals Chamber observes that the Trial Chamber specifically considered and rejected several of **Beara**'s arguments related to the 11:11 a.m. Intercept and 7:48 p.m. Intercept, including that "triage" ought to be interpreted in the same way in both intercepts.[3716] The Trial Chamber's rationale was that these conversations relate to different matters and locations.[3717] In this respect, the Appeals Chamber notes that although killings occurred in Potočari and Bratunac between 12 and 15 July 1995,[3718] by 16 July 1995, a series of agreements about the wounded and sick had been reached between the VRS Main Staff, the ICRC, and UNHCR. By this time, preparations were underway to transport the wounded and sick from Potočari to Bratunac and for ICRC teams to evacuate Bosnian Muslim wounded from Bratunac to Tuzla.[3719] Ultimately, 88 wounded and sick were evacuated from Bratunac and Potočari to Tuzla on 17 and 18 July 1995.[3720] Meanwhile in Pilica 1,000 to 2,000 Bosnian Muslim prisoners were being held at the Kula School and the Pilica Cultural Centre.[3721] In contrast to the abundance of evidence supporting the medical triage in Bratunac and Potočari,[3722] the Trial Chamber found no evidence that any kind of legitimate medical triage was being carried out on these prisoners in Zvornik.[3723] Moreover, the Trial Chamber concluded that between 1,000 and 2,000 persons were executed in the Pilica area on 16 July 1995.[3724] The Appeals Chamber notes that **Beara** ignores the above-mentioned body of circumstantial evidence in advancing his underdeveloped arguments that the impugned finding is not sufficiently reasoned nor supported by credible or direct evidence, and that the Trial Chamber based its finding only on the participants' identities and the word "triage". The Appeals Chamber reiterates that a trial chamber may rely on either direct or circumstantial evidence to underpin its findings.[3725]

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3713 Prosecution's Response Brief (Beara), paras 124, 126, 131, 135.
3714 Prosecution's Response Brief (Beara), paras 104, 121, 131.
3715 Prosecution's Response Brief (Beara), paras 123, 127.
3716 Trial Judgement, para. 1285 & fns 4240 (referring to Beara's Final Brief, paras 310-313), 4242.
3717 Trial Judgement, para. 1285 & fn. 4242. See *supra*, para. 1280.
3718 Trial Judgement, Chapter III, Section E.7 (Potočari); Chapter III, Section F.6 (Bratunac).
3719 Trial Judgement, para. 1285 & fn. 4242, referring to Trial Judgement, para. 1793. See also Trial Judgement, paras 346-347.
3720 Trial Judgement, para. 349.
3721 Trial Judgement, para. 1285.
3722 Trial Judgement, paras 346-350, 1793.
3723 Trial Judgement, para. 1285.
3724 Trial Judgement, para. 550.
3725 See *supra*, note 2791.

1284. The Appeals Chamber finds that **Beara** has failed to demonstrate that no reasonable trier of fact could have concluded that the 11:11 a.m. Intercept and the 7:48 p.m. Intercept could not be interpreted in the same way and that the 11:11 a.m. Intercept was a coded and cryptic reference to the killing operation. Accordingly, the Appeals Chamber dismisses this aspect of **Beara**'s grounds of appeal 6, 7, and 8.

f. Whether the Trial Chamber erred in relying on the Duty Officer's Notebook

1285. The Trial Chamber relied on the Duty Officer's Notebook entry from 14 July 1995 at 3:00 p.m., which reads "Beara is coming [in the following] order to Orovoc [namely, Orahovac] Petkovci Ročević Pilica", to support its findings on **Beara**'s contribution to the common purpose of the JCE to Murder.[3726]

1286. Under his ground of appeal 15, **Beara** submits that the Trial Chamber erred by relying on this entry to establish that he significantly contributed to the common purpose to murder.[3727] He contends that his presence in these places was "never confirmed, corroborated by credible evidence or proven beyond reasonable doubt".[3728] **Beara** further argues that this entry conflicts with the testimonies of Witnesses M. Miloševic and Stanišić.[3729]

1287. The Prosecution responds that **Beara**'s arguments should be dismissed as the Trial Chamber acted reasonably both in finding that on 14 July 1995 he visited the Grbavci School in Orahovac and the Petkovci School, and in rejecting **Beara**'s trial argument that the Duty Officer's Notebook conflicts with the testimonies of M. Milošević and Stanišić.[3730]

1288. The Appeals Chamber recalls that it has considered and dismissed **Beara**'s arguments challenging the Trial Chamber's reliance on the Duty Officer's Notebook to establish his presence in Orahovac as well as his arguments challenging the evidence it relied on to establish his presence in Petkovci.[3731]

1289. Turning to the question of whether the Duty Officer's Notebook conflicts with M. Milošević's and Stanišić's testimonies, the Appeals Chamber observes that the Trial Chamber considered a number of **Beara**'s arguments concerning the reliability of their testimonies, but nevertheless found that both witnesses were credible and reliable.[3732] The Appeals Chamber notes

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3726 Trial Judgement, para. 1300. See Ex. P00377, "Zvornik Brigade Duty Officer Notebook, 29 May to 27 July 1995", pp. 127-128.
3727 Beara's Appeal Brief, intro before para. 175, para. 188.
3728 Beara's Appeal Brief, para. 188.
3729 Beara's Appeal Brief, para. 188.
3730 Prosecution's Response Brief (Beara), para. 188. See Prosecution's Response Brief (Beara), para. 171.
3731 See *supra*, paras 1215, 1273.
3732 Trial Judgement, paras 1217-1218.

that **Beara** has failed to develop his argument as to the substance of the alleged conflict, providing only a general reference to his grounds of appeal 4 and 5.[3733] The Appeals Chamber therefore finds that **Beara**'s argument that this evidence is conflicting is no more than a mere undeveloped assertion, and as such warrants dismissal.

1290. Accordingly, this aspect of **Beara**'s ground of appeal 15 is dismissed.

(vii) Undeveloped general challenges (Grounds 6, 8, and 15 all in part)

1291. In addition to the arguments set out above, under his grounds of appeal 6, 8, and 15, **Beara** advances a number of general challenges to the Trial Chamber's findings and the Trial Judgement.[3734] These challenges identify the paragraphs or findings that **Beara** disputes, but are devoid of any argument.[3735] The Appeals Chamber finds that these undeveloped assertions do not demonstrate how the Trial Chamber's alleged errors would have either invalidated the Trial Judgement and/or resulted in a miscarriage of justice. The Appeals Chamber therefore dismisses these aspects of **Beara**'s grounds of appeal 6, 8, and 15.

(c) Nikolić's appeal (Sub-grounds and grounds 14.3, 16, 18.1, 18.2, 21, and 24)

1292. The Trial Chamber found that **Nikolić** significantly contributed to the JCE to Murder.[3736] The Trial Chamber based its finding on **Nikolić**'s involvement in various aspects of the JCE to Murder, in particular his work pertaining to the organisation of the operation. It found that **Nikolić** was involved behind the scenes of, and at, various detention and execution sites in the Zvornik area. His culpable acts included securing personnel to guard and execute prisoners as well as giving directions at one of the killing sites.[3737] In his (sub-)grounds of appeal 14.3, 16, 18.1, 18.2, 19, 21, 22, 24, and 25, **Nikolić** challenges several specific findings of the Trial Chamber with regard to his contribution to the JCE. The Appeals Chamber notes that parts of **Nikolić**'s ground of appeal 18 and grounds of appeal 19, 22, and 25 in their entirety, although containing arguments regarding the scope of **Nikolić**'s contribution to the common purpose, rely exclusively on the challenges to the overall credibility of relevant witnesses, which the Appeals Chamber has dismissed above.[3738]

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3733 Beara's Appeal Brief, para. 188 & fn. 250.
3734 Beara's Appeal Brief, paras 108, 139, 175; Beara's Reply Brief, paras 47, 70.
3735 See Beara's Appeal Brief, paras 108 (identifying Trial Judgement, paras 1299-1302), 139 (identifying Trial Judgement, paras 1299-1302, 1304, 1307, 1312-1318, 1322, 1324-1333, 1402, 1404, 1406, 1421, 1861, 1883, 1960 and 2037).
3736 Trial Judgement, para. 1392.
3737 Trial Judgement, paras 471, 510, 1345, 1360-1362, 1364, 1367-1368, 1390-1392, 1409.
3738 See *supra*, paras 195-206, 209-212.

(i) Alleged errors concerning Nikolić's release from duty at the Kitovnice IKM on 13 July 1995 (Ground 21)

1293. The Trial Chamber found that after the Nikolić-Obrenović Conversation, **Nikolić** asked Obrenović to be relieved of duty at the Kitovnice IKM and insisted that, in order to carry out the task requested of him, he should be "given" Miomir Jasikovac and at least a military police platoon.[3739] The Trial Chamber concluded that **Nikolić** was indeed released from duty at the Kitovnice IKM on 13 July 1995.[3740]

1294. **Nikolić** submits that the Trial Chamber erred when finding, on the basis of a "wholly erroneous" assessment of Prosecution Witness Mihajlo Galić's credibility, that **Nikolić** was released from duty at the Kitovnice IKM on 13 July 1995.[3741] He posits that since the Trial Chamber placed heavy emphasis on his purported departure from the Kitovnice IKM in assessing his responsibility and sentence, this error occasioned a miscarriage of justice and invalidated the Trial Judgement.[3742]

1295. To support this argument, **Nikolić** submits that the Trial Chamber disregarded contradictions and discrepancies in evidence given by Galić with regard to the witness's replacement of **Nikolić** as the Zvornik Brigade's duty officer on 13 and 14 July 1995 as well as Galić's "nebulous responses" in this respect during cross-examination.[3743] **Nikolić** asserts that Galić co-ordinated his evidence with others to suit his and others' interests.[3744] **Nikolić** also asserts that there were numerous deficiencies in Galić's recollection of the events occurring before and during the time he was allegedly replacing **Nikolić**, including the details of his trip to the Kitovnice IKM.[3745] He further argues that the Trial Chamber disregarded contradictions and inconsistencies between Galić's testimony and other evidence, including the testimonies of Witnesses M. Birčaković, M. Nikolić, PW-168, and Stojkić.[3746] Finally, **Nikolić** submits that the Trial Chamber adopted mutually exclusive findings.[3747] He argues in this respect that in reconstructing the events of 14 July 1995, the Trial Chamber relied on the account of M. Birčaković whose evidence contradicts Galić's claim that **Nikolić** left the Kitovnice IKM on 13 July 1995.[3748]

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3739 Trial Judgement, para. 1345. See *supra*, paras 518, 938.
3740 Trial Judgement, paras 1345, 1349.
3741 Nikolić's Appeal Brief, para. 353; Nikolić's Reply Brief, para. 159.
3742 Nikolić's Appeal Brief, para. 362; Nikolić's Reply Brief, para. 159.
3743 Nikolić's Appeal Brief, paras 354-355; Nikolić's Reply Brief, para. 160.
3744 Nikolić's Appeal Brief, para. 354.
3745 Nikolić's Appeal Brief, paras 356-357.
3746 Nikolić's Appeal Brief, paras 356, 358-360; Nikolić's Reply Brief, para. 160. See also Appeal Hearing, AT. 343 (4 Dec 2013).
3747 Nikolić's Appeal Brief, para. 361.
3748 Nikolić's Appeal Brief, para. 361. See Nikolić's Appeal Brief, para. 353.

1296. The Prosecution responds that **Nikolić**'s ground of appeal 21 should be dismissed.[3749] The Prosecution posits that, even if the Trial Chamber erred with regard to Galić's credibility, this would not invalidate the verdict or occasion a miscarriage of justice, as: (1) the Trial Chamber's findings about **Nikolić**'s departure from the Kitovnice IKM on 13 July 1995 are not based only on Galić's testimony, but corroborated by several other sources, including the testimonies of PW-168, M. Nikolić, and PW-143 as well as the IKM Logbook[3750]; and (2) the finding that he significantly contributed to the JCE to Murder does not turn on his departure from the Kitovnice IKM.[3751]

1297. The Appeals Chamber notes that the Trial Chamber's finding that **Nikolić** was in fact released from duty on 13 July 1995 is not only supported by Galić's evidence, but is based on the evidence of PW-143 who saw **Nikolić** at the Grbavci School during the night of 13 July 1995,[3752] the Zvornik Brigade Vehicle Log,[3753] PW-168's evidence,[3754] and the IKM Logbook.[3755] **Nikolić** has failed to show why the conviction should not stand on this evidence. The Appeals Chamber also notes that the Trial Chamber found that **Nikolić** became an active member of the JCE to Murder when he requested to be relieved as the Kitovnice IKM's duty officer in order to organise the detention and killing of prisoners.[3756] Further, the Appeals Chamber recalls that **Nikolić** has failed to demonstrate that PW-168's account of the Nikolić-Obrenović Conversation was erroneous in respect to his: (1) knowledge of the plan to murder the able-bodied men from Srebrenica as of 13 July 1995; and (2) request to be released from duty the same evening.[3757] **Nikolić** has thus failed to demonstrate how the purported error with regard to Galić's credibility could have any impact on his conviction or sentence.

1298. The Appeals Chamber further observes that **Nikolić** relies on this finding to support his argument that the Trial Chamber attached significant weight to his departure from the Kitovnice IKM on 13 July 1995 in assessing his responsibility and determining his sentence.[3758] Assuming *arguendo* that **Nikolić** did not physically leave the Kitovnice IKM until the morning of 14 July 1995, the Appeals Chamber notes that **Nikolić** does not challenge the finding that on 13 July 1995, upon his specific request, Obrenović assigned to him a military platoon to assist with his tasks in the murder operation and that the platoon went to Orahovac to start preparing the

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3749 Prosecution's Response Brief (Nikolić), paras 319, 321.
3750 See Ex. P00347, "Zvornik Brigade Forward Command Post (IKM) Operations Duty Officer Logbook, 7 July 1995 – 5 October 1995" ("IKM Logbook").
3751 Prosecution's Response Brief (Nikolić), para. 320. See also Appeal Hearing, AT. 327-328 (4 Dec 2013).
3752 Trial Judgement, para. 1350. See *supra*, paras 202-206.
3753 Trial Judgement, para. 1350.
3754 Trial Judgement, para. 1349. See *supra*, para. 1013.
3755 Trial Judgement, para. 1349. See also Trial Judgement, para. 85.
3756 Trial Judgement, para. 1389.
3757 See *supra*, para. 1013; Trial Judgement, paras 470, 1345, 1349, 1354.
3758 Nikolić's Appeal Brief, para. 362.

Grbavci School for the arrival of prisoners the same night.[3759] Furthermore, the Appeals Chamber observes that the Trial Chamber's main emphasis for the determination of his responsibility and sentence was placed on his significant contributions to the JCE to Murder as of 14 July 1995.[3760] Accordingly, **Nikolić**'s ground of appeal 21 is dismissed.

(ii) Whether Nikolić sought to persuade soldiers to participate in the Orahovac killings (Sub-ground 14.3)

1299. The Trial Chamber found that for much of the day on 14 July 1995, **Nikolić** was at the Grbavci School in Orahovac. During the day, **Nikolić** was directing members of the Military Police and interacting with Jasikovac and other VRS officers outside the Grbavci School. In an effort to have the 4th Battalion soldiers present to assist with the executions, **Nikolić** tried to prevent Witness Lazar Ristić, the Acting Commander of the 4th Battalion,[3761] from removing them by offering them new uniforms if they stayed. The Trial Chamber concluded that he offered these uniforms through Witness S. Milošević and ultimately that these 4th Battalion soldiers stayed and participated in the Orahovac killings.[3762]

1300. **Nikolić** submits that the Trial Chamber erred in finding that he offered new uniforms to the 4th Battalion soldiers to persuade them to participate in the Orahovac killings.[3763] He states that the Trial Chamber based this finding solely on hearsay by PW-168, who testified that Ristić informed him about **Nikolić**'s offer of uniforms, to the 4th Battalion soldiers to persuade them to participate in the Orahovac killings, on 15 July 1995 ("Ristić-PW-168 Conversation").[3764] **Nikolić** asserts that the Trial Chamber failed to conduct a genuine assessment of Ristić's credibility.[3765] He posits that the Trial Chamber failed to provide a reasoned opinion on why it rejected Ristić's testimony denying that the Ristić-PW-168 Conversation took place even though his evidence on this point was consistent and the Trial Chamber relied on his evidence in other instances.[3766]

1301. **Nikolić** also submits that the Trial Chamber failed to consider that PW-168 was evasive and defensive during his cross-examination concerning: (1) the Ristić-PW-168 Conversation; (2) the

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3759 See Trial Judgement, paras 471, 1350, 1390.
3760 See Trial Judgement, paras 1390-1392.
3761 Trial Judgement, para. 479.
3762 Trial Judgement, para. 1361.
3763 Nikolić's Appeal Brief, para. 242; Nikolić's Reply Brief, para. 92. See Appeal Hearing, AT. 290, 304 (4 Dec 2013). See also Appeal Hearing, AT. 344 (4 Dec 2013).
3764 Nikolić's Appeal Brief, para. 243; Nikolić's Reply Brief, para. 95; Appeal Hearing, AT. 291 (private session) (4 Dec 2013).
3765 Nikolić's Appeal Brief, paras 242-243, 245.
3766 Nikolić's Appeal Brief, paras 243-244; Nikolić's Reply Brief, paras 97-98. See Appeal Hearing, AT. 291, 300-301 (private session) (4 Dec 2013).

14 July 1995 radio conversation PW-168 had with Ristić ("14 July Radio Conversation"); and (3) a conversation between PW-168 and Ristić in 2000.[3767]

1302. Regarding the Ristić-PW-168 Conversation, **Nikolić** claims that it would have been "entirely illogical" for Ristić to admit that he allowed his men to participate in the Orahovac killings in exchange for uniforms, thereby admitting his own participation therein.[3768] He also points to Witness Landry's evidence that the Ristić-PW-168 Conversation was implausible in the context of the ongoing combat.[3769]

1303. **Nikolić** further submits that the Trial Chamber failed to consider the evidence of Witnesses Ristić, Landry, and Jovo Marković that the 14 July Radio Conversation did not and could not have happened.[3770] Consequently, he asserts that PW-168's evidence about the Ristić-PW-168 Conversation, which was allegedly triggered by the 14 July Radio Conversation, is not credible.[3771]

1304. **Nikolić** claims that the Trial Chamber erred when finding, despite Ristić's evidence to the contrary, that Ristić's men from the 4th Battalion remained and participated in the Orahovac killings.[3772] He submits that this conclusion is neither supported by the evidence the Trial Chamber referred to nor can it be inferred from the totality of the evidence.[3773] **Nikolić** contends in particular that G. Simić's presence is unrelated to that of the 4th Battalion, as he was on leave at the time and came to Orahovac on his own account.[3774] **Nikolić** additionally submits that the Trial Chamber erred in finding that M. Birčaković testified that G. Simić was one of the men *sent* to the Grbavci School.[3775]

1305. Finally, **Nikolić** submits that the Trial Chamber erred in finding that a document issued on 17 July 1995 by a sewing and embroidery plant concerning the delivery of uniforms to the Zvornik Brigade (Exhibit P04600), corroborates PW-168's testimony about the substance of the Ristić-PW-168 Conversation.[3776] In **Nikolić**'s view, the Trial Chamber failed to consider S. Milošević's evidence that Exhibit P04600 does not establish that the Zvornik Brigade received or issued the uniforms.[3777] In any event, **Nikolić** claims that his fair trial rights were violated as the

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3767 Nikolić's Appeal Brief, para. 245.
3768 Nikolić's Appeal Brief, para. 245; Appeal Hearing, AT. 293, 297 (private session) (4 Dec 2013).
3769 Nikolić's Appeal Brief, para. 247. See Appeal Hearing, AT. 297 (private session) (4 Dec 2013).
3770 Nikolić's Appeal Brief, paras 248-249. See Appeal Hearing, AT. 291-297 (private session) (4 Dec 2013).
3771 Nikolić's Appeal Brief, para. 248. See Appeal Hearing, AT. 292, 294 (private session) (4 Dec 2013).
3772 Nikolić's Appeal Brief, para. 246; Nikolić's Reply Brief, paras 96-97. See Appeal Hearing, AT. 298 (private session), 301, 343 (4 Dec 2013).
3773 Nikolić's Appeal Brief, para. 246; Nikolić's Reply Brief, para. 97.
3774 Nikolić's Appeal Brief, para. 246; Nikolić's Reply Brief, para. 96. See Appeal Hearing, AT. 293, 298-299 (private session), 343 (4 Dec 2013).
3775 Appeal Hearing, AT. 343-344 (4 Dec 2013).
3776 Nikolić's Appeal Brief, para. 250.
3777 Nikolić's Appeal Brief, para. 250; Nikolić's Reply Brief, para. 99. See Appeal Hearing, AT. 300 (4 Dec 2013).

document should neither have been used nor admitted into evidence.[3778] He points out in this respect that S. Milošević was initially a Prosecution witness, and that Exhibit P04600, despite being in the Prosecution's possession, was not previously included in its Rule 65 *ter* List and was only introduced during S. Milošević's cross-examination.[3779]

1306. The Prosecution responds that **Nikolić** fails to demonstrate that the Trial Chamber's consideration of the evidence and findings were unreasonable.[3780] It submits that the Trial Chamber properly assessed Ristić's evidence and credibility.[3781] The Prosecution asserts that PW-168's testimony is consistent with evidence of: (1) the 4th Battalion's presence at the Grbavci School and the execution site; (2) **Nikolić**'s role in overseeing and organising events at Orahovac and persuading others to participate; (3) the procurement of the new uniforms by S. Milošević, who was also present at Orahovac and thus whose evidence was correctly treated with caution; and (4) the pattern of events that unfolded.[3782] With regard to Exhibit P04600, the Prosecution submits that nothing in the Rules or practice of the Tribunal prevent the use and admission of this exhibit in cross-examination and emphasises that **Nikolić** did not object to its admission at the time.[3783] Finally, it submits that Landry's opinion on what should have happened according to military doctrine does not impact the body of evidence which establishes what did indeed happen.[3784]

1307. The Trial Chamber relied on PW-168's hearsay evidence to support its conclusion regarding **Nikolić**'s offer of new uniforms.[3785] The Appeals Chamber recalls that a trial chamber has the discretion to rely on hearsay evidence.[3786] It is settled that the weight and probative value to be afforded to hearsay evidence will ultimately depend upon "the infinitely variable circumstances which surround hearsay evidence".[3787] The Trial Chamber found that PW-168's evidence in this regard was corroborated and dismissed Ristić's and S. Milošević's *viva voce* evidence to the contrary.[3788]

1308. With respect to **Nikolić**'s argument that the Trial Chamber did not provide reasons for rejecting Ristić's testimony about the Ristić-PW-168 Conversation, the Appeals Chamber observes that the Trial Chamber not only noted Ristić's demeanour in court,[3789] but also explicitly found that

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3778 Nikolić's Appeal Brief, para. 250; Nikolić's Reply Brief, para. 100.
3779 Nikolić's Appeal Brief, para. 250; Nikolić's Reply Brief, para. 100. See Appeal Hearing, AT. 299-300 (4 Dec 2013).
3780 Prosecution's Response Brief (Nikolić), para. 226.
3781 Prosecution's Response Brief (Nikolić), para. 225.
3782 Prosecution's Response Brief (Nikolić), para. 225. See Appeal Hearing, AT. 321 (4 Dec 2013).
3783 Prosecution's Response Brief (Nikolić), fn. 602.
3784 Prosecution's Response Brief (Nikolić), paras 209-210, 212, 224.
3785 Trial Judgement, fn. 4416.
3786 See *supra*, note 3687.
3787 *Karera* Appeal Judgement, para. 39. See *Kalimanzira* Appeal Judgement, para. 96.
3788 Trial Judgement, fns 4416-4417.
3789 See *infra*, para. 1310.

PW-168's evidence that contradicted Ristić's account was corroborated by Exhibit P04600 and the 4th Battalion soldiers' subsequent participation in the Orahovac killings.[3790] Furthermore, the Appeals Chamber recalls that a trial chamber can accept certain parts of a witness's testimony and reject others.[3791] It finds that **Nikolić** has failed to demonstrate that a reasonable trier of fact could not have dismissed Ristić's testimony regarding the Ristić-PW-168 Conversation notwithstanding relying on Ristić's evidence in other instances.

1309. Turning to **Nikolić**'s challenge to PW-168's testimony about the Ristić-PW-168 Conversation, the Appeals Chamber recalls that the Trial Chamber had a lengthy opportunity to assess the quality and consistency of his evidence as well as PW-168's responsiveness and overall demeanour in court.[3792] The Trial Chamber extensively considered PW-168's credibility[3793] and found that "[PW-168] impressed as a frank and honest witness [who] gave straightforward answers and was neither evasive nor defensive".[3794] The Appeals Chamber finds that **Nikolić**'s references to PW-168's testimony[3795] have failed to demonstrate that the Trial Chamber's assessment of this witness's credibility was erroneous.

1310. Regarding G. Simić's presence, the Appeals Chamber notes that the Trial Chamber indeed misinterpreted M. Birčaković's testimony that G. Simić was one of the men *sent* to the Grbavci School,[3796] as the witness merely stated that G. Simić came there.[3797] However, the Appeals Chamber considers that this error did not result in a miscarriage of justice as **Nikolić** has failed to provide any evidence other than Ristić's testimony supporting his claim that G. Simić's presence was not related to that of 4th Battalion soldiers, and that Ristić withdrew his men before they could participate in the murder operation.[3798] Rather, there is evidence which corroborates PW-168's testimony that 4th Battalion soldiers remained and participated in the Orahovac killings.[3799] The Appeals Chamber finds that **Nikolić** has failed to demonstrate that, having observed Ristić's demeanour in court and considering his role as Commander of the 4th Battalion, the Trial Chamber erred in finding that his testimony lacked credibility with regard to the 4th Battalion's participation in the murder operation.[3800] In light of the above, the Appeals Chamber finds that **Nikolić** has failed

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3790 Trial Judgement, para. 1361 & fn. 4416.
3791 See *supra*, note 3265.
3792 See Trial Judgement, para. 31.
3793 See Trial Judgement, paras 28-47. The Appeals Chamber recalls that it has already rejected **Nikolić**'s challenges to the overall credibility of PW-168. See *supra*, para. 171.
3794 Trial Judgement, para. 42.
3795 See Nikolić's Appeal Brief, para. 245, referring to PW-168, T. 16827-16830 (closed session) (23 Oct 2007); T. 16974-16975, 16987-16989, 16995, 16998-16999, 17001 (closed session) (26 Oct 2007).
3796 Trial Judgement, fn. 1745.
3797 Milorad Birčaković, T. 11038-11039 (7 May 2007).
3798 The Appeals Chamber notes in this regard that the relevance of the references provided in paragraph 96 and footnote 369 of Nikolić's Reply Brief to support his contention is not readily apparent.
3799 Trial Judgement, para. 481 & fn. 1752, para. 483 & fn. 1756.
3800 See Trial Judgement, para. 1361 & fn. 4416.

to demonstrate that a reasonable trier of fact could not have found that 4th Battalion soldiers remained and participated in the Orahovac killings.

1311. As regards **Nikolić**'s contention that it would have been "entirely illogical" that Ristić told PW-168 about the involvement of his troops in the Orahovac killings, the Appeals Chamber finds it speculative and unsupported by any evidence. Similarly, the Appeals Chamber is not persuaded by **Nikolić**'s assertion that the Trial Chamber did not consider Landry's opinion about the implausibility of the Ristić-PW-168 Conversation and recalls that the Trial Chamber found Landry's comments "purely speculative and not founded on any military expertise".[3801]

1312. Furthermore, regarding **Nikolić**'s assertion that the Trial Chamber erred in failing to consider the evidence, including that of Ristić, Landry, and Marković, tending to establish that PW-168's account of the 14 July Radio Conversation was false and the conversation did not and could not have happened, the Appeals Chamber first notes that the Trial Chamber was well aware that Ristić gave contrary testimony to that of PW-168 regarding **Nikolić**'s involvement in the events in Orahovac.[3802] As stated above, the Trial Chamber also dismissed Landry's implausibility assertions as speculative. In a similar vein, as **Nikolić** concedes, Marković's evidence of the possibilities of establishing radio communications in the terrain is inconclusive.[3803] The Appeals Chamber therefore finds that this evidence is not of such relevance that its absence from the Trial Judgement would show its disregard.[3804] **Nikolić** has thus failed to demonstrate that the Trial Chamber disregarded this evidence.

1313. Finally, the Trial Chamber explicitly considered S. Milošević's testimony about whether the Zvornik Brigade was provided with new uniforms and found him evasive and non-responsive on the issue, particularly when confronted with Exhibit P04600.[3805] Furthermore, the Appeals Chamber observes that even if Exhibit P04600 does not reveal whether the uniforms were new, or whether the Zvornik Brigade received them, this has no impact on the finding that the document corroborates PW-168's testimony insofar as it establishes that on 17 July 1995, uniforms were ordered to be provided "for a special purpose".

1314. Furthermore, regarding **Nikolić**'s argument that the Trial Chamber erred in admitting into evidence, and subsequently giving weight to, Exhibit P04600, the Appeals Chamber recalls that a

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3801 Trial Judgement, para. 1355. The Appeals Chamber recalls that it has already rejected **Nikolić**'s challenges to the Trial Chamber's assessment of Landry's evidence. See *supra*, paras 375-377.
3802 See Trial Judgement, para. 1361 & fn. 4416.
3803 Jovo Marković, T. 27656-27673 (31 Oct 2008). See Nikolić's Appeal Brief, para. 249, summarising Marković's evidence as "Obrenović was most likely unable to reach the 4th Battalion Command by radio from his post".
3804 See *supra*, note 2409.
3805 Trial Judgement, fn. 4416.

trial chamber may admit any relevant evidence which it deems to have probative value.[3806] The Appeals Chamber has held that according to the principles enshrined in the Statute on the rights of an accused – in particular in Article 21(4)(b) and (e) – when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it. This is all the more true if evidence is tendered after the close of the Prosecution case.[3807] The Appeals Chamber however notes that in the present case, **Nikolić** does not deny the Prosecution's submission that he did not object to Exhibit P04600's admission during the trial and, hence, did not provide the Trial Chamber an opportunity to address the issue.[3808] The Appeals Chamber finds thereby that **Nikolić** has waived his right to claim any prejudice resulting from the admission of Exhibit P04600 into evidence. His argument is thus dismissed.

1315. For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have concluded that he offered new uniforms to 4th Battalion soldiers to persuade them to participate in the Orahovac killings. **Nikolić**'s sub-ground of appeal 14.3 is therefore dismissed.

(iii) Whether Nikolić ordered that prisoners be secured at the Kula School knowing of their planned execution (Ground 24)

1316. The Trial Chamber based its finding on **Nikolić**'s participation in the JCE to Murder on his involvement in the murder operation at many sites in the Zvornik area, in particular on his participation in planning, physical perpetration, and securing personnel.[3809] It found that **Nikolić**'s pursuit of personnel included ordering Witness Slavko Perić, Assistant Commander for Intelligence and Security of the Zvornik Brigade's 1st Battalion, on 14 July 1995 to secure prisoners at the Kula School in the awareness that they would be executed.[3810]

1317. **Nikolić** submits that the Trial Chamber failed to consider critical evidence and therefore erred in finding that on 14 July 1995 he ordered Perić to secure the prisoners at the Kula School in the awareness that they were to be executed.[3811] He posits that this error led the Trial Chamber to the conclusion that he contributed to the crimes at Branjevo/Pilica.[3812]

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3806 Rule 89(C) of the Rules.

3807 *Delić* Interlocutory Appeal Decision, para. 22. The absence of an opportunity for an accused to challenge such evidence can give rise to a violation of fair trial rights; ameliorative measures can include providing more time for cross-examination, adjourning session, or granting the possibility of re-calling the witness. *Delić* Interlocutory Appeal Decision, paras 22-23.

3808 See, *e.g.*, *Šainović et al.* Appeal Judgement, para. 223.

3809 Trial Judgement, paras 1390-1392.

3810 Trial Judgement, paras 1390-1392, 1409. See also Trial Judgement, paras 1359-1360.

3811 Nikolić's Appeal Brief, para. 385. See also Appeal Hearing, AT. 304-307 (4 Dec 2013).

3812 Nikolić's Appeal Brief, paras 390-391; Nikolić's Reply Brief, para. 170. See Appeal Hearing, AT. 308 (4 Dec 2013).

1318. As a preliminary matter, **Nikolić** reiterates that no reasonable trial chamber could have found that he was informed about the murder operation during the 14 July Meeting,[3813] and hence, contends that he did not speak to Perić with the awareness of the impending execution of the prisoners.[3814]

1319. **Nikolić** submits that as testified by Perić, their conversation did not concern the guarding of prisoners and as such was unrelated to the telegram sent on 14 July 1995 by Zvornik Brigade Command ordering the 1st Battalion to prepare the Kula School for the arrival of about 100 to 200 prisoners ("Zvornik Brigade Command Order").[3815] According to **Nikolić**, he merely suggested to Perić to go to Kula to avoid problems with the surrounding citizenry.[3816] He points in this respect to Perić's assertion that as a soldier of the 1st Battalion, Perić could not have influenced the situation at the Kula School as the prisoners were under the sole authority of the soldiers present there.[3817]

1320. **Nikolić** further asserts that the Trial Chamber erred in finding that Perić classified the instruction from him to go to the Kula School as an order.[3818] In support, he submits that Perić was consistent in his testimony that **Nikolić** merely suggested to him that to go there would be a "good idea".[3819] **Nikolić** also argues that the Trial Chamber failed to consider evidence, including that of Perić and Ristić as well as expert Witnesses Butler and Vuga, showing that as a member of the Security Organ he had neither *de jure* nor *de facto* authority to issue orders to Perić.[3820] Lastly, **Nikolić** submits that the Trial Chamber failed to consider that Perić testified that his departure to the Kula School was not triggered by his conversation with **Nikolić**, but was the result of an agreement reached amongst the 1st Battalion, and that Perić testified that he would have gone to the Kula School anyway as the arrival of the prisoners caused him to fear for his family and friends living in the area.[3821]

1321. The Prosecution responds that **Nikolić** fails to demonstrate that it was unreasonable for the Trial Chamber to find that he ordered Perić to secure the prisoners at the Kula School before they

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3813 See *supra*, para. 344, defining the 14 July Meeting.

3814 Nikolić's Appeal Brief, para. 386, referring to ground of appeal 23. See Appeal Hearing, AT. 305 (4 Dec 2013).

3815 Nikolić's Appeal Brief, paras 387, 389; Nikolić's Reply Brief, paras 172, 174. See Trial Judgement, para. 527.

3816 Nikolić's Appeal Brief, para. 389; Nikolić's Reply Brief, paras 174-175.

3817 Nikolić's Appeal Brief, para. 389; Nikolić's Reply Brief, para. 174.

3818 Nikolić's Appeal Brief, paras 387-389; Nikolić's Reply Brief, paras 171-172.

3819 Nikolić's Appeal Brief, paras 387, 389. See Appeal Hearing, AT. 306-307 (4 Dec 2013).

3820 Nikolić's Appeal Brief, paras 387-389; Nikolić's Reply Brief, para. 173. See Appeal Hearing, AT. 307-308 (4 Dec 2013). Furthermore, according to **Nikolić**, Perić's testimony indicates that he acknowledged in their conversation that it was the Deputy Commander of the 1st Battalion and not him who had the authority to issue orders to Perić. Nikolić's Appeal Brief, para. 387. See Appeal Hearing, AT. 306 (4 Dec 2013).

3821 Nikolić's Appeal Brief, paras 387, 389; Nikolić's Reply Brief, para. 171. See Appeal Hearing, AT. 307 (4 Dec 2013).

were transferred for their execution on 16 July 1995.[3822] The Prosecution submits that **Nikolić**'s conversation with Perić was a follow-up to the Zvornik Brigade Command Order and that ordering as a form of liability does not only "capture" the actual orderer, but also those who transmit the order down the chain of command.[3823] Furthermore, according to the Prosecution, **Nikolić**'s argument that he did not possess *de jure* authority over Perić is moot, since he exercised *de facto* authority.[3824]

1322. As an alternative, the Prosecution asserts that it is in fact irrelevant whether **Nikolić** ordered Perić to secure the prisoners or merely suggested to him to do so, as the conversation between **Nikolić** and Perić caused the latter to move parts of the 1st Battalion to the Kula School and guard the prisoners until they could be killed.[3825]

a. Analysis

1323. At the outset, the Appeals Chamber recalls that it has already dismissed **Nikolić**'s ground of appeal 23 regarding the 14 July Meeting. The Appeals Chamber has found that **Nikolić** has failed to demonstrate that the Trial Chamber erred in concluding that the 14 July Meeting concerned the organisation and co-ordination of the murder operation.[3826] As the telephone conversation between **Nikolić** and Perić took place after the 14 July Meeting,[3827] the Appeals Chamber concludes that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have concluded that he was aware that the prisoners were to be executed when he had the conversation with Perić.[3828]

i. Content of the conversation

1324. As outlined above, **Nikolić** argues that the conversation between him and Perić did not pertain to the guarding of prisoners.[3829] Noting its conclusion above,[3830] the Appeals Chamber finds that **Nikolić** has failed to demonstrate that a reasonable trier of fact could not have considered that even if **Nikolić** only asked Perić to go there to ensure that there were no problems with the surrounding citizenry, such a request was intended to contribute to the murder operation.[3831] With regard to **Nikolić**'s argument that Perić could not influence the situation of the prisoners as they were under the sole authority of the soldiers accompanying them, the Appeals Chamber finds that a

3822 Prosecution's Response Brief (Nikolić), paras 109, 111-112, 172. See also Prosecution's Response Brief (Nikolić), paras 97, 113.
3823 Prosecution's Response Brief (Nikolić), paras 111-112.
3824 Prosecution's Response Brief (Nikolić), para. 112.
3825 Prosecution's Response Brief (Nikolić), para. 110. See Appeal Hearing, AT. 322-323 (4 Dec 2013).
3826 See *supra*, para. 936.
3827 See Trial Judgement, paras 1357, 1359.
3828 See Trial Judgement, paras 1360, 1390.
3829 Nikolić's Appeal Brief, para. 389.
3830 See *supra*, para. 1323.
3831 See Trial Judgement, paras 1390-1392.

reasonable trier of fact could have found that Perić's presence at the Kula School contributed to the common purpose of the murder operation.[3832]

ii. Whether Nikolić's instruction to Perić amounted to an order

1325. The Appeals Chamber finds that the Trial Chamber erred in fact when it interpreted the instruction given by **Nikolić** to Perić as an order, noting that Perić classified the instruction from **Nikolić** as an order.[3833] That conclusion is not supported by the evidence the Trial Chamber relied upon, a review of which shows that Perić was consistent, and indeed firm, in his testimony that he perceived **Nikolić**'s call as merely a suggestion to go to the area of the Kula School.[3834] The Appeals Chamber will thus consider whether this error resulted in a miscarriage of justice.

1326. The Appeals Chamber observes that the testimony of the witness on whose evidence the Trial Chamber relied in entering its findings regarding the events on 14 July 1995 clearly shows that the purpose of **Nikolić**'s conversation with Perić was to prompt him to go to the Kula School area to ensure that there was no disruption with the surrounding citizenry, and that Perić actually did go there shortly after the conversation and spoke to the local population.[3835] Further, according to Prosecution Witness Rajko Babić, the Zvornik Brigade Command Order only instructed the 1st Battalion to prepare the Kula School for the arrival of prisoners who would spend the night at the school and be exchanged the next day, and did not deal with concerns regarding the local population.[3836] **Nikolić**'s instruction to Perić therefore differed from those Perić received from the Zvornik Brigade Command, and although the conversation was not the only impetus for Perić's decision to go to the Kula School it nevertheless influenced his conduct there, irrespective of any overlap that may have existed between **Nikolić**'s instruction and Perić's personal motives. The Appeals Chamber therefore finds that **Nikolić**'s argument – based on Perić's testimony that he would have gone to the Kula School anyway of his own accord and based on an agreement reached by the Battalion Command – does not impact the Trial Chamber's finding.

1327. As outlined above, the Trial Chamber found that **Nikolić** contributed to the JCE to Murder by securing personnel for the guarding of prisoners.[3837] As established above, his conversation with Perić provided at least one impetus for the latter to go to the Kula School and to support the murder operation by dealing with the surrounding citizenry. The Appeals Chamber finds that whether

3832 See Trial Judgement, paras 1390-1392.
3833 Trial Judgement, para. 1359, referring to Slavko Perić, T. 11376, 11378, 11380 (11 May 2007).
3834 Slavko Perić, T. 11376, 11378, 11380 (11 May 2007). See Trial Judgement, para. 527 & fn. 1938.
3835 Slavko Perić, T. 11378-11379, 11384 (11 May 2007).
3836 Rajko Babić, T. 10216 (18 Apr 2007).
3837 Trial Judgement, paras 1390-1392.

**Nikolić** ordered or otherwise influenced Perić to do so has no impact on his degree of responsibility.

b. Conclusion

1328. In light of the above, the Appeals Chamber finds that although the Trial Chamber erred in fact by classifying **Nikolić**'s instruction to Perić to go to the Kula School as an order, this error did not result in a miscarriage of justice. **Nikolić**'s ground of appeal 24 is therefore dismissed.

(iv) Alleged errors in relying on Aćimović's evidence in establishing Nikolić's involvement in the crimes at Kozluk (Grounds 16 and 18 in part)

1329. The Trial Chamber noted that Witness Aćimović testified that between 1:00 and 2:00 a.m. on 15 July 1995, he received a telegram from the Zvornik Brigade Command at the Standard Barracks stating that a platoon of soldiers should be dispatched to execute the prisoners at the Ročević School. According to Aćimović, the telegram was "coded and decoded by members of the 2nd Battalion". Aćimović discussed the telegram with two close associates. They all agreed that no personnel would be assigned to the task, and a reply telegram was sent to the Zvornik Brigade Command stating that the 2nd Battalion did not have any personnel available to execute the prisoners. Aćimović testified that a second coded telegram was received from the Zvornik Brigade Command, relaying the same order, and that a second reply was sent. Aćimović stated that he again discussed the second telegram with his two close associates, as well as Company Commanders or Deputy Commanders.[3838]

1330. The Trial Chamber noted conflicting testimonies regarding the mode and timing of the telegram's delivery, as well as the number of telegrams received, but concluded that how exactly the instruction was received was a peripheral issue. It stressed that the essence of Aćimović's testimony was that an instruction was received from the Standard Barracks that a platoon should be dispatched to execute prisoners at Ročević School, and that the inconsistencies in the evidence were not sufficiently grave to cast doubt upon the existence of this instruction.[3839]

1331. The Trial Chamber also found that around 2:30 a.m. on 15 July 1995, Aćimović received a call from **Nikolić**, who told him that the order "had come from above" and had to be carried out. **Nikolić** called him again at approximately 7:00 or 8:00 a.m. to find out whether Aćimović had carried out the order. Aćimović told **Nikolić** that he would not assign anyone to execute the

3838 Trial Judgement, para. 508. See also Trial Judgement, para. 1367.
3839 Trial Judgement, para. 509.

prisoners.[3840] **Nikolić** was angry and ordered Aćimović to meet him at the school later that morning.[3841]

a. Nikolić's submissions

1332. Under his grounds of appeal 16 and 18, **Nikolić** challenges the Trial Chamber's findings that: (1) Aćimović received two coded telegrams ordering him to dispatch soldiers to execute prisoners detained at Ročević School in the night of 14-15 July 1995 (ground 16 and sub-ground 18.1);[3842] and (2) that **Nikolić** pressured Aćimović over the phone to execute the order contained in the two telegrams (sub-ground 18.2).[3843] In addition, **Nikolić** submits that the Trial Chamber further erred in finding that "how exactly [the order to dispatch soldiers to execute prisoners] was received [by the 2nd Battalion] is a peripheral issue", because this issue pertains directly to Aćimović's credibility (ground 16).[3844]

1333. **Nikolić** argues that the Trial Chamber's assessment of Aćimović's credibility was "wholly erroneous".[3845] He posits that, although the Trial Chamber specifically acknowledged Aćimović's attempt to minimise his own responsibility, it failed to consider that Aćimović's claims about receiving coded telegrams as well as about his ensuing conversations with **Nikolić**, formed part of these attempts at minimisation.[3846] Further, **Nikolić** asserts that the Trial Chamber erred in finding that Witness M. Lazarević's evidence corroborates Aćimović's account of events on 15 July 1995.[3847] **Nikolić** attacks M. Lazarević's credibility arguing that the Trial Chamber did not assess his motivation to lie and protect Aćimović.[3848]

1334. **Nikolić** further argues that the Trial Chamber failed to consider: (1) the discrepancies regarding the receipt of the telegrams in Aćimović's successive statements to the Prosecution;[3849] (2) the denials of the telegrams' existence by other witnesses[3850] and the contradictions between the evidence of M. Lazarević and Aćimović including on the number of telegrams received and sent in

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3840 Trial Judgement, para. 510.
3841 Trial Judgement, paras 510, 1368.
3842 Nikolić's Appeal Brief, paras 270, 272, 287.
3843 Nikolić's Appeal Brief, paras 272, 301.
3844 Nikolić's Appeal Brief, para. 263. See Appeal Hearing, AT. 309-310 (4 Dec 2013).
3845 Nikolić's Appeal Brief, paras 273, 314; Nikolić's Reply Brief, paras 110-112. See Appeal Hearing, AT. 309 (4 Dec 2013).
3846 Nikolić's Appeal Brief, paras 264, 274-276; Nikolić's Reply Brief, paras 107, 112. See Appeal Hearing, AT. 309-310, 338 (4 Dec 2013).
3847 Nikolić's Appeal Brief, paras 284-286; Nikolić's Reply Brief, para. 114. See Appeal Hearing, AT. 339 (4 Dec 2013).
3848 Nikolić's Appeal Brief, paras 284-286; Nikolić's Reply Brief, para. 114. See Appeal Hearing, AT. 339 (4 Dec 2013).
3849 Nikolić's Appeal Brief, paras 265, 281-283; Nikolić's Reply Brief, paras 107, 115. See also Appeal Hearing, AT. 309-310 (4 Dec 2013).
3850 Nikolić's Appeal Brief, paras 265, 288-289; Nikolić's Reply Brief, para. 116.

reply;[3851] (3) the numerous dissimilarities between the receipt of the telegrams at the 2nd Battalion and at the remaining battalions;[3852] (4) that the 2nd Battalion members did not partake in the Kozluk Killings, belying Aćimović's claim that executioners were requested from the 2nd Battalion through the two coded telegrams;[3853] (5) that Aćimović neither knew who signed the telegram nor to whom his reply telegram was addressed;[3854] and (6) that secure lines of communication existed, obviating the need for coded communications.[3855]

1335. **Nikolić** further submits that in light of the enormous importance of Aćimović's testimony and credibility, no reasonable trial chamber could have found the manner of the instruction's receipt to be peripheral without concomitantly exercising its discretionary powers to elucidate this issue during the proceedings.[3856] He asserts in this respect that the fact that the Trial Chamber did not at any stage put any question to witnesses concerning the manner of the order's receipt violates his right to "be informed promptly and *in detail* of the nature and cause of the charges against him".[3857] Finally, **Nikolić** points out that when permitting the Prosecution to present rebuttal evidence, the Trial Chamber deemed the coded telegrams issue "significant".[3858] He argues that no reasonable trial chamber could have subsequently found the manner of receipt to be peripheral.[3859]

1336. Regarding whether **Nikolić** called Aćimović with regard to the order, **Nikolić** argues that the Trial Chamber failed to consider: (1) the contradictions and inconsistencies between the accounts of Aćimović and M. Lazarević;[3860] (2) that the events at Ročević School do not correspond with Aćimović's claims concerning the conversations with **Nikolić**, particularly that the 2nd Battalion did not take part in the Kozluk Killings, but merely provided logistical support;[3861] (3) Aćimović's conflicting testimony concerning the aftermath of the alleged telephone conversations;[3862] and (4) Aćimović's testimony that renders the process of enlisting assistance from the 2nd Battalion on 14-15 July 1995 completely different from how the process was done with respect to the 1st Battalion.[3863]

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3851 Nikolić's Appeal Brief, paras 285-286, 291-293; Nikolić's Reply Brief, para. 117. See also Appeal Hearing, AT. 339 (4 Dec 2013).
3852 Nikolić's Appeal Brief, paras 297-300; Nikolić's Reply Brief, para. 123.
3853 Nikolić's Appeal Brief, paras 294-296; Nikolić's Reply Brief, para. 118.
3854 Nikolić's Appeal Brief, para. 265.
3855 Nikolić's Appeal Brief, para. 265. See Appeal Hearing, AT. 310 (4 Dec 2013). See also Nikolić's Reply Brief, para. 107.
3856 Nikolić's Appeal Brief, para. 266.
3857 Nikolić's Appeal Brief, para. 267 (emphasis in original); Nikolić's Reply Brief, para. 108.
3858 Nikolić's Appeal Brief, para. 268.
3859 Nikolić's Appeal Brief, paras 268-269. See Nikolić's Reply Brief, para. 108.
3860 Nikolić's Appeal Brief, paras 302-305; Nikolić's Reply Brief, para. 120.
3861 Nikolić's Appeal Brief, paras 306-309.
3862 Nikolić's Appeal Brief, paras 310-311.
3863 Nikolić's Appeal Brief, paras 312-313.

b. The Prosecution's response

1337. The Prosecution responds that the Trial Chamber carefully considered Aćimović's evidence in making its findings concerning the events at the Ročević School, the subsequent killings of the prisoners at Kozluk, and **Nikolić**'s responsibility in this regard.[3864] It avers that **Nikolić** resorts to overstatements and repetition of trial submissions.[3865] It argues that **Nikolić** merely seeks to substitute his own evaluation of the evidence for that of the Trial Chamber, without showing any error.[3866]

1338. The Prosecution further submits that Aćimović's testimony forms part of a body of mutually corroborating evidence, which establishes the receipt of the order from the Zvornik Brigade Command and **Nikolić**'s follow-up by telephone.[3867] In particular, it submits that the Trial Chamber reasonably found that many aspects of his testimony were corroborated by M. Lazarević.[3868] As to the discrepancies concerning the number of telegrams received, the Prosecution emphasises that the Trial Chamber only made findings regarding the receipt of one telegram and that **Nikolić** therefore challenges a finding that the Trial Chamber did not make.[3869]

1339. The Prosecution also emphasises that the Trial Chamber considered the conflicting evidence as to whether telegrams could be coded and whether secure lines of communication were available.[3870] With regard to **Nikolić**'s argument that the process to enlist other battalions' assistance was very different from what Aćimović testified, the Prosecution submits that **Nikolić** is overstating dissimilarities and ignores the essentially analogous process used.[3871] Finally, with regard to **Nikolić**'s argument that no member of the 2nd Battalion took part in the Kozluk Killings, the Prosecution points out that this fails to show an error in the Trial Chamber's findings that the 2nd Battalion members were present at the Ročević School and Kozluk, and that the prisoners at the Ročević School were killed, or in its reliance on these two findings as corroborative of Aćimović's evidence concerning the order.[3872]

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3864 Prosecution's Response Brief (Nikolić), paras 228, 240-241.

3865 Prosecution's Response Brief (Nikolić), para. 229. The Prosecution points out that the Trial Chamber specifically considered **Nikolić**'s trial challenges based on the evidence of other 2nd Battalion soldiers who did not know about the telegram and that **Nikolić** has repeated those challenges on appeal without any showing of error. Prosecution's Response Brief (Nikolić), para. 253.

3866 Prosecution's Response Brief (Nikolić), paras 244, 258, 264.

3867 Prosecution's Response Brief (Nikolić), paras 242-243. See also Prosecution's Response Brief (Nikolić), para. 257.

3868 Prosecution's Response Brief (Nikolić), para. 245.

3869 Prosecution's Response Brief (Nikolić), paras 246, 263. The Prosecution also points out that other inconsistencies were not regarded as "sufficiently grave to cast doubt upon the existence of this instruction", a fact which was corroborated by other strands of evidence. Prosecution's Response Brief (Nikolić), para. 246.

3870 Prosecution's Response Brief (Nikolić), para. 254.

3871 Prosecution's Response Brief (Nikolić), para. 251.

3872 Prosecution's Response Brief (Nikolić), para. 249.

1340. In addition, addressing **Nikolić**'s argument regarding the Trial Chamber's power to put questions to the witnesses, the Prosecution asserts that there is no connection between the discretion of judges to ask questions of a witness and the Prosecution's duty to give notice of the case against an accused.[3873] Finally, regarding **Nikolić**'s argument that the Trial Chamber initially deemed the coded telegrams issue to be "significant", the Prosecution asserts that **Nikolić** confuses the threshold standard for accepting evidence in rebuttal with the Trial Chamber's evaluation of the ultimate weight to be accorded to it at the close of a case.[3874]

c. Analysis

i. Whether the 2nd Battalion received two coded telegrams in the early morning of 15 July 1995 and whether the manner of their receipt was a peripherial issue

1341. At the outset, the Appeals Chamber recalls that it has already dismissed **Nikolić**'s claim that the Trial Chamber's assessment of Aćimović's credibility was "wholly erroneous".[3875] The Appeals Chamber also recalls that the Trial Chamber was aware of, and carefully considered, the shortcomings of Aćimović's evidence, stressing that "the inconsistencies uncovered between parts of Aćimović's testimony and other evidence before the Trial Chamber in most instances arise from his attempt to minimise his own responsibility".[3876] The Trial Chamber specifically noted conflicting evidence regarding the coded telegrams allegedly received by Aćimović in the early hours of 15 July 1995, but nevertheless accepted the essence of Aćimović's account, finding that "how exactly the instruction [to dispatch soldiers to execute prisoners] was received is a peripheral issue" and that the inconsistencies were not sufficiently grave to cast doubt upon the instruction's existence.[3877] The Trial Chamber found that M. Lazarević corroborated Aćimović's account, which was further corroborated by the fact that a similar procedure was used to request the 1st Battalion's assistance to guard the prisoners, and the fact that soldiers of the 2nd Battalion were indeed sent to Ročević School.[3878]

1342. Addressing **Nikolić**'s specific challenge to the credibility of Aćimović's testimony with regard to the coded telegrams, the Appeals Chamber first notes that Aćimović did not mention the receipt of the coded telegrams during his first interview with the Prosecution.[3879] At the same time, it observes that Aćimović confirmed the receipt of the two coded telegrams during the second

3873 Prosecution's Response Brief (Nikolić), para. 259.
3874 Prosecution's Response Brief (Nikolić), para. 260.
3875 See *supra*, paras 209-212, also addressing specific arguments brought forward by **Nikolić**, such as that Aćimović held a grudge against **Nikolić** and that Aćimović never attempted to contact his superiors in relation to the telegrams.
3876 Trial Judgement, para. 506. See *supra*, para. 1120.
3877 Trial Judgement, para. 509.
3878 See Trial Judgement, para. 509.

interview.[3880] Aćimović was extensively cross-examined on this topic and stated that during the second interview, questions were put to him triggering his memory.[3881] Although the Trial Chamber did not specifically discuss this potential inconsistency in the Trial Judgement, it generally noted that it evaluated Aćimović's evidence in its totality, including "the extensive cross-examination conducted".[3882] The Appeals Chamber finds that **Nikolić** has failed to demonstrate that the Trial Chamber did not consider these inconsistencies in its overall evaluation of Aćimović's credibility.[3883] Recalling that deference ought to be given to the Trial Chamber's assessment of the various factors that affect a witness's credibility,[3884] the Appeals Chamber dismisses **Nikolić**'s argument.

1343. The Appeals Chamber also observes that, while the Trial Chamber stated that it considered the "conflicting testimony regarding the mode and timing of delivery of the telegram"[3885] as well as the contradictions between Aćimović and M. Lazarević's testimonies regarding the number of telegrams received, a review of the relevant findings reveals that the Trial Chamber also considered the conflicting evidence concerning the telegrams' existence and the 2nd Battalion's capacity to decode telegrams.[3886] The Trial Chamber specifically noted in this respect that there were several witnesses who were "unaware" of the telegrams' existence requesting the 2nd Battalion to provide soldiers for the execution of prisoners,[3887] and that there was evidence against the 2nd Battalion's ability to code and decode telegrams.[3888]

1344. At the same time, the Trial Chamber noted that M. Lazarević's testimony corroborated Aćimović's testimony with regard to the existence of a telegram and the 2nd Battalion's capacity to code and decode telegrams.[3889] As to **Nikolić**'s claim that the Trial Chamber failed to consider the difference between Aćimović's and M. Lazarević's testimonies regarding the time that **Nikolić** became aware of the situation of the prisoners at Ročević and informed M. Lazarević accordingly,[3890] the Appeals Chamber notes that while M. Lazarević mentions that Aćimović provided the information "in the afternoon" of 14 July 1995 without being able to recall when

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3879 Srećko Aćimović, T. 13079-13080 (22 June 2007).
3880 Srećko Aćimović, T. 13086 (22 June 2007).
3881 Srećko Aćimović, T. 13086-13087 (22 June 2007).
3882 Trial Judgement, para. 506.
3883 See *supra*, para. 1020.
3884 See *supra*, note 3414.
3885 Trial Judgement, para. 509.
3886 Trial Judgement, paras 508-509 & fns 1859-1860.
3887 Trial Judgement, fn. 1860, referring to, *inter alia*, Milisav Cvijetinović, T. 25836 (17 Sept 2008), Dragan Jović, T. 18086 (21 Nov 2007), Dragan Stevanović, T. 32848-32849 (1 Apr 2009).
3888 Trial Judgement, fn. 1860, referring to, *inter alia*, Milisav Cvijetinović, T. 25835 (17 Sept 2008).
3889 Trial Judgement, para. 509 & fn. 1861. See also Mitar Lazarević, T. 13374 (27 June 2007); Srećko Aćimović, T. 13020-13021 (21 June 2007).
3890 Nikolić's Appeal Brief, paras 291-292.

exactly,[3891] Aćimović's testimony implies that it was between 8:30 and 9:30 p.m.[3892] However, **Nikolić** fails to show that this apparent discrepancy controverts the substantial corroboration of their accounts of events of 14 and 15 July 1995. Both witnesses testified that Aćimović: (1) went home for a bath where he was informed about the situation at Ročević School; (2) then went to Ročević to see for himself what was happening; and (3) told his battalion about it when he returned from the Ročević School.[3893]

1345. Furthermore, in considering **Nikolić**'s argument that the testimonies of Aćimović and M. Lazarević were inconsistent with regard to who was present when the telegram arrived and who read it,[3894] the Appeals Chamber considers that the inconsistency in the accounts of Aćimović and M. Lazarević as to who was present at the Battalion Command at the time[3895] is not of such relevance that its absence in the Trial Chamber's analysis would show its disregard.[3896] Finally, the Trial Chamber was aware of inconsistencies between M. Lazarević's account and that of others, in particular Witnesses Milisav Cvijetinović, Milan Radić, and Dragan Stevanović,[3897] but found that these inconsistent accounts did not raise reasonable doubt with regard to the essence of Aćimović's testimony, namely that during the night of 14-15 July 1995 the 2nd Battalion received an instruction from the Standard Barracks to dispatch a platoon to the Ročević School to execute prisoners.[3898] **Nikolić** has failed to demonstrate any discernible error.

1346. Further, with regard to **Nikolić**'s claim that M. Lazarević – whom, as outlined above, the Trial Chamber found to corroborate Aćimović – had a motive to lie and protect Aćimović, the Appeals Chamber notes that he bases this assertion on Witness V. Ivanović's testimony.[3899] However, V. Ivanović stated that M. Lazarević was not Aćimović's "deputy" and that, although they knew each other during the war, "they were never good friends".[3900] Furthermore, V. Ivanović testified that while "it was his assumption and suspicion" [REDACTED], "maybe [he was] not

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3891 Mitar Lazarević, T. 13372 (27 June 2007).
3892 Srećko Aćimović, T. 12937 (20 June 2007).
3893 Mitar Lazarević, T. 13364-13368 (26 June 2007); Srećko Aćimović, T. 12934-12937 (20 June 2007); T. 13372 (27 June 2007).
3894 Nikolić's Appeal Brief, paras 292-293.
3895 M. Lazarević testified that all those present at the 2nd Battalion command read the telegram and that even the Company Commanders were there. Mitar Lazarević, T. 13375-13376, 13387 (27 June 2007). Aćimović testified that he discussed the telegrams with V. Lazarević and M. Lazarević, who were at the 2nd Battalion command, and only *called* the Company Commanders or their assistants to confirm that they received the telegram. Srećko Aćimović, T. 12948-12949 (20 June 2007).
3896 See *supra*, note 2661.
3897 See Trial Judgement, fns 1860-1861. Cvijetinović contradicted M. Lazarević with regard to the 2nd Battalion's ability to code and decode telegrams. Radić, Cvijetinović, and Stevanović contradicted M. Lazarević with regard to their knowledge of the telegram.
3898 Trial Judgement, paras 508-509.
3899 See Nikolić's Appeal Brief, para. 285 & fns 710, 712; Veljko Ivanović, T. 18229 (private session) (26 Nov 2007).
3900 Veljko Ivanović, T. 18229-18230 (private session) (26 Nov 2007).

right" about it.[3901] While the Trial Chamber made no explicit finding regarding M. Lazarević's credibility, the Appeals Chamber finds that **Nikolić** misrepresents the trial record and has failed to show any error by the Trial Chamber in this regard.

1347. The Appeals Chamber notes that the Trial Chamber's findings do not show any perfectly uniform procedure as to how and when the different battalions of the Zvornik Brigade received requests for their assistance in dealing with the prisoners arriving in the area. The Trial Chamber found that the 4th Battalion sent men pursuant to a request from Milorad Trbić without specifying in what way this request was received,[3902] that the 6th Battalion was merely informed by telephone that prisoners would be brought to the Petkovci School,[3903] and that the 1st Battalion received a telegram,[3904] which was followed up by a phone call from **Nikolić**.[3905] Taking into account these differences, noting that while indeed no other battalion received a coded telegram directly requesting assistance for the execution of prisoners, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could nevertheless have stressed certain similarities between the process used to enlist the 1st Battalion and the 2nd Battalion and found in it "some further corroboration" of Aćimović's evidence.[3906]

1348. The Appeals Chamber notes that it is undisputed that some soldiers from the 2nd Battalion were sent to the Ročević School and that the prisoners there were executed.[3907] **Nikolić** argues that the Trial Chamber failed to consider that no member of the 2nd Battalion actually participated in the Kozluk Killings, but instead only provided logistical support,[3908] and that this "belies" the claim that executioners were requested by the Zvornik Brigade Command.[3909] The Trial Chamber was well aware that no platoon of soldiers from the 2nd Battalion was present at Kozluk, and only two soldiers, namely V. Ivanović and Jović, provided logistical assistance.[3910] At the same time, the Trial Chamber accepted that Aćimović refused to assign soldiers to execute prisoners.[3911] The Appeals Chamber therefore finds that **Nikolić** merely seeks to substitute the Trial Chamber's interpretation of the evidence with his own without showing an error.

1349. The Appeals Chamber observes that Aćimović did not remember exactly who signed the telegrams he received during the night of 14-15 July 1995 or to whom his reply telegrams were

3901 Veljko Ivanović, T. 18229 (private session) (26 Nov 2007).
3902 Trial Judgement, para. 479.
3903 Trial Judgement, para. 494.
3904 The Appeals Chamber notes that the Trial Chamber did not make any finding as to whether this telegram was coded or not. See Trial Judgement, paras 527, 1359.
3905 Trial Judgement, para. 527.
3906 Trial Judgement, para. 509.
3907 Trial Judgement, para. 509.
3908 See Trial Judgement, paras 509, 513, 517-518, 522.
3909 Nikolić's Appeal Brief, paras 294, 296.
3910 Trial Judgement, paras 517-520.

addressed.[3912] According to him, the first telegram was sent from a person from the Zvornik Brigade Command and Aćimović sent his replies to the same person "who sent [the telegram] to us, or to the duty operations officer".[3913] Aćimović explained that he "focused on the contents of the telegram itself, and [...] didn't pay any attention to the signatory. [He] may have seen it at that time, but [he] simply forgot all about it later."[3914] Although the Trial Chamber did not specifically discuss Aćimović not remembering the exact identity of the coded telegrams' sender, the Appeals Chamber is of the view that this does not necessarily show that the Trial Chamber disregarded this aspect of Aćimović's testimony.[3915] In this regard, the Trial Chamber did note that Aćimović remembered that the person was from the Zvornik Brigade Command.[3916] Given the deference accorded to a trial chamber in assessing the factors that affect a witness's credibility,[3917] the Appeals Chamber finds that **Nikolić** has failed to demonstrate that the Trial Chamber erred in this respect.

1350. The Appeals Chamber finds that **Nikolić**'s argument based on the implausibility of the coded telegrams' use is speculative. As shown above, the Trial Chamber stressed in this respect that similar means of communication were used to enlist the 1st Battalion of the Zvornik Brigade's assistance.[3918] The Appeals Chamber recalls that the task of hearing, assessing, and weighing the evidence presented at trial is left primarily to the Trial Chamber.[3919] In view of the margin of deference the Appeals Chamber must give to a finding of fact reached by a trial chamber, the Appeals Chamber finds that **Nikolić** has failed to show that a reasonable trier of fact could not have reached these findings.

1351. Regarding **Nikolić**'s argument that the Trial Chamber did not question witnesses concerning the manner of receipt of the order to dispatch soldiers by the 2nd Battalion of the Zvornik Brigade, the Appeals Chamber recalls that Rule 85(B) of the Rules provides the judges of a trial chamber with the *discretion* to put questions to a witness at any stage of his/her examination.[3920] This, however, does not mean that the judges are under any obligation to put questions to witnesses or otherwise clarify any of the Parties' case. Moreover, the Appeals Chamber is not convinced that a decision by the Trial Chamber not to use its discretion to question witnesses on a particular point

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3911 Trial Judgement, paras 510-511, 1118.
3912 Srećko Aćimović, T. 12946-12947 (20 June 2007); T. 13011-13012 (21 June 2007).
3913 Srećko Aćimović, T. 12944-12945 (20 June 2007); T. 13011 (21 June 2007).
3914 Srećko Aćimović, T. 12946-12947 (20 June 2007).
3915 See *supra*, note 2661.
3916 See Trial Judgement, para. 508.
3917 See *supra*, para. 20.
3918 Trial Judgement, paras 509, 527.
3919 See *supra*, para. 20.
3920 See also *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Defence Motion Seeking Clarification of the Trial Chamber's Objective in Its Questions Addressed to Witnesses, 14 February 2005, pp. 4, 6; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo, 1 May 1997, para. 26.

violates the right of an accused to be informed promptly and in detail of the nature and cause of the charges against him. The Appeals Chamber thus finds **Nikolić**'s argument to be without merit.

1352. Finally, the Appeals Chamber notes that the Trial Chamber permitted the Prosecution to present rebuttal evidence from Dragan Stevanović regarding the 2nd Battalion's possession of a codebook and its capacity to code and decode telegrams.[3921] In doing so, it explained the applicable legal standard that "rebuttal evidence must relate to a significant issue" and that "[e]vidence of peripheral or background issues will be excluded".[3922] It found that "Dragan Stevanović's proposed evidence does have probative value for important issues in the case".[3923] The Appeals Chamber also recalls that the Trial Judgement contains the finding that "how exactly the instruction [to dispatch soldiers to execute prisoners] was received is a peripheral issue".[3924]

1353. The Appeals Chamber finds merit in **Nikolić**'s argument that the Trial Chamber was not consistent by first labelling the issue of the 2nd Battalion's capacity to decode the telegrams – the issue inherently linked to the manner in which the instruction to dispatch soldiers was received – as "important", only to call it "peripheral" in view of corroborating evidence on the ultimate issue concerning the instruction's receipt. At the same time, the Appeals Chamber finds that **Nikolić** has failed to show how this inconsistency resulted in a miscarriage of justice. The Appeals Chamber notes in this respect that having had the benefit of lengthy deliberations after all the evidence had been presented, the Trial Chamber was best suited to determine the ultimate relevance of this issue. **Nikolić**'s argument is thus dismissed.

1354. For the foregoing reasons, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have concluded that on 15 July 1995 between 1:00 and 2:00 a.m., Aćimović received a telegram from the Zvornik Brigade Command instructing him to dispatch a platoon of soldiers to execute the prisoners at Ročević School[3925] and that "how exactly the instruction was received [by the 2nd Battalion of the Zvornik Brigade was] a peripheral issue".[3926] **Nikolić**'s ground of appeal 16 and sub-ground of appeal 18.1 are thus dismissed.

ii. Whether Nikolić pressured Aćimović to execute the order

1355. Regarding the issue of the alleged telephone conversations between **Nikolić** and Aćimović in the night of 14 July and the morning of 15 July 1995, **Nikolić** first claims that the Trial Chamber

3921 *Popović et al.* Decision of 27 March 2009, paras 109, 145.
3922 *Popović et al.* Decision of 27 March 2009, para. 95.
3923 *Popović et al.* Decision of 27 March 2009, para. 105.
3924 Trial Judgement, para. 509. See *supra*, para. 1341.
3925 Trial Judgement, para. 1367.
3926 Trial Judgement, para. 509.

overlooked contradictions in the testimonies of M. Lazarević and Aćimović in this respect and that it therefore erred in finding M. Lazarević's testimony to be corroborative of Aćimović as to the telephone conversations' occurrence.[3927] In particular, **Nikolić** points out that, according to Aćimović, Vujo Lazarević and M. Lazarević were present when he spoke to **Nikolić** on 15 July 1995 at 7:00 a.m., whereas M. Lazarević never mentioned that he was present, but only stated that he overheard Aćimović speaking to an unknown person on the phone.[3928] Furthermore, **Nikolić** takes issue with Aćimović's claim to have discussed the phone conversation with V. Lazarević and M. Lazarević.[3929] He refers in this regard to M. Lazarević's testimony that Aćimović never mentioned **Nikolić** and that he had no knowledge of a conversation between the two.[3930] **Nikolić** further claims that had the Trial Chamber granted 3DW5 protective measures, 3DW5 would have testified that Aćimović was not credible in this regard.[3931] Finally, **Nikolić** submits that while Aćimović claims to have spoken to **Nikolić** twice, M. Lazarević only mentioned one telephone conversation in his testimony, thereby rendering Aćimović's account of the second telephone conversation uncorroborated.[3932]

1356. The Trial Chamber noted that M. Lazarević testified that: (1) he overheard one angry telephone conversation between Aćimović and another person, after both the initial order to dispatch a platoon of soldiers to the Ročević School had been received by the 2nd Battalion and a reply opposing the order had been sent; and (2) Aćimović never mentioned **Nikolić** as the interlocutor.[3933] The Trial Chamber was therefore well aware of the differences between the accounts of Aćimović and M. Lazarević, but nevertheless considered that the testimony of M. Lazarević added credibility to the evidence of Aćimović.[3934] The Appeals Chamber recalls the deference to be accorded to a trial chamber's assessment of the probative value of the evidence before it as well as of the factors that could affect a witness's credibility.[3935] **Nikolić** merely disagrees with the Trial Chamber's reliance on Aćimović's evidence without showing that the Trial Chamber erred in this respect. Finally, with regard to **Nikolić**'s assertion about what 3DW5 *would* have testified, the Appeals Chamber finds this to be both speculative and irrelevant. It notes in this regard that it has already dismissed **Nikolić**'s claim that the Trial Chamber erred in not granting protective measures to 3DW5.[3936] In light of the above, the Appeals Chamber finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have accepted M. Lazarević's testimony

3927 Nikolić's Appeal Brief, para. 302.
3928 Nikolić's Appeal Brief, para. 304.
3929 Nikolić's Appeal Brief, para. 305.
3930 Nikolić's Appeal Brief, para. 305, referring to Mitar Lazarević, T. 13388 (27 June 2007).
3931 Nikolić's Appeal Brief, para. 304.
3932 Nikolić's Appeal Brief, para. 303.
3933 Trial Judgement, fn. 1864, referring to Mitar Lazarević, T. 13377-13378, 13387-13388, 13392 (27 June 2007).
3934 Trial Judgement, fn. 1864.
3935 See *supra*, para. 20.
3936 See *supra*, paras 80-82.

as corroborating Aćimović on the telephone conversation's occurrence in which Aćimović was pressured to dispatch soldiers to assist in the murder operation.

1357. Regarding **Nikolić**'s argument that the fact that 2nd Battalion soldiers did not participate in the executions, but provided only logistical support as "was required [...] by Popović", contradicts Aćimović's claim that **Nikolić** needed to pressure him to dispatch soldiers to participate in the executions,[3937] the Appeals Chamber notes that in the morning of 15 July 1995, when Aćimović arrived at Ročević, **Popović** counted on the assistance of the 2nd Battalion in executing the prisoners. **Popović** shouted at Aćimović, asking him why he had not brought men as ordered and pressured him to find volunteers willing to *participate in the executions*.[3938] **Nikolić**'s argument thus fails.

1358. Furthermore, **Nikolić** takes issue with Aćimović's testimony that during the second telephone conversation in the early morning of 15 July 1995, **Nikolić** told Aćimović to meet him in front of the Ročević School later that morning.[3939] **Nikolić** argues that in light of the Trial Chamber's finding that he assumed his duties as Duty Operations Officer at the Standard Barracks in the morning of 15 July 1995, it would have been "wholly illogical" for him to request Aćimović to meet him at the Ročević School that morning.[3940] A review of the Trial Judgement reveals that the Trial Chamber did not explicitly address the issue.[3941] However, the Appeals Chamber recalls that, while a trial chamber is required to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of evidence, it does not need to individually address them in the Trial Judgement.[3942] A trial chamber has the discretion to evaluate whether evidence taken as a whole is reliable and credible and to accept or reject the fundamental features of the evidence.[3943] The Appeals Chamber finds **Nikolić**'s argument speculative, and as such it warrants dismissal.

1359. **Nikolić** avers that Aćimović's testimony regarding events subsequent to the alleged telephone conversations is contradictory insofar as he testified of having spoken with the Zvornik Brigade Duty Officer between 11:30 a.m. and 12:15 p.m. on 15 July 1995, yet also claimed that he did not speak with **Nikolić** on this occasion, even though it was established that **Nikolić** had in fact assumed the role of Duty Officer at the latest at 6:30 a.m. on 15 July 1995.[3944] The Appeals

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3937 Nikolić's Appeal Brief, para. 307.
3938 Trial Judgement, paras 511, 1118.
3939 Nikolić's Appeal Brief, para. 308.
3940 Nikolić's Appeal Brief, para. 308.
3941 See Trial Judgement, paras 1368-1369.
3942 See *Đorđević* Appeal Judgement, para. 797; *Šainović et al.* Appeal Judgement, para. 658; *Muhimana* Appeal Judgement, para. 58.
3943 See *supra*, note 3551.
3944 Nikolić's Appeal Brief, para. 311.

Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.[3945] The Appeals Chamber further notes in this respect that this possible contradiction in Aćimović's testimony does not pertain to any salient factual issue in the case and fails to render the entirety of Aćimović's testimony implausible. The Trial Chamber was therefore not under an obligation to specifically discuss it in the Trial Judgement.

1360. Finally, **Nikolić** posits that the Trial Chamber did not consider the "enormous dissimilarities" between how he allegedly enlisted 2nd Battalion soldiers to assist in the murder operation, in comparison with how he requested the 1st Battalion's assistance. He is therefore of the view that the Trial Chamber erred in finding that the "events at the 1st Battalion" corroborate Aćimović's testimony in this regard.[3946] **Nikolić** states that he merely suggested to Perić of the 1st Battalion to go and verify that there were no problems with the local population at the Kula School and that there was no mention of any killings, whereas Aćimović claims that **Nikolić** openly pressured him to execute an illegal order. In **Nikolić**'s view, Aćimović's claim to be the only one who openly received such an illegal order exemplifies his attempt to shift the responsibility to others.[3947] The Appeals Chamber recalls that, as outlined above, the Trial Chamber's findings show that there was no uniform procedure as to how the different Zvornik Brigade battalions received requests for assistance with prisoners arriving in the area but finds that **Nikolić** has failed to demonstrate that no reasonable trier of fact could have found that the procedure the 1st Battalion used was *similar* to that of the 2nd Battalion, and hence to a certain extent corroborated Aćimović's account.[3948] The Appeals Chamber finds that **Nikolić** merely tries to substitute the Trial Chamber's interpretation of the evidence with his own without showing that the Trial Chamber erred.

1361. In light of the above, the Appeals Chamber finds that **Nikolić** has failed to show that the Trial Chamber committed a discernible error in finding that he pressured Aćimović over the phone to dispatch a platoon of soldiers to assist in the Kozluk Killings. **Nikolić**'s sub-ground of appeal 18.2 is thus dismissed.

(d) Conclusion

1362. The Appeals Chamber dismisses all challenges to the Trial Chamber's findings relating to **Popović**'s, **Beara**'s, and **Nikolić**'s contribution to the JCE to Murder.

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3945 See *supra*, note 3551.
3946 Nikolić's Appeal Brief, para. 312.
3947 Nikolić's Appeal Brief, para. 313.
3948 See *supra*, para. 1347.

5. The Prosecution's appeal (Sub-ground 1(a))

1363. The Trial Chamber found that, upon his return to the Standard Barracks on 15 July 1995 at noon, **Pandurević** met with his Deputy Commander Obrenović and was informed that, pursuant to an order of Mladić, **Beara** and **Popović** brought large numbers of prisoners to the Zvornik sector where they were executing them ("15 July Meeting").[3949] The Trial Chamber further found that as of that moment, **Pandurević** knew of the plan to murder the able-bodied Bosnian Muslim males from Srebrenica.[3950] While the Trial Chamber found that **Pandurević**'s Interim Combat Report of the same day ("15 July Report") shows that he was aware of, and concerned with, the burden on his Zvornik Brigade to guard and bury the prisoners, it nevertheless found that the information provided to **Pandurević** at the 15 July Meeting was not sufficient to establish that he knew that members of the Zvornik Brigade were committing or aiding and abetting crimes.[3951] The Trial Chamber therefore concluded that the knowledge requirement for "commission by omission" had not been met.[3952] The Trial Chamber further found that there was not only an absence of acts or omissions or other evidence from which it could be inferred that **Pandurević** shared the intent to commit the crimes that formed the object of the JCE to Murder, but that there was actually evidence tending to negate such intent.[3953] The Trial Chamber concluded that **Pandurević** was not a participant in the JCE to Murder as he lacked the intent to carry out the common purpose of the JCE to Murder and did not significantly contribute to it.[3954]

1364. The Prosecution alleges that the Trial Chamber erred in law and fact, in failing to find that **Pandurević**, after he resumed active operational command of the Zvornik Brigade at noon on 15 July 1995, became a member of the JCE to Murder.[3955] The Prosecution submits that these errors invalidate the verdict and occasion a miscarriage of justice.[3956]

(a) Whether the Trial Chamber erred in not providing a reasoned opinion for its findings

1365. The Prosecution submits that the Trial Chamber erred in law by failing to provide a reasoned opinion when entering its "cursory and erroneous" finding – despite the existence of

3949 Trial Judgement, paras 1861, 1941.
3950 Trial Judgement, paras 1861, 1953, 1959-1960.
3951 Trial Judgement, paras 1948, 1972.
3952 Trial Judgement, para. 1972.
3953 Trial Judgement, paras 1966, 1970-1972.
3954 Trial Judgement, paras 1966, 1978-1979.
3955 Prosecution's Appeal Brief, para. 15. See Appeal Hearing, AT. 513, 530, 532 (6 Dec 2013).
3956 Prosecution's Appeal Brief, para. 15. See Prosecution's Reply Brief, para. 2.

overwhelming evidence to the contrary – that there was no evidence to establish that **Pandurević** shared the intent to carry out the common purpose of the JCE to Murder.[3957]

1366. **Pandurević** responds that the Prosecution's argument is unfounded.[3958] He emphasises that the Trial Chamber's finding that "there is no evidence to establish" his shared intent cannot be evaluated in isolation, but must be seen in the context of the entire section of the Trial Judgement dealing with his alleged participation in the JCE to Murder.[3959]

1367. The Appeals Chamber recalls that the Trial Chamber is obliged to provide a reasoned opinion ensuring that an appellant can exercise his right to appeal and that the Appeals Chamber can understand and review the Trial Chamber's findings as well as its evaluation of the evidence.[3960] The Appeals Chamber emphasises that it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments, which he submits the Trial Chamber omitted to address and to explain why the omission invalidated the decision.[3961]

1368. The Appeals Chamber finds that the Prosecution has failed to identify which specific issues the Trial Chamber omitted to address. To the contrary, the Prosecution itself acknowledges that the Trial Chamber "made detailed factual findings which should have led to the conclusion that **Pandurević** was a member of the JCE to Murder".[3962] The Appeals Chamber considers in this respect that the Trial Chamber's conclusion that "there is simply no evidence to establish that **Pandurević** shared the intent" and that there is "an absence of acts or omissions by **Pandurević** or other evidence from which intent could be inferred" cannot be examined in isolation.[3963] When read in the context of the entire section of the Trial Judgement it is apparent that these findings summarise the Trial Chamber's evaluation of all relevant evidence pertaining to **Pandurević**'s intent.[3964] The Appeals Chamber thus finds that the Prosecution has failed to show that the Trial Chamber erred in law in not providing a reasoned opinion on its findings.

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3957 Prosecution's Appeal Brief, paras 16-18. See Appeal Hearing, AT. 514, 530 (6 Dec 2013). See also Prosecution's Reply Brief, para. 4.
3958 Pandurević's Response Brief, paras 13-26. See also Pandurević's Response Brief, paras 11-12.
3959 Pandurević's Response Brief, paras 14, 17-18, referring to Trial Judgement, para. 1966.
3960 Article 23(2) of the Statute; Rule 98 *ter*(C) of the Rules; *supra*, note 3257. See also *supra*, para. 1123.
3961 *Kvočka et al.* Appeal Judgement, para. 25.
3962 Prosecution's Appeal Brief, para. 17.
3963 See Trial Judgement, para. 1966.
3964 See Trial Judgement, paras 1861-1882, 1929-1978.

(b) Whether the Trial Chamber erred in finding that Pandurević did not share the intent to murder the Bosnian Muslim prisoners

1369. At the outset, the Appeals Chamber recalls that where a conviction under the first category of JCE is concerned, the accused must share both the intent to commit the crimes that form part of the common purpose of the JCE and the intent to participate in a common plan aimed at their commission.[3965] It has been established that the requisite intent for a conviction under JCE can be inferred from a person's knowledge, combined with continuing participation in the crimes.[3966] However, the Appeals Chamber recalls that while such intent can be inferred from circumstantial evidence, it must be the only reasonable inference.[3967] To illustrate this, the Appeals Chamber recalls its finding in the *Blagojević and Jokić* case that, in light of the accused's knowledge of crimes, a failure to intervene in the participation of subordinates in the commission of the crimes might suggest that the accused shared the intent to further the common purpose of the JCE, but does not necessarily compel such a conclusion, in particular if the senior civilian and military authorities play a primary role in the criminal operation.[3968]

1370. In light of the above, the Appeals Chamber will proceed to analyse whether the Trial Chamber erred in failing to conclude that the only reasonable inference from the evidence was that **Pandurević** shared the intent to further the common purpose of the JCE to Murder. In doing so, the Appeals Chamber will examine whether **Pandurević**: (1) had knowledge of his subordinates' involvement in the murder operation following the 15 July Meeting; (2) subsequently continued to participate in the commission of the crimes through his subordinates (*e.g.* by failing to intervene to stop their participation in the murder operation); and (3) manifested his intent to further the common purpose of the JCE to Murder in any other way.

(i) Pandurević's knowledge of the murder operation and his subordinates' criminal participation in it

1371. The Prosecution submits that the only reasonable conclusion on the evidence is that **Pandurević** acquired knowledge of the scope and discriminatory nature of the murder operation

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[3965] *Munyakazi* Appeal Judgement, para. 160; *Brđanin* Appeal Judgement, para. 365. See also *Kvočka et al.* Appeal Judgement, para. 82.

[3966] *Đorđević* Appeal Judgement, para. 512; *Krajišnik* Appeal Judgement, paras 202, 697 (confirming *Krajišnik* Trial Judgement, para. 890); *Blagojević and Jokić* Appeal Judgement, paras 272-273. See also *Kvočka et al.* Appeal Judgement, para. 243.

[3967] *Šainović et al.* Appeal Judgement, para. 995; *Krajišnik* Appeal Judgement, para. 202; *Brđanin* Appeal Judgement, para. 429; *Vasiljević* Appeal Judgement, para. 120.

[3968] *Blagojević and Jokić* Appeal Judgement, paras 272-273. See *Blagojević and Jokić* Appeal Judgement, para. 275.

and his subordinates' criminal participation therein at the 15 July Meeting.[3969] It avers that the Trial Chamber failed to consider compelling evidence and that its findings in this regard are inconsistent and contradictory.[3970]

1372. The Prosecution alleges in particular that the Trial Chamber erred when it found that it was "not convinced" that **Pandurević** knew that his subordinates were committing crimes in the murder operation until he received further information in the evening of 16 July 1995. In the view of the Prosecution, this finding does not acknowledge the full extent of PW-168's evidence and the 15 July Report, and contradicts the Trial Chamber's earlier finding that **Pandurević** knew of his subordinates' participation in the murder operation on 15 July 1995.[3971] It emphasises that the 15 July Report's wording confirms that **Pandurević** had assumed personal responsibility for the "additional burden" placed on him and the Zvornik Brigade of guarding and burying the prisoners as well as for security concerns caused by their presence in Zvornik.[3972] It argues that the combination of guarding and burial, coupled with the context of the murder operation, leaves no doubt that the Zvornik Brigade's participation in the operation was criminal.[3973]

1373. **Pandurević** responds that the Trial Chamber's findings are internally consistent.[3974] He asserts that the Trial Chamber reasonably found that the evidence was not sufficient to establish that he had the requisite knowledge to become a part of the JCE to Murder.[3975] According to **Pandurević**, the Prosecution mischaracterises the Trial Chamber's findings by ignoring the distinction it made between his knowledge of the crimes as such and his knowledge of criminal involvement of members of the Zvornik Brigade.[3976] **Pandurević** also disputes the Prosecution's interpretation of PW-168's evidence.[3977] With regard to the 15 July Report, **Pandurević** submits that the Trial Chamber correctly found that he was deliberately exaggerating the situation and that the "additional burden" did not necessarily refer to the Zvornik Brigade criminal involvement, but could have simply been a reference to the security concerns caused by the prisoners' presence.[3978] He further argues that, even if the "additional burden" may have been a reference to guarding and

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3969 Prosecution's Appeal Brief, paras 11, 23, 25-26, 34-38; Prosecution's Reply Brief, paras 7, 13, 15, 25. See Appeal Hearing, AT. 514-521 (6 Dec 2013).
3970 Prosecution's Appeal Brief, paras 19, 23, 33, 35 & fn. 88; Prosecution's Reply Brief, para. 47. See Appeal Hearing, AT. 514-521, 581-582 (6 Dec 2013).
3971 Prosecution's Appeal Brief, paras 19, 27-28, 32-33; Prosecution's Reply Brief, para. 20. See Appeal Hearing, AT. 514-521 (6 Dec 2013).
3972 Prosecution's Appeal Brief, paras 28-29, 32; Prosecution's Reply Brief, paras 8, 21. See Appeal Hearing, AT. 518-519, 525-526, 583 (6 Dec 2013).
3973 Prosecution's Appeal Brief, para. 32. See Appeal Hearing, AT. 519-520 (6 Dec 2013). See also Prosecution's Reply Brief, paras 9-12, 19.
3974 Pandurević's Response Brief, paras 19, 21, 26, 114.
3975 Pandurević's Response Brief, paras 10, 82, 86. See also Appeal Hearing, AT. 560-561, 563-564 (6 Dec 2013).
3976 Pandurević's Response Brief, paras 25, 114-115. See also Appeal Hearing, AT. 565-568 (6 Dec 2013).
3977 Pandurević's Response Brief, paras 87-90, 94-99, 107-108. See Appeal Hearing, AT. 563, 565 (6 Dec 2013).
3978 Pandurević's Response Brief, paras 21-22, 89, 109-112.

burial of prisoners by the Zvornik Brigade, the information he had on 15 July 1995 was not sufficient to conclude that such assistance was criminal.[3979]

1374. As outlined above, the Trial Chamber found that as of the 15 July Meeting, **Pandurević** knew of the plan to murder the able-bodied Bosnian Muslim males from Srebrenica and the executions taking place in the Zvornik Brigade's area of responsibility.[3980] The Appeals Chamber will therefore proceed to analyse the Trial Chamber's findings regarding **Pandurević**'s knowledge of his subordinates' participation in the murder operation.

1375. The Appeals Chamber notes that the Trial Chamber established on the basis of PW-168's testimony that Obrenović informed **Pandurević** during the 15 July Meeting that according to the Chief of Engineering of the Zvornik Brigade,[3981] "there were enormous problems with the guarding, execution and burial of the prisoners" and that **Pandurević** asked in response why the civilian protection was not performing the burials.[3982] Thereafter, the Trial Chamber made three subsequent findings as to when exactly, and to what extent, **Pandurević** learned about his subordinates' participation in the murder operation. First, after a detailed analysis containing extensive reasoning, the Trial Chamber found that the only reasonable interpretation of the 15 July Report's fourth paragraph, which was found to be based on the information received by **Pandurević** during the 15 July Meeting, is that **Pandurević** was referring to his brigade's burden of assisting with the guarding and the burial of the prisoners.[3983] This conclusion is followed by a finding that, although during the 15 July Meeting **Pandurević** acquired "some knowledge of the murder operation" and was "informed obliquely of some involvement on the part of the Zvornik Brigade", the information acquired by **Pandurević** was "not sufficient [...] to find that at this point [he] knew that members of the Zvornik Brigade were committing or aiding and abetting crimes".[3984] Finally, the Trial Chamber noted that "by his own account, on the evening of 16 July [...] **Pandurević** became aware that members of the Zvornik Brigade had participated in guarding prisoners who had been detained in the Zvornik area and had participated in the burials of the executed prisoners".[3985]

1376. The Appeals Chamber observes that the Trial Chamber's first two findings referred to above both clearly establish that **Pandurević** was informed by Obrenović at the 15 July Meeting of some

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3979 Pandurević's Response Brief, paras 23-24. See also Appeal Hearing, AT. 574 (6 Dec 2013).
3980 Trial Judgement, paras 1861, 1953, 1959-1960. See *supra*, para. 1363.
3981 See Trial Judgement, para. 152.
3982 Trial Judgement, para. 1861.
3983 Trial Judgement, paras 1943-1959.
3984 Trial Judgement, para. 1972.
3985 Trial Judgement, para. 1973. The Trial Chamber stressed in the same paragraph that by the evening of 16 July 1995, members of the Zvornik Brigade were no longer engaged in activities connected to the detention and execution of prisoners.

participation of his subordinates in the crimes committed by the VRS Main Staff.[3986] The second finding qualifies the first one with regard to the extent of **Pandurević**'s knowledge, by stating that while he had "some" knowledge it was not enough to know that his subordinates were committing or aiding and abetting crimes. The Trial Chamber's note regarding **Pandurević**'s admission of knowledge as of 16 July 1995, however, does *prima facie* contradict the previous findings by postponing **Pandurević**'s awareness of his subordinates' participation to the evening of 16 July 1995. The Appeals Chamber observes that the previous findings are based on an extensive evaluation of the evidence,[3987] including PW-168's testimony,[3988] whose credibility on this point was not questioned by the Trial Chamber,[3989] and the 15 July Report,[3990] whereas **Pandurević**'s own account is uncorroborated.[3991] Furthermore, the Trial Chamber expressed serious doubts concerning the credibility of **Pandurević**'s testimony with regard to the source and nature of his knowledge of the murder operation.[3992]

1377. The Appeals Chamber notes **Pandurević**'s response to Obrenović's statement, as referred to by PW-168, that "there were enormous problems with the guarding, execution and burial of the prisoners", namely "why the civilian protection was not performing the burials", which strongly suggests that **Pandurević** understood that members of his brigade were involved in these tasks.[3993] This understanding is clearly and convincingly confirmed in the Trial Chamber's own detailed analysis of the 15 July Report that leaves no doubt that **Pandurević** was aware of the involvement of his brigade, whether it was exaggerated in some respect or not.[3994] The Appeals Chamber finds that no reasonable trier of fact could therefore have concluded that **Pandurević** only became aware of his brigade's participation in the guarding and burying of the prisoners when he met with Obrenović on 16 July 1995.

1378. Furthermore, the Appeals Chamber finds that the distinction made by the Trial Chamber between **Pandurević**'s knowledge of "some participation" of his troops in the murder operation and his knowledge of his troops' assistance in the operation by committing or aiding and abetting crimes, is irrelevant for the purpose of establishing **Pandurević**'s criminal responsibility in the framework of the JCE to Murder. The Appeals Chamber recalls that participation in a JCE need not involve the commission of a specific crime, and does not have to be necessary or substantial, but

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3986 See also Trial Judgement, para. 2039.
3987 See, *e.g.*, Trial Judgement, para. 1934.
3988 PW-168, T. 15879 (closed session) (26 Sept 2007); T. 15886 (closed session) (27 Sept 2007); T. 16538-16539 (closed session) (18 Oct 2007).
3989 See Trial Judgement, paras 1939-1941. See also Trial Judgement, para. 42.
3990 See Trial Judgement, paras 1861, 1865, 1870, 1931-1972.
3991 Trial Judgement, para. 1882. See also Trial Judgement, para. 1958 & fn. 5875.
3992 Trial Judgement, paras 1954-1960.
3993 Trial Judgement, para. 1861.
3994 Trial Judgement, paras 1948-1949. See also Trial Judgement, paras 1943-1947, 1956.

may take the form of at least a significant contribution to the execution of the common purpose.[3995] What is important is that the contribution furthers the execution of the common purpose.[3996] It has been established beyond reasonable doubt that at noon on 15 July 1995, **Pandurević** knew that the Zvornik Brigade was assisting in the guarding and burial of the prisoners. The Appeals Chamber thus finds that no reasonable trier of fact could have found that **Pandurević** did not know that his subordinates were committing or aiding and abetting crimes in the murder operation until the evening of 16 July 1995.

(ii) Continued participation of Pandurević's subordinates in the murder operation

1379. The Trial Chamber found that subordinates of **Pandurević** participated in the murder operation by assisting in guarding and burying the prisoners brought by **Beara** and **Popović** into the Zvornik sector as of 14 July 1995.[3997] While **Pandurević** did not order or explicitly authorise their participation, he became aware of their participation upon his return to the Standard Barracks and did nothing to stop its continuation when he resumed active operational command over the Zvornik Brigade on 15 July 1995 at noon.[3998] The participation of the Zvornik Brigade by guarding the prisoners and assisting in the burial of the executed prisoners continued at least until 16 July 1995.[3999] Having established that the Trial Chamber erred in finding that **Pandurević** did not know that his subordinates were committing or aiding and abetting crimes in the murder operation until the evening of 16 July 1995,[4000] the Appeals Chamber finds that **Pandurević** failed to intervene when he acquired knowledge of his subordinates' assistance in the murder operation.

1380. The Appeals Chamber will now proceed to analyse whether the totality of **Pandurević**'s actions during the relevant time frame, in addition to having knowledge of his subordinates' participation in the murder operation and failing to intervene to stop it, allows for the finding that the only reasonable inference from the evidence was that **Pandurević** shared the intent to further the common purpose of the JCE to Murder.

(iii) Other manifestations of Pandurević's intent

1381. The Prosecution contends that **Pandurević**'s shared intent to further the common purpose of the JCE to Murder was apparent from: (1) his endorsement of Mladić's illegal order and his failure

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3995 *Krajišnik* Appeal Judgement, paras 215, 695; *Brđanin* Appeal Judgement, para. 430; *Vasiljević* Appeal Judgement, para. 100. See also Trial Judgement, paras 1026-1027.
3996 *Krajišnik* Appeal Judgement, para. 218.
3997 Trial Judgement, paras 476-490, 499-501, 517-522, 527-531, 534, 542-547.
3998 See Trial Judgement, paras 2044, 2049.
3999 See Trial Judgement, paras 534, 545-547.
4000 See *supra*, para. 1378.

to prevent the crimes committed by his subordinates;[4001] and (2) his failure to protect the Milići Prisoners in the custody of his subordinates, despite his obligations under international law to refuse to carry out illegal orders and to protect the prisoners.[4002]

1382. The Prosecution further submits that no reasonable trial chamber could have found that **Pandurević**'s decision to open a corridor for the column of Bosnian Muslims trying to break through towards ABiH-held territory, or his later decision to exchange some prisoners, negated the existence of his shared intent to murder the Bosnian Muslim prisoners.[4003] It posits that the opening of the corridor for the column to pass through was based on military necessity, rather than benevolent or humanitarian considerations.[4004] The Prosecution points out that despite an inquiry by the Main Staff into the matter, no disciplinary measures were taken against **Pandurević** for opening the corridor in contravention of superior orders.[4005] Similarly, the Prosecution asserts that **Pandurević**'s efforts to exchange a number of ABiH prisoners with captured VRS soldiers after 17 July 1995 were not driven by a desire to save Bosnian Muslim lives but by enormous pressure exerted by the families of the captured VRS soldiers to have them exchanged.[4006]

1383. **Pandurević** responds that it was reasonable for the Trial Chamber to find that no intent to murder the Bosnian Muslim men can be inferred from his failure to interrupt the executions carried out by the Main Staff.[4007] **Pandurević** claims that his ability to act and to remove any member of the Zvornik Brigade from the murder operation was substantially constrained.[4008] Furthermore, he avers that, even if he had an obligation to investigate the matter further, a failure to do so cannot be equated with intent to further the common purpose of the JCE to Murder.[4009]

1384. **Pandurević** further submits that his conduct as a whole during the period in question is incompatible with his purported shared intent to murder the Bosnian Muslim prisoners.[4010] He points out that, contrary to superior orders,[4011] he negotiated with the commander of the column, opened the corridor, and allowed thousands of Bosnian Muslim men to walk free.[4012] **Pandurević** contests the Prosecution's assertion that the opening of the corridor was only done due to military

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4001 Prosecution's Appeal Brief, paras 12, 39, 56, 58-60, 62-64; Prosecution's Reply Brief, paras 48-51. See Appeal Hearing, AT. 529-530 (6 Dec 2013).
4002 Prosecution's Appeal Brief, paras 13, 53; Prosecution's Reply Brief, para. 59. See also Appeal Hearing, AT. 583 (6 Dec 2013).
4003 Prosecution's Appeal Brief, paras 42-46.
4004 Prosecution's Appeal Brief, paras 42-52; Prosecution's Reply Brief, paras 55-57. See Appeal Hearing, AT. 528-529 (6 Dec 2013).
4005 Prosecution's Appeal Brief, para. 52.
4006 Prosecution's Appeal Brief, paras 44, 53. See also Prosecution's Reply Brief, paras 52-53.
4007 Pandurević's Response Brief, paras 38-39, 43-44, 53-56, 60, 63, 82.
4008 Pandurević's Response Brief, paras 39, 54-57.
4009 Pandurević's Response Brief, paras 57, 62.
4010 Pandurević's Response Brief, paras 40, 82. See also Appeal Hearing, AT. 568-573 (6 Dec 2013).
4011 Pandurević's Response Brief, paras 40, 72-73. See also Appeal Hearing, AT. 571 (6 Dec 2013).
4012 Pandurević's Response Brief, paras 64-67. See also Appeal Hearing, AT. 562-563, 568-571 (6 Dec 2013).

necessity.[4013] **Pandurević** also points to the treatment he afforded to Bosnian Muslim prisoners in the period between 16 and 26 July 1995,[4014] and the fact that he was the only one who wrote official reports that referred to the prisoners and criticised the VRS Command.[4015]

1385. The Appeals Chamber considers that, although **Pandurević**'s failure to intervene in order to stop his subordinates' participation in the murder operation might support the allegation that he had the intent to further the common purpose of a JCE, it does not necessarily compel such a conclusion.[4016] The Appeals Chamber emphasises that, when based on circumstancial evidence, the finding that an accused had the requisite intent to be a member of a JCE must be the only reasonable inference from the evidence.[4017] The Appeals Chamber will therefore proceed with analysing the Trial Chamber's relevant findings in order to ascertain whether **Pandurević**'s conduct, as claimed by the Prosecution, reveals an intent to further the common purpose of the JCE to Murder.

1386. The Appeals Chamber notes that the plan of the murder operation emanated from the highest echelons of the VRS Main Staff, including from Mladić, and that the VRS Security Branch planned, organised, and implemented the murder operation.[4018] The Trial Chamber established, in particular, that the decision to transport a large number of prisoners to the Zvornik area to be executed had been taken by members of the civilian authorities and senior VRS staff.[4019] The transports and killings had started on 14 July 1995, under the supervision of **Beara** and **Popović**, and upon a direct order from Mladić.[4020] While the murder operation included personnel and units from the Main Staff to the corps and the brigades, the Security Branch's authority, and in particular **Beara** and **Popović**, was evident throughout.[4021]

1387. The Trial Chamber found that **Pandurević** had no knowledge of the murder operation before he returned to the Standard Barracks at noon on 15 July 1995.[4022] At this point, the murder operation was well under way and several thousand prisoners had already been executed.[4023]

1388. The Appeals Chamber also observes that **Pandurević** was sent back to the Zvornik sector to deal with the problems on the Zvornik Brigade's combat lines and that he was ordered to block or

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4013 Pandurević's Response Brief, paras 68-70. See Appeal Hearing, AT. 569-570 (6 Dec 2013).
4014 Pandurević's Response Brief, paras 64, 79. See also Appeal Hearing, AT. 572 (6 Dec 2013).
4015 Pandurević's Response Brief, paras 40, 76-78. See Appeal Hearing, AT. 571-572 (6 Dec 2013).
4016 See *Blagojević and Jokić* Appeal Judgement, paras 272-273.
4017 See *supra*, note 3967.
4018 Trial Judgement, paras 1068, 1070, 1072. See *supra*, para. 1052.
4019 Trial Judgement, para. 468.
4020 Trial Judgement, paras 470, 479.
4021 Trial Judgement, para. 1068.
4022 Trial Judgement, paras 1861, 1931-1933.
4023 See, *e.g.*, Trial Judgement, paras 480, 497, 499-500, 519, 529, 794.

destroy the column and prevent its joinder with the ABiH 2nd Corps.[4024] When he returned to the Standard Barracks on 15 July 1995, his main focus was on this problem, and he discussed how to deal with it with his staff.[4025] While Obrenović did inform him about the murder operation at the 15 July Meeting, this information was not very detailed and was eclipsed by the difficult military situation in which the Zvornik Brigade was operating.[4026]

1389. The Appeals Chamber thus observes that, although **Pandurević**'s subordinates were, *inter alia*, assisting in guarding the prisoners, **Pandurević**'s influence over the crimes in which his subordinates participated was limited, given that the murder operation was ordered, administered, and executed by VRS Main Staff and was nearly concluded by the time he became aware of its occurrence.[4027] Furthermore, **Pandurević**'s ability to react was somewhat restricted due to the military crisis that demanded his immediate attention.

1390. With regard to the factors that, in the Trial Chamber's view, tended to negate **Pandurević**'s alleged intent, the Appeals Chamber assumes *arguendo* that the impetus for opening the corridor may have been triggered by the serious military situation facing the Zvornik Brigade. If so, it is notable that it was nevertheless in contradiction to superior orders and effectively saved the lives of thousands.[4028] The former is also true for the exchange of prisoners that saved over a hundred lives.[4029]

1391. With regard to the Milići Prisoners, whom **Popović** took from the Zvornik Brigade's custody on or around 23 July 1995 and who were later executed,[4030] the Trial Chamber found that **Pandurević**'s conduct prior to their removal from the Zvornik Brigade's infirmary, in particular his request for instructions and assistance, showed his intent to exchange them, not to murder them.[4031] The Appeals Chamber further notes in this respect that **Pandurević** made an attempt to protect those prisoners while they were still in the Zvornik Brigade's infirmary.[4032] The Trial Chamber also established that **Popović** was acting on Mladić's orders when he took custody of the prisoners[4033] and that "nothing in the evidence shows that [**Pandurević**] was present at the clinic at that time, or that he ordered their release into the custody of **Popović**".[4034]

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4024 Trial Judgement, para. 1859.
4025 Trial Judgement, paras 1862-1863.
4026 Trial Judgement, paras 1861-1864. See also Trial Judgement, para. 1866.
4027 See Trial Judgement, para. 1964.
4028 Trial Judgement, paras 1873-1875, 1896, 2219-2220.
4029 See Trial Judgement, para. 1913.
4030 Trial Judgement, paras 573-574, 577, 1905 & fn. 5726.
4031 Trial Judgement, para. 1983. See Trial Judgement, paras 1899-1900.
4032 See Trial Judgement, paras 1899-1900.
4033 Trial Judgement, paras 574, 1905.
4034 Trial Judgement, para. 1984.

1392. In addition, the Trial Chamber found that at a briefing at the Standard Barracks on 23 July 1995, **Pandurević** demanded that "part of the prisoners who were held in [the Zvornik Brigade] detention" be evacuated as soon as possible to Batković.[4035] The Trial Chamber also found that in **Pandurević**'s conversation with Obrenović following the briefing, they both expressed their frustration and concern about the situation of the prisoners and the executions in the area, and discussed what they should have done and should do in response to the situation.[4036]

1393. The Appeals Chamber thus finds that **Pandurević**'s conduct as a whole during the relevant time frame is inconsistent with a mindset supporting the JCE to Murder.

(iv) Conclusions

1394. The Appeals Chamber finds that the Prosecution has failed to demonstrate that no reasonable trier of fact could have concluded that it had not been proven that **Pandurević** shared the intent to further the common purpose of the JCE to Murder.

1395. The Appeals Chamber finds that, although **Pandurević**: (1) knew about his subordinates' assistance in the murder operation as of the 15 July Meeting and failed to intervene to stop the operation when he acquired that knowledge; and (2) knew about **Popović**'s planned arrival on 23 July 1995 to Zvornik and its probable consequences for the Milići Prisoners held in the Zvornik Brigade's custody and did nothing to prevent **Popović** from sealing their fate,[4037] this knowledge does not in itself compel the conclusion that he shared the intent of the JCE to Murder. The Appeals Chamber notes particularly in this respect the key role played by the VRS Main Staff and the Security Branch – regarding the assistance rendered to the murder operation by his subordinates on 15 and 16 July 1995 – and the difficult military situation the Zvornik Brigade faced when **Pandurević** resumed active operational command on 15 July 1995, requiring his immediate attention.

1396. Further, regardless of **Pandurević**'s motivation for opening the corridor for the column, which was in contradiction to orders of his superiors, or for transferring 140-150 prisoners to Batković, his actions saved thousands of Bosnian Muslim lives in the Zvornik area. Furthermore, the Appeals Chamber considers the initial protection **Pandurević** afforded the Milići Prisoners while in his custody, his efforts to have them exchanged or transferred to Batković, and his utterance of deep concern about the entire situation in his conversation with Obrenović on 23 July 1995.

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4035 Trial Judgement, para. 1908.
4036 Trial Judgement, paras 1908-1911.
4037 Trial Judgement, paras 1907, 1987-1989.

1397. Having established that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that **Pandurević** lacked the intent to carry out the common purpose of the JCE, the Appeals Chamber does not find it necessary to analyse the Prosecution's challenges to the Trial Chamber's findings regarding **Pandurević**'s contribution to the common purpose of the JCE to Murder.[4038]

(c) Conclusion regarding Pandurević's membership in the JCE to Murder

1398. Based on the foregoing, and considering that in seeking to reverse an acquittal based on an error of fact there is a burden on the Prosecution to show that "all reasonable doubt of the accused's guilt has been eliminated",[4039] the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that **Pandurević** was not a participant in the JCE to Murder. Accordingly, the Appeals Chamber dismisses its sub-ground of appeal 1(a).

### 6. "Opportunistic" killings (third category JCE)

1399. The Trial Chamber found that **Beara** was liable pursuant to JCE III for the "opportunistic" killings that occurred in Bratunac, Potočari, the Petkovci School, and at the Kravica Supermarket.[4040] He was found guilty of committing, *inter alia*, the crimes of murder as a violation of the laws or customs of war as well as murder and persecution as a crimes against humanity.[4041] In reaching this conclusion, the Trial Chamber found that: (1) it was foreseeable to him that the "opportunistic" killings would occur in addition to the large-scale executions; (2) those "opportunistic" killings were a probable consequence of the JCE to Murder; (3) when he participated in the JCE to Murder, **Beara** willingly took this risk;[4042] and (4) it was foreseeable to **Beara** that "opportunistic" killings would be carried out with persecutory intent.[4043] The following section will address **Beara**'s challenges to these findings.

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4038 See Prosecution's Appeal Brief, paras 55-84; Prosecution's Reply Brief, paras 33-44.

4039 See *supra*, para. 21.

4040 Trial Judgement, paras 1303-1304. The Appeals Chamber considers that with respect to the JCE to Murder, it would have been more legally precise to adjudicate the "opportunistic" killings under JCE I and not under JCE III. In this context, the Appeals Chamber recalls that the Trial Chamber found that there was a plan "to murder the able-bodied Bosnian Muslim males from Srebrenica, and that [the plurality of persons in the JCE to Murder] participated in the common purpose and shared the intent to murder". (Trial Judgement, para. 1072, emphasis added). The Appeals Chamber also recalls that under JCE I, an "accused must both intend the commission of the crime and intend to participate in the common plan aimed at its commission". (*Brđanin* Appeal Judgement, para. 365) In this context, the Appeals Chamber considers that the members of the JCE to Murder intended to kill able-bodied Bosnian Muslim males from Srebrenica regardless of whether such killings occurred at planned execution sites or elsewhere, as this was in fact the common purpose of the JCE to Murder. However, as the Prosecution only charged these killings under JCE III, which is a less stringent mode of liability than JCE I, this assessment of the Appeals Chamber in no way disturbs the convictions of the Trial Chamber. Thus, the analysis of the Appeals Chamber related to "opportunistic" killings will be restricted to JCE III. See also *supra*, fn. 297.

4041 Trial Judgement, paras 1327, 1332, 2105.

4042 Trial Judgement, para. 1304.

4043 Trial Judgement, para. 1332.

(a) Beara's Ground 18

(i) Whether the Trial Chamber failed to provide a reasoned opinion

1400. **Beara** submits that the Trial Chamber failed to provide a reasoned opinion for the "conclusion about [his] liability for certain opportunistic killings".[4044] In this regard he asserts that the main inference for the Trial Chamber's conclusion was drawn from the finding that he was an active participant in the JCE to Murder, a finding that he maintains is not based on reliable evidence.[4045]

1401. The Prosecution responds that the Trial Chamber provided a reasoned opinion and that it was not obliged to articulate every step of its reasoning, particularly as the impugned finding was based on evidence and findings set out in detail in other parts of the Trial Judgement.[4046]

1402. The Appeals Chamber recalls that an appellant claiming an error of law on the basis of the lack of a reasoned opinion must identify the specific issues, factual findings, or arguments that the Trial Chamber is said to have failed to address and to explain why this omission invalidated the decision. **Beara**'s vague submission has failed to meet this requirement. In this regard, the Appeals Chamber emphasises that the *only* support **Beara** advances is a reference to arguments submitted under his ground of appeal 15 that have already been dismissed.[4047] Nevertheless, although the argument is not clearly developed, the Appeals Chamber will consider in more detail below whether the Trial Chamber provided a reasoned opinion with respect to the existence of a link between **Beara** and the principal perpetrators of the "opportunistic" killings.

(ii) Whether the Trial Chamber erroneously relied on inferences

1403. **Beara** nominally challenges the Trial Chamber's use of inferences "to conclude that Mladić as a Commander must have given [the] authorisation and order for [the] killing operation, while [the] Security Branch organized and implemented [the] murder operation".[4048] The Prosecution responds that **Beara** ignores the abundant direct evidence showing that the Security Branch organised and implemented the murder operation.[4049]

1404. The Appeals Chamber recalls that a trial chamber may rely on either direct or circumstantial evidence to underpin its findings.[4050] **Beara** does not attempt to demonstrate that no reasonable trier

4044 Beara's Appeal Brief, para. 208.
4045 Beara's Appeal Brief, para. 208, referring to **Beara**'s ground of appeal 15.
4046 Prosecution's Response Brief (Beara), para. 217.
4047 See *supra*, paras 1230, 1233, 1238, 1245, 1250, 1259, 1290-1291.
4048 Beara's Appeal Brief, para. 205 (internal reference omitted).
4049 Prosecution's Response Brief (Beara), para. 215.
4050 See *supra*, note 2791.

of fact could have reached, as the only reasonable inference, the Trial Chamber's conclusion. His argument is thus dismissed.

(iii) Whether the Trial Chamber erred in defining the plurality of persons

1405. The Trial Chamber concluded that "there was a plan involving a plurality of persons to murder the able-bodied Bosnian Muslim males from Srebrenica".[4051] In reaching this conclusion, it noted that: (1) the plan to murder "emanated from the highest echelons of the VRS Main Staff, including Mladić"; (2) "[t]he VRS Security Branch planned, organised and implemented the murder operation"; and (3) "[t]he Drina Corps, MUP, Bratunac Brigade and Zvornik Brigade, along with other units [such as the civilian police, the Zvornik Brigade Battalions, the Zvornik Brigade Military Police, and the 10th Sabotage Detachment], were also implicated in the murder operation".[4052] However, the Trial Chamber qualified these conclusions by holding that: (1) "various Battalion, Brigade and Corps Commanders, forces and individual members were drawn into the plan as participants and perpetrators";[4053] (2) "[w]hile the evidence does not permit an exact determination as to who were participants and who were perpetrators, it is clear that individual units from across the VRS worked together in the implementation of the common purpose";[4054] and (3) it did "not have evidence in respect of each killing site to determine whether the physical perpetrators of each mass execution were themselves members of the JCE".[4055]

1406. **Beara**, relying on the *Krajišnik* Appeal Judgement, asserts that the Trial Chamber's conclusion on his responsibility for JCE III is "impermissibly vague as to the question [of] who were the JCE members and also erroneously unspecific".[4056] In this regard, he highlights the Trial Chamber's findings that various parties were drawn into the plan and that the evidence did not permit an exact determination as to who were participants and who were perpetrators in the common purpose.[4057]

1407. The Prosecution responds that the Trial Chamber's discussion of the membership of the JCE to Murder was not impermissibly vague and argues that once the plurality of persons was identified it was unnecessary to name every other JCE member.[4058] In this respect, the Prosecution argues that

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4051 See Trial Judgement, para. 1072.
4052 Trial Judgement, para. 1072. See Trial Judgement, paras 1063-1065; *supra*, para. 1052.
4053 Trial Judgement, para. 1070.
4054 Trial Judgement, para. 1065.
4055 Trial Judgement, para. 1074. Although this finding is made in the next section of the Trial Judgement, the Appeals Chamber considers that it is relevant to the present analysis.
4056 Beara's Appeal Brief, para. 205. See Beara's Reply Brief, para. 83.
4057 Beara's Appeal Brief, para. 205.
4058 Prosecution's Response Brief (Beara), para. 213. The Prosecution distinguishes the *Krajišnik* case from the present case on the basis that, *inter alia*, the Trial Chamber specified the precise temporal scope of the JCE to Murder, and its geographical ambit. Prosecution's Response Brief (Beara), para. 214.

the physical perpetrators of the "opportunistic" killings were all BSF members used to carry out the JCE to Murder, therefore whether they "were JCE members or simply tools" is irrelevant.[4059]

1408. At the outset, the Appeals Chamber notes that, although the impugned findings concerning membership in the JCE to Murder have been relied on to establish **Beara**'s responsibility under both JCE I and JCE III, they will be addressed in this chapter, since **Beara** has raised them here.

1409. Turning to the case at hand, after a detailed narrative of how the plan to murder was implemented and by whom,[4060] the Trial Chamber concluded that "there was a plan involving a plurality of persons to murder the able-bodied Bosnian Muslim males from Srebrenica".[4061] In reaching this conclusion, the Trial Chamber identified categories or groups of individuals who were involved in the murder operation, including, *inter alia*, the VRS Main Staff, the VRS Security Branch, the Drina Corps, MUP forces, and the Bratunac and Zvornik Brigades.[4062] The Appeals Chamber observes that in addition to these findings, in the individual criminal responsibility section of the Trial Judgement, **Popović**, **Beara**, and **Nikolić** were held to be participants in the JCE to Murder.[4063] It also recalls that Mladić was a participant in the JCE to Murder as well.[4064] In identifying these individuals, the Appeals Chamber considers that the Trial Chamber fulfilled the requirement of establishing that a plurality of persons shared the common criminal purpose.[4065]

1410. The Appeals Chamber further observes that the Trial Judgement implies that the membership of the JCE to Murder extended beyond those explicitly found to be participants.[4066] The Trial Chamber referred to categories or groups of individuals who were involved in the murder operation, but acknowledged that it was unable to distinguish between those who were participants in the JCE and those whose involvement was limited to being either an intermediary or a principal perpetrator.[4067] Consequently, when addressing **Beara**'s related challenges, the Appeals Chamber will only assess whether the required link was established between the principal perpetrators and either **Popović**, **Beara**, **Nikolić**, or Mladić.

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4059 Prosecution's Response Brief (Beara), para. 213.
4060 Trial Judgement, paras 1055-1072.
4061 See Trial Judgement, para. 1072. See *supra*, para. 1405.
4062 Trial Judgement, paras 1063-1065, 1072. See *supra*, para. 1405.
4063 Trial Judgement, paras 1168, 1302, 1392. See *supra*, para. 1031.
4064 See *supra*, para. 1052.
4065 *Đorđević* Appeal Judgement, para. 141; *Tadić* Appeal Judgement, para. 227.
4066 Trial Judgement, paras 1065-1072.
4067 Trial Judgement, paras 1063-1065.

(iv) Alleged error in linking perpetrators of "opportunistic" killings to a member of the JCE to Murder

1411. The Trial Chamber found that "opportunistic" killings occurred in three locations in Bratunac, namely: (1) where the BSF took approximately 40 to 80 Bosnian Muslim prisoners from the hangar behind the Vuk Karadžić School and killed them on 12 and 13 July 1995;[4068] (2) where "VRS military policemen and soldiers" killed one mentally handicapped man on 13 July 1995;[4069] and (3) where the BSF killed an unknown number of Bosnian Muslim prisoners inside and outside the Vuk Karadžić School between the evening of 13 July and the morning of 15 July 1995.[4070] "Opportunistic" killings were also found to have occurred in two locations in Potočari, namely: (1) near the White House, where on 13 July 1995 the BSF killed one Bosnian Muslim man;[4071] and (2) in a field near a stream, about 500 metres away from the DutchBat compound, where on 13 July 1995 the BSF killed nine Bosnian Muslim men.[4072] The Trial Chamber also found that "opportunistic" killings occurred at the Petkovci School on 14 July 1995 where the BSF shot and killed several Bosnian Muslim men.[4073] Finally, the Trial Chamber found that "opportunistic" killings occurred at the Kravica Supermarket during the night of 13 to 14 July 1995 where the BSF killed an unknown number of Bosnian Muslim prisoners who were detained in trucks nearby.[4074]

1412. **Beara** submits that the Trial Chamber erred in finding that the necessary link between principal perpetrators of the "opportunistic" killings and himself existed.[4075] He asserts that no evidence was presented to support this conclusion.[4076]

1413. The Prosecution responds that the "opportunistic" killings were sufficiently linked to **Beara**, as a member of the JCE to Murder, since they were perpetrated by the BSF in the course of implementing the murder operation, and that **Beara** fails to show any error.[4077]

1414. The Appeals Chamber reiterates that JCE members can incur liability for crimes committed in furtherance of the common plan either where the principal perpetrator of the crime is a JCE member, or where the crime can be imputed to at least one JCE member and that this member – when using the principal perpetrators – acted in accordance with the common objective. Where the principal perpetrator is not found to be a JCE member, factors indicative of this link between

4068 Trial Judgement, paras 452, 455, 794.
4069 Trial Judgement, paras 457, 794.
4070 Trial Judgement, paras 463, 794.
4071 Trial Judgement, paras 361, 794.
4072 Trial Judgement, paras 359, 794.
4073 Trial Judgement, paras 497, 794.
4074 Trial Judgement, paras 449, 794, 1303.
4075 Beara's Appeal Brief, intro before para. 204.
4076 Beara's Appeal Brief, para. 207. See also Beara's Appeal Brief, para. 206.
4077 Prosecution's Response Brief (Beara), para. 216. See Appeal Hearing, AT. 245-250 (3 Dec 2013).

principal perpetrator and a JCE member include "evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime".[4078]

1415. With respect to the principal perpetrators, the Appeals Chamber notes that when entering the initial findings on the "opportunistic" killings, the Trial Chamber did not always specify whether the principal perpetrators were VRS or MUP forces – frequently they were attributed to the BSF.[4079] However, the Trial Chamber's subsequent finding, that "the killings by VRS soldiers in Potočari, Bratunac, at the Petkovci School and at the Kravica Supermarket were foreseeable consequences of the plan to kill all the able-bodied Bosnian Muslim males from Srebrenica"[4080] appears to attribute the "opportunistic" killings specifically to the VRS. The Appeals Chamber considers that the unreferenced finding that these killings were committed by the VRS is erroneous.

1416. With respect to the JCE members, the Appeals Chamber observes that **Popović**, **Beara**, **Nikolić**, and Mladić, all participants in the JCE to Murder, were also all VRS members.[4081] In view of their rank and position within the chain of command,[4082] the Appeals Chamber considers that in the cases where the "opportunistic" killings were perpetrated by VRS members, such as the mentally handicapped man killed by "VRS military policemen and soldiers",[4083] the link between JCE members and the principal perpetrators is sufficiently clear. Accordingly, the Appeals Chamber dismisses **Beara**'s argument with respect to the killing of the mentally handicapped man.

1417. The situation is somewhat different with respect to the "opportunistic" killings perpetrated by the BSF. The Appeals Chamber recalls that, although the Trial Chamber found that the BSF consisted of two components, the VRS and the MUP forces,[4084] the Trial Chamber's findings are such that it is not possible to determine whether the principal perpetrators of these killings were members of the VRS, the MUP, or a combination of both.[4085] As these findings could be construed as allowing the principal perpetrators of these crimes to come exclusively from the MUP, the Appeals Chamber considers that it was incumbent upon the Trial Chamber to clearly set out how it established the link between the JCE members, who were all VRS members,[4086] and the principal perpetrators. Given the necessity of this finding for the imputation of liability to members of the

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4078 See *supra*, para. 1050.
4079 Trial Judgement, paras 359, 361 (findings about killings in Potočari), 449 (findings about killings at the Kravica Supermarket), 452, 455, 463 (findings about killings in Bratunac), 497 (findings about killings at the Petkovci School), 794 (finding that the "killings were perpetrated by Bosnian Serb Forces"). See *supra*, para. 1411.
4080 Trial Judgement, para. 1082.
4081 See *supra*, paras 1031, 1052.
4082 See *supra*, paras 1031, 1052.
4083 Trial Judgement, para. 457.
4084 See *supra*, para. 1030.
4085 *Cf. supra*, para. 1048.
4086 See *supra*, para. 1416.

JCE, the Appeals Chamber considers that the Trial Chamber's failure to further elaborate on the link with respect to the killings in Bratunac, near the Kravica Supermarket, in Potočari, and at the Petkovci School constitutes a failure to give a reasoned opinion. In light of this error of law, the Appeals Chamber will analyse the Trial Chamber's factual findings to determine whether they would allow a reasonable trier of fact to establish the necessary link.

a. The Bratunac killings

1418. The Trial Chamber found that the BSF killed approximately 40 to 80 Bosnian Muslim prisoners from the hangar behind the Vuk Karadžić School on 12 and 13 July 1995,[4087] and an unknown number of Bosnian Muslim prisoners inside and outside the Vuk Karadžić School between the evening of 13 July and the morning of 15 July 1995.[4088] The Appeals Chamber observes that the Trial Chamber made findings about the knowledge and/or involvement of **Popović**, **Beara**, Mladić, and the VRS units in these "opportunistic" killings. It found that, during the 12 July Conversation, after **Popović** explained the murder operation to M. Nikolić and asked for his help, M. Nikolić suggested that the Vuk Karadžić School and the hangar in Bratunac could be used to detain the Bosnian Muslim males.[4089] On 13 July 1995, some Bosnian Muslim men taken to the Vuk Karadžić School were escorted by the Bratunac Brigade Military Police.[4090] An hour after Mladić left the Nova Kasaba Football Field,[4091] the prisoners detained there were transported by the Military Police of the 65th Protection Regiment – a unit closely connected to Mladić and **Beara**[4092] – and handed over to the civilian police who were awaiting them at the Vuk Karadžić School.[4093] That same day two meetings were held at the Bratunac Brigade Headquarters: in the morning Mladić, **Popović**, Vasić, and Krstić met and discussed the organisation of VRS and MUP forces;[4094] and in the evening M. Nikolić attended a meeting where it was decided that the Bosnian Muslim men in and around Bratunac should continue to be guarded by VRS and MUP forces.[4095] Finally, that evening, **Beara** and Čelanović walked to the Vuk Karadžić School and the stadium where they saw the vehicles with detained Bosnian Muslim men.[4096]

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4087 Trial Judgement, paras 452, 455, 794. See *supra*, para. 1411.
4088 Trial Judgement, paras 463, 794. See *supra*, para. 1411.
4089 Trial Judgement, para. 280. See Trial Judgement, para. 286.
4090 Trial Judgement, para. 340. See also *supra*, note 3061, referring to the role of the Bratunac Brigade Military Police in the transportation of Bosnian Muslims out of Potočari and the separation and detention of the able-bodied Bosnian Muslim men.
4091 Trial Judgement, paras 394-395, finding that Mladić was present and left an hour before the prisoners boarded the buses. For further details concerning Mladić's membership in the JCE to Murder, see *supra*, para. 1052.
4092 Trial Judgement, para. 133, finding that Mladić would issue orders regarding the disposition of the Military Police Battalion of the 65th Protection Regiment and that **Beara** would make proposals to Mladić as to its use. See also *supra*, note 3061.
4093 Trial Judgement, para. 395.
4094 Trial Judgement, para. 1100. See *supra*, para. 1056.
4095 Trial Judgement, para. 406. See *supra*, para. 1056.
4096 Trial Judgement, para. 407.

1419. The Appeals Chamber finds that, in light of these findings, a reasonable trier of fact could have established a link between the JCE members – **Popović**, **Beara**, and Mladić – and the perpetrators who killed the Bosnian Muslim prisoners who were taken from the hangar behind the Vuk Karadžić School on 12 and 13 July 1995, on one hand, and those who killed the Bosnian Muslim prisoners inside and outside the Vuk Karadžić School between the evening of 13 July 1995 and the morning of 15 July 1995, on the other hand.

b. The Kravica Supermarket killings

1420. The Trial Chamber found that the BSF killed an unknown number of Bosnian Muslim prisoners who were detained on trucks near Kravica Supermarket during the night of 13 to 14 July 1995.[4097] The Appeals Chamber recalls that the Trial Chamber made findings about the knowledge and/or involvement of **Popović**, Mladić, and the VRS units in these "opportunistic" killings. In this regard, the Appeals Chamber notes that the Trial Chamber found that before being sent to Kravica and spending the night between 13 and 14 July 1995 on one of the trucks parked near the Kravica Supermarket, PW-116 was detained at the Nova Kasaba Football Field where the prisoners were guarded by "a total of about 100 military policemen of the 65th Protection Regiment".[4098]

1421. As Kravica village is located along the Bratunac-Konjević Polje Road, approximately midway between Bratunac and Konjević Polje, the Trial Chamber's findings about the operation carried out by the BSF on 13 July 1995 along this road are of particular importance.[4099] The Appeals Chamber emphasises that the Trial Chamber found that the custodial sites along the Bratunac-Konjević Polje Road on 13 July 1995 were not distinct sites with separate forces responsible for each, but rather "a single geographic area [...] where different units of the [BSF], blended together, and had joint custody of the prisoners".[4100] Thus, when the Trial Chamber's findings are read together, it becomes clear that when PW-116 left the Nova Kasaba Football Field – where prisoners were guarded by VRS units – to go to Kravica, PW-116 remained in the "joint custody" of these blended forces.[4101]

1422. With respect to the knowledge and/or involvement of JCE members, the Appeals Chamber notes that the Trial Chamber found that Mladić arrived at the Nova Kasaba Football Field and shouted at the prisoners while PW-116 was being detained there[4102] and that **Popović** went along the Bratunac-Konjević Polje Road on 13 July 1995 and knew about the operation along this road to

4097 Trial Judgement, paras 449, 794. See *supra*, para. 1411.
4098 Trial Judgement, para. 393. See Trial Judgement, paras 392, 395, 397. See also *supra*, notes 3061, 4092.
4099 See Ex. P02111, "Map-Zvornik Area".
4100 Trial Judgement, para. 1548. See also *supra*, paras 1043, 1054.
4101 See Trial Judgement, paras 393, 1548.

capture and detain Bosnian Muslim males.[4103] The Appeals Chamber considers that, in light of these findings, a reasonable trier of fact could have established a link between the JCE members, particularly **Popović** and Mladić, and the perpetrators of the Kravica Supermarket killings.

c. The Potočari killings

1423. With respect to the Bosnian Muslim man who was killed near the White House, the Appeals Chamber observes that the Trial Chamber found that in the afternoon of 12 July 1995, BSF members, led by Mladić's bodyguard, were seen marching off behind the White House.[4104] The Trial Chamber also found that Mladić refused Witness Kingori entry into the White House and ignored him when he complained about the detention conditions and the overcrowding of the Bosnian Muslim men.[4105] The Appeals Chamber therefore considers that these findings would allow a reasonable trier of fact to establish a link between Mladić and the perpetrators of the White House killings.

1424. Turning to the killing of nine Bosnian Muslim men in a field near the DutchBat compound,[4106] the Appeals Chamber observes that aside from finding that they were killed by the BSF, the Trial Chamber made few other findings specific to the perpetrators of this incident. In this respect, the Trial Chamber found that after midday on 13 July 1995, DutchBat officers went to investigate rumours they had heard that Bosnian Muslim men had been killed.[4107] Near a stream, about 500 metres away from the DutchBat compound, nine dead male bodies were discovered that: (1) were in civilian clothes; (2) were still warm, without flies around them; and (3) still had blood flowing from small-calibre gunshot wounds in the back, in the vicinity of the heart.[4108] The Trial Chamber found that "[t]here were no blood trails on the ground".[4109] One of the DutchBat officers saw IDs lying close to the bodies but did not take them as the DutchBat officers came under fire from the BSF.[4110] From these findings, the Appeals Chamber is satisfied that a reasonable trier of fact could have found that the killings occurred in the morning of 13 July 1995 and that the nine men were killed in the location where they were found. Given the time and location of the killings, the Appeals Chamber notes that there are several findings concerning the events of 12 and 13 July 1995 in Potočari generally, and in particular near the DutchBat compound, from which the link between the JCE members and the perpetrators can be reasonably inferred.

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4102 Trial Judgement, paras 393-394. See also *supra*, para. 1055.
4103 Trial Judgement, para. 1102. See also *supra*, para. 1055.
4104 Trial Judgement, para. 328.
4105 Trial Judgement, para. 330.
4106 Trial Judgement, paras 359, 794.
4107 Trial Judgement, para. 354.
4108 Trial Judgement, para. 355. See also Trial Judgement, paras 794.2, 795 (finding that like the other killings in Potočari the men were "taken to an execution site, where they were lined up and shot").
4109 Trial Judgement, para. 355.
4110 Trial Judgement, paras 354, 356.

1425. First, the Appeals Chamber takes note that the killings took place near a stream, about 500 metres from the DutchBat compound, and that the BSF had control over this area at the time the killings were perpetrated. In this regard, the Trial Chamber found that in the morning of 12 July 1995, the BSF, including both VRS and MUP forces, approached Potočari and the area of the DutchBat compound from all directions. In a report sent that morning, Vasić stated that "joint police forces were advancing towards Potočari with the goal of 'taking UNPROFOR personnel prisoner, surrounding the entire civilian population and cleansing the area of enemy troops'".[4111] The Appeals Chamber therefore finds that both the VRS and the MUP forces co-operated and operated in Potočari.

1426. Second, the Appeals Chamber observes that the Trial Chamber made specific findings that demonstrate that JCE members and/or forces under their control were present in Potočari at the time. In this regard, the Appeals Chamber recalls that the Trial Chamber found that the plan to murder emanated from the highest echelons of the VRS Main Staff, including Mladić, and that such a massive operation involving the participation of VRS members from the Main Staff down, could not have been undertaken without Mladić's authorisation and order.[4112] In particular, the Trial Chamber found that Mladić was "constantly moving through the area" during the separation and transportation of Bosnian Muslim males,[4113] and that VRS officers, including Mladić, Krstić, Radislav Janković, **Popović**, Svetozar Kosorić, M. Nikolić, Zeljko Kerkez, Chief of the Department for Traffic and Transportation Service of the Main Staff, Colonel Acamović, and Colonel Krsmanović, Chief of the Transportation Service of the Drina Corps, were present in Potočari during the process of removal of the Bosnian Muslim population.[4114] The Appeals Chamber considers that, in light of these findings, a reasonable trier of fact could have established a link between the perpetrators of these killings and Mladić, a member of the JCE to Murder.

d. The Petkovci School killings

1427. Turning to the Bosnian Muslim men who were shot and killed during the detentions at the Petkovci School on 14 July 1995,[4115] the Appeals Chamber observes that the Trial Chamber made findings about the knowledge and/or involvement of **Beara** and other VRS members or units in these killings. The Trial Chamber found that in the morning of 14 July 1995, Jokić, the Zvornik Brigade Duty Officer, telephoned Witness M. Milošević, the Deputy Commander of the 6th Battalion of the Zvornik Brigade, to inform him that Bosnian Muslim prisoners would be brought to the Petkovci School accompanied by "security". Later that afternoon, M. Milošević notified

4111 Trial Judgement, para. 302.
4112 Trial Judgement, paras 1071-1072. See *supra*, para. 1052.
4113 Trial Judgement, para. 322.
4114 Trial Judgement, para. 343.

Stanišić, the Zvornik Brigade Battalion Commander, of this.[4116] That same afternoon, Jokić called Stanišić and instructed him to notify **Beara**, who it was said could be found around the Petkovci School, to report to the Standard Barracks. The message was relayed to **Beara** who was near the Petkovci School. Notably, four or five Military Police officers were seen near the Petkovci School, which itself was being guarded by soldiers.[4117] The Appeals Chamber considers that, in light of these findings, a reasonable trier of fact could have established a link between the perpetrators of these killings and **Beara**, a member of the JCE to Murder.

e. Conclusion

1428. The Appeals Chamber therefore finds that, based on the circumstantial evidence above, a reasonable trier of fact could have concluded that the only reasonable conclusion is that the BSF members who were involved in the "opportunistic" killings of these Bosnian Muslim men were working in close co-operation with the VRS units whose ultimate superior was Mladić[4118] and in some instances were working with either **Beara**[4119] or **Popović**.[4120] As set out above, the Appeals Chamber further notes that at least one JCE member was present near the Vuk Karadžić School, the Kravica Supermarket, the White House, and Petkovci on the day these killings took place.[4121] The Appeals Chamber is satisfied that, in light of these findings, a reasonable trier of fact could have found a link between the perpetrators of these "opportunistic" killings and Mladić, **Beara**, or **Popović**, who were all members of the JCE to Murder. The Appeals Chamber thus considers that the Trial Chamber's failure to provide a reasoned opinion establishing these links did not invalidate the Trial Judgement.

(v) Alleged error in finding that Beara possessed the requisite *mens rea*

1429. **Beara** also presents several challenges to the Trial Chamber's findings in relation to the *mens rea* requirements for JCE III. He asserts that the Trial Chamber erred in finding that it was foreseeable to him that the "opportunistic" killings would occur and that he willingly took that risk.[4122] More specifically, **Beara** submits that: (1) no evidence was presented that it was foreseeable to him that the "opportunistic" killings would occur;[4123] (2) no evidence was presented that he was "familiar that opportunistic killings [were] being committed in Bratunac, Petkovci

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4115 Trial Judgement, paras 497, 794. See *supra*, para. 1411.
4116 Trial Judgement, para. 494.
4117 Trial Judgement, para. 498.
4118 See *supra*, paras 1418, 1423, 1426.
4119 See *supra*, paras 1418, 1427.
4120 See *supra*, paras 1418, 1426.
4121 See *supra*, paras 1418 (the Vuk Karadžić School), 1420 (the Kravica Supermarket), 1423 (the White House), 1427 (Petkovci).
4122 Beara's Appeal Brief, intro before para. 204. See Beara's Reply Brief, paras 82, 84.
4123 Beara's Appeal Brief, para. 204. See Beara's Reply Brief, para. 82.

School and Kravica supermarket" on 13 July 1995; (3) the only reasonable conclusion from the evidence is that he did not know who was involved in guarding the prisoners that were held in these locations";[4124] and (4) no evidence was presented that he was "aware of the perpetrators" of these killings.[4125]

1430. The Prosecution responds that **Beara** has failed to show an error and that the Trial Chamber reasonably found that the *mens rea* requirements for JCE III were met.[4126] It submits that **Beara** was aware that members of the VRS and MUP forces were guarding the Bosnian Muslim prisoners and that it was possible that they would murder the prisoners during their capture and detention at sites other than the planned execution sites.[4127]

1431. The Appeals Chamber recalls that:

> for convictions under the third category of JCE, the accused can only be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable that such a crime might be perpetrated by one or [more of the persons used by him (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose] and (ii) the accused willingly took that risk (*dolus eventualis*). The crime must be shown to have been foreseeable to the accused in particular.[4128]

1432. At the outset, the Appeals Chamber observes that the Trial Chamber correctly set out the *mens rea* for JCE III, *i.e.* whether it was foreseeable that such a crime *might* be perpetrated.[4129] However, when applying the legal standard to the facts of the case it used a higher standard of foreseeability thus requiring that it was foreseeable that the "opportunistic" killings *would* be perpetrated.[4130] The Appeals Chamber emphasises that the JCE III *mens rea* standard does not require an understanding that the "deviatory crime would *probably* be committed"[4131] but recognises instead that the possibility that "a crime could be committed is sufficiently substantial as to be foreseeable to an accused".[4132] Thus the Appeals Chamber will consider **Beara**'s submissions with the correct standard in mind. In other words, in order to succeed in his challenge **Beara** needs to show that a reasonable trier of fact could not have found that it was foreseeable to him that these killings *might* be committed.

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4124 Beara's Appeal Brief, para. 206.
4125 Beara's Appeal Brief, para. 207.
4126 See Prosecution's Response Brief (Beara), paras 210-212, 216.
4127 Prosecution's Response Brief (Beara), para. 216.
4128 *Brđanin* Appeal Judgement, para. 365 (footnotes and emphases omitted). See *Brđanin* Appeal Judgement, para. 411.
4129 Trial Judgement, para. 1030.
4130 Trial Judgement, paras 1082, 1304.
4131 *Đorđević* Appeal Judgement, para. 907, citing Karadžić JCE III Foreseeability Decision, para. 18 (emphasis in original).
4132 *Đorđević* Appeal Judgement, para. 907, citing Karadžić JCE III Foreseeability Decision, para. 18; *Šainović et al.* Appeal Judgement, para. 1557. See *Šainović et al.* Appeal Judgement, paras 1081, 1538, 1575.

1433. The Appeals Chamber considers that the Trial Chamber was not required to find that **Beara** was "familiar" with information that the "opportunistic" killings were being committed, nor was it required to find that **Beara** knew the perpetrators' identities or was himself present at the execution sites. It was sufficient for the Trial Chamber to satisfy itself that **Beara** was aware that the crimes might be committed either by a JCE member or persons linked to a JCE member.[4133] The Appeals Chamber recalls, in this respect, the Trial Chamber's finding that by the morning of 12 July 1995, **Beara** was aware of and implicated in the plan to murder.[4134] It also found that the Security Branch of the VRS had been tasked with a central co-ordinating role in the implementation of the murder operation and that **Beara**, as the Chief of Security for the VRS Main Staff, played a key role in it.[4135] In these circumstances, the Appeals Chamber considers that a reasonable trier of fact could have inferred that **Beara** was aware that the BSF used by him and/or other JCE members to execute the murder plan were guarding the Bosnian Muslim prisoners.[4136]

1434. The Appeals Chamber also observes that the Trial Chamber's finding that it was foreseeable to **Beara** that the "opportunistic" killings would occur[4137] was based on several pieces of circumstantial evidence. The Trial Chamber found that the murder operation began with the separation, by the BSF, of the Bosnian Muslim men from the woman and children gathered at Potočari on 12 July 1995,[4138] and that the "opportunistic" killings, all of which took place sometime between 12 July 1995 and the morning of 15 July 1995 in, *inter alia*, Bratunac, the Petkovci School, and Potočari, were perpetrated by the BSF.[4139] The Trial Chamber concluded that, within the context of the plan to kill a large number of able-bodied Bosnian Muslim males, it was foreseeable to the members of the JCE to Murder that Bosnian Muslim males would not be killed only at locations designated by the VRS as execution sites in accordance with the plan, but that killings would also occur as the men were detained and captured.[4140] In reaching its conclusion, the Trial Chamber also pointed out that: (1) **Beara** was an active member of the JCE to Murder;[4141] (2) the murder operation occurred in a time of chaos and involved soldiers with personal motives of revenge;[4142] and (3) a huge number of men were transported and detained with the intent to murder

4133 See *supra*, para. 1050.
4134 Trial Judgement, para. 1299. See also *supra*, para. 937.
4135 Trial Judgement, para. 1299.
4136 See Trial Judgement, paras 1050, 1054, 1056, 1063, 1072.
4137 Trial Judgement, para. 1304.
4138 Trial Judgement, para. 1050.
4139 Trial Judgement, paras 359, 361, 449, 452, 455, 457, 463, 497.
4140 Trial Judgement, para. 1082.
4141 Trial Judgement, paras 1302, 1304.
4142 See, *e.g.*, Trial Judgement, paras 1053, 1062, 1069, 1257, 1262, 1266, 1278, 1280, 1283, 1304.

them.[4143] **Beara**'s argument that no evidence was presented that it was foreseeable to him that the "opportunistic" killings "would occur" is therefore without merit.

1435. The Appeals Chamber thus considers that, although **Beara** disagrees with the Trial Chamber's conclusion that it was foreseeable to him that the "opportunistic" killings could occur, he has failed to demonstrate that the Trial Chamber committed any discernible error in reaching it. The Appeals Chamber also notes that **Beara** does not present any argument to support his disagreement with the second prong of the Trial Chamber's finding on his *mens rea* for JCE III – namely that he willingly took the risk that the "opportunistic" killings might be committed.[4144] These aspects of **Beara**'s ground of appeal 18 are therefore dismissed.

(vi) Conclusion

1436. Based on the foregoing the Appeals Chamber dismisses **Beara**'s ground of appeal 18.

(b) Alleged error in finding Beara criminally liable for persecution as a crime against humanity through "opportunistic" killings (Ground 30)

1437. **Beara** submits that the Trial Chamber erred in finding him criminally liable pursuant to JCE III based on its finding that it was foreseeable to him that the "opportunistic" killings would be carried out with persecutory intent.[4145] He argues that the Trial Chamber committed an error of law in finding that a specific intent crime, as such, can be committed through JCE III.[4146] In this regard he submits that "neither customary law nor the Statute of the ICTY permits an accused to be convicted for a special intent crime as a principal perpetrator through [JCE III]".[4147] To support his argument, **Beara** refers to arguments advanced by the *Karadžić* Defence in a motion before the Trial Chamber hearing that case;[4148] the jurisprudence of the ICTY[4149] and other international courts;[4150] and the writings of a former ICTY Appeals Chamber Judge.[4151]

1438. The Prosecution responds that the Trial Chamber properly found **Beara** responsible for persecution as a crime against humanity through the "opportunistic" killings under JCE III.[4152] The Prosecution disputes **Beara**'s interpretation of ICTY jurisprudence and submits that the Appeals

4143 Trial Judgement, para. 1304. See Trial Judgement, paras 1050, 1056, 1058-1060, 1063-1064.
4144 See Trial Judgement, para. 1304.
4145 Beara's Appeal Brief, intro before para. 292. See Beara's Appeal Brief, para. 292.
4146 Beara's Appeal Brief, paras 292-302.
4147 Beara's Appeal Brief, para. 293.
4148 Beara's Appeal Brief, para. 293.
4149 Beara's Appeal Brief, paras 294-298.
4150 Beara's Appeal Brief, paras 299-300, referring to ICC and ECCC jurisprudence.
4151 Beara's Appeal Brief, para. 301.
4152 Prosecution's Response Brief (Beara), para. 301.

Chamber has confirmed that an accused can be convicted of specific intent crimes, including persecution, pursuant to JCE III.[4153]

1439. The Appeals Chamber notes **Beara**'s blanket adoption of arguments of a party to another trial without specifying which arguments he seeks to adopt or giving any indication of their applicability to his grounds of appeal.[4154] The Appeals Chamber will therefore not consider this submission.

1440. The Appeals Chamber recalls that it has already addressed whether liability pursuant to JCE III can attach in the context of two specific intent crimes. First, the Appeals Chamber has held that the specific intent crime of genocide and JCE III are indeed compatible.[4155] Second, the Appeals Chamber has affirmed a conviction for persecution pursuant to JCE III.[4156] The Appeals Chamber reiterates that provided the 'reasonably foreseeable and natural consequences' standard has been established, "criminal liability can attach to an accused for *any* crime that falls outside of an agreed upon joint criminal enterprise".[4157]

1441. The Appeals Chamber recalls that it is settled practice to depart from existing jurisprudence only after the most careful consideration has been given, both as to the law, including the authorities cited, and the facts.[4158] It is also recalled that the notion of "cogent reasons" encompasses considerations that are clear and compelling.[4159] On review of the authorities that **Beara** cites and the facts of this case, the Appeals Chamber finds that **Beara** has failed to demonstrate any cogent reason for departing from the Tribunal's well-established jurisprudence.

1442. With respect to jurisprudence of other international courts, the Appeals Chamber emphasises that it is not bound by it and that it may, after careful consideration, come to a different conclusion on a matter than was reached by the court being cited.[4160] **Beara**'s reliance on this jurisprudence is unpersuasive.

1443. In light of the foregoing, the Appeals Chamber considers that **Beara** has failed to show that the Trial Chamber committed an error of law in finding that the specific intent crime of persecution can be committed through JCE III. Since **Beara** does not present any argument showing how the

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4153 Prosecution's Response Brief (Beara), paras 302-304, 307. See also Prosecution's Response Brief (Beara), paras 305-306.
4154 See Beara's Appeal Brief, para. 293.
4155 *Stakić* Appeal Judgement, para. 38, referring to *Brđanin* JCE III Appeal Decision, paras 9-10. See *Đorđević* Appeal Judgement, paras 77, 83.
4156 See *Đorđević* Appeal Judgement, paras 83, 829; *Martić* Appeal Judgement, paras 183-187, 194-195, 202-205.
4157 *Brđanin* JCE III Appeal Decision, para. 9 (emphasis added). See *Đorđević* Appeal Judgement, paras 919-920.
4158 *Đorđević* Appeal Judgement, para. 23; *Aleksovski* Appeal Judgement, para. 109.
4159 *Đorđević* Appeal Judgement, para. 24.
4160 *Hartmann* Contempt Appeal Judgement, para. 159 and references cited therein; *Čelebići* Appeal Judgement, para. 24. See *Đorđević* Appeal Judgement, para. 83. See also *infra*, para. 1674.

Trial Chamber erred in applying this principle to the facts of the case, the Appeals Chamber dismisses his other assertions in this regard. **Beara**'s ground of appeal 30 is thus dismissed in its entirety.

### 7. Conclusion

1444. The Appeals Chamber, Judge Niang dissenting, has granted **Beara**'s ground of appeal 17, in part, and **Popović**'s analogous challenges and has consequently reversed each of their convictions, insofar as they relate to the Trnovo killings, under Count 1 (genocide); Count 3 (extermination as a crime against humanity); Count 5 (murder as a violation of the laws or customs of war); and Count 6 (persecution as a crime against humanity). The Appeals Chamber, Judge Niang dissenting, has also, *proprio motu*, reversed **Nikolić**'s convictions insofar as they relate to the Trnovo killings in respect of the same counts. The impact of these findings on **Beara**'s, **Popović**'s, and **Nikolić**'s sentences, if any, will be considered in the section of this Judgement on sentencing below.

1445. The Appeals Chamber, Judge Robinson dissenting in part, has dismissed all other challenges to the Trial Chamber's findings regarding **Popović**'s, **Beara**'s, and **Nikolić**'s responsibility through their participation in the JCE to Murder. The Appeals Chamber has also dismissed the Prosecution's challenges to the finding that **Pandurević** was not a member of the JCE to Murder.

## B. Joint Criminal Enterprise to Forcibly Remove

### 1. Introduction

1446. **Miletić** presents challenges to the Trial Chamber's findings regarding his responsibility through his participation, pursuant to Article 7(1) of the Statute, in the JCE to Forcibly Remove. The Appeals Chamber will examine in turn the arguments related to **Miletić**'s: (1) role within the VRS Main Staff; (2) membership in the JCE to Forcibly Remove; (3) contribution to the JCE to Forcibly Remove; (4) *mens rea*; and (5) responsibility pursuant to JCE III.

### 2. First category Joint Criminal Enterprise

#### (a) Alleged errors concerning Miletić's role within the VRS Main Staff

##### (i) Milovanović's presence at the VRS Main Staff and Miletić's position as Stand-in Chief of Staff (Sub-grounds 2.1 in part and 9.1(a))

1447. The Trial Chamber found that the Chief of Staff of the VRS Main Staff, General Milovanović, was absent from the Main Staff at the end of 1994 and for most of 1995, and in

particular, during the period between 29 May 1995 and the end of October 1995.[4161] The Trial Chamber was not satisfied that **Miletić**, Chief of Operations and Training at the VRS Main Staff, was formally assigned as "standing in" for Milovanović ("Stand-in Chief of Staff") during the latter's absence.[4162] The Trial Chamber clarified in this respect that its findings on **Miletić**'s contribution to the JCE to Forcibly Remove were based on his role and responsibilities as established by the evidence, and not on his title.[4163]

1448. **Miletić** contends that the Prosecution's case against him was that he held two positions with separate functions – Chief of Operations and Training and Stand-in Chief of Staff – and that the allegation that he was a co-ordinator and advisor to the Commander, General Mladić, derived only from the latter position.[4164] He submits that the Trial Chamber erred by not first establishing beyond reasonable doubt: (1) when Milovanović was present at the Main Staff in 1995, emphasising the period when Directive 7 was drafted;[4165] and (2) that **Miletić** carried out the functions of Stand-in Chief of Staff only when Milovanović was absent.[4166] **Miletić** contends that, having failed to establish the above facts, the Trial Chamber imputed to him knowledge, responsibilities, and authority that belonged to Milovanović or other officers of the Main Staff.[4167]

1449. The Prosecution responds that **Miletić** has not substantiated his argument and contends that Milovanović's presence at the Main Staff at the time of the drafting of Directive 7 is irrelevant as **Miletić** would have played the same role in drafting it.[4168] The Prosecution further contends that the Trial Chamber distinguished between **Miletić**'s different functions.[4169]

1450. The underlying premise of **Miletić**'s argument is that, if Milovanović was present at the Main Staff in the period during which Directive 7 was drafted and/or during the period following its issuance until the end of May 1995, **Miletić** could not have carried out the functions associated with the position of Stand-in Chief of Staff, and therefore, the Trial Chamber would have arrived at different findings concerning **Miletić**'s participation in the JCE to Forcibly Remove. However, the Appeals Chamber considers that **Miletić**'s submissions lack specificity as to how Milovanović's presence at the Main Staff would have undermined any of the Trial Chamber's findings concerning

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4161 Trial Judgement, para. 1630.
4162 Trial Judgement, para. 1633.
4163 See Trial Judgement, para. 1634.
4164 Miletić's Appeal Brief, paras 57-62. See Miletić's Appeal Brief, para. 229 & fns 462-464.
4165 Miletić's Appeal Brief, paras 227-229; Miletić's Reply Brief, para. 79. See Appeal Hearing, AT. 482-483 (5 Dec 2013). While **Miletić** refers to the period "until 29 May 1995", the Appeals Chamber understands the period to which **Miletić** refers to be from January until 29 May 1995.
4166 Miletić's Appeal Brief, paras 61, 63; Miletić's Reply Brief, paras 14-16. See Miletić's Reply Brief, para. 79.
4167 Miletić's Appeal Brief, paras 227-229. See Miletić's Appeal Brief, para. 63; Miletić's Reply Brief, paras 78-79.
4168 Prosecution's Response Brief (Miletić), paras 146-148; Appeal Hearing, AT. 472-473 (5 Dec 2013).
4169 Prosecution's Response Brief (Miletić), paras 27-28, 148.

**Miletić**'s role in drafting Directive 7 and his knowledge of it. **Miletić** does not provide any evidentiary support for his assertion that Milovanović was present at the Main Staff for a significant part of the Indictment period, including when Directive 7 was drafted.[4170] Moreover, he neither shows that his involvement in the drafting of Directive 7 would have been in the purview of the Chief of Staff of the Main Staff, nor does he address the fact that Directive 7 was issued in his name rather than Milovanović's.[4171]

1451. As to **Miletić**'s argument that the Trial Chamber erred by not determining that he carried out functions of the Chief of Staff of the Main Staff, the Appeals Chamber observes that the Trial Chamber found that during Milovanović's absences from the Main Staff, **Miletić** took on some of his duties.[4172] As will be shown below, **Miletić** has not demonstrated any error in these factual findings.[4173]

1452. Accordingly, the Appeals Chamber dismisses the portions of sub-ground 2.1 of **Miletić**'s appeal addressed here as well as sub-ground of appeal 9.1(a).

(ii) Miletić's position (Sub-ground 9.1(d))

1453. The Trial Chamber found that in June 1995, **Miletić** was promoted to the rank of general.[4174] On the basis of the factual evidence before it, rather than on the basis of his rank, the Trial Chamber determined **Miletić**'s role and responsibilities in relation to his participation in the JCE to Forcibly Remove.[4175]

1454. **Miletić** submits that the Trial Chamber erred in assessing the evidence related to his position within the VRS Main Staff, thereby assigning him authority he did not possess and responsibilities he could not have carried out.[4176] Specifically, **Miletić** submits that he was a colonel until the end of June 1995 and that, even after becoming a general, he was inferior in rank to certain other generals of the VRS Main Staff.[4177] **Miletić** contends that the Trial Chamber neglected to note evidence showing that he: (1) was not a member of the inner circle of the VRS Main Staff; (2) was not among Mladić's close collaborators who participated in decision-making; and (3) did not participate in the sessions of the working bodies which determined RS policies.[4178]

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4170 See Miletić's Reply Brief, para. 14.
4171 See also *infra*, paras 1498-1511.
4172 Trial Judgement, para. 1630. See, *e.g.*, Trial Judgement, paras 1711-1715.
4173 See *infra*, paras 1464-1474, 1478-1481, 1587-1591, 1616-1628, 1639.
4174 Trial Judgement, para. 1622.
4175 See Trial Judgement, paras 1634, 1703-1715.
4176 Miletić's Appeal Brief, paras 241-244.
4177 Miletić's Appeal Brief, para. 242.
4178 Miletić's Appeal Brief, para. 243. See Miletić's Reply Brief, para. 85.

1455. The Prosecution responds that the Trial Chamber reasonably found that in exercising his functions within the VRS Main Staff, **Miletić** had an important impact not only on the Main Staff's functioning and operation but on the VRS as a whole, and that **Miletić** fails to show that the Trial Chamber overestimated his role and authority.[4179]

1456. The Appeals Chamber observes that **Miletić**'s only support for his contention that the Trial Chamber erred in assuming that he held the rank of general in 1995 is an introductory paragraph to the Trial Judgement.[4180] He entirely ignores the finding indicating that "[i]n June 1995, [**Miletić**] was promoted to the rank of General"[4181] as well as the findings detailing **Miletić**'s comparative rank and authority vis-à-vis other generals of the VRS Main Staff.[4182] The Appeals Chamber is satisfied that the Trial Chamber was clearly informed as to **Miletić**'s rank and position within the VRS Main Staff during the Indictment period.[4183] **Miletić** has failed to demonstrate that his responsibility was based on an erroneous assumption as to the rank he held.

1457. With respect to **Miletić**'s contentions that he was not a member of the inner circle of the Main Staff and not one of Mladić's advisors who participated in decision-making, **Miletić** draws the Appeals Chamber's attention to the testimony of Witness Trkulja,[4184] and excerpts of Mladić's 1996 New Year's celebration speech ("Mladić's New Year's Speech") in which Mladić does not name him when he lists the "inner core" of the Main Staff as those persons who helped him to take the most important decisions.[4185]

1458. **Miletić** fails to demonstrate how not being part of the "inner core", if established, would have undermined the Trial Chamber's findings concerning his participation in the common purpose. In particular, the Appeals Chamber observes that the Trial Chamber found that **Miletić**'s participation was not derived from his having a role as an inner core "decision-maker", but rather from his specific role in the process of drafting directives, in restricting humanitarian aid and UNPROFOR re-supply, and in monitoring and co-ordinating work for the VRS Main Staff.[4186] In light of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred.

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4179 Prosecution's Response Brief (Miletić), paras 165-167; Appeal Hearing, AT. 471-472 (5 Dec 2013).
4180 Trial Judgement, para. 4.
4181 Trial Judgement, para. 1622.
4182 Trial Judgement, paras 1640, 1686.
4183 Trial Judgement, para. 1711.
4184 Miletić's Appeal Brief, para. 243 & fn. 516, referring to Nedeljko Trkulja, T(F). 15127 (10 Sept 2007).
4185 Miletić's Appeal Brief, para. 243 & fns 516-517, referring to Ex. 5D01441, "Mladić's 1996 New Year's Speech Video Transcript", p. 1.
4186 Trial Judgement, paras 1704-1716. See Trial Judgement, paras 1635, 1637.

1459. In relation to his contention that there was no evidence suggesting that he participated in the sessions of the working bodies which determined RS policies,[4187] the Appeals Chamber recalls that the Trial Chamber found that **Miletić** had acquired "wide and substantive knowledge of the strategies and goals of RS" through, in particular, his participation in the Briefing[4188] which resulted in Directive 7.[4189] **Miletić** has not shown how his non-participation in these working bodies, if established, would have resulted in a miscarriage of justice.

1460. In view of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in assessing his position in the VRS. Accordingly, the Appeals Chamber dismisses sub-ground 9.1(d) of **Miletić**'s appeal.

(iii) Miletić's role as a "co-ordinator" at the VRS Main Staff (Sub-ground 9.1(c))

1461. The Trial Chamber found that considering the scale and scope of the military attack and the operations to forcibly remove the Bosnian Muslim civilian population from the Srebrenica and Žepa enclaves, co-ordination from the Main Staff level was essential. With respect to **Miletić**, the Trial Chamber found that with his in-depth knowledge of the strategies and goals of the VRS, he was at the centre of this co-ordination.[4190]

1462. **Miletić** submits that the Trial Chamber erred in finding that he was responsible for "coordination" at the VRS Main Staff.[4191] **Miletić** argues that the Trial Chamber failed to properly define the term "coordination" and, as a result, made findings which more accurately describe the role of "intermediary" or "administrative assistant".[4192] Moreover, while **Miletić** acknowledges that as Chief of the Administration for Operations and Training, he played a "coordination" role, he submits that this role "was limited to planning combat at a strategic level". In this regard, he argues that, in the absence of evidence, the Trial Chamber expanded the scope of his responsibility under the JCE to Forcibly Remove to that of a planner of "all combat activity", including "any operation of the Main Staff" and to co-ordination, in an advisory capacity, of the work of the Assistant Commanders. In respect of the latter, he challenges the Trial Chamber's reliance upon Witness Milovanović's testimony.[4193]

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4187 Miletić's Appeal Brief, para. 243 & fn. 518; Miletić's Reply Brief, para. 85.
4188 See *supra*, para. 739, defining the Briefing.
4189 Trial Judgement, para. 1648.
4190 Trial Judgement, para. 1712.
4191 Miletić's Appeal Brief, paras 236, 240, referring to Trial Judgement, paras 1635, 1662, 1672, 1678, 1682, 1688-1689, 1696, 1712, 1715, 1726.
4192 Miletić's Appeal Brief, paras 237-240.
4193 Miletić's Appeal Brief, para. 236.

1463. The Prosecution responds that **Miletić** misrepresents the Trial Chamber's findings and/or seeks to substitute his own interpretation of the evidence without showing any error.[4194]

a. Alleged error in not defining the term "co-ordination"

1464. The Appeals Chamber observes that in support of his argument, **Miletić** gives an unreferenced definition of the term "coordination", arguing that a co-ordinator must have authority and power over persons he is called upon to co-ordinate and who are expected to follow his instructions, whereas an "intermediary" has neither power nor authority.[4195]

1465. The Appeals Chamber considers this argument to be purely semantic. A common refrain in the Indictment against **Miletić** is that he monitored certain activities and then communicated information regarding these activities up and down the chain of command.[4196] Notably, the word "co-ordination" is not used to describe his role in the Indictment. The pertinent issue is whether the Trial Chamber's findings regarding **Miletić**'s role within the Main Staff conform to the nature of the participation in the JCE to Forcibly Remove that was alleged in the Indictment and not whether these findings are more accurately described by the term "intermediary" or "administrative assistant" rather than "co-ordinator".[4197]

b. Whether the findings on Miletić's "co-ordinating" role are consistent with the Indictment

1466. The evidence to which **Miletić** refers, and which is largely intercept evidence, indicates that he: (1) was to be contacted for additional orders and for confirmation of Mladić's approval in relation to an order concerning the treatment of prisoners of war ("POWs") issued on 13 July 1995 by Tolimir, Assistant Commander for Intelligence and Security;[4198] (2) ordered, on 15 July 1995, that certain equipment be dispatched to **Pandurević**;[4199] (3) was to be contacted by Krstić concerning Žepa, according to a 17 July 1995 instruction from Mladić;[4200] (4) was sought out by Mladić for updates during the course of the removal of the Bosnian Muslims from Žepa;[4201] (5) in

4194 Prosecution's Response Brief (Miletić), paras 154-164. See Appeal Hearing, AT. 470-472 (5 Dec 2013).
4195 Miletić's Appeal Brief, para. 237.
4196 Indictment, para. 75.
4197 The Appeals Chamber notes that, even if it were to regard **Miletić**'s argument as not being purely semantic, it would nonetheless fail. The Appeals Chamber observes that the plain meaning of the verb "co-ordinate" would not support his position that a co-ordinator "must have authority and power over persons he is called upon to coordinate". To "co-ordinate" is to "act in combined order for the production of a particular result". See Oxford English Dictionary (Oxford English Dictionary Online, December 2012, Oxford University Press).
4198 Trial Judgement, paras 1671-1672, referring to Ex. P00192, "Procedure on treatment of POWs, addressed to Mladić and Gvero, type-signed Savčić, 13 July 1995".
4199 Trial Judgement, para. 1678 referring to Ex. P02367c, "Intercept, 15 July 1995, 22:26 hours".
4200 Trial Judgement, para. 1682, referring to Ex. P01231a, "Intercept, 17 July 1995, 19:50 hours".
4201 Trial Judgement, para. 1696, referring to Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours".

the latter context, had authority to convey instructions to Tolimir;[4202] and (6) was asked by Mladić to do a number of tasks.[4203]

1467. As a preliminary matter, the Appeals Chamber notes that, with the exception of the intercept on 23 July 1995 ("23 July Co-ordination Intercept"),[4204] **Miletić** challenges the Trial Chamber's general interpretation of these exhibits as well as the Trial Chamber's reliance upon them in the context of its finding that he was responsible for co-ordination.[4205] In relation to the 23 July 1995 Co-ordination Intercept, he only challenges the Trial Chamber's reliance upon it in the context of its finding that he was responsible for co-ordination.[4206]

1468. Concerning the interpretation of these exhibits, with the exception of the intercept on 24 July 1995 ("24 July 1995 Intercept"),[4207] the Appeals Chamber has addressed and dismissed these challenges under ground 21 of **Miletić**'s appeal.[4208] Concerning the 24 July 1995 Intercept, the Trial Chamber concluded that this intercept "shows **Miletić**'s authority conveying instructions to Tolimir".[4209] The Appeals Chamber has considered **Miletić**'s contention that: (1) the "General" with whom Tolimir was speaking was unidentified and thus the individual concerned could have been Milovanović, Djukić, or Gvero; and (2) the intercept shows that he did not have any authority in that his instructions to Tolimir were overridden by this unidentified "General".[4210] The Appeals Chamber is of the view that Tolimir's recounting of **Miletić**'s instruction to the "General", which Tolimir was unwilling to contravene absent counter-instructions from the "General", attests to Tolimir's understanding that he was to obey the instruction until such time as it might be overridden and that this conclusion stands irrespective of whether the "General" was Mladić or another high ranking VRS officer. The Appeals Chamber therefore finds that **Miletić** has failed to show that a reasonable trial chamber could not have concluded that this intercept demonstrates **Miletić**'s authority to convey instructions to Tolimir.

1469. Concerning **Miletić**'s contention that the Trial Chamber erroneously relied upon all of these exhibits[4211] as demonstrative of his role as a "co-ordinator", the Appeals Chamber reiterates that the material issue is whether the evidence shows that **Miletić**'s role was consistent with that set out in the Indictment.[4212] The Appeals Chamber considers that the functions conveyed through these

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4202 Trial Judgement, para. 1689, referring to Ex. P01327a, "Intercept, 24 July 1995, 19:24 hours".
4203 Trial Judgement, para. 1688, referring to Ex. P01315a, "Intercept, 23 July 1995, 13:59 hours".
4204 Ex. P01315a, "Intercept, 23 July 1995, 13:59 hours" ("23 July 1995 Co-ordination Intercept").
4205 Miletić's Appeal Brief, paras 238, 417.
4206 Miletić's Appeal Brief, para. 239.
4207 Ex. P01327a, "Intercept, 24 July 1995, 19:24 hours"
4208 See *supra*, paras 405, 407, 410.
4209 Trial Judgement, para. 1689.
4210 Miletić's Appeal Brief, para. 238.
4211 See *supra*, para. 1466.
4212 See *supra*, para. 1465.

exhibits, as described above, fall within the scope of the allegations set out in the Indictment against **Miletić** concerning the nature of his participation in the JCE to Forcibly Remove.[4213] The Appeals Chamber therefore dismisses this aspect of his argument.

c. Alleged error in expanding Miletić's "co-ordinating" role

1470. **Miletić** contends that, without evidence permitting it, the Trial Chamber substituted the role of co-ordinator through planning combat at the strategic level with that of planner of "all combat activity".[4214] The Appeals Chamber observes that the Trial Chamber was well aware of the fact that the Administration for Operations and Training, headed by **Miletić**, and to which the Department for Operations belonged, planned operations at the *strategic* level.[4215] This aspect of **Miletić**'s argument is therefore dismissed.

1471. **Miletić** also refers to other Trial Chamber's findings relating to his role as a co-ordinator which he contends indicate that he planned all combat activities, expanding his role to "any operation of the Main Staff".[4216] The Appeals Chamber considers that this aspect of **Miletić**'s argument is unsubstantiated. **Miletić** refers generally to paragraphs in the Trial Judgement without clarifying the precise findings with which he takes issue. Moreover, it is not apparent that any of these paragraphs indicate that the Trial Chamber found that **Miletić**'s role included planning "any operation of the Main Staff". Accordingly, the Appeals Chamber dismisses this aspect of **Miletić**'s argument.

1472. As a further indication that the Trial Chamber unduly expanded the scope of his responsibility, **Miletić** refers to its finding that "[he] also coordinated the work of the Assistant Commanders but only in an 'advisory role'".[4217] He challenges the Trial Chamber's reliance on Milovanović's testimony to this end.[4218] The Appeals Chamber recalls that it has already dismissed **Miletić**'s challenge to Milovanović's overall credibility. In so doing, it considered **Miletić**'s argument that when Milovanović was absent from the Main Staff, he was not in a position to confirm whether **Miletić**'s role included, among other things, co-ordinating, in an advisory capacity, the work of the Assistant Commanders.[4219]

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4213 See *supra*, para. 1465; Indictment, para. 75.
4214 Miletić's Appeal Brief, para. 236.
4215 The Trial Chamber found that "[t]he Administration for Operations and Training planned operations at the strategic level, namely, those operations encompassing the entire army or the forces of two or more corps". Trial Judgement, para. 1623.
4216 Miletić's Appeal Brief, para. 236 & fn. 484, referring to Trial Judgement, paras 1662, 1712, 1715, 1726.
4217 Trial Judgement, para. 1635. See Miletić's Appeal Brief, para. 236.
4218 Miletić's Appeal Brief, para. 236.
4219 See *supra*, para. 215; Miletić's Appeal Brief, para. 411.

1473. Concerning the specific portion of Milovanović's testimony to which **Miletić** refers, the Appeals Chamber emphasises that Milovanović testified that, in his absence, **Miletić** "had to coordinate the work of assistant commanders, but not in an order-issuing sense, but rather in an advisory role".[4220] Other than his unsupported statement that Milovanović's description of the role of co-ordinator "stand[s] in contradiction to the very essence of the responsibility of coordination", **Miletić** does not advance any argument substantiating his claim that the Trial Chamber erred in relying on Milovanović's testimony in this regard.[4221] While he takes issue with Milovanović's categorisation of his role as one who "co-ordinated" in relation to the Assistant Commanders, the Appeals Chamber considers this issue to be purely semantic in nature. **Miletić** has failed to demonstrate that co-ordination of the work of the Assistant Commanders, as described by Milovanović, is precluded by the description of **Miletić**'s role in the charges against him.[4222] **Miletić**'s argument is thus dismissed.[4223]

1474. In view of the above, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber erred in its findings describing his role as a "co-ordinator" within the Main Staff and therefore dismisses sub-ground 9.1(c) of **Miletić**'s appeal.

(iv) Whether Miletić "advised" Mladić (Sub-ground 9.1(b))

1475. The Trial Chamber entered several findings indicating that **Miletić** advised or conveyed proposals to Mladić.[4224] These findings indicate, *inter alia*, that in Milovanović's absence, **Miletić** "took over Milovanović's tasks in the Staff Sector, which included [...] briefing the Commander, drawing his attention to problems and suggesting solutions",[4225] and that during the daily Main Staff morning briefings, he "conveyed proposals to the Commander"[4226] and "advised Mladić directly".[4227]

1476. **Miletić** submits that the Trial Chamber erred with respect to his advisory responsibilities when it found that he advised or proposed solutions to Mladić.[4228] **Miletić** first contends that there was no evidence other than Milovanović's testimony, the credibility of which he challenges, that supported the Trial Chamber's finding.[4229] While Milovanović stated that **Miletić** could have given

4220 Manojlo Milovanović, T. 12305 (31 May 2007). See Manojlo Milovanović, T. 12306 (31 May 2007).
4221 Miletić's Appeal Brief, para. 236.
4222 See *supra*, para. 1465.
4223 See *Đorđević* Appeal Judgement, paras 781, 819; *Lukić and Lukić* Appeal Judgement, paras 86, 112, 235, 375. See also *Nchamihigo* Appeal Judgement, para. 47.
4224 *E.g.*, Trial Judgement, paras 1635-1637, 1714.
4225 Trial Judgement, para. 1635 (internal references omitted).
4226 Trial Judgement, para. 1637.
4227 Trial Judgement, paras 1636, 1714.
4228 Miletić's Appeal Brief, paras 230 (referring to Trial Judgement, paras 1635, 1637, 1714), 235.
4229 Miletić's Appeal Brief, paras 230-231, 233; Miletić's Reply Brief, paras 86-87.

advice to Mladić, **Miletić** contends that Milovanović's absence from the Main Staff precludes him from confirming the matter.[4230] **Miletić** also contends that the Trial Chamber distorted Milovanović's testimony and thereby erroneously concluded that **Miletić** belonged to the category of officials who submitted proposals to Mladić.[4231] Finally, **Miletić** submits that the Trial Chamber disregarded evidence indicating that he never acted in the role of advisor to Mladić.[4232]

1477. The Prosecution responds that the Trial Chamber properly found that **Miletić** advised Mladić directly and that **Miletić** seeks to substitute his interpretation of Milovanović's testimony for that of the Trial Chamber without showing any error.[4233]

1478. The Appeals Chamber recalls its dismissal of **Miletić**'s challenge to Milovanović's credibility, including the argument that when Milovanović was absent from the Main Staff, he was not in a position to confirm **Miletić**'s role in submitting proposals to Mladić.[4234] The Appeals Chamber also recalls that the testimony of a single witness may be accepted without corroboration.[4235]

1479. **Miletić**'s claim that the Trial Chamber distorted Milovanović's testimony specifically refers to the finding that "[t]he Assistant Commanders and Chiefs of *Administrations* would study the details brought to their attention and provide proposals to Mladić based on their expertise".[4236] The Appeals Chamber notes Milovanović's testimony that "chiefs of sectors" rather than "chiefs of administrations" would have submitted proposals to Mladić.[4237] However, **Miletić** has not sought to demonstrate that this interpretation of Milovanović's evidence by the Trial Chamber resulted in a miscarriage of justice.

1480. The Appeals Chamber has considered **Miletić**'s contention that the Trial Chamber failed to take into account evidence indicating that he never acted in the role of advisor to Mladić.[4238] In this regard, **Miletić** has not demonstrated how the testimony of Witness Trkulja that **Miletić** was not a member of the "inner circle" undermines the Trial Chamber's findings as to **Miletić** having acted in an advisory capacity vis-à-vis Mladić.[4239] Nor has **Miletić** demonstrated that membership in the

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4230 Miletić's Appeal Brief, paras 231, 233.
4231 Miletić's Appeal Brief, paras 232, 235.
4232 Miletić's Appeal Brief, paras 233-235; Miletić's Reply Brief, para. 88.
4233 Prosecution's Response Brief (Miletić), paras 149-151, 153. See also Appeal Hearing, AT. 470 (5 Dec 2013).
4234 See *supra*, para. 215.
4235 *Lukić and Lukić* Appeal Judgement, para. 375 and references cited therein. See *Bizimungu* Appeal Judgement, para. 241.
4236 Miletić's Appeal Brief, para. 232 (emphasis added), citing Trial Judgement, paras 113, 1637.
4237 Manojlo Milovanović, T(F). 12189 (29 May 2007). See also Manojlo Milovanović, T(F). 12242-12244 (30 May 2007).
4238 Miletić's Appeal Brief, paras 233-235; Miletić's Reply Brief, para. 88.
4239 See *supra*, paras 1457-1458, 1460.

"inner circle of the VRS Main Staff" or the fact that he should have been named in Mladić's New Year's Speech were conditions *"sine qua non"* for advising or proposing solutions to Mladić.[4240]

1481. Based on the foregoing, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in finding that he advised or proposed solutions to Mladić. Accordingly, the Appeals Chamber dismisses sub-ground 9.1(b) of **Miletić**'s appeal.

(b) Alleged errors concerning Miletić's membership in the JCE to Forcibly Remove

(i) Equating Miletić's membership in the VRS with that in the JCE to Forcibly Remove (Sub-grounds 9.4 and 10.15 both in part)

1482. The Trial Chamber's conclusion that **Miletić** participated in the JCE to Forcibly Remove was based on the findings that: (1) the Bosnian Serb political and military leadership belonged to a JCE, sharing the common criminal purpose to forcibly remove the Bosnian Muslim populations from Srebrenica and Žepa;[4241] (2) **Miletić** made a significant contribution to the common criminal purpose of the JCE to Forcibly Remove;[4242] and (3) **Miletić** carried out these tasks with knowledge of the common plan and the only reasonable inference was that he shared the common intent of the JCE to Forcibly Remove.[4243]

1483. **Miletić** submits that the Trial Chamber erred in law by confusing membership in the VRS with "membership in a JCE".[4244] He argues that as "the VRS is not the JCE", the sole fact of belonging to an army cannot constitute "participation in the JCE".[4245] The Prosecution responds that **Miletić** fails to show that his membership in the JCE was determined on the sole basis of his membership in the VRS.[4246]

1484. In arguing that "the VRS is not the JCE", **Miletić** ignores the Trial Chamber's methodical treatment of each element necessary for proving commission through JCE I.[4247] It is on this basis, rather than the mere fact that he was a service member in the VRS, that the Trial Chamber concluded that **Miletić** participated in the JCE to Forcibly Remove.[4248] The Appeals Chamber therefore dismisses this aspect of **Miletić**'s argument.

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4240 See *supra*, paras 1457-1458, 1460.
4241 Trial Judgement, paras 1085-1087.
4242 Trial Judgement, paras 1704-1716.
4243 Trial Judgement, para. 1717.
4244 Miletić's Appeal Brief, paras 261-262, 331.
4245 Miletić's Appeal Brief, para. 261; Appeal Hearing, AT. 443-444 (5 Dec 2103). See Miletić's Appeal Brief, para. 331.
4246 Prosecution's Response Brief (Miletić), para. 179.
4247 See Trial Judgement, paras 1085-1087, 1704-1717.
4248 Trial Judgement, para. 1718.

1485. In view of the above, the Appeals Chamber dismisses the portions of **Miletić**'s sub-grounds of appeal 9.4 and 10.15 discussed here.

(ii) Alleged failure to consider relevant evidence pertaining to his JCE membership (Sub-grounds 9.2 and 9.4 in part)

1486. **Miletić** submits that in finding that he participated in the JCE to Forcibly Remove, the Trial Chamber erred by not taking into account relevant evidence indicating that he was not a "member" of the JCE to Forcibly Remove.[4249] To this end, **Miletić** first asserts that the Trial Chamber neglected to consider evidence showing that he did not belong to the circle of those close to Mladić and that, at the time Directive 7 was drafted, he had the rank of colonel and Milovanović was present at the Main Staff.[4250] Second, **Miletić** asserts that the Trial Chamber ignored evidence indicating that he did not participate in any important event related to Srebrenica and Žepa, *i.e.* he : (1) did not have any knowledge of Karadžić's 9 July Order transforming the VRS offensive into an attack on the enclaves; (2) did not participate in the meetings at the Hotel Fontana on 11-12 July 1995; (3) did not have any contact with Mladić during the evening of 11 or the morning of 12 July 1995 when the plan to transport the Srebrenica Muslims from Potočari was developed by Mladić; (4) did not participate in the meeting in Bratunac, where the decision was taken to attack Žepa; and (5) could not have been better informed than Mladić, who was present in both enclaves in July 1995, and therefore Mladić had no need to rely on **Miletić** for information.[4251] Finally, **Miletić** argues that the Trial Chamber refused to admit the Mladić Diary, which he submits would have provided the Trial Chamber with a greater appreciation of his role.[4252]

1487. The Prosecution responds that the Trial Chamber reasonably found that **Miletić** was a member of the JCE and that he fails to show that the Trial Chamber neglected to consider relevant evidence.[4253]

1488. The Appeals Chamber recalls that it has already dismissed **Miletić**'s first argument that the Trial Chamber failed to take into account evidence indicating that until the end of June 1995 he held the rank of colonel, that he was not part of Mladić's "inner circle", and that the Trial Chamber failed to establish when Milovanović was present at the Main Staff.[4254]

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4249 Miletić's Appeal Brief, paras 245-250.
4250 Miletić's Appeal Brief, paras 245-246, 249, 260, 276; Appeal Hearing, AT. 482-483 (5 Dec 2013). See Appeal Hearing, AT. 443-444 (5 Dec 2013).
4251 Miletić's Appeal Brief, paras 247-248; Miletić's Reply Brief, paras 91-92; Appeal Hearing, AT. 442 (5 Dec 2013).
4252 Miletić's Appeal Brief, para. 249; Appeal Hearing, AT. 434-435 (private session) (5 Dec 2013).
4253 Prosecution's Response Brief (Miletić), paras 168-171, 179. See Appeal Hearing, AT. 471-472 (5 Dec 2013).
4254 See *supra*, paras 1450-1451, 1456-1458.

1489. Regarding **Miletić**'s second contention,[4255] the Appeals Chamber considers that he has failed to elucidate how the evidence he refers to would have undermined any of the Trial Chamber's conclusions as to his participation in the JCE to Forcibly Remove, even if the Trial Chamber had endorsed his interpretation of this evidence. In this respect, the Appeals Chamber recalls that among the Trial Chamber's findings concerning **Miletić**'s importance in the process through which the JCE to Forcibly Remove was implemented, it found that he "served as a 'hub' for information".[4256] The Trial Chamber explained:

> in the lead up to the attack on Srebrenica, on critical days when the population was physically moved from there, and during the Žepa campaign, **Miletić** skilfully and efficiently used his unique position of knowledge to inform and advise. Through this function he enabled the decisions taken to successfully implement the plan, resulting in the forced removal of thousands of Bosnian Muslims from the enclaves.[4257]

Further, in two instances, **Miletić** suggests facts which he submits the Trial Chamber should have established, yet without providing any accompanying reference to the evidence he says the Trial Chamber overlooked.[4258]

1490. The only point on which **Miletić** elaborates is his contention that he was unaware of Karadžić's 9 July Order related to the conduct of combat operations around Srebrenica.[4259] However, the Appeals Chamber has previously addressed and dismissed **Miletić**'s argument that it was only with Karadžić's 9 July Order that the civilian population of the enclaves became the target of the attack.[4260] On this basis, the Appeals Chamber considers **Miletić**'s awareness of Karadžić's 9 July Order immaterial to establishing his participation in the JCE to Forcibly Remove. The Appeals Chamber therefore dismisses this aspect of **Miletić**'s argument.

1491. Further, in advancing his argument that Mladić was present in both Srebrenica and Žepa in July 1995 and that he knew the situation in this zone better than anyone, **Miletić** does not provide any indication of evidence that the Trial Chamber is alleged to have overlooked when it found that **Miletić** was "best informed on the situation in various theatres of the war".[4261] The Appeals Chamber first notes that the Trial Chamber's finding to which **Miletić** refers is not limited to the

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4255 Miletić's Appeal Brief, paras 247-248.

4256 Trial Judgement, para. 1716.

4257 Trial Judgement, para. 1716 (internal references omitted).

4258 Concerning **Miletić**'s contention that the Trial Chamber did not take into account evidence showing that he neither participated in the meetings at the Hotel Fontana on 11-12 July 1995 nor had any contact with Mladić during the evening of 11 or the morning of 12 July, **Miletić** refers the Appeals Chamber to the Indictment rather than to evidence supporting his argument. Miletić's Appeal Brief, fns 527-528.

4259 Miletić's Reply Brief, para. 91 (referring to Ex. P00849 "VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995"); Appeal Hearing, AT. 442-443 (5 Dec 2013).

4260 See *supra*, para. 599.

4261 Trial Judgement, para. 1714, citing Manojlo Milovanović, T. 12311 (31 May 2007). See Miletić's Appeal Brief, para. 248.

period of July 1995. The Trial Chamber found that **Miletić** played an essential role at the Main Staff before, during, and after the attack on the Srebrenica and Žepa enclaves.[4262] **Miletić** has failed to show how the fact that Mladić was present at some of the main theatres of war in July 1995 negates the importance of **Miletić**'s role as found by the Trial Chamber. In this regard, the Appeals Chamber recalls the Trial Chamber's conclusion that "considering the scale and scope of the military attack and the operations to forcibly remove the Bosnian Muslim civilian population from the Srebrenica and Žepa enclaves, coordination from the Main Staff level was essential".[4263] The Appeals Chamber therefore dismisses this part of **Miletić**'s argument.

1492. Finally, the Appeals Chamber recalls that it has previously addressed and dismissed **Miletić**'s argument concerning the Trial Chamber's decision not to admit the Mladić Diary.[4264]

1493. In view of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in not taking into account certain evidence indicating that he was not a "member" of the JCE. Accordingly, the Appeals Chamber dismisses sub-ground 9.2 of **Miletić**'s appeal and the portion of sub-ground of appeal 9.4 discussed here.

(c) Alleged errors concerning Miletić's contribution to the JCE to Forcibly Remove

1494. The Trial Chamber found that **Miletić** made a significant contribution to the common criminal purpose of the JCE to Forcibly Remove through his involvement in the drafting of Directives 7 and 7/1 and by restricting humanitarian aid and UNPROFOR re-supply as well as through his role, in the exercise of his functions, in monitoring and co-ordinating work and information for the VRS Main Staff.[4265]

(i) Whether Miletić drafted and had knowledge of Directive 7 (Sub-grounds 10.1 and 10.2 in part)

1495. The Trial Chamber found that Directive 7 tasked the Drina Corps with an illegal plan for an attack on the civilian population involving the creation of "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa"[4266] and that the JCE to Forcibly Remove came into existence, at the latest, with the issuance of Directive 7.[4267] The Trial Chamber concluded that **Miletić** "drafted" Directive 7[4268] and that "regardless of whether he physically drafted the Directive or inserted the words in the criminal

4262 Trial Judgement, paras 1711-1715.
4263 Trial Judgement, para. 1712.
4264 See *supra*, para. 85.
4265 Trial Judgement, paras 1704-1716.
4266 Trial Judgement, para. 762.
4267 Trial Judgement, para. 1087.

parts, by his central role in the drafting process, **Miletić** provided the addressees with an overview of the political leadership's broader vision, upon the authority of the Supreme Commander".[4269]

1496. **Miletić** submits that the Trial Chamber erred in law when it made the above impugned finding concerning **Miletić**'s central role in the drafting process of Directive 7.[4270] He asserts in this regard that the Trial Chamber failed to establish certain facts necessary for a conviction beyond reasonable doubt and that the Trial Chamber reversed the burden of proof.[4271] In particular, **Miletić** argues that the Trial Chamber failed to establish beyond reasonable doubt "the only relevant fact", namely whether he defined/drafted[4272] the impugned portion of Directive 7.[4273] Additionally, **Miletić** argues that the Trial Chamber failed to establish whether he knew of the impugned portion of Directive 7 before it was sent to the Corps and that, without having established this fact, it is incomprehensible that the Trial Chamber arrived at the impugned finding.[4274]

1497. The Prosecution responds that the Trial Chamber reasonably concluded that whether **Miletić** himself drafted the impugned portion of Directive 7 or simply included what he received from others, the directive that he drafted according to the so-called "full method" contained the criminal parts.[4275] It also submits that the Trial Chamber clearly established that **Miletić** knew about the final text of Directive 7 before it was sent to the Corps.[4276]

a. Alleged failure to establish whether Miletić drafted the impugned portion of Directive 7

1498. At the outset, the Appeals Chamber emphasises that the Trial Chamber clarified that **Miletić**'s contribution, and ultimately his liability, was not defined by whether he physically drafted or inserted the words in the impugned portion of Directive 7 and that his contribution lay more generally in the "drafting process" of Directive 7.[4277] The impugned finding is preceded by a

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4268 Trial Judgement, paras 1649, 1705.
4269 Trial Judgement, para. 1705.
4270 Miletić's Appeal Brief, paras 263, 269 (referring to Trial Judgement, para. 1705), 273.
4271 Miletić's Appeal Brief, paras 267, 269, 273; Miletić's Reply Brief, paras 95-97; Appeal Hearing, AT. 438-440 (5 Dec 2013). See Appeal Hearing, AT. 444-445 (5 Dec 2013).
4272 The Appeals Chambers observes that **Miletić** appears to use these terms interchangeably. See, *e.g.*, Miletić's Appeal Brief, para. 267.
4273 Miletić's Appeal Brief, paras 267, 270-272, 274-275; Miletić's Reply Brief, paras 82-83, 95, 97; Appeal Hearing, AT. 438-441, 483 (5 Dec 2013).
4274 Miletić's Appeal Brief, paras 271-273; Miletić's Reply Brief, paras 84, 96; Appeal Hearing, AT. 421-422, 438-440, 483 (5 Dec 2013).
4275 Prosecution's Response Brief (Miletić), para. 182; Appeal Hearing, AT. 468-469 (5 Dec 2013).
4276 Prosecution's Response Brief (Miletić), para. 186.
4277 Trial Judgement, para. 1705.

detailed accounting of the Trial Chamber's understanding of that process and **Miletić**'s involvement therein.[4278]

1499. The Trial Chamber determined that, like other Supreme Command Directives, Directive 7 was a political policy document for the VRS, setting out the RS's long-term aspirations,[4279] and that it resulted from the Briefing during which Karadžić briefed the high-level political and military participants, including **Miletić**, on "defining future political and military goals and strategies of conducting the war and peace strategies".[4280] Thus, the Briefing, in which **Miletić** was involved, was viewed by the Trial Chamber as a component of the process culminating in Directive 7.

1500. As to the methodology for drafting Directive 7, the Trial Chamber determined that the majority of such directives would be drafted by the Main Staff on the basis of guidelines from the Supreme Command, and that when the so-called "full" or "complete" method of drafting was used, the Administration for Operations and Training, headed by **Miletić**, merged elements drafted by other command organs and approved by the Main Staff Commander, incorporating all elements together into a single document called a "directive".[4281] The Trial Chamber found that Directive 7 was drafted according to this "full" method.[4282] The Main Staff would send such directives to the Supreme Commander for review and the Main Staff would implement requested changes, finalise the document, and then return it to the Supreme Commander for signature.[4283] It is in this context that the Trial Chamber's findings that **Miletić** "drafted"[4284] and played a "central role in the drafting process"[4285] of Directive 7 must be viewed.

1501. Concerning **Miletić**'s specific role, the Trial Chamber found that his tasks in relation to the combat readiness analysis briefing were to draw up the agenda and, based on the discussions during the meeting, to draw up the conclusions that, if accepted by Karadžić, would form the basis of directives.[4286] The Trial Chamber further found that, following the briefing, **Miletić** would receive combat readiness analysis reports from all corps. On this basis, the Trial Chamber concluded that **Miletić** had gained a wide and substantive knowledge of the RS strategies and goals.[4287] The Trial Chamber observed that Directive 7 was dated 8 March 1995 and (type-)signed "drafted by"

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4278 See, *e.g.*, Trial Judgement, paras 115-116, 199-200, 1644-1653.
4279 Trial Judgement, para. 199.
4280 Trial Judgement, para. 1648, citing Ex. 5D00967, "Schedule briefing on Combat Readiness in 1994, 29 and 30 January 1995, signed by Mladić", p. 3.
4281 Trial Judgement, paras 115-116.
4282 Trial Judgement, para. 1649.
4283 Trial Judgement, para. 115.
4284 Trial Judgement, paras 199, 1649.
4285 Trial Judgement, para. 1705.
4286 Trial Judgement, para. 1648.
4287 Trial Judgement, para. 1648.

"Colonel Radivoje Miletić"[4288] and considered that **Miletić** "drafted" it according to the full method, in which capacity he would not have been able to change the contents, but would have been able to influence form and wording.[4289] Moreover, the Trial Chamber found that, according to this method, when he was standing in for Milovanović, **Miletić** would have sent such directives to the Commander for his approval to forward on to the Supreme Commander.[4290] The Trial Chamber was satisfied that in "drafting" Directive 7, **Miletić** used the knowledge of the larger political and military context of the conflict and the goals and strategies of the RS that he had acquired through his position and function at the Main Staff.[4291] Finally, the Trial Chamber acknowledged that Milovanović forwarded Directive 7 to the Corps on 17 March 1995.[4292]

1502. Concerning the specific wording of Directive 7, the Trial Chamber found that all sectors and administrations of the VRS Main Staff would have been duty-bound to provide **Miletić** with their input and that, regardless of whether the command organs of the Main Staff provided the actual words, the Trial Chamber was satisfied that they provided substantial input.[4293] The Trial Chamber was further satisfied that the section of Directive 7 containing Corps assignments pertaining to combat operations, which included the impugned portion, fell within the jurisdiction of the Administration for Operations and Training and, accordingly, that **Miletić** played a role in providing the underlying information.[4294]

1503. It is only following these findings describing the drafting process culminating in Directive 7 and **Miletić**'s part in that process that the Trial Chamber characterised **Miletić**'s contribution to the JCE to Forcibly Remove in relation to Directive 7. In so doing, it is clear that the Trial Chamber broadly interpreted the term "drafted" to include a series of stages in the process and a number of actors who assisted in the drafting by providing relevant information and language culminating in Directive 7. The Appeals Chamber considers that the Trial Chamber's characterisation of **Miletić**'s contribution in relation to Directive 7 as playing a "central role in the drafting process" is consistent with the findings supporting that characterisation.

1504. By contrast, **Miletić**'s argument that the "only relevant fact" for determining whether he contributed to the JCE through his involvement in Directive 7 is whether "this drafting included the disputed parts of the Directive" or whether he "contributed to the drafting of the disputed parts" is

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4288 Trial Judgement, para. 199 & fn. 537, referring to, *inter alia*, Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 15. See also Manojlo Milovanović, T. 12274-12275 (30 May 2007).
4289 Trial Judgement, paras 1646, 1649.
4290 Trial Judgement, para. 1646.
4291 Trial Judgement, para. 1652.
4292 Trial Judgement, para. 1650.
4293 Trial Judgement, para. 1649.
4294 Trial Judgement, para. 1651 & fn. 5058.

premised on a narrow interpretation of the impugned finding.[4295] In essence, **Miletić** imputes a connotation to the term "drafting" that would apply more readily to the question whether he had *conceived* the impugned portion of Directive 7. Were it to be established that **Miletić** conceived it, this would be a relevant consideration for characterising the level of his contribution. However, bearing in mind the Trial Chamber's broader characterisation of his contribution, the Appeals Chamber finds that it was not necessary for the Trial Chamber to have established this fact in order to make the impugned finding.

b. Miletić's knowledge of Directive 7's final version before its transmission to the Corps

1505. The Appeals Chamber now turns to **Miletić**'s argument that the impugned finding[4296] was reached without the Trial Chamber having first established whether he knew of the impugned portion of Directive 7 *before* it was sent to the Corps.[4297] The Appeals Chamber observes in this regard that the context of the impugned finding is the Trial Chamber's analysis of **Miletić**'s contribution to the JCE to Forcibly Remove.[4298] After making the impugned finding, the Trial Chamber clarified that it considered that through his involvement in Directive 7, as previously described, he "informed the addressees of the plan" to forcibly remove the Bosnian Muslims from the enclaves and that "in doing so, **Miletić** contributed to the JCE to Forcibly Remove".[4299] It follows by implication from this finding and the impugned finding that **Miletić** had knowledge of the impugned portion of Directive 7 before it was transmitted on 17 March 1995 to the Corps. Neither the finding that he informed the addressees of the plan nor the impugned finding includes cross-references to parts of the Trial Judgement where such knowledge was established.

1506. The Appeals Chamber observes that in the analysis preceding the impugned finding the Trial Chamber found that "at least from 17 March, [the date upon which Directive 7 was forwarded to the Corps], **Miletić** was familiar with the final version of Directive 7".[4300] However, this finding alone is inconclusive. Although it does not preclude the possibility that **Miletić** knew about the final text of Directive 7 before it was sent to the Corps, it only positively establishes that he had knowledge of this text at some point on 17 March 1995.

1507. Nonetheless, the Appeals Chamber considers that the Trial Chamber's conclusion as to **Miletić**'s knowledge of the final version of Directive 7 prior to its transmission to the Corps is, by

4295 Miletić's Reply Brief, paras 95, 97.
4296 See *supra*, para. 1495.
4297 Miletić's Appeal Brief, paras 271-272; Miletić's Reply Brief, para. 96. See also Appeal Hearing, AT. 421-422, 440 (5 Dec 2013).
4298 Trial Judgement, paras 1703-1718.
4299 Trial Judgement, para. 1705. See Trial Judgement, para. 1717.

implication, amply supported by the antecedent findings of the Trial Chamber. Namely, as previously recalled, the Trial Chamber acknowledged **Miletić**'s (type-)signed signature as "drafter".[4301] The Trial Chamber further found that **Miletić** would have been responsible for merging elements drafted by other command organs and approved by the Main Staff Commander.[4302] Additionally, it was established that the impugned portion of Directive 7 fell within the jurisdiction of the Administration for Operations and Training and, accordingly, that **Miletić**, as its Chief, played a role in providing the underlying information for this portion.[4303] Finally, the Trial Chamber concluded that when the Supreme Commander amended parts of a directive, normally such amendments would be sent back to the Main Staff with redrafting instructions, whereupon the Main Staff would implement changes, producing a final version to be returned to the Supreme Commander.[4304] In this latter respect, the Appeals Chamber observes that in the portion of Milovanović's testimony to which the Trial Chamber referred, Milovanović's precise words were that the Supreme Commander "return[s] [editorial changes] to the author", "[t]he author then enters all the corrections", and the author "comes up with a final version".[4305] In the case of Directive 7, specifically, the Trial Chamber's analysis indicates that **Miletić** was the "author" in the sense of the previously described central role he played in the drafting process.[4306]

1508. Regarding **Miletić**'s submission that the evidence of the 16 March 1995 meeting between Milovanović, Tolimir, and Karadžić should have raised reasonable doubt with respect to his involvement in the impugned portion of Directive 7,[4307] the Appeals Chamber notes that this meeting took place eight days after the date marked on Directive 7 and one day prior to it being sent to the Corps.[4308] The Trial Chamber did not have evidence before it indicating that **Miletić** was present at this meeting. It concluded that considering who was present at this meeting, "Directive 7 may well have been discussed", but further clarified that it had "no basis to draw any conclusion as to the substantive content of the discussion at the meeting".[4309]

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4300 Trial Judgement, para. 1653. See Trial Judgement, fn. 5058.
4301 See *supra*, note 4288.
4302 See *supra*, note 4281.
4303 See *supra*, note 4294.
4304 See *supra*, note 4283.
4305 Manojlo Milovanović, T. 12193 (29 May 2007). See Trial Judgement, para. 115. The Appeals Chamber moreover observes that concerning the process of drafting Supreme Command directives, the Trial Chamber relied on the testimony of Obradović, who was the Chief of the Operations Department within the Administration for Operations and Training in 1995. See, *e.g.*, Trial Judgement, paras 1646-1653. During his testimony, which was based on his experience in the VRS army and knowledge of how things proceeded at the time, Obradović acknowledged that in the event of editorial changes by the Supreme Commander, **Miletić** would have seen any such changes. See Ljubomir Obradović, T. 28321 (17 Nov 2008), referred to in Trial Judgement, fn. 5041.
4306 See *supra*, paras 1499-1503.
4307 Miletić's Appeal Brief, para. 271. See also Appeal Hearing, AT. 420-421, 440 (5 Dec 2013).
4308 Ex. 5D01322, "Diary of Radovan Karadžić's secretary for the year 1995", p. 31; Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", pp. 1, 15.
4309 Trial Judgement, para. 1650.

1509. The Appeals Chamber considers that the conclusion **Miletić** suggests based on the mere fact that a meeting of senior RS/VRS officials took place on 16 March 1995 is speculative. In light of the Trial Chamber's findings recalled above, the Appeals Chamber is of the view that the existence of this meeting does not raise reasonable doubt as to the Trial Chamber's conclusion that **Miletić** knew about the final version of Directive 7 prior to its transmission to the Corps.

1510. The Appeals Chamber therefore considers that **Miletić** has not demonstrated that the Trial Chamber's conclusion, by implication, that **Miletić** knew about the final version of Directive 7, falls short of the beyond reasonable doubt standard.

c. Conclusion

1511. In light of the above, the Appeals Chamber dismisses **Miletić**'s sub-ground of appeal 10.1, and the part of sub-ground of appeal 10.2 discussed here.

(ii) Alleged error in finding that Directive 7/1 was a continuation of the objectives established in Directive 7 (Sub-grounds 3.2 and 10.2 in part)

1512. The Trial Chamber found that VRS Main Staff Directive 7/1 was directed to the corps commands, including the Drina Corps, and that while it did not repeat the wording of the impugned portion of Directive 7 tasking the Drina Corps with the creation of "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa",[4310] it nonetheless elaborated on and specified the operations regarding the Srebrenica and Žepa enclaves, including the forcible transfer of the Bosnian Muslim population.[4311] The Trial Chamber considered the argument that with the issuance of Directive 7/1 Mladić assigned the Drina Corps a task that nullified those assigned in Directive 7.[4312] The Trial Chamber rejected this theory based on the observations that: (1) Directive 7 is consistent with earlier documents, including Directive 4; and (2) Directive 7/1 does not state that it replaces Directive 7 and in fact refers to Directive 7 and the Directive 7 language relating to the task of the Drina Corps was adopted by the Drina Corps itself (between the issuance of Directive 7 and Directive 7/1) through the 20 March 1995 Operative No. 7.[4313] Having rejected this theory, the Trial Chamber found that Directive 7/1 was a continuation of the objectives of Directive 7 ("Directive 7/1 Finding").[4314] **Miletić** was entrusted with the task of

4310 See *supra*, para. 1495.
4311 Trial Judgement, paras 203, 764.
4312 Trial Judgement, para. 763.
4313 Trial Judgement, para. 764.
4314 Trial Judgement, paras 765, 1706.

drafting Directive 7/1, and in so doing, he made a further contribution to the JCE to Forcibly Remove.[4315]

1513. **Miletić** submits that the Trial Chamber erred in considering his role in drafting Directive 7/1 as a contribution to the JCE to Forcibly Remove because it "contains no material element of the crime".[4316] **Miletić** further specifies that the Trial Chamber ignored evidence establishing that Directive 7/1 modified the task assigned to the Drina Corps in Directive 7.[4317]

1514. The Prosecution responds that the Trial Chamber reasonably found that Directive 7/1 elaborated on, and specified, operations set out in Directive 7, including the forcible removal of the Bosnian Muslim inhabitants of the enclaves and that **Miletić** does not show that the Trial Chamber erred.[4318]

a. Consistency of Directive 7 with the policy set out in earlier documents

1515. Pointing to Directives 5 and 6 and portions of Kosovac's testimony concerning Directives 4 and 6, **Miletić** submits that the Trial Chamber ignored relevant evidence in finding that "Directive 7 is consistent with the policy set out in earlier documents, including Main Staff Directive 4".[4319] He posits that Directive 4, issued by Mladić and dated 19 November 1992, and hence predating the establishment of the safe areas of Srebrenica and Žepa, was subsequently replaced by Directive 5, issued by Mladić and dated 25 June 1993, and by Directive 6, issued by Karadžić and dated 11 November 1993.[4320] He argues that while Directives 5 and 6 illustrate VRS concern with Bosnian Muslim forces in the enclaves, neither contains "any section including the Muslim population in the objectives of the VRS".[4321] Moreover, he asserts that Directive 6 shows that the Drina River region was no longer of a strategic importance.[4322]

1516. The Prosecution responds that the evidence to which **Miletić** refers in support of his position is insufficient to show that the Trial Chamber erred in its assessment of Directive 4.[4323] Concerning Directives 5 and 6, it asserts that both indicate the strategic importance of the enclaves and that Directive 7 specifically refers to Directive 6. Finally, the Prosecution emphasises that VRS

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4315 Trial Judgement, paras 1654, 1706.
4316 Miletić's Appeal Brief, paras 274, 276, 278.
4317 Miletić's Appeal Brief, paras 80-81, 90-99; Miletić's Reply Brief, paras 30-34; Appeal Hearing, AT. 430-431 (5 Dec 2013).
4318 Prosecution's Response Brief (Miletić), paras 43, 47, 189.
4319 Miletić's Appeal Brief, paras 90-97, referring to Trial Judgement, para. 764; Miletić's Reply Brief, paras 30, 32-33.
4320 Miletić's Appeal Brief, paras 91-94. See Ex. P00029, "VRS Main Staff Order 02/5-210, Operational Directive 4, 19 November 1992"; Ex. 5D01201, "VRS Main Staff Order 02/2-479, Operational Directive 5, 25 June 1993"; Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993".
4321 Miletić's Appeal Brief, para. 92.
4322 Miletić's Appeal Brief, para. 93; Miletić's Reply Brief, para. 30.
4323 Prosecution's Response Brief (Miletić), para. 45.

orders and reports following the creation of the safe areas and prior to the issuance of Directive 7 demonstrate that the expulsion of Bosnian Muslims from the enclaves was a VRS long-term policy objective.[4324]

1517. As a contextual matter, the Appeals Chamber recalls that the Trial Chamber found that Directive 4 tasked forces of the Drina Corps to "exhaust the enemy, inflict the heaviest possible losses on him and force him to leave the [...] Žepa [...] area[] together with the Muslim population".[4325] The Appeals Chamber notes that Directives 5[4326] and 6,[4327] while lacking explicit reference to the Bosnian Muslim population of the enclaves found in Directives 4 and 7, nonetheless suggest that the situation in the enclaves was of high importance to the VRS Command. Directive 5, for example, indicates that the task of the Drina Corps included to "hold the remaining Muslim forces in Goražde, Žepa and Srebrenica completely under siege and encirclement".[4328] As for Directive 6, the Appeals Chamber notes that the Trial Chamber found that the list of strategic war goals in this document, while non-exhaustive,[4329] included "expanding the borders of Republika Srpska in its northeastern part and establishing firmer ties with Serbia".[4330] The Appeals Chamber moreover notes that part of the context of this Directive is the RS Supreme Command's anticipation of the intention of Bosnian Muslim forces to prepare for "extensive offensive operations towards VRS-controlled territory in order to gain access to [...] the Drina [R]iver (in the Goražde and Srebrenica areas)" during the winter of 1993.[4331] In this context, the "task" assigned to the Drina Corps under the Directive included to "maintain the blockade of enemy forces in the Žepa, Srebrenica and Goražde enclaves, constantly inflict losses on them and disrupt their communications".[4332]

1518. The Appeals Chamber notes that Directives 5 and 6 are not dispositive in showing that the Bosnian Muslim population *was not* encompassed by the objectives of the VRS at the time they were written or at any time thereafter. Further, the task assigned to the Drina Corps under Directive 6 did not indicate that, by the time of its issuance, the Drina River region was no longer of strategic importance.

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4324 Prosecution's Response Brief (Miletić), para. 46.
4325 Trial Judgement, para. 91, citing Ex. P00029, "VRS Main Staff Order 02/5-210, Operational Directive 4, 19 November 1992", p. 5.
4326 Ex. 5D01201, "VRS Main Staff Order 02/2-479, Operational Directive 5, 25 June 1993".
4327 Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993".
4328 Ex. 5D01201, "RS Main Staff Order 02/2-479, Operational Directive 5, 25 June 1993", p. 7.
4329 The non-exhaustive nature of the "strategic war goals" listed in Directive 6 is indicated by the term "including" which precedes the list. Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993", p. 3.
4330 Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993", p. 3. See Trial Judgement, para. 1647.
4331 Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993", pp. 1-2.
4332 Ex. P03919, "RS Supreme Command Directive 6, 11 November 1993", p. 5.

1519. Based on the foregoing, the Appeals Chamber finds that **Miletić** has failed to show, on the basis of Directives 5 and 6, that no reasonable trier of fact could have found that Directive 7 is consistent with the policy set out in earlier documents.

1520. As for Kosovac's testimony, concerning Directive 4, the Appeals Chamber notes that Kosovac testified that "[t]here would be no logic in the linking up [of Directives 4 and 7] in any sense at all".[4333] Concerning Directive 6, Kosovac's view was that "none of this has anything to do with the Drina [R]iver".[4334] This evidence, contradicting the Trial Chamber's findings as to the continuity of purpose between Directives 4 and 7, was not referred to by the Trial Chamber in the context of this finding.

1521. However, the Appeals Chamber recalls that if the Trial Chamber did not refer to evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[4335] In light of the contents of Directives 4, 5 and 6,[4336] the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber disregarded this aspect of Kosovac's testimony instead of simply rejecting it.

1522. The Appeals Chamber thus finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in concluding that Directive 7 was consistent with earlier documents, including Directive 4.

b. Whether Directive 7/1 replaced Directive 7

1523. **Miletić** contends that the Directive 7/1 Finding[4337] was based, in part, on the Trial Chamber's observations that Directive 7/1 did not state that it replaced Directive 7 and that the former referred to the latter.[4338] He argues in this regard that, as seen in Operative No. 7,[4339] "the Corps began to execute tasks directly on the basis of Directive 7" and therefore the only plausible explanation for the VRS to issue its own directive, Directive 7/1, was to modify the tasks that had been assigned under Directive 7.[4340] On this basis, **Miletić** submits that it is "entirely logical" that in issuing Directive 7/1 Mladić would not expressly indicate that it was replacing Directive 7 and that

4333 Slobodan Kosovac, T. 29968 (12 Jan 2009).
4334 Slobodan Kosovac, T. 30126 (14 Jan 2009). See Slobodon Kosovac, T. 30125 (14 Jan 2009).
4335 *Haradinaj et al.* Appeal Judgement, para. 129; *Krajišnik* Appeal Judgement, para. 353; *Kvočka et al.* Appeal Judgement, para. 23.
4336 See *supra*, paras 1517-1518.
4337 See *supra*, para. 1512.
4338 Miletić's Appeal Brief, para. 90.
4339 See *supra*, para. 1512.
4340 Miletić's Appeal Brief, paras 95-96. See Appeal Hearing, AT. 430 (5 Dec 2013).

he would refer to Directive 7 as often as possible.[4341] In the same vein, **Miletić** argues that had Directive 7/1 maintained the policy of Directive 7, Karadžić would not have visited the Drina Corps in June 1995 to "give the order concerning Srebrenica" to the Commander of the Drina Corps, and as a result by-passing the Main Staff.[4342] Finally, **Miletić** argues that Operative No. 7 cannot provide "any useful information to assess Directive 7/1" as it was issued before the latter.[4343]

1524. The Prosecution responds that **Miletić** points to evidence contrary to the Trial Chamber's observations without showing that the Trial Chamber's finding was unreasonable.[4344]

1525. The Appeals Chamber observes that the Trial Chamber duly considered and rejected **Miletić**'s theory – based on, *inter alia*, the evidence of Kosovac and Milovanović concerning Mladić's alleged disagreement with portions of Directive 7 and his attempt to circumvent Karadžić in this regard by issuing Directive 7/1.[4345] **Miletić** disagrees with this conclusion, but fails to show that the Trial Chamber erred in this respect. In support of his position, he offers speculative and unsubstantiated arguments.[4346] The Appeals Chamber observes that he has failed to show that no reasonable trier of fact could have come to the Trial Chamber's conclusion, especially in light of the fact that both Directives co-existed in that they were jointly referred to in the *Krivaja*-95 orders.[4347]

1526. Further, the Appeals Chamber does not agree with **Miletić**'s interpretation of the Trial Chamber's findings to which he refers in support of his argument that "had Directive 7/1 merely maintained [...] the policy of Directive 7, [Karadžić] would not have needed to bypass the Main Staff to give his own orders to the Drina Corps".[4348] The Trial Chamber indeed found that Karadžić personally visited the Drina Corps in June 1995, roughly three months following the issuance of Directive 7/1, and that he met with Krstić, the Chief of Staff of the Drina Corps at the time. The Trial Chamber found that during the course of this meeting, Karadžić asked Krstić "how much time he needed to set off for Srebrenica" and assured him that "if [he] put in a request [for ammunition, fuel, and food] he would be given everything".[4349] The Trial Chamber acknowledged that "[i]t was unusual that Karadžić as the Supreme Commander intervened directly with the Corps circumventing the Main Staff".[4350] These findings, however, are not dispositive of whether

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4341 Miletić's Appeal Brief, para. 95.
4342 Miletić's Appeal Brief, para. 97. See Miletić's Reply Brief, para. 33.
4343 Miletić's Reply Brief, para. 32. See Miletić's Appeal Brief, para. 96; Appeal Hearing, AT. 430 (5 Dec 2013).
4344 Prosecution's Response Brief (Miletić), paras 47-49.
4345 Trial Judgement, paras 763-764. See *supra*, para. 1512.
4346 See Miletić's Appeal Brief, paras 95-96; Miletić's Reply, para. 32.
4347 Ex. P00107, "Drina Corps Command Order 04/156-2, Operations Order No. 1 Krivaja-95, dated 02 July 1995", p. 3; Ex. 5DP00106, "Drina Corps Order No. 01/04-156-1 Preparatory Order No. 1, type-signed Milenko Živanović, 2 July 1995", p. 1.
4348 See Miletić's Appeal Brief, para. 97.
4349 Trial Judgement, para. 242.
4350 Trial Judgement, para. 242.

Directive 7/1 was a continuation of the policies of Directive 7. In this regard, the Appeals Chamber again recalls that the *Krivaja*-95 orders refer to both Directives 7 and 7/1.[4351] The Appeals Chamber therefore dismisses **Miletić**'s argument as speculative.

c. Conclusion

1527. In view of the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in finding that by drafting Directive 7/1 he contributed to the JCE to Forcibly Remove. The Appeals Chamber therefore dismisses **Miletić**'s sub-ground of appeal 3.2 and the portion of his sub-ground of appeal 10.2 discussed here.

(iii) Alleged errors concerning Miletić's role in the approval and notification procedure for humanitarian aid convoys (Sub-ground 10.3)

1528. The Trial Chamber found that the processes in place for the granting of passage for both UNPROFOR and humanitarian aid convoys implicated various civilian and military authorities and personnel.[4352] This convoy process involved both an approval procedure and a notification procedure (collectively, approval and notification procedure). While the Trial Chamber found that requests for the passage of humanitarian aid convoys – unlike requests for the passage of UNPROFOR convoys – went through various co-ordinating bodies, it nonetheless concluded that the VRS still had input in the final decision on the approval of these convoys.[4353] It found that subsequent to Milovanović's or Mladić's approval, the Main Staff sent a notification to the relevant subordinate units.[4354] Without such a notification from the Main Staff, a convoy was not allowed to pass.[4355] Concerning **Miletić**'s role in this regard, the Trial Chamber found that "[i]n the absence of Milovanović, **Miletić** signed these notifications".[4356] The Trial Chamber noted that out of 11 such notifications sent after 28 April 1995 in evidence, seven were signed by **Miletić**.[4357] The latter finding was, in part, the basis for the Trial Chamber's conclusion that **Miletić** was one of the authorities who had a role in the convoy approval and notification procedure (for both humanitarian aid and UNPROFOR convoys) ("Convoy Procedure Finding").[4358]

4351 Ex. P00107, "Drina Corps Command Order 04/156-2, Operations Order No. 1 Krivaja-95, dated 02 July 1995", p. 3; Ex. 5DP00106, "Drina Corps Order No. 01/04-156-1 Preparatory Order No. 1, type-signed Milenko Živanović, 2 July 1995", p. 1.
4352 Trial Judgement, para. 1709, referring to Trial Judgement, Chapter III, Sections C.4.(a)-(c).
4353 Trial Judgement, para. 1658. See also Trial Judgement, para. 221.
4354 Trial Judgement, paras 222, 1659.
4355 Trial Judgement, para. 222.
4356 Trial Judgement, para. 1659. See Trial Judgement, para. 222.
4357 Trial Judgement, para. 1660.
4358 Trial Judgement, para. 1709.

1529. **Miletić** contends that the Trial Chamber erred in law in finding that through his role in the "convoy approval process" he contributed to the JCE to Forcibly Remove.[4359] He contends that the Trial Chamber's finding that he "possessed authority" in this process was not reached beyond reasonable doubt.[4360] **Miletić** points out in this respect that the Trial Chamber was unable to establish the precise role of the VRS in the humanitarian convoy approval process[4361] and that no evidence exists suggesting that he participated in this process.[4362] He admits that he signed a certain number of humanitarian aid convoy notifications but argues that the Trial Chamber incorrectly found that he "signed" seven out of 11 such notifications that were admitted into evidence.[4363]

1530. The Prosecution responds that **Miletić** misrepresents the Trial Chamber's findings and that, while it could not make findings on all aspects of the humanitarian aid convoy process, it nevertheless found that the evidence was sufficient to form conclusions as to the role of the VRS and of **Miletić** therein.[4364] It further submits that **Miletić** fails to show that the Trial Chamber's finding that he "signed" seven humanitarian aid convoy notifications was unreasonable.[4365]

1531. At the outset, the Appeals Chamber observes that **Miletić** sometimes employs the generic phrasing "convoy approval process" without specifying whether his arguments pertain to the Trial Chamber's findings concerning his role in the processes related to UNPROFOR convoys or to humanitarian aid convoys or both.[4366] However, reading his sub-ground of appeal as a whole, it is clear that **Miletić**'s arguments pertain only to the Trial Chamber's findings concerning his role with respect to humanitarian aid convoys.

1532. In relation to **Miletić**'s argument, referring to the Convoy Procedure Finding,[4367] that no evidence indicates that he possessed authority in the "approval process" for humanitarian aid convoys, he apparently understands the Trial Chamber to have found that he had a role in the approval procedure for humanitarian aid convoys. The Appeals Chamber is of the view that although the Convoy Procedure Finding could have been phrased more precisely, as has been

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4359 Miletić's Appeal Brief, paras 279 (referring to Trial Judgement, para. 1709), 282.

4360 Miletić's Appeal Brief, paras 279-280. See Miletić's Appeal Brief, para. 284; Appeal Hearing, AT. 441 (5 Dec 2013).

4361 Miletić's Appeal Brief, paras 280, 282. See Appeal Hearing, AT. 441 (5 Dec 2013).

4362 Miletić's Appeal Brief, para. 280.

4363 Miletić's Appeal Brief, para. 281. See also Miletić's Reply Brief, para. 98.

4364 Prosecution's Response Brief (Miletić), para. 191; Appeal Hearing, AT. 469-470 (5 Dec 2013).

4365 Prosecution's Response Brief (Miletić), para. 193.

4366 In the title of this sub-ground of appeal, **Miletić** states that his role in the "convoy approval process" was not specified by the Trial Chamber. **Miletić** then contends that the Trial Chamber held that he possessed authority in "the convoy approval process". Miletić's Appeal Brief, para. 279. Subsequently, he refers to the Trial Chamber's findings related to the "humanitarian convoy approval process". Miletić's Appeal Brief, paras 280, 282. In his concluding remarks, he then refers to the Trial Chamber's alleged failure to specify his role in the "humanitarian convoy approval process". Miletić's Appeal Brief, para. 282.

4367 Trial Judgement, para. 1709.

previously described,[4368] the Trial Chamber did not find that **Miletić** played a role specifically in the approval procedure for humanitarian aid convoys. **Miletić**'s argument thus fails.

1533. Concerning **Miletić**'s argument that among the Trial Chamber's findings concerning his involvement in the humanitarian aid notifications procedure, it erred in seven instances where it found that he "signed" notifications, the Appeals Chamber observes that the Trial Chamber characterised three notifications as "signed by" or "by" **Miletić**[4369] and the remaining four as "type-signed" by **Miletić**.[4370] The Appeals Chamber further observes that all seven notifications are "type-signed" by **Miletić** as "Standing in for the Chief of Staff". While the Trial Chamber's characterisation of the signature format on these notifications is not entirely precise, **Miletić** has not substantiated his argument that this difference has any bearing on his "involvement in the approval of convoys".[4371] The Appeals Chamber therefore dismisses this aspect of his argument.

1534. In view of the above, the Appeals Chamber finds that **Miletić** has failed to show that no reasonable trier of fact could have found that **Miletić** was one of the authorities who had a role in the convoy approval and notification procedure and that this constituted a contribution to the JCE to Forcibly Remove. The Appeals Chamber therefore dismisses sub-ground 10.3 of **Miletić**'s appeal.

(iv) Alleged errors concerning Miletić's involvement in the approval and notification procedure for UNPROFOR convoys (Sub-ground 10.5)

1535. The Trial Chamber found that in 1995 requests for the passage of UNPROFOR convoys were sent to the VRS and were "normally decided" by Mladić or Milovanović, who would "mark[] 'yes' or 'no' at the top of the page of the original document together with their initials indicating approval or denial".[4372] Tolimir, **Miletić**, Gvero, and Miloš Đurđić[4373] at times also "initialled requests".[4374] In support of the latter finding, the Trial Chamber referred to a stipulation between

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4368 See *supra*, para. 1528; Trial Judgement, paras 216-224, 1709.

4369 Trial Judgement, fn. 5079, referring to Ex. P04062, "VRS Main Staff Notification to the Drina Corps on authorization of humanitarian aid convoys, signed by Miletić, 30 June 1995", Ex. P02570, "VRS Main Staff Notification re movement ICRC and UNHCR to various Military Posts, signed by Miletić, 18 July 1995", Ex. P02661a, "VRS Main Staff notification to East Bosnia Corps, Drina Corps, Sarajevo-Romanija Corps and Herzegovina Corps, signed by Miletić, 26 July 1995". Regarding Ex. P04062, see also Trial Judgement, fn. 651 where the Trial Chamber refers to this exhibit as "signed by" **Miletić**.

4370 Trial Judgement, fn. 5079, referring to Ex. P02714, "VRS Main Staff notification concerning UNHCR convoys, type-signed Miletić, 2 June 1995", Ex. 5D01429, "VRS Main Staff notification to the Drina Corps and East Bosnia Corps concerning humanitarian convoys, type-signed Miletić, 12 June 1995", Ex. P02717, "VRS Main Staff notification to Drina Corps concerning humanitarian convoys, type-signed Miletić, 12 June 1995", Ex. P02551, "VRS Main Staff notification to Military Post 7111 concerning movement of UN civilian observers, type-signed Miletić, 29 June 1995".

4371 Miletić's Reply Brief, para. 98.

4372 Trial Judgement, paras 216, 1656.

4373 VRS Colonel Đurđić was a member of the State Committee for Cooperation with the United Nations and International Humanitarian Organisations and he was in charge of co-ordinating the committee's relations with the Ministry of Defence and the VRS Main Staff. Trial Judgement, para. 220.

4374 Trial Judgement, para. 216. See also Trial Judgement, paras 1656-1657.

**Miletić** and the Prosecution which states, *inter alia*, that "[o]f a total of 1413 initials found on the UNPROFOR convoy requests [...] 82 belong to Radivoje **Miletić** (reflecting 50 approvals and 32 refusals)".[4375] Finally, when addressing **Miletić**'s contribution to the JCE to Forcibly Remove through his involvement in restrictions of humanitarian aid and UNPROFOR re-supply, the Trial Chamber recalled that "on a few days in April, **Miletić** initialled UNPROFOR convoy requests, *indicating approval or denial*".[4376]

1536. In addition to notifications to UNPROFOR, the Main Staff sent notifications to subordinate units informing them of decisions concerning UNPROFOR convoy requests, without which a convoy was not allowed to pass.[4377] The Trial Chamber found that in the absence of Milovanović, **Miletić** (type-)signed these notifications.[4378] The Trial Chamber also noted that all six such notifications sent after April 1995 were signed by **Miletić**.[4379]

1537. **Miletić** contends that the Trial Chamber erred in finding that, through his involvement in the convoy approval and notification procedure for UNPROFOR convoys, he contributed to the JCE to Forcibly Remove.[4380] He submits that the Trial Chamber based its findings on the presence of his initials on various UNPROFOR convoy requests and on the fact that he "signed" various notifications to subordinate units.[4381] As concerns UNPROFOR convoy requests initialled by him, **Miletić** argues that the Trial Chamber did not establish by whom the decisions to approve or deny were made, and asserts that he did not have such authority.[4382] **Miletić** argues that his participation in the "convoy process" was technical in nature and limited to sending the notifications required for the passage of authorised convoys, and that his actions did not bear negatively on convoy passage but were solely for the purpose of allowing convoys to pass.[4383] He also submits that the Trial Chamber erroneously found that he "signed" six notifications to subordinate units after April 1995 whereas they only "bear his name".[4384]

1538. The Prosecution responds that the Trial Chamber considered at length the procedure related to UNPROFOR convoys and reasonably found that **Miletić**'s involvement in, and use of, the

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4375 Ex. 5D01447, "Stipulations concerning convoy-related documents, 2 June 2009", para. 3(b) & Appendix, Tables 1, 3. See Trial Judgement, para. 216 & fn. 628, para. 1657 & fn. 5069.
4376 Trial Judgement, para. 1708 (emphasis added).
4377 Trial Judgement, para. 217. See Trial Judgement, paras 216, 1659.
4378 Trial Judgement, para. 217.
4379 Trial Judgement, para. 1660.
4380 Miletić's Appeal Brief, paras 287, 292.
4381 Miletić's Appeal Brief, para. 287.
4382 Miletić's Appeal Brief, para. 288. See Miletić's Appeal Brief, para. 284.
4383 Miletić's Appeal Brief, paras 290-291.
4384 Miletić's Appeal Brief, para. 289. See Miletić's Reply Brief, para. 98.

approval and notification procedure to create the conditions for forcible transfer constituted a contribution to the JCE to Forcibly Remove.[4385]

a. Miletić's role in the UNPROFOR convoy approval procedure

i. Whether it was found that Miletić acted as a decision-maker

1539. Recalling the Trial Chamber's findings detailing **Miletić**'s role in the UNPROFOR convoy "approval" procedure,[4386] the Appeals Chamber observes that the Trial Chamber initially made a linguistic distinction between Mladić and Milovanović who "decided" requests, "indicating approval or denial", and **Miletić** who "initialled" requests.[4387] However, it subsequently found that **Miletić** "initialled" requests "indicating approval or denial".[4388] The Appeals Chamber notes that when read in isolation, the plain meaning of the language "indicating approval or denial", is merely that *someone* approved or denied the request. It does not necessarily signify that it was **Miletić** who approved or denied the request. However, a contextual reading of this language, bearing in mind that the Trial Chamber used the same phrasing when describing the significance of Mladić's or Milovanović's initials,[4389] indicates that this should be read as conveying that **Miletić** acted as a decision-maker in approving or denying UNPROFOR convoy requests. On this basis, the Appeals Chamber is of the view that the Trial Chamber found that when **Miletić**'s initials appeared on UNPROFOR convoy requests, this signified that he was the decision-maker.

ii. Whether the Trial Chamber disregarded evidence

1540. In asserting that he did not have the authority to approve or deny UNPROFOR convoy requests, **Miletić** challenges the evidentiary basis of this finding.[4390] In this regard, **Miletić** draws the Appeals Chamber's attention to portions of the testimonies of Defence Witnesses Kralj and Obradović and of Prosecution Witness General Cornelis Nicolai, UNPROFOR Chief of Staff, as well as to intercepts dated 12 August 1995 and 4 August 1995.[4391] **Miletić** refers to a portion of Kralj's testimony wherein he states that "General Miletić never participated in any decision-making with regard [to] convoys, either with General Milovanović or General Mladić".[4392] **Miletić** refers to the testimony of Nicolai, who stated that his first designated contact within the VRS was

4385 Prosecution's Response Brief (Miletić), paras 190, 192-194; Appeal Hearing, AT. 469-470 (5 Dec 2013). See Appeal Hearing, AT. 471 (5 Dec 2013).
4386 See *supra*, para. 1535.
4387 See *supra*, para. 1535.
4388 Trial Judgement, para. 1708.
4389 See *supra*, para. 1535.
4390 See *supra*, para. 1537.
4391 Miletić's Appeal Brief, fns 605-606.
4392 Slavko Kralj, T(F). 29260-29261 (4 Dec 2008). See Miletić's Appeal Brief, fn. 605.

Milovanović, and in the latter's absence, either Mladić, Tolimir, or Gvero.[4393] In the intercepted conversation of 12 August 1995, Nicolai asked **Miletić** for his "in principle" approval for the passage of UNHCR transport aircraft and helicopters. **Miletić** replied "[y]ou know what? I will consult my superiors and get back to you. [...] I do not think there will be any problems there, but still, I must consult them, and will let you know through our liaison officer".[4394] When asked about whether this intercept indicated that **Miletić** had "authorisation to issue decisions", Obradović testified that, "from the conversation one can see that General Miletić was unable to reply to the request from the Chief of Staff of UNPROFOR".[4395] Finally, in the course of the intercepted conversation of 4 August 1995 between **Miletić** and UN Colonel Quape concerning a requested medical evacuation of a patient, **Miletić** referred to a previous incident in which the route of evacuation was altered without his permission.[4396] He then stated that "I have no desire whatsoever to take on any more responsibility myself, because at that time I approved it on my own responsibility, not with the agreement of my commander".[4397]

1541. The Appeals Chamber recalls that it is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[4398] The Trial Chamber's footnote references encompass Kralj's testimony, to which **Miletić** refers, and which apparently contradicts the conclusion that when **Miletić**'s initials appeared on UNPROFOR convoy requests, this signified that it was he who decided to grant or deny them.[4399] It is therefore clear that the Trial Chamber took this portion of Kralj's testimony on the subject into account but rejected it. In this regard, the Appeals Chamber recalls that a trial chamber has the discretion to consider whether the evidence of a witness taken as a whole is reliable or credible, and to accept or reject the fundamental features of the evidence.[4400]

1542. With respect to Nicolai's testimony,[4401] it is apparent that the Trial Chamber did in fact consider this evidence as it concluded, based in part on his testimony, that "[i]n the absence of Milovanović, UNPROFOR Chief of Staff General Nicolai interacted with other members of the

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4393 Cornelis Nicolai, T(F). 18448 (29 Nov 2007). See Miletić's Appeal Brief, fn. 606.
4394 Ex. 5D01281, "Intercepted conversation between Miletić and Nicolai, 12 August 1995, 11:47 hours". See Miletić's Appeal Brief, fn. 605.
4395 Ljubomir Obradović T(F). 28294 (17 Nov 2008). See Miletić's Appeal Brief, fn. 605.
4396 Ex. P01401a, "Intercepted conversation between Miletić and UN Colonel Quape, 4 August 1995, 11:20 hours". See Miletić's Appeal Brief, fn. 605.
4397 Ex. P01401a, "Intercepted conversation between Miletić and UN Colonel Quape, 4 August 1995, 11:20 hours". See Miletić's Appeal Brief, fn. 605.
4398 *Đorđević* Appeal Judgement, fn. 2527; *Šainović et al.* Appeal Judgement, fns 3289, 4205; *Kvočka et al.* Appeal Judgement, para. 23.
4399 Trial Judgement, fns 623, 630, 632, 5068, referring to, *inter alia*, Slavko Kralj, T. 29260 (4 Dec 2008).
4400 See *Munyakazi* Appeal Judgement, para. 51; *Hategekimana* Appeal Judgement, para. 282; *Bagosora et al.* Appeal Judgement, para. 253. See also *supra*, para. 137.
4401 See *supra*, para. 1540.

Main Staff rather than **Miletić**".[4402] As the Trial Chamber's findings are not necessarily contradicted by the testimony of Nicolai to which **Miletić** refers, the Appeals Chamber finds his argument that this testimony was disregarded to be unpersuasive. Similarly, as it relates to Obradović's testimony concerning the 12 August 1995 intercept,[4403] the Appeals Chamber notes that the Trial Chamber refers to the evidence of this witness,[4404] and **Miletić** fails to show that Obradović's evidence was disregarded. Regarding the 4 August 1995 intercept,[4405] while the Trial Chamber does not refer to this exhibit, this is not necessarily an indication of disregard,[4406] especially as this evidence shows that on at least one occasion prior to 4 August 1995, **Miletić** acted in a decision-making role, thereby supporting the Trial Chamber's conclusion.

1543. On the basis of the above, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber disregarded evidence in finding that when his initials appeared on UNPROFOR convoy requests, this signified that it was he who decided to grant or deny them. Accordingly, the Appeals Chamber dismisses this aspect of his argument.

b. Miletić's role in the UNPROFOR convoy notification procedure

i. Whether Miletić's role was technical and facilitatory

1544. The Appeals Chamber now turns to **Miletić**'s argument that his role in the "convoy process" was limited to the technical aspect of sending notifications, an aspect that did not bear negatively on the passage of convoys as the decision to approve or deny would have already been taken. In this regard, the Appeals Chamber recalls that among the requirements for a conviction through JCE, a trier of fact must prove beyond reasonable doubt that the accused made a contribution to the common criminal purpose.[4407] Whether an act is "technical" does not *per se* preclude it from being a contribution to a JCE.

1545. As to his contention that his acts in this regard "did not bear negatively upon th[e] passage" of convoys and indeed "facilitated the passage of authorized convoys",[4408] the Appeals Chamber recalls that the Trial Chamber found that UNPROFOR convoy notifications were one component of the process regulating humanitarian access to the enclaves.[4409] Consequently, even if in isolation notifications did not have a negative bearing on convoys already approved for passage, they were a

4402 Trial Judgement, para. 1642 & fn. 5027, referring to Cornelis Nicolai, T. 18448 (29 Nov 2007).
4403 See *supra*, para. 1540.
4404 See Trial Judgement, fn. 5029, referring to Ljubomir Obradović, T(F). 28294 (17 Nov 2008), Ex. 5D01281, "Intercepted conversation between Miletić and Nicolai, 12 August 1995, 11:47 hours".
4405 See *supra*, para. 1540.
4406 See *supra*, note 4398.
4407 *Gotovina and Markač* Appeal Judgement, para. 89 and references cited therein.
4408 Miletić's Appeal Brief, paras 290-291.
4409 Trial Judgement, paras 216-218.

component of the regulatory apparatus of the Main Staff directed toward the realisation of the criminal objective to forcibly remove the Bosnian Muslims of the enclaves. As such, the Appeals Chamber considers that **Miletić** has failed to demonstrate that no reasonable trier of fact could have found that his involvement in this component of the apparatus constituted a contribution to the JCE to Forcibly Remove.[4410] The Appeals Chamber therefore dismisses this aspect of his argument.

ii. Whether Miletić "signed" six notifications

1546. Concerning the six UNPROFOR convoy notifications to subordinate units dated after April 1995 that the Trial Chamber found were "signed" by **Miletić**, the Appeals Chamber observes that only one of the six bears **Miletić**'s hand-written name along with "Standing in for the Chief of Staff".[4411] The remaining five bear **Miletić**'s type-signed signature as "Stand-in Chief of Staff".[4412] The Appeals Chamber considers that, while the Trial Chamber's characterisation of the signature format on these five notifications is not as precise as it could be, **Miletić** has not substantiated his argument that this difference has any bearing on the Trial Chamber's findings concerning his "involvement in the approval of convoys".[4413] The Appeals Chamber therefore dismisses this aspect of his argument.

c. Conclusion

1547. In view of the above, the Appeals Chamber finds that **Miletić** has not demonstrated an error in the Trial Chamber's findings concerning his role in the "approval" and "notification" procedure related to UNPROFOR convoy requests. Accordingly, the Appeals Chamber dismisses sub-ground 10.5 of **Miletić**'s appeal.

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4410 Trial Judgement, paras 1709-1710.

4411 Ex. P02497, "VRS Main Staff notification of UNPROFOR convoys for Žepa, Goražde, and Srebrenica addressed to various brigades, signed by Miletić, 18 June 1995".

4412 Ex. P02554, "VRS Main [Staff] Notification of UNPROFOR convoys to the Sarajevo-Romanija Corps and the Drina Corps, type-signed by Miletić, 1 July 1995"; Ex. P02556, "VRS Main Staff Notification re UNPROFOR convoys to the Drina Corps, type-signed by Miletić, 3 July 1995"; Ex. P02558, "VRS Main Staff notification re UNPROFOR convoys to Military Posts 7598 and 7111, type-signed by Miletić, 5 July 1995"; Ex. P02565, "VRS Main Staff notification re UNPROFOR convoys to Military Post 7111, type-signed by Miletić, 12 July 1995"; Ex. P02586, "VRS Main Staff notification to Military Post 7111 re approved movement of UNPROFOR staff, type-signed by Miletić, 27 July 1995".

4413 Miletić's Reply Brief, para. 98.

(v) Whether Miletić knowingly implemented the instructions of Directive 7 regarding convoy restrictions (Sub-grounds 10.4 and 10.5 in part)

1548. The Trial Chamber found that through his involvement in the convoy approval and notification procedure, **Miletić** implemented the instructions of Directive 7 regarding humanitarian aid and UNPROFOR convoys with full knowledge as to the overall aim of these restrictions.[4414]

1549. **Miletić** contends that the Trial Chamber did not establish that he knew that any instructions given to him in relation to convoys were on the basis of Directive 7.[4415] In this regard, he submits that he did not know the ultimate purpose of the convoy restrictions because: (1) there was no increase in convoy restrictions or a change in the convoy procedures following the issuance of Directive 7; (2) he was neither a member of the inner circle of the Main Staff command who was acquainted with the objectives and strategy of the VRS, nor of the circle who participated in decision-making; and (3) convoys were not part of the "business" of the Administration for Operations and Training.[4416]

1550. The Prosecution responds that the Trial Chamber's findings in this regard are reasonable in that **Miletić** had full knowledge of the criminal plan from its inception.[4417]

1551. The Appeals Chamber recalls that the Trial Chamber found that **Miletić** drafted Directive 7 and that he was well-acquainted with its final text, including the part setting out the criminal objective to forcibly remove the Bosnian Muslims from the enclaves.[4418] Pursuant to this objective, Directive 7 admonished that:

> The relevant State and military organs responsible for work with UNPROFOR and humanitarian organisations shall, through the planned and unobtrusively restrictive issuing of permits, reduce and limit the logistics support of UNPROFOR to the enclaves and the supply of material resources to the Muslim population, making them dependent on our good will.[4419]

The Trial Chamber found that the VRS implemented this objective.[4420] As to **Miletić**'s involvement in the convoy approval and notification procedure, the Trial Chamber found that, at times, he initialled requests for approval of UNPROFOR convoys and signed related notifications to UNPROFOR or subordinate units and that he signed, in Milovanović's absence, notifications concerning humanitarian aid convoys.[4421]

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4414 Trial Judgement, para. 1709.
4415 Miletić's Appeal Brief, paras 285, 291.
4416 Miletić's Appeal Brief, para. 285; Miletić's Reply Brief, para. 99.
4417 Prosecution's Response Brief (Miletić), para. 195. See Appeal Hearing, AT. 469-470 (5 Dec 2013).
4418 Trial Judgement, paras 1652-1653, 1704-1705.
4419 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 14.
4420 Trial Judgement, paras 767, 1707.
4421 Trial Judgement, paras 1656-1660.

1552. The Appeals Chamber has addressed and dismissed in its analysis under sub-ground 5.8 of **Miletić**'s appeal the argument that the finding that he knowingly implemented the instructions of Directive 7 is arbitrary as the Trial Chamber did not establish that, following the issuance of Directive 7, there was an increase in restrictions on convoys.[4422] In this regard, the Appeals Chamber notes that the Trial Chamber found that at least from June 1995, the aid supply decreased significantly, resulting in a very dire humanitarian situation in the enclaves.[4423] The Appeals Chamber finds that **Miletić** has failed to develop his assertion as to the relevance of a Trial Chamber finding that following the issuance of Directive 7, there was a change in the procedure for responding to convoy requests. The Appeals Chamber therefore dismisses this aspect of his argument.

1553. Finally, the Appeals Chamber notes the two other factors which he argues the Trial Chamber failed to establish and take into account in concluding that he knowingly implemented the instructions of Directive 7.[4424] Bearing in mind the Trial Chamber's findings as to **Miletić**'s first-hand knowledge of the criminal purpose of Directive 7 and his direct role in the convoy approval and notification procedure,[4425] the Appeals Chamber considers that **Miletić** has not demonstrated how, had these facts been established, they would have undermined the Trial Chamber's finding that **Miletić** *knowingly* implemented the instructions of Directive 7. The Appeals Chamber therefore dismisses these arguments.

1554. Based on the foregoing, the Appeals Chamber considers that **Miletić** has failed to demonstrate that no reasonable trier of fact could have concluded that through his involvement in the convoy approval and notification procedure, he knowingly implemented the instructions of Directive 7. Accordingly, the Appeals Chamber dismisses sub-ground of appeal 10.4 and the remainder of sub-ground of appeal 10.5 discussed here.

(vi) Whether the Trial Chamber overestimated the importance of the Main Staff's reporting function and Miletić's role therein (Sub-grounds 9.3(a) in part and 10.6)

1555. Concerning **Miletić**'s role in collecting and disseminating information, the Trial Chamber found that in the absence of Milovanović, **Miletić** received regular daily reports from subordinate units to the VRS Main Staff ("Regular Combat Reports") and interim reports from subordinate units (collectively, "Subordinate Unit Reports"). In his capacity as Chief of the Administration for Operations and Training, he compiled the information from these reports into a single report that he would, in Milovanović's absence, review and sign before it was encrypted and forwarded to

4422 See *supra*, paras 667, 671. See also *supra*, paras 630-640.
4423 Trial Judgement, para. 767. See *supra*, para. 631.
4424 See *supra*, para. 1549. See also Miletić's Appeal Brief, para. 285; Miletić's Reply Brief, para. 99.

Karadžić, among others.[4426] The Trial Chamber found in this regard that **Miletić** was kept abreast of all developments in the field and the implementation of Mladić's orders and that he forwarded the knowledge he gained to Mladić and Karadžić.[4427] The Trial Chamber found that the information **Miletić** provided through the daily reports sent from the VRS Main Staff to Karadžic ("Daily Main Staff Reports") was "comprehensive and included details on [...] the transportation of the civilian population out of Srebrenica and Žepa"[4428] and that in this capacity he "served as a 'hub' for information" such that "on critical days when the population was physically moved from [Srebrenica], and during the Žepa campaign, [he] skilfully and efficiently used his unique position of knowledge to inform and advise".[4429] Through this role, the Trial Chamber found that **Miletić** "enabled the decisions taken to successfully implement the plan, resulting in the forced removal of thousands of Bosnian Muslims from the enclaves".[4430] The Trial Chamber found that in exercising these functions related to the Subordinate Unit and Daily Main Staff Reports, **Miletić** contributed to the JCE to Forcibly Remove.[4431]

1556. **Miletić** submits that the Trial Chamber erred in finding that the drafting and transmission of the Daily Main Staff Reports constituted a contribution to the JCE to Forcibly Remove.[4432] He argues that the Trial Chamber assigned these reports undue importance and that there is no evidence suggesting that the Daily Main Staff Reports were "the primary means for transmitting information".[4433] He further submits that the Trial Chamber erred in concluding that he was continually informed of the activities of subordinate units on the basis of their reports to the Main Staff as his knowledge was limited to the information reported to him, which was sometimes intentionally false.[4434] He argues that, had the Trial Chamber carefully analysed the reports sent to the Main Staff by subordinate units, it would have concluded that they did not contain information indispensable for conveying an accurate picture of the situation, including information related to the forcible removal of the Bosnian Muslims from the enclaves.[4435] Finally, **Miletić** presents four detailed submissions, alleging that the Trial Chamber misconstrued the Main Staff's reporting role with respect to certain events related to the forcible transfer. He contends that as a consequence, the

4425 See *supra*, para. 1551. See also *supra*, paras 1498-1510, 1528-1547.
4426 Trial Judgement, paras 1636, 1638-1639.
4427 Trial Judgement, para. 1713 (internal references omitted).
4428 Trial Judgement, para. 1714 (internal references omitted).
4429 Trial Judgement, para. 1716 (internal references omitted).
4430 Trial Judgement, para. 1716 (internal references omitted).
4431 Trial Judgement, paras 1713-1715.
4432 Miletić's Appeal Brief, para. 298.
4433 Miletić's Appeal Brief, para. 293 & fns 615, 618.
4434 Miletić's Appeal Brief, paras 251, 253-254, 256, 294.
4435 Miletić's Appeal Brief, para. 294; Miletić's Reply Brief, para. 101.

Trial Chamber incorrectly concluded that the Main Staff knew about "all of the events" and that "its reports" related to criminal activity.[4436]

1557. The Prosecution responds that the Trial Chamber reasonably found that **Miletić** contributed to the JCE to Forcibly Remove through his key role in receiving and distributing information, that he was fully informed of the situation on the ground, and that his challenges to a limited number of reports upon which the Trial Chamber relied show no error.[4437] The Prosecution also asserts that in his submissions alleging that the Trial Chamber misconstrued the Main Staff's reporting role in relation to certain events pertaining to the forcible transfer, **Miletić** fails to show any error or any impact on the Trial Chamber's findings as to his knowledge.[4438]

a. Whether the Daily Main Staff Reports were a "central instrument" for updating the President

1558. The Appeals Chamber observes that while **Miletić** argues that there is no evidence suggesting that the Daily Main Staff Reports were the "primary means" for transmitting information,[4439] the Trial Chamber "note[d] the significance of [the Daily Main Staff Reports …] in that they were *a central instrument* for updating the President and Supreme Command on the activities of the VRS".[4440] Thus, even accepting **Miletić**'s proposition that the Daily Main Staff Reports were not the only source of information for Karadžić, a reasonable trier of fact could have considered that they were nevertheless important in keeping him informed.[4441] The Appeals Chamber finds that **Miletić** misrepresents the Trial Chamber's factual finding, and therefore dismisses this aspect of his argument.

b. Miletić's knowledge through the Subordinate Unit Reports

1559. Regarding **Miletić**'s contention that the Subordinate Unit Reports contained inaccurate information and, accordingly, that this had a bearing upon the information available to him, the Appeals Chamber observes that the Trial Chamber specifically acknowledged that evidence had been adduced to show that the Subordinate Unit Reports did not always accurately reflect the situation on the ground. However, the Trial Chamber found that "in light of the totality of evidence,

4436 Miletić's Appeal Brief, para. 295; Miletić's Reply Brief, paras 102-103.
4437 Prosecution's Response Brief (Miletić), para. 196. See Prosecution's Response Brief (Miletić), paras 175-176, 197, 199; Appeal Hearing, AT. 470 (5 Dec 2013).
4438 Prosecution's Response Brief (Miletić), para. 200.
4439 Miletić's Appeal Brief, para. 293, referring to Trial Judgement, para. 1639.
4440 Trial Judgement, para. 1639 (emphasis added).
4441 See Trial Judgement, para. 1639.

including showing that **Miletić** was updated directly by telephone, [it was] satisfied that **Miletić** ensured [that] he was kept fully updated".[4442]

1560. **Miletić** refers to certain Regular Combat Reports from the Drina Corps to the Main Staff asserting that the reports the Main Staff received did not contain information indispensable for conveying an accurate picture of the situation. The Appeals Chamber notes that these reports were sent by the Drina Corps to the Main Staff during the 2-26 July 1995 time period in which events preparatory to the forcible transfer took place and during which much of the forcible transfer itself took place. In relation to Srebrenica, these events included: (1) the VRS's achievement of combat readiness, its attack on Srebrenica, and its subsequent advancement towards, and eventual take over of, the town of Srebrenica; (2) the departure of BiH forces from Srebrenica; (3) the flight of thousands of Bosnian Muslims from Srebrenica to Potočari and the formation of the column of 10,000-15,000 largely able-bodied men moving from the enclave towards Konjević Polje; and (4) the separation at Potočari of the Bosnian Muslim men from their families and the temporary detention and eventual transportation of the former to Bratunac.[4443] In relation to Žepa, these events included: (1) the preparations for and the VRS advance towards and subsequent attack on Žepa; (2) the cessation of major fighting in relation to the enclave following the 24 July 1995 Agreement; and (3) the subsequent transportation of Bosnian Muslim civilians out of Žepa.[4444]

1561. The Appeals Chamber notes that while the Regular Combat Reports to which he refers do not comprehensively address all details of each of the above events, their contents do correspond to these events.[4445] The Appeals Chamber moreover observes that these Regular Combat Reports cover only a certain number of days in the 2-26 July 1995 period. **Miletić** has not pointed to the Regular Combat Reports of 5-6, 9-12, 17, and 19-24 July 1995 or explained his lack of reference to them.

1562. The Appeals Chamber therefore considers, on the basis of the reports to which **Miletić** refers, that he has not shown that the Regular Combat Reports sent by the Drina Corps to the Main

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4442 Trial Judgement, fn. 5009.
4443 Trial Judgement, paras 242-342.
4444 Trial Judgement, paras 665-724.
4445 Ex. 4D00312, "Drina Corps Daily Combat Report, 2 July 1995", para. 2; Ex. 4D00315, "Drina Corps Daily Combat Report, 3 July 1995", para. 2; Ex. 5D01106, "Drina Corps regular combat report to the VRS Main Staff, signed by Živanović, 4 July 1995", paras 2, 8; Ex. 4D00325, "Drina Corps regular combat report to the VRS Main Staff, 7 July 1995", para. 8; Ex. 4D00327, "Drina Corps regular combat report to the VRS Main Staff, 8 July 1995", para. 2; Ex. P00136, "Drina Corps Regular Combat Report to the VRS Main Staff, signed by Radislav Krstić, 13 July 1995," paras 1-3; Ex. 4D00084, "Drina Corps Regular Combat Report, type-signed Radislav Krstić, 14 July 1995", paras 2, 8; Ex. 7DP00138, "Drina Corps Regular Combat Report, 15 July 1995", paras 1-2; Ex. 7DP00139, "Drina Corps Regular Combat Report, 16 July 1995", paras 1-2, 8; Ex. P00141, "Regular Combat Report from the Drina Corps Command to the VRS Main Staff signed by Krstić, 18 July 1995", paras 2, 8; Ex. P03074, "Drina Corps Regular Combat Report signed by Radislav Krstić, 25 July 1995", paras 2-3; Ex. P03075, "Drina Corps Regular Combat Report signed by Radislav Krstić, 26 July 1995", paras 2, 8. The Appeals Chamber notes that there is no translation on the trial record of

Staff did not contain information indispensable for the Main Staff's accurate understanding of the situation, or that a reasonable trier of fact could not have concluded that through his role in relation to the Subordinate Unit Reports, he "always had knowledge of the activities of, and issues relating to, the subordinate units".[4446]

c. The Main Staff's reporting role in relation to the forcible transfer

1563. The Appeals Chamber now turns to **Miletić**'s detailed submissions alleging that the Trial Chamber misconstrued the Main Staff's reporting role in relation to the forcible transfer.[4447] He contends that the Trial Chamber erred in finding that, "[f]ollowing Karadžić's visit to the Drina Corps Command [on 28 June 1995], the Main Staff kept him updated on the combat readiness of the forces for the Srebrenica operation"[4448] ("Reporting Finding") and erred in its interpretation of three specific VRS reports.[4449] In **Miletić**'s view, the consequence of these errors is that the Trial Chamber incorrectly concluded that the Main Staff knew about "all of the events" and that "its reports" related to criminal activity.[4450]

1564. **Miletić** understands the Reporting Finding to indicate that the Main Staff updated Karadžić on the Drina Corps' readiness for combat in the Srebrenica area *because* Karadžić visited the Drina Corps on 28 June 1995.[4451] However, this interpretation is not supported by a contextual reading of the Reporting Finding. This finding is situated in the section of the Trial Judgement setting out **Miletić**'s role in the operations in Srebrenica and Žepa through, *inter alia*, his preparation of daily reports to Karadžić.[4452] This section begins with the Trial Chamber's statement that "[a]s previously elaborated, **Miletić** kept the President of [the] RS updated of the preparations and the military activity in the area of the Drina Corps through daily and interim Main Staff reports".[4453] The Trial Chamber then describes **Miletić**'s contributions of this nature in the context of a chronological narrative of events from 28 June to 2 August 1995.[4454] Immediately subsequent to the Reporting Finding, the Trial Chamber finds that, on each day between 2 and 6 July 1995, the Main Staff sent reports, type-signed by **Miletić**, to Karadžić.[4455] Nothing in the context of the Reporting Finding indicates that the Trial Chamber intended to signify that these Daily Main Staff Reports were sent

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Ex. 5D00012 in an official language of the Tribunal and therefore the Appeals Chamber will not consider the contents of this exhibit.

4446 Trial Judgement, para. 1639.

4447 See *supra*, para. 1556.

4448 Trial Judgement, para. 1664. See Miletić's Appeal Brief, para. 295.

4449 Miletić's Appeal Brief, para. 295, referring to Ex. 5D01083, "Regular Combat Report from the Pribicevac Forward Command Post, signed by Milenko Jevđević, 3 June 1995", Ex. P02895, "Main Staff Situation Report type-signed Miletić, 6 July 1995", Ex. 7DP00139, "Drina Corps Regular Combat Report, 16 July 1995".

4450 Miletić's Appeal Brief, para. 295. See *supra*, para. 1556.

4451 Miletić's Appeal Brief, para. 295.

4452 Trial Judgement, paras 1661-1699.

4453 Trial Judgement, para. 1661.

4454 Trial Judgement, paras 1661-1699.

to Karadžić *because* of his visit to the Drina Corps rather than as a matter of normal procedure. In this respect, **Miletić** misinterprets this factual finding and the Appeals Chamber dismisses this aspect of his argument.

1565. Concerning **Miletić**'s argument related to Exhibit 5D01083, a VRS report of 3 June 1995 pertaining to its takeover of DutchBat OP Echo (south of the Srebrenica enclave), he cites an error in the English translation concerning the report's origin and contends that it was sent to the Drina Corps Command, rather than to the Main Staff, as the Trial Chamber determined.[4456] The Appeals Chamber observes in this regard that both **Miletić** and the Prosecution acknowledged this translation error at trial, indicating their understanding that the report was *not* sent to the Main Staff.[4457] Nonetheless, as **Miletić** has not attempted to demonstrate how this error results in a miscarriage of justice, the Appeals Chamber dismisses this aspect of his argument.

1566. Concerning **Miletić**'s argument related to Exhibit P02895, he submits that this report – indicating, *inter alia*, that the Drina Corps had achieved combat readiness and was prepared for active combat operations toward the enclaves – was sent from the Main Staff to Karadžić on 7 July 1995 instead of 6 July 1995 – 24 hours after the "outbreak of combat" in Srebrenica.[4458] The first page of this document is dated 6 July 1995, whereas the stamp on the last page indicates that it was received at 5:25 a.m. on 7 July 1995.[4459] The Appeals Chamber is not in a position to precisely determine when this report was sent. However, the Appeals Chamber considers that even if the Trial Chamber erred in determining that the report was sent on 6 July 1995, **Miletić** has failed to demonstrate that this error led to a miscarriage of justice.[4460] Accordingly, the Appeals Chamber dismisses this aspect of his argument.

1567. Finally, the Appeals Chamber turns to **Miletić**'s contention that the Trial Chamber erred in concluding that information regarding **Pandurević**'s opening of a corridor on 16 July 1995 in order to allow the passage of Bosnian Muslim civilians was "reported up the chain of command and reached the Main Staff as well as the President".[4461] **Miletić** points to: (1) Exhibit 7DP00139, a 16 July 1995 regular combat report from the Drina Corps to the Main Staff, which does not

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4455 Trial Judgement, para. 1664.

4456 Miletić's Appeal Brief, para. 295, referring to Ex. 5D01083, "Regular Combat Report from the Pribicevac Forward Command Post, signed by Milenko Jevđević, 3 June 1995". See also Trial Judgement, para. 208 & fn. 585, referring to Ex. 5D01083, "Drina Corps regular combat report to the Main Staff, signed by Milenko Jevđević, 3 June 1995".

4457 Milenko Jevđević, T. 29503-29504 (10 Dec 2008); T. 29733-29734 (15 Dec 2008).

4458 Miletić's Appeal Brief, para. 295, referring to Ex. P02895, "Main Staff Situation Report type-signed Miletić, 6 July 1995", p. 4, paras 6(a)-6(b).

4459 Ex. P02895, "Main Staff Situation Report type-signed Miletić, 6 July 1995", pp. 1, 5.

4460 See *supra*, para. 19.

4461 Trial Judgement, para. 1680. See Miletić's Appeal Brief, para. 295.

explicitly mention the opening of a corridor;[4462] and (2) a 4:15 p.m. intercepted conversation of the same day between Mladić and a VRS Main Staff Duty Officer, which indicates that the President had been informed by a certain Karišik of the opening of the corridor ("16 July Intercept").[4463] Based on this, **Miletić** contends that information concerning the corridor did not reach the Main Staff via the Drina Corps but rather via Karadžić.[4464]

1568. The Appeals Chamber observes that a Daily Main Staff Report sent to Karadžić, dated 16 July 1995 and type-signed **Miletić** ("16 July Combat Report"), indicated the opening of the corridor.[4465] The indication on the report is that it was received on 17 July 1995 at 1:15 a.m.[4466] The Appeals Chamber notes that **Pandurević** reported the opening of the corridor to the Drina Corps at 1:44 p.m. on 16 July 1995 and that soon after that the Main Staff knew about this decision.[4467] The Appeals Chamber therefore considers that **Miletić** has not demonstrated that the Trial Chamber erred in concluding that the opening of the corridor was reported up the chain of command, reaching the Main Staff as well as Karadžić. The Appeals Chamber therefore dismisses this aspect of his argument.

d. Conclusion

1569. In view of the above, the Appeals Chamber finds that **Miletić** has failed to show that no reasonable trier of fact could have concluded that the drafting and transmission of the Daily Main Staff Reports constituted a contribution to the JCE to Forcibly Remove. Accordingly, the Appeals Chamber dismisses the portion of sub-ground of appeal 9.3(a) discussed here and sub-ground 10.6 of **Miletić**'s appeal.

(vii) Miletić's knowledge of and role in the attack on Srebrenica (Sub-ground 10.7)

1570. The Trial Chamber concluded that it was not established that **Miletić** was at the VRS Main Staff between 7 and 11 July 1995 but found that this did not affect its findings on **Miletić**'s overall role.[4468] The Trial Chamber found that **Miletić** returned to the VRS Main Staff on 12 July 1995. It considered that, upon his return, it would be impossible for him to effectively carry out his functions as Chief of Operations and Training, and any tasks undertaken for the Chief of Staff, without being fully informed of recent developments and the current state of key military

4462 Miletić's Appeal Brief, para. 295, referring to Ex. 7DP00139, "Drina Corps Regular Combat Report, 16 July 1995".
4463 Miletić's Appeal Brief, fn. 628, referring to Ex. P01195a (confidential).
4464 Miletić's Appeal Brief, para. 295, referring to Ex. P01195a (confidential).
4465 Trial Judgement, para. 1680 & fn. 5129, referring to Ex. P00050, "VRS Main Staff Daily Combat Report, type-signed Miletić, 16 July 1995", p. 4.
4466 Ex. P00050, "VRS Main Staff Daily Combat Report, type-signed Miletić, 16 July 1995", p. 5.
4467 Trial Judgement, paras 559, 1680, 1874-1875.
4468 Trial Judgement, para. 1665, fn. 5211.

actions.[4469] Moreover, the Trial Chamber found that following Milovanović's absence from the VRS Main Staff, upon his return, **Miletić** was duty-bound to brief him.[4470] On this basis, the Trial Chamber was satisfied that **Miletić** was briefed in detail about all the developments and the situation in Srebrenica as soon as he arrived back at Crna Rijeka on 12 July 1995 ("12 July Briefing Finding").[4471] Ultimately, the Trial Chamber concluded that with his in-depth knowledge of the goals and strategies of the VRS, **Miletić** was at the centre of the co-ordination work at the Main Staff and that, through this co-ordination, he contributed to the JCE to Forcibly Remove.[4472]

1571. **Miletić** submits that the Trial Chamber erred in establishing his knowledge of and role in the Srebrenica operation.[4473] **Miletić** asserts that the 12 July Briefing Finding is speculative and based upon the Trial Chamber's premise that he was duty-bound to brief Milovanović on the events in Srebrenica.[4474] **Miletić** further submits that even if he updated Milovanović on events in Srebrenica, it would have been *ex post facto*, and therefore of no use to him.[4475] Further, **Miletić** submits that, based on the reports, he did not acquire or transmit detailed information regarding the Srebrenica attack.[4476]

1572. **Miletić** also challenges the Trial Chamber's reliance on Tolimir's 13 July 1995 order concerning POWs in describing his role in the events in Srebrenica. **Miletić** points out that, although he was mentioned in this order, he was not among its addressees. He asserts that the Trial Chamber failed to determine whether he had any knowledge of this document.[4477] Finally, **Miletić** claims that, had he been the central figure at the Main Staff, he would not have been able to be absent during the attack on Srebrenica, one of the most important operations at that time.[4478]

1573. The Prosecution responds that the Trial Chamber reasonably found that upon his return to the Main Staff, **Miletić** was fully updated about the military attack against Srebrenica.[4479] It points out that, irrespective of whether POWs and the civilian population were officially within **Miletić**'s purview, he received information on and reported about them.[4480]

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4469 Trial Judgement, para. 1667.
4470 Trial Judgement, fn. 5097.
4471 Trial Judgement, para. 1667.
4472 See Trial Judgement, paras 1712, 1715.
4473 Miletić's Appeal Brief, paras 299-303.
4474 Miletić's Appeal Brief, para. 299 (referring to Trial Judgement, para. 1667 & fn. 5097), 303. See also Miletić's Reply Brief, para. 104.
4475 Miletić's Appeal Brief, para. 299.
4476 Miletić's Appeal Brief, para. 300.
4477 Miletić's Appeal Brief, para. 301.
4478 Miletić's Appeal Brief, para. 302, referring to Trial Judgement, para. 1667. See also Appeal Hearing, AT. 443 (5 Dec 2013).
4479 Prosecution's Response Brief (Miletić), para. 201. See Prosecution's Response Brief (Miletić), para. 203; Appeal Hearing, AT. 473-474 (5 Dec 2013).
4480 Prosecution's Response Brief (Miletić), para. 202.

1574. The Prosecution also submits that the wording of Tolimir's 13 July 1995 order concerning POWs as well as the testimony of Witness Savčić confirm that **Miletić** knew about its content.[4481] Finally, the Prosecution submits that, in arguing that had he been the central figure at the Main Staff, he would not have been able to be away from 7 to 11 July 1995, **Miletić** fails to address the Trial Chamber's finding that his absence did not diminish his co-ordinating role throughout the criminal plan's implementation from March through August 1995.[4482]

1575. The Appeals Chamber observes that the 12 July Briefing Finding is supported by the Trial Chamber's finding that upon his return to the Main Staff, and in Milovanović's absence, **Miletić** "continued to be in charge of receiving Regular Combat Reports and drafting daily Main Staff reports updating the President on the events".[4483] Furthermore, the 12 July Briefing Finding is supported by the Trial Chamber's conclusion that the information that passed through his hands included details on the situation at the front, the transportation of the civilian population out of Srebrenica and Žepa, the taking of POWs, and the monitoring of the column.[4484]

1576. The Appeals Chamber considers that a reasonable trier of fact could have inferred that **Miletić** would first have to possess knowledge of the events that had occurred in his absence in order to effectively and efficiently process new information coming into the Main Staff and then convey that information, in accordance with his role, to others.[4485] In this regard, the Appeals Chamber notes that the evidence upon which the Trial Chamber relied reveals that, already on 12 July 1995, **Miletić** resumed sending reports to the President.[4486] **Miletić** ignores this aspect of the Trial Chamber's findings and instead focuses his argument on the ancillary support for the 12 July Briefing Finding indicating that it was, in general, part of **Miletić**'s role at the Main Staff to update Milovanović upon his return to the Main Staff.[4487] The Appeals Chamber considers that **Miletić** has failed to demonstrate why the 12 July Briefing Finding should not stand on the basis of the above-mentioned inference. His challenge is thus dismissed.

1577. Further, the Appeals Chamber recalls that it has already addressed and dismissed **Miletić**'s argument that the Subordinate Unit Reports sent to the Main Staff did not contain information regarding the Srebrenica operation, including information pertaining to civilians and the process of

4481 Prosecution's Response Brief (Miletić), paras 159, 204.
4482 Prosecution's Response Brief (Miletić), para. 205.
4483 Trial Judgement, para. 1668.
4484 Trial Judgement, para. 1668.
4485 Trial Judgement, para. 1667. See *supra*, para. 1570.
4486 Trial Judgement, para. 1669.
4487 Trial Judgement, para. 1667 & fn. 5097.

their removal from the enclave.[4488] Equally, as will be discussed in more detail below, the Appeals Chamber observes that the reports **Miletić** sent to the President on 12 and 13 July 1995 clearly included information concerning the removal of the civilian population from Srebrenica.[4489] As **Miletić** does not advance any additional argumentation to this end, the Appeals Chamber dismisses this aspect of his challenge.

1578. The Appeals Chamber now turns to the argument concerning the Trial Chamber's use of Tolimir's 13 July 1995 order in establishing **Miletić**'s role in the Srebrenica operation. This order is addressed to the Command of the Military Police Battalion of the Protection Regiment, is type-signed by Commander Milomir Savčić,[4490] and sets out Tolimir's proposed procedure for dealing with issues related to POWs.[4491] Although the order was not specifically addressed to **Miletić**, it nevertheless ordered the Commander of the Military Police Battalion to "contact General Miletić and receive from him additional orders and verify if the proposal has been approved by [Mladić]".[4492]

1579. The Appeals Chamber observes that the Trial Chamber relied on this order as one example of **Miletić**'s "vital coordinating role at the Main Staff in the flow of information".[4493] In this regard, the Appeals Chamber notes that the order named **Miletić** as the person who should be contacted for further information,[4494] which indicates that Tolimir viewed **Miletić** as a conduit for information. Witness Savčić confirmed **Miletić**'s co-ordinating role in respect of this document in testifying that **Miletić** "was supposed to inform [Mladić] of the existence of the document, of its contents, and to seek from [Mladić] his explanation as to whether he accepted those proposals".[4495] Contrary to **Miletić**'s assertion, the Appeals Chamber is of the view that it was not necessary for the Trial Chamber to establish that he knew about this order before concluding that it is evidence of **Miletić**'s co-ordinating role at the Main Staff. The Appeals Chamber considers that **Miletić** has therefore failed to demonstrate that no reasonable trier of fact could have concluded that Tolimir's 13 July 1995 order showed **Miletić**'s co-ordinating role.

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4488 The Appeals Chamber considers that it is not directly relevant for the purposes of **Miletić**'s liability through his participation in the JCE to Forcibly Remove whether the Subordinate Unit Reports pertained to the issue of POWs. See Miletić's Appeal Brief, para. 300; *supra*, paras 1555, 1561-1562.

4489 See *infra*, para. 1586.

4490 See Trial Judgement, para. 1671 & fn. 5107.

4491 Ex. P00192, "Procedure on treatment of POWs, addressed to Mladić and Gvero, type-signed Savčić, 13 July 1995", pp. 1-2.

4492 Ex. P00192, "Procedure on treatment of POWs, addressed to Mladić and Gvero, type-signed Savčić, 13 July 1995", p. 2; Trial Judgement, para. 1671.

4493 Trial Judgement, para. 1672.

4494 See Ex. P00192, "Procedure on treatment of POWs, addressed to Mladić and Gvero, type-signed Savčič, 13 July 1995", pp. 1-2.

4495 See Milomir Savčić, T. 15313 (13 Sept 2007), referred to in Trial Judgement, fn. 5109.

1580. Finally, the Appeals Chamber turns to **Miletić**'s contention that, if he had been the "central figure at the Main Staff", he would not have been able to be away during the attack on Srebrenica.[4496] **Miletić** has neither substantiated this claim nor attempted to address it in the context of the Trial Chamber's finding that his absence from the Main Staff from 7 to 11 July 1995 "does not affect its finding on [his] overall role".[4497]

1581. Based on the foregoing, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber erred in its findings concerning **Miletić**'s knowledge of and role in the Srebrenica operation. Accordingly, the Appeals Chamber dismisses sub-ground 10.7 of **Miletić**'s appeal.

(viii) Whether Miletić "informed" and "advised" in the removal of the population of Potočari (Sub-ground 10.8)

1582. The Trial Chamber found that busing of the Bosnian Muslim population out of Potočari occurred largely between 12 and 13 July 1995.[4498] The Trial Chamber also found that it had not been established that **Miletić** was present at the VRS Main Staff between 7 and 11 July 1995 and that it could not be assumed that **Miletić** had knowledge of the contents of certain Subordinate Unit Reports to the Main Staff or the Daily Main Staff Reports to the President authored during this period.[4499] However, the Trial Chamber determined that in the morning of 12 July 1995, **Miletić** returned to the Main Staff.[4500] Upon his return, the Trial Chamber found that he was briefed in detail about all of the developments, including the situation in Srebrenica, and that, in Milovanović's absence, he continued to be in charge of receiving the Subordinate Unit Reports and drafting the Daily Main Staff Reports to the President.[4501] In this context the Trial Chamber determined that, in the lead up to the attack on Srebrenica, on critical days when the population was physically moved from there, **Miletić** skilfully and efficiently used his unique position of knowledge to inform and advise.[4502] This function was one among several upon which the Trial Chamber concluded that, cumulatively, **Miletić** made a significant contribution to the JCE to Forcibly Remove.[4503]

1583. **Miletić** contends that the finding that he informed and advised in relation to Srebrenica implies that he had a role in transporting the population of Srebrenica who had gathered at Potočari,

4496 Miletić's Appeal Brief, para. 302. See also Appeal Hearing, AT. 443 (5 Dec 2013).
4497 See Trial Judgement, fn. 5211.
4498 Trial Judgement, paras 263-324.
4499 Trial Judgement, paras 1665-1666.
4500 Trial Judgement, para. 1667.
4501 Trial Judgement, paras 1667-1668.
4502 Trial Judgement, para. 1716.
4503 Trial Judgement, para. 1716. See Trial Judgement, para. 1718.

whereas there was no evidence establishing his involvement therein.[4504] Specifically, **Miletić** contends that he was unaware of the situation in Potočari or the fact that the populace was assembling there and therefore he could neither inform nor advise in this regard.[4505] Finally, **Miletić** argues that there is no evidence to suggest that during "this period" he advised anyone at all.[4506]

1584. The Prosecution responds that the Trial Chamber reasonably concluded both that **Miletić** had full knowledge of the situation when the Bosnian Muslim civilian population was forcibly transported from Potočari and that **Miletić** contributed to this end by using his unique position to inform and advise.[4507]

a. Whether Miletić used his unique position of knowledge to "inform"

1585. In advancing his argument that there was no evidence supporting the portion of the impugned finding that he used his knowledge to "inform" when the population was removed from Potočari, **Miletić** refers to a 12 July 1995 Main Staff report to the President and two reports dated 13 July 1995 – one from the Drina Corps to the Main Staff and one from the Main Staff to the President.[4508] He contends that, while he "might have had knowledge of the information reported", the reports do not indicate the situation in Potočari or that the people were assembled there.[4509]

1586. The Appeals Chamber notes in this regard that, as indicated by the Trial Chamber, and contrary to **Miletić**'s submissions, the Main Staff reports, type-signed by **Miletić** and sent to Karadžić on both 12 and 13 July 1995, contain clear references to an organised and planned transfer of the population from Srebrenica towards Kladanj.[4510] Similarly, the Trial Chamber indicated that the report sent by the Drina Corps to the Main Staff on 13 July 1995 mentions that "the transport of 15,000 Muslims from Potočari to Kladanj has been organised".[4511] The Appeals Chamber thus considers that **Miletić** has failed to demonstrate that there was no evidence supporting the Trial Chamber's finding that on critical days when the population was physically moved from Srebrenica, **Miletić** used his knowledge to "inform".

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4504 Miletić's Appeal Brief, paras 304-306.
4505 Miletić's Appeal Brief, paras 304-305.
4506 Miletić's Appeal Brief, para. 305.
4507 Prosecution's Response Brief (Miletić), paras 206-208, 210. See Appeal Hearing, AT. 470 (5 Dec 2013).
4508 Miletić's Appeal Brief, para. 304 & fn. 647.
4509 Miletić's Appeal Brief, para. 304.
4510 Trial Judgement, para. 1669 & fn. 5100 (referring to Exs. P00044, P02748, "VRS Main Staff Daily Combat Report, 12 July 1995", p. 4), para. 1670 & fn. 5105 (referring to Ex. P00047, "VRS Main Staff daily combat report, type-signed Miletić, 13 July 1995", p. 3; Ex. P00136, "Drina Corps regular combat report, signed by Krstić, 13 July 1995", p. 1).
4511 Trial Judgement, fn. 5105, citing Ex. P00136, "Drina Corps regular combat report, signed by Krstić, 13 July 1995", p. 1.

b. Whether the Trial Chamber erred in finding that Miletić "advised"

1587. The Appeals Chamber considers that **Miletić** has taken a narrow, formalistic view of the notion "advise" in the impugned finding, which is not supported by the Trial Chamber's findings. The impugned finding is located in the conclusory paragraph of the section of the Trial Judgement on **Miletić**'s contribution to the JCE to Forcibly Remove.[4512] Prior to this finding, the Trial Chamber had concluded that among the "routine daily tasks" of the Chief of Staff of the Main Staff was briefing and advising Mladić[4513] and that, in Milovanović's absence, **Miletić** co-ordinated the work of the Assistant Commanders in an advisory capacity[4514] and advised Mladić directly concerning the Subordinate Unit Reports to the Main Staff.[4515] Moreover, during daily morning Main Staff meetings, in Milovanović's absence, **Miletić** "participated in the discussions, conveyed proposals to [Mladić], and explained the situation in the field".[4516] Finally, concerning **Miletić**'s role in relation to Karadžić, the Appeals Chamber observes that the Trial Chamber found that **Miletić** informed the Supreme Command of any relevant combat developments through the Daily Main Staff Reports.[4517]

1588. The Trial Chamber relied heavily on Milovanović's testimony in reaching these findings.[4518] Milovanović stated that, in terms of advising, while **Miletić** was certainly not Mladić's "main man", in his absence, **Miletić** "probably did" advise Mladić and that **Miletić** "would suggest to Mladić how to use units, and [that] advising the commander amounts to giving the commander your opinion".[4519] Milovanović emphasised that **Miletić** "knows everyone, he is able to advise everyone, to give them the appropriate information"[4520] and that **Miletić** could play this role because, in his absence, **Miletić** was "the best-informed on the situation in various theatres of war in Republika Srpska".[4521] Milovanović also acknowledged that **Miletić** briefed Karadžić through Daily Main Staff Reports.[4522]

1589. The Appeals Chamber has considered the Trial Chamber's use of the term "advise" in the context of the impugned finding and in light of Milovanović's testimony and the related findings of

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4512 Trial Judgement, para. 1716.
4513 Trial Judgement, para. 111.
4514 Trial Judgement, para. 1635.
4515 Trial Judgement, paras 1635-1636. The Appeals Chamber has previously addressed and dismissed **Miletić**'s argument challenging the Trial Chamber's finding that, during Milovanović's absence from the Main Staff, **Miletić** took on certain of his duties, including advising Mladić. See *supra*, paras 1478-1481.
4516 Trial Judgement, para. 1637.
4517 Trial Judgement, para. 1638.
4518 See Trial Judgement, paras 111 & fn. 269, 1635 & fn. 4997, 1636 & fn. 5002, 1638 & fn. 5008.
4519 Manojlo Milovanović, T. 12311 (31 May 2007). See Trial Judgement, para. 1636 & fn. 5002.
4520 Manojlo Milovanović, T. 12309 (31 May 2007). See Trial Judgement, para. 1627 & fn. 4974. See also Trial Judgement, fn. 5002, referring to Manojlo Milovanović, T. 12311 (31 May 2007).
4521 Manojlo Milovanović, T. 12311 (31 May 2007).
4522 Trial Judgement, para. 1638 & fn. 5008, referring to Manojlo Milovanović, T. 12174 (29 May 2007).

the Trial Chamber.[4523] The Appeals Chamber is of the view that in using the term "advise", the Trial Chamber intended to convey that **Miletić** "forwarded the knowledge he gained to Mladić, Karadžić, and others and that this enabled them to take informed decisions".[4524] The fact that **Miletić** was "informed" about the Srebrenica operation and in a position to "give an opinion" in the manner described by Milovanović is supported by the Trial Chamber's findings. Notably, the Trial Chamber found that **Miletić** "was briefed in detail about all the developments and the situation in Srebrenica as soon as he arrived back [at the Main Staff on 12 July 1995]".[4525] Moreover, the Trial Chamber concluded that, upon his return to the Main Staff, and in Milovanović's continued absence **Miletić** continued to be in charge of receiving daily and interim (combat) reports and drafting Daily Main Staff Reports updating the President on the events.[4526]

1590. The Trial Chamber then referred to the 12 and 13 July 1995 Main Staff reports to the President, type-signed by **Miletić**, which, as described above,[4527] clearly indicate the organised and planned transfer of the population from Srebrenica towards Kladanj.[4528] Thus, through the resumption of his duties at the Main Staff, as described by the Trial Chamber, **Miletić** enabled decision-makers to take informed decisions on the critical days when the population was being physically moved. While the Appeals Chamber does not consider this decision-enabling function to be entirely distinct from the function of "informing", in view of the above understanding of the term "advise", the Appeals Chamber finds that **Miletić** has failed to demonstrate that there was no evidence supporting this aspect of the impugned finding.

c. Conclusion

1591. Based on the foregoing analysis, the Appeals Chamber finds that **Miletić** has failed to show that no reasonable trier of fact could have concluded that "on critical days when the population was physically moved [from Srebrenica ...], **Miletić** skilfully and efficiently used his unique position of knowledge to inform and advise".[4529] Accordingly, the Appeals Chamber dismisses sub-ground 10.8 of **Miletić**'s appeal.

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4523 See *supra*, paras 1587-1588.
4524 Trial Judgement, para. 1713.
4525 Trial Judgement, para. 1667.
4526 Trial Judgement, para. 1668.
4527 See *supra*, para. 1586.
4528 Trial Judgement, para. 1669 & fn. 5100 (referring to Exs. P00044, P02748, "VRS Main Staff Daily Combat Report, 12 July 1995", p. 4), para. 1670 & fn. 5105 (referring to Ex. P00047, "VRS Main Staff daily combat report, type-signed Miletić, 13 July 1995", p. 3; Ex. P00136, "Drina Corps regular combat report, signed by Krstić, 13 July 1995", p. 1).
4529 Trial Judgement, para. 1716.

(ix) Miletić's role in monitoring the movement of the column (Sub-ground 10.9)

1592. The Trial Chamber found that **Miletić**'s involvement in events in Srebrenica upon his return to the Main Staff on 12 July 1995 included playing a role in monitoring the movement of the column of Bosnian Muslims.[4530] Among the Trial Chamber's findings concerning **Miletić**'s role in relation to the column were that: (1) on 14 July 1995, during a phone conversation between Dragan Jokić, Duty Officer at the Zvornik Brigade, and **Miletić**, the latter told the former to "block the group" ("Jokić-Miletić Intercept");[4531] and (2) on 15 July 1995, **Miletić** denied Obrenović's request to allow the column to pass through VRS defence lines[4532] ("Obrenović-Miletić Conversation") and, on 16 July 1995, ordered two officers from the VRS Main Staff, Colonels Nedeljko Trkulja and Bogdan Sladojević, to travel to Zvornik Brigade Command to investigate the opening of a corridor for the column.[4533] **Miletić**'s role in monitoring the column was one of the factors enabling the Trial Chamber to conclude that **Miletić** contributed to the JCE to Forcibly Remove.[4534]

1593. **Miletić** submits that the Trial Chamber erred in finding that he played a role in monitoring the column and that this constituted a contribution to the JCE to Forcibly Remove.[4535] He submits that the Trial Chamber erred in its evaluation of: (1) the Jokić-Miletić Intercept, mistakenly identifying him as one of the interlocutors;[4536] (2) the Obrenović-Miletić Conversation, mistakenly concluding that it shows **Miletić**'s authority as well as knowledge and that he monitored the column;[4537] and (3) evidence pertaining to the 17 July 1995 visit to the Zvornik Brigade by two Main Staff officers, mistakenly concluding that **Miletić** ordered them to go there in order to investigate the opening of the corridor to allow for the passage of the column.[4538]

1594. The Prosecution responds that the Trial Chamber reasonably found that **Miletić** contributed to the JCE to Forcibly Remove by monitoring the column and that **Miletić** ignores the extensive evidence the Trial Chamber relies on to this end.[4539]

a. Alleged error in interpreting the Jokić-Miletić Intercept

1595. Concerning the Jokić-Miletić Intercept, **Miletić** contends that the Trial Chamber's finding that **Miletić** was the interlocutor "Vilotić", who spoke to Jokić, telling him to "block the group"

4530 Trial Judgement, para. 1668.
4531 Trial Judgement, para. 1674.
4532 Trial Judgement, para. 1677.
4533 Trial Judgement, paras 560, 1680.
4534 See Trial Judgement, para. 1714 & fn. 5205, para. 1715.
4535 Miletić's Appeal Brief, paras 307 (referring to Trial Judgement, para. 1668), 314.
4536 Miletić's Appeal Brief, para. 308.
4537 Miletić's Appeal Brief, paras 308-311; Miletić's Reply Brief, para. 105.
4538 Miletić's Appeal Brief, paras 308, 312; Miletić's Reply Brief, para. 106.
4539 Prosecution's Response Brief (Miletić), paras 211-222 & fn. 756. See also Prosecution's Response Brief (Miletić), paras 319-321.

was not established beyond reasonable doubt.[4540] The Appeals Chamber recalls that it has addressed and dismissed this argument under ground 21 of **Miletić**'s appeal.[4541] As **Miletić** does not advance any additional arguments under this sub-ground of appeal, the Appeals Chamber will not address this further.

b. Alleged error in interpreting the Obrenović-Miletić Conversation

1596. Before turning to **Miletić**'s three arguments concerning the Obrenović-Miletić Conversation the Appeals Chamber observes that at paragraph 553, in the section of the Trial Judgement setting out facts pertaining to the opening of the corridor for the passage of the column, the Trial Chamber described the Obrenović-Miletić Conversation as follows:

> Obrenović sought approval from the Drina Corps Command for the proposal to let the 28th Division pass through their territory. He also tried to contact **Pandurević** who could not be reached as he was already on his way to the Zvornik Brigade Command. The Drina Corps Commander and Chief of Staff being unavailable, Dragan Obrenović called the VRS Main Staff and asked to be connected to "any of the generals". **Miletić** took the call and stated he did not approve the proposal; and he ordered that Obrenović use all available manpower and equipment of the Zvornik Brigade to continue fighting the column and "destroy it".[4542]

At paragraph 1677, in the section of the Trial Judgement setting out **Miletić**'s "Role in the Operations of Srebrenica and Žepa", the Trial Chamber provides an abbreviated version of the above description as follows:

> Dragan Obrenović, Chief of Staff and Deputy Commander of the Zvornik Brigade, called **Miletić**, through extension 155, and requested his permission to open the VRS defence lines in order for the column of Bosnian Muslims to pass. **Miletić** denied the request and ordered that all the available equipment and manpower be used to fight the column and destroy it.[4543]

In support of this description, the Trial Chamber refers to its earlier paragraph 553.[4544]

1597. In arguing that, contrary to the Trial Chamber's finding, "Obrenović did not place a telephone call to Miletić, but to the Main Staff, asking for any of the generals",[4545] **Miletić** misrepresents the Trial Judgement. **Miletić** only refers to paragraph 1677, while it is clear from paragraph 553, that the Trial Chamber was aware that when Obrenović called the Main Staff, he asked for any of the generals.

1598. **Miletić** further argues that, contrary to the Trial Chamber's findings, "Obrenović did not ask for the corridor to be opened on behalf of the populace but on behalf of the personnel of the

4540 Miletić's Appeal Brief, para. 308. See Trial Judgement, para. 1674.
4541 See *supra*, para. 404.
4542 Trial Judgement, para. 553 (internal references omitted).
4543 Trial Judgement, para. 1677 (internal references omitted).
4544 Trial Judgement, para. 1677, referring to, *inter alia*, Trial Judgement, para. 553.
4545 Miletić's Appeal Brief, para. 309.

28th Division of the BH Army".[4546] As the excerpt of paragraph 553 of the Trial Judgement indicates, the Trial Chamber stated that Obrenović requested approval to let "the column of the 28th Division" through.[4547] Whereas, at paragraph 1677 of the Trial Judgement, the Trial Chamber found that Obrenović requested approval to let "the column of Bosnian Muslims" pass.[4548]

1599. Noting this inconsistency in describing Obrenović's request,[4549] **Miletić** submits that the members of the 28th Division were not civilians and that he had no way of knowing that if he rejected Obrenović's proposal to open a corridor, he was rejecting that possibility for civilians.[4550]

1600. The Appeals Chamber considers that **Miletić** seeks to limit his knowledge of the column to what was conveyed to him in this conversation, ignoring other information that had been brought to his attention before or after this conversation. In this regard, the Appeals Chamber observes that the Trial Chamber found that, on 12 July 1995, a VRS Main Staff report, type-signed **Miletić**, was sent to the President informing him that "the enemy tried to pull out together with the women and children towards Ravni Buljin and Konjević Polje".[4551] On 13 July 1995, **Miletić** would have received the Drina Corps Regular Combat Report sent to the VRS Main Staff,[4552] indicating that "[i]n Konjević Polje and also in Nova Kasaba reception of Muslim civilians and soldiers who surrendered is being carried out [...] in an organised fashion".[4553] The Appeals Chamber therefore considers that **Miletić** has failed to substantiate his claim that he was not aware that there were civilians present among those in the column.

1601. Finally, the Appeals Chamber turns to **Miletić**'s argument that the Obrenović-Miletić Conversation does not demonstrate his position and authority.[4554] In support of this argument, **Miletić** submits, in particular, that following this conversation, Obrenović neither followed his instructions to destroy the column nor transmitted them to the Corps Commander or to his own Commander.[4555] The Appeals Chamber observes in this regard that the Trial Chamber found that **Miletić** "ordered" Obrenović to use all available equipment and manpower to continue fighting the

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4546 Miletić's Appeal Brief, para. 309.
4547 Trial Judgement, para. 553.
4548 Trial Judgement, para. 1677.
4549 Under **Miletić**'s ground of appeal 7, he submits that "Serb forces were convinced that this was a military column made up of members of the 28th Division of the BH Army". He argues that the Trial Chamber "violated the principle of the presumption of innocence and Article 21(3) of the Statute by placing those of Miletić's actions ostensibly linked to the column, but committed in the course of his legitimate and ordinary responsibilities, within the attack upon the civilian population". Miletić's Appeal Brief, paras 210-212.
4550 Miletić's Reply Brief, para. 105. See Miletić's Appeal Brief, para. 313; Appeal Hearing, AT. 432 (5 Dec 2013).
4551 Trial Judgement, para. 1669 & fn. 5098, citing Exs. P00044, P02748, "VRS Main Staff Daily Combat Report, 12 July 1995", p. 3.
4552 See *supra*, paras 1555-1562.
4553 Ex. P00136, "Regular Combat report from the Drina Corps Command signed by Major General Radislav Krstić, 13 July 1995", p. 1. See Trial Judgement, para. 1056 & fn. 3460.
4554 Miletić's Appeal Brief, paras 308-311.
4555 Miletić's Appeal Brief, para. 309.

column and destroy it.[4556] PW-168 explained that he "understood it as him ordering [Obrenović] to do that on behalf of General Mladić".[4557]

1602. The Appeals Chamber recalls the Trial Chamber's methodology for determining **Miletić**'s liability, whereby it held that it would not base its assessment on his title, but on the actions he carried out in this capacity.[4558] The Appeals Chamber considers that the Trial Chamber's analysis of the Obrenović-Miletić Conversation is consistent with that approach. Even if **Miletić** had no legal authority of his own to "order" Obrenović to take any particular course of action with respect to the column, and even if Obrenović neither followed **Miletić**'s instruction nor transmitted it to his immediate superiors, **Miletić**'s "order" was apparently regarded as authoritative. The Appeals Chamber therefore considers that **Miletić** has not demonstrated that the Trial Chamber erred in finding that the Obrenović-Miletić Conversation is an example of **Miletić**'s position and authority.

c. Whether Miletić ordered an investigation into the opening of the corridor

1603. **Miletić** argues that the Trial Chamber erred in finding that: (1) it was he rather than Mladić who gave the order to Trkulja and Sladojević; and (2) the purpose of the order was to initiate an investigation into the opening of the corridor.[4559]

1604. In support of his arguments, **Miletić** points to a 17 July 1995 Main Staff order to, *inter alia*, the Drina Corps Command, signed Mladić, and calling for three officers (Trkulja, Sladojević, and Stanković) to be sent from the VRS Main Staff to the Command of the Zvornik Infantry Brigade "to assist in the joining of the VRS and MUP [...] forces, the planning and coordination of combat operations to block, crush and destroy lagging Muslim forces in the wider areas of Kamenica and Cerska" ("17 July Main Staff Order").[4560]

1605. Concerning the source of the impetus for the trip by the officers to the Zvornik Brigade, the Trial Chamber relied on the testimonies of Witnesses Trkulja and Bogdan Sladojević.[4561] Portions of Trkulja's testimony to which the Trial Chamber referred indicate that on 15 or 16 July 1995, he was verbally and in person "ordered [by **Miletić**] to go to the Zvornik Brigade".[4562] Other portions of Trkulja's testimony to which the Trial Chamber referred indicate that upon his return to the Main Staff, he reported to **Miletić**.[4563] In a portion of Trkulja's testimony to which the Prosecution refers,

4556 Trial Judgement, para. 1677, referring to PW-168, T. 15874 (closed session) (26 Sept 2007).
4557 PW-168, T. 16644 (closed session) (19 Oct 2007). See Trial Judgement, fn. 5124.
4558 Trial Judgement, para. 1711.
4559 Miletić's Appeal Brief, para. 312.
4560 Ex. P00927, "Main Staff order, re integration of operations to crush lagging Muslim forces, signed by Mladić, 17 July 1995", para. 1. See Miletić's Appeal Brief, para. 312 & fns 667, 670.
4561 Trial Judgement, paras 560, 1680 & fns 2048, 5130.
4562 Nedeljko Trkulja, T. 15105 (10 Sept 2007). See Trial Judgement, fn. 2048.
4563 Nedeljko Trkulja, T. 15115 (10 Sept 2007). See Trial Judgement, fn. 5130.

he states that he did not go to the Zvornik Brigade pursuant to the 17 July Main Staff Order from Mladić and that "[he] had already been [there] and returned when that order came".[4564]

1606. Sladojević's testimony to which the Trial Chamber referred indicates that on 17 July 1995, after **Miletić** handed Trkulja a piece of paper, Trkulja informed Sladojević that they were going to the "Zvornik area"[4565] and that Trkulja "most probably" got the order to go to the Zvornik Brigade from **Miletić**.[4566]

1607. Bearing in mind that Trkulja testified that he had not seen the 17 July Main Staff Order before visiting the Zvornik Brigade and that both Trkulja and Sladojević indicated that the visit to the Zvornik Brigade was precipitated by an exchange between **Miletić** and Trkulja, the Appeals Chamber considers that **Miletić** has failed to demonstrate that no reasonable trial chamber could have concluded that **Miletić** ordered Trkulja and Sladojević to go to the Zvornik Brigade.[4567]

1608. Concerning the purpose of the trip to the Zvornik Brigade, the Trial Chamber relied on the testimonies of Witnesses Sladojević, Dragutinović,[4568] PW-168, and **Pandurević** in addition to an excerpt from the Zvornik Brigade Duty Officer Logbook.[4569]

1609. The Appeals Chamber observes that Trkulja indicated that the purpose of the visit was "to convey a message that the security of the units on the front line should be raised to the highest level because there was a possibility that Muslim groups would come from Srebrenica on their way to Tuzla".[4570] The Trial Chamber did not rely on this testimony in its conclusion as to the purpose of the visit, but was nonetheless aware of this testimony.[4571]

1610. The Appeals Chamber further observes that Trkulja testified that he went to Crni Vrh, discussed with Obrenović the opening of the corridor as well as related losses among VRS forces,[4572] and reported this information to **Miletić** upon his return to the Main Staff.[4573] At the

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4564 Nedeljko Trkulja, T. 15117 (10 Sept 2007. See Prosecution's Response Brief (Miletić), fn. 772.

4565 Bogdan Sladojević, T. 14366 (27 Aug 2007). See Trial Judgement, para. 1680 & fn. 5130.

4566 Bogdan Sladojević, T. 14367 (27 Aug 2007). See Trial Judgement, para. 560 & fn. 2048.

4567 This conclusion is not altered by the fact that the Appeals Chamber concurs with **Miletić** (Miletić's Appeal Brief, para. 312) that there is some ambiguity in Sladojević's testimony concerning whether it was Trkulja who hinted to **Miletić** that "something was going to happen in the area" or the reverse. See Bogdan Sladojević, T(F). 14366-14367 (27 Aug 2007) and Bogdan Sladojević, T. 14367-14368 (27 Aug 2007). The Trial Chamber's conclusion that **Miletić** ordered Trkulja and Sladojević to investigate the corridor does not turn on the establishment of this fact.

4568 Prosecution Witness Miodrag Dragutinović was the Chief of Operations and Training of the Zvornik Brigade, Trial Judgement, para. 152.

4569 Trial Judgement, paras 560, 1887 & fns 2049, 5671. See Bogdan Sladojević, T. 14373 (27 Aug 2007); Miodrag Dragutinović, T. 12710 (15 June 2007); PW-168, T. 15911-15912 (closed session) (27 Sept 2007); T. 16544 (closed session) (18 Oct 2007); Vinko Pandurević, T. 31091 (9 Feb 2009); Ex. 7DP00378, "Zvornik Brigade Duty Officer logbook, 12 February 1995 to 3 January 1996", p. 4.

4570 Nedeljko Trkulja, T. 15105 (10 Sept 2007).

4571 Trial Judgement, fn. 2048, referring to Nedeljko Trkulja, T. 15105-15107 (10 Sept 2007).

4572 Nedeljko Trkulja, T. 15112-15113 (10 Sept 2007). See Prosecution's Response Brief (Miletić), para. 220 & fn. 772.

same time, several VRS officers, Sladojević, Dragutinović, PW-168, and **Pandurević** each confirm that the opening of the corridor was a focal point of discussion with the officers from the Main Staff.[4574] Even if some other issues might have been discussed during the course of the officers' visit, the Appeals Chamber considers that **Miletić** has failed to show that the Trial Chamber erred in concluding that the purpose of the officers' visit was to investigate the opening of the corridor to allow for the passage of the column.[4575] The Appeals Chamber therefore dismisses this aspect of **Miletić**'s argument.

d. Conclusion

1611. In view of the above, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber erred in finding that he played a role in monitoring the movement of the column of Bosnian Muslims and that his activities in this regard constituted a contribution to the JCE to Forcibly Remove. Accordingly, the Appeals Chamber dismisses sub-ground 10.9 of **Miletić**'s appeal.

(x) Whether Miletić contributed to the JCE to Forcibly Remove in Žepa through his monitoring and co-ordinating role at the Main Staff (Sub-grounds 10.10 and 10.11)

1612. Among the Trial Chamber's findings concerning **Miletić**'s involvement in the Žepa operation are that: (1) he had full knowledge of the situation in the Žepa enclave before, during, and after the attack;[4576] (2) he played the role of focal point at the VRS Main Staff for all incoming information and he made sure that the relevant persons were informed;[4577] and (3) he issued instructions to units in the field and co-ordinated between the Main Staff and the field.[4578]

1613. **Miletić** advances three lines of argumentation contesting elements of the Trial Chamber's findings concerning his contribution to the JCE to Forcibly Remove in relation to Žepa.[4579] These may be categorised into those concerning his: (1) advisory role; (2) role in issuing instructions to the field and co-ordination between the field and the Main Staff; and (3) role as an information source at the Main Staff. Additionally, **Miletić** argues more broadly that his actions were no more than "daily tasks" and therefore not properly found to be contributions to the JCE to Forcibly Remove.[4580]

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4573 Nedeljko Trkulja, T. 15114-15117 (10 Sept 2007). See Trial Judgement, para. 1680 & fn. 5131.
4574 See *supra*, para. 1608.
4575 Trial Judgement, paras 560, 1680.
4576 Trial Judgement, para. 1715.
4577 Trial Judgement, para. 1686.
4578 Trial Judgement, para. 1681.
4579 Miletić's Appeal Brief, paras 315-321; Miletić's Reply Brief, para. 107.
4580 Miletić's Appeal Brief, paras 315, 317; Appeal Hearing, AT. 443 (5 Dec 2013).

1614. The Prosecution responds that the Trial Chamber reasonably found that **Miletić** contributed to the forcible removal of the Bosnian Muslim population of Žepa.[4581]

1615. The Appeals Chamber recalls that it has previously held that the participation of an accused in a JCE need not involve the commission of a crime, but that it may take the form of assistance in, or contribution to, the execution of the common objective or purpose.[4582] Moreover, it has previously held that "the fact that [the] participation [of an accused] amounted to no more than his or her 'routine duties' will not exculpate the accused".[4583] Accordingly, the Appeals Chamber will not further address the argument that **Miletić** was merely carrying out "daily tasks".

a. Alleged errors concerning Miletić's advisory role in relation to Žepa

1616. **Miletić** contends that the Trial Chamber's finding that he "used his unique position of knowledge to inform and advise" is erroneous in that the Trial Chamber did not identify any advice offered by **Miletić** to anyone concerning Žepa.[4584] The Prosecution responds that **Miletić** advised Mladić and the Assistant Commanders during daily morning briefings and that he also advised by informing and co-ordinating.[4585]

1617. The Appeals Chamber recalls its previous finding that **Miletić** has taken a narrow, formalistic view of the notion of "advise" which is not supported by the Trial Chamber's findings.[4586] In this regard, the Appeals Chamber determined that in the context of the Trial Chamber's findings concerning **Miletić**'s involvement in the Srebrenica and Žepa operations, the term "advise" should be understood to mean informed and in a position to give an opinion.[4587] That **Miletić** was "informed" about the Žepa operation and in a position to "give an opinion" in accordance with his role at the Main Staff is amply supported by the Trial Chamber's findings. Notably, the Trial Chamber found that, upon **Miletić**'s return to the Main Staff on 12 July 1995, and in Milovanović's continued absence:

> **Miletić** continued to be in charge of receiving daily and interim (combat) reports and drafting daily Main Staff reports updating the President on the events. The information included details on the situation at the front, the transportation of the civilian population out of Srebrenica and Žepa, and the taking of POWs.[4588]

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4581 Prosecution's Response Brief (Miletić), para. 223. See Prosecution's Response Brief (Miletić), para. 224; Appeal Hearing, AT. 470-471 (5 Dec 2013).

4582 *Krajišnik* Appeal Judgement, paras 215, 695-696; *Kvočka et al.* Appeal Judgement, para. 263. See also *Šainović et al.* Appeal Judgement, para. 985.

4583 See *Blagojević and Jokić* Appeal Judgement, para. 189 making this statement in the context of aiding and abetting liability.

4584 Miletić's Appeal Brief, para. 315, referring to Trial Judgement, para. 1716.

4585 Prosecution's Response Brief (Miletić), para. 224.

4586 See *supra*, paras 1587-1590.

4587 See *supra*, para. 1589.

4588 Trial Judgement, para. 1668.

1618. The Trial Chamber drew, in particular, upon evidence of information concerning Žepa that passed through **Miletić**'s hands from 12 July to 2 August 1995 – the time period directly preceding and including the forcible transfer of the Bosnian Muslims from Žepa. This evidence included: (1) Subordinate Unit Reports to the Main Staff on 29 July and 1 August 1995;[4589] (2) Daily Main Staff Reports to the President on 13, 15-18, 21, 25-26, 29, and 31 July 1995;[4590] (3) Witness Obradović's testimony;[4591] (4) various requests and/or reports pertaining to the Žepa operation either from Krstić or Tolimir to **Miletić** personally[4592] or recounting **Miletić**'s involvement in related events;[4593] and (5) intercept evidence.[4594] Thus, the Trial Chamber found that through the resumption of his duties at the Main Staff, **Miletić** enabled decision-makers to take informed decisions during the Žepa campaign.[4595] The Appeals Chamber thus finds that **Miletić** has not demonstrated that there was no evidence supporting this aspect of the finding.

b. Miletić's role in co-ordinating and issuing instructions regarding Žepa

1619. Concerning his issuance of instructions to the field and his role as a co-ordinator between the field and the Main Staff, **Miletić** contends that the Trial Chamber concluded that he carried out these roles without any evidence supporting such a finding.[4596] Specifically, **Miletić** submits that the Trial Chamber's conclusion that he "had the responsibility of coordination" was based solely on

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4589 Trial Judgement, paras 1695 (referring to Ex. P02792, "Rogatica Brigade report to the VRS Main Staff regarding a meeting with UNPROFOR concerning evacuation of civilians from Žepa, type-signed Dragomir Pećanac, 29 July 1995", p. 2), 1698 (referring to Ex. P03036, "Document to VRS Main Staff, Miletić, Krstić, and Drina Corps concerning movement of enemy groups in the Žepa enclave, type-signed Zoran Carkić, 1 August 1995").

4590 Trial Judgement, paras 1670 (referring to Ex. P00047, "VRS Main Staff daily combat report, type-signed Miletić, 13 July 1995", p. 3, Ex. P00049, "VRS Main Staff daily combat report, type-signed Miletić, 15 July 1995", p. 3, Ex. P00050, "VRS Main Staff daily combat report, type-signed Miletić, 16 July 1995", p. 4, Ex. P03061, "VRS Main Staff daily combat report, signed by Miletić, 18 July 1995", p. 6), 1681 (referring to Ex. P00050, "VRS Main Staff Daily Report type-signed Miletić, 16 July 1995", Ex. P03057, "VRS Main Staff Situation Report signed by Miletić, 17 July 1995", Ex. P03061, "VRS Main Staff Situation Report signed by Miletić, 18 July 1995"), 1687 (referring to Ex. P03020, "VRS Main Staff situation report, type-signed Miletić, 21 July 1995"), 1692 (referring to Ex. P03021, "VRS Main Staff situation report, type-signed Miletić, 25 July 1995", p. 3), 1693 (referring to Ex. P03022, "VRS Main Staff situation report, type-signed Miletić, 26 July 1995", p. 4), 1695 (referring to Ex. P03023, "VRS Main Staff situation report, type-signed Miletić, 29 July 1995", p. 4), 1697 (referring to Ex. P03024, "VRS Main Staff situation report, type-signed Miletić, 31 July 1995", p. 4).

4591 Trial Judgement, para. 1681 & fn. 5134, referring to, *inter alia*, Ljubomir Obradović, T. 28270 (14 Nov 2008); T. 28290 (17 Nov 2008); T. 28367, 28393-28394 (18 Nov 2008).

4592 Trial Judgement, paras 1673 (referring to Ex. P00183, "1st PLPBR document regarding communications device to VRS Main Staff, Miletić, type-signed by Zdravko Tolimir, 14 July 1995"), 1685-1686 (referring to Ex. P03015, "Drina Corps Command document requesting the engagement of VRS Main Staff Military Police Battalion, type-signed by Krstić, 20 July 1995"), 1690 (referring to Ex. P00191, "Document re Agreement on disarmament of Žepa, sent to Gvero or Miletić, type-signed Tolimir, 25 July 1995").

4593 Trial Judgement, para. 1691, referring to Ex. P00190, "VRS Main Staff Intelligence and Security Report, type-signed Jovica Karanović, 25 July 1995".

4594 Trial Judgement, paras 1690 (referring to Ex. P01328a, "Intercept, 25 July 1995, 07:09 hours"), 1696 (referring to Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours"), 1699 (referring to Ex. P01395c, "Intercept, 2 August 1995, 13:00 hours").

4595 See Trial Judgement, paras 1713, 1715-1716.

4596 Miletić's Appeal Brief, paras 316 (referring to Trial Judgement, para. 1681), 319 (referring to Trial Judgement, paras 1682, 1688-1689).

its erroneous interpretation of three intercepts.[4597] He further argues, in relation to this finding, that he could not co-ordinate persons in the hierarchy above him and that co-ordination between the Main Staff and the field was "conducted in the field because Mladić was there, accompanied by his assistant, Tolimir".[4598] Finally, **Miletić** contends that the Trial Chamber found that he issued instructions to units in the field without ever identifying any such instructions.[4599]

1620. The Prosecution responds that **Miletić** ignores the evidentiary basis of the Trial Chamber's finding concerning his co-ordinating role beyond the three intercepts, and that his specific challenges regarding the Trial Chamber's interpretation of these intercepts warrant summary dismissal.[4600]

1621. The Appeals Chamber observes that, contrary to **Miletić**'s submission, the Trial Chamber's conclusion that **Miletić** assumed a co-ordinating role at the Main Staff in relation to the Žepa operation was not based solely on the three intercepts to which he refers.[4601] Nonetheless, the Appeals Chamber has considered **Miletić**'s arguments concerning the alleged erroneous interpretation of three intercepts by the Trial Chamber.

1622. The Appeals Chamber has considered and dismissed **Miletić**'s submission that the Trial Chamber did not properly evaluate Exhibit P01231a, an intercept dated 17 July 1995, in addressing ground 21 of his appeal.[4602] The Appeals Chamber finds that **Miletić** has not advanced any additional argument under this sub-ground of appeal and therefore dismisses this argument.

1623. Concerning Exhibit P01237a, an intercept dated 17 July 1995, **Miletić** contends that this intercept did not concern events in Žepa.[4603] The Appeals Chamber observes that the Trial Chamber's findings concerning **Miletić**'s co-ordinating role in relation to the forcible transfer of the Bosnian Muslim population of Srebrenica and Žepa are interwoven and set against a chronological narrative of events, supported by evidence pertaining to Srebrenica in some instances and to Žepa in others. The Appeals Chamber further observes that the Trial Chamber was explicit in its analysis

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4597 Miletić's Appeal Brief, para. 319.
4598 Miletić's Appeal Brief, para. 319.
4599 Miletić's Appeal Brief, para. 316.
4600 Prosecution's Response Brief (Miletić), para. 224.
4601 See, *e.g.*, Trial Judgement, paras 1681-1696, referring to, *inter alia*, Ex. 5D01113, "VRS Main Staff document, regarding transport of civilians from Žepa, signature illegible, 19 July 1995", Ex. P03015, "Drina Corps Command document requesting the engagement of VRS Main Staff Military Police Battalion, type-signed by Krstić, 20 July 1995", Ex. P02794, "Rogatica Brigade document, to Miletić personally, 'Situation in Žepa', type-signed Tolimir, 21 July 1995", Ex. P03020, "VRS Main Staff situation report, type-signed Miletić, 21 July 1995", Ex. P01327a, "Intercept, 24 July 1995, 19:24 hours", Ex. P00191, "Document re Agreement on disarmament of Žepa, sent to Gvero or Miletić, type-signed Tolimir, 25 July 1995", Ex. P00190, "VRS Main Staff Intelligence and Security Report, type-signed Jovica Karanović, 25 July 1995", Ex. P03023, "VRS Main Staff situation report, type-signed Miletić, 29 July 1995", p. 4, Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours".
4602 See *supra*, para. 410.
4603 Miletić's Appeal Brief, para. 319.

that this intercept related to Srebrenica, not Žepa.[4604] **Miletić** has therefore misrepresented the Trial Chamber's findings.

1624. Concerning Exhibit P01315a, an intercept dated 23 July 1995, **Miletić** again argues that it is in no way associated with Žepa.[4605] The Appeals Chamber has considered the Trial Chamber's analysis of this intercept, whereby the Trial Chamber was satisfied that the intercept indicated that: (1) **Miletić** spoke to Mladić and that when Mladić asked **Miletić** if "Tošo" had arrived, **Miletić** responded that "Tošo" "was waiting for him at the agreed place"; and (2) "Tošo" was Tolimir.[4606] The Trial Chamber did not specify that this intercepted conversation pertained to Žepa; however, in the Appeals Chamber's view, such an association is implied. In this respect, the Appeals Chamber notes that the Trial Chamber had previously set out a chronological narrative of the unfolding events, which culminated in the forcible transfer of the Bosnian Muslim population of Žepa, a narrative which prominently featured both Mladić and Tolimir – in particular with respect to the signing of the 24 July 1995 Agreement.[4607] **Miletić** has not attempted to demonstrate, beyond mere assertion, that a reasonable trier of fact could not have associated the 23 July 1995 intercept with Žepa.

1625. **Miletić** has therefore not demonstrated, on the basis of these three intercepts, that the Trial Chamber erred in concluding that he carried out a co-ordinating role at the Main Staff.

1626. The Appeals Chamber recalls that it has already addressed and dismissed **Miletić**'s argument that he could not co-ordinate the work of those who were superior to him in rank under ground 21 of his appeal.[4608] Moreover, the fact that **Miletić** did co-ordinate between the field and the Main Staff in relation to Žepa – and in particular between Mladić, Tolimir, and Krstić, respectively, and the Main Staff – is supported by the evidence upon which the Trial Chamber relied.[4609]

1627. Finally, regarding **Miletić**'s argument that, while the Trial Chamber found that "[d]uring the Žepa Operation, [he] also issued instructions to units in the field", it did not refer to any instructions given by **Miletić** to those in the field,[4610] the Appeals Chamber observes that in the same sub-

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4604 Trial Judgement, fn. 5137.
4605 Miletić's Appeal Brief, para. 319.
4606 Trial Judgement, para. 1688.
4607 Trial Judgement, paras 665-738.
4608 See *supra*, paras 410, 1473.
4609 See Trial Judgement, paras 1685 (referring to Ex. P03015, "Drina Corps Command document requesting the engagement of VRS Main Staff Military Police Battalion, type-signed by Krstić, 20 July 1995"), 1686 (referring to Ex. P02794, "Rogatica Brigade document, to Miletić personally, 'Situation in Žepa', type-signed Tolimir, 21 July 1995"), 1689 (referring to Ex. P01327a, "Intercept, 24 July 1995, 19:24 hours"), 1690 (referring to Ex. P00191, "Document re Agreement on disarmament of Žepa, sent to Gvero or Miletić, type-signed Tolimir, 25 July 1995"), 1696 (referring to Ex. P01376d, "Intercept, 30 July 1995, 22:15 hours").
4610 See Miletić's Appeal Brief, para. 316, citing Trial Judgement, para. 1681.

section of the Trial Judgement in which this conclusion is found ("Role in the Operations in Srebrenica and Žepa"),[4611] the Trial Chamber provided evidentiary support for this conclusion. The Trial Chamber relied on the 24 July 1995 Intercept in which Tolimir recounts (to the General with whom he is speaking) instructions pertaining to Žepa given to him by **Miletić**. The Trial Chamber found that this intercept demonstrated "**Miletić**'s authority [to] convey[] instructions to Tolimir".[4612] Additionally, in finding that in Milovanović's absence, **Miletić** was responsible for conveying tasks to the Armoured Units, including in relation to Žepa, the Trial Chamber relied on Obradović's testimony.[4613] With these findings in mind, the Appeals Chamber considers that when the Trial Chamber found that **Miletić** "issued instructions" with regard to the Žepa operation, it intended to signify that he "conveyed instructions". In arguing that the Trial Chamber did not identify any such instructions, **Miletić** either misinterprets the Trial Chamber's findings or ignores the evidentiary basis upon which the Trial Chamber relied.

1628. In view of the above, the Appeals Chamber considers that **Miletić** has failed to demonstrate an error in the Trial Chamber's findings in relation to Žepa that he issued instructions to units in the field and co-ordinated from the Main Staff, including between the Main Staff and the field.

c. Alleged errors concerning Miletić's role as an information source at the Main Staff in relation to Žepa

1629. Concerning his role as an information source at the Main Staff, **Miletić** first submits that, while the Trial Chamber found on the basis of the documents sent to him that he "had a central responsibility", documents were sent to him from all fronts – not just the front at Žepa – and therefore the documents do not constitute proof of his involvement in actions at Žepa.[4614]

1630. Second, **Miletić** submits that the Trial Chamber erroneously concluded that he was fully informed of the activities in Žepa, whereas he was only informed of "the information which had been sent to him" and that such information was not always accurate. He also points to a certain number of reports from the Drina Corps to the Main Staff and argues that the reports he received "contained very little detail".[4615]

1631. Third, **Miletić** draws the Appeals Chamber's attention to a specific report sent by Tolimir to the Main Staff, to him personally, suggesting the use of chemical weapons against the Žepa enclave

4611 See Trial Judgement, paras 1661-1699.
4612 Trial Judgement, para. 1689, referring to Ex. P01327a, "Intercept, 24 July 1995, 19:24 hours". See *supra*, para. 1468.
4613 Trial Judgement, para. 1673 & fn. 5111, referring to Ljubomir Obradović, T. 28374-28375 (18 Nov 2008).
4614 Miletić's Appeal Brief, para. 317.
4615 Miletić's Appeal Brief, para. 320.

as a means of expediting its fall.[4616] **Miletić** refers to the Trial Chamber's finding that he "was not responsible for deciding on the request" and that his role was "to ensure information reached the relevant persons to enable them to make informed decisions".[4617] **Miletić** submits that in order to include this report in its assessment of "the degree to which he followed the common plan", the Trial Chamber should have determined his view of Tolimir's proposal. Yet, he contends, it would be impossible to form such a conclusion solely on the basis of the fact that this proposal was sent to **Miletić** so that it could be forwarded to the Commander.[4618]

1632. The Prosecution first responds that **Miletić** was the focal point at the Main Staff for all incoming information and that he provided crucial information to the relevant persons, thereby allowing them to make informed decisions. It submits that it is irrelevant that **Miletić** received reports from all corps and frontlines.[4619] Second, the Prosecution responds that **Miletić** had multiple sources of information and that he ignores the extensive evidence upon which the Trial Chamber relied while merely pointing to a few exhibits without showing an error.[4620] Finally, the Prosecution responds that it was unnecessary for the Trial Chamber to have established whether **Miletić** supported Tolimir's proposal to use chemical weapons against Žepa.[4621]

1633. Concerning **Miletić**'s first submission,[4622] the Appeals Chamber considers **Miletić**'s argument that documents were sent to him from all corps and frontlines to be inapposite. The mere fact that he could have assumed a similar role in relation to other theatres of war fails to establish that no reasonable trier of fact could have reached this finding in relation to Žepa. The Appeals Chamber therefore dismisses this aspect of his argument.

1634. Concerning **Miletić**'s second submission,[4623] the Appeals Chamber recalls that the Trial Chamber specifically acknowledged that evidence had been adduced showing that the Subordinate Unit Reports did not always reflect the situation on the ground, but found "in light of the totality of evidence, including evidence showing that **Miletić** was updated directly by telephone, [that it was] satisfied that **Miletić** ensured [that] he was kept fully updated".[4624] **Miletić** refers to certain reports

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4616 Miletić's Appeal Brief, para. 318, referring to Trial Judgement, para. 1686 & fn. 5144 (referring to Ex. P02794, "Rogatica Brigade document to Miletić personally, 'Situation in Žepa', type-signed Tolimir, 21 July 1995"). The Appeals Chamber notes that in footnotes 680-681 of Miletić's Appeal Brief, **Miletić** refers to paragraph 1687 of the Trial Judgement. The Appeals Chamber considers this to be a typographical error and that he intended to refer to paragraph 1686.

4617 Trial Judgement, fn. 5144. See Miletić's Appeal Brief, para. 318.

4618 Miletić's Appeal Brief, para. 318.

4619 Prosecution's Response Brief (Miletić), para. 224.

4620 Prosecution's Response Brief (Miletić), paras 225-226.

4621 Prosecution's Response Brief (Miletić), para. 227.

4622 Miletić's Appeal Brief, para. 317. **Miletić** refers to paragraph 1687 of the Trial Judgement. The Appeals Chamber considers this to have been a typographical error and that he intended to refer to paragraph 1686. See *supra*, para. 1629.

4623 Miletić's Appeal Brief, para. 320. See *supra*, para. 1630.

4624 Trial Judgement, fn. 5009. See *supra*, paras 1559-1562.

from the Drina Corps to the Main Staff between 14 and 26 July 1995 and contends that they show that the reports he received contained "very little detail".[4625] The Appeals Chamber observes that the time period of the reports to which **Miletić** refers encompasses the period during which the following events, among others, occurred: (1) the combat readiness was achieved and the attack, pursuant to Krstić's order on operation *Stupčanica*-95, commenced on Žepa; (2) the VRS encircled Žepa; (3) a second round of negotiations concerning the fate of the Bosnian Muslim population of the enclave failed; (4) the VRS attack on Žepa intensified; (5) the ABiH's organised defence of Žepa ceased; (6) the 24 July 1995 Agreement setting out the terms of the transportation of the Bosnian Muslim population out of Žepa and the surrender of the Bosnian Muslim men was signed; (7) the fighting ceased at Žepa; (8) Krstić ordered the Drina Corps to search and "mop up" the terrain in Žepa; and (9) the majority of the wounded and the civilians of Žepa were transported out.[4626]

1635. The Appeals Chamber notes that while the combat reports to which he refers did not comprehensively address all of the details of the above events, their contents did correspond to these events.[4627] The Appeals Chamber moreover observes that these reports cover only a certain number of days in the 14 to 26 July 1995 time period. **Miletić** has not referred to Drina Corps reports to the Main Staff during this period on 17 or 20-24 July 1995, or explained why he has not referred to them.

1636. The Appeals Chamber therefore considers, on the basis of the reports to which **Miletić** refers, that he has not shown that no reasonable trier of fact could have concluded that **Miletić** had full knowledge of the situation in Žepa before, during, and after the attack.

1637. Finally, concerning Miletić's arguments with regard to a 21 July 1995 report sent by Tolimir to the Main Staff, addressed to **Miletić** personally and proposing the use of chemical weapons,[4628] the Appeals Chamber notes that the Trial Chamber used this exhibit in support of its finding that "it was well-known and accepted that **Miletić** played the role of focal point at the VRS Main Staff for all incoming information and made sure that the relevant persons were informed".[4629] The Trial Chamber noted that for the purposes of this finding, it was irrelevant whether Tolimir's

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4625 Miletić's Appeal Brief, para. 320 & fn. 689.

4626 Trial Judgement, paras 681-718.

4627 See Ex. 4D00084, "Drina Corps Regular Combat Report, type-signed Radislav Krstić, 14 July 1995", pp. 1-2; Ex. P04112, "Drina Corps Extraordinary Combat Report, 14 July 1995", p. 1; Ex. 7DP00138, "Drina Corps Regular Combat Report, 15 July 1995", pp. 1-2; Ex. 7DP00139, "Drina Corps Regular Combat Report, 16 July 1995", pp. 1-3; Ex. P00141, "Regular Combat Report from the Drina Corps Command to the VRS Main Staff signed by Krstić, 18 July 1995", pp. 1, 3; Ex. 5D01112, "Drina Corps Interim Combat Report signed by Radislav Krstić, 19 July 1995", p. 1; Ex. P03074, "Drina Corps Regular Combat Report signed by Radislav Krstić, 25 July 1995", p. 2; Ex. P03075, "Drina Corps Regular Combat Report signed by Radislav Krstić, 26 July 1995", pp. 2, 4.

4628 Miletić's Appeal Brief, para. 318, referring to Trial Judgement, fn. 5144 (referring to Ex. P02794, "Rogatica Brigade document, to Miletić personally, 'Situation in Žepa', type-signed Tolimir, 21 July 1995").

proposal was considered or implemented, explaining that **Miletić**'s role was not that of decision-maker, but rather an intermediary.[4630] The Appeals Chamber finds no error in the Trial Chamber's reasoning in this regard. Moreover, there is nothing to suggest that the Trial Chamber used this evidence to establish that **Miletić** supported Tolimir's proposal. Accordingly, the Appeals Chamber dismisses this aspect of his argument.

1638. In view of the above, the Appeals Chamber considers that **Miletić** has failed to demonstrate an error in the Trial Chamber's findings, in relation to Žepa, concerning his role as a source of information at the Main Staff.

d. Conclusion

1639. Based on the foregoing analysis, the Appeals Chamber finds that **Miletić** has failed to show any error in the Trial Chamber's finding that he contributed to the JCE to Forcibly Remove in relation to Žepa through the monitoring and co-ordinating roles he assumed at the Main Staff. Accordingly, the Appeals Chamber dismisses **Miletić**'s sub-grounds of appeal 10.10 and 10.11.

(xi) Alleged failure to consider relevant evidence indicating that Miletić's acts were part of his normal and legitimate responsibilities (Sub-grounds 10.15 in part and 10.16)

1640. **Miletić** contends that the Trial Chamber committed an error of fact by not taking into account relevant evidence in finding that: (1) his actions were part of an attack against the civilian population; and (2) these actions amounted to a substantial contribution to the JCE to Forcibly Remove. Specifically, **Miletić** argues that the Trial Chamber neglected to consider that his actions in this regard were carried out in the course of his "ordinary and legitimate responsibilities".[4631] The Prosecution responds that it is irrelevant that **Miletić**'s acts fell within his routine duties at the Main Staff.[4632]

1641. The Appeals Chamber observes at the outset that **Miletić** does not point to any evidence that the Trial Chamber supposedly failed to take into account. Instead, he merely submits that the Trial Chamber neglected to consider that the actions he carried out were part of his normal duties.[4633] The Appeals Chamber recalls that it has previously addressed and dismissed **Miletić**'s similar arguments.[4634] **Miletić** does not advance any additional argument under the present sub-ground of

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4629 Trial Judgement, para. 1686.
4630 Trial Judgement, fn. 5144.
4631 Miletić's Appeal Brief, para. 333. See Miletić's Appeal Brief, paras 313, 330; Appeal Hearing, AT. 431-432, 441-442 (5 Dec 2013).
4632 Prosecution's Response Brief (Miletić), paras 228, 230, 232; Appeal Hearing, AT. 474-475 (5 Dec 2013).
4633 Miletić's Appeal Brief, paras 333-334.
4634 See *supra*, paras 697, 1615. See *infra*, para. 1653.

appeal. The Appeals Chamber therefore dismisses the portions of sub-ground 10.15 addressed here as well as sub-ground 10.16 of **Miletić**'s appeal.

(xii) Conclusion

1642. The Appeals Chamber dismisses all of **Miletić**'s challenges to the Trial Chamber's findings relating to his contribution to the JCE to Forcibly Remove.[4635]

(d) Alleged errors regarding Miletić's *mens rea* for the JCE to Forcibly Remove

1643. The Trial Chamber found that **Miletić** shared the requisite *mens rea* as a participant in the JCE to Forcibly Remove.[4636] This finding was based on a number of intermediate Trial Chamber conclusions concerning **Miletić**'s knowledge and the actions he carried out, including that he: (1) gained a wide and substantive knowledge of the strategies and goals of the RS through his participation in the Briefing;[4637] (2) had full knowledge of the situation in Srebrenica and Žepa before, during, and after the attack;[4638] (3) knew about the plan to forcibly remove the Bosnian Muslim population of Srebrenica;[4639] and (4) carried out his tasks in relation to the JCE to Forcibly Remove with knowledge of the plan.[4640]

1644. **Miletić** argues that the Trial Chamber erred in law and fact when it found that he shared the requisite *mens rea* as a participant in the JCE to Forcibly Remove.[4641] **Miletić**'s arguments may be grouped into challenges pertaining to the following three categories: (1) the Trial Chamber's erroneous application of the legal standard governing the establishment of *mens rea* for JCE I;[4642] (2) the Trial Chamber's erroneous conclusions concerning the scope of his knowledge, including his knowledge of the criminal plan to forcibly remove Bosnian Muslims from the enclaves;[4643] and (3) the Trial Chamber's erroneous conclusion that his acts, found to contribute to the common purpose, were carried out "in relation to the JCE to Forcibly Remove".[4644]

1645. With regard to the Trial Chamber's application of the *mens rea* standard for JCE I, relying on the *Brđanin* Appeal Judgement, **Miletić** asserts that the Trial Chamber ought to have established

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4635 The Appeals Chamber recalls that sub-ground 10.12 of **Miletić**'s appeal was rendered moot by the granting of sub-ground 6.2 of his appeal. See *supra*, para. 775.
4636 Trial Judgement, para. 1717.
4637 Trial Judgement, para. 1648. See *supra*, para. 739.
4638 Trial Judgement, para. 1715.
4639 See Trial Judgement, paras 1704, 1706, 1726.
4640 Trial Judgement, paras 1717, 1719.
4641 Miletić's Appeal Brief, paras 277, 297, 313, 331, 335-337.
4642 See Miletić's Appeal Brief, paras 339-341. See Appeal Hearing, AT. 441-444 (5 Dec 2013).
4643 See Miletić's Appeal Brief, paras 251-259, 342-345.
4644 See Miletić's Appeal Brief, paras 325, 329-333; Miletić's Reply Brief, para. 110. See Miletić's Appeal Brief, paras 276-277, 296-297, 307, 313.

that he had both the intent to commit the crimes and the intent to participate in the furtherance of the common criminal purpose, but that it did not establish either.[4645]

1646. Concerning alleged errors pertaining to his knowledge, **Miletić** submits that the Trial Chamber erred in determining the scope of his knowledge, including in relation to the plan to remove the Bosnian Muslim population from the enclaves.[4646] Related to this, he challenges the Trial Chamber's finding that he had wide and substantive knowledge of the political and military background of the conflict and of the objectives and strategy of the RS as well as thorough knowledge of the situation in Srebrenica and Žepa.[4647]

1647. In support of his claim that he lacked the relevant knowledge, **Miletić** first asserts that the Trial Chamber neglected to note the participants of the Briefing. He argues therefore that "it is unlikely that plans for the actions, which took place later, in July 1995, were discussed before such a large audience".[4648] **Miletić** also submits that he did not belong to the group of officers and/or political bodies who developed the VRS/RS objectives and strategy and that his knowledge was limited to what was written in military documents.[4649] In a related argument, **Miletić** submits that there is no evidence to suggest that he had any information about the situation in Srebrenica and Žepa other than that which was dispatched to him through the Drina Corps reports, which were incomplete, incorrect, or sometimes even deliberately false.[4650]

1648. Second, **Miletić** asserts that the Trial Chamber's finding that he had full knowledge of the situation in the Srebrenica and Žepa enclaves stands in contradiction to its other findings. He points out in this respect that the Trial Chamber concluded that it was not established that he was present in the VRS Main Staff during important developments in relation to the attack on Srebrenica between 9 and 12 July 1995 and that he was only briefed about them in the morning of 12 July 1995.[4651]

1649. Third, **Miletić** asserts that the initial purpose of the VRS military offensive in Srebrenica to separate the enclaves was altered without his knowledge on 9 July 1995 to include the capture of Srebrenica. He argues that he could not have foreseen the transfer of the population and, as such, their removal could not have motivated his actions.[4652] He submits that his knowledge was limited

4645 Miletić's Appeal Brief, para. 339.
4646 Miletić's Appeal Brief, paras 342-345.
4647 Miletić's Appeal Brief, paras 251-256.
4648 Miletić's Appeal Brief, para. 252. See Miletić's Reply Brief, para. 85.
4649 Miletić's Appeal Brief, para. 253. See also Miletić's Appeal Brief, para. 276.
4650 Miletić's Appeal Brief, para. 254.
4651 Miletić's Appeal Brief, para. 255, referring to Trial Judgement, paras 1666-1667.
4652 Miletić's Appeal Brief, para. 343.

to military operations, *i.e.* combat, and that the removal of the population from the enclaves, although a consequence of a military operation, was not part of it.[4653]

1650. Finally, with regard to the Trial Chamber's alleged error in finding that he carried out his tasks in relation to the JCE to Forcibly Remove, **Miletić**'s overarching argument is that the Trial Chamber failed to consider the possibility that the acts he carried out within the framework of his post were committed "legally and properly", in the ordinary course of his daily work and without any intention either of contributing to the JCE to Forcibly Remove or committing a crime.[4654] To this end, he claims that the Trial Chamber erred by failing to establish beyond reasonable doubt, for each act found to constitute a contribution to the JCE to Forcibly Remove, that it was "committed with the intent to contribute to the common purpose and to commit a criminal act".[4655] To illustrate this argument, **Miletić** points, in particular, to the Trial Chamber's findings concerning his contribution to the JCE to Forcibly Remove through his involvement in: (1) the drafting of Directive 7;[4656] (2) the drafting of Directive 7/1;[4657] (3) the Main Staff's reporting function;[4658] and (4) the monitoring of the column.[4659]

1651. The Prosecution responds that the Trial Chamber did find that **Miletić** had the requisite intent for the crimes committed within the JCE to Forcibly Remove.[4660] It further submits that the Trial Chamber reasonably found that **Miletić** gained wide and substantive knowledge of RS strategy and goals by participating in the Briefing.[4661] In addition, the Prosecution asserts that **Miletić** had other multiple sources enabling him to gain such knowledge.[4662] According to the Prosecution, the Trial Chamber properly found that from the issuance of Directive 7, **Miletić** had "full knowledge of the Bosnian Serb criminal goal to eliminate the Srebrenica and Žepa enclaves and remove their Bosnian Muslim population".[4663] Finally, the Prosecution submits that the fact that **Miletić**'s contributions fell within the remit of his regular duties at the Main Staff does not exculpate him.[4664]

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4653 Miletić's Appeal Brief, paras 257-259.
4654 Miletić's Appeal Brief, paras 296-297, 325, 330-331, 333; Miletić's Reply Brief, para. 110. Appeal Hearing, AT. 441-445 (5 Dec 2013).
4655 Miletić's Appeal Brief, para. 329. See Miletić's Appeal Brief, para. 332.
4656 Miletić's Appeal Brief, para. 277.
4657 Miletić's Appeal Brief, para. 276.
4658 Miletić's Appeal Brief, paras 296-297, 344.
4659 Miletić's Appeal Brief, paras 307, 313.
4660 Prosecution's Response Brief (Miletić), para. 236. See Prosecution's Response Brief (Miletić), paras 235, 238.
4661 Prosecution's Response Brief (Miletić), paras 173-174.
4662 Prosecution's Response Brief (Miletić), paras 172, 175. See Prosecution's Response Brief (Miletić), para. 178.
4663 Prosecution's Response Brief (Miletić), para. 238. See Prosecution's Response Brief (Miletić), paras 178, 239. See also Appeal Hearing, AT. 474-475 (5 Dec 2013).
4664 Prosecution's Response Brief (Miletić), paras 181 (internal references omitted), 198 (internal references omitted); Appeal Hearing, AT. 474-475 (5 Dec 2013).

(i) Whether the Trial Chamber applied the correct legal standard

1652. At the outset, the Appeals Chamber recalls that, in the *Brđanin* case, it held that where JCE I is concerned "the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission".[4665] At the same time it has been the consistent jurisprudence of the Tribunal that the requisite *mens rea* for a conviction under JCE I can be inferred from a person's knowledge of the common plan, combined with his continuous participation,[4666] if this is the only reasonable inference available on the evidence.[4667]

1653. The participation does not have to be in and of itself criminal, as long as the accused performs acts that in some way contribute to the furtherance of the common purpose of the JCE.[4668] The Appeals Chamber recalls in this regard its finding in the *Blagojević and Jokić* case, albeit made in connection to aiding and abetting, that "the fact that [the accused's] participation amounted to no more than his or her 'routine duties' will not exculpate the accused".[4669] Furthermore, the presence of the participant when and where the crime is committed is not necessary.[4670] Finally, as the Appeals Chamber held in the *Kvočka et al.* case, while the contribution does not have to be "a *sine qua non,* without which the crimes could or would not have been committed",[4671] its significance will be relevant in demonstrating that the accused shared the intent to pursue the common purpose.[4672]

1654. The Trial Chamber found that **Miletić** shared the common intent of the JCE.[4673] It further concluded that he had the specific intent needed for the crime of persecution.[4674] Although it used slightly different terminology than that used in the *Brđanin* case, the Trial Chamber's findings are consistent with the jurisprudence outlined above. That is, the Trial Chamber applied the correct legal standard when it relied on **Miletić**'s knowledge of the plan to forcibly remove the Bosnian Muslims from the Srebrenica and Žepa enclaves and his continuous participation in furthering the common purpose of the JCE in establishing that he possessed the requisite *mens rea*.

1655. The Appeals Chamber therefore dismisses this aspect of **Miletić**'s argument and will proceed to analyse whether a reasonable trier of fact could have found that **Miletić** knew of the

4665 *Brđanin* Appeal Judgement, para. 365. See also *Kvočka et al.* Appeal Judgement, para. 82.
4666 *Đorđević* Appeal Judgement, para. 512; *Krajišnik* Appeal Judgement, paras 202, 204, 697. See also *Kvočka et al.* Appeal Judgement, para. 243.
4667 *Krajišnik* Appeal Judgement, para. 202; *Brđanin* Appeal Judgement, paras 428-429; *Vasiljević* Appeal Judgement, para. 120.
4668 *Šainović et al.* Appeal Judgement, para. 985; *Krajišnik* Appeal Judgement, paras 215, 695-696; *Kvočka et al.* Appeal Judgement, para. 263. See *supra*, para. 1615.
4669 *Blagojević and Jokić* Appeal Judgement, para. 189. See *supra*, paras 1615, 1641.
4670 *Kvočka et al.* Appeal Judgement, paras 112-113; *Krnojelac* Appeal Judgement, para. 81.
4671 *Kvočka et al.* Appeal Judgement, para. 98. See also *Gatete* Appeal Judgement, para. 96.
4672 *Krajišnik* Appeal Judgement, para. 680; *Kvočka et al.* Appeal Judgement, para. 97.
4673 Trial Judgement, para. 1717. See *supra*, para. 1643.

criminal purpose of the JCE to Forcibly Remove and that he continuously participated in furthering the common purpose.

(ii) The scope of Miletić's knowledge

1656. Regarding **Miletić**'s challenge to the importance the Trial Chamber attributed to his participation in the Briefing, the Appeals Chamber notes that it was attended by, *inter alia*, Karadžić, Mladić, the Prime Minister, the Minister of Defence as well as the corps commanders. Karadžić briefed the participants on "defining future political and military goals and strategies of conducting the war and peace strategies".[4675] **Miletić** was not only present but was also assigned the task of extracting the most important points and drawing conclusions, based on the discussions from the participants, which, if accepted by Karadžić, would form the basis for a directive. Further, "all corps were ordered by Mladić to submit their prepared combat readiness analysis reports directly to **Miletić**".[4676]

1657. The Appeals Chamber has considered **Miletić**'s assertion that it is unlikely that the plans for the actions that took place in July 1995 were discussed at the Briefing. In this regard, it observes that the Briefing resulted in Directive 7, which was drafted by **Miletić**,[4677] and which set out the criminal plan[4678] that was gradually implemented and finally resulted in the expulsion of the Bosnian Muslim population from the enclaves. The Appeals Chamber also recalls that language akin to that of Directive 7 already appeared in Directive 4, which tasked the Drina Corps to "force [the enemy] to leave the Birač, Žepa and Goražde areas together with the Muslim population".[4679] The Appeals Chamber considers that **Miletić**'s assertion is speculative and therefore dismisses this aspect of his argument.

1658. The Appeals Chamber has also considered **Miletić**'s assertion that he was neither part of the "inner circle" of officers who were developing the VRS objectives and strategy and participating in decision-making nor a participant in formulating these strategies within the political bodies. Even accepting this assertion, the Appeals Chamber recalls that, in addition to his participation in the Briefing, **Miletić** was brought into close contact with the main actors in the VRS through his participation in the daily morning briefings with Mladić and the assistant commanders.[4680] Furthermore, **Miletić** received daily and interim reports from subordinate units, including the Drina Corps, and "he and his staff were responsible for incorporating the substance of the information

4674 Trial Judgement, para. 1729.
4675 Trial Judgement, para. 1648.
4676 Trial Judgement, para. 1648.
4677 See *supra*, paras 1498-1504.
4678 See Trial Judgement, paras 199, 762, 1653.
4679 Ex. P00029, "VRS Main Staff Order 02/5-210, Operational Directive 4, 19 November 1992", para. 5(d).

received into the daily Main Staff reports to the President".[4681] Based on this information, **Miletić** also updated Mladić and the present assistant commanders during the Main Staff morning briefings.[4682] The Trial Chamber stressed that **Miletić** was a key advisor to Milovanović, and in the latter's absence, advised Mladić directly.[4683] The updates **Miletić** provided were comprehensive and included details on the situation at the front, the transportation of the civilian population out of Srebrenica and Žepa, and the taking of POWs.[4684] The Trial Chamber specifically observed that **Miletić** was informed of the details of the operations against the enclaves and their implementation, that he was in direct contact with subordinate units, including at the brigade level, and that he was the person to turn to for advice.[4685] Indeed, the Trial Chamber concluded that he was the person "best informed on the situation in various theatres of the war".[4686] Furthermore, through his tasks related to the co-ordination of the work of other Main Staff organs and the drawing up of combat documents, he played a key role in planning operations at the strategic level.[4687] **Miletić** has thus failed to demonstrate that a reasonable trier of fact could not have found that he had a wide and substantive knowledge of the strategies and goals of the RS.[4688]

1659. With regard to **Miletić**'s argument that the reports sent by the corps did not afford particularly thorough knowledge, the Appeals Chamber recalls that the Regular Combat Reports sent by the Drina Corps to the Main Staff did contain information indispensable for the Main Staff's accurate understanding of the situation[4689] and considers that a reasonable trier of fact could have concluded that through his role in relation to the Subordinate Unit Reports, **Miletić** "always had knowledge of the activities of, and issues relating to, the subordinate units".[4690]

1660. **Miletić** also asserts that the Trial Chamber made contradictory findings in concluding that he had full knowledge of the situation in the Srebrenica and Žepa enclaves before, during, and after the attack, even though it had previously noted that it was not established that he was aware of the contents of certain reports from subordinate units to the Main Staff or daily Main Staff reports sent to Karadžić while absent from the Main Staff between 7 and 11 July 1995.[4691] The Appeals Chamber emphasises in this respect that the Trial Chamber specifically considered that **Miletić** was briefed in detail about all the recent developments and the situation in Srebrenica as soon as he

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4680 Trial Judgement, paras 1637, 1661.
4681 Trial Judgement, para. 1639. See Trial Judgement, paras 1635, 1638, 1714.
4682 Trial Judgement, paras 1636-1637, 1714.
4683 Trial Judgement, paras 1625, 1627-1628, 1630, 1636-1637, 1714.
4684 Trial Judgement, paras 1638, 1714 & Chapter V, Section B.7(d)(iii).
4685 Trial Judgement, paras 1662, 1677, 1686, 1713.
4686 Trial Judgement, para. 1714. See Trial Judgement, para. 1639.
4687 Trial Judgement, paras 1623-1624, 1635-1637, 1714.
4688 See Trial Judgement, paras 1648, 1653, 1712.
4689 See *supra*, para. 1562.
4690 See *supra*, para. 1562.
4691 Miletić's Appeal Brief, para. 255, referring to Trial Judgement, paras 1666-1667, 1715.

returned to the Main Staff.[4692] Although it may have been more precise to note **Miletić**'s absence between 7-11 July 1995 in qualifying the part of the finding that he was aware of the situation in Srebrenica *during* the attack, it is clear that the Trial Chamber was well aware that **Miletić** would have been fully briefed on 12 July 1995, upon his return to the Main Staff, of the details of the events of 7 to 11 July 1995.[4693] **Miletić** has therefore failed to show that the Trial Chamber erred resulting in a miscarriage of justice.

1661. With regard to the alleged error pertaining to **Miletić**'s knowledge of the plan to remove the Bosnian Muslim population from the enclaves, the Appeals Chamber finds **Miletić**'s argument that his knowledge was limited to military operations, *i.e.* combat,[4694] to be inapposite. The Appeals Chamber recalls in this regard that the Trial Chamber linked the attack on the civilian population in the Srebrenica and Žepa enclaves to Directive 7,[4695] established **Miletić**'s central role in the drafting process of that document,[4696] and found that he had full knowledge of the attack on the enclaves.[4697]

1662. **Miletić** was aware of the criminal goal to remove the Bosnian Muslim population from the enclaves as expressly spelled out in Directive 7, at least from 17 March 1995.[4698] He not only knew about its implementation through the incremental deprivation of sufficient humanitarian aid through which the supplies were depleted, creating an untenable situation for the population and incapacitating UNPROFOR, but also played an active role in this process.[4699] The Appeals Chamber also notes that **Miletić** was at the heart of the Main Staff and served as a "hub" for information. He played the key role in receiving and distributing information from and to the relevant actors, both superior and subordinate, including the RS President.[4700] As stated above, this information included details on the situation at the front, on the transportation of the civilian population out of Srebrenica and Žepa, and the taking of POWs.[4701] The Appeals Chamber thus considers that **Miletić** has failed to demonstrate that no reasonable trier of fact could have concluded that from the early stages he had full knowledge of the common plan to forcibly remove the Bosnian Muslim population from the Srebrenica and Žepa enclaves as set out in Directive 7.

1663. The Appeals Chamber recalls that it has previously addressed and dismissed **Miletić**'s argument that Directive 7 was limited to the separation of the enclaves and that the objective was

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4692 Trial Judgement, para. 1667. See Trial Judgement, para. 1666; *supra*, para. 1575.
4693 Trial Judgement, paras 1665-1667.
4694 Miletić's Appeal Brief, para. 258.
4695 See *supra*, paras 575-600.
4696 See *supra*, paras 1495, 1498-1504.
4697 Trial Judgement, fn. 5213. Regarding the question of whether the Trial Chamber's finding that the attack commenced with Directive 7 was reasonable, see *supra*, paras 575-580.
4698 Trial Judgement, para. 1653.
4699 See *supra*, paras 1528-1554.
4700 See *supra*, paras 1461-1481, 1555-1569.
4701 See *supra*, paras 1575, 1617.

altered, without his knowledge, to entail the capture and disappearance of the enclaves, through Karadžić's 9 July Order.[4702] The Appeals Chamber reiterates that Directive 7 had the objectives of creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa" and of "breaking up and destroying the Muslim forces in these enclaves and definitively liberating the Drina valley region".[4703] On this basis, the Appeals Chamber considers **Miletić**'s awareness of Karadžić's 9 July Order irrelevant to establishing his knowledge of the common purpose.

1664. Based on the above, the Appeals Chamber finds that **Miletić** has failed to demonstrate that a reasonable trier of fact could not have found that his knowledge included "a wide and substantive knowledge of the strategies and goals of RS" as well as "full knowledge of the situation in Srebrenica and Žepa", and that he was aware of the plan for the JCE to Forcibly Remove as set out in Directive 7.

(iii) Miletić's continuous participation in furthering the common purpose

1665. The Appeals Chamber recalls that it has addressed **Miletić**'s challenges to the Trial Chamber's findings establishing the manner in which he was found to have participated in the JCE to Forcibly Remove.[4704] As discussed in more detail above, **Miletić** has failed to demonstrate that a reasonable trier of fact could not have found that his tasks relating to the drafting of Directives 7 and 7/1, monitoring and co-ordination at the Main Staff, and the VRS process regulating UNPROFOR and humanitarian convoys constituted contributions to the JCE to Forcibly Remove.[4705] All these contributions to the JCE to Forcibly Remove furthered the implementation and realisation of that JCE's common purpose.[4706]

1666. As established above,[4707] in accordance with the Appeals Chamber's jurisprudence, whether **Miletić**'s specific acts were not in themselves criminal or were part of his daily duties is irrelevant, as long as they "somehow furthered" the common purpose of the JCE to Forcibly Remove.

1667. The Appeals Chamber considers that **Miletić** has failed to demonstrate an error in the Trial Chamber's findings concerning his continuous participation in the furtherance of the common purpose of the JCE to Forcibly Remove.

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4702 See *supra*, paras 591, 599-600, 1490.
4703 Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", pp. 10-11. See *supra*, para. 588.
4704 See *supra*, paras 1446-1641.
4705 See *supra*, paras 1447-1481, 1494-1639.
4706 See Trial Judgement, paras 1704-1706, 1709-1710, 1713-1716.
4707 See *supra*, para. 1653.

(iv) Conclusion

1668. The Appeals Chamber finds that **Miletić** has not shown that the Trial Chamber erred in finding that he shared the requisite *mens rea* for the JCE to Forcibly Remove. **Miletić**'s sub-grounds of appeal 9.3(a), 9.3(b), 11.1, 11.2, and 10.14 are thus dismissed in their entirety, and his sub-grounds of appeal 10.2, 10.6, 10.9, and 10.15 are dismissed in part, as far as they concern **Miletić**'s knowledge and intent.

3. "Opportunistic" killings (third category JCE)

1669. The Trial Chamber found that the BSF committed "opportunistic" killings in Potočari.[4708] The Trial Chamber then found that these "opportunistic" killings were foreseeable consequences of the JCE to Forcibly Remove, were foreseeable to **Miletić**, and that he took the risk that such killings might occur.[4709] Accordingly, the Trial Chamber found **Miletić** responsible, under JCE III, for murder and persecution as crimes against humanity for the "opportunistic" killings in Potočari.[4710]

(a) Whether the Trial Chamber erred in finding that JCE III was part of customary international law (Ground 12)

1670. **Miletić** submits that the Trial Chamber erred in law in holding that JCE III existed in customary international law prior to the events described in the Indictment.[4711] In support of his argument, **Miletić** first emphasises that the Tribunal upheld the existence of JCE III in customary international law on the basis of, *inter alia*, two international treaties that did not exist at the time when the events described in the Indictment occurred and do not support the existence of JCE III.[4712] Next, **Miletić** submits that rejection of the existence of JCE III in customary international law by the Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the ICC – shows that it is not generally accepted, especially as constituting international customary law.[4713] As a consequence, according to **Miletić**, its application is contrary to the principle of *nullum crimen sine lege* and the interests of justice demand that the Appeals Chamber depart from its previous jurisprudence.[4714]

1671. The Prosecution responds that the existence of JCE III in customary international law has been firmly established in the Tribunal's case law and that the Trial Chamber therefore did not err

4708 Trial Judgement, paras 359, 361.
4709 Trial Judgement, paras 1088, 1727, 1734-1735.
4710 Trial Judgement, paras 1727, 1735.
4711 Miletić's Appeal Brief, para. 359.
4712 Miletić's Appeal Brief, para. 353.
4713 Miletić's Appeal Brief, para. 357; Miletić's Reply Brief, para. 115. See also Miletić's Reply Brief, paras 112-114. **Miletić** also refers to the STL jurisprudence in his oral submissions. See Appeal Hearing, AT. 450-451 (5 Dec 2013).

by convicting **Miletić** under this mode of liability.[4715] The Prosecution further submits that the Appeals Chamber is not bound by the decisions of other tribunals.[4716] Finally, it asserts that the findings of the ICC, the ECCC, and the STL do not undermine the customary international law status of JCE III.[4717]

1672. The Appeals Chamber has consistently held that JCE, including JCE III, is a form of "commission" that has existed in customary international law since at least 1992.[4718] It has previously found that JCE does not violate the principle of *nullum crimen sine lege*, holding in this respect that the long and consistent stream of judicial decisions, international instruments, and domestic legislation in force at the time as well as the "moral gravity" and "egregious nature" of serious violations of humanitarian law would have given individuals reasonable notice that committing an international crime on the basis of participating in a JCE incurs individual criminal liability.[4719]

1673. The Appeals Chamber in the *Tadić* case examined post-World War II war crimes cases extensively[4720] in arriving at its holding that the common purpose doctrine is firmly established in customary international law and applicable to three categories of cases: JCE I, JCE II, and JCE III.[4721] Subsequent consideration by the Appeals Chamber in the *Tadić* case of the International Convention for the Suppression of Terrorist Bombings and the ICC Statute, *inter alia*,[4722] was limited to demonstrating the consistent legal view of a large number of States on the existence of a notion of a "common criminal purpose" as such.[4723] **Miletić**'s argument that the Appeals Chamber based its findings regarding the customary status of JCE III on these two treaties is therefore misplaced.

1674. The Appeals Chamber recalls that it is not bound by the findings of other courts – domestic, international, or hybrid – and that, even though it will take them into consideration, it may, after careful consideration, come to a different conclusion on a matter than that reached by another

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4714 Miletić's Appeal Brief, paras 355-358. See also Appeal Hearing, AT. 450 (5 Dec 2013).
4715 Prosecution's Response Brief (Miletić), para. 243. See also Prosecution's Response Brief (Miletić), paras 244-256; Appeal Hearing, AT. 466 (5 Dec 2013).
4716 Prosecution's Response Brief (Miletić), para. 257; Appeal Hearing, AT. 466 (5 Dec 2013).
4717 Prosecution's Response Brief (Miletić), paras 257-260; Appeal Hearing, AT. 466 (5 Dec 2013).
4718 See *Đorđević* Appeal Judgement, para. 81; *Martić* Appeal Judgement, para. 80; *Brđanin* Appeal Judgement, para. 405; *Stakić* Appeal Judgement, para. 100; *Vasiljević* Appeal Judgement, para. 95; *Ojdanić* Jurisdiction Decision, paras 21, 29; *Tadić* Appeal Judgement, paras 194-226.
4719 *Ojdanić* Jurisdiction Decision, paras 40-43; *Stakić* Appeal Judgement, para. 101. See *Tadić* Appeal Judgement, paras 194-226. See also *Krajišnik* Appeal Judgement, para. 669.
4720 *Tadić* Appeal Judgement, paras 195-219. See also *Đorđević* Appeal Judgement, paras 40-41.
4721 *Tadić* Appeal Judgement, para. 220. See also *Tadić* Appeal Judgement, para. 226.
4722 The Appeals Chamber also examined the domestic legislation of both civil law and common law jurisdictions. *Tadić* Appeal Judgement, paras 224-225.
4723 *Tadić* Appeal Judgement, paras 221-223, 226.

judicial body.[4724] The Appeals Chamber considers that in order to constitute a cogent reason for departing from its established jurisprudence on a matter, the party advocating a departure would need to show that a non-binding opinion of another court is the correct law and demonstrate that there is a clear mistake in the Appeals Chamber's approach.[4725] Accordingly, and on review of the authorities **Miletić** cites, the Appeals Chamber finds that **Miletić** has failed to demonstrate any cogent reason for departing from the Appeals Chamber's well-established jurisprudence. **Miletić**'s ground of appeal 12 is therefore dismissed.

(b) Whether the Trial Chamber erred in finding that the members of the VRS committed the "opportunistic" killings in Potočari (Sub-ground 13.1)

1675. **Miletić** submits that the Trial Chamber erred when it concluded that it was foreseeable to him that "opportunistic" killings would be committed by the VRS in Potočari.[4726] He emphasises that while the Trial Chamber held that the BSF included both the VRS and the MUP forces, it never identified the perpetrators of the Potočari killings as either the VRS or the MUP and the Trial Chamber always distinguished between them.[4727] He argues that because the Trial Chamber held that the Potočari killings were committed by the BSF, it erred in fact when it later found that it was foreseeable to **Miletić** that the VRS would commit killings in Potočari.[4728] **Miletić** further argues that the Trial Chamber erred in law by failing to provide a reasoned opinion for attributing the Potočari killings to the VRS.[4729] **Miletić** emphasises that the Trial Chamber attributed these killings to the VRS in order to link the perpetrators to him.[4730] He also asserts that the MUP forces' subordination to the VRS is irrelevant because the MUP did not inform the VRS Main Staff of it and there is no evidence showing that **Miletić** knew of this subordination.[4731] Finally, **Miletić** submits that the Trial Chamber in the *Tolimir* case did not attribute the killings of nine Bosnian Muslim men in a field near the DutchBat compound to the BSF.[4732]

1676. The Prosecution responds that the Trial Chamber properly linked **Miletić** to the physical perpetrators of the Potočari killings.[4733] It argues that the Trial Chamber's reference to the VRS

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4724 *Hartmann* Contempt Appeal Judgement, para. 159 & fn. 314; *Čelebići* Appeal Judgement, para. 24.

4725 See *Đorđević* Appeal Judgement, para. 24; *Aleksovski* Appeal Judgement, para. 108 (stating that "[i]nstances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'").

4726 Miletić's Appeal Brief, paras 363-366.

4727 Miletić's Appeal Brief, para. 363; Miletić's Reply Brief, para. 116; Appeal Hearing, AT. 446 (5 Dec 2013). See also Miletić's Reply Brief, para. 117.

4728 Miletić's Appeal Brief, paras 363-366; Appeal Hearing, AT. 446 (5 Dec 2013).

4729 See Miletić's Appeal Brief, paras 365-366.

4730 Miletić's Appeal Brief, para. 365.

4731 Miletić's Reply Brief, para. 116.

4732 Appeal Hearing, AT. 446-447 (5 Dec 2013).

4733 Prosecution's Response Brief (Miletić), paras 262-264.

must be understood as including the MUP forces in Potočari because those MUP forces were re-subordinated to the VRS Drina Corps.[4734] It further submits that even if the MUP forces committed the murders, they were linked to members of the JCE through their re-subordination and concerted action with the VRS.[4735] Finally, the Prosecution asserts that any conclusions drawn by another trier of fact on different evidence cannot impact this case.[4736]

1677. At the outset, the Appeals Chamber recalls that it is not bound by findings of trial chambers[4737] and that two reasonable triers of fact may come to different but equally reasonable conclusions based on the same evidence.[4738] The Appeals Chamber therefore reiterates that an error cannot be established by merely pointing to the fact that other trial chambers have exercised their discretion in a different way.[4739] Accordingly, the Appeals Chamber finds no merit in **Miletić**'s comparison of this case to the *Tolimir* case.

1678. The Appeals Chamber notes that the Trial Chamber found that the BSF committed the "opportunistic" killings in Potočari[4740] and that the BSF consisted of both the VRS and the MUP forces,[4741] both of which were operating in Potočari.[4742] However, the Trial Chamber subsequently appeared to attribute these killings to the VRS in holding that it was foreseeable to **Miletić** that the VRS would commit killings in Potočari.[4743] The Appeals Chamber notes that in a section of the Trial Judgement discussing in detail the killings in Potočari, findings referring to the VRS are notably absent.[4744] This leaves open the possibility that members of the BSF identified as the principal perpetrators were drawn exclusively from the MUP forces. The Appeals Chamber therefore finds that, in light of the Trial Chamber's findings that the BSF committed these killings and that both the VRS and the MUP forces were operating in Potočari, a reasonable trier of fact could not have later concluded that the VRS committed the killings in Potočari. In so doing, the Trial Chamber committed an error of fact. The Appeals Chamber will therefore consider whether this error occasioned a miscarriage of justice.

1679. The Appeals Chamber reiterates that under JCE III, an accused may incur criminal responsibility for crimes committed by non-members of the JCE "provided that it had been shown that the crimes could be imputed to at least one member of the JCE and that this member, when

4734 Prosecution's Response Brief (Miletić), para. 263; Appeal Hearing, AT. 478 (5 Dec 2013).
4735 Prosecution's Response Brief (Miletić), para. 265; Appeal Hearing, AT. 478 (5 Dec 2013).
4736 Appeal Hearing, AT. 478 (5 Dec 2013).
4737 *Đorđević* Appeal Judgement, para. 550.
4738 *Bizimungu* Appeal Judgement, para. 210; *Đorđević* Appeal Judgement, paras 257, 701; *Krnojelac* Appeal Judgement, para. 12. See *Nzabonimana* Appeal Judgement, fn. 1119; *Aleksovski* Appeal Judgement, para. 114.
4739 *Đorđević* Appeal Judgement, paras 257, 701.
4740 Trial Judgement, paras 359, 361.
4741 Trial Judgement, para. 102.
4742 Trial Judgement, paras 302-305.
4743 Trial Judgement, para. 1727.
4744 Trial Judgement, paras 354-361.

using a principal perpetrator, acted in accordance with the common plan".[4745] Thus, **Miletić** can only be held liable for the "opportunistic" killings in Potočari if the perpetrators can be linked to one or more members of the JCE to Forcibly Remove. Regrettably, the Trial Chamber did not provide any reasoning in this respect. The Appeals Chamber must therefore determine whether the Trial Chamber's implicit finding that such a link was established is one that a reasonable trier of fact could have made, notwithstanding the Trial Chamber's error of fact identified above.

1680. The Appeals Chamber first observes that the Trial Chamber found the existence of a JCE "of the Bosnian Serb political and military leadership to forcibly remove the Bosnian Muslim populations from Srebrenica and Žepa"[4746] of which the only specifically named members were **Miletić** and Gvero.[4747] Additional specificity with respect to the composition of the "Bosnian Serb political and military leadership" would assist in determining whether a link was established between the perpetrators of the Potočari killings and a member of the JCE to Forcibly Remove. In this respect, the Appeals Chamber recalls the Trial Chamber's findings that Mladić, the Commander of the Main Staff of the VRS,[4748] "was constantly moving through the area" during the process of removal of the Bosnian Muslim population from Potočari.[4749] Accordingly, the Appeals Chamber will review the Trial Chamber's factual findings and consider whether a reasonable trier of fact could have considered that the only reasonable inference to be drawn is that Mladić was a member of the JCE to Forcibly Remove.

1681. The Appeals Chamber notes that the JCE to Forcibly Remove came into existence, at the latest, with the issuance of Directive 7 setting a plan to create "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[4750] Mladić was well aware of this document, referring to it in Directive 7(1), which he issued on 31 March 1995.[4751] The Trial Chamber further found that this plan was first pursued by limiting the aid to the enclaves and the subsequent military attacks. Eventually, the implementation of the plan culminated in the terrorising of the people in Srebrenica town, as well as the terrorising and cruel and inhumane treatment of the people gathered at Potočari. The Trial Chamber found that all these acts were intrinsic steps to the ultimate aim of forcing the Bosnian Muslim populations out of the enclaves. This common purpose was finally achieved through the actual busing of the people out of

4745 *Đorđević* Appeal Judgement, para. 911, citing *Martić* Appeal Judgement, para. 168.
4746 Trial Judgement, para. 1087.
4747 Trial Judgement, paras 1718, 1822.
4748 Trial Judgement, para. 104.
4749 Trial Judgement, para. 322. See Trial Judgement, paras 318, 343. See also *supra*, paras 1426, 1428.
4750 Trial Judgement, paras 1086-1087; Ex. P00005, "RS Supreme Command Directive 7, 8 March 1995", p. 10.
4751 See Trial Judgement, para. 202; Ex. 5D00361, "VRS Main Staff Directive 7/1, signed by Mladić, 31 March 1995", pp. 2, 4.

the enclaves and amounted to forcible transfer of the Bosnian Muslim civilian population from Srebrenica and Žepa.[4752]

1682. The Appeals Chamber notes that the Trial Chamber made numerous findings showing that Mladić was a central figure in the implementation of the JCE to Forcibly Remove. Regarding the final phase of the plan, these included: (1) the reference to Mladić's intercepted words on 12 July 1995 that "we'll evacuate them all – those who want to [go] and those who don't want to";[4753] (2) Mladić's participation in the Hotel Fontana meetings,[4754] at which the plans for implementing the forcible transfer were arranged; (3) Mladić's intimidating, leadership role at these meetings,[4755] where he was informed that between 10,000 and 20,000 women, children, and the elderly[4756] were suffering in "the difficult humanitarian situation in Potočari";[4757] (4) that Mladić repeatedly requested and arranged transportation to effectuate the forcible removal;[4758] (5) that Mladić was present during the forced removal of the Bosnian Muslims from Potočari;[4759] and (6) emphasising the underlying importance of Mladić's own remarks that the Bosnian Muslims can "either survive or disappear" and considering them as "best evidenc[ing] the deliberate intent to terrify [them]",[4760] which was a part of the common purpose of the JCE to Forcibly Remove.[4761] In light of the above, the Appeals Chamber considers that a reasonable trier of fact could have considered that the only reasonable inference to be drawn is that Mladić was a member of the JCE to Forcibly Remove.

1683. As discussed above, regarding the Bosnian Muslim man killed outside the vicinity of the White House, the Appeals Chamber found that, in light of the Trial Chamber's findings, a reasonable trier of fact could have linked the BSF perpetrators of this killing to Mladić.[4762] Similarly, the Appeals Chamber previously held that the Trial Chamber made several findings concerning the events in Potočari from 12-13 July 1995 from which a reasonable trier of fact could have concluded that the only reasonable inference is that the perpetrators of the killings of the nine men in a field outside the DutchBat compound were linked to Mladić.[4763] It thus follows that irrespective of whether the direct perpetrators of the "opportunistic" killings in Potočari were members of the VRS, the MUP forces, or a combination thereof, a reasonable trier of fact could

4752 Trial Judgement, para. 1086.
4753 Trial Judgement, para. 915.
4754 Trial Judgement, paras 274-279, 289-290.
4755 Trial Judgement, paras 274-279, 289-290.
4756 Trial Judgement, paras 275, 277.
4757 Trial Judgement, para. 277.
4758 Trial Judgement, paras 276, 290, 293, 299.
4759 Trial Judgement, paras 318, 322, 343.
4760 Trial Judgement, para. 997.
4761 Trial Judgement, para. 1087.
4762 *Cf. supra*, paras 1423, 1428.
4763 *Cf. supra*, paras 1424-1426, 1428.

have concluded that a link was established between them and Mladić, a member of the JCE to Forcibly Remove.

1684. The Appeals Chamber thus considers that although the Trial Chamber erred in fact by entering convoluted findings as to the affiliation of the direct perpetrators of the Potočari killings, this error did not result in a miscarriage of justice. The Trial Chamber's implicit finding that a link between the perpetrators of the "opportunistic" killings in Potočari and a member of the JCE to Forcibly Remove was established is one that a reasonable trier of fact could have made notwithstanding the Trial Chamber's factual error. **Miletić**'s sub-ground of appeal 13.1 is therefore dismissed.

(c) Whether the "opportunistic" killings in Potočari were a foreseeable and natural consequence of the JCE to Forcibly Remove (Sub-ground 13.2)

1685. The Trial Chamber noted that:

> the Prosecution has not only charged the "opportunistic" killings as a natural and foreseeable consequence of the JCE to Murder,[4764] but also as a natural and foreseeable consequence of the JCE to Forcibly Remove. The Trial Chamber, by majority, Judge Kwon dissenting, is satisfied that in the circumstances of this forced movement of an entire population, numbering in the thousands, it was foreseeable that "opportunistic" killings would occur. This is particularly the case where the movement was accompanied by acts of cruel and inhumane treatment and terrorisation. Therefore, the Trial Chamber is satisfied that "opportunistic" killings were a natural and foreseeable consequence of the JCE to Forcibly Remove. However, given the two JCEs alleged in this case and the Trial Chamber's findings as to the detention of the men being part of the JCE to Murder, the Trial Chamber is of the view that only the killings which occurred in Potočari were foreseeable consequences of the forcible removal of the population.[4765]

1686. **Miletić** submits that the Trial Chamber erred in law and fact when it held that the "opportunistic" killings in Potočari were a natural and foreseeable consequence of the JCE to Forcibly Remove.[4766] He argues that these murders are indistinguishable from the murders of other men in detention and "cannot be tied to the forcible transfer".[4767] **Miletić** further argues that because the victims of these killings were detained and "detention did not constitute either the common purpose or a natural, foreseeable consequence of the JCE [to Forcibly Remove]", these murders could not have been foreseeable to members of the JCE to Forcibly Remove.[4768] He points in this respect to the Trial Chamber's findings that: (1) detention of men constituted part of the JCE

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4764 The Trial Chamber found that the "opportunistic" killings in Bratunac town, at the Petkovci School in the Zvornik area, in Potočari, and at the Kravica Supermarket in the Bratunac area were foreseeable consequences of the JCE to Murder. Trial Judgement, para. 1082.

4765 Trial Judgement, para. 1088 (internal reference omitted and supplemented).

4766 Miletić's Appeal Brief, paras 368-369. See Appeal Hearing, AT. 447 (5 Dec 2013).

4767 Miletić's Appeal Brief, para. 368.

4768 Miletić's Appeal Brief, para. 368.

to Murder; (2) the detained men in Potočari were not victims of forcible transfer;[4769] and (3) the murder victims in Potočari were detained prior to being killed.[4770]

1687. The Prosecution responds that the victims of the "opportunistic" killings were in Potočari as a result of the implementation of the common purpose to remove the Bosnian Muslim population from the enclave.[4771] It argues that at Potočari, the BSF were working to implement both the JCE to Murder and the JCE to Forcibly Remove.[4772] The Prosecution adds that it is irrelevant that the Trial Chamber did not qualify the displacement of the men to Bratunac, Zvornik, and their execution sites as forcible transfer.[4773]

1688. **Miletić** replies that, even if the victims of the "opportunistic" killings found themselves in Potočari because of the forcible removal, an "objective causal link between the common objective of the JCE and the conditions that allowed the commission of another crime" is not enough to establish that the crime was a foreseeable consequence of the JCE to Forcibly Remove.[4774]

1689. The Appeals Chamber considers that **Miletić**'s arguments are centred around the flawed premise that "[t]he detention of the men falls completely outside of the JCE [to Forcibly Remove]" and therefore he could not be held responsible for murders of detained men.[4775] While the Trial Chamber found that generally, "the detention of the men [was a] part of the JCE to Murder",[4776] the Appeals Chamber recalls that the totality of the Trial Chamber's findings establish that the separation and detention process in Potočari was not solely a part of the JCE to Murder but *also* done in furtherance of the JCE to Forcibly Remove.[4777] Furthermore, the Appeals Chamber recalls that while the men separated and detained at Potočari were not found to be victims of forcible transfer, they were found to be subjected to cruel and inhumane treatment, which formed an intrinsic component of the common purpose of the JCE to Forcibly Remove.[4778]

1690. For the foregoing reasons, the Appeals Chamber finds that **Miletić** has failed to demonstrate that a reasonable trier of fact could not have found that the "opportunistic" killings in Potočari were a natural and foreseeable consequence of the JCE to Forcibly Remove and dismisses his sub-ground of appeal 13.2.

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4769 Miletić's Appeal Brief, para. 367.
4770 Miletić's Appeal Brief, para. 368.
4771 Prosecution's Response Brief (Miletić), para. 267.
4772 Prosecution's Response Brief (Miletić), paras 268-269; Appeal Hearing, AT. 476-477 (5 Dec 2013).
4773 Prosecution's Response Brief (Miletić), para. 270.
4774 Miletić's Reply Brief, para. 118.
4775 Miletić's Appeal Brief, para. 368.
4776 Trial Judgement, para. 1088.
4777 Trial Judgement, paras 917-918, 992-994, 997, 1088. See *supra*, paras 753-754.
4778 Trial Judgement, paras 1086-1087. See also *supra*, paras 753-755.

(d) Whether the Trial Chamber erred in finding that the "opportunistic" killings in Potočari were foreseeable to Miletić (Sub-ground 14.1)

1691. **Miletić** submits that the Trial Chamber erred by concluding that the Potočari killings were foreseeable to him.[4779] He argues that the Trial Chamber imputed knowledge to him that he did not have when it found that he was well-placed to foresee that the large-scale removal of the population would result in the murders at Potočari.[4780] In this respect, he submits that the Trial Chamber failed to consider that he was unaware of: (1) the BSF's intention to enter Srebrenica; (2) the gathering of the population and the conditions at Potočari; (3) the men being separated and detained; and (4) the arrival of the MUP forces in Srebrenica on 10 July 1995.[4781]

1692. **Miletić** further argues that the Trial Chamber adopted an inconsistent approach vis-à-vis its findings regarding Gvero's responsibility. He asserts that the Trial Chamber erred in not finding that he, like Gvero, could not foresee the Potočari murders because he was also not present in Potočari or implicated in the logistics of the transfer of the population.[4782]

1693. The Prosecution responds that the Trial Chamber properly found that **Miletić** could foresee the Potočari murders occurring in the course of the large-scale violent, forced movement of the population.[4783] The Prosecution further asserts, emphasising the 12 July 1995 Main Staff Report, that **Miletić** had sufficient knowledge to foresee the Potočari murders.[4784] The Prosecution also argues that **Miletić**'s comparison to Gvero is misplaced because these murders were also foreseeable to Gvero as the latter's acquittal was based on the wrong standard of foreseeability.[4785]

1694. **Miletić** replies that the 12 July 1995 Main Staff Report only alerted him to the movement of the Bosnian Muslim population towards Kladanj and did not inform him about the forcible transfer or the conditions at Potočari. He also asserts that the information he could have obtained on 12 July 1995 was far too late to hold him responsible for murders that occurred the following day.[4786]

1695. First, the Appeals Chamber recalls that while the Trial Chamber noted the correct legal standard governing the *mens rea* for JCE III – namely whether it was foreseeable that such a crime *might* be committed[4787] – when applying this standard to the facts, it indicated that a higher

4779 Miletić's Appeal Brief, paras 370-373.
4780 Miletić's Appeal Brief, para. 370.
4781 Miletić's Appeal Brief, para. 371, referring to Miletić's Appeal Brief, paras 247, 294, 363.
4782 Miletić's Appeal Brief, paras 372-373.
4783 Prosecution's Response Brief (Miletić), para. 272.
4784 Prosecution's Response Brief (Miletić), paras 274-275; Appeal Hearing, AT. 477 (5 Dec 2013).
4785 Prosecution's Response Brief (Miletić), paras 276-278.
4786 Miletić's Reply Brief, para. 119.
4787 Trial Judgement, para. 1030. See *Šainović et al.* Appeal Judgement, paras 1061, 1557.

standard of foreseeability was applied, *i.e.* that it was foreseeable that the "opportunistic" killings *would* occur.[4788] The Appeals Chamber will therefore consider **Miletić**'s submissions according to the correct legal standard. In other words, in order to succeed **Miletić** must show that it was unreasonable to find that it was foreseeable to him that these killings might be committed.

1696. Regarding **Miletić**'s arguments that the Trial Chamber improperly imputed knowledge to him, the Appeals Chamber recalls its previous discussion on his challenges to the Trial Chamber's findings related to his membership in the JCE to Forcibly Remove, especially with regard to the scope of his knowledge.[4789] **Miletić** played a central role in drafting Directive 7,[4790] which tasked the Drina Corps with creating "an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa",[4791] and the Appeals Chamber has dismissed **Miletić**'s argument that it was only after Karadžić's 9 July Order that the civilian population of the enclaves became the target of the attack.[4792] Moreover, while the 12 July 1995 Main Staff Report does not specifically mention the conditions at Potočari, it does explicitly note the engagement of the MUP forces in the Srebrenica enclave.[4793] In any event, the Appeals Chamber recalls that **Miletić** was fully briefed on 12 July 1995, upon his return to the Main Staff after his absence between 7 and 11 July 1995, of the details of the events that took place in the Srebrenica enclave.[4794] Finally, the Appeals Chamber considers that because there is no express time frame included in the foreseeability standard,[4795] **Miletić**'s unreferenced contention – that even if he gained the requisite knowledge on 12 July 1995, this was too late to hold him responsible for crimes occurring on 13 July 1995 – is without merit.

1697. Regarding **Miletić**'s arguments related to Gvero, the Appeals Chamber considers that once the Trial Chamber thoroughly assessed **Miletić**'s knowledge of the situation in Potočari, any inconsistencies between its findings related to **Miletić** and those related to Gvero are of relevance only to the latter.[4796] It emphasises in this regard that whether a crime is foreseeable under JCE III is a question that must be assessed in relation to the knowledge of each particular accused.[4797] The Appeals Chamber therefore dismisses the specific arguments relating to the Trial Chamber's alleged inconsistent approach adopted vis-à-vis the findings on Gvero's responsibility.

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4788 Trial Judgement, paras 1726-1727. See also *supra*, para. 1432.
4789 See *supra*, paras 1484, 1489-1493, 1507-1511, 1527, 1562, 1569, 1575-1581, 1591, 1611, 1664, 1668.
4790 Trial Judgement, para. 1705. See also *supra*, para. 1503.
4791 Ex. P00005 "RS Supreme Command Directive 7, 8 March 1995", p. 10.
4792 See *supra*, para. 1663 & note 4702.
4793 Exs. P00044, P02748, "VRS Main Staff Daily Combat Report, 12 July 1995", p. 4.
4794 Trial Judgement, paras 1665-1667. See also *supra*, para. 1575.
4795 See *Šainović et al.* Appeal Judgement, paras 1061, 1557.
4796 The Appeals Chamber recalls that the appellate proceedings against Milan Gvero were terminated and that the Trial Judgement was declared final in relation to him. See Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013.
4797 See *Kvočka et al.* Appeal Judgement, para. 86. See also *Šainović et al.* Appeal Judgement, paras 1557-1558.

1698. In light of the foregoing, the Appeals Chamber finds that **Miletić** has failed to show that a reasonable trier of fact could not have found, as the only reasonable inference, that he had sufficient knowledge to be in a position to foresee that the large-scale forced removal of the population might result in "opportunistic" killings in Potočari. **Miletić**'s sub-ground of appeal 14.1 is therefore dismissed.

(e) Whether Miletić willingly took the risk that "opportunistic" killings might occur in Potočari (Sub-ground 14.2)

1699. **Miletić** submits that the Trial Chamber erred in law and fact by finding that he willingly took the risk that the Potočari murders would occur.[4798] He argues that in order to find that one willingly took the risk under JCE III, it is not enough to show that one continued to participate in the JCE but rather it must be established that one "was driven by some fraudulent motive".[4799] Further, **Miletić** submits that there was no evidence that he had such a motive.[4800]

1700. The Prosecution responds that the Trial Chamber properly found that by continuing to contribute to the JCE to Forcibly Remove after the "opportunistic" killings in Potočari became foreseeable to him, **Miletić** willingly took the risk that the killings might occur.[4801]

1701. The Appeals Chamber first recalls that:

> The correct legal standard for the JCE III *mens rea* requires that it was foreseeable to the accused that such a crime might be committed by a member of the JCE or one or more of the persons used by the accused (or by any other member of the JCE) in order to carry out the *actus reus* of the crimes forming part of the common purpose and the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.[4802]

The Appeals Chamber notes that nothing in this definition indicates that it is a requirement to show that an accused had a fraudulent motive. The Appeals Chamber therefore rejects **Miletić**'s contention that the Trial Chamber should have established that he was "driven by some fraudulent motive".

1702. The Appeals Chamber notes that **Miletić**'s contribution to the JCE to Forcibly Remove continued after 12 July 1995. In particular, it recalls that **Miletić** continued his co-ordinating role within the VRS Main Staff and used "his unique position of knowledge to inform and advise".[4803]

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4798 Miletić's Appeal Brief, paras 374-375. See Appeal Hearing, AT. 447 (5 Dec 2013).
4799 Miletić's Appeal Brief, para. 375.
4800 Miletić's Appeal Brief, para. 375.
4801 Prosecution's Response Brief (Miletić), para. 279.
4802 *Šainović et al.* Appeal Judgement, para. 1061 (internal references omitted).
4803 See *supra*, paras 410, 1462-1474, 1575-1581, 1591; Trial Judgement, paras 1715-1716. See also Trial Judgement, paras 1711-1714, 1717-1718.

1703. Accordingly, the Appeals Chamber finds that **Miletić** has failed to show that the Trial Chamber erred in finding that he willingly took the risk that the Potočari killings might occur, and therefore dismisses his sub-ground of appeal 14.2.

(f) Whether the Trial Chamber erred with respect to the foreseeability of the Potočari killings being committed with persecutory intent (Sub-grounds 15.1 and 15.2)

1704. **Miletić** submits that because the "opportunistic" killings in Potočari were not foreseeable to him and he did not willingly take the risk that they would occur, he could likewise not foresee that they would be committed with discriminatory intent, nor could he have willingly taken the risk they would be committed with such intent.[4804] He argues therefore that the Trial Chamber erred in holding him responsible for persecution as a crime against humanity for these murders and his conviction should be set aside.[4805] Finally, **Miletić** refers to the STL-11-01/I Decision to support his contention that because persecution is a specific intent crime, it cannot be committed through JCE III.[4806]

1705. The Prosecution responds that **Miletić**'s arguments hinge on submissions made in his ground of appeal 14 and should be rejected.[4807] In the alternative, it argues that the Trial Chamber's finding that it was foreseeable to **Miletić** that the Potočari killings might be committed with persecutory intent was reasonable.[4808] Finally, the Prosecution contests **Miletić**'s reliance on the STL-11-01/I Decision.[4809]

1706. The Appeals Chamber recalls that it has already dismissed **Miletić**'s challenges to the Trial Chamber's findings that: (1) the "opportunistic" killings in Potočari were foreseeable to him;[4810] and (2) he willingly took the risk of their occurrence.[4811] As **Miletić** fails to submit any independent argument as to why the discriminatory nature of these killings were not foreseeable to him, **Miletić**'s arguments, insofar as they depend on the success of these challenges, are dismissed.

1707. The Appeals Chamber also recalls that it has already addressed whether liability pursuant to JCE III can attach in the context of specific intent crimes.[4812] The Appeals Chamber reiterates that provided the "reasonably foreseeable and natural consequences" standard has been established,

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4804 Miletić's Appeal Brief, paras 376-377; Miletić's Reply Brief, para. 120.
4805 Miletić's Appeal Brief, paras 377-378.
4806 Miletić's Reply Brief, para. 120 (referring to the STL-11-01/I Decision, paras 248-249); Appeal Hearing, AT. 450-451 (5 Dec 2013).
4807 Prosecution's Response Brief (Miletić), para. 281.
4808 Prosecution's Response Brief (Miletić), paras 280, 282.
4809 Appeal Hearing, AT. 466 (5 Dec 2013).
4810 See *supra*, paras 1691-1698.
4811 See *supra*, paras 1699-1703.
4812 See *supra*, para. 1440.

"criminal liability can attach to an accused for *any* crime that falls outside of an agreed upon joint criminal enterprise".[4813]

1708. Finally, with respect to **Miletić**'s reliance on the STL-11-01/I Decision,[4814] the Appeals Chamber notes that this jurisprudence is not binding on the Tribunal.[4815] The Appeals Chamber emphasises that the jurisprudence of this Tribunal not only allows for convictions under JCE III for specific intent crimes as a matter of principle, but also that several accused have actually been convicted of specific intent crimes pursuant to JCE III.[4816] These are precedents not to be lightly dismissed simply because another tribunal has decided the matter differently.[4817] The Appeals Chamber recalls that it will "only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts".[4818] The Appeals Chamber considers that **Miletić** has failed to provide an explanation as to why the STL-11-01/I Decision justifies a departure from the well-established jurisprudence of the Tribunal.

1709. The Appeals Chamber therefore finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in finding him responsible, under JCE III, for persecution as a crime against humanity and dismisses his ground of appeal 15 in its entirety.

(g) Whether the Trial Chamber erred in not convicting Miletić for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari (Prosecution Ground 9)

1710. In assessing **Miletić**'s individual responsibility, the Trial Chamber found that he was liable under JCE III for murder as a crime against humanity for the "opportunistic" killings in Potočari. At the same time, the Trial Chamber, without providing any further reasons, held that "in the circumstances of 'opportunistic' killings arising from a JCE to Forcibly Remove – encompassing forcible transfer as other inhumane acts constituting a crime against humanity – his criminal responsibility is for murder as a crime against humanity and not as a war crime".[4819]

1711. The Prosecution submits that the Trial Chamber erred in law in acquitting **Miletić** of murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari.[4820] It argues that in doing so, the Trial Chamber erroneously required that for criminal responsibility under JCE

4813 See *supra*, para. 1440. See also *supra*, paras 1670-1674.
4814 See STL-11-01/I Decision, para. 249, finding it preferable not to allow convictions under the JCE III for specific intent crimes, such as terrorism.
4815 *Đorđević* Appeal Judgement, para. 83, referring to *Čelebići* Appeal Judgement, para. 24.
4816 See, *e.g.*, *Đorđević* Appeal Judgement, paras 83, 829; *Martić* Appeal Judgement, paras 194-195, 202-204, 205; *Krstić* Appeal Judgement, para. 150.
4817 *Đorđević* Appeal Judgement, para. 83.
4818 *Đorđević* Appeal Judgement, para. 23, citing *Aleksovski* Appeal Judgement, para. 109. See *supra*, para. 1441.
4819 Trial Judgement, para. 1727.

III, the category of the JCE III crime must match that of the JCE I crime.[4821] In the alternative, the Prosecution argues that the Trial Chamber erred in fact as all the elements necessary for convicting **Miletić** of murder as a violation of the laws or customs of war were met.[4822]

1712. **Miletić** responds that the Trial Chamber did not require that the category of JCE III crimes match those of JCE I, but simply considered that his responsibility was for crimes against humanity and not for war crimes.[4823] He further responds that the Trial Chamber did not err in acquitting him of murder as a violation of the laws or customs of war for the killings in Potočari because the evidence does not support that conviction, in particular because it was not foreseeable to him that war crimes would be committed in Potočari.[4824]

1713. The Appeals Chamber considers that the Trial Chamber's scant reasoning as to why it acquitted **Miletić** for war crimes committed in Potočari suggests that the Trial Chamber required that the category of the JCE III crime must match that of the JCE I crime.[4825] In this regard, the Appeals Chamber notes that the jurisprudence of the Tribunal does not require the category of the JCE I crime and the JCE III crime to match.[4826] The Appeals Chamber recalls that in the *Šainović et al.* case the Appeals Chamber upheld convictions for both murder as a war crime and murder as a crime against humanity under JCE III committed in the execution of a JCE encompassing crimes against humanity.[4827] The Appeals Chamber therefore finds that the Trial Chamber erred in law. As a consequence of this error, the Appeals Chamber will now apply the correct legal standard and examine whether the Trial Chamber's factual findings allow for a conclusion beyond reasonable doubt that **Miletić** was responsible for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari.

1714. The Appeals Chamber recalls that a trial chamber may enter a conviction for both murder as a war crime and murder as a crime against humanity for the same underlying act because they have materially distinct elements.[4828] In order to establish murder as a war crime it must be shown, *inter*

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4820 Prosecution's Appeal Brief, paras 321-322, 327, 331; Appeal Hearing, AT. 487-489 (6 Dec 2013).

4821 Prosecution's Appeal Brief, paras 322, 324-327; Prosecution's Reply Brief, para. 171; Appeal Hearing, AT. 488 (6 Dec 2013).

4822 Prosecution's Appeal Brief, paras 323, 328-330; Appeal Hearing, AT. 487-489 (6 Dec 2013). See Prosecution's Reply Brief, paras 172-174.

4823 Miletić's Response Brief, para. 5.

4824 Miletić's Response Brief, paras 6, 8.

4825 See Trial Judgement, para. 1727.

4826 See, *e.g.*, *Martić* Appeal Judgement, para. 183, referring to *Martić* Trial Judgement, paras 454-455.

4827 *Šainović et al.* Appeal Judgement, paras 283, 1069, 1082-1083, 1277, 1283, 1541.

4828 See *Gatete* Appeal Judgement, para. 259; *Kunarac et al.* Appeal Judgement, para. 176; *Čelebići* Appeal Judgement, paras 420, 423. See also Trial Judgement, paras 739-743, 2112.

*alia*, that: (1) the victim must have taken no active part in the hostilities; and (2) there is a close link between the crime and the armed conflict.[4829]

1715. The Appeals Chamber notes the Trial Chamber's findings that: (1) "opportunistic" killings in Potočari "constitute murder both as a crime against humanity and a violation of the laws or customs of war";[4830] (2) **Miletić** was a member of the JCE to Forcibly Remove;[4831] (3) these "opportunistic" killings were a foreseeable and natural consequence of the JCE to Forcibly Remove;[4832] (4) these killings were specifically foreseeable to **Miletić**;[4833] and (5) he willingly took the risk that they might occur.[4834] Further, the Appeals Chamber recalls that the Trial Chamber made sufficient findings to support its implicit conclusion that the physical perpetrators of these killings were linked to a member of this JCE.[4835]

1716. With respect to whether it was foreseeable to **Miletić** that murder as a violation of the laws or customs of war might occur in Potočari, the Appeals Chamber recalls the Trial Chamber's findings that he "was one of the most knowledgeable persons in the Main Staff when it came to [...] this operation to forcibly remove" and that he "was in a position to foresee that this large scale forced movement of the population would result in 'opportunistic' killings in Potočari".[4836] More specifically, the Appeals Chamber recalls that **Miletić** was fully briefed on 12 July 1995 of the details of the events that took place in the Srebrenica enclave.[4837] The Appeals Chamber considers that in light of these findings, the only reasonable inference is that it was foreseeable to **Miletić** that murder as a violation of the laws or customs of war might occur in Potočari.

1717. In light of the foregoing, the Appeals Chamber finds that when the correct legal standard is applied, no reasonable trier of fact could have found that **Miletić** was not responsible for murder as a war crime for the "opportunistic" killings in Potočari. The Appeals Chamber therefore grants the Prosecution's ground of appeal 9, reverses **Miletić**'s acquittal under JCE III for murder as a violation of the laws or customs of war for the Potočari "opportunistic" killings, and, Judge Pocar dissenting, enters a new conviction against **Miletić** in this regard.

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4829 See *Kunarac et al.* Appeal Judgement, paras 55, 58-59; *Čelebići* Appeal Judgement, para. 420. See also Trial Judgement, paras 739, 741, 743.
4830 Trial Judgement, paras 794(2), 796, 1725.
4831 Trial Judgement, para. 1718. See *supra*, paras 1482-1668.
4832 Trial Judgement, paras 1088, 1725. See *supra*, paras 1686-1690.
4833 Trial Judgement, paras 1726-1727. See *supra*, paras 1691-1698.
4834 Trial Judgement, para. 1727. See *supra*, paras 1699-1703.
4835 See *supra*, paras 1675-1684.
4836 Trial Judgement, para. 1726.
4837 Trial Judgement, paras 1665-1667. See also *supra*, paras 1575, 1696.

### 4. Conclusion

1718. The Appeals Chamber has granted ground 9 of the Prosecution's appeal and, Judge Pocar dissenting, has entered a new conviction against **Miletić** under Count 5 for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari. The impact of this finding on **Miletić**'s sentence, if any, will be considered in the section of this Judgement on sentencing below.

1719. The Appeals Chamber has dismissed all other challenges to the Trial Chamber's findings regarding **Miletić**'s responsibility through his participation in the JCE to Forcibly Remove.

## C. Aiding and Abetting

### 1. Introduction

1720. The Trial Chamber found that there was no evidence of any acts or omissions of **Pandurević** that would amount to aiding and abetting,[4838] except for his omissions regarding the murder of the Milići Prisoners.[4839] The Trial Chamber found that he had a legal duty to protect the Milići Prisoners and, despite his ability to do so, he took no action to fulfil this duty.[4840] The Trial Chamber also found that **Pandurević**'s failure to discharge his legal duty assisted in and substantially contributed to the murder of the Milići Prisoners,[4841] and that he knew that if he failed to act, his omission would assist in their murders.[4842] The Trial Chamber, however, was not satisfied that **Pandurević**, through his participation in the murder of the Milići Prisoners, aided and abetted persecution through murder.[4843]

1721. The Trial Chamber also found that **Pandurević** aided and abetted the crime of forcible transfer,[4844] as it considered that his actions had a substantial effect on the realisation of the forcible transfer of the civilian population from Srebrenica and that he knew that his participation assisted in the commission of this crime.[4845]

1722. As a result, the Trial Chamber acquitted **Pandurević** of aiding and abetting genocide (Count 1),[4846] extermination as a crime against humanity (Count 3),[4847] and persecution through

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4838 Trial Judgement, para. 1980 & fn. 5908, referring to Indictment, paras 88-90.
4839 Trial Judgement, paras 1980-1991, 2072.
4840 Trial Judgement, paras 1986-1988.
4841 Trial Judgement, para. 1988.
4842 Trial Judgement, paras 1989-1990.
4843 Trial Judgement, para. 2097.
4844 Trial Judgement, paras 2008, 2012.
4845 Trial Judgement, paras 2010-2011. Notably, the Trial Chamber found that **Pandurević** did not aid and abet the forcible transfer of the Bosnian Muslim population from Žepa due to his minimal participation in this attack. Trial Judgement, para. 2009.
4846 Trial Judgement, para. 2090. See Trial Judgement, paras 2080-2089, 2110.
4847 Trial Judgement, para. 2078. See Trial Judgement, paras 2074-2077, 2110.

murder as a crime against humanity (Count 6). **Pandurević** was convicted of aiding and abetting murder as a crime against humanity and as a violation of the laws or customs of war as it relates only to the Milići Prisoners (Counts 4 and 5),[4848] persecution as a crime against humanity through aiding and abetting the forcible transfer of the Bosnian Muslim population from Srebrenica (Count 6),[4849] and inhumane acts (forcible transfer) as a crime against humanity (Count 7).[4850]

1723. The Trial Chamber found that **Nikolić** aided and abetted genocide as he knew of the genocidal intent of others and since his participation in the JCE to Murder amounted to a substantial contribution to the commission of genocide.[4851]

1724. **Pandurević**, the Prosecution, and **Nikolić** present challenges to the Trial Chamber's findings related to aiding and abetting. The Appeals Chamber will examine in turn the arguments pertaining to: **Pandurević**'s appeal against the finding that he aided and abetted the murder of the Milići Prisoners; **Pandurević**'s appeal against the findings on his criminal responsibility as an aider and abettor to the forcible transfer; the Prosecution's appeal against **Pandurević**'s lack of criminal responsibility as an aider and abettor to the crimes within the JCE to Murder; the Prosecution's appeal against **Pandurević**'s acquittal of aiding and abetting by omission persecution through the murder of the Milići Prisoners; and **Nikolić**'s appeal against the Trial Chamber's finding on his *mens rea* for aiding and abetting genocide.

### 2. Pandurević's appeal

#### (a) Whether Pandurević had advance knowledge that the Milići Prisoners would be murdered (Sub-ground 1.1)

##### (i) Arguments of the Parties

1725. **Pandurević** submits that the Trial Chamber erred in fact by finding that he must have realised that if he failed to take action, he would be assisting **Popović** to carry out the murders of the Milići Prisoners.[4852] According to **Pandurević**, the Trial Chamber erred in finding that he must have been informed of **Popović**'s visit before it took place.[4853] He acknowledges the evidence found in the 8:05 a.m. Intercept showing that Colonel Cerović called and left a message that **Popović** would be arriving that same day on 23 July 1995, and of a notation concerning this message made

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4848 Trial Judgement, para. 2072. See Trial Judgement, paras 2067-2070, 2110.
4849 Trial Judgement, para. 2099. See Trial Judgement, paras 2094-2098, 2110.
4850 Trial Judgement, para. 2101. See Trial Judgement, para. 2110.
4851 Trial Judgement, para. 1415. See Trial Judgement, paras 1397-1414, 2106.
4852 Pandurević's Appeal Brief, paras 11-14, 19-75; Pandurević's Reply Brief, paras 1-15; Appeal Hearing, AT. 348-350, 359 (4 Dec 2013).
4853 Pandurević's Appeal Brief, paras 19, 23, 35-56.

at 8:30 a.m.[4854] **Pandurević** submits, however, that no reasonable trier of fact could have excluded the reasonable possibility that **Popović** arrived as early as 10:00 a.m., and that he was otherwise occupied and so had not received the message until later in the day.[4855] In his view, the Trial Chamber erred in failing to determine the exact timing of events.[4856] **Pandurević** further argues that the duty officer might not have perceived an immediate need to convey the message to him.[4857]

1726. **Pandurević** maintains that, in any event, no reasonable trier of fact could have concluded that he knew of **Popović**'s murderous intent.[4858] **Pandurević** observes that the Trial Chamber found that he communicated with the Drina Corps with the goal of exchanging or transporting the Milići Prisoners to another camp.[4859] **Pandurević** submits that because of this benign intent, no reasonable trier of fact could have expected him to know that **Popović** would deviate from his understanding of the Drina Corps' intentions with respect to the Milići Prisoners.[4860] Furthermore, he reasonably believed that the killing operation had stopped, he had no indication that **Popović** was coming to deal specifically with the Milići Prisoners as opposed to all of the prisoners, and the segregation and killing of the Milići Prisoners was an unforeseen anomaly.[4861]

1727. Finally, **Pandurević** argues that the knowledge standard has been applied strictly in prior cases,[4862] and that the evidence in this case could not have satisfied this high threshold.[4863] He contends that the most that could be said was that **Popović**'s presence raised a possibility that he would subvert the instructions from his own command to kill prisoners, but this is insufficient to prove **Pandurević**'s knowledge.[4864]

1728. The Prosecution responds that the evidence supports the only reasonable conclusion that **Pandurević** learned about **Popović**'s arrival before it took place, and that **Pandurević**'s speculative submissions fail to show otherwise.[4865] It adds that it was unnecessary for the Trial Chamber to enter findings about the exact timing of these events, as it was the sequence that was important, and

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4854 Pandurević's Appeal Brief, paras 43, 45.

4855 Pandurević's Appeal Brief, paras 39, 47, 50, 56. See also Pandurević's Appeal Brief, paras 40-46, 48-49, 51-55; Pandurević's Reply Brief, paras 5, 8.

4856 Pandurević's Appeal Brief, paras 19-22, 24-35; Pandurević's Reply Brief, para. 7. **Pandurević** specifies that this alleged failure "is not relied upon as a separate basis for quashing [the challenged] finding" but is instead submitted for its relevance to the finding that he must have been informed of **Popović**'s visit before it happened. Pandurević's Appeal Brief, para. 19.

4857 Pandurević's Appeal Brief, paras 46-49. See Pandurević's Reply Brief, paras 10-13.

4858 Pandurević's Appeal Brief, paras 19, 23, 57-75.

4859 Pandurević's Appeal Brief, para. 61, referring to Trial Judgement, para. 1983. See also Pandurević's Appeal Brief, paras 58-60, 62-63.

4860 Pandurević's Appeal Brief, para. 64.

4861 Pandurević's Appeal Brief, paras 66-68. See also Pandurević's Appeal Brief, paras 65, 69-70.

4862 Pandurević's Appeal Brief, para. 72, referring to *Haradinaj et al.* Appeal Judgement, para. 60, *Mrksić and Šljivančanin* Appeal Judgement, paras 51, 57, 63, *Vasiljević* Appeal Judgement, para. 128. See also Pandurević's Appeal Brief, para. 71.

4863 Pandurević's Appeal Brief, para. 73.

4864 Pandurević's Appeal Brief, para. 73. See also Pandurević's Appeal Brief, paras 74-75.

the Trial Chamber issued a reasoned opinion in this regard.[4866] The Prosecution further submits that the importance of Cerović's message would have been obvious to the duty officer, and that in light of the quick succession of conversations and the fact that the duty officer was only "steps away" from **Pandurević**'s office, the message must have been relayed immediately to **Pandurević**.[4867]

1729. With respect to knowledge, the Prosecution submits that the Trial Chamber applied the correct standard and reasonably concluded that **Pandurević** knew it was probable that the Milići Prisoners would be murdered in **Popović**'s custody.[4868] In particular, the Prosecution refers to **Pandurević**'s evidence and the Trial Chamber's finding that he knew of **Popović**'s key role in the murder operation by 23 July 1995.[4869] The Prosecution also argues that **Pandurević**'s reliance on his and the Drina Corps' own intent is irrelevant to whether he knew of **Popović**'s intent.[4870]

(ii) Analysis

1730. The Trial Chamber found, based on the 23 July Intercepts, that two conversations occurred in the morning of 23 July 1995. The first one occurred at 8:00 a.m. between **Pandurević** and Cerović in which **Pandurević** asked for a solution to the issue of the wounded prisoners.[4871] Minutes later at 8:05 a.m., Cerović called back and instructed the Zvornik Brigade Duty Officer to tell **Pandurević** that **Popović** would arrive that day.[4872] The Trial Chamber also observed that this message was reflected at 8:30 a.m. in the Duty Officer's Notebook.[4873] Relying on "the importance of the message" about **Popović**'s impending arrival, the "sequence of conversations" that took place in the morning, and the entry made in the Duty Officer's Notebook, the Trial Chamber was convinced that the message was in fact conveyed to **Pandurević** that day.[4874]

1731. The Trial Chamber further relied on **Pandurević**'s testimony to find that he was aware, by 23 July 1995, that **Popović** was in the area and was involved in executing prisoners.[4875] Based on this, the Trial Chamber found that **Pandurević** knew it was probable that the Milići Prisoners

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4865 Prosecution's Response Brief (Pandurević), paras 11, 15-16, 20-24.

4866 Prosecution's Response Brief (Pandurević), paras 17-19.

4867 Prosecution's Response Brief (Pandurević), paras 15, 20. See also Prosecution's Response Brief (Pandurević), paras 12-14; Appeal Hearing, AT. 378-379 (4 Dec 2013).

4868 Prosecution's Response Brief (Pandurević), paras 25-32; Appeal Hearing, AT. 388-389 (4 Dec 2013).

4869 Prosecution's Response Brief (Pandurević), paras 25-26; Appeal Hearing, AT. 388-389 (4 Dec 2013).

4870 Prosecution's Response Brief (Pandurević), paras 27-31.

4871 Trial Judgement, paras 573, 1903-1904, fns 5719-5724. See *supra*, para. 1157.

4872 Trial Judgement, para. 1904. See Trial Judgement, fn. 5724, citing Ex. P00377, "Zvornik Brigade Duty Officers Notebook, 29 May-27 July 1995", p. 177 ("0830 hrs. – Lieutenant Colonel Cerović relayed a message for commander that LTC **Popović** will arrive by 17:00 hours."). See also Trial Judgement, para. 82, considering that this Notebook is "accurate, authentic, and reliable" and that it "is a contemporaneous document of the Zvornik Brigade".

4873 See also Trial Judgement, para. 82, 1904.

4874 Trial Judgement, para. 1907.

4875 Trial Judgement, fn. 5730, referring to Vinko Pandurević, T. 32261-32262 (27 Feb 2009) ("Q. And by the 23rd of July, you were fully aware that Vujadin Popovi[ć] had been involved in the murder operation of the prisoners? A. I knew at the time that he was there and that he was involved in those activities."). See also Trial Judgement, para. 1989.

would be murdered once they were transferred into **Popović**'s custody.[4876] The Trial Chamber then concluded that **Pandurević** must have realised that if he failed to ensure their continued protection, he would be assisting **Popović** to carry out the murders.[4877]

1732. The Appeals Chamber recalls that the *actus reus* for aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and the *mens rea* requires "knowledge that these acts assist the commission of the offense".[4878] The *mens rea* also requires that the aider and abettor was aware of the essential elements of the crime which was ultimately committed, including the intent of the principal perpetrator.[4879] It is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed – if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[4880]

1733. Regarding **Pandurević**'s first argument on his advance notice of **Popović**'s arrival, the Appeals Chamber notes that the Trial Chamber considered **Pandurević**'s testimony that he did not remember receiving the message about **Popović**'s arrival but it remained convinced that he was informed on 23 July 1995 that **Popović** would come later that day to take care of the situation.[4881] While the Trial Chamber made no finding on the exact time **Pandurević** received the message, it was convinced that "the message was in fact conveyed to **Pandurević** that day".[4882] Notably, in the 8:05 a.m. Intercept, Cerović said that **Popović** would arrive by 5:00 p.m. to "say what needs to be done regarding the work we talked about".[4883] **Pandurević**'s challenge to his advance notice of **Popović**'s arrival centres on his alternative explanation that he did not receive the message before 10:00 a.m. when he entered a meeting that lasted an hour,[4884] but he fails to provide an explanation that would call into question the inference, as the only reasonable one, that he received the message after 11:00 a.m. and before **Popović**'s stipulated arrival by 5:00 p.m. The Appeals Chamber further rejects his speculative argument that as **Popović** left Vlasenica for Zvornik at 9:00 a.m., he would have arrived at the Standard Barracks as early as 10:00 a.m.[4885] While the Trial Chamber noted

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4876 Trial Judgement, para. 1989.
4877 Trial Judgement, para. 1990.
4878 *Šainović et al.* Appeal Judgement, para. 1649; *Blaškić* Appeal Judgement, para. 46, citing *Blaškić* Trial Judgement, para. 283, in turn citing *Furundžija* Trial Judgement, para. 249. See also *Taylor* Appeal Judgement, para. 436.
4879 *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58; *Orić* Appeal Judgement, para. 43.
4880 *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58; *Blaškić* Appeal Judgement, para. 50.
4881 Trial Judgement, paras 1906-1907.
4882 Trial Judgement, para. 1907.
4883 Trial Judgement, paras 573, 1904.
4884 See Pandurević's Appeal Brief, paras 50, 56.
4885 Pandurević's Appeal Brief, paras 28-29, 42.

evidence indicating that **Popović** began his journey to the Zvornik area at 9:00 a.m.,[4886] this does not indicate that he went directly to the Standard Barracks, especially as Cerović's message clearly estimated **Popović**'s arrival to be by 5:00 p.m. **Pandurević**'s mere disagreement with the Trial Chamber's conclusion and his attempts to offer alternative assessments of the evidence are insufficient to demonstrate an error. The Appeals Chamber considers that **Pandurević** has failed to demonstrate that the Trial Chamber erred in inferring – as the only reasonable conclusion – that he knew in advance about **Popović**'s arrival. Likewise, the Appeals Chamber finds no merit in **Pandurević**'s contention that the Trial Chamber was required to make a precise determination as to the timing of the events in question. Based on the Trial Chamber's findings, it is implicit that the Trial Chamber was satisfied that **Pandurević** knew of **Popović**'s impending arrival beforehand and with sufficient time to take action.[4887] Thus, **Pandurević**'s argument is dismissed.

1734. With respect to the issue of knowledge, **Pandurević** has not substantiated his submission that he was unaware of **Popović**'s murderous intent, particularly in light of his own evidence – relied on by the Trial Chamber – that he was aware of **Popović**'s involvement in murdering prisoners.[4888] In addition, the Trial Chamber noted that **Pandurević** had received information about **Popović**'s key role in executions in the area from Obrenović on 15 and 17 July 1995.[4889] Based on these considerations, **Pandurević** has not shown that the Trial Chamber erred in finding that the only reasonable inference is that he knew that it was *probable* that the Milići Prisoners would be killed and that if he failed to act, his omission would assist in their murder.[4890] **Pandurević**'s submissions concerning his own intent and that of the Drina Corps also fail to demonstrate that the Trial Chamber erred in concluding that he possessed the requisite knowledge of **Popović**'s intent. Finally, the Appeals Chamber considers that, by relying on the circumstances found in other cases to support his argument of a high threshold for the knowledge standard,[4891] **Pandurević** has failed to demonstrate that the Trial Chamber committed any error in this case.

1735. The Appeals Chamber therefore dismisses **Pandurević**'s sub-ground of appeal 1.1.

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4886 Trial Judgement, paras 1150, 1904, referring to Ex. P00197, "Vehicle log for VW GOLF P-7065 assigned to Vujadin Popović from 1 to 31 July 1995", p. 4. Notably, the Trial Chamber observed that "[o]n the same day, 23 July, the vehicle log for a car assigned to **Popović** recorded that this car travelled from Vlasenica to Zvornik". Trial Judgement, para. 1904.

4887 See Trial Judgement, paras 1987-1988, fn. 5730.

4888 Trial Judgement, para. 1989, fn. 5730. See *supra*, note 4875.

4889 Trial Judgement, para. 1989.

4890 See Trial Judgement, para. 1990. See also Trial Judgement, para. 1989.

4891 See *supra*, para. 1727 & fn. 4862.

(b) Whether Pandurević could have taken measures that would have made the Milići Prisoners' murders substantially less likely (Sub-ground 1.2)

1736. The Trial Chamber found that **Pandurević** had the ability to protect the Milići Prisoners, but that he took no action to discharge this duty upon having learned of **Popović**'s impending arrival.[4892] According to the Trial Chamber, this made it possible for **Popović** to take the prisoners and either kill them or facilitate their killing.[4893] The Trial Chamber therefore concluded that **Pandurević**'s failure to discharge his legal duty to protect these prisoners assisted in and substantially contributed to their murder.[4894] In arriving at its conclusions, the Trial Chamber considered that **Pandurević** had several options open to him to protect the prisoners, namely, he could have: (1) arranged their transfer and transportation to a POW camp or another location for exchange; (2) moved them temporarily to another facility in order to deny their presence at the Zvornik Brigade; (3) called in the ICRC to register them; (4) instructed the Military Police at the Standard Barracks to inform him of **Popović**'s arrival; and (5) told **Popović** that they were no longer there or simply exercised his power and authority as brigade commander to prevent **Popović** from taking them.[4895]

(i) Arguments of the Parties

1737. **Pandurević** submits that the Trial Chamber erred in fact by finding that his alleged inaction substantially contributed to the murder of the Milići Prisoners.[4896] He argues that this finding was unreasonable as he had no realistic courses of action that would have made the crime "substantially less likely".[4897] **Pandurević** contends that the crime must have been substantially less likely to have occurred had the accused acted in ways open to him or her,[4898] and that the assessment of the impact of omissions requires a determination of "what *could* have been done by the accused, and what *would* have happened had those actions been performed".[4899] **Pandurević** also submits that the Appeals Chamber in the *Mrkšić and Šljivančanin* case "appear[ed] to have accepted that one or more of the potential actions [it found that Šljivančanin could have done] in combination would have made the subsequent crimes substantially less likely".[4900]

4892 Trial Judgement, paras 1987-1988.
4893 Trial Judgement, paras 1156, 1988.
4894 Trial Judgement, paras 1987-1988.
4895 Trial Judgement, para. 1987.
4896 Pandurević's Appeal Brief, paras 15, 76, 92.
4897 Pandurević's Appeal Brief, paras 15, 76-77, 91-92.
4898 Pandurević's Appeal Brief, para. 77, referring to, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, paras 97, 100, 155. **Pandurević** also argues that the rarity of the application of aiding and abetting by omission as well as the reasoning in the *Mrkšić and Šljivančanin* case suggests that the evidence must be compelling and comprehensive for the standard of proof to be met. Pandurević's Appeal Brief, para. 79.
4899 Pandurević's Appeal Brief, para. 78 (emphasis in original).
4900 Pandurević's Appeal Brief, para. 83. See Pandurević's Appeal Brief, paras 80-82, 84.

1738. **Pandurević** further argues that none of the measures the Trial Chamber proposed that he could have taken would have ultimately kept the Milići Prisoners "out of Popović's hands".[4901] Specifically, **Pandurević** argues that these measures were based on the Trial Chamber's flawed assumption that he could have prevented **Popović** from taking the Milići Prisoners.[4902] **Pandurević** contends that: (1) the Trial Chamber made no finding on his advance notice of **Popović**'s arrival which would be essential in order to find which viable actions he could have taken;[4903] (2) the Trial Chamber's assumption that he could have sent the prisoners to Batković and placed them out of **Popović**'s reach is "pure speculation" as **Popović** could have taken them away from Batković as well;[4904] (3) **Popović** already knew of the presence of the prisoners at the Zvornik Brigade and could easily have inquired about them, and their concealment was not a viable course of action;[4905] and (4) denying **Popović** access to the prisoners would have been futile as the latter "would have done everything possible to get access to them", and he would have received an order from the Drina Corps Command to hand them over – a superior order which he would have had no proper legal basis to refuse.[4906]

1739. The Prosecution responds that **Pandurević** fails to show that the Trial Chamber's findings were those no reasonable trial chamber could have made.[4907] It contends that in substance **Pandurević** argues that the Trial Chamber should have considered whether he could have ultimately prevented the murder of the Milići Prisoners at any point in time – which is the wrong causal standard.[4908] It also argues that **Pandurević** misinterprets the case law.[4909] The Prosecution further submits that **Pandurević**'s challenges to the measures he could have taken identified by the Trial Chamber are based on speculation,[4910] and nothing in the evidence suggests that he could not have acted immediately to protect the Milići Prisoners upon learning of **Popović**'s impending arrival.[4911] It finally argues that, at the very least, **Pandurević** had the means to make the removal of prisoners by **Popović** and their subsequent murder substantially less likely.[4912]

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4901 Pandurević's Appeal Brief, para. 76. See Pandurević's Appeal Brief, paras 15, 91.
4902 Pandurević's Appeal Brief, para. 86. See Pandurević's Appeal Brief, para. 91.
4903 Pandurević's Appeal Brief, para. 87.
4904 Pandurević's Appeal Brief, para. 88.
4905 Pandurević's Appeal Brief, para. 89.
4906 Pandurević's Appeal Brief, para. 90.
4907 Prosecution's Response Brief (Pandurević), paras 10, 38.
4908 Prosecution's Response Brief (Pandurević), paras 33-34, 36. See also Appeal Hearing, AT. 389 (4 Dec 2013). The Prosecution also argues that this wrong standard connects **Pandurević** with a different crime than which he was convicted, and therefore his argument is irrelevant to the question of whether his acts on 23 July 1995 would have made the murders substantially less likely. Prosecution's Response Brief (Pandurević), paras 34, 36.
4909 Prosecution's Response Brief (Pandurević), para. 35.
4910 Prosecution's Response Brief (Pandurević), para. 36.
4911 Prosecution's Response Brief (Pandurević), para. 37.
4912 Prosecution's Response Brief (Pandurević), para. 38.

(ii) Analysis

1740. The Appeals Chamber recalls that in order for the *actus reus* element to be met for aiding and abetting by omission, it must be established that the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime, and had a substantial effect on it.[4913] In addition, it must be demonstrated that there were means available to the accused to fulfil this duty.[4914] The Appeals Chamber also recalls that there is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of the crime.[4915]

1741. Finally, it is recalled that whether an act or omission had a substantial effect on the commission of a crime is a fact-based inquiry,[4916] and further, this aspect of aiding and abetting by omission has been interpreted to mean that had the accused acted the commission of the crime would have been substantially less likely.[4917]

1742. The Appeals Chamber will first address the challenges to the finding of the Trial Chamber on the measures that **Pandurević** could have taken to protect the Milići Prisoners. On the question of **Pandurević**'s ability to transfer the prisoners to another location, the Appeals Chamber notes the Trial Chamber's consideration of **Pandurević**: (1) making arrangements for the transfer or exchange of prisoners;[4918] and (2) requesting instructions on where to send the Milići Prisoners on 23 July 1995 and whether they could be exchanged or transferred to Batković.[4919] In particular, the Trial Chamber found that from "23 to 26 July, between 140 and 150 POWs who had been captured by the Zvornik Brigade were transferred to Batković".[4920] Based on these findings of the Trial Chamber, the Appeals Chamber finds that **Pandurević** has failed to show an error in the Trial Chamber's consideration of his means to transfer the Milići Prisoners to another location before **Popović**'s arrival.

1743. Regarding the possibility of calling in the ICRC to register the Milići Prisoners, the Appeals Chamber recalls the Trial Chamber's consideration of the evidence that arrangements were in place where the Batković detention centre, in conjunction with the ICRC, was used to accommodate POWs in mid-July 1995.[4921] Specifically of note is that approximately 185 prisoners were registered

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4913 *Šainović et al.* Appeal Judgement, para. 1677; *Mrkšić and Šljivančanin* Appeal Judgement, para. 146.
4914 *Šainović et al.* Appeal Judgement, para. 1677; *Mrkšić and Šljivančanin* Appeal Judgement, paras 49, 154.
4915 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgement, para. 48.
4916 *Mrkšić and Šljivančanin* Appeal Judgement, para. 200.
4917 See *Šainović et al.* Appeal Judgement, paras 1679, 1682, fn. 5510; *Mrkšić and Šljivančanin* Appeal Judgement, paras 97, 100.
4918 Trial Judgement, paras 1898, 1966, 1982.
4919 Trial Judgement, paras 1903, 1982.
4920 Trial Judgement, para. 1913.
4921 Trial Judgement, paras 590-596.

by the ICRC as POWs at the Batković detention centre in the second half of July 1995.[4922] The Trial Chamber also noted evidence that in the morning of 23 July 1995 **Pandurević** had demanded that some prisoners be transferred from the Standard Barracks to Batković, and eventually 140 to 150 POWs were transferred.[4923] Turning to **Pandurević**'s challenges, the Appeals Chamber dismisses his argument concerning his advance notice of **Popović**'s arrival for reasons set out above,[4924] and notes that **Pandurević**'s remaining arguments on this issue are essentially twofold: (1) that regardless of what he could have done, **Popović** could still have located and taken away the Milići Prisoners; and (2) he would have received a superior order to hand them over to **Popović**. These arguments are more relevant to the question of whether the murder of the Milići Prisoners would have been substantially less likely to occur, which will be discussed below.[4925] Based on the foregoing, and **Pandurević**'s authority as Commander of the Zvornik Brigade, the Appeals Chamber finds that the Trial Chamber's conclusions on the measures he could have taken is supported by evidence, and **Pandurević** has failed to show that no reasonable trier of fact could have concluded that **Pandurević** had the means to fulfil his duty.[4926]

1744. The Appeals Chamber will now consider **Pandurević**'s arguments about whether the commission of the crime would have been substantially less likely had **Pandurević** taken the measures identified above. The Appeals Chamber considers **Pandurević**'s arguments to be speculative and unsupported – he has failed to provide any references to the record that could allow a reasonable trier of fact to infer what **Popović** or the Drina Corps Command would have done had he transferred the Milići Prisoners to another location or refused to hand them over to **Popović**. Had **Pandurević** transferred the Milići Prisoners to another location, called in the ICRC to register them, or refused **Popović** access, this would have prevented **Popović** from having immediate and easy access to the prisoners which in turn would have made their murders substantially less likely. Whether **Popović** would have been able to ultimately take custody at some point in the future is not only speculative but also irrelevant to what occurred on 23 July 1995. Additionally, **Pandurević** raises the point that if he did have advance notice of **Popović**'s arrival, it would have been very short notice therefore making the measures identified by the Trial Chamber unviable.[4927] The Appeals Chamber is not convinced by this submission and finds that a reasonable trier of fact could have concluded that several actions, or a combination of actions, were available to him.[4928] Thus, the Appeals Chamber considers that a reasonable trier of fact could have concluded that, by failing

4922 Trial Judgement, para. 595.
4923 Trial Judgement, paras 593, 1913.
4924 See *supra*, para. 1733.
4925 See *infra*, para. 1744.
4926 Trial Judgement, para. 1987.
4927 Pandurević's Appeal Brief, para. 87.
4928 Trial Judgement, para. 1987. See also *supra*, paras 1742-1743.

to act, **Pandurević** assisted in and substantially contributed to the murder of the Milići Prisoners.[4929]

1745. In light of the above, the Appeals Chamber finds that **Pandurević** has failed to demonstrate that the Trial Chamber erred in finding that he had the ability to act, such that there were means available to him to fulfil his duty to protect the Milići Prisoners, and that his failure to act assisted in and substantially contributed to the murder of these prisoners.

1746. Accordingly, the Appeals Chamber, Judge Niang dissenting, dismisses **Pandurević**'s sub-ground of appeal 1.2.

(c) Alleged errors on Pandurević's *mens rea* for aiding and abetting the murder of the Milići Prisoners (Sub-ground 1.4)

1747. In finding that **Pandurević** aided and abetted the murder of the Milići Prisoners, the Trial Chamber was satisfied that he "knew it was probable that the wounded prisoners would be murdered once they were transferred into **Popović**'s custody".[4930] It further found "that **Pandurević** must have also realised that, given his responsibility for the prisoners, if he failed to take action to ensure their continued protection, he would be assisting **Popović** to carry out the murders".[4931]

1748. **Pandurević** submits that the Trial Chamber erred in applying a wrong *mens rea* standard of aiding and abetting, and therefore his conviction should be quashed.[4932] He argues that: (1) the Trial Chamber erroneously applied an "awareness of a probability" standard;[4933] (2) the *mens rea* standard was improperly lowered as he was found to have an ongoing duty to assure himself that the prisoners would not be harmed;[4934] and (3) customary international law does not justify a *mens rea* standard without the assistance being purposefully directed to the crime.[4935] The Prosecution responds that **Pandurević**'s sub-ground of appeal 1.4 should be dismissed as the correct *mens rea* standard was applied.[4936]

4929 Trial Judgement, para. 1988.
4930 Trial Judgement, para. 1989.
4931 Trial Judgement, para. 1990.
4932 Pandurević's Appeal Brief, paras 140-141. See Appeal Hearing, AT. 348, 350 (4 Dec 2013).
4933 Pandurević's Appeal Brief, paras 140, 142-146.
4934 Pandurević's Appeal Brief, paras 140, 147-153.
4935 Pandurević's Appeal Brief, paras 140, 154-160. See also Appeal Hearing, AT. 350-358 (4 Dec 2013).
4936 Prosecution's Response Brief (Pandurević), para. 65.

(i) Awareness of a probability standard

1749. **Pandurević** contends that the Trial Chamber incorrectly applied an awareness of a probability standard in assessing his knowledge of **Popović**'s intent.[4937] He argues that the Appeals Chamber rejected the awareness of a probability standard in the *Haradinaj et al.* case when it held that the aider and abettor must: (1) know that his own acts assisted the commission of the principal's crime; and (2) be aware of the essential elements of that crime.[4938] According to **Pandurević**, the awareness of a probability standard is only directed to the range of possible crimes for which the accused may be liable once he or she knows that at least one crime will be committed,[4939] and this awareness does not extend the definition of *mens rea* of aiding and abetting.[4940]

1750. The Prosecution responds that **Pandurević** misinterprets the Tribunal's case law.[4941] It contends that **Pandurević**'s assertion that the Appeals Chamber expressly rejected the awareness of a probability standard, and his interpretation of it, are incorrect.[4942] According to the Prosecution, the Appeals Chamber's comment in the *Blagojević and Jokić* case that the awareness of a probability standard did not extend the definition of the *mens rea* merely acknowledges that this probability was already part of the definition.[4943]

1751. The Appeals Chamber is of the view that **Pandurević** is misguided in his interpretation of the relevant finding in the *Haradinaj et al.* Appeal Judgement.[4944] The aider and abettor must be aware of the "essential elements" of the crime(s) committed by the principal offender, including his or her state of mind.[4945] The requisite *mens rea* can be established if the aider and abettor is not certain which of a number of crimes will ultimately be committed as long as the aider and abettor is aware that one of a number of crimes will *probably* be committed, and one of those crimes is in fact

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4937 Pandurević's Appeal Brief, para. 146. **Pandurević** submits that the *mens rea* in the present case is knowledge of the murder or the criminal intent of the perpetrator. Pandurević's Reply Brief, para. 36. See Pandurević's Reply Brief, para. 35.

4938 Pandurević's Appeal Brief, para. 144, referring to *Haradinaj et al.* Appeal Judgement, para. 58.

4939 Pandurević's Appeal Brief, para. 145.

4940 Pandurević's Appeal Brief, para. 145, referring to *Blagojević and Jokić* Appeal Judgement, para. 222.

4941 Prosecution's Response Brief (Pandurević), paras 65-72.

4942 Prosecution's Response Brief (Pandurević), paras 68-69.

4943 Prosecution's Response Brief (Pandurević), para. 70. The Prosecution also argues that **Pandurević** was not required to know for certain that **Popović** had the intent to murder, as this would require a higher standard of *mens rea* for an aider and abettor than for the principal perpetrator (with indirect intent). Prosecution's Response Brief (Pandurević), para. 72. See also Prosecution's Response Brief (Pandurević), para. 71.

4944 See *Haradinaj et al.* Appeal Judgement, para. 58.

4945 *Šainović et al.* Appeal Judgement, para. 1772; *Ndahimana* Appeal Judgement, para. 157; *Haradinaj et al.* Appeal Judgement, para. 58; *Mrkšić and Šljivančanin* Appeal Judgement, paras 146, 159, referring to *Orić* Appeal Judgement, para. 43 and references cited therein.

committed.[4946] The Appeals Chamber in the *Blagojević and Jokić* case did not disapprove this statement when it held that the *Blaškić* Appeal Judgement did not extend the definition of the *mens rea* of aiding and abetting.[4947] Thus, **Pandurević** is misguided when he asserts that the awareness of a probability standard is directed to the range of possible crimes for which the accused may be liable "once he or she *knows* that at least one crime *will be* committed".[4948] Consequently, **Pandurević** has failed to demonstrate that the Trial Chamber erred.

(ii) Duty of inquiry

1752. **Pandurević** argues that the Trial Chamber relied on a "duty of inquiry" in determining his actual knowledge of the murders, thus impermissibly lowering the *mens rea* standard from "knowledge" that a crime will be committed to imposing liability in case of doubt.[4949] He asserts that in doing so, the Trial Chamber misconstrued the Appeals Chamber's findings in the *Mrkšić and Šljivančanin* case in relation to Veselin Šljivančanin's duties to protect prisoners of war, which were not related to the latter's *mens rea* but to his capacity to act.[4950]

1753. The Prosecution responds that **Pandurević**'s arguments are based on a misunderstanding of the Trial Chamber's findings and should be summarily dismissed.[4951] It submits that the Trial Chamber's analysis is consistent with the *Mrkšić and Šljivančanin* Appeal Judgement.[4952]

1754. In the context of discussing his duty to protect the Milići Prisoners, the Trial Chamber noted that **Pandurević**'s duty did not end with their transfer and that there was "an ongoing duty [...] to assure himself [...] that the prisoners will not be harmed".[4953] This finding is consistent with the finding in the *Mrkšić and Šljivančanin* Appeal Judgement that the accused's duty to protect prisoners of war includes the obligation not to allow the transfer of their custody without first assuring himself that they would not be harmed.[4954] In both cases, the respective finding belongs to the discussion of the duty to protect as part of the *actus reus*, and not the *mens rea* for aiding and abetting. The Trial Chamber then correctly relied on **Pandurević**'s knowledge of **Popović**'s involvement in the murder operation, and not on a "duty of inquiry", to conclude that he knew that

4946 *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58; *Blaškić* Appeal Judgement, para. 50 (referring to *Blaškić* Trial Judgement, para. 287); *Simić* Appeal Judgement, para. 86. *Cf. Šainović et al.* Appeal Judgement, para. 1709.
4947 *Blagojević and Jokić* Appeal Judgement, para. 222.
4948 See Pandurević's Appeal Brief, para. 145 (emphases added).
4949 Pandurević's Appeal Brief, paras 151, 153.
4950 Pandurević's Appeal Brief, paras 148-152. **Pandurević** further asserts that the Trial Chamber conflated the failure to protect prisoners of war, which is a crime, with the requirements of aiding and abetting, which is a form of liability. Pandurević's Appeal Brief, para. 152.
4951 Prosecution's Response Brief (Pandurević), para. 73. See also Appeal Hearing, AT. 389 (4 Dec 2013).
4952 Prosecution's Response Brief (Pandurević), para. 74. See Prosecution's Response Brief (Pandurević), para. 75.
4953 Trial Judgement, para. 1986.
4954 See *Mrkšić and Šljivančanin* Appeal Judgement, para. 74.

it was probable that the Milići Prisoners would be murdered once they were transferred into the latter's custody.[4955] Accordingly, the Appeals Chamber finds that **Pandurević**'s assertion that the Trial Chamber imposed a "duty of inquiry", thus lowering the *mens rea*, is without merit.

(iii) Purposeful assistance

1755. **Pandurević** submits that "customary international law does not justify a *mens rea* standard [of aiding and abetting] without the assistance being purposefully directed to the crime".[4956] For that reason, he argues that the Trial Chamber erroneously held that aiding and abetting does not require that the assistance be "specifically directed" to support the perpetration of a crime, and that this error invalidated the Trial Chamber's finding that he had the necessary *mens rea*.[4957]

1756. In his oral submissions, **Pandurević** argues that "whether it is considered to be part of the *mens rea* or *actus reus* of aiding and abetting, direction or purposefulness should be an essential element of this mode of liability".[4958] **Pandurević** asserts that no reasonable trier of fact could have concluded that his failure to act was purposeful, as the evidence shows that he not only did not intend the crime, but wanted to exchange the prisoners.[4959]

1757. The Prosecution responds that **Pandurević**'s arguments should be dismissed as the Trial Chamber correctly: (1) applied the knowledge-based standard of the *mens rea*; and (2) held that "specific direction" is not an essential ingredient of the *actus reus* of aiding and abetting.[4960] The Prosecution submits that the case law correctly reflects customary international law for the elements of aiding and abetting and that **Pandurević** has not shown cogent reasons to depart from it.[4961]

1758. The Appeals Chamber recalls that "'specific direction' is not an element of aiding and abetting liability under customary international law".[4962] The Appeals Chamber further recalls that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"[4963] and the *mens rea* is "the knowledge that these acts assist the commission of the offense".[4964] The Appeals Chamber therefore dismisses **Pandurević**'s argument to incorporate a requirement of specific direction into the *mens*

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4955 Trial Judgement, para. 1989.
4956 Pandurević's Appeal Brief, para. 154.
4957 Pandurević's Appeal Brief, paras 154, 160. See Pandurević's Appeal Brief, paras 155-159. See also Appeal Hearing, AT. 350-358 (4 Dec 2013).
4958 Appeal Hearing, AT. 353 (4 Dec 2013).
4959 Pandurević's Appeal Brief, para. 160.
4960 Prosecution's Response Brief (Pandurević), paras 76-77. See Appeal Hearing, AT. 383-387 (4 Dec 2013).
4961 Prosecution's Response Brief (Pandurević), paras 79, 83. See Prosecution's Response Brief (Pandurević), paras 80-81.
4962 *Šainović et al.* Appeal Judgement, para. 1649. See *Šainović et al.* Appeal Judgement, paras 1626-1648, 1650.
4963 *Šainović et al.* Appeal Judgement, para. 1649; *Blaškić* Appeal Judgement, para. 46.

*rea* or the *actus reus* for aiding and abetting. Accordingly, the Appeals Chamber also dismisses **Pandurević**'s argument that it was required that his failure to act was purposeful.

(iv) Conclusion

1759. For the foregoing reasons, the Appeals Chamber dismisses **Pandurević**'s sub-ground 1.4.

(d) Alleged errors in not considering whether Pandurević's actions were specifically directed to assist and had a substantial effect on the commission of the crime of forcible transfer (Ground 3)

(i) Arguments of the Parties

1760. **Pandurević** submits that the Trial Chamber erred in law when convicting him for aiding and abetting inhumane acts (forcible transfer) and persecution by not evaluating whether his actions were specifically directed to assist in the commission of the crime of forcible transfer.[4965] He maintains that, in customary international law, specific direction is a required element of aiding and abetting whether as a part of its *mens rea* or its *actus reus*.[4966] Regarding his assistance in the attack on the Srebrenica enclave, **Pandurević** alleges that his actions were lawful under international humanitarian law because military raids were being carried out by the ABiH from the enclave.[4967]

1761. **Pandurević** also submits that the Trial Chamber erred in fact and caused a miscarriage of justice by finding that his actions had a substantial effect on the realisation of the crime of forcible transfer.[4968] He argues that his lawful actions cannot validly be found to have assisted in the unlawful removal of civilians from their lawful residence.[4969] He further argues that the Trial Chamber contradicted itself in finding that his actions had a substantial effect on the realisation of the crime, while at the same time acknowledging the limited nature of his involvement.[4970]

1762. The Prosecution responds that the Trial Chamber applied the correct legal standards, including no "specific direction" requirement, when assessing whether **Pandurević** aided and abetted forcible transfer.[4971] The Prosecution maintains that **Pandurević**'s participation in the attack

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4964 *Šainović et al.* Appeal Judgement, para. 1649; *Blaškić* Appeal Judgement, para. 46. See *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58.

4965 Pandurević's Appeal Brief, paras 203-204, 206-207, 213; Appeal Hearing, AT. 361, 364 (4 Dec 2013). See also Appeal Hearing, AT. 411 (5 Dec 2013).

4966 Pandurević's Appeal Brief, para. 204; Appeal Hearing, AT. 353, 361 (4 Dec 2013). See Pandurević's Reply Brief, para. 70. **Pandurević** further argues that an absence of a purpose-based standard when considering aiding and abetting could lead to criminal liability for soldiers who are lawfully engaged in combat. Pandurević's Appeal Brief, paras 207-209. See also Pandurević's Reply Brief, paras 71-75; Appeal Hearing, AT. 362-363 (4 Dec 2013).

4967 Pandurević's Appeal Brief, paras 205-206. See Appeal Hearing, AT. 410-411 (5 Dec 2013).

4968 Pandurević's Appeal Brief, paras 203, 212-213. See Appeal Hearing, AT. 361 (4 Dec 2013).

4969 Pandurević's Appeal Brief, paras 205, 210-211; Appeal Hearing, AT. 410-411 (5 Dec 2013).

4970 Pandurević's Appeal Brief, para. 212; Appeal Hearing, AT. 362 (4 Dec 2013).

4971 Prosecution's Response Brief (Pandurević), paras 124-125, 127, 137. See Prosecution's Response Brief (Pandurević), paras 128, 132. The Prosecution also argues that regardless of whether "specific direction" is a

on Srebrenica was unlawful as he had knowledge of the plan to forcibly remove the Bosnian Muslim population and that his participation contributed to the commission of the crime.[4972]

1763. The Prosecution also submits that the Trial Chamber's finding – that **Pandurević**'s participation in the attack on Srebrenica, irrespective of whether he intended to carry out the lawful military objectives of the attack, substantially contributed to the JCE to Forcibly Remove – was reasonable and consistent with the elements of aiding and abetting liability.[4973]

(ii) Analysis

1764. As far as **Pandurević** argues that specific direction is an element of aiding and abetting, the Appeals Chamber recalls that it has already addressed, and dismissed, this argument in his sub-ground of appeal 1(d) concerning his responsibility for the murder of the Milići Prisoners.[4974] In light of this, the Appeals Chamber finds that **Pandurević** has failed to demonstrate an error of law regarding the elements of aiding and abetting.

1765. Regarding **Pandurević**'s argument that his lawful actions cannot be found to have assisted in the unlawful coercion of civilians from their place of lawful residence, the Appeals Chamber observes that the participation of the aider and abettor need not be a crime in itself.[4975] Rather, the relevant question is whether his actions assisted in and substantially contributed to the commission of the forcible transfer. The Trial Chamber found that they did.[4976] As for the alleged contradiction with regard to **Pandurević**'s contribution to the forcible transfer,[4977] the Trial Chamber found, when considering whether **Pandurević** aided and abetted the crime of forcible transfer, that his participation in the attack on the Srebrenica enclave enabled the VRS to remove the civilian population from the enclave, and thus had a substantial effect upon the realisation of the crime of forcible transfer.[4978] Later, when determining **Pandurević**'s sentence, the Trial Chamber found "that the limited nature of **Pandurević**'s involvement in the forcible transfer diminishes the gravity of his criminal conduct".[4979] The Appeals Chamber observes that these findings were adopted in different contexts, applying different principles of law. Further, it is conceivable that even a

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requirement, the "specific direction" test has been met on the findings made by the Trial Chamber. Appeal Hearing, AT. 382 (4 Dec 2013). See Appeal Hearing, AT. 383-387 (4 Dec 2013).

4972 Prosecution's Response Brief (Pandurević), paras 129-131, 137; Appeal Hearing, AT. 382, 385-387 (4 Dec 2013). See also Prosecution's Response Brief (Pandurević), para. 133.

4973 Prosecution's Response Brief (Pandurević), paras 126, 133-135, 137. See also Prosecution's Response Brief (Pandurević), para. 136.

4974 See *supra*, para. 1758.

4975 See *Šainović et al.* Appeal Judgement, para. 1663; *Blagojević and Jokić* Appeal Judgement, paras 201-202.

4976 Trial Judgement, para. 2011. See also Trial Judgement, paras 1995, 2098. The Trial Chamber also found that he knew that his participation assisted in the commission of the forcible transfer in Srebrenica, which remains uncontested in this ground of appeal. Trial Judgement, para. 2010.

4977 See Pandurević's Appeal Brief, para. 212, referring to Trial Judgement, paras 2011, 2212.

4978 Trial Judgement, para. 2011. See also Trial Judgement, paras 2009-2010, 2012.

4979 Trial Judgement, para. 2212.

"limited involvement" may nevertheless have a substantial effect on the realisation of a crime. The Appeals Chamber therefore cannot discern any contradiction in the Trial Chamber's findings. Accordingly, the Appeals Chamber finds that **Pandurević** has failed to demonstrate an error.

(e) Conclusion

1766. In sum, the Appeals Chamber dismisses **Pandurević**'s ground of appeal 3 in its entirety.

3. The Prosecution's appeal

(a) Alleged errors in failing to find that Pandurević aided and abetted crimes within the JCE to Murder as of noon on 15 July 1995 (Sub-ground 1(b))

1767. The Trial Chamber found that, at the 15 July Meeting, Deputy Commander Obrenović informed **Pandurević** that pursuant to an order of Mladić, **Beara** and **Popović** brought a large number of prisoners to the Zvornik sector where they were being executed, and that, as of this moment, **Pandurević** knew of the plan to murder the able-bodied Bosnian Muslim men from Srebrenica.[4980] While the Trial Chamber found that the 15 July Report shows that **Pandurević** was aware of, and concerned with, the burden for his brigade to guard and bury the prisoners, it nevertheless found that the information provided to **Pandurević** during the 15 July Meeting was not sufficient to establish that he knew that members of the Zvornik Brigade were committing or aiding and abetting crimes.[4981] The Trial Chamber therefore concluded that the knowledge requirement for "commission by omission" had not been met.[4982] The Trial Chamber also found that **Pandurević** was not a participant in the JCE to Murder the able-bodied Bosnian Muslim males from Srebrenica.[4983] It further found that there is no evidence before it of any acts or omissions on **Pandurević**'s part that would constitute other Article 7(1) forms of responsibility with respect to the crimes committed within the JCE to Murder.[4984] This finding explicitly excluded **Pandurević**'s responsibility as an aider and abettor to the murder of the Milići Prisoners.[4985]

1768. In the alternative to its sub-ground of appeal 1(a),[4986] the Prosecution alleges that the Trial Chamber erred in law and/or fact when it failed to find that **Pandurević**, after he resumed active operational command of the Zvornik Brigade at noon on 15 July 1995, became an aider and abettor to the extermination, murder, and persecution committed in the Zvornik area through the

4980 Trial Judgement, paras 1861, 1953, 1959-1960.
4981 Trial Judgement, paras 1948, 1972.
4982 Trial Judgement, para. 1972.
4983 Trial Judgement, para. 1979.
4984 Trial Judgement, para. 1980.
4985 Trial Judgement, paras 1980-1991.
4986 See *supra*, paras 1364-1398.

participation of his subordinates.[4987] The Prosecution submits that these errors invalidate the verdict and occasion a miscarriage of justice.[4988] It seeks convictions against **Pandurević** under Article 7(1) of the Statute as an aider and abettor of extermination as a crime against humanity (Count 3) or, alternatively, murder as a crime against humanity (Count 4); murder as a violation of the laws or customs of war (Count 5); and persecution through murder and cruel and inhumane treatment as a crime against humanity (Count 6).[4989] It also requests the Appeals Chamber to increase **Pandurević**'s sentence significantly to reflect his criminal liability.[4990]

(i) Failure to provide a reasoned opinion and making inconsistent factual findings

1769. The Prosecution submits that the Trial Chamber erred in law by failing to provide a reasoned opinion when reaching its conclusions, by failing to adjudicate on **Pandurević**'s criminal responsibility for aiding and abetting the crimes of extermination, murder, and persecution within the murder operation, and by making inconsistent and contradictory factual findings on his knowledge.[4991] The Prosecution argues that the Trial Chamber merely noted that **Pandurević** was not found to have the intent to murder but did not assess all the evidence relevant to aiding and abetting murder.[4992]

1770. **Pandurević** responds that the Trial Chamber did not fail to adjudicate on his criminal responsibility for aiding and abetting the crimes.[4993] He submits that the Trial Chamber found that the *mens rea* standard of aiding and abetting had not been met, and as this finding necessarily precluded responsibility both as a member of the JCE to Murder and as an aider and abettor, it did not have to consider whether the *actus reus* of aiding and abetting was fulfilled.[4994]

1771. The Appeals Chamber recalls that a trial chamber is obliged to provide a reasoned opinion in writing to ensure that an appellant can exercise his right to appeal and the Appeals Chamber can understand and review the findings of the Trial Chamber, including its evaluation of the evidence.[4995] The Trial Chamber is required only to make findings of those facts that are essential

4987 Prosecution's Appeal Brief, paras 15, 54; Appeal Hearing, AT. 513-514 (6 Dec 2013).
4988 Prosecution's Appeal Brief, para. 15.
4989 Prosecution's Appeal Brief, paras 15, 87-88.
4990 Prosecution's Appeal Brief, para. 89.
4991 Prosecution's Appeal Brief, paras 16, 18-19, 21, 77; Appeal Hearing, AT. 514 (6 Dec 2013). The Prosecution further argues that this error of law constitutes a violation of its fair trial protections. Prosecution's Appeal Brief, para. 16 & fn. 36.
4992 Prosecution's Reply Brief, para. 5, referring to Trial Judgement, para. 1980, Prosecution's Appeal Brief, fn. 42.
4993 Pandurević's Response Brief, paras 27-28.
4994 Pandurević's Response Brief, paras 28-30. See also Pandurević's Response Brief, para. 36.
4995 Article 23(2) of the Statute; Rule 98 *ter*(C) of the Rules; *Haradinaj et al.* Appeal Judgement, para. 128; *Limaj et al.* Appeal Judgement, para. 81 and references cited therein.

for the determination of guilt on a particular count.[4996] The Appeals Chamber emphasises that it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments, which he submits the Trial Chamber omitted to address, and to explain why the omission invalidated the decision.

1772. The Appeals Chamber considers that the Trial Chamber's conclusion that "there is no evidence [...] of any acts or omissions on [**Pandurević**'s] part that would constitute other Article 7(1) forms of responsibility, except for aiding and abetting"[4997] the murder of the Milići Prisoners, must be read in the context of the Trial Chamber's preceding evaluation of all the relevant evidence pertaining to **Pandurević**'s knowledge of the crimes.[4998] Indeed, before discussing specific evidence pertinent to his knowledge of such crimes, the Trial Chamber explicitly stated that "these findings [including those on modes of liability other than JCE] are based upon all of the relevant evidence".[4999] Furthermore, the Trial Chamber, in discussing **Pandurević**'s knowledge on his return to the Standard Barracks on 15 July 1995 at noon, was not convinced that the evidence was sufficient "to find that at this point **Pandurević** knew that members of the Zvornik Brigade were committing or aiding and abetting crimes",[5000] and concluded that the knowledge requirement for commission by omission had not been met.[5001] The Trial Chamber then found that "it cannot be said that at this point **Pandurević** knew that his men were committing crimes and he tacitly authorised their continuing participation".[5002] Additionally, the Trial Chamber found that on 16 July 1995, **Pandurević** learned that members of the Zvornik Brigade had participated in guarding prisoners and the burials of the executed prisoners but by this time they were no longer engaged in activities connected to the detention and execution of prisoners.[5003]

1773. Consequently, the Prosecution has not demonstrated that the Trial Chamber failed to adjudicate **Pandurević**'s criminal responsibility for aiding and abetting the crimes of extermination, murder, and persecution within the murder operation, failed to provide a reasoned opinion, or failed to assess the relevant evidence. Additionally, the Appeals Chamber finds that the Prosecution's

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4996 *Haradinaj et al.* Appeal Judgement, para. 128, referring to *Hadžihasanović and Kubura* Appeal Judgement, para. 13.
4997 Trial Judgement, para. 1980.
4998 See Trial Judgement, paras 1861-1980.
4999 Trial Judgement, para. 1928.
5000 Trial Judgement, para. 1972.
5001 Trial Judgement, para. 1972.
5002 Trial Judgement, para. 1972.
5003 Trial Judgement, para. 1973.

argument with respect to inconsistent and contradictory factual findings regarding **Pandurević**'s knowledge concerns allegedly erroneous reasoning rather than a lack of reasoning.[5004]

(ii) Aiding and abetting the crimes within the JCE to Murder

a. Arguments of the Parties

1774. The Prosecution submits that **Pandurević** had the *mens rea* for aiding and abetting extermination, murder, and persecution.[5005] It further submits that **Pandurević**'s acts and omissions in the 48 hours following noon on 15 July 1995 had a substantial effect on these crimes against up to 3,000 Bosnian Muslim prisoners.[5006]

1775. The Prosecution argues that the actions of **Pandurević**'s subordinates after noon on 15 July 1995 were an expression of his will and "became his contributions" to the murder operation.[5007] It submits that **Pandurević** was in command regardless of **Beara**'s and **Popović**'s roles, had a system in place to ensure that he knew and controlled what transpired in his area of responsibility, and that his brigade fulfilled the tasks he ordered.[5008] In this regard, the Prosecution asserts that, after having learned of the "manifestly illegal order" that required the Zvornik Brigade's involvement in the murder operation, he assumed responsibility to complete the tasks and chose to exercise command over his troops' continued participation in the murder operation for a further 48 hours.[5009] The Prosecution argues that the ensuing orders of his subordinates were implemented by members of the Zvornik Brigade at the various detention, execution, and burial sites around Zvornik.[5010] It asserts that the 15 July Report shows that he monitored the fulfilment of his subordinates' tasks.[5011]

1776. As to the particular crime sites, the Prosecution argues that **Pandurević** knew of, endorsed, and approved his subordinates' participation at the detention sites at the Ročević and Kula Schools and at the execution/burial sites at Kozluk, the Pilica Cultural Centre, and the Branjevo Military

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5004 This argument has been discussed in the context of **Pandurević**'s knowledge of his subordinates' participation in the murder operation. See *supra*, para. 1377.

5005 Prosecution's Appeal Brief, paras 24-38, 54; Appeal Hearing, AT. 530-531 (6 Dec 2013). See Appeal Hearing, AT. 532 (6 Dec 2013).

5006 Prosecution's Appeal Brief, paras 14, 55, 76, 83-84, 86; Prosecution's Reply Brief, paras 27-45; Appeal Hearing, AT. 531-532 (6 Dec 2013).

5007 Prosecution's Appeal Brief, para. 56. See also Prosecution's Appeal Brief, paras 12, 63, 76.

5008 Prosecution's Appeal Brief, paras 39, 57, 59-60; Prosecution's Reply Brief, paras 41-42. See Prosecution's Reply Brief, para. 44.

5009 Prosecution's Appeal Brief, paras 11-12, 39-40, 58-60, 62, 65, 76. In this context, the Prosecution argues that, in **Pandurević**'s absence, Obrenović authorised the participation of the Zvornik Brigade in the murder operation. Prosecution's Appeal Brief, para. 61. See Prosecution's Reply Brief, para. 30.

5010 Prosecution's Appeal Brief, para. 63.

5011 Prosecution's Appeal Brief, para. 64. See Prosecution's Appeal Brief, paras 4, 45.

Farm.[5012] It argues that, with **Pandurević**'s authorisation, the Zvornik Brigade provided oversight and co-ordination, delivered Bosnian Muslim prisoners to their execution, put bullets in the executioners' guns, provided machines and fuel for transportation and burial of the victims, and, in at least one case, executed them.[5013]

1777. The Prosecution further submits that **Pandurević**'s omissions substantially contributed to the commission of crimes within the JCE to Murder.[5014] It argues that **Pandurević** had a legal duty to protect the prisoners within his custody and to prevent the commission of crimes by his subordinates once he learned of the situation of the prisoners in Zvornik, including the order for their execution, at noon on 15 July 1995.[5015] The Prosecution argues that **Pandurević** had the ability to protect the prisoners, but chose not to do so.[5016]

1778. **Pandurević** responds that he had only incomplete knowledge of the events on 15 and 16 July 1995,[5017] that he did not substantially contribute to the crimes against prisoners who were already accompanied by guards upon their arrival in Bratunac, and that it was **Beara** who had the overarching responsibility.[5018] He also asserts that having been informed that killings were being committed by **Beara** and **Popović** under the apparent authority of Mladić, "real doubt arose as to [his] authority to remove any member of the Zvornik Brigade who might at that moment [...] be receiving orders from Beara".[5019] **Pandurević** further argues that **Nikolić**, the only person at the Zvornik Brigade who was informed of Mladić's plan, was not acting, between 13 and 15 July 1995, within the regular Zvornik Brigade chain of command,[5020] and that he never again reported to either Obrenović or himself during the murder operation.[5021]

1779. **Pandurević** argues that the Zvornik Brigade had no task in relation to the executions,[5022] and that the role of individual Zvornik Brigade members in the murder operation was isolated and marginal.[5023] With respect to Ročević School, **Pandurević** argues that the prisoners arrived on 14 July 1995, that **Popović**'s orders to provide men for the executions predated **Pandurević**'s

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5012 Prosecution's Appeal Brief, paras 56, 62, 66, 68-69, 72-75; Prosecution's Reply Brief, paras 7-25.
5013 Prosecution's Appeal Brief, paras 65-67, 70-71. The Prosecution further submits that the role of the Zvornik Brigade in the murder operation was neither "marginal" nor "disparate". Prosecution's Reply Brief, paras 34-36.
5014 Prosecution's Appeal Brief, paras 13, 77-78; Appeal Hearing, AT. 531 (6 Dec 2013).
5015 Prosecution's Appeal Brief, paras 12-13, 40, 59, 78-80; Prosecution's Reply Brief, paras 39-40. The Prosecution also argues that **Pandurević** puts forward a definition of "custody" that is unsupported and under which no one would have custody if more than one unit were involved in the detention. Prosecution's Reply Brief, para. 40.
5016 Prosecution's Appeal Brief, paras 13, 78, 80-83. See also Prosecution's Reply Brief, paras 52-58.
5017 Pandurević's Response Brief, paras 85-116.
5018 Pandurević's Response Brief, paras 117-118, 122-124, 133, 143, 152.
5019 Pandurević's Response Brief, para. 55. See Pandurević's Response Brief, paras 56, 133-134.
5020 Pandurević's Response Brief, paras 125-126.
5021 Pandurević's Response Brief, para. 127.
5022 Pandurević's Response Brief, paras 128-134.
5023 Pandurević's Response Brief, paras 135-136.

return, and that ammunition and food were delivered to the school two hours before his return.[5024] **Pandurević** further argues that there was an interval of only 90 minutes in which he could have started to look into the disposition of his troops in relation to any prisoners that might be held by them.[5025] As to the Kula School, **Pandurević** argues that only ten to 15 unarmed members of the 1st Battalion were involved and that they were of limited use in guarding the prisoners.[5026] **Pandurević** further argues that the Zvornik Brigade was not involved in the detention or execution of prisoners on 16 July 1995 at the Branjevo Military Farm and in Pilica.[5027] He submits that **Popović** did not ask the Zvornik Brigade to provide fuel and that all the killings were over on 16 July 1995 at 10:22 p.m. when machinery was requested for the 1st Battalion.[5028] Also, **Pandurević** argues that none of the prisoners in the Zvornik area were in his subordinates' custody which he defines by "analogy with superior responsibility".[5029]

1780. According to **Pandurević**, the Prosecution wrongly interprets the reference in the 15 July Report to the prisoners as an "additional burden" for the brigade.[5030] He submits that he exaggerated this difficulty and the threat posed by a column of thousands of Bosnian Muslim men in order to deceive his superiors and to allow this column to pass through his lines on 16 July 1995,[5031] although this was not "the only viable military option".[5032]

1781. In conclusion, **Pandurević** responds that he: (1) lacked any knowledge of the killing operation prior to noon on 15 July 1995, when it was substantially accomplished;[5033] (2) received at noon on 15 July 1995 only uncertain information about any involvement of the Zvornik Brigade, the number of prisoners involved, the scope and the location of the killings, as well as the strength, identity, and authority of the forces who might be involved;[5034] (3) faced at the same time an immediate military crisis;[5035] and (4) decided to allow, contrary to orders, about 10,000 Bosnian Muslim men to pass through his lines.[5036]

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5024 Pandurević's Response Brief, paras 137-139.
5025 Pandurević's Response Brief, paras 140-143.
5026 Pandurević's Response Brief, para. 144.
5027 Pandurević's Response Brief, paras 145-146.
5028 Pandurević's Response Brief, paras 147-151.
5029 Pandurević's Response Brief, paras 153-155. See also Pandurević's Response Brief, para. 122.
5030 Pandurević's Response Brief, para. 59.
5031 Pandurević's Response Brief, paras 66-70, 72-74. **Pandurević** also argues that even on 18 July 1995, he arranged for a group of young captured men to be collected safely at the frontline. Pandurević's Response Brief, para. 66.
5032 Pandurević's Response Brief, para. 68, referring to Prosecution's Appeal Brief, paras 43-49.
5033 Pandurević's Response Brief, paras 44, 46-50.
5034 Pandurević's Response Brief, para. 54.
5035 Pandurević's Response Brief, paras 54, 60.
5036 Pandurević's Response Brief, para. 44.

b. Analysis

1782. As a preliminary matter, the Appeals Chamber notes that the Prosecution bases its arguments that **Pandurević** aided and abetted cruel and inhumane treatment on portions of the Trial Judgement that are silent on the matter of cruel and inhumane treatment.[5037] As such, these arguments are unsubstantiated, and the Appeals Chamber dismisses the Prosecution's arguments related to cruel and inhumane treatment.

1783. The Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".[5038] There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of the crime.[5039] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[5040]

1784. The Appeals Chamber further recalls that the *actus reus* of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[5041] The Appeals Chamber also recalls that the provision of engineering machinery and personnel for burial operations can have a substantial effect on the commission of mass executions.[5042] The Appeals Chamber will now consider whether a reasonable trial chamber could have found that there was no evidence of **Pandurević**'s acts and omissions constituting aiding and abetting with respect to the crimes committed within the JCE to Murder.[5043]

1785. With respect to **Pandurević**'s control over the Zvornik Brigade, the Trial Chamber found that the Commander of the Zvornik Brigade "was commanding the units in his Brigade and those attached to it".[5044] As the Commander, **Pandurević** "was in command of [the Military Police Company, the Signals Company, the Engineering Company, and the Reconnaissance Platoon] through the intermediary of the Chief of Staff and the assistant commanders or chiefs, who would report to him" and he was "consulted on all particular tasks, including the use of the Military Police

5037 Prosecution's Appeal Brief, para. 82, referring to Trial Judgement, paras 524, 550.
5038 *Šainović et al.* Appeal Judgement, paras 1626, 1649; *Blaškić* Appeal Judgement, para. 46. See *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127.
5039 *Šainović et al.* Appeal Judgement, fn. 5336 (citing *Rukundo* Appeal Judgement, para. 52); *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgement, para. 48.
5040 *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Blaškić* Appeal Judgement, para. 48.
5041 *Blagojević and Jokić* Appeal Judgement, para. 127; *Krstić* Appeal Judgement, paras 137-138, 144.
5042 *Blagojević and Jokić* Appeal Judgement, paras 180, 196.
5043 See Trial Judgement, para. 1980.

in combat, which he had to approve".[5045] In light of this, **Pandurević** has not shown that **Beara**'s overarching responsibility impacted on **Pandurević**'s ability to function effectively as Commander of the Zvornik Brigade. After having been informed in the 15 July Meeting about the order to kill the Bosnian Muslim prisoners, **Pandurević** continued to exercise his command over the Zvornik Brigade which was partly involved in the murder operation.[5046] Similarly, **Pandurević** has not shown that he no longer had the authority to remove any member of the Zvornik Brigade in light of Mladić's authorisation of the murder operation. In this context, **Pandurević**'s arguments that **Nikolić**, the only person at the Zvornik Brigade who was informed of Mladić's plan, was not acting, between 13 and 15 July 1995, within the regular Zvornik Brigade chain of command, and that he never again reported to either Obrenović or **Pandurević** during the murder operation, are inconsequential in light of the Trial Chamber's findings on the involvement of other Zvornik Brigade members in the murder operation at the relevant time after the 15 July Meeting. In sum, the Appeals Chamber, Judge Niang dissenting, is satisfied that the Trial Chamber reasonably established that **Pandurević** remained in control of the Zvornik Brigade during the relevant time period.[5047]

1786. With respect to the active participation of members of the Zvornik Brigade at various detention and execution sites, the Trial Chamber noted "the significant involvement of elements of the Zvornik Brigade in the events at Ročević School and Kozluk" on 15 and 16 July 1995[5048] and found that more than 1,000 male individuals were executed at Kozluk on 15 July 1995.[5049] The Trial Chamber further found that: (1) commanders, soldiers, and military police of the Zvornik Brigade were present when the Bosnian Muslim men were detained at the Ročević School; (2) the commanders issued orders to their subordinates; (3) members of the Zvornik Brigade's 2nd Battalion transported prisoners from the school to the execution site; (4) at least one Zvornik Brigade Military Police member was involved in the execution; and (5) the Zvornik Brigade Engineering Company buried the bodies.[5050] **Pandurević**'s arguments that the events at the Ročević School occurred before his return do not undermine the Trial Chamber's finding that Zvornik Brigade members were involved in the Kozluk Killings.[5051]

1787. The Trial Chamber further found that in the evening of 15 July 1995, 15-20 soldiers of the Zvornik Brigade's 1st Battalion arrived at the Kula School to take over guarding the Bosnian

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5044 Trial Judgement, para. 150. See also Trial Judgement, paras 2028-2034.
5045 Trial Judgement, para. 157.
5046 See Trial Judgement, para. 2027.
5047 See Trial Judgement, para. 2027.
5048 Trial Judgement, para. 522. See also Trial Judgement, paras 517-521.
5049 Trial Judgement, para. 524.
5050 Trial Judgement, paras 522, 2043. See also Trial Judgement, paras 515-521.
5051 Trial Judgement, paras 519, 522. See also Trial Judgement, paras 517-521.

Muslims who were held there.[5052] The Trial Chamber also found that on 16 July 1995, Radivoje Lakić, the Commander of the Work Platoon of the Zvornik Brigade's 1st Battalion, ordered one of his subordinates to go to the Kula School where he was ordered by the soldiers present to stand guard while the prisoners were boarded onto buses.[5053] These prisoners, who were all wearing civilian clothes, were later executed by the 10th Sabotage Detachment and other VRS soldiers at the Branjevo Military Farm.[5054]

1788. In addition, the Trial Chamber found that on 16 July 1995, seven members of the Work Platoon of the Zvornik Brigade's 1st Battalion were sent to the Pilica Cultural Centre where platoon members loaded civilian-clothed dead bodies onto two trucks.[5055] The Trial Chamber found that on 17 July 1995, a member of the Zvornik Brigade, acting upon an order from his supervisor, transported two truckloads of corpses from the Pilica Cultural Centre to the Branjevo Military Farm, and that in the morning of that day, Damjan Lazarević, the Commander of the 2nd Platoon of the Zvornik Brigade Engineering Company, ordered members of this company to take an excavating machine to the Branjevo Military Farm and to dig a pit there.[5056] D. Lazarević was present at the Branjevo Military Farm during burials.[5057] The Trial Chamber found that between 1,000 and 2,000 persons were executed in the Pilica Area Killings on 16 July 1995.[5058]

1789. Based on the above,[5059] the Appeals Chamber finds that no reasonable trier of fact could have found that "there is *no evidence* [...] of any acts or omissions on [**Pandurević**'s] part that would constitute other Article 7(1) forms of responsibility" with respect to the crimes committed within the JCE to Murder.[5060] In light of this factual error, the Appeals Chamber will now determine whether all reasonable doubt of the accused's guilt, with respect to the *actus reus* and *mens rea* of aiding and abetting the crimes within the JCE to Murder, has been eliminated.

i. Whether Pandurević fulfilled the *actus reus* of aiding and abetting

1790. The Trial Chamber's findings show that **Pandurević** was following both the involvement of his subordinates in providing logistical support to the executions as well as their fulfilment of the Zvornik Brigade's military duties. This is evidenced in the 15 July Report in which **Pandurević** referred to the "additional burden" presented by prisoners as well as to the status of the enemy

5052 Trial Judgement, paras 528, 531.
5053 Trial Judgement, paras 534, 2043. See also Trial Judgement, paras 532-533.
5054 Trial Judgement, paras 534-536.
5055 Trial Judgement, paras 542-543.
5056 Trial Judgement, paras 545-546.
5057 Trial Judgement, para. 547.
5058 Trial Judgement, para. 550.
5059 See also *supra*, paras 1374 *et seq.*
5060 Trial Judgement, para. 1980 (emphasis added).

forces, the efforts by his brigade to secure the area, and the casualties suffered by his brigade.[5061] The Trial Chamber found that the 15 July Report referred "to the burden [of] the Brigade of assisting with the burial of the prisoners who had been brought by others to the Zvornik area for execution".[5062] The Trial Chamber further found that "[t]he words and tone of the report [...] convey a [...] significant concern about security and the drain on resources".[5063] Based on these findings as well as the findings recalled above,[5064] and notwithstanding **Pandurević**'s attempts to downplay the involvement of the Zvornik Brigade, the Appeals Chamber considers that, by providing them with logistical support, **Pandurević** permitted the Zvornik Brigade members under his active control to facilitate the perpetration of the killings within the JCE to Murder and that his doing so had a substantial effect upon their commission.

1791. Turning now to **Pandurević**'s responsibility for aiding and abetting by omission, the Appeals Chamber recalls that the requirements are the same as for aiding and abetting by a positive act.[5065] Thus, it must be determined whether, on the particular facts of a case, it is established that the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime, and had a substantial effect on it.[5066] In addition, it must be demonstrated that the accused had "the ability to act, or in other words, that there were means available to the accused to fulfil this duty".[5067]

1792. **Pandurević** provides no authority for his argument that in "analogy with superior responsibility", "custody" requires "the capacity to keep [prisoners] at a particular location, and the capacity to exclude others from that location",[5068] and has failed to show that this is how the term "custody" should be understood. The Trial Chamber reasonably found that **Pandurević** had a duty to prevent the commission of criminal acts by his subordinates from the 15 July Meeting onwards when Obrenović informed him of the situation of the prisoners in Zvornik.[5069] The Trial Chamber was further satisfied that as the Commander of the Zvornik Brigade, **Pandurević** had the necessary authority and ability to order Zvornik Brigade members not to participate in the murder operation.[5070] The Trial Chamber found no evidence indicating that in the afternoon of 15 July 1995 or during the day of 16 July 1995 **Pandurević** took any steps to prevent or stop the participation of

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5061 See Trial Judgement, paras 1868-1870.
5062 Trial Judgement, para. 1948.
5063 Trial Judgement, para. 1957.
5064 See *supra,* paras 1785-1788.
5065 *Mrkšić and Šljivančanin* Appeal Judgement, para. 146 and references cited therein.
5066 *Šainović et al.* Appeal Judgement, para. 1677; *Mrkšić and Šljivančanin* Appeal Judgement, para. 146.
5067 *Šainović et al.* Appeal Judgement, para. 1677. See *Mrkšić and Šljivančanin* Appeal Judgement, para. 49. See also *Mrkšić and Šljivančanin* Appeal Judgement, paras 82, 154.
5068 Pandurević's Response Brief, para. 154.
5069 See Trial Judgement, para. 2042.
5070 Trial Judgement, para. 2050.

Zvornik Brigade members in the detention, execution, and burial of the prisoners.[5071] The Trial Chamber further found that **Pandurević** could, for instance, have immediately issued orders to the Zvornik Brigade Battalion Commanders to the effect that all members of the Zvornik Brigade cease or refrain from participation in the executions,[5072] and the Appeals Chamber is not convinced by the argument that the "immediate military crisis" which **Pandurević** faced prevented him from doing so. The Appeals Chamber further rejects his argument that there was an interval of only 90 minutes in which he could have started to look into what his troops were doing at Ročević School, as it is based on the testimony of one witness regarding when the transportation of prisoners from the school to the execution site ended, while disregarding the evidence of two other witnesses that the transportation continued for several hours.[5073] The Appeals Chamber notes the Trial Chamber's conclusion that **Pandurević** failed to fulfil his duty to prevent his subordinates from assisting in the commission of crimes, despite having the means to do so.[5074] The Appeals Chamber is therefore satisfied that **Pandurević**'s omissions practically assisted the perpetration of the killings within the JCE to Murder and had a substantial effect upon their perpetration.

1793. Based on the foregoing, the Appeals Chamber is satisfied that the Prosecution has shown that all reasonable doubt as to whether **Pandurević**'s acts and omissions constituted the *actus reus* of aiding and abetting the crimes within the JCE to Murder has been eliminated.

ii. Whether Pandurević had the *mens rea* for aiding and abetting

1794. At the outset, the Appeals Chamber recalls that the *mens rea* requirement for aiding and abetting "is the knowledge that these acts assist the commission of the offense".[5075] While the aider and abettor need not share the intent of the principal perpetrator, he must be aware of such intent.[5076] He must also be aware of the essential elements of the crime which was ultimately committed.[5077] The *mens rea* of an aider and abettor can be established even if he is uncertain which of a number of crimes will ultimately be committed. In this respect, where an accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor".[5078]

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5071 Trial Judgement, para. 2044.
5072 Trial Judgement, para. 2048.
5073 Trial Judgement, para. 517 & fn. 1896.
5074 Trial Judgement, paras 2050-2051, 2066.
5075 *Šainović et al.* Appeal Judgement, para. 1649. See *Ndahimana* Appeal Judgement, para. 157; *Haradinaj et al.* Appeal Judgement, para. 58 and references cited therein. The Appeals Chamber notes that "these acts" refer to the *actus reus* of aiding and abetting. See *Šainović et al.* Appeal Judgement, para. 1649.
5076 *Haradinaj et al.* Appeal Judgement, para. 58; *Brđanin* Appeal Judgement, para. 487; *Simić* Appeal Judgement, para. 86. See *Ndahimana* Appeal Judgement, para. 157.
5077 *Šainović et al.* Appeal Judgement, para. 1772.
5078 *Šainović et al.* Appeal Judgement, para. 1772. See *Haradinaj et al.* Appeal Judgement, para. 58; *Blaškić* Appeal Judgement, para. 50.

1795. The Trial Chamber was not convinced that, after the 15 July Meeting, **Pandurević** knew that members of the Zvornik Brigade were committing or aiding and abetting crimes.[5079] In this context, the Appeals Chamber recalls its previous findings that "**Pandurević**'s influence over the crimes in which his subordinates participated was limited, given that the murder operation was ordered, administered, and executed by VRS Main Staff and was nearly concluded by the time he became aware of its occurrence."[5080] The Appeals Chamber also recalls that "**Pandurević**'s ability to react was somewhat restricted due to the military crisis that demanded his immediate attention."[5081]

1796. The Trial Chamber found, however, that as of noon on 15 July 1995 **Pandurević** knew that a large number of prisoners had been brought from Bratunac to Zvornik where they were being executed,[5082] and that as of this point in time, he knew of the plan to murder the able-bodied Bosnian Muslim males from Srebrenica.[5083] The Appeals Chamber has previously found that at noon on 15 July 1995, **Pandurević** knew that the Zvornik Brigade was assisting in the guarding and burial of prisoners.[5084] The Appeals Chamber finds that the distinction made by the Trial Chamber between **Pandurević**'s knowledge of "some participation" of his troops in the murder operation and his knowledge of his troops' assistance in the operation by aiding and abetting crimes,[5085] is irrelevant for the purpose of establishing **Pandurević**'s criminal responsibility as an aider and abettor. The Appeals Chamber recalls that the act of an aider or abettor does not have to be criminal itself.[5086] What is important in the case at hand is that **Pandurević** permitted the Zvornik Brigade members under his active control to facilitate the perpetration of the killings within the JCE to Murder, he failed to prevent his troops from assisting the commission of these crimes (*actus reus*), and whether **Pandurević** knew that these acts and omissions assisted in the perpetration of the crimes (*mens rea*). The Appeals Chamber recalls in this regard that **Pandurević** knew of the plan to murder following the 15 July Meeting,[5087] and that he then actively followed the involvement of his subordinates in providing logistical support for the executions.[5088]

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5079 Trial Judgement, para. 1972. In this context, the Appeals Chamber recalls that the Trial Chamber found that after the 15 July Meeting, "members of the Zvornik Brigade aided and abetted murder and at least one member of the Brigade committed murder". Trial Judgement, paras 2042-2043.

5080 See *supra*, para. 1389.

5081 See *supra*, para. 1389.

5082 Trial Judgement, paras 1861, 1959-1960. See also Trial Judgement, para. 1953. See *supra*, para. 1767.

5083 Trial Judgement, para. 1960. See also Trial Judgement, paras 1861, 1953, 1959. See *supra*, para. 1767.

5084 See *supra*, para. 1378.

5085 *Cf. supra*, para. 1378. The Appeals Chamber notes that there is very limited evidence of **Pandurević**'s troops *committing* crimes as relevant to the present discussion, and that the Trial Chamber found there was no evidence that **Pandurević** knew that any of his troops were *committing* crimes. See *supra*, paras 1785-1788

5086 See *Šainović et al.* Appeal Judgement, para. 1663; *Blagojević and Jokić* Appeal Judgement, paras 201-202.

5087 See *supra*, para. 1767.

5088 See *supra*, para. 1790.

1797. Regarding **Pandurević**'s argument that he intended to deceive his superiors when he complained about the "additional burden" presented by the prisoners in order to exaggerate the threat posed by the column, the Appeals Chamber notes that the Trial Chamber found that **Pandurević**'s reference to the "additional burden" indicated that he was aware of the involvement of the Zvornik Brigade in the securing of prisoners detained in the area of Zvornik.[5089] **Pandurević**'s argument would not affect the assessment of whether he acted with knowledge that his acts and omissions in relation to the fate of the prisoners would assist in the commission of crimes.[5090] It is therefore dismissed.

1798. The Trial Chamber concluded that between 1,000 and 2,000 individuals were executed at the Branjevo Military Farm and the Pilica Cultural Centre on 16 July 1995,[5091] after **Pandurević** became aware of the murder operation. Also, the Trial Chamber's findings reflect the central and substantial role played by members of the Zvornik Brigade in the burial of the murder victims at the Pilica Cultural Centre and the Branjevo Military Farm on 16 and 17 July 1995.[5092] Thus, the Appeals Chamber is not convinced by the argument that **Pandurević** did not know of the killing operation before it was substantially accomplished.

1799. As to **Pandurević**'s knowledge of the number of killings, the Trial Chamber found that:

> At the latest by late afternoon of 18 July, **Pandurević** also possessed greater knowledge of the scale of the murder operation, as illustrated by his reference to 3,000 Bosnian Muslim men that had been brought to the area of Zvornik and allusion to their execution there in the 18 July Interim Combat Report. Ultimately, [...] the Trial Chamber is satisfied that on 18 July he was aware of the scale of the murder operation.[5093]

Thus, on 15 July 1995 **Pandurević**'s knowledge of the exact scale of the murder operation may still have been limited regarding the precise number of victims as well as the modalities and locations of the murders in which his subordinates were involved.[5094] However, the Trial Chamber also found that, as of noon on 15 July 1995, **Pandurević** was aware "of the plan to murder the able-bodied Bosnian Muslim males from Srebrenica" and that he knew that "*a large number of prisoners* [had been brought] from Bratunac to Zvornik where they were being executed".[5095] Furthermore, Obrenović informed him around noon on 15 July 1995 about the "*enormous problems* with the guarding, execution, and burial of prisoners".[5096] Finally, **Pandurević** referred in the 15 July Report

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5089 Trial Judgement, paras 1948, 2039.
5090 See *Šainović et al.* Appeal Judgement, para. 1649.
5091 Trial Judgement, para. 550.
5092 Trial Judgement, paras 542-547.
5093 Trial Judgement, para. 1965. See also Trial Judgement, para. 2076.
5094 Trial Judgement, paras 1972, 2100.
5095 Trial Judgement, para. 1960 (emphasis added). See also Trial Judgement, paras 1861, 1934-1935, 1959.
5096 Trial Judgement, paras 1861, 1935 (emphasis added). See also Trial Judgement, paras 1959-1960.

to the "additional burden for us" of "obligations of security and restoration of the terrain",[5097] which the Trial Chamber found to refer "to the burden [of] the Brigade of assisting with the burial of the prisoners who had been brought by others to the Zvornik area for execution".[5098] The Trial Chamber found that "[t]he words and tone of the report [...] convey a [...] significant concern about security and the drain on resources".[5099] Thus, based on these findings, the Appeals Chamber is satisfied that **Pandurević** was aware, as of the afternoon of 15 July 1995, that his troops intended to participate in these killings and that the killing of prisoners fulfilled the large-scale requirement of the crime of extermination.

1800. The Appeals Chamber also recalls that aiding and abetting liability does not require knowledge of every specific detail of the crimes, and it is thus sufficient that **Pandurević** was aware of the "essential elements" of the crimes committed by the principal perpetrators and that the degree of knowledge pertaining to the details of the crime required to satisfy the *mens rea* of aiding and abetting will depend on the circumstances of the case, including the scale of the crimes and the type of assistance provided.[5100] Thus, the Appeals Chamber is not persuaded by the argument that **Pandurević** received only uncertain information about the number of prisoners involved, the scope and the location of the killings as well as the strength, identity, and authority of the forces who were involved.

1801. Although the Trial Chamber found that **Pandurević** did not have "the specific intent to discriminate on political, racial or religious grounds" and therefore "did not commit persecution",[5101] it also found that **Pandurević** had "sufficient information from which to infer the discriminatory intent [of the VRS Main Staff and the Security Branch] against Bosnian Muslims".[5102] The Trial Chamber held, with respect to the underlying act of murder, that "given the limited nature of **Pandurević**'s knowledge as to possible crimes and the involvement of his subordinates", the Trial Chamber was "not satisfied that he had reason to know that crimes would be committed with discriminatory intent".[5103] The Appeals Chamber finds that this holding rests on an erroneous premise. Indeed, the Appeals Chamber recalls its finding that at noon on 15 July 1995, **Pandurević** knew that the Zvornik Brigade was assisting in the guarding and burial of prisoners.[5104] The Appeals Chamber is satisfied, considering that **Pandurević** knew of the plan to murder

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5097 Trial Judgement, para. 1870. See also Trial Judgement, para. 1868.
5098 Trial Judgement, para. 1948.
5099 Trial Judgement, para. 1957.
5100 *Šainović et al.* Appeal Judgement, paras 1772-1773; *Haradinaj et al.* Appeal Judgement, para. 58. See *Ndahimana* Appeal Judgement, para. 157. The Appeals Chamber notes in this regard that the Trial Chamber found that the knowledge requirement for crimes under Article 5 of the Statute as well as for war crimes was met for **Pandurević**. Trial Judgement, paras 2067-2070, 2072-2073.
5101 Trial Judgement, para. 2096. See also Trial Judgement, para. 2100.
5102 Trial Judgement, para. 2088. See also Trial Judgement, para. 1004.
5103 Trial Judgement, para. 2100.

following the 15 July Meeting,[5105] and that he then followed the involvement of his subordinates in providing logistical support to the executions,[5106] that he became aware of the discriminatory nature of the killings no later than the afternoon of 15 July 1995.[5107] Thus, the Appeals Chamber finds that **Pandurević** was aware, as of the afternoon of 15 July 1995, that the killing of prisoners would be committed with discriminatory intent.

1802. Accordingly, the Appeals Chamber is satisfied that after the 15 July Meeting, **Pandurević** was aware of the essential elements of the crimes of extermination, murder, and persecution which were ultimately committed by the principal perpetrators, and he was aware that his acts and omissions assisted in the commission of these offences.

1803. For the foregoing reasons, the Appeals Chamber, Judge Niang dissenting, is satisfied that the only reasonable inference from the Trial Chamber's findings and the evidence on the record is that **Pandurević** had the *mens rea* of aiding and abetting the crimes of extermination, murder, and persecution as of the afternoon on 15 July 1995.[5108] Thus, the Appeals Chamber, Judge Niang dissenting, is satisfied that the Prosecution has shown that all reasonable doubt as to **Pandurević**'s responsibility for aiding and abetting the crimes within the JCE to Murder has been eliminated.

(iii) Conclusion

1804. For the reasons set out above, the Appeals Chamber, Judge Niang dissenting, finds that **Pandurević**, by his acts and omissions after the 15 July Meeting, provided practical assistance which had a substantial effect on crimes within the JCE to Murder, thus aiding and abetting the extermination, murder, and persecution of Bosnian Muslim prisoners in the Ročević School, the Kula School, Kozluk, the Pilica Cultural Centre, and the Branjevo Military Farm. Accordingly, the Appeals Chamber grants in part the Prosecution's sub-ground of appeal 1(b) and reverses **Pandurević**'s acquittal for extermination as a crime against humanity (Count 3)[5109] as well as his acquittals for having aided and abetted murder as a violation of the laws or customs of war (Count 5)[5110] and persecution as a crime against humanity through murder (Count 6).[5111] These crimes refer to the killing of more than 1,000 Bosnian Muslim prisoners at Kozluk on 15 July 1995 (Kozluk Killings)[5112] and the killing of between 1,000 and 2,000 persons at the Branjevo Military

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5104 See *supra*, para. 1378.
5105 See *supra*, para. 1767.
5106 See *supra*, para. 1790.
5107 *Cf.* Trial Judgement, para. 2098.
5108 *Cf. Blagojević and Jokić* Appeal Judgement, para. 180.
5109 See Trial Judgement, para. 2079, Disposition, Pandurević section.
5110 See Trial Judgement, paras 793-798. The Trial Chamber only convicted **Pandurević** for having aided and abetted the murder of the Milići Prisoners. Trial Judgement, para. 1991.
5111 *Cf.* Trial Judgement, paras 991, 1004, 2093-2100.
5112 Trial Judgement, para. 524.

Farm and Pilica Cultural Centre on 16 July 1995 (Pilica Area Killings).[5113] The Appeals Chamber, Judge Pocar dissenting, further enters new convictions against **Pandurević** for these crimes. The Appeals Chamber, however, notes that murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity.[5114] Thus, the Appeals Chamber will not enter a conviction for aiding and abetting murder as a crime against humanity (Count 4).

1805. The Prosecution's sub-grounds of appeal 2(a), 2(b), and 2(c) are moot as a consequence of the Appeals Chamber granting in part the Prosecution's sub-ground of appeal 1(b).[5115]

1806. Accordingly, while not disturbing the related findings of the Trial Chamber, the Appeals Chamber sets aside **Pandurević**'s murder convictions under Article 7(3) of the Statute for crimes committed by his subordinates during the murder operation at Kozluk and the Branjevo Military Farm following noon on 15 July 1995 and until and including 16 July 1995.[5116] Specifically, his conviction under Count 4 is set aside because murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity,[5117] while his conviction under Count 5 is set aside because it is improper to maintain a conviction under Article 7(3) of the Statute in addition to a conviction under Article 7(1) of the Statute for the same count and the same set of facts.[5118]

(b) Alleged errors in failing to find that Pandurević aided and abetted the crime of persecution through the murder of the Milići Prisoners (Sub-ground 1(c))

(i) Arguments of the Parties

1807. The Prosecution submits that the Trial Chamber erred in law in acquitting **Pandurević** of the crime of aiding and abetting persecution through the murder of the Milići Prisoners.[5119] Alternatively, it argues that the Trial Chamber erred in fact as no reasonable trier of fact could have found that **Pandurević** did not aid and abet this crime.[5120] The Prosecution requests that the

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5113 Trial Judgement, para. 550.

5114 *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 542. See Trial Judgement, paras 799-806. See also Prosecution's Appeal Brief, paras 15, 87-88.

5115 The Prosecution argues that sub-grounds of appeal 2(a) through 2(d) are in the alternative to sub-grounds of appeal 1(a) and 1(b). See Prosecution's Appeal Brief, paras 104-105, 107. The Appeals Chamber has not granted sub-ground of appeal 1(b) in relation to aiding and abetting persecution through cruel and inhumane treatment as a crime against humanity. Thus, sub-ground of appeal 2(d) is not moot.

5116 See Trial Judgement, paras 2043, 2051, 2066, 2110.

5117 See *supra*, para. 1804 & fn. 5114.

5118 See *Nahimana et al.* Appeal Judgement, para. 487; *Blaškić* Appeal Judgement, para. 91.

5119 Prosecution's Appeal Brief, paras 91, 100. The Prosecution presents its sub-ground of appeal 1(c) as an alternative to sub-ground of appeal 1(a). Prosecution's Appeal Brief, para. 90.

5120 Prosecution's Appeal Brief, para. 91. The Prosecution submits that the Trial Chamber erred as **Pandurević**'s contribution had a substantial effect on the murder of the Milići Prisoners, and that he contributed with the knowledge of the discriminatory intent of the perpetrators. Prosecution's Appeal Brief, para. 101.

Appeals Chamber correct the errors, convict **Pandurević** for this crime, and increase his sentence.[5121]

1808. With respect to the alleged error of law, the Prosecution submits that the Trial Chamber erred in requiring an additional *actus reus* element.[5122] Specifically, the Prosecution contends that Judge Prost erroneously stated that **Pandurević**'s "omission does not constitute a substantial contribution to the crime of persecutions",[5123] as his contribution was not "to the discriminatory nature of the crime".[5124] The Prosecution argues that the Tribunal's jurisprudence does not require that an aider and abettor's contribution must be aimed at any particular aspect of a crime.[5125] It further asserts that the substantial contribution need not discriminate in fact nor contribute to the discriminatory nature of the underlying crime.[5126]

1809. The Prosecution argues that **Pandurević**'s conduct satisfies the *actus reus* for aiding and abetting persecution as he made a substantial contribution to the murder of the Milići Prisoners.[5127] It submits that he facilitated and perpetuated their persecution by failing to take steps to protect them once they had been selected, and he had a legal duty to protect them.[5128] The Prosecution further argues that the Trial Chamber, by Majority, was satisfied that **Pandurević** had the requisite *mens rea* and made the necessary findings.[5129] The Prosecution highlights that the Trial Chamber found that by 23 July 1995, **Pandurević** was, at least, aware of the probability that the murder of the Milići Prisoners would be committed with discriminatory intent.[5130]

1810. **Pandurević** responds that the crime of persecution not only requires a discriminatory *mens rea*, but also that the act itself "discriminates in fact".[5131] He argues that as Judge Prost concluded that his omission did not discriminate in fact, there was no *actus reus* of persecution through aiding and abetting.[5132]

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5121 Prosecution's Appeal Brief, paras 102-103.
5122 Prosecution's Appeal Brief, para. 91.
5123 Prosecution's Appeal Brief, para. 92, citing Trial Judgement, para. 2097.
5124 Prosecution's Appeal Brief, para. 92, citing Judge Prost Separate Opinion, para. 3. The Prosecution argues that Judge Prost confirmed that Judge Agius would have convicted **Pandurević** for aiding and abetting persecution. Prosecution's Appeal Brief, para. 98, fn. 250, referring to Judge Prost Separate Opinion, para. 1.
5125 Prosecution's Appeal Brief, paras 93-95, referring to, *inter alia*, *Blagojević and Jokić* Appeal Judgement, paras 143, 180-200, *Krnojelac* Appeal Judgement, paras 36-44, *Simić* Appeal Judgement, para. 155.
5126 Prosecution's Reply Brief, para. 62. See Prosecution's Appeal Brief, para. 96; Prosecution's Reply Brief, paras 63-64.
5127 Prosecution's Appeal Brief, para. 97.
5128 Prosecution's Appeal Brief, para. 97.
5129 Prosecution's Appeal Brief, paras 98-99.
5130 Prosecution's Appeal Brief, para. 99.
5131 Pandurević's Response Brief, para. 156. See also Appeal Hearing, AT. 359-360 (4 Dec 2013).
5132 Pandurević's Response Brief, para. 156. **Pandurević** responds that the cases of *Blagojević and Jokić*, *Krnojelac* and *Simić* concerned positive acts of assistance committed over a significant period of time. By contrast, **Pandurević** submits that he "committed a single omission", did not choose the prisoners in detention, and never again had any connection to **Popović** that led to discrimination in fact. Further, he argues that his acts do not show an

(ii) Analysis

1811. The Trial Chamber concluded that it was "not satisfied that **Pandurević** aided and abetted persecution through aiding and abetting by omission the murder of [the Milići Prisoners]".[5133] In arriving at this conclusion, the Trial Chamber merely noted the opinions of individual judges.[5134]

1812. The Prosecution's first argument is essentially that the criminal responsibility of an aider and abettor does not require the contribution to the crime of persecution to go to the discriminatory nature of this crime,[5135] with which the Appeals Chamber agrees.[5136] In this regard, the Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime"[5137] and the *mens rea* of aiding and abetting "is the knowledge that these acts assist the commission of the offense".[5138] In this context, the Appeals Chamber recalls that the *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.[5139] The Appeals Chamber further recalls that while the aider and abettor need not share the intent of the principal perpetrator, he must be aware of such intent.[5140] Thus, **Pandurević**'s argument that the assistance given must also be discriminatory in fact is dismissed. The Appeals Chamber will now review the findings of the Trial Chamber in light of the law of aiding and abetting recalled above.[5141]

1813. The Appeals Chamber first recalls that the Trial Chamber found that **Pandurević**'s failure to discharge his legal duty to protect the Milići Prisoners substantially contributed to the murder of these men. It was thus satisfied that the necessary requirements for the *actus reus* of aiding and abetting by omission had been met.[5142] In these circumstances, **Pandurević** has failed to show that his contribution by omission to the murder of the prisoners was unsubstantial because he: (1) committed only a single omission; (2) did not choose the Milići Prisoners; and (3) did not have

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encouragement of discrimination and his omissions did not make a substantial contribution to discriminatory murder. Pandurević's Response Brief, paras 158-162.

5133 Trial Judgement, para. 2097.

5134 Trial Judgement, para. 2097, referring to Judge Kwon Dissent, paras 60-66, Judge Prost Separate Opinion, paras 1-4.

5135 See *supra*, para. 1808.

5136 See *Šainović et al.* Appeal Judgement, paras 1677, 1772 and references cited therein.

5137 *Šainović et al.* Appeal Judgement, paras 1626, 1649; *Blaškić* Appeal Judgement, para. 46. See *Mrkšić and Šljivančanin* Appeal Judgement, para. 81; *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127.

5138 *Šainović et al.* Appeal Judgement, para. 1649. See *Ndahimana* Appeal Judgement, para. 157; *Haradinaj et al.* Appeal Judgement, para. 58 and references cited therein.

5139 *Mrkšić and Šljivančanin* Appeal Judgement, para. 146. See *Šainović et al.* Appeal Judgement, para. 1677, fn. 5510; *Mrkšić and Šljivančanin* Appeal Judgement, para. 49.

5140 *Haradinaj et al.* Appeal Judgement, para. 58; *Brđanin* Appeal Judgement, para. 487; *Simić* Appeal Judgement, para. 86. See *Ndahimana* Appeal Judgement, para. 157.

5141 *Cf.* Trial Judgement, para. 2097, referring to Judge Kwon Dissent, paras 60-66; Judge Prost Separate Opinion, paras 1-4 (which the Appeals Chamber considers to be premised on an incorrect statement of law).

5142 Trial Judgement, para. 1988.

any connection to **Popović** in a later operation that led to discrimination in fact. **Pandurević** has therefore failed to show any error in the Trial Chamber's findings on his *actus reus*.[5143]

1814. As to **Pandurević**'s *mens rea*, the Trial Chamber found that, on 23 July 1995, **Pandurević** was informed that **Popović** would come later that same day to "take care of the situation of the wounded prisoners".[5144] The Trial Chamber then found that **Pandurević**, upon learning this, "knew that it was probable that the wounded prisoners would be murdered once they were transferred into **Popović**'s custody",[5145] and that if he failed to act, his omission would assist in the murder of the Milići Prisoners.[5146] Consequently, the Trial Chamber found that the requisite elements for the *mens rea* of aiding and abetting the murder of the Milići Prisoners had been met.[5147] **Pandurević** fails to dispute this finding as it relates to this discussion.[5148]

1815. The Appeals Chamber further recalls that the Trial Chamber also found that the murder of the Milići Prisoners fell within the JCE to Murder which **Popović** participated in with discriminatory intent, thereby committing persecution through murder.[5149] In this regard, the Appeals Chamber also recalls that **Pandurević** was aware of **Popović**'s involvement in murdering prisoners.[5150] Thus, the Appeals Chamber finds, as the only reasonable inference, that **Pandurević** was aware of **Popović**'s discriminatory intent. Accordingly, the Appeals Chamber further concludes that the findings of the Trial Chamber established that **Pandurević** had the requisite *mens rea* for aiding and abetting persecution.

1816. In sum, the Appeals Chamber concludes that the Trial Chamber erred in failing to convict **Pandurević** of the crime of aiding and abetting persecution through murder as a crime against humanity as it relates to the Milići Prisoners.

(c) Conclusion

1817. In light of the above, the Appeals Chamber, Judge Niang dissenting, grants the Prosecution's sub-ground of appeal 1(c), reverses **Pandurević**'s acquittal for aiding and abetting persecution as a crime against humanity through murder (Count 6) for the murder of the Milići Prisoners, and, Judge Pocar dissenting, enters a new conviction in this regard.

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5143 See *supra*, paras 1742-1745.
5144 Trial Judgement, para. 1907.
5145 Trial Judgement, para. 1989.
5146 Trial Judgement, para. 1990.
5147 Trial Judgement, para. 1990.
5148 See *supra*, paras 1747-1759.
5149 Trial Judgement, paras 1167, 1194. See *supra*, paras 1155 *et seq.*
5150 Trial Judgement, para. 1989.

## 4. Nikolić's appeal (Ground 6)

### (a) *Mens rea* for aiding and abetting genocide

#### (i) Arguments of the Parties

1818. **Nikolić** alleges that the Trial Chamber erred in fact which occasioned a miscarriage of justice when finding that soon after his involvement in the killing operation began he knew that it was being carried out with genocidal intent.[5151] Consequently, he argues that no reasonable trial chamber could have found that he had the requisite *mens rea* for aiding and abetting genocide.[5152]

1819. First, **Nikolić** argues that the Trial Chamber erred in finding that he gained knowledge of the genocidal intent behind the operation after the 14 July Meeting with **Beara** and **Popović**, based on having learned of the details of the execution plan.[5153] **Nikolić** argues that the Trial Chamber ignored the evidence that established that the nature of his knowledge on 13 July 1995 was not altered or significantly developed after the 14 July Meeting.[5154] **Nikolić** stresses that he remained under the impression that the targeted persons were male ABiH detainees of an unknown geographical origin who were held for reasons related to the conflict.[5155] He argues that it is irrelevant that POWs can be victims of genocide as his belief that only POWs were targeted negates his awareness that the destruction of a protected group as such was intended,[5156] and further, he could not have surmised this intention due to his lack of knowledge regarding events in Srebrenica.[5157] **Nikolić** highlights the evidence of Witnesses M. Birčaković and Ristić concerning his impression that prisoners would be exchanged.[5158]

1820. Second, **Nikolić** argues that the Trial Chamber erred in finding that he observed first hand the systematic and organised nature of the killing operation and took an active role in it, as it failed to consider evidence establishing his limited overall involvement in the crimes.[5159] **Nikolić** further argues that he was clearly unaware of additional elements required for the *mens rea* of genocide.[5160]

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5151 Nikolić's Appeal Brief, paras 100, 119.
5152 Nikolić's Appeal Brief, paras 100, 117, 119; Nikolić's Reply Brief, paras 37-38.
5153 Nikolić's Appeal Brief, para. 101.
5154 Nikolić's Appeal Brief, paras 101-107; Nikolić's Reply Brief, paras 39-42.
5155 Nikolić's Appeal Brief, paras 102-107; Nikolić's Reply Brief, para. 41.
5156 Nikolić's Reply Brief, paras 41, 43-44.
5157 Nikolić's Appeal Brief, para. 105; Nikolić's Reply Brief, paras 40-41, 43-45.
5158 Nikolić's Reply Brief, para. 44. See also Nikolić's Appeal Brief, paras 106-107.
5159 Nikolić's Appeal Brief, paras 108-110; Nikolić's Reply Brief, para. 42.
5160 Nikolić's Appeal Brief, para. 110:
> Such a *mens rea* requires knowledge of additional elements as the Prosecution alleged that the genocidal acts consisted of killing members of the group and causing serious bodily and mental harm by, *inter alia*, separating the able-bodied men and forcibl[y] removing the population as well as that the alleged perpetrators knew that the forcible transfer created conditions contributing to the destruction of

1821. Third, **Nikolić** argues that the Trial Chamber erred in finding that he would have known of **Beara**'s and **Popović**'s genocidal intent, and that he saw evidence of the sheer determination that every detained Bosnian Muslim male would be killed. He argues that the Trial Chamber failed to consider important pieces of evidence concerning his limited interaction with **Beara** and **Popović** during the relevant period and his repeated observations of victims being spared.[5161]

1822. Fourth, **Nikolić** argues that in light of the similarity between his knowledge of others' genocidal intent and that of **Pandurević**, Borovčanin, and Jokić, who were not found guilty of genocide, no reasonable trial chamber could have found that he possessed the requisite *mens rea* for aiding and abetting genocide.[5162]

1823. **Nikolić** concludes that his conviction for aiding and abetting genocide was contrary to the totality of the evidence on the record and seems to have been based more on his affiliation with the Security Service than on what he actually knew.[5163] **Nikolić** requests the Appeals Chamber to quash his conviction and reduce his sentence accordingly.[5164]

1824. The Prosecution responds that the Trial Chamber's findings are supported by a wealth of mutually corroborative evidence and that **Nikolić** merely disagrees with the Trial Chamber's assessment of the evidence, without demonstrating any error.[5165] The Prosecution argues that the possibility that **Nikolić** may not have been aware of every detail of the murder operation did not detract from his knowledge.[5166] The Prosecution contends that the Trial Chamber reasonably found that **Nikolić**'s involvement in the crimes was important and significant and that he worked closely with **Beara** and **Popović** to implement the murder operation,[5167] and knew of their genocidal aim.[5168] The Prosecution argues that **Nikolić**'s comparison with others ignores that his involvement in and knowledge of the genocide were unique to him.[5169]

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the entire population of Eastern Bosnia. The Appellant was clearly unaware of these elements. (internal references omitted)

See also Nikolić's Reply Brief, para. 38.

5161 Nikolić's Appeal Brief, paras 111-113; Nikolić's Reply Brief, paras 41, 45.

5162 Nikolić's Appeal Brief, paras 114-116; Nikolić's Reply Brief, para. 39.

5163 Nikolić's Appeal Brief, paras 100, 117.

5164 Nikolić's Appeal Brief, para. 119.

5165 Prosecution's Response Brief (Nikolić), paras 96-97, 100-101, 136, 154, 173.

5166 Prosecution's Response Brief (Nikolić), paras 140-144, 146-150, 155-157.

5167 Prosecution's Response Brief (Nikolić), paras 99, 124, 126, 129-138.

5168 Prosecution's Response Brief (Nikolić), paras 140, 158.

5169 Prosecution's Response Brief (Nikolić), para. 159.

(ii) Analysis

1825. The Appeals Chamber notes that **Nikolić**'s arguments under this ground of appeal concern several findings of the Trial Chamber that he attacks under other grounds of appeal.[5170] The Appeals Chamber recalls that it has dismissed those grounds of appeal elsewhere.[5171]

1826. The Trial Chamber found that "on 13 July when he joined in the common plan, **Nikolić** was aware of the plan to murder on a large scale but not of some of the key features of the operation which would evidence genocidal intent".[5172] The Trial Chamber then found that what occurred soon after was more than sufficient for **Nikolić** to conclude that the plan was to destroy, and found the following: (1) in the morning of 14 July 1995, he met with **Beara** and **Popović** to discuss the details of the killing operation; and (2) later that morning he saw the convoy of buses and subsequently acquired first hand information from his observations at Orahovac about the composition of the victims.[5173] The Trial Chamber then found that **Nikolić** observed first hand the systematic and organised manner in which the killing operation was planned and carried out, and further he took an active role in it.[5174] It also noted **Nikolić**'s close association and interaction with **Beara** and **Popović**, whom it found harbored genocidal intent.[5175] The Trial Chamber concluded that **Nikolić** knew that the massive killing operation was being carried out with genocidal intent.[5176]

1827. With regard to **Nikolić**'s first argument, the Appeals Chamber considers that a reasonable trier of fact could have considered **Nikolić**'s knowledge of "the details of the plan" and that "the executions were to be carried out in multiple locations in the Zvornik area and the victims would number in the hundreds to thousands"[5177] to be relevant to his knowledge of the genocidal intent behind the killing operation. Notwithstanding the intimation of **Nikolić**,[5178] the Trial Chamber did not find that **Nikolić** knew of the genocidal intent of **Popović** and **Beara** based only on the meeting in the morning of 14 July 1995.[5179] Contrary to his argument that he did not know the victims' geographical origin and status,[5180] the Trial Chamber explicitly found that **Nikolić** knew of the military attack against the Srebrenica enclave and that the prisoners had come into the custody of the VRS as a result of the attack.[5181] The Appeals Chamber also recalls the Trial Chamber's finding that "**Nikolić** saw that the Bosnian Muslim prisoners detained at the Grbavci School and executed at

5170 See Nikolić's Appeal Brief, para. 118, fns 252-253, 260-266, 275-276, 301, 303.
5171 See *supra*, paras 172, 186, 201, 206, 212, 936, 997, 1013, 1023, 1026, 1028, 1297, 1315, 1328, 1354, 1361.
5172 Trial Judgement, para. 1403.
5173 Trial Judgement, para. 1404.
5174 Trial Judgement, para. 1405.
5175 Trial Judgement, para. 1406.
5176 Trial Judgement, para. 1407.
5177 Trial Judgement, para. 1404.
5178 See Nikolić's Appeal Brief, paras 101, 104-107.
5179 Trial Judgement, paras 1404-1406.
5180 See Nikolić's Appeal Brief, paras 105-107.

Orahovac were not only soldiers, but also civilians and that no distinction or selection was made in terms of those to be executed".[5182]

1828. **Nikolić** refers to the evidence of M. Birčaković and Ristić which indicates that **Nikolić** was ordered to provide accommodation for people coming in for exchange.[5183] The Appeals Chamber has previously rejected, in light of **Nikolić**'s prior knowledge that the prisoners were to be shot, his argument that he was under the impression that the prisoners were destined for a prisoner exchange.[5184] For this reason, the Appeals Chamber is not convinced that the Trial Chamber completely disregarded this particular evidence of M. Birčaković and Ristić.[5185] Regardless of **Nikolić**'s prior impressions, at the Grbavci School and at Orahovac he saw that not all prisoners were affiliated with the ABiH.[5186] Furthermore, **Nikolić**'s explanation of their civilian clothing and varying ages as being commonplace in non-international armed conflicts is merely an overly broad assertion that does not show that the Trial Chamber committed any error.[5187] The Appeals Chamber consequently dismisses **Nikolić**'s first argument.

1829. With regard to the second argument, the Appeals Chamber considers that **Nikolić** shows on one hand that the Trial Chamber found his involvement in the crimes to be relatively circumscribed, particularly compared to **Popović** and **Beara**.[5188] On the other hand, he fails to demonstrate his claim that he was not cognisant of the crimes in the wider area of Srebrenica, or involved in the planning of the murder operation.[5189] According to the Trial Chamber's findings, his involvement in the organisation and co-ordination of the killing operation began on 14 July 1995 around 8:00 a.m.[5190] The Trial Chamber found that he participated in the planning of the murder operation[5191] and found him guilty of planning murder.[5192] The Trial Chamber further found that, although many victims had been killed before he learned of the murder plan,[5193] "the killings that followed and with which he was involved were sufficient to make **Nikolić** aware of the scale and scope of this killing operation".[5194] The Trial Chamber concluded in this regard that "soon after the

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5181 Trial Judgement, paras 1403, 1418. See also Nikolić's Final Brief, para. 1159.
5182 Trial Judgement, para. 1418. See also Trial Judgement, paras 1361-1365, 1404.
5183 Nikolić's Appeal Brief, para. 107, referring to Trial Judgement, fn. 4400, Milorad Birčaković, T. 11120 (8 May 2007), Lazar Ristić, T. 10088-10089 (16 Apr 2007).
5184 See *supra*, para. 688.
5185 See *Đorđević* Appeal Judgement, fn. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23. See also Trial Judgement, fns 4400, 4416.
5186 See *supra*, note 5182.
5187 See Nikolić's Appeal Brief, para. 107.
5188 See Nikolić's Appeal Brief, para. 109, referring to Trial Judgement, paras 1345, 1361-1373, 1379-1380, 1395, 1402, 1410.
5189 See Nikolić's Appeal Brief, para. 109.
5190 Trial Judgement, paras 472, 1357.
5191 Trial Judgement, paras 1391, 1421.
5192 Trial Judgement, para. 2106, Disposition, Nikolić section.
5193 Trial Judgement, paras 1402-1403, 1405.
5194 Trial Judgement, para. 1405.

inception of his involvement in the killing operation, and certainly by the time of executions at Orahovac, **Nikolić** knew that this was a massive killing operation".[5195]

1830. Furthermore, the Appeals Chamber considers that **Nikolić** does not advance any argument that could show that the Trial Chamber erred in finding that he "observed first hand the systematic and organised manner in which the killing operation was planned and carried out and further he took an active role in it".[5196] The Appeals Chamber observes that this finding has strong support in other findings made by the Trial Chamber.[5197] Considering the broad basis on which the Trial Chamber found that **Nikolić** knew of the genocidal intent behind the murder operation,[5198] the Appeals Chamber is not convinced that the Trial Chamber failed to consider the evidence of his relatively limited involvement in the crimes. Nor has **Nikolić** demonstrated that he could not have surmised that the destruction of a protected group as such was intended. Finally, the Appeals Chamber rejects **Nikolić**'s argument that he was unaware of additional elements required for the *mens rea* of genocide. The Appeals Chamber recalls that a conviction for aiding and abetting genocide requires proof that the defendant knew about the principal perpetrator's genocidal intent.[5199] The additional *mens rea* requirements suggested by **Nikolić** have no basis in law.[5200] In sum, the Appeals Chamber dismisses **Nikolić**'s second argument.

1831. With regard to **Nikolić**'s third argument, the Appeals Chamber notes that the Trial Chamber found several instances where **Nikolić** interacted with **Popović** and **Beara** during the relevant time period: (1) at the 14 July Meeting;[5201] (2) in the late afternoon of 14 July 1995, when **Nikolić** and **Beara** were near the Petkovci School;[5202] (3) in the evening of 14 July 1995, when **Nikolić** and **Popović** were present at the Orahovac killings;[5203] and (4) in the evening of 14 July 1995, when **Nikolić** was informed that **Beara** was coming to the Standard Barracks at 9:00 a.m. the following day.[5204] The Appeals Chamber further considers that other findings of the Trial Chamber indicate co-ordination between **Nikolić** and the other two Appellants.[5205] In the view of the Appeals Chamber, **Nikolić**'s submissions essentially amount to a list of occasions on which he could have interacted with **Popović** and **Beara** but did not.[5206] As such, his submissions do not demonstrate any

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5195 Trial Judgement, para. 1407.
5196 Trial Judgement, para. 1405.
5197 See, in particular, Trial Judgement, paras 1345, 1354, 1357-1368.
5198 See *supra*, para. 1826.
5199 *Šainović et al.* Appeal Judgement, para. 1772; *Ndahimana* Appeal Judgement, para. 157; *Blagojević and Jokić* Appeal Judgement, para. 127.
5200 See *supra*, note 5160.
5201 Trial Judgement, paras 472, 1357.
5202 Trial Judgement, paras 498, 1366.
5203 Trial Judgement, paras 486, 1362.
5204 Trial Judgement, para. 1368.
5205 See Trial Judgement, paras 1368-1369.
5206 See Nikolić's Appeal Brief, para. 112.

error in the impugned findings of the Trial Chamber that **Nikolić**, through his interaction with **Popović** and **Beara**, "would have known of their genocidal intent"[5207] and that he "saw evidence of the sheer determination that every detained Bosnian Muslim male would be killed, including the incident when **Popović** enjoined the soldiers at an execution site to shoot a young boy".[5208]

1832. In support of his submission that he repeatedly observed prisoners being spared, **Nikolić** relies on the: (1) detention of four survivors from the Branjevo Military Farm killings; (2) detention of the Milići Prisoners; (3) detention of 140-150 prisoners at the military prison at the Standard Barracks of the Zvornik Brigade prior to their exchange; and (4) sparing of a child during an execution.[5209] With regard to the first situation, the Trial Chamber stated that "[t]here is no evidence that **Nikolić** had any direct involvement with the four survivors; however the Trial Chamber has found that he was aware of their presence and the fact that they had survived the mass killing".[5210] With regard to the second situation, the Trial Chamber was not "satisfied as to what involvement **Nikolić** had with the ten wounded prisoners and more specifically his role in terms of their custody".[5211] In both of these cases, the Trial Chamber found that the prisoners were eventually murdered.[5212] In sum, **Nikolić** has failed to support his argument that he observed these prisoners being spared. With regard to the third situation, **Nikolić** seeks to draw an inference from findings of the Trial Chamber that say nothing of what he knew about these prisoners.[5213] His submission is therefore unsubstantiated. Finally, with regard to the last situation, the Trial Chamber found that **Nikolić** saw **Popović** order the execution of a boy, who was nevertheless spared and taken away.[5214] The Appeals Chamber is not convinced that this incident demonstrates any error in the impugned findings. In addition, even if **Nikolić** did observe some cases in which lives were spared, it would not call into question his knowledge that a massive killing operation was being carried out with genocidal intent. **Nikolić**'s third argument is dismissed.

1833. Regarding **Nikolić**'s fourth argument, the Appeals Chamber considers that the fact that **Pandurević**, Borovčanin, and Jokić were not found guilty of genocide has no particular relevance. The question is whether **Nikolić** has demonstrated an error in the Trial Chamber's finding that he satisfied the *mens rea* standard for aiding and abetting genocide. The Appeals Chamber considers that **Nikolić** has failed to show any error in the Trial Chamber's finding and this argument is therefore dismissed.

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5207 Trial Judgement, para. 1406.
5208 Trial Judgement, para. 1405.
5209 Nikolić's Appeal Brief, para. 113, referring to Trial Judgement, paras 487-488, 592-593, 1379-1380, 1411.
5210 Trial Judgement, para. 1379.
5211 Trial Judgement, para. 1380. See also Trial Judgement, para. 1411.
5212 Trial Judgement, paras 1379-1380.
5213 Nikolić's Appeal Brief, para. 113, referring to Trial Judgement, paras 592-593.
5214 Trial Judgement, paras 486-488, 1111, 1405.

1834. In light of the above, the Appeals Chamber considers that **Nikolić** has failed to substantiate his final submission that his conviction for aiding and abetting genocide was contrary to the totality of the evidence on the record and seemingly based on his affiliation with the Security Service.[5215] This is a mere assertion and is dismissed.

(b) Conclusion

1835. Consequently, the Appeals Chamber dismisses **Nikolić**'s ground of appeal 6 in its entirety.

### 5. Conclusion

1836. The Appeals Chamber, Judge Niang dissenting, has granted the Prosecution's sub-ground of appeal 1(b) and has reversed **Pandurević**'s acquittals for aiding and abetting extermination as a crime against humanity (Count 3), murder as a violation of the laws or customs of war (Count 5), and persecution as a crime against humanity through murder (Count 6). The Appeals Chamber, Judge Niang dissenting, has also granted the Prosecution's sub-ground of appeal 1(c) and has reversed **Pandurević**'s acquittal for aiding and abetting persecution through murder as it relates to the Milići Prisoners. Consequently, the Appeals Chamber, Judge Pocar dissenting, has entered new convictions against **Pandurević** for these crimes. The impact of these findings on **Pandurević**'s sentence, if any, will be considered in the section of this Judgement on sentencing below.

1837. The Appeals Chamber has dismissed all other challenges concerning the mode of liability of aiding and abetting.

## D. Ordering and Planning

1838. The Trial Chamber found that **Beara** was individually responsible under Article 7(1) of the Statute for genocide, extermination, murder, and persecution as crimes against humanity as well as murder as a violation of the laws or customs of war on the basis that he planned, ordered, and committed these crimes against Bosnian Muslim males from Srebrenica.[5216] However, the Trial Chamber was of the view that **Beara**'s conduct would be most appropriately described as commission of these crimes in pursuance of the JCE to Murder.[5217]

1839. The Trial Chamber found that **Miletić** planned the forcible transfer of Bosnian Muslims from Srebrenica and Žepa as well as committed and planned persecution as a crime against humanity through forcible transfer, cruel and inhumane treatment, terrorising civilians, and

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5215 Nikolić's Appeal Brief, para. 117.
5216 Trial Judgement, paras 1319, 1326, 1328, 1333, 2105.
5217 Trial Judgement, paras 1319, 1326, 1328, 1333.

murder.[5218] However, the Trial Chamber considered that his conduct would be most appropriately described as commission based on his participation in the JCE to Forcibly Remove.[5219]

1840. Both **Beara** and **Miletić** have appealed these respective findings. **Miletić**'s main argument under his ground of appeal 8 is that the Trial Chamber erred in law by failing to find which of his actions constituted planning, and by using the same set of facts to declare him guilty through planning and commission.[5220] **Beara**, under his ground of appeal 23, focuses his arguments on the alleged weaknesses in the evidence underpinning the Trial Chamber's findings.[5221] The Prosecution disputes the contentions of **Beara** and **Miletić** and submits that the Trial Chamber properly reached its conclusions.[5222] The Prosecution contends that **Miletić** was not convicted on the basis of planning as a mode of liability.[5223]

1841. The Appeals Chamber recalls that it has inherent discretion to determine which of the Parties' submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning.[5224] The Appeals Chamber further recalls that, as a general rule, it declines to discuss alleged errors which have no impact on the conviction or sentence.[5225] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[5226]

1842. The Appeals Chamber observes that the Trial Chamber did not base the convictions or the sentencing of **Beara** and **Miletić** on its findings that they planned (and in **Beara**'s case, ordered) the crimes in question but on their roles in the commission of these crimes as a part of the joint criminal enterprises that were established by the Trial Chamber.[5227] The Trial Chamber clearly stated that the conduct of **Beara** and **Miletić** was most appropriately described as commission of the crimes and then proceeded to enter a conviction on the basis of commission for each of them.[5228]

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5218 Trial Judgement, paras 1722, 1731, 2108.
5219 Trial Judgement, paras 1722, 1731.
5220 Miletić's Appeal Brief, paras 213-223; Miletić's Reply Brief, para. 76; Appeal Hearing, AT. 445-446 (5 Dec 2013).
5221 Beara's Appeal Brief, intro before para. 244, paras 244-258; Beara's Reply Brief, paras 91-92.
5222 Prosecution's Response Brief (Beara), paras 252-267; Prosecution's Response Brief (Miletić), paras 141-142.
5223 Appeal Hearing, AT. 478-479 (5 Dec 2013).
5224 See *supra*, para. 22. See *Đorđević* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 26.
5225 *Krajišnik* Appeal Judgement, para. 20; *Martić* Appeal Judgement, para. 17; *Strugar* Appeal Judgement, para. 19.
5226 *Stakić* Appeal Judgement, para. 11. See *Ndahimana* Appeal Judgement, para. 11.
5227 Trial Judgement, paras 1319, 1326, 1328, 1333, 1722, 1731, 2105, 2108, Disposition, Beara section, Disposition, Miletić section.
5228 Trial Judgement, paras 1319, 1326, 1328, 1333, 1722, 1731, 2105, 2108, Disposition, Beara section, Disposition, Miletić section.

1843. Furthermore, the Appeals Chamber is of the view that there was nothing improper in the Trial Chamber's findings that the convictions could be supported by other modes of liability.[5229] It appears to the Appeals Chamber that the Trial Chamber only sought to accurately describe the full extent of **Beara**'s and **Miletić**'s criminal conduct.[5230] Additionally, the Trial Chamber's findings that **Beara** planned and ordered the relevant crimes and that **Miletić** planned forcible transfer and persecution were not considered by the Trial Chamber as relevant factors affecting sentencing.[5231]

1844. Consequently, as the questions of whether **Beara** planned and ordered the crimes against the Bosnian Muslim males from Srebrenica, and whether **Miletić** planned the forcible transfer and persecution of Bosnian Muslims from Srebrenica and Žepa do not affect the verdicts, their convictions, or sentences, the Appeals Chamber will not address the merits of **Beara**'s and **Miletić**'s challenges to these findings.

1845. In sum, **Beara**'s ground of appeal 23 and **Miletić**'s ground of appeal 8 are dismissed in their entirety.

## E. Command Responsibility

### 1. Introduction

1846. The Trial Chamber found that, during the Indictment period, **Pandurević** was Commander of the Zvornik Brigade.[5232] The Trial Chamber further found that from 4 to 15 July 1995, **Pandurević** commanded Tactical Group-1 ("TG-1") at various locations and only returned to the Standard Barracks of the Zvornik Brigade at noon on 15 July 1995.[5233] The Trial Chamber ultimately concluded that **Pandurević** maintained *de jure* and *de facto* authority as well as a superior-subordinate relationship over the Zvornik Brigade throughout the relevant period in July 1995.[5234]

1847. The Trial Chamber found that from 13 July to the morning of 16 July 1995, members of the Zvornik Brigade assisted in the detention, guarding, and transportation of Bosnian Muslim

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5229 See *Kamuhanda* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, paras 405-409, 413. In the *Kamuhanda* case, the majority of Judges concluded, in their separate opinions, that there is no reason why a single crime cannot be perpetrated through multiple modes of responsibility set forth in Article 6(1) of the ICTR Statute (equivalent to Article 7(1) of the Statute). See *Kamuhanda* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, paras 401-416), Separate Opinion of Presiding Judge Theodor Meron, para. 366, Separate Opinion of Judge Inés Mónica Weinberg de Roca, para. 417. See also *Kamuhanda* Appeal Judgement, Separate Opinion of Judge Wolfgang Schomburg, para. 389.

5230 See *Ndindabahizi* Appeal Judgement, paras 122-123.

5231 Trial Judgement, paras 2164-2170, 2195-2202.

5232 Trial Judgement, para. 1841.

5233 Trial Judgement, paras 1843-1861.

5234 Trial Judgement, paras 2027, 2031, 2034.

prisoners detained in the area of Zvornik.[5235] The Trial Chamber further found that the Bosnian Muslim men who were detained in the detention facilities in Zvornik were subject to intolerable conditions, including physical and verbal abuse, which amounted to cruel and inhumane treatment.[5236] It also found that the Zvornik Brigade members' assistance in detaining and transporting the prisoners who were executed between 14 and 16 July 1995 amounted to aiding and abetting murder and that at least two members of the Zvornik Brigade committed murder.[5237] Although noting that **Pandurević** was physically absent from the Zvornik area from 4 July 1995 to noon on 15 July 1995, the Trial Chamber was satisfied that he "at all times, retained the ability to exercise control over the Zvornik Brigade".[5238] However, the Trial Chamber found that the knowledge requirement under Article 7(3) of the Statute was only met after **Pandurević**'s return to the Standard Barracks around noon on 15 July 1995.[5239]

1848. The Trial Chamber convicted **Pandurević**, pursuant to Article 7(3) of the Statute, of murder as a crime against humanity and as a violation of the laws or customs of war for failing to take necessary and reasonable measures to prevent his subordinates from committing crimes.[5240] However, **Pandurević** was not found guilty pursuant to Article 7(3) of the Statute of, *inter alia*: (1) persecution through cruel and inhumane treatment as a crime against humanity;[5241] and (2) murder as a crime against humanity and as a violation of the laws or customs of war for failing to punish his subordinates for crimes they committed.[5242] **Pandurević** and the Prosecution both challenge the Trial Chamber's findings on his liability based on command responsibility.

### 2. Pandurević's appeal (Ground 2)

#### (a) Alleged error in using an unduly formalistic standard of effective control (Sub-ground 2.1)

##### (i) Arguments of the Parties

1849. **Pandurević** submits that the Trial Chamber erred in law by applying an unduly formalistic approach to the standard for effective control in concluding that he had the "material ability" to exercise control over the Zvornik Brigade from 4 to 15 July 1995.[5243] He argues that the Zvornik Brigade was an unusually large unit with a wide geographical and operational scope and that only a

5235 Trial Judgement, para. 2017.
5236 Trial Judgement, paras 993-994.
5237 Trial Judgement, para. 2017.
5238 Trial Judgement, para. 2029. See Trial Judgement, paras 2030-2031.
5239 Trial Judgement, paras 2037, 2040.
5240 Trial Judgement, paras 2042-2051, 2066, 2073, 2110.
5241 Trial Judgement, paras 2100, 2110.
5242 Trial Judgement, paras 2052-2065, 2110.
5243 Pandurević's Appeal Brief, paras 164, 168.

small portion of the brigade's members were involved in the murder operation.[5244] **Pandurević** further contends that the Trial Chamber implicitly accepted that he was not in fact exercising the powers of command during this period, but found that his theoretical capacity to do so triggered command responsibility anyway.[5245] In this regard, he contends that the Trial Chamber noted that Obrenović was issuing and receiving orders and it was still open to **Pandurević** to assert his authority and re-take command at any point.[5246] **Pandurević** argues that "the imposition of a *de jure* standard" led to a finding of effective control.[5247]

1850. **Pandurević** submits that effective control cannot be exercised in reality without adequate reporting and information.[5248] **Pandurević** argues that pursuant to superior orders, from 4 to 15 July 1995 he was in command of TG-1, fully occupied by such command, and not in a position to "retake command at any point" with respect to the Zvornik Brigade.[5249] In addition, he contends that he did not choose to narrow the scope of his own material ability or his own authority, rather, the lack of communication with the Zvornik Brigade in this period was a direct result of a shift in his command authority to TG-1, as ordered by the superior command.[5250] **Pandurević** also avers that it is important to assess whether the orders and tasks received render the alleged commander practically incapable of exercising effective control.[5251] He further argues that reporting will always be a highly significant indicator of material ability when a commander is sent away from the unit he normally commands and is assigned to another command or other tasks.[5252]

1851. **Pandurević** contends that this error of law invalidates the Trial Chamber's findings concerning the period of 4 to 15 July 1995 while he was away from the Zvornik Brigade.[5253] He argues that this error in turn invalidates the findings regarding the period from 15 July 1995 onwards, as the Trial Chamber in effect reversed the burden of proof by requiring him to prove that he lost *de facto* control over the Zvornik Brigade around 15 to 16 July 1995, rather than considering whether he re-asserted effective control at this time.[5254]

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5244 Pandurević's Appeal Brief, paras 162, 165; Appeal Hearing, AT. 370-372 (4 Dec 2013).
5245 Pandurević's Appeal Brief, para. 173.
5246 Pandurević's Appeal Brief, paras 169, 173 (referring to Trial Judgement, para. 2031 (emphasis in original)); Appeal Hearing, AT. 366-368 (4 Dec 2013).
5247 Pandurević's Appeal Brief, para. 174.
5248 Pandurević's Appeal Brief, paras 170-171.
5249 Pandurević's Reply Brief, paras 37, 40. See Appeal Hearing, AT. 366 (4 Dec 2013).
5250 Pandurević's Appeal Brief, para. 172; Pandurević's Reply Brief, paras 37, 40. See also Appeal Hearing, AT. 367, 371 (4 Dec 2013).
5251 Pandurević's Reply Brief, paras 43, 46. See also Appeal Hearing, AT. 365, 372-374 (4 Dec 2013).
5252 Pandurević's Reply Brief, paras 47-48.
5253 Pandurević's Appeal Brief, para. 174.
5254 Pandurević's Appeal Brief, paras 175-176. See also Pandurević's Appeal Brief, para. 191; Pandurević's Reply Brief, paras 59-61.

1852. The Prosecution responds that no conviction arose from the Trial Chamber's finding that **Pandurević** had effective control from 4 to 15 July 1995, and that even if there was an error in this regard, **Pandurević** does not demonstrate any impact on the verdict.[5255]

1853. The Prosecution submits that **Pandurević** alleges an error of fact, not law, and that he effectively only challenges the weight or importance given to reporting.[5256] It contends that, in any event, the Trial Chamber correctly identified and applied the standard for effective control, which is the ability or capacity, not the actual exercise thereof.[5257] It argues that **Pandurević**'s restrictive standard of "actual exercise" would allow superiors to avoid responsibility by choosing not to exercise their authority.[5258] The Prosecution submits that the Trial Chamber correctly found that **Pandurević** had the necessary authority and ability to receive information from 4 to 15 July 1995, and that whether he chose to exercise his authority "is not an indicator limiting his effective control".[5259]

1854. The Prosecution also contends that reporting is only one possible indicator of effective control, and not a mandatory requirement.[5260] Further, it submits that the Trial Chamber did not reverse the burden of proof as it first made findings that **Pandurević** had *de jure* and *de facto* control during both relevant periods and then considered whether he lost *de facto* control.[5261]

(ii) Analysis

1855. The Appeals Chamber considers it appropriate to address two related submissions as a preliminary matter: (1) **Pandurević**'s contention that the Trial Chamber reversed the burden of proof with respect to the period of 15 July 1995 onwards; and (2) the Prosecution's effective request for summary dismissal of the first and second sub-grounds of appeal concerning the period of 4 to 15 July 1995 as no conviction resulted from the Trial Chamber's finding regarding this period.

1856. It is clear that there was no conviction entered for **Pandurević** concerning the period of his absence as the Trial Chamber found that the knowledge requirement for superior responsibility under Article 7(3) of the Statute had not been met for the period prior to 12:00 p.m. on

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5255 Prosecution's Response Brief (Pandurević), para. 86; Appeal Hearing, AT. 391, 397 (4 Dec 2013).
5256 Prosecution's Response Brief (Pandurević), paras 87, 90-91.
5257 Prosecution's Response Brief (Pandurević), paras 92-94.
5258 Prosecution's Response Brief (Pandurević), paras 92, 94, 98-99. See Appeal Hearing, AT. 391 (4 Dec 2013), AT. 407 (5 Dec 2013).
5259 Prosecution's Response Brief (Pandurević), para. 96. See also Appeal Hearing, AT. 403 (4 Dec 2013).
5260 Prosecution's Response Brief (Pandurević), para. 97.
5261 Prosecution's Response Brief (Pandurević), paras 100-101. See also Prosecution's Response Brief (Pandurević), paras 113-115; Appeal Hearing, AT. 397 (4 Dec 2013).

15 July 1995.[5262] However, there was a conviction for the period 15 to 16 July 1995 and it is to this that **Pandurević**'s challenge refers. It is based on the argument that the Trial Chamber first erred in finding that he had effective control over the Zvornik Brigade from 4 to 15 July 1995 and subsequently required him to demonstrate that he lost said effective control, thus reversing the burden of proof for the later period. If this argument were to succeed, **Pandurević** would have successfully demonstrated an error of law which could possibly have an impact on the verdict. Thus, the Appeals Chamber will address the contention that the Trial Chamber erred in finding that **Pandurević** exercised effective control over the Zvornik Brigade from 4 to 15 July 1995.[5263] The Appeals Chamber will then consider the argument that the Trial Chamber reversed the burden of proof in finding that **Pandurević** had effective control from 15 July 1995 onwards.

1857. As to **Pandurević**'s contention that the Trial Chamber erred in law by taking an unduly formalistic approach to effective control in concluding that he had the material ability to exercise control, the Appeals Chamber recalls that to be found criminally liable pursuant to Article 7(3) of the Statute, a superior must be shown to have exercised effective control over those of his or her subordinates who have committed crimes.[5264] Effective control has been defined to mean the material ability to prevent offences or punish the offender.[5265] The concept of material ability necessarily takes into account all factors which might impede a superior's ability to prevent and punish.[5266] In circumstances where a superior would not be able to perform the functions necessary to prevent or punish, the superior could not be said to possess the material ability required to exercise effective control.

1858. In this regard, the Trial Chamber noted that:

> the test of effective control relates to the relationship between the individuals and is not limited to a consideration of whether actual control is being exercised at any given moment. Otherwise the responsibility would be significantly narrowed – restricted to those who were in control and not reaching those who could have taken that control to prevent these crimes or punish them. Thus, in assessing effective control for these purposes, the issue is not whether the superior was in command or exercising control at any given moment but rather whether he or she had the material ability to prevent or punish the perpetrators of the crimes. It is this ability that evidences a superior-subordinate relationship. As stated by the Appeals Chamber even more specifically, "it is

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5262 Trial Judgement, para. 2037. The Appeals Chamber notes, however, that the Prosecution, in ground 2(e) of its appeal, has requested the Appeals Chamber to enter convictions in the 4-15 July 1995 period related to **Pandurević**'s alleged failure to punish his subordinates for crimes committed on 13 and 14 July 1995. See Prosecution's Appeal Brief, paras 105, 167-168, 185-186. In light of the Prosecution's appeal, the Appeals Chamber will consider **Pandurević**'s ground of appeal regarding whether he exercised effective control over his subordinates in this period.

5263 See *infra*, paras 1886-1887.

5264 *Ndahimana* Appeal Judgement, para. 38; *Perišić* Appeal Judgement, para. 87; *Čelebići* Appeal Judgement, paras 196-198.

5265 *Ndahimana* Appeal Judgement, para. 38; *Perišić* Appeal Judgement, para. 87; *Orić* Appeal Judgement, para. 20; *Čelebići* Appeal Judgement, paras 197-198.

5266 The Appeals Chamber notes that indiscipline amongst subordinates and the non-compliance with orders from a superior are factors that have been considered in determining whether an accused can exercise effective control. See *Strugar* Appeal Judgement, paras 257-258; *Hadžihasanović and Kubura* Appeal Judgement, para. 230; *Blaškić* Appeal Judgement, para. 499.

> necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences".[5267]

The Appeals Chamber is satisfied that the Trial Chamber accurately recounted the law that effective control requires the material ability to prevent or punish the commission of subordinates' offences.

1859. In applying the law to the facts, the Trial Chamber was:

> satisfied that while this absence [during the period 4 to 15 July] clearly limited what **Pandurević** knew about the actions of his Brigade and to some extent narrowed the reasonable measures available to him, it did not in any way alter his ability to control the Brigade in terms of a superior-subordinate relationship. Whether physically at Standard Barracks or elsewhere, **Pandurević**, at all times, retained the ability to exercise control over the Zvornik Brigade. Whether he chose to do so or whether there may have been communication problems in no way changed the superior-subordinate relationship that existed. Specifically, while his contact with the Brigade during his absence was very limited and the subject matter discussed marginal, that contact evidences that he did not hesitate to continue to assert his authority with respect to the Brigade when he deemed it necessary to do so.
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> [...] The Trial Chamber has also found that during the same time period, Obrenović, as Deputy Commander, was in command of the Zvornik Brigade, with respect to those units which remained in the Zvornik area at that time. However, the Trial Chamber further finds that this situation did not interfere with **Pandurević**'s relationship to members of the Brigade, including Obrenović himself. As noted above, Obrenović assumed command as Deputy Commander, just as he would do on any other occasion. In fulfilling his command functions, Obrenović gave orders and received commands without contacting **Pandurević** and without any intervention from him. However, this evidences only that Obrenović was in command at that point in time and responsible for the actions of the troops under his command. But this does not change the fact that Obrenović was still a subordinate of **Pandurević**, as were all members of the Zvornik Brigade.[5268]

Contrary to **Pandurević**'s submission, the Trial Chamber clearly did not limit itself to a consideration of his "theoretical capacity" to command or impose "a *de jure* standard on a question that should be assessed according to practical realities".[5269] Rather, it took into account his assignment away from the Zvornik Brigade and expressly considered the way in which his material ability to exercise control was limited by factors such as geographical location, communication problems, and the command exercised by Obrenović over the Zvornik Brigade during the relevant period. It was only upon consideration of these practical limitations that the Trial Chamber drew any conclusion with respect to his criminal responsibility. Accordingly, **Pandurević** has not demonstrated that the Trial Chamber erred in its application of the law regarding material ability.

1860. Next, with regard to **Pandurević**'s contention that the Trial Chamber erred in law because effective control cannot be exercised in reality without adequate reporting and information, the Appeals Chamber recalls that there is no definitive list of indicators of effective control. Indicators

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5267 Trial Judgement, para. 2023, citing *Čelebići* Trial Judgement, para. 378. While the Trial Judgement mistakenly attributes to the Appeals Chamber the statement it quotes from the *Čelebići* Trial Judgement, it is noted that this statement was indeed affirmed on appeal. *Čelebići* Appeal Judgement, para. 197.

5268 Trial Judgement, paras 2029-2030 (internal references omitted).

5269 See Pandurević's Appeal Brief, paras 173-174.

considered will necessarily depend on the case and are a matter of evidence showing that the accused had the power to prevent or punish the alleged perpetrators where appropriate.[5270]

1861. To the extent that **Pandurević** is contending that the Trial Chamber failed to recognise or consider reporting as an indicator of effective control in the instant case,[5271] the Appeals Chamber notes that the Trial Chamber expressly identified the broad category of "information flow", which would clearly encompass reporting, as relevant in principle to the establishment of a superior-subordinate relationship.[5272] It went on to consider this factor when finding that "while **[Pandurević**'s] contact with the Brigade during his absence was very limited and the subject matter discussed marginal, that contact evidences that he did not hesitate to continue to assert his authority with respect to the Brigade when he deemed it necessary to do so".[5273] The Appeals Chamber therefore dismisses this contention as being without merit.

1862. Accordingly, **Pandurević** has failed to demonstrate that the Trial Chamber erred in law with respect to its interpretation and application of the standard of effective control. The Appeals Chamber, Judge Niang dissenting, therefore dismisses his sub-ground of appeal 2.1.

(b) Alleged error regarding Pandurević's effective control 4-15 July 1995 (Sub-ground 2.2)

(i) Arguments of the Parties

1863. **Pandurević** submits that the Trial Chamber erred in fact by finding that he had effective control of the Zvornik Brigade from 4 to 15 July 1995 and finding that a lack of information "did not in any way alter his ability to control the Brigade in terms of a superior-subordinate relationship".[5274] He argues that during that time frame: (1) he was tasked with another assignment away from the Zvornik Brigade and was limited to controlling TG-1; and (2) Obrenović dealt with the brigade's affairs and operations, giving orders and commands without contacting him or seeking his approval, while reporting to and receiving orders from Živanović and/or Krstić.[5275] He submits that from the morning of 4 July to noon on 15 July 1995, he did not receive any reports, briefings, or notifications regarding the affairs and operations of the brigade, nor did he issue any orders.[5276]

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5270 *Ndahimana* Appeal Judgement, para. 53; *Perišić* Appeal Judgement, para. 87; *Bagosora and Nsengiyumva* Appeal Judgement, para. 450; *Strugar* Appeal Judgement, para. 254; *Blaškić* Appeal Judgement, para. 69.

5271 See Pandurević's Appeal Brief, p. 63. **Pandurević**'s contention may also be understood as challenging the weight given by the Trial Chamber to reporting and information in reaching its conclusion, and the reasonableness of its decision. This argument alleges an error of fact and will be addressed in the following sub-ground.

5272 Trial Judgement, para. 2024.

5273 Trial Judgement, para. 2029. See also Trial Judgement, para. 2031.

5274 Pandurević's Appeal Brief, para. 185. See also Pandurević's Reply Brief, para. 38.

5275 Pandurević's Appeal Brief, paras 179, 182; Pandurević's Reply Brief, paras 54-55, 58; Appeal Hearing, AT. 365-367 (4 Dec 2013). See also Appeal Hearing, AT. 415 (5 Dec 2013).

5276 Pandurević's Appeal Brief, para. 182; Pandurević's Reply Brief, para. 50; Appeal Hearing, AT. 367 (4 Dec 2013). **Pandurević** submits that the contention that Obrenović was required to inform him of any non-routine

1864. **Pandurević** avers that the Trial Chamber's finding that "he did not hesitate to continue to assert his authority with respect to the brigade" during this period is erroneous, as it fails to consider the effect that the lack of substantive communication had on all the indicia of effective control.[5277] Specifically, he submits that the lack of information flow from the brigade to him "fundamentally impaired" his ability to control the actions of his subordinates,[5278] leaving him with no material ability to: (1) make decisions as to the combat operations and general affairs of the brigade; (2) issue orders and ensure the execution thereof; (3) take measures against criminal activity; and (4) report to the higher command on the operations and affairs of the brigade.[5279]

1865. **Pandurević** suggests that the Trial Chamber seems to imply that he had a duty to request information about the Zvornik Brigade's affairs as a corollary of his ability to control. He submits that there is no such general duty and that a superior is bound to inform himself only upon receiving information about the risk of criminal activity.[5280]

1866. The Prosecution responds that the Trial Chamber's finding that **Pandurević** had effective control from 4 July to noon on 15 July 1995 was reasonable.[5281] The Prosecution submits that not every indicia of effective control need to be present, and that in the instant case **Pandurević** had the ability to communicate with and issue orders to his subordinates and did so when necessary.[5282] It contends that **Pandurević** was also in regular contact with the Drina Corps Command and Mladić, and not cut off from the flow of information.[5283]

1867. The Prosecution also responds that **Pandurević** retained effective control while his Deputy Commander and Chief of Staff, Obrenović, deputised for him and was subject to his authority.[5284] It emphasises in this regard that for this period, there was no formal order replacing him as there was in August 1995,[5285] and it was not necessary for **Pandurević** to be consulted on every task undertaken by his subordinates because he delegated authority.[5286] Further, it submits that Obrenović was required to inform **Pandurević** of any non-routine matters and seek orders when necessary.[5287] The Prosecution also contends that **Pandurević** acknowledged that he could assert

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matters and seek orders where necessary is not supported by the Trial Judgement. Pandurević's Reply Brief, para. 56. See also Appeal Hearing, AT. 413-414 (5 Dec 2013).

5277 Pandurević's Appeal Brief, para. 180. **Pandurević** argues that he was in touch with the Zvornik Brigade only twice between 4 to 15 July 1995, and contrasts his case, in which he was effectively out of touch for 11 days, with that of Krstić, who retained effective control while out of contact for one day. Pandurević's Reply Brief, paras 50-52.

5278 Pandurević's Appeal Brief, paras 181, 185.

5279 Pandurević's Appeal Brief, paras 179, 184.

5280 Pandurević's Appeal Brief, para. 183.

5281 Prosecution's Response Brief (Pandurević), paras 103, 111.

5282 Prosecution's Response Brief (Pandurević), paras 104-105. See Appeal Hearing, AT. 391-392 (4 Dec 2013).

5283 Prosecution's Response Brief (Pandurević), para. 105.

5284 Prosecution's Response Brief (Pandurević), paras 106-110; Appeal Hearing, AT. 396 (4 Dec 2013).

5285 Appeal Hearing, AT. 392, 396 (4 Dec 2013).

5286 Prosecution's Response Brief (Pandurević), para. 106.

5287 Prosecution's Response Brief (Pandurević), para. 107. See also Appeal Hearing, AT. 391-393 (4 Dec 2013).

his authority and retained his power to issue orders to his brigade when necessary.[5288] Further, the Prosecution submits that this does not mean that **Pandurević** had a "general duty to inquire".[5289]

1868. At the Appeal Hearing, the Parties were asked to discuss the Trial Chamber's reliance on PW-168's evidence regarding **Pandurević**'s effective control over the Zvornik Brigade between 4 to 15 July 1995.[5290] The Prosecution argues that PW-168's testimony regarding Obrenović's actions during this period, particularly that he was required to inform **Pandurević** about the passage of the ABiH column and [REDACTED], was credible.[5291] **Pandurević**, however, argues that the Trial Chamber improperly assessed the credibility of this evidence because it only relied on the witness's testimony given in examination-in-chief, and not on his responses in cross-examination where he admitted that "Pandurević did not command the units of the Zvornik Brigade which Obrenović commanded".[5292] He contends that PW-168's testimony, that [REDACTED].[5293]

(ii) Analysis

1869. It is not contested that until 4 July 1995 **Pandurević** exercised effective control over his subordinates in the Zvornik Brigade. On that date, he undertook a new assignment commanding TG-1, leading approximately 400 men for the purposes of the *Krivaja*-95 military operation in Srebrenica.[5294] During this period he was regularly in touch with Krstić regarding TG-1's operations and orders, but had very limited contact with the Zvornik Brigade until he and his forces were ordered back to Zvornik by Krstić on 15 July 1995.[5295] Given the fundamental change from **Pandurević**'s regular duties during this period, the Appeals Chamber considers that it would not be reasonable to assume that his material ability to control his subordinates at the Zvornik Brigade remained unaffected. Rather, some concrete indication that he remained able to issue orders and take decisions would be necessary to support such a conclusion.

1870. **Pandurević** limits his challenge to the finding that he possessed *de facto* authority over the Zvornik Brigade during his period of absence. The Trial Chamber's finding in this respect appears to have rested upon a number of different bases. First, with respect to the duration of **Pandurević**'s tenure as commander, the Trial Chamber relied generally upon the control that he had established

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5288 Prosecution's Response Brief (Pandurević), para. 109. See also Appeal Hearing, AT. 392-393, 396-397 (4 Dec 2013). The Prosecution also submits that **Pandurević** maintained the authority to control combat operations regardless of the VRS Main Staff's determination of combat strategy. Prosecution's Response Brief (Pandurević), para. 108.

5289 Prosecution's Response Brief (Pandurević), para. 110.

5290 See *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, and Vinko Pandurević*, Case No. IT-05-88-A, Order for the Preparation of the Appeal Hearing, 6 November 2013, p. 3.

5291 Appeal Hearing, AT. 391, 393-395 (4 Dec 2013).

5292 Appeal Hearing, AT. 412-414 (5 Dec 2013).

5293 Appeal Hearing, AT. 413-414 (5 Dec 2013).

5294 Trial Judgement, paras 1843-1844.

5295 Trial Judgement, paras 1845, 1849-1851, 1853-1856, 1858-1859, 2029, 2031.

over time since his appointment as Zvornik Brigade Commander.[5296] Accepting that this control was indeed established by 4 July 1995, which is not contested by **Pandurević** here, the Appeals Chamber considers that the fact that he exercised *de facto* control prior to his period of absence is not sufficient on its own to demonstrate the continuation of his ability to control during this absence in which he was performing functions wholly unrelated to his normal command. However, it could be considered relevant in combination with other evidence of such continued ability.

1871. Second and expressly challenged by **Pandurević**,[5297] the Trial Chamber relied upon its finding that "while his contact with the Brigade during his absence was very limited and the subject matter discussed marginal, that contact evidences that **[Pandurević]** did not hesitate to continue to assert his authority with respect to the Brigade when he deemed it necessary to do so".[5298] This finding was based on two instances of contact: (1) on 5 July 1995, **Pandurević** contacted the Zvornik Brigade Command to request that missing grenades be supplied to the "tank company";[5299] and (2) on 7 July 1995, he called to request that some teaching materials be photocopied and delivered to the students of the School of Technology.[5300] The Trial Chamber itself qualified the subject matter of these contacts as marginal and found that the restricted contact clearly limited what he knew about the actions of his brigade.[5301] Accordingly, the Appeals Chamber holds that a reasonable trier of fact could have concluded on this basis "that **[Pandurević]** did not hesitate to continue to assert his authority with respect to the Brigade when he deemed it necessary to do so".[5302]

1872. On a related point, **Pandurević** submits that the Trial Chamber failed to consider the effect that the lack of substantive communication had on the indicia of effective control. This contention is without merit. The Trial Chamber expressly considered this in finding that "[his] absence clearly limited what **Pandurević** knew about the actions of the Brigade".[5303] Further, it made a number of findings concerning the established reporting lines in the Zvornik Brigade which support the conclusion that even when **Pandurević** was at the Brigade Command, information generally flowed through Obrenović, leaving the former to exercise his command through the latter.[5304] Specifically with respect to the Military Police, the Trial Chamber found that while **Pandurević**, as the Brigade

5296 Trial Judgement, para. 2028.
5297 See *supra*, para. 1864.
5298 Trial Judgement, para. 2029. See also Trial Judgement, para. 2031.
5299 Trial Judgement, para. 1845.
5300 Trial Judgement, para. 1846.
5301 Trial Judgement, para. 2029.
5302 See Trial Judgement, para. 2029.
5303 Trial Judgement, para. 2029.
5304 Trial Judgement, para. 157. The Trial Chamber found that, in an order dated 21 March 1994, **Pandurević** had reformed the organisation of the Zvornik Brigade with the result that certain units were not under the brigade commander's direct command but reported directly to the Chief of Staff and the assistant commanders or chiefs, who

Commander, was in command of the Military Police, the Commander of the Military Police Company reported directly to the Chief of Staff and **Nikolić** as Chief of Security.[5305] The Trial Chamber sufficiently considered this point and **Pandurević** has failed to show that the lack of communication had an impact on his material ability to exercise effective control.

1873. Third, the Trial Chamber considered the role of Obrenović and his relationship with **Pandurević**. The Trial Chamber found that as Deputy Commander, Obrenović was in command of the Zvornik Brigade during **Pandurević**'s absence, giving orders and receiving commands without either contacting **Pandurević** or being subject to any intervention from him.[5306] In the view of the Trial Chamber, the assumption of command functions by the Deputy Commander was to be expected during a temporary absence of the Brigade Commander[5307] and simply demonstrated that Obrenović was in command at that point in time and responsible for the actions of the troops under his command.[5308] The Trial Chamber concluded that Obrenović and other members of the Zvornik Brigade were still subordinate to **Pandurević** and that it was open to **Pandurević** to retake command at any point, as he did on 15 July 1995.[5309]

1874. The Appeals Chamber considers that **Pandurević** was subject to strict orders from his superior regarding a full-time assignment to command TG-1. This assignment was quite clearly not at **Pandurević**'s discretion, having been ordered by a superior to undertake it. During the assignment, he regularly received updated orders as to the immediate tasks to be carried out, all away from the Zvornik Brigade Command. Further, when he raised his view about operations affecting the Zvornik Brigade, he was expressly told to restrict himself to TG-1 matters.[5310] When he did eventually return to the Zvornik Brigade Command on 15 July 1995, it was pursuant to an explicit order from Krstić.[5311] Given these circumstances, the Appeals Chamber considers that a reasonable trier of fact could not have concluded that **Pandurević** could have retaken command at any point in the particular sense of returning to the Zvornik Brigade Command. This does not preclude a finding that **Pandurević** nonetheless had the material ability to exercise effective control.

1875. In this regard, the Trial Chamber relied on PW-168's testimony that [REDACTED].[5312] Regarding **Pandurević**'s challenge to the credibility of this evidence, the Appeals Chamber recalls

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would report to him. Further, it found that **Pandurević** was still in command of these units, but through the intermediary of the Chief of Staff and the assistant commanders or chiefs, who would report to him.

5305 Trial Judgement, para. 158.
5306 Trial Judgement, para. 2030.
5307 Trial Judgement, para. 2027.
5308 Trial Judgement, para. 2030.
5309 Trial Judgement, paras 2030-2031.
5310 Trial Judgement, para. 1855.
5311 Trial Judgement, para. 1859.

that trial chambers are best placed to assess the credibility of a witness, and further recalls that a trial chamber may reasonably accept some but reject other parts of a witness's testimony.[5313] Moreover, the Appeals Chamber reiterates that it will not lightly disturb a trial chamber's broad discretion in weighing witness evidence.[5314] Accordingly, the Appeals Chamber finds no error in the Trial Chamber's finding that, [REDACTED], PW-168's evidence, given in examination-in-chief, regarding Obrenović's actions in this period was credible. This evidence gives a strong indication that Obrenović, the person exercising command in **Pandurević**'s absence, considered that his *de jure* superior should know about, and provide instructions with respect to, the involvement of Zvornik Brigade members in the murder operation. Notably, it concerns a time when **Pandurević** was dedicated to his TG-1 assignment away from the Zvornik Brigade.

1876. The Appeals Chamber notes that there are two other findings of the Trial Chamber that support the conclusion that **Pandurević** maintained the ability to exercise control over the Zvornik Brigade's operations during his absence. First, Obrenović tried to contact **Pandurević** on 15 July 1995 about the proposal to let the 28th Division pass through their territory, but was unable to reach him because he was on his way to the Zvornik Brigade Command.[5315] Second, **Pandurević** himself acknowledged that he "could have issued orders" to the Zvornik Brigade members he spoke with on the telephone in the morning of 15 July 1995, prior to his return to the Standard Barracks.[5316] While both instances took place following Krstić's order for **Pandurević** to return to the Zvornik area, when viewed in light of PW-168's testimony regarding 13 July 1995, they reasonably support a conclusion that **Pandurević** possessed *de facto* control during his absence.

1877. The Appeals Chamber turns to **Pandurević**'s contention that the Trial Chamber implied a duty for commanders to request information even when they are not on notice of the risk of criminal activity by subordinates. The Trial Chamber expressly found that **Pandurević** would have been under a duty to give orders (such as requesting information) only "had the information he received at that time alerted him to criminal activity on the part of his Brigade".[5317] Further, the Trial Chamber concluded:

> that there is insufficient evidence that prior to his return to the Standard Barracks on 15 July, **Pandurević** knew or had reason to know that his subordinates had committed or were committing crimes in relation to the detention, execution, and burial of the Bosnian Muslim prisoners in the area of Zvornik. The Trial Chamber therefore finds that the knowledge requirement for superior responsibility under Article 7(3) has not been met for the period prior to 12 p.m. on 15 July.[5318]

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5312 Trial Judgement, para. 2030, referring to PW-168, T. 15830-15833 (closed session) (26 Sept 2007).
5313 *Šainović et al.* Appeal Judgement, paras 294, 437. See also Second *Muvunyi* Appeal Judgement, para. 26.
5314 *Šainović et al.* Appeal Judgement, para. 1384.
5315 Trial Judgement, para. 553, referring to PW-168, T. 15873 (closed session) (26 Sept 2007).
5316 Trial Judgement, para. 2031. See also Trial Judgement, paras 1859-1860.
5317 Trial Judgement, para. 2031.
5318 Trial Judgement, para. 2037.

In reaching this conclusion, the Trial Chamber did not require a commander to request information unless he or she is on notice of possible criminal activity, consistent with the Tribunal's jurisprudence.[5319] Thus, the Appeals Chamber is not persuaded by **Pandurević**'s contention.

1878. In view of the above, the Appeals Chamber, Judge Niang dissenting, finds that the Trial Chamber did not err in concluding that the evidence demonstrated that **Pandurević** maintained the ability to exercise control over both Obrenović and the rest of the Zvornik Brigade during his period of absence. Accordingly, **Pandurević** has failed to demonstrate that the Trial Chamber erred in fact in this regard and the Appeals Chamber, Judge Niang dissenting, therefore dismisses his sub-ground of appeal 2.2.

(c) Alleged error in ignoring the evidence of Mladić's interruption of the usual chain of command in the Zvornik Brigade (Sub-ground 2.3)

(i) Arguments of the Parties

1879. **Pandurević** submits that the Trial Chamber erred in fact in finding that: (1) he exercised effective control over men who were performing tasks at the direction of **Beara** and **Popović**;[5320] and (2) there was no evidence to "support a finding that because of the role of the Security Branch and the Superior Command, Pandurević lost *de facto* control over **Nikolić** or any other members of the Zvornik Brigade".[5321]

1880. **Pandurević** submits that the usual command relationships within the Zvornik Brigade, including Obrenović's residual authority, had been interrupted by 15 July 1995 and that **Beara** and **Popović** were issuing orders on Mladić's instructions, with apparent legal authority which was accepted in practice.[5322] He submits that he did not have the authority to countermand Mladić's orders as implemented by high-level officers from the Main Staff and from the Drina Corps, and that no reasonable trier of fact could impute effective control as an automatic consequence of his *de jure* position as Zvornik Brigade Commander combined with his return to the area.[5323] In addition, **Pandurević** submits that he did not have the practical capacity to attempt to usurp Mladić's authority within the limited time frame.[5324] He submits that he had no resources or time at his

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5319 *Bagilishema* Appeal Judgement, para. 28. See *Čelebići* Appeal Judgement, paras 238-239.

5320 Pandurević's Appeal Brief, para. 202. The Appeals Chamber observes that **Nikolić** was also listed in Pandurević's Appeal Brief, seemingly in error. See also Appeal Hearing, AT. 365, 369-370, 373-376 (4 Dec 2013).

5321 Pandurević's Appeal Brief, para. 190, citing Trial Judgement, para. 2033.

5322 Pandurević's Appeal Brief, para. 192; Appeal Hearing, AT. 368-370 (4 Dec 2013). See also Appeal Hearing, AT. 364-367, 371-377 (4 Dec 2013). **Pandurević** replies that the Prosecution fails to address his submission that the chain of command was interrupted by Mladić. Pandurević's Reply Brief, paras 41, 62-63.

5323 Pandurević's Appeal Brief, paras 193-195. **Pandurević** submits that he was not obliged to countermand orders given by his superiors to his subordinates, by-passing his authority. Pandurević's Reply Brief, para. 66.

5324 Pandurević's Appeal Brief, paras 193, 196. See Appeal Hearing, AT. 371-372 (4 Dec 2013). **Pandurević** submits he only had about 30 hours act, upon his arrival.

disposal to engage in an armed confrontation with **Beara** and **Popović** in an attempt to re-subordinate the relatively small number of his troops who were potentially engaging in crimes.[5325]

1881. **Pandurević** further submits that the rules of command responsibility stop short "of compelling a person to use force to prevent non-subordinates from committing crimes".[5326] Accordingly, he submits that the measures to assert control should not require the use of significant force to overcome an ostensibly lawful authority, and be clearly available.[5327] **Pandurević** contends that this approach was adopted in the *Blagojević and Jokić* case and argues that the military situation and the operating command chain in relation to the murder operation was "precisely similar" in Bratunac and Zvornik.[5328]

1882. The Prosecution responds that the Trial Chamber's finding that **Pandurević** had effective control from noon on 15 July 1995 was reasonable.[5329] It contends that **Beara** and **Popović** did not interrupt the chain of command. In its view, **Pandurević** retained *de jure* and *de facto* command over his troops participating in the murder operation, with the exclusive right to command.[5330] While the Zvornik Brigade Security Organ was subordinate to **Popović** along the professional line and to **Pandurević** along the regular command line, the Prosecution contends that the professional support chain did not supersede the regular command chain, and superior security organs could not issue formal orders to their subordinate counterparts. Further, noting that the Zvornik Brigade's involvement in the murder operation went far beyond its Security Organ, the Prosecution submits that **Beara** and **Popović** did not have any direct formal authority over, and did not issue any direct orders to, the Zvornik Brigade.[5331]

1883. The Prosecution further submits that Zvornik Brigade members involved in the murder operation were in fact acting under **Pandurević**'s command from the moment Obrenović [REDACTED] in the evening of 13 July 1995 and issued orders to other Zvornik Brigade units to participate.[5332] The Prosecution contends that, as Zvornik Brigade Commander, **Pandurević** had the

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5325 Pandurević's Appeal Brief, para. 196. **Pandurević** argues that the only thing that might have stopped members of the Bratunac Brigade and the 10th Sabotage Detachment from committing murders was military intervention. Pandurević's Reply Brief, para. 67.

5326 Pandurević's Appeal Brief, para. 200.

5327 Pandurević's Appeal Brief, para. 200.

5328 Pandurević's Appeal Brief, para. 201; Pandurević's Reply Brief, paras 68-69.

5329 Prosecution's Response Brief (Pandurević), para. 122.

5330 Prosecution's Response Brief (Pandurević), paras 113, 115.

5331 Prosecution's Response Brief (Pandurević), paras 115, 117; Appeal Hearing, AT. 404-406 (5 Dec 2013).

5332 Prosecution's Response Brief (Pandurević), para. 116; Appeal Hearing, AT. 397 (4 Dec 2013); AT. 404-405 (5 Dec 2013). The Prosecution argues that **Nikolić** played a co-ordinating role in the murder operation, while in contrast, **Beara** and **Popović** oversaw Zvornik Brigade troops only once the troops' involvement was authorised by the Zvornik Brigade Command. Prosecution's Response Brief (Pandurević), para. 116.

ability and the means to issue orders to prevent his subordinates' crimes.[5333] It submits that he had the obligation to ensure his troops were not engaging in unlawful acts, and that this extended to both countermanding illegal orders issued by Obrenović and his subordinates, and refusing to obey and pass on illegal orders from his superior command.[5334]

1884. The Prosecution submits that armed force would not have been required to prevent his subordinates' crimes and that Zvornik Brigade members comprised a large proportion of the troops involved in the murder operation.[5335] The Prosecution avers that **Pandurević**'s reliance on the *Blagojević and Jokić* Trial Judgement is misplaced.[5336]

1885. In his oral submissions, **Pandurević** further clarifies the importance of the interruption in the chain of command over the Zvornik Brigade.[5337] He asserts that, under the principle of unity of command, a military unit cannot have two commanders at the same time.[5338] In further support of his contention that the chains of command were interrupted, **Pandurević** points to Exhibit 7DP00417 and testimonies of Witnesses Stanišić, Dragutinović, Galić, and Mirko Trivić, which he argues the Trial Chamber ignored when considering whether the chains of command were interrupted.[5339] The Prosecution responds that in so arguing, **Pandurević** "introduced a new ground of appeal".[5340] In the alternative, the Prosecution responds that **Pandurević** is rearguing issues raised at trial by selectively relying on evidence in isolation and that even if the Appeals Chamber reviews the evidence, it does not show that he lost the material ability to take the reasonable and necessary measures to prevent the crime of murder.[5341]

(ii) Analysis

1886. At the outset, the Appeals Chamber must resolve the apparent challenge raised at the Appeal Hearing that **Pandurević** presented a new ground of appeal. The Appeals Chamber observes that in the relevant portions of his written submissions there are no references to Exhibit

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5333 Prosecution's Response Brief (Pandurević), para. 118. See also Appeal Hearing, AT. 404-407 (5 Dec 2013). The Prosecution argues that issuing orders required little time, and time-consuming tasks could have been delegated. Prosecution's Response Brief (Pandurević), para. 118.

5334 Prosecution's Response Brief (Pandurević), para. 118. See also Appeal Hearing, AT. 407-408 (5 Dec 2013).

5335 Prosecution's Response Brief (Pandurević), para. 119. See Appeal Hearing, AT. 403-405 (5 Dec 2013).

5336 Prosecution's Response Brief (Pandurević), para. 121.

5337 Appeal Hearing, AT. 365 (4 Dec 2013), 414-416 (5 Dec 2013).

5338 Appeal Hearing, AT. 365 (4 Dec 2013), 414-416 (5 Dec 2013). The Appeals Chamber notes that **Pandurević** also attempts to "adopt[]" the Judge Kwon Dissent in this ground of appeal. However, because he does not develop this assertion beyond the unity of command argument, the Appeals Chamber dismisses the generic incorporation of the Judge Kwon Dissent. Appeal Hearing, AT. 366-367 (4 Dec 2013).

5339 Appeal Hearing, AT. 372-377 (4 Dec 2013). The Appeals Chamber observes that **Pandurević** mistakenly refers to Exhibit 7DP4117 when discussing Exhibit 7DP00417.

5340 Appeal Hearing, AT. 406 (5 Dec 2013).

5341 Appeal Hearing, AT. 406 (5 Dec 2013).

7DP00417 or the various testimonies **Pandurević** referred to at the Appeal Hearing.[5342] The Appeals Chamber considers that **Pandurević**'s references to specific evidence do not constitute a new argument but are merely elaborations of his argument that Mladić interrupted the chain of command. The Appeals Chamber therefore dismisses the Prosecution's procedural objection.

1887. The Appeals Chamber will next address, as a preliminary matter, **Pandurević**'s submission that the Trial Chamber in effect reversed the burden of proof with respect to the period of 15 July 1995 onwards by first erring in finding that he had effective control over the Zvornik Brigade from 4 to 15 July 1995, and then requiring **Pandurević** to demonstrate that he lost this effective control.

1888. The Appeals Chamber recalls that the burden of proof in respect of charges against an accused before this Tribunal lies with the Prosecution.[5343] With respect to **Pandurević**'s challenge to his *de facto* control, in general the Trial Chamber found that, "[w]hile he had arrived to an undisciplined brigade, which demonstrated a distinct lack of respect for authority, under his command and, certainly by 1995, the Zvornik Brigade was under the clear authority of **Pandurević**".[5344] The Trial Chamber then separately found that **Pandurević** maintained the material ability to exercise control over the Zvornik Brigade during his absence from brigade command from 4 to 15 July 1995. As discussed above, it did not err in making this finding.[5345] Having clearly established that in July 1995 **Pandurević** had the material ability to exercise control over his subordinates, regardless of whether he was present at the brigade command, the Trial Chamber was under no obligation to re-examine the same question for the period of 15 July 1995 onwards immediately following his return. Rather, it was open to the Trial Chamber to consider whether any contra-indicator may have resulted in **Pandurević** losing *de facto* control at that time. Accordingly, **Pandurević** has failed to demonstrate that the Trial Chamber reversed the burden of proof.

1889. Regarding **Pandurević**'s submission that effective control cannot be imputed from *de jure* control and a return to the Zvornik area, the Appeals Chamber reiterates that the Trial Chamber did not impute anything from his return to the Zvornik area. Rather, the Trial Chamber established on the basis of the evidence that **Pandurević** had the material ability to exercise control over his

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[5342] See Pandurević's Appeal Brief, paras 186-202; Pandurević's Reply Brief, paras 62-69. The Appeals Chamber also notes that at the Appeal Hearing, the Prosecution had sufficient time to prepare a response to this argument and responded to it on the merits. Appeal Hearing, AT. 406 (5 Dec 2013). The Appeals Chamber observes that **Pandurević** presented this argument on 4 December 2013 and that the Prosecution responded to it the following day.

[5343] *D. Milošević* Appeal Judgement, para. 60. See also *Limaj et al.* Appeal Judgement, para. 63; *Kamuhanda* Appeal Judgement, para. 167; *Kajelijeli* Appeal Judgement, paras 41-42.

[5344] Trial Judgement, para. 2028 (internal reference omitted).

[5345] See *supra*, paras 1874-1878.

subordinates in July 1995, regardless of whether he was present at the brigade command.[5346] This finding concerned both his *de jure* and *de facto* authority. **Pandurević**'s submission is therefore unpersuasive and dismissed.

1890. The Appeals Chamber now turns to the primary contention that **Pandurević**'s command authority over the Zvornik Brigade was "interrupted" or negated by the exercise of command authority by **Beara** and **Popović** on behalf of Mladić.

1891. The Trial Chamber found that at the relevant time, two parallel chains of instruction were functioning with respect to the Zvornik Brigade Security Organ. **Pandurević** possessed both *de jure* and *de facto* authority over his subordinates, and in particular the Zvornik Brigade Security Organ, along the regular command line.[5347] Pursuant to the professional chain of command, the Zvornik Brigade Security Organ was subordinate to **Popović**, but only with respect to matters associated with security or intelligence.[5348] Security Organ officers such as **Nikolić** therefore had two chains of command which legally co-existed. Notably, the professional chain of command did not supersede the regular command chain.[5349]

1892. The Appeals Chamber turns to **Pandurević**'s contention that his authority along the regular command chain was effectively negated because instructions were issued by **Popović** and **Beara** on the authority of Mladić *via* the professional chain of command.[5350] The Appeals Chamber recalls that to "the extent that more than one person is found to have effective control over the subordinates who have committed a crime, they may all incur criminal responsibility".[5351] Thus, the exercise of effective control by one commander does not necessarily exclude effective control being exercised by a different commander.[5352] Accordingly, **Pandurević**'s contention is dismissed.

1893. In this regard, the Appeals Chamber considers that Exhibit 7DP00417, the Provisional Service Regulations of the VRS, and the specific testimonies **Pandurević** referred to at the Appeal Hearing do not undermine the Trial Chamber's conclusion that he had effective control. **Pandurević** argues that the relevant parts of Exhibit 7DP00417 "might relate to mixed units of soldiers under a commander from an outside institution" like this situation of mixed units under the

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5346 Trial Judgement, paras 2027-2031. See also *supra*, paras 1869-1877.
5347 Trial Judgement, paras 121, 155, 2027, 2033.
5348 Trial Judgement, paras 155, 1091.
5349 Trial Judgement, para. 121.
5350 The Appeals Chamber understands that the regular chain of command concerned activities controlled by the unit of which the Zvornik Brigade Security Organ formed a part, while the professional chain of command concerned professional or counter-intelligence activities controlled centrally by the Security and Intelligence Organs of the Superior Command. See Trial Judgement, para. 155.
5351 *Nizeyimana* Appeal Judgement, para. 201.
5352 *Nizeyimana* Appeal Judgement, paras 201, 346.

command of **Beara** and **Popović**.[5353] The Appeals Chamber observes, however, that **Pandurević** recognises that the regulations only "might" apply in this context and that "army regulations as to ad hoc command structures in mixed or disrupted units are separate and distinct from legal considerations as to an accused's ability to exercise effective control".[5354] Nonetheless, the Appeals Chamber considers, assuming *arguendo* that such evidence demonstrates that **Beara** and **Popović** may have intervened in the chain of command in Zvornik, that this does not demonstrate an error by the Trial Chamber regarding **Pandurević**'s ability to exercise effective control.[5355]

1894. Regarding the testimonies of Witnesses Dragutinović, Galić, and Trivić, the Appeals Chamber observes that **Pandurević** provides no references or arguments related to this evidence and therefore dismisses this aspect of his contention as unsubstantiated. As to Stanišić's evidence, the Appeals Chamber notes that he testified that "[he] suppose[d]" that if a higher commander arrived, that commander would have responsibility.[5356] In this regard, **Pandurević** noted that this testimony was merely Stanišić's "*perception* as to who he was answerable".[5357] Furthermore, Stanišić's testimony that he would be subordinate to a higher command if it arrived, does not lead to the conclusion that **Pandurević** would therefore be stripped of the ability to exercise effective control.[5358] But even assuming that it did, this conclusion does not necessarily apply to, let alone resolve, the issue at hand: whether **Beara**'s and **Popović**'s arrival at Zvornik interrupted the chain of command, and thus demonstrate an error by the Trial Chamber regarding **Pandurević**'s ability to exercise effective control.

1895. Moreover, as to **Pandurević**'s contention that the Trial Chamber "just ignored" this evidence,[5359] the Appeals Chamber recalls that:

> It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[5360]

In light of: (1) the Trial Chamber's extensive discussion regarding **Pandurević**'s superior-subordinate relationship;[5361] (2) the fact that, as **Pandurević** himself noted, Exhibit 7DP00417 "was discussed extensively at trial"; and (3) that the Trial Chamber explicitly reviewed Exhibit

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5353 Appeal Hearing, AT. 374 (4 Dec 2013).
5354 Appeal Hearing, AT. 374, 376 (4 Dec 2013).
5355 See *supra*, para. 1892. See also *Nizeyimana* Appeal Judgement, paras 201, 346.
5356 Ostoja Stanišić, T. 11705 (17 May 2007).
5357 Appeal Hearing, AT. 375 (4 Dec 2013) (emphasis added).
5358 See Appeal Hearing, AT. 375 (4 Dec 2013); *Nizeyimana* Appeal Judgement, paras 201, 346.
5359 Appeal Hearing, AT. 374 (4 Dec 2013).
5360 *Kvočka et al.* Appeal Judgement, para. 23 (internal reference omitted). See *Đorđević* Appeal Judgement, fn. 2527; *Šainović et al.* Appeal Judgement, para. 658.
5361 Trial Judgement, paras 2021-2035.

7DP00417 when laying out the VRS command structure,[5362] the Appeals Chamber considers that there is no indication that the Trial Chamber completely disregarded this evidence.

1896. Accordingly, **Pandurević**'s claim may only be sustained by a demonstration on the facts that his own clearly established *de facto* authority was in practice negated by **Popović** and **Beara**'s instructions. Even assuming *arguendo* that **Popović** and **Beara** were in fact exercising effective control over the Zvornik Brigade by 15 July 1995, **Pandurević** has failed to demonstrate that their exercise of such control negated his own *de facto* authority.[5363]

1897. In related arguments, **Pandurević** submits that he did not have the *de jure* authority to countermand orders from Mladić because he was the latter's subordinate, and that in any event he did not have the practical capacity to usurp Mladić's authority within the necessary time frame. The Appeals Chamber considers that, as Zvornik Brigade Commander with knowledge of the murder operation as of 15 July 1995, **Pandurević** was legally obligated to take the necessary and reasonable measures to prevent further crimes or to punish the perpetrators thereof. He was required to abide by the rules of international humanitarian law when fulfilling his duties.[5364] When faced with manifestly unlawful orders that were issued by his superiors – orders that were invalid domestically and which were in violation of the laws of war – he was legally obligated to ensure that international humanitarian law was applied.[5365] In this regard, it was wrong for **Pandurević** to do nothing.[5366] Contrary to his submission that taking action would have required the use of force, there is evidence that it was possible to refuse to participate in the murder operation without having to resort to armed confrontation, even for a commander.[5367] As commander, it was clearly within

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5362 Appeal Hearing, AT. 374 (4 Dec 2013); Trial Judgement, para. 106 & fn. 254.

5363 See also *supra*, paras 1874-1878.

5364 Ex. P00409, "Regulations on the Application of the Rules of International Law of War in the Armed Forces of the SFRY", Article 3 ("The commanders of units [...] shall be responsible for the application of the international laws of war. The officer in charge shall institute proceedings against persons who violate the international laws of war for the pronouncement of the penalties prescribed by the law."); Ex. P00416, "Order on the Application of the Rules of the International Law of War in the Army of the Serbian Republic of Bosnia and Herzegovina", Article 1 ("In an armed conflict, the Army of the Serbian Republic of Bosnia and Herzegovina [...] shall apply and respect the rules of the international law of war"); Ex. 1D01289, "Provisional Service Regulations of the Army of the Serbian Republic", Article 3 ("members of the Army shall abide by the provisions of international humanitarian law"); Ex. 7D00717, "Rules regarding Brigade Commanders' Authority", Article 10 ("The commander is responsible for the overall situation in the brigade or regiment, for the *correct and lawful work* of the command organs") (emphasis added).

5365 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 154: Every combatant has a duty to disobey a manifestly unlawful order.

5366 See also *Trial of Wilhelm von Leeb et al.*, Judgement of 28 October 1948, United States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals, Vol. XII, p. 75 (an officer is required to do more than stand by, while his subordinates execute a criminal order of his superiors which he knows is criminal).

5367 In particular, there is evidence that on 15 July 1995, **Beara** complained to both Živanović and Krstić that Lieutenant Colonel Radomir Furtula ignored a commander's order, and informed Krstić that the MUP would not do anything (Trial Judgement, paras 1281-1282, fn. 327), and that Borovčanin stated at a meeting at Zvornik Brigade Command on 15 July 1995 that he did not want the MUP units he commanded to participate in guarding prisoners (Trial Judgement, para. 1464). See also Trial Judgement, paras 421 (three individuals refuse an order to execute prisoners), 488 (soldiers refused to shoot a boy), 540 (eight members of the 10th Sabotage Detachment refuse an order to go to the Pilica Cultural Centre in order to execute Bosnian Muslims detained there).

his ability to issue orders to his own brigade. Accordingly, **Pandurević** could have issued orders to the Zvornik Brigade troops to refrain from participating in the murder operation, as well as countermand any illegal orders issued by Obrenović or any other subordinate in this regard.

1898. Contrary to **Pandurević**'s suggestion,[5368] there is no minimum number of subordinates that are required to be involved in the commission of crimes in order to trigger a commander's responsibility. Further, the fact that crimes may be substantially beyond prevention does not relieve a commander of his duty to prevent those which may still be prevented. While **Pandurević** would indeed have needed to act quickly, issuing orders requires little time and responsibility for this could have been delegated if necessary. Finally, reliance on the *Blagojević and Jokić* Trial Judgement in this case is not apt. The case is distinguishable in a number of ways.[5369] The Appeals Chamber therefore considers that **Pandurević** issuing orders to the Zvornik Brigade to refrain from participating in the murder operation would have been reasonable under the circumstances.

1899. Accordingly, the Appeals Chamber, Judge Niang dissenting, concludes that the Trial Chamber did not err in finding that **Pandurević** exercised effective control over men who were performing tasks at the direction of **Beara** and **Popović**. The Appeals Chamber, Judge Niang dissenting, thus dismisses **Pandurević**'s sub-ground of appeal 2.3.

### 3. The Prosecution's appeal (Ground 2)

#### (a) Alleged error in failing to find Pandurević guilty of failing to prevent persecution through cruel and inhumane treatment (Sub-ground 2(d))

1900. **Pandurević** was charged with persecution through, *inter alia*, the cruel and inhumane treatment of Bosnian Muslim civilians in detention facilities in Zvornik under Article 7(3) of the Statute.[5370] In addressing **Pandurević**'s Article 7(3) responsibility for persecution, however, the Trial Chamber only considered persecution through the underlying act of murder.[5371] The result was that **Pandurević** was acquitted of superior responsibility for persecution through the cruel and inhumane treatment of Bosnian Muslim prisoners detained, prior to their executions, including at the Ročević and Kula Schools in the Zvornik area, on 15 and 16 July 1995.[5372]

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5368 Pandurević's Reply Brief, para. 67 ("The murders which had yet to be committed [...] were substantially beyond prevention and/or involved minimal participation of the Brigade".).

5369 For example, in the *Blagojević and Jokić* case, partcipation was by a multi-unit task force under a direct order of the Drina Corps, thus skipping the intermediate level of brigade command. See *Blagojević and Jokić* Trial Judgement, paras 411, 413, 415, 795.

5370 Indictment, para. 48(b). See also Prosecution's Final Brief, para. 2882.

5371 Trial Judgement, para. 2100. Since the Trial Chamber found **Pandurević** responsible pursuant to Article 7(1) of the Statute for persecution with respect to forcible transfer, it found it unnecessary to consider his responsibility under Article 7(3) of the Statute.

5372 Trial Judgement, Disposition, Pandurević section.

(i) Arguments of the Parties

1901. The Prosecution submits that the Trial Chamber erred in law by failing to adjudicate or provide a reasoned opinion regarding **Pandurević**'s responsibility under Article 7(3) of the Statute for failing to prevent the Zvornik Brigade members' participation, from noon on 15 July through 16 July 1995, in persecution through cruel and inhumane treatment.[5373] It contends that the Trial Chamber should have considered whether the involvement of Zvornik Brigade members in guarding the Bosnian Muslim prisoners at and transporting them from the Ročević and Kula Schools on 15 and 16 July 1995 amounted to participation in persecution through cruel and inhumane treatment, instead it did so only in the context of aiding and abetting murder.[5374]

1902. The Prosecution argues that the evidence established that **Pandurević** failed to prevent his subordinates from participating in persecution through the cruel and inhumane treatment of the Bosnian Muslim prisoners on 15 and 16 July 1995, even though he knew or had reason to know they might commit this crime.[5375] In the Prosecution's contention, the guarding of Bosnian Muslim prisoners "had a substantial effect, perpetuating the intolerable detention conditions and the commission of cruel and inhumane treatment", and also meant that **Pandurević**'s subordinates were aware of the deplorable conditions of detention and the abuse of the prisoners.[5376]

1903. The Prosecution further argues that the intention to discriminate against the Bosnian Muslim prisoners was manifest from the circumstances surrounding the infliction of the cruel treatment and the general discriminatory context of the detention, and that the Zvornik Brigade members involved in guarding the prisoners were aware of their single ethnicity, which **Pandurević** became aware of from noon on 15 July 1995.[5377] The Prosecution contends that **Pandurević** had reason to know that his subordinates were involved in the cruel treatment of the prisoners before their executions.[5378] In its submission, by noon on 15 July 1995, **Pandurević** therefore had sufficiently alarming information that his subordinates might participate in persecution through the cruel and inhumane treatment, but he took no steps to prevent or stop their participation in the detention, transport, and execution of those prisoners in the afternoon of 15 July or on 16 July 1995.[5379]

1904. Alternatively, the Prosecution submits that the Trial Chamber erred in fact, as no reasonable trial chamber could have concluded that **Pandurević** was not responsible for failing to prevent the

5373 Prosecution's Appeal Brief, paras 142-144. See Prosecution's Reply Brief, para. 76.
5374 Prosecution's Appeal Brief, paras 143-144.
5375 Prosecution's Appeal Brief, paras 145-148. See also Appeal Hearing, AT. 503 (6 Dec 2013).
5376 Prosecution's Appeal Brief, para. 149. See also Prosecution's Reply Brief, para. 77.
5377 Prosecution's Appeal Brief, paras 150-151.
5378 Prosecution's Appeal Brief, para. 152.

participation of his subordinates in persecution through cruel and inhumane treatment.[5380] The Prosecution requests the Appeals Chamber to correct the alleged errors and convict **Pandurević** under Article 7(3) of the Statute for persecution as a crime against humanity through the cruel and inhumane treatment of 1,500 to 2,500 Bosnian Muslim prisoners at the Ročević and Kula Schools, and increase his sentence accordingly.[5381]

1905. **Pandurević** responds that the Trial Chamber did not err in law and reasonably found that guarding and transporting prisoners did not necessarily have a substantial effect on the conditions of detention. In his submission, since the Trial Chamber found that members of the Zvornik Brigade did not contribute to or participate in perpetuating the conditions of detention of the Bosnian Muslim prisoners, the Trial Chamber was not required to consider **Pandurević**'s *mens rea* pursuant to Article 7(3) of the Statute.[5382] **Pandurević** also submits that the Prosecution failed to demonstrate that no reasonable trial chamber could have acquitted him of failing to prevent persecution through cruel and inhumane treatment.[5383] He argues that he had no information about the conditions of detention at the Ročević and Kula Schools, nor did he know that Zvornik Brigade members were contributing to such conditions.[5384] **Pandurević** further contends that the Prosecution fails to establish any "*specific* circumstance" that, in addition to the general discriminatory context of the Main Staff's operation, would have amounted to sufficiently alarming information to trigger superior responsibility for the crime of persecution.[5385] He argues that since the Trial Chamber found that he had no reason to know that his subordinates would commit persecution through *murder* – despite finding that he had reason to know of underlying act of murder – it follows that it could not infer his knowledge of persecution through cruel and inhumane treatment.[5386]

(ii) Analysis

1906. The Appeals Chamber recalls that a trial chamber is required to make findings on those facts which are essential to the determination of guilt on a particular count.[5387] While it need not articulate every step of its reasoning, a trial chamber must indicate clearly the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual.[5388] The absence of any specific findings by the Trial Chamber on the question of **Pandurević**'s liability

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5379 Prosecution's Appeal Brief, para. 153. The Prosecution also argues that it is not necessary to demonstrate that **Pandurević** knew the exact details of the crimes, and that his lack of inquiry into such crimes demonstrates that his ignorance was wilful and that he should not benefit from it. Prosecution's Reply Brief, para. 77.

5380 Prosecution's Appeal Brief, para. 154.

5381 Prosecution's Appeal Brief, para. 155.

5382 Pandurević's Response Brief, para. 240.

5383 Pandurević's Response Brief, paras 241, 244.

5384 Pandurević's Response Brief, para. 242.

5385 Pandurević's Response Brief, para. 242 (emphasis in original).

5386 Pandurević's Response Brief, para. 243.

5387 *Hadžihasanović and Kubura* Appeal Judgement, para. 13.

for failure to prevent the crime of persecution through the Zvornik Brigade members' cruel and inhumane treatment of Bosnian Muslim prisoners necessitates the conclusion that the Trial Chamber failed to provide a reasoned decision in writing.[5389] Having identified an error of law, the Appeals Chamber will now review the relevant factual findings of the Trial Chamber, and when necessary the evidence in the trial record.[5390]

1907. The Trial Chamber found that, in the period between 13 July and the morning of 16 July 1995, members of the Zvornik Brigade participated in guarding the detained Bosnian Muslim prisoners and in transporting the prisoners to execution sites in the area of Zvornik. This participation specifically included guarding prisoners held at the Grbavci School in Orahovac, the Kula School, and the Ročević School.[5391] The prisoners were packed into the detention centres and had little, if any, food, water, or medical treatment.[5392] One prisoner was compelled to drink his own urine.[5393] The lack of toilet facilities meant that some prisoners had to relieve themselves where they stood.[5394] The prisoners were subjected to physical and verbal abuse, and could often hear screams, moans, and bursts of gunfire.[5395] Based on these findings, the Trial Chamber was satisfied that the Bosnian Muslim men detained in Zvornik, among other places, were subjected to cruel and inhumane conditions, constituting "a serious attack on their human dignity" and inflicting on them "serious mental and physical suffering and injury".[5396] In light of the established factual findings, the Appeals Chamber is also convinced that the conditions which the Bosnian Muslim prisoners were subjected to in detention sites in Zvornik amounted to the infliction of cruel and inhumane treatment.

1908. Furthermore, the Trial Chamber found that members of the Zvornik Brigade participated in the cruel and inhumane treatment described above by guarding the prisoners to ensure that they did not escape.[5397] The Appeals Chamber also considers that, by loading prisoners onto trucks, sometimes together with the dead bodies of other Bosnian Muslims, to be taken for execution, Zvornik Brigade members inflicted cruel and inhumane treatment on the men and boys.[5398] The severe mental harm perpetrated upon these persons, whose fate must have been obvious to them, is evident in the Trial Chamber's finding that the prisoners were often blindfolded and their hands were tied, and the evidence of a participating Zvornik Brigade member that "[t]hey were half dead,

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5388 *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Čelebići* Appeal Judgement, para. 481.
5389 Article 23(2) of the Statute; Rule 98 *ter*(C) of the Rules; *Kordić and Čerkez* Appeal Judgement, paras 383-385. *Cf. Bizimungu* Appeal Judgement, para. 19.
5390 See *supra*, para. 18.
5391 Trial Judgement, para. 2017. See Trial Judgement, paras 476-478, 481, 483, 514-520, 522, 527-528, 531, 534.
5392 Trial Judgement, para. 993. See Trial Judgement, paras 478, 495-496, 518, 529. See also *supra*, para. 1847.
5393 Trial Judgement, fn. 1799.
5394 Trial Judgement, paras 478, 496 & fn. 1805, 529.
5395 Trial Judgement, paras 480, 495, 497, 529.
5396 Trial Judgement, para. 994.
5397 Trial Judgement, paras 515-516, 518, 528 & fns 531, 534, 1941.

exhausted, without water or bread. Nobody – nobody begged for their lives."[5399] The Appeals Chamber notes the finding of the Trial Chamber that Zvornik Brigade members had "significant involvement" in the events at the Ročević School.[5400] It further notes the findings of the Trial Chamber that the guarding of the prisoners in the schools of the Zvornik area by members of the Zvornik Brigade formed part of the *modus operandi* of the Serb campaign in Srebrenica aimed at eliminating the Bosnian Muslim males of the enclave.[5401] In the circumstances of this case, the Appeals Chamber finds that the involvement of Zvornik Brigade members in the guarding of the Bosnian Muslim prisoners in the schools in the Zvornik area as well as their participation in loading the prisoners onto trucks to be taken for execution substantially contributed to the infliction and perpetuation of the appalling conditions of detention that amounted to cruel and inhumane treatment.

1909. All of the victims of cruel and inhumane treatment in the detention sites in Zvornik were Bosnian Muslims.[5402] The only reason they were subjected to this treatment was because they belonged to the Muslim population of Srebrenica.[5403] The detentions formed part of a general discriminatory attack on the Bosnian Muslim population of Srebrenica and were a prelude to the systematic murder of the prisoners.[5404] The evidence demonstrates that those Zvornik Brigade members present at the schools were aware of the fact that all the prisoners were Bosnian Muslims and of the cruel and inhumane treatment to which they were subjected.[5405] Like the Trial Chamber, the Appeals Chamber is thus satisfied that the infliction of such treatment was carried out with the intention to discriminate against the Bosnian Muslims on political, racial, or religious grounds,[5406] or with an awareness of the discriminatory context in which the crime was to be committed.

1910. The Appeals Chamber recalls that the "reason to know" standard pursuant to Article 7(3) of the Statute is met if the superior possessed information sufficiently alarming to justify further inquiry.[5407] This information does not need to provide specific details about the unlawful acts committed or about to be committed but may consist of general information which would put a superior on notice of possible unlawful acts by his subordinates.[5408]

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5398 See Trial Judgement, paras 516-518, 531, 534.
5399 Trial Judgement, paras 518, 534.
5400 Trial Judgement, para. 522.
5401 See Trial Judgement, paras 1063, 1075, 2017, 2043.
5402 Trial Judgement, paras 993-995, 1191, 1329, 1424, 1592.
5403 See Trial Judgement, para. 995.
5404 Trial Judgement, paras 1004, 1960. See Trial Judgement, paras 1861, 1882, 1948, 1959, 2037, 2040.
5405 Trial Judgement, paras 507, 511, 518, 527, 529, 531; PW-142, T. 6462 (29 Jan 2007); Slavko Perić, T. 11375-11376 (11 May 2007).
5406 See Trial Judgement, para. 995.
5407 *Strugar* Appeal Judgement, para. 298.
5408 *Krnojelac* Appeal Judgement, para. 154; *Čelebići* Appeal Judgement, para. 238.

1911. The findings of the Trial Chamber establish that as of noon on 15 July 1995 following his conversation with Obrenović, **Pandurević** knew that Zvornik Brigade members were involved in the guarding, execution, and burial of large numbers of Bosnian Muslim prisoners who had been brought into the Zvornik area.[5409] He was specifically informed that there were "enormous problems" in carrying out these tasks.[5410] Soon afterwards, at 2:00 p.m. on 15 July 1995, **Pandurević** received further specific information from Grujić that the prisoners were being kept in the schools in the area.[5411] In response to this news, he assured Grujić that he would check on the situation of the prisoners in the area.[5412] **Pandurević**'s knowledge of the involvement of members of the Zvornik Brigade in the guarding of the prisoners in schools in the Zvornik area is confirmed by the 15 July Report, which makes specific reference to the "additional burden for [the Zvornik Brigade of] [...] the large number of prisoners distributed throughout schools in the brigade area".[5413]

1912. While **Pandurević** may not have had detailed information about the conditions of detention at the schools, the Appeals Chamber recalls that under superior responsibility, it need only be established that a superior had general information which would put him on notice of possible unlawful acts by his subordinates.[5414] Given his awareness of the large numbers of Bosnian Muslim prisoners being detained in the schools and guarded by members of the Zvornik Brigade as well as the crucial fact that the detention of the prisoners was a precursor to their planned murder,[5415] the Appeals Chamber finds that **Pandurević** had sufficiently alarming information to justify further inquiry into the conditions in which the prisoners were being kept and the involvement of his subordinates in perpetuating such conditions. At this point in time, **Pandurević** had reason to know of the risk that his subordinates might participate in the cruel and inhumane treatment of the prisoners through their role in guarding them.

1913. The findings of the Trial Chamber demonstrate that **Pandurević** was personally aware of the overall discriminatory design of the Serb campaign in Srebrenica, since he: (1) was aware of the indiscriminate attack on the Bosnian Muslim population of the Srebrenica enclave; (2) knew of the discriminatory intent with which the forcible transfer was committed; (3) knew that by participating in the attack on the enclave, he was assisting in the commission of persecution; and (4) had sufficient information from which to infer the discriminatory intent on the part of other members of

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5409 Trial Judgement, paras 1861, 1959-1960, 2037-2038.
5410 Trial Judgement, para. 1861.
5411 Trial Judgement, para. 1865.
5412 Trial Judgement, para. 1865.
5413 Ex. P00329 "Zvornik Brigade Daily Interim Combat Report signed by Vinko Pandurević, 15 July 1995". See Trial Judgement, paras 1948-1949.
5414 See *supra*, para. 1910.
5415 Trial Judgement, paras 1960, 2037.

the VRS against Bosnian Muslims, including **Popović**, whom he was specifically told had organised the transportation of the prisoners from Bratunac to Zvornik for execution.[5416] The Appeals Chamber finds that in light of his personal awareness of such a persecutory plan against the Bosnian Muslims in Srebrenica, from the time he was informed at noon on 15 July 1995 about the involvement of his subordinates in guarding the prisoners prior to their execution, he had sufficient notice of the risk that Bosnian Muslim males might be subjected to cruel and inhumane treatment during their detention by his subordinates because of their political, racial, or religious affiliation. In addition, **Pandurević**'s knowledge that the source of the orders related to the detention of the prisoners was Mladić and that they were implemented through **Popović**, together with his awareness of the pre-execution purpose of the detention, satisfies the Appeals Chamber that he knew of specific circumstances in addition to the general discriminatory context of the Main Staff's operation that amounted to sufficiently alarming information to trigger superior responsibility for the crime of persecution.[5417]

1914. The Appeals Chamber notes that **Pandurević**, being physically present at the Standard Barracks on 15 and 16 July 1995, had the material ability to order his subordinates not to participate in guarding the Bosnian Muslim prisoners, or at the very least to inquire into the conditions at the schools where the prisoners were being detained so as to address the risk that his subordinates might be participating in the cruel and inhumane treatment of the prisoners.[5418] The evidence indicates that the prisoners detained at the Ročević School were not transported to the execution site at Kozluk until the late afternoon of 15 July 1995.[5419] This gave **Pandurević** a few hours in which he might have made the relevant inquiries or issued orders. In this time, **Pandurević** made only one attempt to inquire: asking Ljubo Bojanović, an officer from the Zvornik Brigade Operations Organ who arrived at the Kitovnice IKM later that day, if he had information about the situation of the prisoners who were brought to the Zvornik area.[5420] The Appeals Chamber considers that based on the alarming information **Pandurević** received from Obrenović and Grujić,[5421] merely asking Bojanović if he had any information is insufficient to discharge his duty to investigate under Article 7(3) of the Statute.

1915. Those prisoners detained at the Kula School continued to be guarded by Zvornik Brigade members throughout the night of 15 July 1995, and were not moved to the execution site at the Branjevo Military Farm until around 10:00 a.m. the next morning.[5422] **Pandurević** therefore had

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5416 Trial Judgement, paras 2088, 2098. See also Trial Judgement, paras 1861, 1960; *supra*, paras 1908-1909.
5417 See *Krnojelac* Appeal Judgement, para. 184.
5418 Trial Judgement, para. 2050.
5419 Trial Judgement, paras 516-518.
5420 Trial Judgement, paras 1866 & fn. 5598, 2045-2046.
5421 See *supra*, para. 1911. See also Trial Judgement, paras 1866, 2045.
5422 Trial Judgement, paras 531-536.

ample time and opportunity to initiate action to prevent his subordinates stationed at the Kula School from participating in the persecution of the Bosnian Muslim prisoners through cruel and inhumane treatment. However, **Pandurević** took no such action.[5423]

1916. In light of the foregoing, the Appeals Chamber, Judge Niang dissenting, finds beyond reasonable doubt that **Pandurević** failed to take the necessary and reasonable measures to prevent his subordinates from participating in persecution through cruel and inhumane treatment from noon on 15 July to 16 July 1995 at the Ročević and Kula Schools, as required to discharge his duty under Article 7(3) of the Statute. Thus, the Appeals Chamber, Judge Niang dissenting, grants the Prosecution's sub-ground of appeal 2(d). **Pandurević**'s acquittal on this charge is hereby reversed and the Appeals Chamber, Judge Pocar dissenting, enters a new conviction in respect of Count 6.

(b) Alleged error regarding the Trial Chamber's finding on failure to punish the criminal acts of Zvornik Brigade members (Sub-ground 2(e))

1917. The Trial Chamber found that the Prosecution failed to prove beyond reasonable doubt that **Pandurević** failed to take the necessary and reasonable measures to punish his subordinates as required under Article 7(3) of the Statute.[5424] In this respect, the Trial Chamber emphasised that "in these very particular and extraordinary circumstances, there were no other reasonable means available to **Pandurević** and within his material ability to pursue punishment for the crimes committed in the murder operation".[5425]

(i) Arguments of the Parties

1918. The Prosecution alleges that the Trial Chamber erred in law in its application of the "necessary and reasonable measures to punish" standard under Article 7(3) of the Statute.[5426] It contends that instead of examining what **Pandurević** could and should have done in terms of initiating an investigation of the crimes, the Trial Chamber focused on the irrelevant factor of the "subsequent potential effectiveness" of the bodies to which he could have reported – the Brigade Crime Prevention Service ("CPS") and the Military Prosecutor – and prejudged their lack of independence.[5427] The Prosecution argues that the effectiveness of any resulting investigation would only be relevant to determining whether **Pandurević** was required to do more to discharge his duty

5423 Trial Judgement, paras 2044-2046, 2048, 2050-2051.
5424 Trial Judgement, para. 2065.
5425 Trial Judgement, para. 2064.
5426 Prosecution's Appeal Brief, paras 159, 165-166. See Prosecution's Appeal Brief, paras 160-161, 163.
5427 Prosecution's Appeal Brief, para. 165; Appeal Hearing, AT. 505-507 (6 Dec 2013). The Prosecution argues that this amounts to an implicit legal finding that a superior does not have to initiate steps within his or her material ability if the superior is unable to ensure that punishment ultimately occurs. Prosecution's Notice of Appeal, para. 25.

to punish; it could not be considered as a reason for him to avoid taking steps.[5428] The Prosecution submits that the failure to punish is a distinct crime from the failure to prevent,[5429] and that the correct application of the legal standard would result in **Pandurević**'s conviction for failing to punish the crimes committed by his subordinates from 13 to 17 July 1995.[5430]

1919. Alternatively, the Prosecution alleges that the Trial Chamber erred in fact since no reasonable trial chamber could have found that there were no necessary and reasonable measures available to **Pandurević**, and that this error amounts to a miscarriage of justice.[5431] It argues that as the Zvornik Brigade Commander, **Pandurević** had many necessary and reasonable measures at his disposal to investigate the crimes, preserve the crime scenes, discipline and punish his subordinates, report to competent authorities, and express disapproval of the crimes.[5432] The Prosecution contends that **Pandurević**'s actions, including his interim combat reports of 15 and 18 July 1995[5433] ("Two Interim Combat Reports") and his conversation with Krstić on 27 July 1995, were insufficient to satisfy his duty to punish.[5434] It submits that the Trial Chamber's reasoning is inconsistent since it applied the obligation to make genuine inquiries to Borovčanin, but failed to apply this factor to **Pandurević**.[5435] In terms of **Pandurević**'s reporting options, the Prosecution alleges that the Trial Chamber erred in finding that reporting to the Military Prosecutor was not a "realistic option".[5436] It also argues that **Pandurević** could have reported to the MUP and was in fact legally obliged to do so,[5437] or should have reported the crimes to the Tribunal, since it was operational at the time.[5438]

1920. The Prosecution requests the Appeals Chamber to correct the alleged errors and convict **Pandurević** under Article 7(3) of the Statute for: extermination as a crime against humanity or, alternatively, murder as a crime against humanity; persecution as a crime against humanity through murder and cruel and inhumane treatment; and murder as a violation of the laws or customs of war; and increase his sentence accordingly.[5439]

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5428 Prosecution's Appeal Brief, paras 165-166.
5429 Prosecution's Appeal Brief, paras 185-186.
5430 Prosecution's Appeal Brief, paras 167-168.
5431 Prosecution's Appeal Brief, paras 159, 169, 171, 183-184. See also Appeal Hearing, AT. 507 (6 Dec 2013).
5432 Prosecution's Appeal Brief, paras 159, 170-174, 176-177; Prosecution's Reply Brief, para. 82. The Prosecution argues that disciplinary measures could have been imposed in lieu of court-martial, or pending criminal investigation or punishment, thereby recording **Pandurević**'s disapproval. Prosecution's Reply Brief, paras 83-84.
5433 Ex. P00329, "Zvornik Brigade Interim Combat Report, signed by Vinko Pandurevic, 15 July 1995"; Ex. P00334, "Zvornik Brigade Interim Combat Report, signed by Vinko Pandurević, 18 July 1995".
5434 Prosecution's Appeal Brief, paras 170-171, 182; Appeal Hearing, AT. 507-508 (6 Dec 2013).
5435 Prosecution's Appeal Brief, para. 175, referring to Trial Judgement, paras 1574-1575.
5436 Prosecution's Appeal Brief, para. 171, referring to Trial Judgement, para. 2057. See Prosecution's Reply Brief, para. 86; Appeal Hearing, AT. 506 (6 Dec 2013).
5437 Prosecution's Appeal Brief, para. 179; Prosecution's Reply Brief, para. 85. See also Appeal Hearing, AT. 507 (6 Dec 2013).
5438 Prosecution's Appeal Brief, para. 180.
5439 Prosecution's Appeal Brief, paras 185-186.

1921. **Pandurević** responds that the Trial Chamber applied the correct legal standard,[5440] and properly concluded that he discharged his duty by drafting combat reports and raising the issue with Krstić.[5441] In his contention, the Trial Chamber followed the Tribunal's jurisprudence, which establishes that the assessment of what constitutes necessary and reasonable measures is done on the basis of the particular circumstances, including a consideration of the actions of others.[5442]

1922. **Pandurević** further responds that the Trial Chamber did not err in fact in assessing the necessary and reasonable measures available to him.[5443] He argues that the Prosecution ignores the finding of the Trial Chamber that he did personally undertake some investigative measures about the crimes committed by his subordinates by requesting information about the situation from Obrenović and Jokić.[5444] **Pandurević** submits that the Prosecution speculates about the options available to him and fails to explain why it was unreasonable for the Trial Chamber to find that reporting to the Military Prosecutor was not a realistic option or that it was normally **Nikolić** who ordered the CPS to conduct investigations.[5445] While **Pandurević** could have taken the step of sealing off and preserving the crime sites within his area of responsibility, he argues that such a step was not a practical one in the circumstances at the time since there was no realistic likelihood of a criminal investigation taking place given the involvement of the Main Staff in the commission of the crimes. **Pandurević** submits that, in any case, this argument was never raised at trial which bars the Prosecution from raising it on appeal.[5446]

1923. **Pandurević** submits that disciplinary measures were not available to him since the relevant crimes would have required referral to a court-martial and it was not possible under the law to have simultaneous disciplinary proceedings.[5447] In addition, he argues that the Prosecution has not shown why it was unreasonable for the Trial Chamber to find that his failure to take such measures did not amount to a breach of the duty to punish.[5448] With respect to the Prosecution's arguments as to **Pandurević**'s options to report crimes to the MUP or to the Tribunal, **Pandurević** responds that these are entirely new arguments and are unsubstantiated.[5449] He submits that the Prosecution examines the Trial Chamber's findings on the Two Interim Combat Reports out of context and without regard to the careful analysis of the Trial Chamber in deciding that he "resorted to the only

5440 Pandurević's Response Brief, paras 246, 250.
5441 Appeal Hearing, AT. 576, 578 (6 Dec 2013).
5442 Pandurević's Response Brief, paras 248-249, 253, 263; Appeal Hearing, AT. 576-577 (6 Dec 2013).
5443 Pandurević's Response Brief, para. 251; Appeal Hearing, AT. 576-578 (6 Dec 2013).
5444 Pandurević's Response Brief, para. 255, referring to Trial Judgement, para. 2059.
5445 Pandurević's Response Brief, paras 256-258.
5446 Pandurević's Response Brief, paras 259-260.
5447 Pandurević's Response Brief, para. 261.
5448 Pandurević's Response Brief, paras 262-263.
5449 Pandurević's Response Brief, paras 264-266. See also Appeal Hearing, AT. 578 (6 Dec 2013).

realistic option at hand in the circumstances prevailing at the time".[5450] **Pandurević** also points to the observation of the Appeals Chamber in the *Krstić* case (on Krstić's limited scope for superior responsibility as he would have had to report the crimes to the very people who ordered them), which in his submission, suggests that a similar conclusion should be reached in regard to him.[5451]

1924. The Prosecution replies that the only exception to the requirement of taking every necessary and reasonable measure to prevent or punish, in accordance with the circumstances surrounding a superior's powers, is impossibility.[5452] It argues that this is not inconsistent with the *Krstić* case.[5453] The Prosecution submits that, while the Trial Chamber did find that **Pandurević** took some measures to investigate, it failed to consider what options he had available to ensure the investigation was thorough.[5454] It also avers that, while it was **Nikolić** who normally ordered the CPS to conduct an investigation, he did so only subject to **Pandurević**'s orders and authority.[5455] Finally, the Prosecution replies that **Pandurević** had notice of its case on his duty to punish.[5456]

(ii) Analysis

1925. The Appeals Chamber notes, at the outset, that the Trial Chamber did not err in its express articulations of the legal standard for liability for failing to fulfil the duty to punish under Article 7(3) of the Statute.[5457] As to whether the Trial Chamber erred in any implicit legal findings made in its interpretation of what constitutes "necessary and reasonable measures" to punish, the Appeals Chamber observes the reasoning of the Trial Chamber that the "normal avenues open to a Commander were effectively unrealistic in [**Pandurević**'s] situation" because of the involvement of his superiors in the planning, ordering, and execution of the crimes committed by his subordinates.[5458] In particular, the likely interference of the Main Staff in the proper functioning of the Military Prosecutor in relation to any potential proceedings against **Pandurević**'s subordinates for their role in the crimes rendered the option of reporting to the Military Prosecutor – either directly or through the Brigade's Security Organ – not realistic or practical for **Pandurević** in the circumstances.[5459] The Trial Chamber further held that:

> there is no evidence of an alternative independent avenue being open to him. Despite these obvious limitations, **Pandurević** did take some measures to address the crimes that had occurred through his Interim Combat Reports of 15 and 18 July and by raising the issue with Krstić in

5450 Pandurević's Response Brief, para. 267.
5451 Pandurević's Response Brief, paras 267-268, referring to *Krstić* Appeal Judgement, fn. 250. See Pandurević's Response Brief, paras 248-249.
5452 Prosecution's Reply Brief, para. 78.
5453 Prosecution's Reply Brief, para. 78 & fn. 203. See also Prosecution's Reply Brief, para. 87.
5454 Prosecution's Reply Brief, para. 80.
5455 Prosecution's Reply Brief, para. 81.
5456 Prosecution's Reply Brief, para. 88.
5457 See Trial Judgement, paras 1043-1046, 2053, 2058.
5458 Trial Judgement, para. 2063.
5459 Trial Judgement, paras 2056-2057.

> person on 27 July. In most instances, such action would be insufficient to fulfil the obligation on a superior to punish. However, the Trial Chamber is satisfied that, in these very particular and extraordinary circumstances, there were no other reasonable means available to **Pandurević** and within his material ability to pursue punishment for the crimes committed in the murder operation. Furthermore, there is no evidence before the Trial Chamber that this situation significantly changed later during **Pandurevic**'s remaining time as Commander of the Zvornik Brigade so as to provide him with other options in terms of necessary and reasonable measures.[5460]

1926. Inherent in the Trial Chamber's reasoning are two legal findings. The first is that a measure that would ordinarily be considered necessary and reasonable – such as reporting crimes committed by a superior's subordinates to a competent authority or up the chain of command – may in certain circumstances be unreasonable if the evidence indicates that such a competent authority may be subject to interference by the persons or bodies responsible for ordering or planning the crimes. The second legal finding is that measures that would normally not be sufficient to fulfil the duty to punish might in certain circumstances be considered as the only necessary and reasonable measures available. The Appeals Chamber will consider whether either of these implicit legal findings amount to an error of law.

1927. Turning to the first finding, the Appeals Chamber recalls that the duty to punish will be fulfilled when necessary and reasonable measures to punish perpetrators have been taken.[5461] "Necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and "reasonable" measures are those reasonably falling within the material powers of the superior.[5462] The Appeals Chamber understands the Trial Chamber's references to what was "reasonable" to in fact be covering "necessary" and "reasonable" measures.[5463]

1928. With regard to what constitutes reasonable measures, the Appeals Chamber agrees that the obligation to take measures is restricted to those that are feasible, so that no responsibility attaches

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[5460] Trial Judgement, para. 2064.

[5461] *Bagosora and Nsengiyumva* Appeal Judgement, para. 683; *Boškoski and Tarčulovski* Appeal Judgement, para. 230; *Halilović* Appeal Judgement, para. 175.

[5462] *Orić* Appeal Judgement, para. 177; *Halilović* Appeal Judgement, para. 63; *Blaškić* Appeal Judgement, para. 417. In considering such measures within the context of Article 7(3) of the Statute, the Appeals Chamber has relied on the corresponding provisions in Articles 86 and 87 of Additional Protocol I. See *Hadžihasanović and Kubura* Appeal Judgement, para. 33; *Halilović* Appeal Judgement, para. 63 & fn. 167. See also *Blagojević and Jokić* Appeal Judgement, para. 281 (recalling that "criminal responsibility under Article 7(3) is based primarily on Article 86(2) of [Additional] Protocol I"); *Čelebići* Appeal Judgement, para. 237 (observing that Article 86(2) of Additional Protocol I is "interpret[ed]" by Article 87 of Additional Protocol I "as far as the duties of the commander or superior are concerned"). The Appeals Chamber has previously looked to Articles 86 and 87 of Additional Protocol I in so far as they reflect customary international law, which is the applicable law of the Tribunal. *Prosecutor v Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 28-29. See also *Halilović* Appeal Judgement, para. 63.

[5463] See Trial Judgement, para. 2056: "Given that **Pandurević** had information about **Nikolić**'s involvement in the murder operation, the Trial Chamber finds that it was *unreasonable* under the circumstances for him to report the matter to the Security Organ." (internal references omitted; emphasis added). See also Trial Judgement, para. 2063 ("In light of this fact [that the crimes had been ordered by the Main Staff, particularly Mladić and the Security Branch], the Trial

to a superior for whom the fulfilment of the duty to punish was not possible in the prevailing circumstances.[5464] It is well-established in the case law of the Tribunal that the determination of what is materially possible in terms of fulfilling the duty to punish is primarily linked to the question of a superior's effective control.[5465] In the *Čelebići* case, the Trial Chamber interpreted the term "necessary and reasonable measures" to be limited to measures, which are within someone's power, as no one can be obliged to perform the impossible.[5466] This finding was upheld by the Appeals Chamber in the *Blaškić* case.[5467] The focus on the superior's personal sphere of power to assess feasibility is also in line with Article 86 of Additional Protocol I which refers to the taking of "all feasible measures within [a superior's] power".[5468]

1929. The Trial Chamber interpreted "necessary and reasonable measures" as synonymous with "realistic" and "practical" options, which it determined by reference to factors external to **Pandurević**'s own material powers, that is, the likely interference of the Main Staff with any proceedings initiated by the Military Prosecutor.[5469] While the Appeals Chamber agrees that feasibility relates to what is realistic and practical in the circumstances,[5470] it considers that when used in the context of command responsibility, the assessment must remain anchored in the material powers of the superior. However, in the case at hand, the Trial Chamber's finding that it was not possible for **Pandurević** to act was based on the doubtful independence of any potential

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Chamber considers that **Pandurević** had limited options in terms of *reasonable* means available to him and within his material ability in order to discharge his duty to punish crimes committed during that operation.") (emphasis added).

[5464] *Čelebići* Trial Judgement, para. 395. See Article 86(2) of Additional Protocol I, referring to the responsibility of a superior for failing to "take all feasible measures within their power to prevent or repress the breach"; Commentary on Additional Protocols, para. 3548 ("[Article 86] reasonably restricts the obligation upon superiors to 'feasible' measures, since it is not always possible to [...] punish the perpetrators.").

[5465] *Blaškić* Appeal Judgement, para. 72; *Čelebići* Appeal Judgement, para. 198. See *Bagosora and Nsengiyumva* Appeal Judgement, para. 672.

[5466] *Čelebići* Trial Judgement, para. 395.

[5467] *Blaškić* Appeal Judgement, para. 417.

[5468] The measures concerned are described in the Commentary on Additional Protocols as those "'within [a superior's] power' and only those". Commentary on Additional Protocols, para. 3548. The ICRC *Customary International Humanitarian Law Study* similarly finds as a customary rule the criminal responsibility of commanders and other superiors who "did not take all necessary and reasonable measures *in their power* [...] to punish the persons responsible". Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 153, p. 558 (emphasis added).

[5469] Trial Judgement, paras 2056-2057, 2063. See also Trial Judgement, fn. 6043: "The Trial Chamber considers that this evidence tends to indicate that an investigation by the Military Prosecutor would not have produced a genuine result and thus that it is unlikely that an effort by **Pandurević** to report to the Military Prosecutor would have led to the investigation or punishment of members of the Zvornik Brigade for their involvement in the murder operation.".

[5470] A number of States (*e.g.* Canada, Germany, Ireland, Italy, Netherlands, and Spain) included the definition of "feasible" in Article 86 of Additional Protocol I as meaning that which is "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations" in statements that accompanied their instruments of ratification to Additional Protocol I. Canada, Reservations made at the time of ratification of the 1977 Additional Protocol I, 20 November 1990, § 5; Germany, Declarations at the time of ratification of the 1977 Additional Protocol I, 14 February 1991, § 2; Ireland, Declarations and Reservations made in relation to 1977 Additional Protocol I, 19 May 1999, § 6; Italy, Declarations made at the time of ratification of the 1977 Additional Protocol I, 27 February 1986, § 2; Netherlands, Declarations made at the time of ratification of the 1977 Additional Protocol I, 26 June 1987, §2; Spain, Interpretative declarations made at the time of ratification of the 1977 Additional Protocol I, 21 April 1989, § 3. Although used in a different context (in relation to "feasible precautions"),

proceedings.[5471] The Appeals Chamber recalls its finding in the *Hadžihasanović and Kubura* case that a superior's responsibility should not turn on the competent authority's possible failure to initiate criminal proceedings.[5472] If the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was sham, this entails that such a report would not be sufficient to fulfil the obligation to punish offending subordinates.[5473] It does not mean that the action of reporting becomes impossible in the circumstances.

1930. In regards to the Trial Chamber's analysis of whether **Pandurević** failed to take necessary measures, the Appeals Chamber notes the Trial Chamber's reasoning that "it is evident that referring the matter to the Security Organ, to **[Pandurević**'s] direct superior or even to the Commander of the VRS for investigation and punishment in the usual manner was not possible when all of them were implicated in planning, ordering and executing these horrific crimes".[5474] In so finding, the Trial Chamber would appear to be relying on the legal holding it made earlier in the Trial Judgement that "when the most which could be done by a superior would be to report the illegal conduct of subordinates to the very persons who had ordered it, the superior cannot be found responsible under Article 7(3)".[5475] In the view of the Appeals Chamber, this legal holding should be narrowly construed. In *Krstić*, the Appeals Chamber applied this reasoning in *obiter dicta* with the limited purpose of articulating why responsibility under Article 7(1) of the Statute best encapsulated Krstić's criminality.[5476] Significantly, though, this comment in no way disturbed the finding in the *Krstić* Trial Judgement that Krstić had failed in his obligation to punish his subordinates in relation to the crimes they committed by not reporting the crimes to the competent authorities, including the Military Prosecutor's office.[5477] While the Appeals Chamber accepts that reporting on crimes committed by one's subordinates to a military organ directly involved in the ordering, planning, and execution of the crimes may not be necessary,[5478] this reasoning cannot be extended to other military authorities which were not so involved.

1931. The Appeals Chamber is mindful of the complex situation facing commanders during armed conflict when their subordinates have committed crimes upon the orders of the top echelons of the military and political structures. However, international law requires commanders to take some

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this definition of "feasible" is codified in Article 3(10) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), adopted at Geneva, 10 October 1980, as amended on 3 May 1996.

[5471] Trial Judgement, paras 2056-2057, 2063-2064.

[5472] *Hadžihasanović and Kubura* Appeal Judgement, para. 154.

[5473] *Boškoski and Tarčulovski* Appeal Judgement, para. 234.

[5474] Trial Judgement, para. 2063.

[5475] Trial Judgement, para. 1046, referring to, *inter alia*, *Krstić* Appeal Judgement, fn. 250.

[5476] *Krstić* Appeal Judgement, fn. 250.

[5477] *Krstić* Trial Judgement, paras 649-652. No conviction under Article 7(3) of the Statute was entered for Krstić in view of his conviction under Article 7(1) of the Statute.

[5478] See, *e.g.*, *Ntagerura et al.* Appeal Judgement, para. 345.

action to punish their subordinates for committing crimes, even in these circumstances.[5479] In the view of the Appeals Chamber, the Trial Chamber's finding of impossibility of action due to the likely interference of the Main Staff in any potential investigation by the Military Prosecutor[5480] does not comport with the legal standard of an unreasonable or unnecessary measure under Article 7(3) of the Statute.

1932. The Appeals Chamber now turns to the second implicit legal finding on the duty to punish, namely whether measures that would ordinarily be considered insufficient to fulfill the duty to punish might in certain circumstances be considered as the only necessary and reasonable measures available. The Appeals Chamber affirms that what constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.[5481] This means that the assessment of measures taken, in view of the material ability of the superior, must be evaluated on a case-by-case basis.[5482] That being said, the Tribunal's case law has established a minimum standard for measures that may fulfil the duty to punish. A trial chamber must look at what steps were taken to secure an adequate investigation capable of leading to the criminal prosecution of the perpetrators.[5483] In this respect, it is well accepted that a superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.[5484] In respect of merely reporting crimes, this would only suffice to fulfil the duty to punish if such a report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.[5485] The Appeals Chamber notes that the duty of commanders to report to competent authorities is specifically provided for under Article 87(1) of Additional Protocol I, and that the duty may also be deduced from the provision of Article 86(2) of Additional Protocol I.[5486] In addition, Article 87(3) of Additional Protocol I specifies that where a commander is aware that his subordinates have committed

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[5479] See Article 87(3) of Additional Protocol I requires "any commander", who is aware of his subordinates committing crimes, "to initiate disciplinary or penal action against violators". The commentary to this provision notes that "[t]he object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provisions of the Conventions and the Protocol, and with regard to other rules of the army to which they belong". Commentary on Additional Protocols, para. 3562. As stated by the United States Military Tribunal in the *Von Leeb* case, "[u]nder basic principles of command authority and responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under International Law. By doing nothing he cannot wash his hands of international responsibility". *Trial of Wilhelm von Leeb et al.*, Judgement of 28 October 1948, United States Military Tribunal, Nuremberg, Law Reports of Trials of War Criminals, Vol. XII, pp. 75, 106.

[5480] Trial Judgement, para. 2057.

[5481] *Bagosora and Nsengiyumva* Appeal Judgement, para. 672; *Orić* Appeal Judgement, para. 177; *Halilović* Appeal Judgement, para. 63; *Blaškić* Appeal Judgement, para. 72.

[5482] *Boškoski and Tarčulovski* Appeal Judgement, para. 259; *Hadžihasanović and Kubura* Appeal Judgement, para. 33; *Blaškić* Appeal Judgement, para. 417.

[5483] *Halilović* Appeal Judgement, para. 182; *Strugar* Trial Judgement, para. 378 (undisturbed on appeal, see *Strugar* Appeal Judgement, especially para. 378, referring to Strugar's failure to provide "an adequate investigation").

[5484] *Halilović* Appeal Judgement, para. 182. See also *Bagosora and Nsengiyumva* Appeal Judgement, para. 510.

[5485] *Boškoski and Tarčulovski* Appeal Judgement, paras 231, 235, 270. See also *Hadžihasanović and Kubura* Appeal Judgement, para. 154.

[5486] *Blaškić* Appeal Judgement, para. 69.

breaches of the Conventions or the Protocol, he must "initiate disciplinary or penal action against violators thereof". While these provisions indicate that the report by a commander must be made to a body tasked with investigation and punishment, in military practice such reports may sometimes be made either directly to the competent authorities or through a superior officer.[5487] The crucial point is that in order to constitute a necessary and reasonable measure to punish, the commander's report must be sufficient to trigger the action of the competent authorities.

1933. As indicated by the above, a particular measure can only be regarded as necessary and reasonable where it has been shown to be capable of contributing to investigating or punishing the crimes in the circumstances which prevailed at the time. This is so even if the result ultimately falls short of punishment.[5488] The Appeals Chamber finds that the Trial Chamber erred in law by failing to consider if the measures **Pandurević** took were in fact capable of contributing to an investigation or punishment of those who committed the crimes or whether those measures were so inadequate as to render meaningless the superior's obligation to punish crimes.

1934. Having identified two implicit errors of law in the Trial Chamber's interpretation of the standard of liability for failure to punish under Article 7(3) of the Statute, the Appeals Chamber will now review the relevant factual findings of the Trial Chamber and, when necessary, evidence contained in the trial record, in line with the correct legal standard. The Trial Chamber found that **Pandurević** did not punish or take any disciplinary measures against his subordinates for their criminal conduct in relation to the detention and execution of Bosnian Muslim males in the area of Zvornik in July 1995.[5489] The Trial Chamber found that the responsibility for investigating criminal acts within a VRS brigade generally fell within the authority of the Security Organ and Military Police,[5490] which suggests that the competence to conduct investigations lay outside **Pandurević**'s direct powers. While, as a superior officer, **Pandurević** was obliged under the law to take steps to preserve the crime scene and collect information useful for any criminal proceedings,[5491] the Appeals Chamber accepts that such a measure may have been practically impossible in the circumstances given the direct involvement of the Main Staff in the ordering, planning, execution, and attempted cover-up of the crimes.

1935. The Trial Chamber further found that **Pandurević** did not request the Military Prosecutor's Office or the Zvornik Brigade CPS to conduct an investigation into possible crimes committed by

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5487 The Appeals Chamber notes that the applicable law of the Republika Srpska at the relevant time provided for the option of a superior officer to inform the military prosecutor "directly or through a higher-ranking officer" of his subordinates' crimes. Ex. 6D00218, "Law on Military Courts", Article 65.

5488 *Bagosora and Nsengiyumva* Appeal Judgement, para. 683.

5489 Trial Judgement, para. 2053.

5490 Trial Judgement, para. 2055.

5491 Ex. 4DP00420 "Decree on Law of Court Martial", Art. 65.

his subordinates,[5492] in spite of obligations under domestic law to do so.[5493] The Appeals Chamber notes that, although it was **Nikolić**, the Chief of Security in the Zvornik Brigade, who normally issued an order for the CPS to conduct an investigation, it was technically possible for **Pandurević**, the Brigade Commander, to issue an order for an investigation directly.[5494] Even if **Pandurević** directly engaged the CPS, however, this service was still required to report to **Nikolić**, who would in turn report to **Pandurević**.[5495] This effectively gave control over any work of the CPS to **Nikolić**. Given that **Pandurević** knew about **Nikolić**'s involvement in the crimes committed by his subordinates through conversations with Obrenović on 16 and 17 July 1995,[5496] the Appeals Chamber finds that in these particular circumstances, it was reasonable for **Pandurević** to consider that reporting the crimes to the CPS was not a realistic option.[5497]

1936. In respect of the option of reporting directly to the Military Prosecutor, the Appeals Chamber notes that – unlike the CPS – this body fell under the administration of the Ministry of Defence.[5498] The Trial Chamber observed that there was very little evidence presented on the functioning of the Military Prosecutor,[5499] but it found that Gvero, Assistant Commander in the VRS Main Staff, "retained some degree of control or monitoring power over the work of the military courts even after 1993".[5500] In the Trial Chamber's view, this indicated that the Military Prosecutor was in fact not independent of the Main Staff, which made this option not realistic for **Pandurević**.[5501] The Appeals Chamber recalls that the correct legal standard for assessing necessary and reasonable measures is whether an option falls within a superior's material powers in the circumstances.[5502] **Pandurević** had the legal competence to report directly or through his superior officer to the Military Prosecutor about crimes committed by his subordinates.[5503] The Appeals Chamber notes that the Trial Chamber's finding on Gvero's scope of influence over the Military Prosecutor's Office was based on the evidence of Manojlo Milovanović that Gvero "was to monitor the work of military courts in contact with an appropriate section in the Ministry of

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5492 Trial Judgement, para. 2054.

5493 Trial Judgement, para. 2055. See also Ex. 4D00503, "Expert Report on Ristivogević on Jurisdiction, Powers and Conduct of Members of the Armed Forces of the Republika Srpska", para. 5.7; Ex. 4DP00420, "Decree on Law of Court Martial", Art. 65; Ex. P00028 "Guidelines for Determining Criteria for Criminal Prosecution", p. 8; Ex. P00409, "Regulations on the Application of International Laws of War in the Armed Forces of the SFRY", Art. 21.

5494 Trial Judgement, paras 2055-2056. See also Trial Judgement, paras 160-161. Within the Zvornik Brigade **Nikolić** was formally subordinated to **Pandurević**, the Brigade Commander. Trial Judgement, para. 155.

5495 Trial Judgement, para. 160.

5496 Trial Judgement, para. 2056, referring to Trial Judgement, paras 1879, 1889.

5497 The Trial Chamber noted that **Pandurević** testified to the effect that "it was pointless for him to report to the Security Organ any suspected criminal act regarding the prisoners because he knew that 'the Superior Commands of the Security Organs' were involved". Trial Judgement, para. 2060.

5498 Trial Judgement, para. 2057, fn. 6042.

5499 Trial Judgement, para. 2057.

5500 Trial Judgement, fn. 6042.

5501 Trial Judgement, para. 2057.

5502 See *supra*, para. 1928.

5503 Trial Judgement, para. 1573 & fn. 4875.

Defence".[5504] In the view of the Appeals Chamber, this evidence only supports the Trial Chamber's finding that Gvero retained monitoring power, but it does not support the contention that he had any degree of control over the work of the Military Prosecutor. Furthermore, there is no evidence or findings related to **Pandurević**'s knowledge of any possible Main Staff interference in the work of the Military Prosecutor.[5505] The Trial Chamber's finding on this possible interference was therefore speculative. Furthermore, as noted above, commanders who suspect their subordinates to have committed crimes are required to report to the competent authorities, even if the result falls short of punishment. The Appeals Chamber finds, therefore, that the option of **Pandurević** reporting directly to the Military Prosecutor about the crimes committed by his subordinates was a reasonable and necessary measure to punish in the circumstances.

1937. While **Pandurević** could have reported directly to the Military Prosecutor, he could also have fulfilled his duty to report to the competent authorities by reporting to his higher ranking officer, Krstić, so that he would take the appropriate punitive actions against his subordinates. **Pandurević** argues that this is precisely what he did by means of the Two Interim Combat Reports and his raising the issue of the execution of prisoners in Zvornik with Krstić in person on 27 July 1995.[5506] The Appeals Chamber notes that neither of the Two Interim Combat Reports mentions any crimes committed by his subordinates.[5507] Even when viewed in conjunction with **Pandurević**'s conversation with Obrenović on 23 July 1995 when they discussed the executions that had been carried out in the Zvornik area,[5508] the reports do not convey in any respect a necessity to investigate and prosecute his subordinates. **Pandurević**'s explanation at trial that he included mention of the prisoners in the 18 July 1995 report because he believed an investigation should be launched is not supported by the wording of the report.[5509] In fact, **Pandurević**'s comments to Obrenović about the 18 July 1995 report suggest that the report was supposed to

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5504 Trial Judgement, fn. 6042, citing Manojlo Milovanović, T. 12246-12247 (30 May 2007).

5505 **Pandurević**'s comment expressed to Obrenović that "with Mladić up there, we are all doomed" was said in the context of the conversation relating to Mladić's role in the ordering of the crimes. It was not mentioned with regard to any influence he or other Main Staff members might have had in influencing the work of the Military Prosecutor. Trial Judgement, para. 2060, citing PW-168, T. 15950 (closed session) (27 Sept 2007).

5506 Pandurević's Response Brief, para. 267. **Pandurević** testified at trial that since he had no authority to investigate officers from higher commands, "[a]ll I could do was to inform the corps commander and to expect him to initiate the appropriate mechanisms and to launch an investigation into these crimes". Trial Judgement, fn. 6052, citing Vinko Pandurević, T. 31111-31112 (9 Feb 2009).

5507 Ex. P00329, "Zvornik Brigade Interim Combat Report, signed by Vinko Pandurevic, 15 July 1995", para. 4 referring to "the large number of prisoners distributed throughout schools in the brigade area" which created "[a]n additional burden" for the Zvornik Brigade. Ex. P00334, "Zvornik Brigade Interim Combat Report, signed by Vinko Pandurević, 18 July 1995", pp. 2-3 stated, in relevant part:

> It is inconceivable to me that someone brought in 3,000 Turks of military age and placed them in schools in the municipality, in addition to the 7,000 or so who have fled into the forests. This has created an extremely complex situation and the possibility of the total occupation of Zvornik in conjunction with the forces at the front. These actions have stirred up great discontent among the people and the general opinion is that Zvornik is to pay the price for the taking of Srebrenica.

5508 Trial Judgement, paras 1910, 2061, referring to PW-168, T. 15949-15950 (closed session) (27 Sept 2007).

5509 See Vinko Pandurević, T. 31125-31126 (9 Feb 2009). See *supra*, note 5507.

clearly show that it was the Main Staff that was responsible for the situation in the area, not the Zvornik Brigade, which was merely following orders.[5510] Far from being a report that would give reason to Krstić to initiate an investigation and prosecution of his subordinates, **Pandurević**'s comments suggest that he was using the report as a way to distance the Zvornik Brigade from blame.

1938. With respect to **Pandurević**'s conversation with Krstić on 27 July 1995, the Appeals Chamber notes the finding of the Trial Chamber that during this conversation **Pandurević** asked Krstić if he had any more specific information about the prisoners executed in Zvornik, to which Krstić responded that it was not **Pandurević**'s concern and that he would deal with the problem in the appropriate way.[5511] The Appeals Chamber recalls that a report up the line of command may constitute a necessary and reasonable measure to punish only where such a report is likely to trigger penal or disciplinary action. In addition, whether a report to the appropriate authorities is sufficient to discharge the obligation to punish offending subordinates depends on the circumstances of each case.[5512] In the present case, according to the account given by **Pandurević**, he merely asked Krstić if he had further information about the execution of prisoners in Zvornik.[5513] **Pandurević** made no direct or indirect reference to the need to initiate penal or disciplinary action, to inform the Military Prosecutor, or to trigger any punitive measure whatsoever. Indeed, **Pandurević** never made any formal or informal report to Krstić about the crimes in which he suspected his subordinates had participated.[5514] His inquiry to Krstić about the executions in the course of a 15 minute conversation primarily about the military situation of the Zvornik Brigade cannot suffice to constitute a report likely to trigger judicial action.[5515] Krstić's response that the matter was not **Pandurević**'s concern and that he would deal with it in the appropriate manner does not change this analysis. The Appeals Chamber notes the Trial Chamber's findings that reporting to **Pandurević**'s immediate superior, *i.e.* Krstić, was not realistic given the latter's involvement in the crimes and that "[i]n most instances, such action would be insufficient to fulfil the obligation on a superior to punish".[5516] The Appeals Chamber considers that a duty to punish is not fulfilled where a commander was content to rely on

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5510 **Pandurević** stated in response to Obrenović's comment that "still, it was all happening here at our area", "It's all the Drina Corps area and it's also the area of the Main Staff. What is more [Mladić] ordered they did it. Whoever reads the report, it will be clear to them." PW-168, T. 15950 (closed session) (27 Sept 2007). See Trial Judgement, para. 1910.

5511 Trial Judgement, paras 1915, 2062.

5512 *Boškoski and Tarčulovski* Appeal Judgement, para. 234; *Blaškić* Appeal Judgement, para. 72.

5513 Trial Judgement, paras 1915, 2062.

5514 As found above, the Appeals Chamber does not consider the Two Interim Combat Reports to constitute such formal reports since they contain no mention of any suspected crimes allegedly committed by **Pandurević**'s subordinates.

5515 See Vinko Pandurević, T. 31179 (10 Feb 2009).

5516 Trial Judgement, paras 2063-2064.

assurances which he knew would not be or were not being implemented.[5517] The Appeals Chamber finds that, in such circumstances, **Pandurević**'s brief conversation with Krstić cannot be considered to be sufficient to fulfil his obligation to take necessary and reasonable measures to punish.

1939. Another option for **Pandurević** – to report the crimes of his subordinates to a competent authority provided by the law at the time – was to report to the MUP.[5518] The Appeals Chamber notes that the finding of the Trial Chamber that "there is no evidence of an alternative independent avenue being open to [**Pandurević**]"[5519] stands in marked contrast to the Trial Chamber's earlier finding in relation to the liability under Article 7(3) of the Statute for Borovčanin that "[e]ven if [Borovčanin] determined that Mladić, Krstić, and others in the VRS were involved and thought it useless to report the crimes to them, he had the option and obligation of reporting through his MUP chain of command".[5520]

1940. The Appeals Chamber observes that in finding that Borovčanin had the option to report to the MUP, the Trial Chamber noted that this was in his chain of command. Although **Pandurević** was a VRS commander, not a MUP officer, the option of reporting to the MUP also remained available to him under the applicable law. The Trial Chamber considered that:

> if an officer for some reason is unable to inform the competent authorities of the commission of a crime, he still carries out his duty by informing another organ, which formally has no jurisdiction, and which then has an obligation and ability to pass that information on to the competent authorities.[5521]

The Appeals Chamber observes that, while the relevant war-time legislation made the Military Prosecutor the competent authority to which the relevant crimes should be reported, the MUP investigative, prosecutorial, and judicial systems remained fully functioning.[5522] In these circumstances, it was necessary and reasonable for **Pandurević** to report the crimes committed by

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5517 See *The Tokyo Judgment, International Military Tribunal for the Far East, 29 April 1946-12 November 1948*, in B.V.A. Röling, C.F. Rüter (eds.), Vols I-II (1977), Vol I, p. 448. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 234; *Strugar* Appeal Judgement, paras 232, 236, 238.

5518 See Ex. 4D00503 "Expert Report by Ristivogević on Jurisdiction, Powers and Conduct of Members of the Armed Forces of the Republika Srpska", paras 5.7-5.8.

5519 Trial Judgement, para. 2064.

5520 Trial Judgement, para. 1575.

5521 Trial Judgement, fn. 4879, referring to Ex. 4D00503 "Expert Report by Ristivogević on Jurisdiction, Powers and Conduct of Members of the Armed Forces of the Republika Srpska", paras 5.7-5.8.

5522 Trial Judgement, para. 1573; Ex. 6D00218, "Law on Military Courts", Art. 65; Ex. 4DP00420, "Decree on Law of Court Martial", Art. 65; Ex. P00423, "Law on the Mandatory Reporting of Crimes against Humanity and International Law", Art. 1; Ex. P00422, "Decree on the Promulgation of the Law of the Implementation of the Law on Regular Courts during an Imminent Threat of War or a State of War", Art. 1, "Law on the Implementation of the Law on Criminal Proceedings During an Imminent Threat of War of a State of War", Art. 1, "Law on the Implementation of the Law on the Execution of Criminal Sanctions During an Imminent Threat of War or a State of War", Art. 2, "Law on the Implementation of the Law on the Public Prosecutor's Office During an Imminent Threat of War or a State of War", Art. 1.

his subordinates to the MUP so that they could investigate or pass it on to the competent authority.[5523]

1941. The Appeals Chamber is satisfied that **Pandurević** had notice of the Prosecution's case on his duty to punish, including the option of reporting to the MUP. While the Prosecution's Pre-Trial Brief set out a non-exhaustive list of possible measures which **Pandurević** could have taken,[5524] evidence at trial was specifically led on the option of reporting crimes to organs other than the competent authority, including the MUP, and **Pandurević** had the opportunity to cross-examine and respond to such testimony.[5525] Conversely, the Appeals Chamber accepts that **Pandurević** did not have adequate notice as to the Prosecution's argument regarding the option of reporting to the Tribunal, which was not raised or alluded to in the Prosecution's Pre-Trial Brief, at trial, or in the Prosecution's Final Brief. Accordingly, the Appeals Chamber will not consider it.

1942. With respect to the option of imposing disciplinary sanctions, the Appeals Chamber notes that the Trial Chamber found that **Pandurević** had not taken any disciplinary measure,[5526] although it made no finding as to whether the imposition of disciplinary sanctions on his subordinates would have constituted necessary and reasonable measures to punish in the circumstances.[5527] The Appeals Chamber recalls that the use of disciplinary measures may in certain circumstances be sufficient for a superior to discharge his duty to punish crimes under Article 7(3) of the Statute.[5528] In the present case, **Pandurević** had the legal competence to impose disciplinary sanctions on his subordinates for breaches of military discipline.[5529] Ordinarily, disciplinary proceedings would not be initiated within the Zvornik Brigade when there was suspicion that a criminal offence has been committed.[5530] The imposition of a disciplinary sanction did not, however, preclude a matter from being subsequently dealt with by the military justice system.[5531] Given the grave nature of the crimes in which **Pandurević**'s subordinates were suspected of participating, imposing disciplinary sanctions for serious breaches of military discipline may well have been a necessary means for

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5523 See, *e.g.*, *Hadžihasanović and Kubura* Appeal Judgement, para. 154.

5524 Prosecution's Pre-Trial Brief, para. 256.

5525 See, *e.g.*, Milan Vojinović, T. 23720-23721 (21 July 2008); Branislav Ristivojević, T. 28078 (12 Nov 2008).

5526 Trial Judgement, para. 2053.

5527 The Trial Chamber emphasised instead that a superior is not required to dispense punishment personally but may discharge his or her duty to punish by initiating an investigation and reporting the matter to competent authorities. Trial Judgement, para. 2053.

5528 *Hadžihasanović and Kubura* Appeal Judgement, para. 33.

5529 Ex. 7D00370, "Law on the Army", Arts 67, 68, 79, 92.

5530 Trial Judgement, fn. 6039.

5531 The Appeals Chamber notes the evidence of Nebojša Jeremić that if the Zvornik Brigade had already instituted disciplinary procedures, then they would be suspended upon a suspicion that a criminal act had been committed and the case would be forwarded to the responsible Military Prosecutor's Office. Nebojša Jeremić, T. 10471 (24 Apr 2007); Trial Judgement, fn. 6039. However, the Trial Chamber also found that **Nikolić** initially ordered Jeremić to draft an order giving VRS soldiers Neško Đokić and Slobodan Đokić, who helped four Bosnian Muslims, 60 days' military imprisonment on behalf of the Brigade Commander, although **Nikolić** ended up ordering only three days' detention, and in addition, a criminal complaint was made to the Military Prosecutor for aiding the enemy. Trial Judgement, paras 586-587 & fn. 2144; Nebojša Jeremić, T. 10474 (24 Apr 2007).

**Pandurević** to explicitly express his condemnation of the actions of his subordinates, but it would have been insufficient to constitute an appropriate or adequate means to punish.[5532] The Appeals Chamber therefore finds that while initiating the disciplinary offence procedure was an option **Pandurević** could have taken, such action on its own would not have satisfied the obligation to take necessary and reasonable measures to punish his subordinates in the circumstances of the situation. Consequently, his failure to institute such measures will not be considered for the purpose of determining his responsibility under Article 7(3) of the Statute.

1943. While the Appeals Chamber is satisfied that the above-noted options were available to **Pandurević**, it recalls that a commander is liable for failure to fulfil the duty to punish only where he has failed to adopt any measure or where the measures he adopted could not be regarded as reasonable and adequate.[5533] The Trial Chamber found that **Pandurević** "did take some measures to address the crimes".[5534] Nonetheless, in the view of the Appeals Chamber, the measures taken by **Pandurević** as found by the Trial Chamber do not meet the minimum threshold of "reasonable and necessary measures" to punish under Article 7(3) of the Statute.

1944. The Trial Chamber found that **Pandurević** "took some measures to investigate and gather further information about the crimes that occurred in the area of Zvornik and any involvement of his subordinates in the commission of those crimes".[5535] These measures consisted of a conversation with Obrenović on 16 July 1995 about the situation of the prisoners in the Zvornik area, **Pandurević**'s subsequent ordering of Obrenović to gather more information about the killings, and his conversation with Obrenović and Jokić on 18 July 1995 during which Jokić confirmed that engineering machinery belonging to the Zvornik Brigade was used in the burial of bodies of executed prisoners.[5536] As noted above, it is not sufficient for a superior to simply try to ascertain the facts – not only must the investigation be adequate but it must be accompanied by an action either to sanction the subordinates directly or, if the superior lacks that power, to report the suspicion of crimes to a competent authority.[5537] **Pandurević**'s attempts to investigate the crimes as found by the Trial Chamber were of questionable adequacy and were not followed by any action to report the suspected crimes of his subordinates to the competent authority either directly or through his superiors.

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5532 See *Boškoski and Tarčulovski* Appeal Judgement, para. 235; *Hadžihasanović and Kubura* Appeal Judgement, para. 152. The Appeals Chamber notes that the highest sentence available for "disciplinary offences", considered the most serious violations of military discipline, was correctional custody of up to 20 days. See Ex. 7D00370, "Law on the Army", Arts 63, 68. At trial, Nebojša Jeremić gave evidence that military detention of up to 60 days was sometimes handed down. See, *e.g.*, Nebojša Jeremić, T. 10420-10421 (24 April 2007).

5533 See *Hadžihasanović and Kubura* Appeal Judgement, paras 152-153.

5534 Trial Judgement, para. 2064.

5535 Trial Judgement, para. 2059.

5536 Trial Judgement, para. 2059. See also Trial Judgement, paras 1879-1881, 1883.

5537 See *supra*, para. 1932.

1945. In light of the foregoing, the Appeals Chamber, Judge Niang dissenting, finds beyond reasonable doubt that **Pandurević** failed to take the necessary and reasonable measures to punish his subordinates as required to discharge his duty under Article 7(3) of the Statute. The Appeals Chamber, Judge Niang dissenting, therefore grants sub-ground 2(e) of the Prosecution's appeal and finds **Pandurević** responsible as a superior for the following crimes of his subordinates: (1) between 13 July and the morning of 16 July 1995, members of the Zvornik Brigade guarded Bosnian Muslim prisoners at the Grbavci, Kula, and Ročević Schools, and transported them to execution sites at Orahovac and Kozluk, thereby participating in their persecution through cruel and inhumane treatment between 13 and 16 July 1995 as well as aiding and abetting their murders between 14 and 16 July 1995; (2) at least one member of the Zvornik Brigade shot prisoners on 14 July 1995 at the execution site in Orahovac and at least one member of the Zvornik Brigade shot prisoners at the execution site in Kozluk on 15 July 1995, thereby committing murder; and (3) on 14 July 1995, members of the Zvornik Brigade Engineering Company dug graves at Orahovac while the killings took place, thereby aiding and abetting the murder of the Bosnian Muslim prisoners executed there on the same day.[5538]

1946. However, the Appeals Chamber, Judge Niang dissenting, has found **Pandurević** responsible for aiding and abetting extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution through murder as a crime against humanity, for the killing of Bosnian Muslim prisoners during part of this period, from noon on 15 July to 16 July 1995, and the Appeals Chamber, Judge Pocar dissenting, has consequently entered new convictions against **Pandurević** for these crimes. The Appeals Chamber will therefore not enter a conviction under Article 7(3) for the same crimes under Counts 3, 5, and 6, as it would be improper to enter convictions under Article 7(3) of the Statute in addition to convictions under Article 7(1) of the Statute for the same counts and the same set of facts. Furthermore, the Appeals Chamber, Judge Niang dissenting, has found **Pandurević** responsible for aiding and abetting extermination as a crime against humanity (Count 3) and, Judge Pocar dissenting, has entered a new conviction for this crime. Consequently, a conviction for murder as a crime against humanity (Count 4) pursuant to Article 7(3) of the Statute will not be entered, as murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity.[5539]

1947. Accordingly, the Appeals Chamber, Judge Pocar dissenting, enters new convictions against **Pandurević** under Article 7(3) of the Statute for failing to punish the crimes perpetrated by his subordinates between 13 July 1995 and noon on 15 July 1995, under Counts 3 (extermination as a crime against humanity), 5 (murder as a violation of the laws or customs of war), and 6 (persecution

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5538 Trial Judgement, paras 2017-2018 and references cited therein; *supra*, paras 1907-1914.

5539 See *supra*, paras 1804, 1806.

through murder as a crime against humanity). These convictions are limited to the crimes of his subordinates perpetrated prior to noon on 15 July 1995, *i.e.* aiding and abetting the murder of the Bosnian Muslim prisoners from the Grbavci, Ročević, and Kula Schools by detaining them and by transporting some of them to Orahovac; and murdering Bosnian Muslim prisoners at Orahovac on 14 July 1995 and aiding and abetting their murders by digging graves.[5540] The Appeals Chamber, Judge Pocar dissenting, further enters a new conviction against **Pandurević** under Count 6 for failure to punish persecution as a crime against humanity through cruel and inhumane treatment, as perpetrated by his subordinates during the entire period from 13 July to 16 July 1995 through guarding Bosnian Muslim prisoners at the Grbavci, Kula, and Ročević Schools, and transporting them to execution sites at Orahovac and Kozluk.[5541]

### 4. Conclusion

1948. The Appeals Chamber, Judge Niang dissenting, has dismissed all of **Pandurević**'s challenges to his convictions of murder pursuant to Article 7(3) of the Statute as a crime against humanity and as a violation of the laws or customs of war.

1949. The Appeals Chamber, Judge Niang dissenting, has granted sub-grounds 2(d) and 2(e) of the Prosecution's appeal and has consequently reversed **Pandurević**'s acquittals under Counts 3, 5, and 6. The Appeals Chamber, Judge Pocar dissenting, has therefore entered new convictions under these counts pursuant to Article 7(3) of the Statute. The impact of these findings on **Pandurević**'s sentence, if any, will be considered in the sentencing section of this Judgement.

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[5540] See *supra*, para. 1945 & note 5538. The Appeals Chamber excludes the crimes of **Pandurević**'s subordinates for which the Trial Chamber's factual findings do not establish with sufficient precision whether they occurred before or after noon on 15 July 1995.

[5541] See *supra*, para. 1945 & note 5538.

# X. MISCELLANEOUS GROUNDS OF APPEAL

## A. Alleged Error Concerning the Trial Chamber's Failure to Render a Decision (Miletić's Ground 23)

1950. On 25 October 2007, **Miletić** filed a motion in which he requested the Trial Chamber to order the Prosecution to disclose all UNPROFOR documents relevant to his case.[5542] **Miletić** submits that the Trial Chamber deprived him of his right to a fair trial by declining to render a decision on the 25 October 2007 Motion. He argues that a decision was essential for ensuring the fairness of proceedings and that neglecting to rule on the motion violated Articles 20(1), 21(2), and 21(4)(b) of the Statute as well as Rules 54 and 73 of the Rules.[5543] Moreover, he posits, such neglect puts in doubt the impartiality of the Trial Chamber.[5544] **Miletić** contends that this error invalidates his conviction on all counts.[5545]

1951. The Prosecution responds that it had disclosed all relevant UNPROFOR documents in its possession after the filing of the 25 October 2007 Motion, rendering it moot.[5546] The Prosecution argues that **Miletić** cannot remain silent about an alleged fair trial violation during the trial and then raise it on appeal.[5547] The Prosecution contends that **Miletić** fails to show a discernible error by the Trial Chamber.[5548] In its oral submissions, the Prosecution argues that the motion was "disposed of" and no further decision was necessary.[5549]

1952. The Appeals Chamber notes that Rule 73 of the Rules allows a party to move before a chamber by way of a motion for an appropriate ruling or relief and introduces the procedure for requesting certification to file an interlocutory appeal after a decision on a motion is rendered. Although its wording is not entirely explicit in this regard, Rule 73 of the Rules should be understood as imposing a duty on a chamber to render an order or decision on every validly filed motion, even if the motion is considered frivolous or an abuse of process.[5550] This duty ensures that an accused can exercise his or her right of appeal and take such actions as provided for by

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5542 Urgent Motion of General Miletić for an Order Instructing the Prosecution to Disclose to the Defence all UNPROFOR Documents Relevant to the Present Case, 25 October 2007 (confidential) ("25 October 2007 Motion"). See Miletić's Appeal Brief, para. 428.

5543 Miletić's Appeal Brief, paras 429-430.

5544 Miletić's Appeal Brief, para. 430.

5545 Miletić's Appeal Brief, para. 431.

5546 Prosecution's Response Brief (Miletić), paras 333-334, 336. See Prosecution's Response Brief (Miletić), para. 335.

5547 Prosecution's Response Brief (Miletić), para. 337. See Prosecution's Response Brief (Miletić), para. 333.

5548 Prosecution's Response Brief (Miletić), para. 338.

5549 Appeal Hearing, AT. 479 (5 Dec 2013), referring to T. 17408 (2 Nov 2007).

5550 See, *e.g.*, *Hategekimana* Appeal Judgement, para. 41 ("[V]alidly filed pending motions are not implicitly dismissed with the pronouncement or filing of the trial judgement."); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Pauline Nyiramasuhuko's Motion to Void Trial Chamber Decisions,

Rule 73(C) of the Rules. The Appeals Chamber notes that, after a discussion with **Miletić**'s counsel and the Prosecution on the disclosure of some documents which were the subject of the 25 October 2007 Motion, the Presiding Judge said "[s]o that disposes of that matter".[5551] However, it is unclear if the Presiding Judge was referring to the 25 October 2007 Motion itself, or the preceding discussion on whether the Trial Chamber's assistance was needed to accelerate the process of obtaining clearance to allow for disclosure of documents.[5552] A motion which can be considered as being rendered moot by subsequent actions still remains within the jurisdiction of a trial chamber to consider. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in not clearly deciding the 25 October 2007 Motion. Nonetheless, the Appeals Chamber is not convinced that this error invalidates the Trial Judgement.

1953. The Trial Chamber's attempts to facilitate the disclosure requested in the 25 October 2007 Motion plainly negate **Miletić**'s unsubstantiated claim of doubtful impartiality and clearly show that, even absent a direct order from the Trial Chamber to do so, the Prosecution assumed the obligation to identify the documents requested, obtain their clearance, and disclose them to **Miletić**.[5553] In this regard, the Appeals Chamber notes the Prosecution's contention that it had disclosed all relevant UNPROFOR documents and **Miletić**'s assertion that he never obtained assurances that the documents disclosed were all those requested.[5554] The Appeals Chamber emphasises that the system of disclosure in the Tribunal is based on a presumption that the Prosecution discharges its disclosure duties diligently and in good faith.[5555] Considering the above, the Appeals Chamber finds that **Miletić** has failed to advance any compelling argument indicating that the Prosecution failed to comply with the relief requested in the 25 October 2007 Motion. The Appeals Chamber therefore finds that **Miletić** has not shown that he suffered any prejudice as a result of the Trial Chamber's error in not explicitly rendering a decision on the 25 October 2007 Motion. Accordingly, **Miletić** has not demonstrated that the Trial Chamber violated his right to a fair trial and this ground of appeal is therefore dismissed.

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30 September 2011, p. 2. See also *Édouard Karemera et al. v. The Prosecutor*, Case Nos. ICTR-98-44-AR72.5 and ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 23.

5551 T. 17408 (2 Nov 2007). See T. 17402-17406 (2 Nov 2007).

5552 See T. 17407-17408 (2 Nov 2007). See also T. 17402-17406 (2 Nov 2007).

5553 T. 16934 (closed session) (26 Oct 2007); T. 17055 (closed session) (29 Oct 2007); T. 17402-17404, 17406 (2 Nov 2007).

5554 Miletić's Appeal Brief, para. 431.

5555 *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 30.

## B. Alleged Error in Not Rendering the Entire Trial Judgement Public (Miletić's Ground 28)

1954. On 10 June 2010, the Trial Chamber sitting in public session pronounced the judgement in the present case by reading out the disposition and summarising the grounds underlying it.[5556] A confidential version of the written Trial Judgement was issued to the Parties and a redacted version was made available to the public.[5557]

1955. **Miletić** submits that by making only the redacted version of the Trial Judgement public, the Trial Chamber committed an error of law by violating Article 14(1) of the ICCPR, thereby depriving him of his fundamental right to obtain a public judgement.[5558] **Miletić** contends that publicly reading out the sentence and summary of the judgement is insufficient to relieve the Trial Chamber of its obligation to disclose the judgement publicly.[5559] **Miletić** emphasises that the purpose of public disclosure is to ensure public oversight of the judiciary.[5560] **Miletić** requests that the confidentiality of the Trial Judgement be rescinded and it be made public in its entirety.[5561]

1956. The Prosecution responds that the existence of both confidential and public versions of the Trial Judgement is in conformity with the Tribunal's established practice and the fair trial requirements under the ICCPR.[5562] The Prosecution also emphasises that the right to a public judgement is not absolute.[5563]

1957. The Appeals Chamber recalls that the established practice of the Tribunal to publish redacted versions of documents that contain "information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness" also extends to judgements.[5564] The Appeals Chamber further recalls that the Statute, the Rules, and the ICCPR all recognise that the right to a public judgement needs to be balanced against other interests, which may include the effect of publicizing confidential witness or victim information.[5565]

1958. The Appeals Chamber considers that by issuing a public redacted version of the Trial Judgement, the Trial Chamber ensured **Miletić**'s right to a public judgement, after balancing his rights with the need to protect the identity of witnesses and victims in the interests of justice.

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5556 Judgement Delivery, T. 34919-34956 (10 June 2010).
5557 Trial Judgement; Public Redacted Version of the Trial Judgement.
5558 Miletić's Appeal Brief, paras 449, 452. **Miletić** argues that the only exceptions to the principle of public judgements are those provided for under Article 14(1) of the ICCPR, namely matters concerning matrimonial disputes, guardianship of children, or where the interests of juvenile persons otherwise require. Miletić's Appeal Brief, para. 450; Miletić's Reply Brief, para. 144.
5559 Miletić's Appeal Brief, para. 449.
5560 Miletić's Appeal Brief, para. 451; Appeal Hearing, AT. 452 (5 Dec 2013).
5561 Miletić's Appeal Brief, para. 452; Appeal Hearing, AT. 452 (5 Dec 2013).
5562 Prosecution's Response Brief (Miletić), paras 363-367.
5563 Prosecution's Response Brief (Miletić), paras 365-366.
5564 *Šešelj* Contempt Appeal Judgement 2010, para. 32 and references cited therein.
5565 *Šešelj* Contempt Appeal Judgement 2010, para. 32 and references cited therein.

Additionally, the public redacted version sufficiently allows for public scrutiny of the Trial Judgement in order to safeguard the right to a fair trial. Accordingly, **Miletić** has failed to show any error by the Trial Chamber in issuing both confidential and public redacted versions of the Trial Judgement, and his ground of appeal 28 is therefore dismissed.

# XI. SENTENCING

1959. The Trial Chamber sentenced **Popović** and **Beara** to life imprisonment.[5566] The Trial Chamber sentenced **Nikolić** to a single sentence of 35 years of imprisonment,[5567] **Miletić** to a single sentence of 19 years of imprisonment,[5568] and **Pandurević** to a single sentence of 13 years of imprisonment.[5569] All the Appellants, including the Prosecution, have appealed against these sentences.[5570]

## A. Applicable Law and Standard of Review

1960. Pursuant to Article 24 of the Statute and Rule 101 of the Rules, a trial chamber must take into account the following factors in sentencing: (1) the gravity of the offence or totality of the culpable conduct; (2) the individual circumstances of the convicted person; (3) the general practice regarding prison sentences in the courts of the former Yugoslavia; and (4) aggravating and mitigating circumstances.[5571]

1961. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[5572] Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[5573] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[5574] It is for the party challenging the sentence to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.[5575]

1962. To show that the Trial Chamber committed a discernible error in exercising its discretion, an appellant must demonstrate that the Trial Chamber gave weight to extraneous or irrelevant

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5566 Trial Judgement, Disposition, Popović and Beara sections.
5567 Trial Judgement, Disposition, Nikolić section.
5568 Trial Judgement, Disposition, Miletić section.
5569 Trial Judgement, Disposition, Pandurević section.
5570 See Popović's Notice of Appeal para. 441; Popović's Appeal Brief, paras 482-484; Beara's Notice of Appeal, paras 33-41; Beara's Appeal Brief, paras 310-347; Nikolić's Notice of Appeal, paras 17-22; Nikolić's Appeal Brief, paras 5-45; Miletić's Notice of Appeal, paras 177-194; Miletić's Appeal Brief, paras 432-447; Pandurević's Notice of Appeal, paras 32-35; Pandurević's Appeal Brief, paras 214-270; Prosecution's Notice of Appeal, paras 28-29, 41-42; Prosecution's Appeal Brief, paras 187-224, 298-320.
5571 *Đorđević* Appeal Judgement, para. 931; *Šainović et al.* Appeal Judgement, para. 1797; *Čelebići* Appeal Judgement, paras 429, 716.
5572 *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Boškoski and Tarčulovski* Appeal Judgement, para. 204.
5573 *Đorđević* Appeal Judgement, para. 931; *Lukić and Lukić* Appeal Judgement, para. 640; *Haradinaj et al.* Appeal Judgement, para. 321. See *Šainović et al.* Appeal Judgement, para. 1798.
5574 *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Lukić and Lukić* Appeal Judgement, para. 640.

considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or demonstrate that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to properly exercise its discretion.[5576]

## B. Alleged Errors Concerning Retribution and Deterrence (Beara's Grounds 35 and 38)

1963. **Beara** submits that the Trial Chamber erred in pursuing a form of punitive retribution instead of pursuing the aims of reformation and rehabilitation.[5577] **Beara** argues that a sentence of life imprisonment is at odds with Articles 7 and 10(3) of the ICCPR.[5578] **Beara** also submits that the Trial Chamber's imposition of a life sentence was based on an unfair reliance upon the principles of retribution and deterrence as sole determinative factors, while ignoring reintegration into society, proportionality, and consistency.[5579] **Beara** argues that the sentence imposed should be reversed as it is "not well-balanced".[5580]

1964. The Prosecution responds that the Trial Chamber was fully entitled to impose a life sentence on **Beara** in light of the extreme gravity and scale of the crimes.[5581] It contends that the Trial Chamber properly applied the principles governing sentencing.[5582]

1965. The Appeals Chamber has previously held that "[n]either Article 7 nor Article 10 of the ICCPR prohibits life imprisonment".[5583] Accordingly, **Beara**'s submission that the imposition of a life sentence is inconsistent with the ICCPR is without merit.

1966. The Appeals Chamber recalls that the goals of sentencing should not be accorded undue prominence in the overall assessment of the sentences to be imposed. Although they play an important role and must be considered, the Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.[5584] The Appeals Chamber further recalls that in view of the gravity of the crimes in respect of which the Tribunal has

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5575 *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1798; *Boškoski and Tarčulovski* Appeal Judgement, para. 204.

5576 *Đorđević* Appeal Judgement, para. 932; *Šainović et al.* Appeal Judgement, para. 1799; *Lukić and Lukić* Appeal Judgement, para. 641.

5577 Beara's Appeal Brief, para. 324.

5578 Beara's Appeal Brief, para. 323. **Beara** adds that for these reasons this form of punishment was abolished by Yugoslavian lawmakers and other European States. Beara's Appeal Brief, para. 322.

5579 Beara's Appeal Brief, paras 330-331.

5580 Beara's Appeal Brief, para. 332.

5581 Prosecution's Response Brief (Beara), para. 320.

5582 Prosecution's Response Brief (Beara), paras 321-323, 332-333.

5583 *Stakić* Appeal Judgement, para. 395.

5584 *Mrkšić and Šljivančanin* Appeal Judgement, para. 415; *D. Nikolić* Judgement on Sentencing Appeal, paras 45-46.

jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.[5585]

1967. The Trial Chamber found that **Beara** was a driving force behind the murder enterprise and a central figure in the organisation and execution of the genocide.[5586] Taking into account the gravity of the crimes and **Beara**'s criminal conduct, the Appeals Chamber considers that **Beara** has failed to demonstrate that the sentence was inconsistent with the principles outlined above. In particular, he has failed to demonstrate that the Trial Chamber erred in exercising its discretion by relying on the factors of retribution and deterrence, and attributing limited importance to the goal of rehabilitation.[5587]

1968. The Trial Chamber accurately recalled the legal principles applicable to retribution and deterrence as goals of sentencing[5588] and specifically highlighted that "retribution requires the imposition of a just and appropriate punishment, and nothing more".[5589] **Beara** has not identified any aspect of the Trial Chamber's assessment of his sentence which could be considered "punitive" in contravention of the principles noted by the Trial Chamber.

1969. Accordingly, the Appeals Chamber dismisses **Beara**'s grounds of appeal 35 and 38.

## C. Alleged Errors Concerning the Gravity of Crimes and Involvement of the Appellants

### 1. Beara's appeal (Ground 33)

1970. **Beara** submits that the Trial Chamber erred in defining the nature and extent of his involvement in the crimes and disregarded: (1) part of Witness Čelanović's testimony showing that **Beara** did not make any derogatory remark about Bosnian Muslims; and (2) the fact that he did not directly or personally commit any of the crimes of which he was found guilty.[5590] He also asserts that the Trial Chamber failed to give an adequately reasoned opinion as required by Article 25 of the Statute in its sentencing analysis.[5591] The Prosecution responds that this ground should be summarily dismissed.[5592] It also asserts that the Trial Chamber's sentencing analysis provides an adequately reasoned opinion.[5593]

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5585 *Nahimana et al.* Appeal Judgement, para. 1057; *Stakić* Appeal Judgement, para. 402; *Deronjić* Judgement on Sentencing Appeal, paras 136-137.
5586 Trial Judgement, paras 1314, 2164.
5587 See Trial Judgement, para. 2130.
5588 Trial Judgement, paras 2128-2129.
5589 Trial Judgement, para. 2128, citing *Kordić and Čerkez* Appeal Judgement, para. 1075 (emphasis in original).
5590 Beara's Appeal Brief, paras 311-312, 315.
5591 Beara's Appeal Brief, para. 317.
5592 Prosecution's Response Brief (Beara), paras 313-315, 317.
5593 Prosecution's Response Brief (Beara), para. 316.

1971. The Appeals Chamber will not consider **Beara**'s arguments previously dismissed by the Appeals Chamber.[5594] The Appeals Chamber also notes that in its analysis of whether **Beara** participated in the JCE to Murder with discriminatory intent, the Trial Chamber did not refer to the testimony of Čelanović indicating that **Beara** did not make any derogatory remark towards Bosnian Muslims.[5595] Where the Trial Chamber did not refer to a witness's evidence "even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighted the evidence, but found that the evidence did not prevent it from arriving at its actual finding".[5596] In his cursory submission **Beara** has failed to demonstrate that the Trial Chamber disregarded this aspect of Čelanović's testimony as opposed to simply rejecting it.

1972. The Appeals Chamber considers that, contrary to **Beara**'s submission, the Trial Chamber was well aware that **Beara** did not personally commit the crimes in question, concluding instead that "**Beara** was a central figure in the organisation and execution of the genocide" and that he "was a driving force behind the murder enterprise".[5597] Finally, the Appeals Chamber considers that **Beara** has failed to substantiate his submission that the Trial Chamber failed to give an adequately reasoned opinion in its sentencing analysis as he merely asserts his view but provides no basis for this contention.

1973. For these reasons, the Appeals Chamber dismisses **Beara**'s ground of appeal 33.

### 2. Nikolić's appeal (Sub-ground 1.1)

1974. **Nikolić** submits that the Trial Chamber erred in its assessment of the form and degree of his participation when considering the gravity of the crimes.[5598] First, **Nikolić** argues that the Trial Chamber erred in its determination of the time frame of his participation in the JCE to Murder, which he submits ended in the very early morning of 15 July 1995, before the Kozluk Killings and Pilica Area Killings took place.[5599] He contends that his contribution lasted no more than approximately 36 hours, which he avers is highly limited in comparison to other JCE members.[5600]

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5594 See Beara's Appeal Brief, paras 311-314, 316, referring to, *inter alia*, the submissions made by **Beara** in grounds 4, 5, 6, 15, and 16 of his appeal; Prosecution's Response Brief (Beara), paras 313-315, 317; *supra*, paras 987, 1205, 1208, 1210-1213, 1215, 1217, 1249-1250, 1273. See also *supra*, paras 129, 181, 191, 229, 316, 324.

5595 See Trial Judgement, para. 1331.

5596 *Haradinaj et al.* Appeal Judgement, para. 129; *Krajišnik* Appeal Judgement, para. 353; *Kvočka et al.* Appeal Judgement, para. 23.

5597 Trial Judgement, para. 2164.

5598 Nikolić's Appeal Brief, para. 6.

5599 Nikolić's Appeal Brief, paras 7-8; Appeal Hearing, AT. 275-277 (3 Dec 2013). See also Nikolić's Reply Brief, paras 7-8.

5600 Nikolić's Appeal Brief, para. 8. See also Nikolić's Appeal Brief, para. 7; Nikolić's Reply Brief, paras 7-8; Appeal Hearing, AT. 277-278 (3 Dec 2013).

1975. Second, **Nikolić** contends that the Trial Chamber failed to give sufficient weight to the fact that his role did not assume great importance in the overall context of the crimes.[5601] In support, he notes that the Trial Chamber's findings indicate that his involvement in the crimes was limited,[5602] that he was merely "a junior officer drawn into specific aspects of an ongoing, overwhelming operation" of which he had limited knowledge,[5603] and that he participated "with '*little authority of his own*' in an operation designed on a level far beyond his rank".[5604] **Nikolić** further argues that: (1) in July 1995 he held the lowest rank among those officers found guilty of crimes committed in Srebrenica;[5605] and (2) "he was not a graduate from the military academy and that nobody liked him or trusted him because he was not a real 'officer'" and because "he was the chief of security and had to investigate on his buddies".[5606]

1976. Third, **Nikolić** submits that the Trial Chamber erred in failing to give sufficient weight to the fact that he did not augment his contribution to the JCE to Murder that ceased in the early morning of 15 July 1995 even though he had the ability to do so.[5607]

1977. Finally, **Nikolić** submits that the Trial Chamber erred in failing to consider the disparity between those JCE members who made "overwhelmingly large" contributions and those who made significant contributions, but not as great, to the JCE to Murder.[5608] He argues that **Popović** and **Beara** were the architects of the murder operation while his role was limited in time, extent, and influence.[5609] **Nikolić** additionally argues that the Trial Chamber failed to assess the differences in the scope between his contribution and that of Borovčanin and **Pandurević**. **Nikolić** emphasises in this regard that Borovčanin was much more involved in the events in Srebrenica than him and that **Pandurević**, as a brigade commander, had the authority and ability to stop the events from taking place.[5610]

1978. The Prosecution responds that **Nikolić** fails to show any error in the Trial Chamber's exercise of its sentencing discretion and that his appeal should be dismissed.[5611] It submits that

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5601 Nikolić's Appeal Brief, para. 9. See also Appeal Hearing, AT. 284-286 (4 Dec 2013).
5602 Nikolić's Appeal Brief, paras 9-13. See also Nikolić's Reply Brief, paras 7-8 (referring to Trial Judgement, paras 565-589, 499-501, 1344-1345, 1366, 1393, 1402-1403, 1409-1412); Appeal Hearing, AT. 286-287, 340 (4 Dec 2013).
5603 Nikolić's Appeal Brief, para. 9; Appeal Hearing, AT. 278 (3 Dec 2013). See also Nikolić's Appeal Brief, paras 10-13; Nikolić's Reply Brief, paras 9-13.
5604 Nikolić's Appeal Brief, para. 13 (emphasis in original), referring to Trial Judgement, para. 1412. See Appeal Hearing, AT. 278-279 (3 Dec 2013); AT. 284-286 (4 Dec 2013).
5605 Appeal Hearing, AT. 280-281 (3 Dec 2013).
5606 Appeal Hearing, AT. 281 (3 Dec 2013).
5607 Nikolić's Appeal Brief, paras 14-16.
5608 Nikolić's Appeal Brief, paras 17-18, 20.
5609 Nikolić's Appeal Brief, para. 18.
5610 Appeal Hearing, AT. 279-280 (3 Dec 2013).
5611 Prosecution's Response Brief (Nikolić), para. 39.

**Nikolić** mischaracterises his involvement in and knowledge of the crimes as limited.[5612] The Prosecution also asserts that **Nikolić**'s contribution to the JCE to Murder was substantial and that any consideration of whether he could have contributed further is "immaterial and unrealistic".[5613]

1979. The Appeals Chamber notes that the Trial Chamber considered **Nikolić**'s participation in the JCE to Murder to end after around 7:00 or 8:00 a.m. on 15 July 1995.[5614] While the Trial Chamber did make the finding that **Nikolić**'s "participation in the killing operation [...] end[ed] suddenly midday on 16 July",[5615] this would appear to be an error of a clerical nature when seen in the context of the entire Trial Judgement.[5616] The time frame which served as the basis for the Trial Chamber's finding regarding **Nikolić**'s participation in the JCE to Murder was clearly the early morning of 15 July 1995.[5617] There is no indication that the Trial Chamber based its sentencing considerations on a different time frame. **Nikolić**'s assertion that the Trial Chamber erred in this respect is accordingly dismissed.

1980. Regarding **Nikolić**'s argument that his role was not of great importance in the overall context of the crimes, the Appeals Chamber notes that the Trial Chamber found that "**Nikolić** played an important role in the JCE to Murder in terms of planning and organising detentions and executions" and described his contribution as "persistent and determined".[5618] In reaching this conclusion, the Trial Chamber was aware that his participation was not without restriction, observing that "**Nikolić** was of relatively low rank and his authority was limited",[5619] "[h]is criminal acts, though horrific in nature, were confined to his sphere of responsibility – some specific detention and execution sites in Zvornik", and his participation and role in the operation was not overarching.[5620] Further, the Trial Chamber recognised that **Nikolić**'s knowledge was different from that of **Popović** and **Beara**, in that the information he was given was sparse and that, significantly, he was first informed of the murder plan on 13 July 1995.[5621] However, the Trial Chamber also found that he acquired "a clearer picture of the operation"[5622] on 14 July 1995 and was soon made

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5612 Prosecution's Response Brief (Nikolić), para. 95. See Prosecution's Response Brief (Nikolić), paras 10, 13-15, 99-121, 127-129; Appeal Hearing, AT. 324-325, 332 (4 Dec 2013).

5613 Prosecution's Response Brief (Nikolić), para. 16. See Prosecution's Response Brief (Nikolić), para. 125.

5614 Trial Judgement, para. 1368.

5615 Trial Judgement, para. 1410.

5616 For example, in the part of the Trial Judgement meticulously detailing **Nikolić**'s conduct in July 1995, the Trial Chamber found that it had not been established beyond reasonable doubt that **Nikolić**'s conduct as the Zvornik Brigade Duty Officer on 16 July 1995 was connected to the murder operation. Trial Judgement, para. 1372. Similarly, in the section containing the findings on **Nikolić**'s participation in the JCE to Murder, the Trial Judgement does not list any contribution to the common purpose made by him on 16 July 1995. Trial Judgement, paras 1389-1392.

5617 Trial Judgement, fn. 4488, referring to Trial Judgement, paras 1367-1369.

5618 Trial Judgement, para. 2171.

5619 Trial Judgement, para. 2173.

5620 Trial Judgement, para. 1410.

5621 Trial Judgement, para. 1402. See also Trial Judgement, para. 1403.

5622 Trial Judgement, para. 1404.

aware of the scale and scope of the killing operation.[5623] The Trial Chamber concluded that "[h]is key contributions to the JCE to Murder [we]re made concurrent with, and after the acquisition of this knowledge".[5624] In challenging these findings, **Nikolić** merely asserts that the Trial Chamber should have interpreted the evidence differently to find that even the information disclosed to him by **Popović** and **Beara** during the 14 July Meeting could not change the fact that he lacked crucial knowledge of "the scope of the operation targeting all able-bodied men from Srebrenica".[5625] In so doing, **Nikolić** has failed to articulate a discernible error by the Trial Chamber in reaching its conclusion as to his role and importance.

1981. With respect to **Nikolić**'s argument that the Trial Chamber failed to give weight to the fact that on 15 July 1995 he did not augment his contribution to the JCE to Murder even though he had the ability to do so, the Appeals Chamber finds that this cannot have any impact on the Trial Chamber's characterisation of his actual conduct and is therefore irrelevant.

1982. Regarding **Nikolić**'s argument that the Trial Chamber erred in failing to reflect the disparity between his contribution to the JCE to Murder and the contributions of **Popović** and **Beara** in their respective sentences, the Appeals Chamber notes that the Trial Chamber clearly considered the extent of each of the respective defendants' contributions to the crimes committed in the determination of their sentences[5626] and differentiated accordingly. While both **Popović** and **Beara** were sentenced to life imprisonment, **Nikolić** was sentenced to a lower sentence of 35 years' imprisonment. This corresponds to the Trial Chamber's finding that **Nikolić** played a more limited but nonetheless important role in the JCE to Murder. **Nikolić** merely asserts that the difference in sentences should have been greater.[5627] However, he has failed to identify a discernible error made by the Trial Chamber.

1983. Similarly, the Appeals Chamber notes that neither Borovčanin nor **Pandurević** was found to be a member of the JCE to Murder.[5628] Moreover, the Trial Chamber specifically considered the extent of Borovčanin's and **Pandurević**'s contributions to the crimes committed in the determination of their sentences, noting, *inter alia*, the unique set of factors that, to a certain extent, limited the gravity of their contributions.[5629] Other than noting that their contributions were

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5623 Trial Judgement, para. 1405.
5624 Trial Judgement, para. 1407.
5625 Nikolić's Appeal Brief, para. 10. The Appeals Chamber recalls that it has already dismissed partly-related arguments concerning **Nikolić**'s *mens rea* and the subject matter discussed during the 14 July Meeting. See *supra*, para. 936. See also *supra*, para. 997.
5626 See Trial Judgement, paras 2157, 2164, and 2171.
5627 Nikolić's Appeal Brief, para. 20.
5628 Trial Judgement, paras 1541, 1979, 2213.
5629 Trial Judgement, paras 2180-2187, 2211-2215.

significant, **Nikolić** has failed to show how the Trial Chamber erred. His argument is thus dismissed.

1984. For the foregoing reasons, **Nikolić**'s sub-ground of appeal 1.1 is dismissed.

### 3. Miletić's appeal (Ground 27 in part)

1985. **Miletić** submits that the Trial Chamber erred in ascribing unwarranted weight to the nature and extent of his participation in the crimes and therefore imposed an excessive and disproportionate sentence.[5630] He argues that the Trial Chamber overestimated his position and did not take into account the fact that all of his actions occurred within the context of his ordinary responsibilities.[5631] The Prosecution responds that the Trial Chamber reasonably assessed **Miletić**'s role.[5632]

1986. The Appeals Chamber recalls that it has already dismissed **Miletić**'s arguments that the Trial Chamber overestimated his position, responsibilities, and authority.[5633] Similarly, it recalls its earlier conclusion that the fact that **Miletić**'s participation may have amounted to no more than his routine duties does not exculpate him.[5634] Accordingly, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion when sentencing him to 19 years' imprisonment. This aspect of **Miletić**'s ground of appeal 27 is dismissed.

### 4. Prosecution's appeal

#### (a) Pandurević's manifestly inadequate sentence (Ground 3 in part)

1987. The Prosecution submits that **Pandurević**'s sentence of 13 years' imprisonment is manifestly inadequate and does not meet the key sentencing objectives of retribution and deterrence. [5635] The Prosecution first argues that **Pandurević**'s sentence does not reflect the gravity of his crimes.[5636] The Prosecution argues that these crimes included: (1) the murder of up to 2,500 Bosnian Muslim males at Kozluk and in the Pilica area, where executions were carried out with "considerable cruelty" by **Pandurević**'s subordinates;[5637] (2) the murder of the vulnerable Milići

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5630 Miletić's Appeal Brief, para. 447. See also Miletić's Reply Brief, para. 143.
5631 Miletić's Appeal Brief, para. 446, referring to Miletić's Appeal Brief, paras 230-244.
5632 Prosecution's Response Brief (Miletić), paras 357-358, referring to Prosecution's Response Brief (Miletić), paras 143 *et seq*. See also Prosecution's Response Brief (Miletić), paras 361-362.
5633 See *supra*, paras 1452, 1460, 1474, 1481.
5634 See *supra*, para. 1615.
5635 Prosecution's Appeal Brief, paras 187-188, 190, 192, 223-224. See Appeal Hearing, AT. 533-534 (6 Dec 2013). See also Prosecution's Reply Brief, para. 89.
5636 Prosecution's Appeal Brief, para. 193, referring to Trial Judgement, para. 2152. See Appeal Hearing, AT. 533-534 (6 Dec 2013).
5637 Prosecution's Appeal Brief, paras 191, 194-196.

Prisoners;[5638] and (3) the forcible transfer of up to 32,000 Bosnian Muslims.[5639] The Prosecution submits that the crime of ethnic cleansing has irreparably altered the lives of Bosnian Muslims in Eastern Bosnia and has a "continuing impact" on the lives of its victims.[5640]

1988. Second, the Prosecution submits that **Pandurević**'s sentence does not reflect the essential role of superior responsibility in upholding and enforcing the standards of international humanitarian law.[5641] It argues that **Pandurević**'s failure to control his troops, which resulted in up to 2,500 murders, and his responsibility for the culture of ethnic discrimination and prejudice amongst his troops, calls for unequivocal condemnation and effective deterrence.[5642] The Prosecution submits that **Pandurević** had full command and control of his brigade and could have prevented the continued involvement of his troops in future crimes.[5643]

1989. Finally, the Prosecution submits that **Pandurević**'s sentence as a commander should correlate with the likely sentences of his subordinates, as the gravity of the superior's omission and that of his/her subordinates' crimes are intrinsically linked.[5644] It emphasises in this respect that **Pandurević**'s sentence of 13 years' imprisonment does not correlate with the sentencing ranges applicable to war crimes in the courts of the former Yugoslavia.[5645]

1990. **Pandurević** responds that the Trial Chamber properly exercised its discretion in the determination of his sentence and had due regard to the gravity of the offences committed as well as the sentencing practice in the courts of the former Yugoslavia.[5646]

1991. The Appeals Chamber recalls that the gravity of the offence is the primary consideration in imposing a sentence.[5647] It further recalls that in assessing the gravity of an offence in the context of a conviction under Article 7(3) of the Statute, the Chamber must take into account: (1) the gravity of the underlying crime committed by the convicted person's subordinate; and (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[5648] Thus, in

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5638 Prosecution's Appeal Brief, paras 189, 197.
5639 Prosecution's Appeal Brief, paras 189, 198-202.
5640 Prosecution's Appeal Brief, para. 202, referring to Trial Judgement, para. 2152. See Appeal Hearing, AT. 533 (6 Dec 2013). See also Prosecution's Appeal Brief, para. 198.
5641 Prosecution's Appeal Brief, paras 203-207.
5642 Prosecution's Appeal Brief, paras 203, 205-206. See Appeal Hearing, AT. 533-534 (6 Dec 2013).
5643 Prosecution's Appeal Brief, paras 211-212.
5644 Prosecution's Appeal Brief, paras 208-209. See Appeal Hearing, AT. 534 (6 Dec 2013).
5645 Prosecution's Appeal Brief, para. 210, referring to Rule 101(B)(iii) of the Rules. See Appeal Hearing, AT. 534 (6 Dec 2013). As an example, the Prosecution points out that in the courts of Bosnia and Herzegovina, war crimes and crimes against humanity carry a minimum sentence of ten years' imprisonment and a maximum sentence of 45 years' imprisonment, and the gravest forms of serious criminal offences perpetrated with intent carry a minimum sentence of 20 years' imprisonment. Prosecution's Appeal Brief, para. 210 & fn. 564.
5646 Pandurević's Response Brief, paras 272-276. See also Appeal Hearing, AT. 580 (6 Dec 2013).
5647 *Đorđević* Appeal Judgement, para. 969; *Lukić and Lukić* Appeal Judgement, para. 649; *Čelebići* Appeal Judgement, para. 731.
5648 *Hadžihasanović and Kubura* Appeal Judgement, para. 313; *Čelebići* Appeal Judgement, paras 732, 741.

the context of a conviction under Article 7(3) of the Statute, the gravity of a subordinate's crime remains an "essential consideration" in assessing the gravity of the superior's own conduct in sentencing.[5649]

1992. A reading of the Trial Judgement clearly evinces that the Trial Chamber fully considered the gravity of the crimes for which **Pandurević** was found responsible.[5650] The Trial Chamber considered the "sheer scale and cruelty" of the crimes committed on the Bosnian Muslim population of Srebrenica.[5651] It emphasised the massive scale of both the forcible transfers and the campaign of persecution underlying the crimes committed as part of the JCE, the fact that the crimes were executed with systematic and cold brutality, and the continuing impact of the crimes on the victims and their families.[5652] The Trial Chamber also specifically noted that "[t]he murder of the ten wounded Bosnian Muslim prisoners from Milići Hospital was an appalling and inexcusable criminal act. **Pandurević**'s responsibility for these murders, albeit through aiding and abetting by omission, can only be condemned without reservation."[5653] The Appeals Chamber is accordingly satisfied that the Trial Chamber had due regard to the gravity of the crimes for which it found **Pandurević** responsible in the determination of his sentence.

1993. The Appeals Chamber recalls that trial chambers are obliged to individualise penalties to fit the circumstances of an accused and the gravity of the crimes and, to this end, they are vested with broad discretion to determine the appropriate sentence.[5654] In assessing the nature and level of **Pandurević**'s involvement in the crimes for sentencing purposes, the Trial Chamber explicitly noted that "in more than one respect, **Pandurević**'s case presents an uncommon and extraordinary set of facts and circumstances".[5655]

1994. In considering his liability for aiding and abetting the forcible transfers, the Trial Chamber considered that **Pandurević** was not involved in the planning and design of the operation, was not present during the operation, did not share the intent to carry out the common purpose, and was involved in the forcible transfers only as far as the *Krivaja*-95 military operation was concerned,[5656] in which **Pandurević**'s role was "a military commander, acting at a tactical level carrying out arguably justifiable military objectives".[5657] The Trial Chamber concluded that the "limited nature

5649 *Hadžihasanović and Kubura* Appeal Judgement, para. 313; *Čelebići* Appeal Judgement, para. 741.
5650 See Trial Judgement, para. 2210.
5651 Trial Judgement, paras 2148, 2152.
5652 Trial Judgement, paras 2149-2152.
5653 Trial Judgement, para. 2077.
5654 See *supra*, para. 1961.
5655 Trial Judgement, para. 2210.
5656 Trial Judgement, paras 2211-2212, referring to Trial Judgement, paras 2000-2012.
5657 Trial Judgement, para. 2212.

of **Pandurević**'s involvement in the forcible transfer diminishes the gravity of his criminal conduct".[5658]

1995. Regarding **Pandurević**'s responsibility under Article 7(1) of the Statute for the crime of murder, the Trial Chamber recalled its findings that **Pandurević** was not a participant in the JCE to Murder, did not share the intent to contribute to its common purpose, and did not significantly contribute to it.[5659] It also recalled **Pandurević**'s absence from the Zvornik area.[5660] Further, in considering **Pandurević**'s responsibility for the murder of the Milići Prisoners, the Trial Chamber considered that his liability arose "not from any positive, intentional acts on his part, but instead from his failure to discharge his legal duty to protect the wounded prisoners" on one occasion, and considered the circumstances surrounding his omission, "including the high level authorities behind the murder operation".[5661] The Appeals Chamber also notes that the Trial Chamber was cognisant of its findings on **Pandurević**'s responsibility as a superior.[5662]

1996. The Appeals Chamber is thus satisfied that, in addition to expressly considering the gravity of the crimes at issue, the Trial Chamber conducted a thorough examination of **Pandurević**'s individual circumstances, including his criminal conduct, when determining the appropriate sentence.

1997. With respect to the argument that **Pandurević**'s sentence does not reflect the essential role of superior responsibility in upholding and enforcing the standards of international humanitarian law, the Appeals Chamber notes that the Trial Chamber expressly recognised the importance of a superior's duty to enforce the rules of international humanitarian law, stating that "a failure to fulfil a legal duty is a serious form of responsibility, particularly when it contributes, as in this case, to murder. **Pandurević**'s omission thus cannot be trivialized".[5663] However, this recognition does not automatically require a sentence above a certain threshold; rather, a trial chamber is required to consider this together with other considerations of the gravity of the offences, the accused's personal conduct, the general practice regarding prison sentences in the courts of the former Yugoslavia, and any aggravating or mitigating circumstances in arriving at a sentencing determination.[5664] The Trial Chamber in the instant case did just that. Accordingly, the Prosecution has failed to identify a discernible error in this regard.

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5658 Trial Judgement, para. 2212.
5659 Trial Judgement, para. 2213.
5660 Trial Judgement, paras 2213, 2215.
5661 Trial Judgement, para. 2214.
5662 Trial Judgement, paras 2027-2029, 2031, 2034, 2040, 2049, 2051, 2064-2065.
5663 Trial Judgement, para. 2214.
5664 See *Đorđević* Appeal Judgement, para. 931; *Šainović et al.* Appeal Judgement, para. 1797; *Čelebići* Appeal Judgement, paras 429, 716, 732, 741.

1998. Finally, in relation to the Prosecution's argument that a sentence of a commander should correlate with the likely sentences of his subordinates, the Appeals Chamber notes that, although sentences received by subordinates may be a factor to be considered when determining the sentence of a commander,[5665] this should not derogate from the Trial Chamber's primary responsibility concerning sentencing – that is, tailoring the penalties to fit the individual circumstances of the accused.[5666] The Prosecution does not provide any information about the sentences received by **Pandurević**'s subordinates in the courts of the former Yugoslavia or about the factors used in their determination.[5667] The Appeals Chamber thus considers that the Prosecution has failed to show any discernible error in the exercise of the Trial Chamber's discretion in this regard.

1999. For the foregoing reasons, the Appeals Chamber dismisses this aspect of the Prosecution's ground of appeal 3.

(b) Nikolić's manifestly inadequate sentence (Ground 8 in part)

2000. The Prosecution submits that **Nikolić**'s sentence of 35 years' imprisonment is manifestly inadequate.[5668] It asserts that only a sentence of life imprisonment can fully reflect the gravity of **Nikolić**'s crimes and his conduct.[5669]

2001. The Prosecution contends that the Trial Chamber erred in determining **Nikolić**'s sentence by minimising the gravity of his crimes.[5670] The Prosecution argues that he played a "central and crucial" role in contributing to the genocide of up to 6,000 Bosnian Muslims.[5671] It further contends that **Nikolić**: (1) personally supervised the detention, guarding, and transportation of between 800 and 2,500 Bosnian Muslim prisoners in inhumane conditions at the Grbavci School and their subsequent execution at Orahovac;[5672] (2) worked closely with **Beara** and **Popović** in organising the execution of more than 1,000 Bosnian Muslim prisoners in Kozluk;[5673] (3) oversaw the detention of up to 1,500 Bosnian Muslim prisoners in intolerable conditions at the Kula School and their subsequent execution at the Branjevo Military Farm;[5674] and (4) is criminally responsible for

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5665 See *Strugar* Appeal Judgement, paras 350-351.
5666 *Šainović et al.* Appeal Judgement, para. 1837; *Mrkšić and Šljivančanin* Appeal Judgement, para. 415; *D. Nikolić* Judgement on Sentencing Appeal, paras 45-46.
5667 The Appeals Chamber also notes that, while the Tribunal is obliged to consider the sentencing practice in the former Yugoslavia, it is not bound by it. Article 24(1) of the Statute; Rule 101(B)(iii) of the Rules; *Đorđević* Appeal Judgement, para. 955; *Šainović et al.* Appeal Judgement, para. 1830; *Čelebići* Appeal Judgement, para. 788.
5668 Prosecution's Appeal Brief, paras 298, 301. See also Prosecution's Reply Brief, paras 153, 157.
5669 Prosecution's Appeal Brief, paras 298, 301, 318-320.
5670 Prosecution's Appeal Brief, para. 302. See also Prosecution's Reply Brief, paras 158-162.
5671 Prosecution's Appeal Brief, paras 300, 303.
5672 Prosecution's Appeal Brief, paras 303-306.
5673 Prosecution's Appeal Brief, paras 307-308.
5674 Prosecution's Appeal Brief, paras 309-311.

the murders and cruel treatment perpetrated at other detention and killing sites, including in Petkovci and at the Pilica Cultural Centre.[5675]

2002. The Prosecution also emphasises that **Nikolić** was "persistent, determined and resolved in committing his crimes" and that his intent to treat with cruelty and kill Bosnian Muslims based on their particular religious or ethnic characteristics renders the commission of his crimes particularly grave.[5676] It submits that the unreasonableness of the Trial Chamber's analysis of the gravity of crimes is exemplified by its undue focus on **Nikolić**'s lack of genocidal intent rather than on his murderous and persecutory mindset. It further argues that, although **Nikolić** abused his authority to commit crimes, the Trial Chamber "excused it" and that the Trial Chamber's suggestion that "**Nikolić** was disturbed by what he was asked to do" is not supported by the evidence.[5677]

2003. **Nikolić** responds that the Prosecution fails to identify a precise error committed by the Trial Chamber and that its appeal should be summarily dismissed.[5678] He submits that the Trial Chamber considered both the gravity of his crimes and the totality of his conduct in determining his sentence, and did not minimise either of these factors.[5679]

2004. The Appeals Chamber observes that a reading of the Trial Judgement clearly shows that the Trial Chamber expressly considered the gravity of **Nikolić**'s crimes. The Trial Chamber referred to the "scale and cruelty" of the genocide and extermination at Srebrenica as well as the persecution of the Bosnian Muslim population,[5680] the massive scale of the persecutory campaign underlying the crimes,[5681] the fact that the crimes "were executed with systematic and cold brutality",[5682] and the continuing impact of the crimes on the victims and their families.[5683] The Trial Chamber also duly considered **Nikolić**'s role in the commission of the crimes, labelling it as "persistent and determined" and carried out with "resolve".[5684] It determined that **Nikolić** "was actively involved in many facets" of the executions committed[5685] and "participated in various aspects of the operation – planning, physical preparations, and securing personnel", including the events in Orahovac, and at

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5675 Prosecution's Appeal Brief, paras 312-314.
5676 Prosecution's Appeal Brief, para. 315. See also Prosecution's Appeal Brief, para. 301.
5677 Prosecution's Appeal Brief, para. 316. See also Prosecution's Reply Brief, paras 163-165.
5678 Nikolić's Response Brief, paras 192-193, 197-206.
5679 Nikolić's Response Brief, paras 194, 207, 209-215, 229. See Nikolić's Response Brief, paras 225-226, 230-240, 242-246.
5680 Trial Judgement, para. 2152. See Trial Judgement, para. 2148.
5681 Trial Judgement, para. 2150.
5682 Trial Judgement, para. 2149.
5683 Trial Judgement, paras 2151-2152.
5684 Trial Judgement, paras 1408-1409, 2171.
5685 Trial Judgement, para. 1409.

the Ročević School and the Kula School.[5686] He was also found to possess the specific intent to discriminate on political, racial, or religious grounds.[5687]

2005. At the same time, in considering **Nikolić**'s involvement in the genocide, the Trial Chamber notably determined that "while **Beara** and **Popović** can properly be described as architects of this genocidal operation, **Nikolić** was brought in to carry out specific tasks assigned to him, in implementation of a monstrous plan, designed by others", and that "[h]is criminal acts, though horrific in nature, were confined to his sphere of responsibility – some specific detention and execution sites in Zvornik".[5688] Moreover, the Trial Chamber found that "[h]is participation in the killing operation is limited in time [... and as] a result he is not directly implicated in the [Pilica Area Killings]".[5689] It concluded that "[it] is not satisfied that the only reasonable inference to be drawn from **Nikolić**'s acts is that he shared the genocidal intent"[5690] and that his role in the genocide was that of an aider and abettor.[5691]

2006. The Appeals Chamber notes that the Trial Chamber did not explicitly repeat all its findings concerning the gravity of **Nikolić**'s conduct in its sentencing considerations, limiting itself to stressing that **Nikolić**'s contribution was "persistent and determined", that "he demonstrated a resolve to carry out his assigned tasks", and that he did not share the genocidal intent.[5692] However, the Trial Judgement must be read as a whole and it is clear from the findings set out in the previous paragraphs that the Trial Chamber did not minimise the gravity of **Nikolić**'s crimes. On the contrary, it stressed their very serious nature. Similarly, the Trial Chamber clearly found that **Nikolić** possessed the intent required for murder and persecution. The fact that it also considered a lack of genocidal intent to be relevant to its sentencing considerations does not, in the view of the Appeals Chamber, show that the Trial Chamber abused its discretion by unduly focusing on this to the detriment of other relevant considerations.

2007. The Appeals Chamber further notes that, contrary to the Prosecution's contention, the Trial Chamber expressly considered and rejected the submission that **Nikolić** abused his authority, finding that he was of relatively low rank and his authority was limited.[5693] The Prosecution does not show any discernible error in this regard.

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5686 Trial Judgement, paras 1390-1391, 1409. See also Trial Judgement, paras 1389, 1392.
5687 Trial Judgement, para. 1426.
5688 Trial Judgement, para. 1410.
5689 Trial Judgement, para. 1410.
5690 Trial Judgement, para. 1414.
5691 Trial Judgement, para. 2171. See also Trial Judgement, paras 1414-1415.
5692 Trial Judgement, para. 2171.
5693 Trial Judgement, para. 2173 & fn. 6281.

2008. Finally, the Appeals Chamber turns to the Trial Chamber's observation that "there is some evidence that **Nikolić** was disturbed by what he was asked to do".[5694] The Appeals Chamber notes that M. Birčaković, a member of the Zvornik Brigade Military Police[5695] and the only direct source of information about this incident, expressly identified the reason for **Nikolić**'s anger as the fact that he "was not consulted beforehand but was only ordered to find some accommodation for these people".[5696] It follows that **Nikolić** was disturbed not by the nature of the tasks assigned to him, but rather because he was ordered to carry out the tasks without first being consulted. There would be no basis for arriving at another conclusion in the absence of further evidence. Accordingly, the Appeals Chamber finds that the Trial Chamber failed to properly exercise its discretion in arriving at this conclusion. However, the Appeals Chamber notes that the Trial Chamber's remark was relied upon only in the context of its discussion on zeal as an aggravating factor. The wording chosen by the Trial Chamber does not suggest that this erroneous interpretation of M. Birčaković's evidence was a decisive factor in rejecting zeal as aggravating **Nikolić**'s criminal conduct.[5697] The Appeals Chamber thus considers that this error did not result in a miscarriage of justice.

2009. In view of the above, the Appeals Chamber sees no merit in the Prosecution's assertion that the Trial Chamber minimised the gravity of **Nikolić**'s crimes or his criminal conduct in the determination of his sentence. A sentence of 35 years' imprisonment is at the upper end of the sentencing scale,[5698] and the Appeals Chamber considers that this sentence is not out of reasonable proportion to the gravity of the crimes for which **Nikolić** was convicted and the totality of his criminal conduct so as to evidence an abuse of discretion by the Trial Chamber.

2010. For the foregoing reasons, the Appeals Chamber dismisses this aspect of the Prosecution's ground of appeal 8.

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5694 Trial Judgement, para. 2174.

5695 Trial Judgement, para. 486.

5696 Milorad Birčaković, T. 11120 (8 May 2007).

5697 Trial Judgement, para. 2174 (internal references omitted):

> The Trial Chamber notes that there is some evidence that **Nikolić** was disturbed by what he was asked to do. While the evidence shows that **Nikolić** was determined and persistent in organising, planning and executing the murder operation, the Trial Chamber does not find that **Nikolić** carried out his role with a particular enthusiasm. Accordingly, the Trial Chamber does not consider that zeal has been established as an aggravating factor.

The Appeals Chamber considers that the conclusion to reject zeal as an aggravating factor appears to be based on the totality of the evidence concerning *how* **Nikolić** carried out his role in the murder operation. "Some evidence" that he was disturbed by his tasks after the meeting does not appear to have been a decisive factor here.

5698 See, *e.g.*, *D. Milošević* Appeal Judgement, para. 329, stating that "[t]he sentence of 33 years imprisonment imposed on Milošević [is] very serious". The Appeals Chamber notes that only seven convicted persons have received sentences of 30 years or more at the Tribunal: Radoslav Brđanin - 30 years. *Brđanin* Appeal Judgement, p. 157 (Disposition); Radislav Krstić - 35 years. *Krstić* Appeal Judgement, para. 275 (Disposition); Milan Martić - 35 years. *Martić* Appeal Judgement, para. 355 (Disposition); Goran Jelisić - 40 years. *Jelisić* Appeal Judgement, p. 41 (Disposition); Milomir Stakić - 40 years. *Stakić* Appeal Judgement, p. 142 (Disposition); Stanislav Galić - life imprisonment. *Galić* Appeal Judgement, p. 185 (Disposition); Milan Lukić - life imprisonment. *Lukić and Lukić* Appeal Judgement, para. 672 (Disposition). Further, Zdravko Tolimir was sentenced to life imprisonment (with appeal currently pending). *Tolimir* Trial Judgement, para. 1242 (Disposition).

## D. Alleged Errors in Evaluating Aggravating Circumstances

### 1. Abuse of authority and double-counting

#### (a) Beara's appeal (Ground 40)

2011. **Beara** submits that the Trial Chamber erred in law by identifying aggravating circumstances and attributing them undue weight in imposing his sentence.[5699] He argues that the finding that he abused his position of authority to orchestrate the crimes is based on unreliable evidence as well as impermissible inferences and conclusions from circumstantial evidence.[5700] Moreover, **Beara** contends that the Trial Chamber erred in relying solely on Witness Deronjić's untested and untrustworthy testimony in finding that his actions were "cold and calculated".[5701]

2012. **Beara** further submits that the Trial Chamber considered the aggravating circumstances twice as "[f]irst, it gave them [undue] weight and based on that [imposed] an inadequate and harsh sentence and then used them to completely negate the mitigating circumstances".[5702] **Beara** asserts that the Trial Chamber erred when it found that his willing participation constituted an aggravating factor and distinguished it from voluntariness which is a necessary component of the crime and as such cannot be considered as an aggravating factor.[5703]

2013. Finally, **Beara** submits that his superior position and alleged abuse thereof were already considered and incorporated into the charges. He argues that he was indicted for abusing his authority as Chief of the Security Branch in planning, organising, and realising the murder operations and under such circumstances the abuse of authority should not also be used as an aggravating factor.[5704] **Beara** points out that such a practice is unfair to him and stands against sentencing principles of the former Yugoslavia and elsewhere in the world.[5705]

2014. The Prosecution responds that the Trial Chamber properly took into account the aggravating circumstances.[5706] It submits that **Beara** fails to substantiate his claim that the Trial Chamber considered aggravating circumstances twice and as such his argument warrants summary

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5699 Beara's Appeal Brief, para. 340. See also Beara's Reply Brief, para. 109.
5700 Beara's Appeal Brief, para. 343.
5701 Beara's Appeal Brief, para. 344. See also Appeal Hearing, AT. 251 (3 Dec 2013).
5702 Beara's Appeal Brief, para. 342. See also Appeal Hearing, AT. 209 (3 Dec 2013).
5703 Beara's Appeal Brief, para. 341.
5704 Beara's Reply Brief, para. 109. See also Appeal Hearing, AT. 209-210 (3 Dec 2013).
5705 Beara's Reply Brief, para. 109. The Appeals Chamber notes that **Beara** refers only to the U.S. Sentencing Guidelines without identifying the relevant provisions. In these circumstances and noting that Chambers are not bound by national sentencing practices (*cf. infra*, para. 2087), the Appeals Chamber does not consider it necessary to examine the proffered guidelines. See also Appeal Hearing, AT. 210 (3 Dec 2013); *infra*, paras 2087-2089.
5706 Prosecution's Response Brief (Beara), paras 335, 337-338.

dismissal.[5707] Finally, it emphasises that the Trial Chamber did not consider **Beara**'s willing participation in the crimes to be an aggravating factor.[5708]

2015. The Appeals Chamber first recalls that it has already ruled on **Beara**'s grounds of appeal concerning reliability of evidence, including that given by Deronjić, and challenged findings based on circumstantial evidence, without finding any errors on the part of the Trial Chamber.[5709] **Beara**'s argument is accordingly dismissed.

2016. The Appeals Chamber further finds that **Beara** has failed to develop his claim that the Trial Chamber considered certain factors twice, first as aggravating factors and subsequently to negate mitigating factors. This assertion is therefore dismissed.

2017. The Appeals Chamber observes that the Trial Chamber noted that "willingness in the sense of voluntariness is a necessary component of the crimes and therefore *does not* consider it to be an aggravating factor".[5710] This clearly shows that the Trial Chamber rejected willing participation as an aggravating factor. **Beara**'s argument therefore lacks merit.

2018. Regarding **Beara**'s argument on double-counting, the Appeals Chamber first notes that **Beara** raised this argument only in his reply brief, making it difficult for the Prosecution to respond.[5711] Nonetheless, in the interests of justice the Appeals Chamber will exercise its discretionary power to address this argument.[5712]

2019. The Appeals Chamber recalls that factors considered in establishing the gravity of the crime cannot be double-counted as aggravating circumstances.[5713] In the instant case, **Beara** submits that the Trial Chamber double-counted with respect to his position of authority in the Main Staff of the VRS. This position was noted in the Indictment,[5714] which further alleged that "**Beara** [...] was given authority for organising, co-ordinating and facilitating the detention, transportation, summary execution and burial of the Muslim victims."[5715] Subsequently, in its analysis of the gravity of the

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5707 Prosecution's Response Brief (Beara), para. 336.

5708 Prosecution's Response Brief (Beara), para. 336; Appeal Hearing, AT. 213 (3 Dec 2013).

5709 See *supra*, paras 86-94, 97-98, 101-106, 111-129, 143-150, 179-181, 188-191, 221-229, 293-329, 363-373, 378-401, 416-426, 446-450, 473-494, 547-555, 561-572, 675-681, 699-715, 787-803, 823-824, 838-840, 861-862, 922-930, 969-990, 1035-1057, 1199-1291, 1838-1845. *Cf. supra*, paras 1058-1069.

5710 Trial Judgement, para. 2154 (internal references omitted) (emphasis added).

5711 See *Martić* Appeal Judgement, para. 229.

5712 See *Jokić* Judgement on Sentencing Appeal, para. 54.

5713 *Đorđević* Appeal Judgement, para. 936; *D. Milošević* Appeal Judgement, paras 306, 309; *Limaj et al.* Appeal Judgement, para. 143.

5714 Indictment, para. 14:

> **Beara** was a Colonel and was the Chief of Security of the Main Staff of the VRS. [...] As part of his job he was, *inter alia*, responsible for managing the Main Staff units of the Military Police [...] and proposing ways to utilise the Military Police. He was also responsible, in general, for co-ordinating with the bodies of the Ministry of Interior (MUP) in the six VRS Corps zones of responsibility.

5715 Indictment, para. 27.

crimes, the Trial Chamber found **Beara** to be a central figure in the organisation and execution of genocide, noting his position of authority as "the most senior officer of the Security Branch – the entity charged with a central directing role" to show that **Beara** "had the clearest overall picture of the massive scale and scope of the killing operation".[5716]

2020. In its examination of whether the Trial Chamber relied on these findings when determining the gravity of the offence for sentencing purposes, the Appeals Chamber takes into consideration the fact that **Beara** was not charged pursuant to the doctrine of superior responsibility but rather for his participation in the JCE to Murder. Such participation does not require a position of authority in the VRS.[5717] Further, a position of authority is not a precondition for the crimes charged in the Indictment. Accordingly, **Beara**'s position of authority is clearly not an element establishing criminal responsibility in this case. Against this background, the Appeals Chamber is of the view that the Trial Chamber only considered the position he held as relevant to his role in the crimes and did not directly rely on it in determining the gravity of the crimes.[5718] Following from this, and noting that it was not expressly addressed in the section assessing the gravity of the crimes, the Appeals Chamber also considers that the Trial Chamber did not rely on **Beara**'s abuse of authority – materialised in giving "directions and orders to the subordinate troops who implemented the murder plan"[5719] – as a factor increasing the gravity of the crimes.[5720] Accordingly, his contention that the Trial Chamber double-counted is without merit.

2021. For the above-mentioned reasons, **Beara**'s ground of appeal 40 is therefore dismissed.

(b) Miletić's appeal (Grounds 24 and 27 in part)

2022. Under his ground of appeal 24, **Miletić** submits that the Trial Chamber erred in finding that he abused his position of authority and subsequently considering it as an aggravating circumstance.[5721] He argues that the Trial Chamber did not identify any specific action that constituted an abuse of position of authority. **Miletić** notes that he did nothing other than what he did everyday as part of his job.[5722] Moreover, **Miletić** points out that the Trial Chamber adopted an inconsistent approach when it did not consider an abuse of authority as an aggravating factor in the case of Gvero.[5723] **Miletić** also submits that the Trial Chamber considered his central, co-ordinating

5716 Trial Judgement, para. 2164.
5717 See *Đorđević* Appeal Judgement, para. 937; *Šainović et al.* Appeal Judgement, para. 1823. The Trial Chamber found that the units involved in the murder operation fell across the entire spectrum of the VRS hierarchy. Trial Judgement, para. 1072.
5718 See also *Ntabakuze* Appeal Judgement, para. 272.
5719 Trial Judgement, para. 2165.
5720 See, *e.g.*, *Stakić* Appeal Judgement, para. 411.
5721 Miletić's Appeal Brief, paras 432, 436.
5722 Miletić's Appeal Brief, para. 433.
5723 Miletić's Appeal Brief, para. 434.

role when assessing the nature and the extent of his involvement in the crimes, and then erroneously double-counted it as an aggravating factor.[5724]

2023. Under his ground of appeal 27, **Miletić** asserts that the Trial Chamber's finding that he used the trust of his superiors to organise and execute the criminal plan could be construed as indicating an independent action of his without the knowledge of his superiors.[5725]

2024. The Prosecution responds that the Trial Chamber acted within its discretion in finding that **Miletić** abused his position of authority.[5726] It argues that **Miletić** used his central position and the influence that it brought to organise efficiently and carry out the criminal plan.[5727] The Prosecution agrees that the Trial Chamber took an inconsistent approach with respect to the abuse of authority, but argues that the inconsistency benefited Gvero, who also abused his authority, rather than prejudiced **Miletić**.[5728]

2025. The Prosecution further submits that the Trial Chamber did not engage in double-counting as it found that **Miletić**'s co-ordinating role enabled the plan to be successfully implemented in discussing his involvement, whereas it considered **Miletić**'s use of his position's authority to influence the actions of others and further the criminal plan as an aggravating factor.[5729] Finally, in response to **Miletić**'s argument under his ground of appeal 27, the Prosecution argues that **Miletić** fails to articulate an error.[5730]

2026. The Appeals Chamber notes that, in the Trial Chamber's findings on the nature and extent of **Miletić**'s involvement, he was found to have drafted Directive 7, participated in the convoy approval procedures, played a key role in receiving information from and distributing it to the relevant actors, and making contributions at all stages to the plan to forcibly remove Bosnian Muslims from Srebrenica and Žepa.[5731] A reading of the Trial Judgement reveals that **Miletić**'s actions constituting these contributions generally fell within his regular duties.[5732] His key role in the JCE to Forcibly Remove was therefore inextricably linked to his position in the VRS Main Staff and this aspect was duly taken into consideration by the Trial Chamber in its findings on the gravity of the crime, even though his position and authority were not explicitly discussed.[5733] The Appeals Chamber recalls that factors considered in establishing the gravity of the crime cannot be

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5724 Miletić's Appeal Brief, para. 435.
5725 Miletić's Appeal Brief, para. 446. See Trial Judgement, para. 2196.
5726 Prosecution's Response Brief (Miletić), paras 339-340.
5727 Prosecution's Response Brief (Miletić), para. 340. See also Prosecution's Response Brief (Miletić), para. 341.
5728 Prosecution's Response Brief (Miletić), para. 342.
5729 Prosecution's Response Brief (Miletić), para. 343.
5730 Prosecution's Response Brief (Miletić), para. 359. See also Prosecution's Response Brief (Miletić), para. 360.
5731 Trial Judgement, para. 2195.
5732 Trial Judgement, paras 1620-1641. See also Trial Judgement, paras 1661-1662, 1703-1706, 1711-1715.
5733 Trial Judgement, para. 2195.

considered again as separate aggravating circumstances.[5734] Accordingly, the Trial Chamber erred in law by considering **Miletić**'s use of his authority within the VRS Main Staff as an aggravating circumstance, thus effectively double-counting it. Consequently, it is unnecessary to consider whether the Trial Chamber erred in concluding that **Miletić** abused his authority. **Miletić**'s ground of appeal 24 is therefore granted, in part.

2027. The Appeals Chamber now turns to **Miletić**'s challenge under his ground of appeal 27. The Trial Chamber found that "[**Miletić**] used [...] the trust placed in him by Milovanović and Mladić [...] to organise and carry out the criminal plan to forcibly remove the Bosnian Muslim population from the enclaves."[5735] The Appeals Chamber considers that the wording of this finding, although potentially ambiguous, does not allow for the interpretation given to it by **Miletić** when read in the context of the Trial Judgement as a whole. The Trial Chamber expressly found that both Milovanović and Mladić were well aware of the criminal plan to forcibly remove the Bosnian Muslim population from Srebrenica and Žepa.[5736] It follows that the Trial Chamber clearly did not mean (and did not consider as an aggravating factor) that **Miletić**'s actions were independent and as such constituted an abuse of trust placed in him by the unaware VRS authorities. The Appeals Chamber thus dismisses this aspect of **Miletić**'s ground of appeal 27.

(c) The Prosecution's appeal concerning Pandurević (Ground 3 in part)

2028. The Prosecution submits that the Trial Chamber erred in finding that the evidence does not demonstrate that **Pandurević** abused his position in committing crimes.[5737] It argues that, as a superior, he abused his authority by: (1) failing to uphold international humanitarian law standards, particularly by breaching his legal duty to protect the Milići Prisoners, as well as by failing to prevent the continued involvement of his troops in crimes;[5738] (2) propagating ethnic hatred and discrimination within his brigade;[5739] and (3) actively participating in the forcible transfer of up to 32,000 Bosnian Muslims from Srebrenica by knowingly using his senior position and authority to make material and personnel resources available for the operation.[5740]

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5734 *Đorđević* Appeal Judgement, para. 936; *D. Milošević* Appeal Judgement, paras 306, 309; *Limaj et al.* Appeal Judgement, para. 143.
5735 Trial Judgement, para. 2196.
5736 See Trial Judgement, paras 1630, 1650, 1713, referred to in Prosecution's Response Brief (Miletić), para. 360.
5737 Prosecution's Appeal Brief, para. 216.
5738 Prosecution's Appeal Brief, paras 213, 215. See Prosecution's Appeal Brief, paras 203-207, 211-212.
5739 Prosecution's Appeal Brief, para. 214. See Prosecution's Appeal Brief, paras 36, 134, 206.
5740 Prosecution's Appeal Brief, para. 216. See Prosecution's Appeal Brief, paras 217-218.

2029. **Pandurević** responds that the Prosecution's arguments that he abused his authority and propagated ethnic hatred are contrary to the findings of the Trial Chamber. He submits that the Trial Chamber properly exercised its discretion in rejecting these arguments.[5741]

2030. The Appeals Chamber recalls that superior position *per se* does not constitute an aggravating factor; rather it is the superior's abuse of his position of a high-level of authority that may be taken into consideration for a conviction under Article 7(3) of the Statute.[5742] **Pandurević** was not "actively" involved in the commission of crimes in Srebrenica, nor was it established that the crimes would not have been committed without his assent, that he encouraged them, or that he exerted his influence. The Appeals Chamber observes that, in its consideration of aggravating factors, the Trial Chamber specifically noted the military character of **Pandurević**'s contribution in support of the forcible transfer and the nature of his responsibility with respect to murder before finding that the evidence did not support the conclusion that he abused his authority in committing these crimes.[5743] The Appeals Chamber considers that the Trial Chamber's assessment of **Pandurević**'s limited involvement in the forcible transfer and nature of his participation in the JCE to Murder[5744] is at odds with the Prosecution's submissions that he abused his authority. The Appeals Chamber therefore finds that the Prosecution has failed to demonstrate that **Pandurević**'s participation in the crimes should be considered as an aggravating factor.

2031. In arguing that **Pandurević**'s breach of his international humanitarian law obligations should be considered as aggravating, the Prosecution relies solely on **Pandurević**'s position and his failure to prevent crimes. The Prosecution already presented these arguments in relation to the gravity of his offences.[5745] In this regard, the Appeals Chamber recalls its conclusion that the Trial Chamber conducted a thorough examination of **Pandurević**'s individual circumstances, including its discussion on his failure to discharge his legal duty to protect the Milići Prisoners.[5746] Accordingly, the Trial Chamber considered **Pandurević**'s breach of his international humanitarian law obligations under its assessment of the nature and extent of his involvement in the crimes. It notably took into account the circumstances he faced and found that they "diminish[ed] the gravity of his omission to some limited extent".[5747] Thus, any consideration of **Pandurević**'s position and failure to prevent crimes, without more, as an aggravating factor would be tantamount to double-counting. Furthermore, the Appeals Chamber notes the Trial Chamber's analysis on **Pandurević**'s

5741 Pandurević's Response Brief, para. 277.
5742 *Hadžihasanović and Kubura* Appeal Judgement, para. 320.
5743 Trial Judgement, para. 2216.
5744 See Trial Judgement, paras 2211-2215.
5745 See *supra*, para. 1987.
5746 See *supra*, para. 1992. See also Trial Judgement, para. 2214.
5747 See Trial Judgement, para. 2214.

position and failure to prevent crimes[5748] and its conclusions regarding: (1) his limited participation in the JCE to Forcibly Remove;[5749] and (2) the fact that his responsibility for the crimes that took place pursuant to the JCE to Murder arose "not from any positive, intentional acts on his part, but instead his failure to discharge his duty".[5750] The Appeals Chamber thus considers that the Prosecution has failed to present any argument to show that **Pandurević**'s breach of his international humanitarian law obligations amounted to an abuse of authority.

2032. With respect to the issue of ethnic hatred and discrimination as an aggravating factor, the Appeals Chamber recalls that discriminatory intent or a discriminatory state of mind for crimes for which such a state of mind is not an element or ingredient can be considered as an aggravating factor.[5751] The Prosecution argues that **Pandurević**'s use of his position to propagate ethnic hatred and discrimination should be seen as an abuse of authority. In support of this submission, it refers to **Pandurević**'s use of derogatory language in brigade documents,[5752] language which, given the culture of the VRS and Zvornik Brigade, the Trial Chamber considered to be "commonplace".[5753] However, the Prosecution has failed to demonstrate that the Trial Chamber made a finding that **Pandurević** used his position to promote the use of such language, or to identify supporting evidence on the record not taken into account by the Trial Chamber such as to demonstrate a discernible error on its part.[5754] Accordingly, the Prosecution has failed to show that **Pandurević**'s use of derogatory language should be considered as an aggravating factor.

2033. The Appeals Chamber thus considers that the Prosecution has failed to show that the Trial Chamber erred in finding that "given the nature of [**Pandurević**'s] responsibility with respect to murder, the evidence does not demonstrate that [he] abused his position in committing these crimes".[5755] This aspect of the Prosecution's ground of appeal 3 is therefore dismissed.

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5748 See Trial Judgement, paras 2210-2215.
5749 See Trial Judgement, paras 2211-2212.
5750 See Trial Judgement, para. 2214.
5751 *Blaškić* Appeal Judgement, para. 686. See also *Vasiljević* Appeal Judgement, paras 172-173; *Kunarac et al.* Appeal Judgement, para. 357.
5752 Prosecution's Appeal Brief, fns 89, 367, 555, referring to Trial Judgement, paras 1062, 1398-1399, 1895, 1903, 2002-2003, 2086.
5753 Trial Judgement, para. 1399.
5754 See *Čelebići* Appeal Judgement, para. 763.
5755 Trial Judgement, para. 2216.

2. Other aggravating circumstances

(a) Popović's appeal

2034. **Popović** submits that the Trial Chamber erred in finding that the alleged enthusiasm with which he committed the crimes was an aggravating factor. He refers to some of his previous arguments in which he disputes all the Trial Chamber's factual findings supporting this sentencing conclusion.[5756] The Prosecution responds that **Popović** relies entirely on allegations of factual errors previously made in his brief and fails to demonstrate an error in the Trial Chamber's factual findings or legal conclusions.[5757]

2035. The Appeals Chamber recalls its previous dismissal of **Popović**'s challenges to the Trial Chamber's findings on: (1) his dedication to the murder operation through his robust participation in the mass executions of 14-17 July 1995;[5758] (2) his participation in the execution of the Milići Prisoners;[5759] and (3) his ordering of the execution of a young boy in Orahovac on 14 July 1995.[5760] Consequently, the Appeals Chamber finds that **Popović** has failed to demonstrate that the Trial Chamber committed a discernible error in considering the enthusiasm with which he committed the crimes as an aggravating factor.[5761] His argument is therefore dismissed.

(b) Miletić's appeal

(i) Prolonged and systematic involvement in the crimes (Ground 25)

2036. **Miletić** submits that the Trial Chamber erred in the exercise of its discretion in finding that his participation in the commission of the crimes was prolonged and systematic and in considering this as an aggravating circumstance.[5762] **Miletić** argues that he contributed to the JCE to Forcibly Remove by carrying out his ordinary tasks which were not inherently illegal and the duration of these tasks cannot constitute an aggravating factor.[5763] Finally, **Miletić** submits that the Trial Chamber adopted an inconsistent approach in not considering the duration of participation in the JCE to Forcibly Remove as an aggravating factor in the case against Gvero.[5764]

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5756 Popović's Appeal Brief, para. 484.
5757 Prosecution's Response Brief (Popović), para. 318.
5758 See *supra*, paras 1073-1154.
5759 See *supra*, para. 1193.
5760 See *supra*, paras 193-194.
5761 The informed, willing, or enthusiastic participation in crime has been considered to be aggravating in the Tribunal's case law. See *Blaškić* Appeal Judgement, para. 686, referring to *Jelisić* Appeal Judgement, para. 86, *Kayishema and Ruzindana* Appeal Judgement, para. 351.
5762 Miletić's Appeal Brief, para. 440.
5763 Miletić's Appeal Brief, para. 438.
5764 Miletić's Appeal Brief, para. 439.

2037. The Prosecution responds that the Trial Chamber properly took into account the full duration of **Miletić**'s JCE contributions and that his performance of routine duties does not preclude the consideration of their temporal scope as aggravating.[5765] The Prosecution agrees that the Trial Chamber took an inconsistent approach with respect to Gvero, but avers that it should also have considered the duration of Gvero's criminal conduct as aggravating.[5766]

2038. The Appeals Chamber recalls that prolonged and systematic involvement in criminal conduct may be considered as an aggravating circumstance.[5767] Although the crime of physically removing the population from Srebrenica and Žepa was carried out during a short time span, it was the culmination of a long process aimed at the removal of the Bosnian Muslims from the area. In this regard, the Appeals Chamber notes that **Miletić** was aware of the criminal plan to remove the Bosnian Muslim civilian population from Srebrenica and Žepa from at least March 1995, when Directive 7 was issued.[5768] During the relevant period, he systematically contributed, through his high position within the VRS Main Staff, to the success of this plan at all its stages, including the drafting of Directive 7, the restrictions of humanitarian aid, and the plan's final phase, *i.e.* the busing out of thousands of Bosnian Muslims from Srebrenica and Žepa.[5769] While **Miletić**'s conduct may have involved routine activities, the Trial Chamber's findings show that it clearly constituted consistent involvement in criminal conduct.

2039. With respect to the consistency of the Trial Chamber's approach regarding duration as an aggravating circumstance, the Appeals Chamber again recalls that the determination of the sentence involves the individualisation of the sentence so as to appropriately reflect the particular facts of the case and the circumstances of the convicted person.[5770] Having established that the Trial Chamber did not err in finding that **Miletić**'s prolonged and systematic involvement in criminal conduct amounted to an aggravating circumstance, the Appeals Chamber considers that the Trial Chamber properly exercised its sentencing discretion concerning **Miletić**. Any potential inconsistency in the exercise of the Trial Chamber's discretion regarding the duration of participation in the JCE to

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[5765] Prosecution's Response Brief (Miletić), paras 345-346. See also Prosecution's Response Brief (Miletić), para. 344.

[5766] Prosecution's Response Brief (Miletić), paras 347-348.

[5767] *D. Milošević* Appeal Judgement, para. 304; *Martić* Appeal Judgement, para. 340; *Hadžihasanović and Kubura* Appeal Judgement, paras 350-353; *Kunarac et al.* Appeal Judgement, para. 356.

[5768] Trial Judgement, paras 1703-1704, 1716-1717.

[5769] Trial Judgement, para. 2197. See Trial Judgement, paras 1705, 1710, 1715-1716, 1718.

[5770] *Šainović et al.* Appeal Judgement, paras 1837, 1839; *Strugar* Appeal Judgement, para. 348; *M. Nikolić* Judgement on Sentencing Appeal, para. 38; *Kvočka et al.* Appeal Judgement, para. 681.

Forcibly Remove as an aggravating factor in the case against Gvero was of relevance only to Gvero.[5771]

2040. For these reasons, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion when it found that his participation in the commission of the crimes was prolonged and systematic and considered this to be an aggravating circumstance. **Miletić**'s ground of appeal 25 is therefore dismissed.

(ii) Obstructing justice (Ground 26)

2041. The Trial Chamber found that at two meetings held in 1999 and 2000 at the Zvornik Brigade Headquarters, **Miletić** appealed to the attendees not to provide any information related to the events in Srebrenica to the Tribunal ("1999/2000 Meetings"). It concluded that the 1999/2000 Meetings were aimed at obstructing justice and considered them as an aggravating factor.[5772]

2042. **Miletić** challenges these findings.[5773] First, he argues that the finding concerning the subject matter of the 1999/2000 Meetings is based solely on the evidence of M. Nikolić, whose credibility is in question.[5774] **Miletić** submits that the account of his alleged appeals to the attendees, although included in his Statement of Facts, was not specifically confirmed by M. Nikolić in his testimonies in the *Blagojević and Jokić* and the *Popović et al.* cases.[5775] **Miletić** points out that, even though the Trial Chamber emphasised that M. Nikolić's testimony must be considered with the greatest care, it nevertheless accepted M. Nikolić's testimony without any corroboration.[5776] Second, **Miletić** submits that the Trial Chamber did not establish by whom and for what purpose the 1999/2000 Meetings were organised, drew a completely arbitrary conclusion as to the purpose of his actions, and failed to establish his intent to obstruct justice.[5777] In further support, **Miletić** submits that "if [he] had the intent to obstruct the work of the Tribunal, it is not very likely that he would have surrendered voluntarily, immediately after learning of the Indictment".[5778]

2043. The Prosecution responds that the Trial Chamber properly considered in aggravation that **Miletić** had engaged in acts aimed at the obstruction of justice.[5779] It submits that the Trial Chamber

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5771 The Appeals Chamber recalls that the appellate proceedings against Milan Gvero were terminated and that the Trial Judgement was declared final in relation to him. See Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013.

5772 Trial Judgement, para. 2199.

5773 Miletić's Appeal Brief, paras 441, 445.

5774 Miletić's Appeal Brief, paras 441-442.

5775 Miletić's Appeal Brief, para. 441, referring to Ex. C00001, "Statement of Facts and Acceptance of Responsibility, 6 May 2003", para. 15.

5776 Miletić's Appeal Brief, para. 442.

5777 Miletić's Appeal Brief, paras 443-444.

5778 Miletić's Appeal Brief, para. 443.

5779 Prosecution's Response Brief (Miletić), paras 349, 355.

was mindful of the credibility issues in relation to the evidence of M. Nikolić, and argues that M. Nikolić's testimony in the *Blagojević and Jokić* case, confirmed in this case, does not contradict his Statement of Facts but rather builds and elaborates on it.[5780] The Prosecution also submits that the Trial Chamber reasonably inferred **Miletić**'s intent from his conduct and contends that establishing who organised the 1999/2000 Meetings and for what purpose was not needed to reach this conclusion.[5781] It argues that **Miletić**'s voluntary surrender five years after the 1999/2000 Meetings is not inconsistent with the aim to obstruct justice, as **Miletić** had a vested interest in a favourable outcome of the trial.[5782]

2044. The Appeals Chamber recalls that as a general rule, the testimony of a single witness on a material fact does not require any corroboration.[5783] In the instant case, the Trial Chamber was well aware of the credibility challenges in relation to the evidence of M. Nikolić and stressed that it took a "very cautious and careful"[5784] approach and "considered his credibility on each point individually".[5785] While the testimony of M. Nikolić given in the *Blagojević and Jokić* case and confirmed in this case[5786] may not have specifically addressed his account of **Miletić**'s alleged appeals to the 1999/2000 Meetings' attendees given in his Statement of Facts, the Appeals Chamber notes that his testimony in this case had a different focus, namely, the effect that the meetings had on him.[5787] Thus, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in relying solely on the evidence of M. Nikolić to establish the former's conduct.

2045. With respect to the finding of **Miletić**'s intent to obstruct justice, the Appeals Chamber considers that a reasonable trier of fact could have characterised the pressure **Miletić** put on the attendees not to cooperate with the Tribunal's investigators as having been exerted with the intent to obstruct justice. The Appeals Chamber considers that the identification of the organisers of the 1999/2000 Meetings or the official purpose behind them is unnecessary to establish **Miletić**'s intent. Similarly, **Miletić**'s voluntary surrender does not impact upon the Trial Chamber's finding. Accordingly, **Miletić** has failed to demonstrate an error on the part of the Trial Chamber.

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5780 Prosecution's Response Brief (Miletić), paras 352-353.

5781 Prosecution's Response Brief (Miletić), paras 350, 354.

5782 Prosecution's Response Brief (Miletić), para. 351.

5783 See, *e.g.*, *Đorđević* Appeal Judgement, paras 319, 781, 819, 858; *D. Nikolić* Judgement on Sentencing Appeal, fn. 70, referring to *Čelebići* Appeal Judgement, paras 492, 506, *Aleksovski* Appeal Judgement, para. 62, *Tadić* Appeal Judgement, para. 65. See also *Nizeyimana* Appeal Judgement, paras 135, 246.

5784 Trial Judgement, para. 51.

5785 Trial Judgement, para. 53.

5786 Momir Nikolić, T. 32981-32982 (22 Apr 2009).

5787 M. Nikolić (T. 32981 (22 Apr 2009)) testified that:

> How I felt personally, I think it was partly pressure, but let me be quite specific here, this was not direct in any way or emphasised in any way, but in view of the way in which this was spoken about, patriotism was mentioned that as little should be stated to the investigators as possible and all the rest of it. So I think this was a form of coercion or pressure on us. Those of us who were to appear before the investigators of The Hague Tribunal in December 1999.

2046. Finally, the Appeals Chamber recalls that obstructing justice has been identified as one of the factors that may be considered as an aggravating circumstance.[5788] **Miletić** has failed to provide any compelling arguments why the Trial Chamber erred in considering his obstruction of justice as an aggravating factor.

2047. For these reasons, the Appeals Chamber finds that **Miletić** has failed to demonstrate that the Trial Chamber erred in holding that his conduct during the 1999/2000 Meetings was aimed at obstructing justice. Similarly, **Miletić** has failed to demonstrate that the Trial Chamber erred in exercising its discretion by holding that **Miletić**'s conduct during these meetings constituted an aggravating factor. **Miletić**'s ground of appeal 26 is therefore dismissed.

(c) Beara's appeal

2048. In its analysis concerning aggravating circumstances, the Trial Chamber referred to its previous finding describing the Beara-Deronjić Argument, when **Beara** announced his intent to "kill all" of the detained Bosnian Muslim men.[5789] In his oral submissions, **Beara** challenges the Trial Chamber's reliance on this finding, submitting that it is based solely on the testimony of Witness Deronjić, who was not reliable and whose evidence should have been excluded.[5790]

2049. The Appeals Chamber recalls that it has already dismissed **Beara**'s challenges to the evidence of Deronjić.[5791] As a consequence, **Beara**'s argument insofar as it relates to sentencing also fails.

## E. Alleged Errors Concerning Mitigating Circumstances

### 1. Beara's appeal (Ground 39)

2050. **Beara** submits that the Trial Chamber erred when it failed to give any or adequate weight to the mitigating circumstances he put forward, while imposing the maximum sentence of life imprisonment.[5792] Additionally, he argues that the Trial Chamber failed to consider his public plea to other fugitive indictees to surrender as proof of his remorse and his good behaviour after the events.[5793]

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5788 *Čelebići* Appeal Judgement, paras 789-790.
5789 Trial Judgement, para. 2166, referring to Trial Judgement, para. 1264.
5790 Appeal Hearing, AT. 192-193 (3 Dec 2013).
5791 See *supra*, para. 90.
5792 Beara's Appeal Brief, paras 333, 335-337, 339; Appeal Hearing, AT. 207-209 (3 Dec 2013).
5793 Beara's Appeal Brief, para. 338. See Appeal Hearing, AT. 208 (3 Dec 2013).

2051. The Prosecution responds that the Trial Chamber took into consideration all the factors raised by **Beara** and, where appropriate, gave them limited weight. It contends that **Beara** fails to show any error in the Trial Chamber's approach.[5794]

2052. The Appeals Chamber notes that the Trial Chamber took into consideration and gave some weight to a number of mitigating circumstances, notably **Beara**'s: (1) good behaviour during trial, at the UNDU, and on provisional release; (2) lack of a prior criminal record; (3) good character; (4) surrender to the Tribunal; and (5) age. The Trial Chamber gave a reasoned opinion as to the weight attached to them.[5795] Although it did not explicitly accord any weight to these factors, it also considered **Beara**'s submissions on: (1) the assistance given to non-Serbs during the war; and (2) his lack of discriminatory intent towards other ethnic groups.[5796]

2053. The Appeals Chamber recalls that what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion.[5797] The Trial Chamber is endowed with a considerable degree of discretion in making this determination as well as in deciding how much weight, if any, to be accorded to the mitigating circumstances identified.[5798] Accordingly, the existence of mitigating circumstances does not automatically result in a reduction of sentence or preclude the imposition of a sentence of life imprisonment where the gravity of the offence so requires.[5799] **Beara** fails to put forward any compelling argument to show that the Trial Chamber committed an error in weighing the mitigating factors against the gravity of the crimes and the various aggravating factors.

2054. For these reasons, **Beara**'s ground of appeal 39 is therefore dismissed.

### 2. Nikolić's appeal (Sub-grounds 1.2 and 1.3)

2055. **Nikolić** submits that the Trial Chamber erred in exercising its discretion in relation to the mitigating circumstances applicable to him as it failed to give any or sufficient weight to relevant considerations.[5800] He argues that the absence of abuse of authority as an aggravating factor should have been considered as a mitigating circumstance.[5801] He also asserts that upon finding that the

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5794 Prosecution's Response Brief (Beara), para. 334. See Appeal Hearing, AT. 238 (3 Dec 2013).
5795 Trial Judgement, paras 2155-2156, 2167-2170.
5796 Trial Judgement, para. 2167.
5797 *D. Milošević* Appeal Judgement, para. 316 and references cited therein.
5798 *Đorđević* Appeal Judgement, para. 944; *Šainović et al.* Appeal Judgement, para. 1807; *D. Milošević* Appeal Judgement, para. 316 and references cited therein.
5799 *Nizeyimana* Appeal Judgement, para. 445; *Ntabakuze* Appeal Judgement, paras 267, 280; *Niyitegeka* Appeal Judgement, para. 267.
5800 Nikolić's Appeal Brief, paras 25-31.
5801 Nikolić's Appeal Brief, para. 22. See Nikolić's Reply Brief, para. 17.

aggravating factor of zeal or enthusiasm had not been established, the Trial Chamber failed to consider his distress about the illegal orders as a mitigating circumstance.[5802]

2056. **Nikolić** further contends that the Trial Chamber failed to recognise that his "military ethos lay partially at the basis of his limited contribution"[5803] and that his contribution consisted exclusively of implementing specific orders issued by **Beara** and **Popović**.[5804] **Nikolić** asserts that he never exceeded these orders and did not escalate his contribution, even though he could have chosen to do so.[5805] Consequently, **Nikolić** submits that his characteristics as a military officer should be given weight as a mitigating circumstance.[5806]

2057. **Nikolić** also submits that he was keen on minimising his role to the extent possible. He points out that his contribution ceased on the early morning of 15 July 1995 and that he decided to physically separate himself from the events in the Zvornik area at the climax of the killing operation.[5807] In addition, he submits that the Trial Chamber, while according some weight to his partial acceptance of his responsibility, erred in finding that he expressed no remorse.[5808] Finally, **Nikolić** maintains that the Trial Chamber failed to consider his limited participation in the commission of the crimes as a mitigating factor.[5809]

2058. The Prosecution responds that none of the factors advanced by **Nikolić** could mitigate his sentence.[5810] It argues that the evidence does not support the assertion that **Nikolić** was troubled by the illegal orders he received or that he was reluctant or distressed.[5811] Moreover, the Prosecution submits that the idea of "military ethos" as a mitigating factor in genocide cases is misguided and that **Nikolić** was not a passive tool but an active and resolute member of the JCE to Murder.[5812] The Prosecution further avers that his departure in the afternoon of 16 July 1995 was not aimed at evading continuing participation in the murder operation.[5813] Finally, the Prosecution submits that **Nikolić**'s unsworn statement at the end of the trial expressed no remorse but only self-pity for what he lost in the war and the consequences for him.[5814]

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5802 Nikolić's Appeal Brief, para. 23; Appeal Hearing, AT. 281 (3 Dec 2013).
5803 Nikolić's Appeal Brief, para. 26.
5804 Nikolić's Appeal Brief, para. 27; Nikolić's Reply Brief, para. 19.
5805 Nikolić's Appeal Brief, paras 27-28.
5806 Nikolić's Appeal Brief, para. 26.
5807 Nikolić's Appeal Brief, para. 29. See Appeal Hearing, AT. 340 (4 Dec 2013).
5808 Nikolić's Appeal Brief, para. 30. See Nikolić's Reply Brief, para. 20.
5809 Nikolić's Appeal Brief, para. 31; Nikolić's Reply Brief, para. 21. See *supra*, paras 1974-1975.
5810 Prosecution's Response Brief (Nikolić), paras 17-30. See also Appeal Hearing, AT. 332-333 (4 Dec 2013).
5811 Prosecution's Response Brief (Nikolić), paras 21-22.
5812 Prosecution's Response Brief (Nikolić), paras 25-26.
5813 Prosecution's Response Brief (Nikolić), para. 129.
5814 Prosecution's Response Brief (Nikolić), paras 28-30.

2059. As a preliminary matter, the Appeals Chamber considers that **Nikolić** misunderstands the manner in which aggravating circumstances may affect sentencing. The failure to establish aggravating circumstances does not in itself constitute a mitigating circumstance.[5815] **Nikolić**'s submission to this effect concerning the absence of abuse of authority is therefore without merit.

2060. While some evidence that **Nikolić** was disturbed by orders he received was considered by the Trial Chamber in its sentencing deliberations on aggravating circumstances, this was not presented at trial by **Nikolić** for consideration as a separate mitigating factor.[5816] The Appeals Chamber recalls that, if an appellant fails to specifically refer in his final brief or closing arguments to a mitigating circumstance, the appellant cannot raise it for the first time on appeal.[5817] Thus, this argument is dismissed.

2061. The Appeals Chamber notes that the Trial Chamber considered **Nikolić**'s submissions that he "was a good soldier, who conscientiously discharged his duties and respected his superior officers" but gave no weight to this factor as a mitigating circumstance due to his active involvement in the commission of mass murder in the Zvornik area.[5818] The Appeals Chamber notes in this respect that, while **Nikolić**'s function was indeed found to be somewhat limited compared to the roles played by **Beara** and **Popović**, this was taken into consideration by the Trial Chamber in assessing the nature and extent of **Nikolić**'s involvement.[5819] Further, the Appeals Chamber considers **Nikolić**'s argument that he did not escalate his contribution, even though he could have to be inapposite. His contribution was found to consist of carrying out criminal orders of his superiors in a "persistent and determined"[5820] fashion and the fact that he refrained from actions that would *further* aggravate the gravity of his crimes cannot be seen as a valid mitigating factor. The Appeals Chamber also finds that execution of manifestly illegal orders cannot in any circumstance be justified, regardless of devotion to service or "military ethos". Accordingly, the Appeals Chamber considers that a reasonable trier of fact could have given no weight to this factor as a mitigating circumstance.

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5815 *Cf. Blaškić* Appeal Judgement, para. 687.

5816 The Appeals Chamber notes that, during his closing arguments, **Nikolić** mentioned, in the context of his overall knowledge that "he informs his driver of what he has been told during this meeting. He expresses his dissatisfaction, without reserve". Nikolić Closing Arguments, T. 34522 (9 Sept 2009). **Nikolić** also challenged, in his closing arguments, the Prosecution's submissions that he was a willing participant in the crimes and that this was an aggravating factor. Nikolić Closing Arguments, T. 34541-34542 (9 Sept 2009). However, neither of these assertions were made in an attempt to present **Nikolić**'s distress over his orders as a mitigating factor.

5817 *Nzabonimana* Appeal Judgement, para. 459; *Bizimungu* Appeal Judgement, para. 389; *Bikindi* Appeal Judgement, para. 165; *Kvočka et al.* Appeal Judgement, para. 674. See *Đorđević* Appeal Judgement, para. 945; *Šainović et al.* Appeal Judgement, para. 1816.

5818 Trial Judgement, para. 2176.

5819 Trial Judgement, para. 2171.

5820 Trial Judgement, para. 2171.

2062. With respect to **Nikolić**'s absence from the area of Srebrenica between 16 and 17 July 1995, the Appeals Chamber notes that this was taken into account by the Trial Chamber in assessing the nature and extent of **Nikolić**'s involvement in the crimes.[5821] Moreover, due to the absence of supporting evidence, the Appeals Chamber dismisses as unsubstantiated **Nikolić**'s argument that his absence reflected his desire to minimise his role in the killing operation.

2063. The Appeals Chamber recalls that, in order for remorse to be considered as a mitigating factor, it has to be sincere and that an accused can express sincere regrets without admitting his participation in a crime.[5822] **Nikolić**'s statement given at the end of the trial focuses on denying his ability to change a course of events and thus on belittling his responsibility rather than showing his feeling of regret for the crimes committed.[5823] Moreover, the partial acceptance of his responsibility expressed in the statement was given some weight as a mitigating circumstance.[5824] The Appeals Chamber thus finds that **Nikolić** has failed to demonstrate an error on the part of the Trial Chamber in finding that his statement did not amount to an expression of remorse.

2064. Finally, **Nikolić** refers to his earlier ground of appeal submitting that the Trial Chamber failed to consider his limited participation in the commission of the crime as mitigating.[5825] The Appeals Chamber recalls its previous findings dismissing **Nikolić**'s arguments in this respect,[5826] notes that the Trial Chamber already considered his limited participation as affecting the gravity of the offence, and finds that **Nikolić** has not shown that the Trial Chamber erred in not considering this factor as mitigating.

2065. For these reasons, **Nikolić**'s sub-grounds of appeal 1.2 and 1.3 are dismissed.

### 3. Pandurević's appeal (Sub-ground 6.2)

2066. **Pandurević** submits that the Trial Chamber failed to discount his sentence sufficiently in light of "the almost unique mitigating features" of his case.[5827] He contends that the Trial Chamber failed to accord sufficient weight to the mitigating act of opening the corridor at Baljkovica.[5828] **Pandurević** also submits that more weight should be afforded to this mitigating factor "for jurisprudential and public policy reasons", because if such acts are seen to be rewarded it "will

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5821 See Trial Judgement, paras 1373, 1410.
5822 *Vasiljević* Appeal Judgement, para. 177 and references cited therein.
5823 Statement of the Accused Nikolić, T. 34897-34899 (15 Sept 2009).
5824 Trial Judgement, para. 2178. See Statement of the Accused Nikolić, T. 34896-34899 (15 Sept 2009).
5825 Nikolić's Appeal Brief, para. 31; Nikolić's Reply Brief, para. 21.
5826 See *supra*, para. 1984.
5827 Pandurević's Appeal Brief, paras 216, 218.
5828 Pandurević's Appeal Brief, para. 252. In this regard, he avers that he should have received "a discernibly greater" discount than Obrenović and Borovčanin for the act, as their participation in opening the corridor was both peripheral and ineffective, while he had the moral courage to act and contravened orders to do so. Pandurević's Appeal Brief, paras 250-251.

impact on the behaviour of commanders and soldiers in future situations".[5829] **Pandurević** further argues that this mitigating factor merits greater reward than other mitigating factors such as pleading guilty and cooperating with authorities, as these actions do not mitigate the offences themselves, "cannot save lives", and are self-serving and driven by the desire to achieve a discount in sentencing.[5830] He avers that his act was done before he had any reason to know that he would later become an accused and was therefore not motivated by any desire to secure a better outcome for himself.[5831]

2067. Moreover, **Pandurević** submits that the Trial Chamber afforded insufficient weight to the Two Interim Combat Reports.[5832] He argues that these reports bravely criticised the army high command,[5833] were self-incriminatory,[5834] and are "the central pieces of evidence in the cases against [himself] and other members of the Zvornik Brigade before [the] Tribunal".[5835] **Pandurević** contends that the reports also indicated his "plain disagreement" with the murder operation[5836] and that the Trial Chamber underestimated the impact and consequences of these reports.[5837] In addition, **Pandurević** submits that he was in an effectively similar position to an accused who entered a guilty plea and an agreement to give evidence for the Prosecution, as he gave evidence in his own defence on 2 October 2001, before he was indicted, which allowed the Prosecution to use him to adduce evidence general to the case and rely heavily on his evidence.[5838] Further, **Pandurević** asserts that the acts of opening the corridor and writing the Two Interim Combat Reports were "substantial and significant acts of mitigation".[5839] **Pandurević** submits that he therefore should have received a sentence discount of one-half to two-thirds.[5840]

2068. The Prosecution responds that **Pandurević** fails to demonstrate that the Trial Chamber erred by giving insufficient weight to mitigating factors or not taking them into account.[5841] It submits that the Trial Chamber gave significant weight to his act of opening the corridor at Baljkovica and the Two Interim Combat Reports as mitigating factors.[5842] The Prosecution also avers that "[g]iving evidence in one's own defence aims to refute Prosecution charges and is inherently contradictory to

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5829 Pandurević's Appeal Brief, para. 253. See also Pandurević's Appeal Brief, para. 267.
5830 Pandurević's Appeal Brief, para. 254. See also Pandurević's Appeal Brief, para. 268.
5831 Pandurević's Appeal Brief, paras 252, 254.
5832 Pandurević's Appeal Brief, para. 257.
5833 Pandurević's Appeal Brief, para. 257.
5834 Pandurević's Appeal Brief, paras 258, 261.
5835 Pandurević's Appeal Brief, para. 260. See also Pandurević's Appeal Brief, paras 258-259, 261.
5836 Pandurević's Appeal Brief, para. 261.
5837 Pandurević's Appeal Brief, para. 257.
5838 Pandurević's Appeal Brief, paras 262-265.
5839 Pandurević's Appeal Brief, para. 266. **Pandurević** further argues that apart from these acts, "it is impossible to imagine what further or better things [he] could have done to ameliorate the situation". Pandurević's Appeal Brief, para. 266.
5840 Pandurević's Appeal Brief, para. 270.
5841 Prosecution's Response Brief (Pandurević), paras 141, 158-161.

seeking to co-operate with the Prosecution"[5843] and that **Pandurević** cannot compare himself to an accused who pleads guilty, because he did not accept criminal responsibility for his actions.[5844]

2069. The Appeals Chamber notes that the Trial Chamber considered both **Pandurević**'s act of opening the corridor and the Two Interim Combat Reports as mitigating factors and clearly afforded these actions "significant weight" in the determination of his sentence.[5845]

2070. With respect to the opening of the corridor, the Trial Chamber considered the nature of **Pandurević**'s individual role and the fact that the act saved lives. In so doing, it was neither required to compare **Pandurević**'s role to the roles of others nor to compare the act with others which did not save lives. Regarding the Two Interim Combat Reports, the Appeals Chamber notes that the Trial Chamber found these to have been "brave acts on the part of **Pandurević**".[5846] The Appeals Chamber finds that **Pandurević** has failed to demonstrate how the Trial Chamber may have underestimated the impact and consequences of these reports. Recalling the Trial Chamber's discretion to determine the weight, if any, to be attributed to mitigating factors,[5847] the Appeals Chamber finds that **Pandurević** has failed to demonstrate that the Trial Chamber erred.

2071. Additionally, the Appeals Chamber can see no comparison between **Pandurević**, who pleaded not guilty, gave evidence in his defence at trial, and was subsequently convicted by the Trial Chamber, and an accused who pleads guilty, substantially cooperates with the Prosecution, and accepts responsibility for his criminal conduct. The Trial Chamber considered the good behaviour of all the Accused during trial,[5848] but did not find that **Pandurević** had substantially cooperated with the Prosecution, and **Pandurević** does not argue that the Trial Chamber erred in this regard.

2072. For the foregoing reasons, **Pandurević**'s sub-ground of appeal 6.2 is dismissed.

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5842 Prosecution's Response Brief (Pandurević), para. 157. See also Prosecution's Response Brief (Pandurević), paras 162, 165-166.
5843 Prosecution's Response Brief (Pandurević), para. 169.
5844 Prosecution's Response Brief (Pandurević), para. 172.
5845 Trial Judgement, paras 2219-2222.
5846 Trial Judgement, para. 2221.
5847 *Đorđević* Appeal Judgement, para. 944; *Šainović et al.* Appeal Judgement, para. 1807; *Lukić and Lukić* Appeal Judgement, para. 617.
5848 Trial Judgement, para. 2155.

## 4. The Prosecution's appeal

### (a) No mitigating circumstances for Pandurević's sentence (Ground 3 in part)

2073. The Prosecution submits that the Trial Chamber abused its discretion by misapplying mitigating factors in its determination of **Pandurević**'s sentence.[5849] In particular, it argues that the Trial Chamber erred in considering **Pandurević**'s opening of the corridor as a mitigating factor as "the passage of the civilian component of the column represented the completion of the crime of forcible transfer, and if lives were saved, they were saved from the danger posed by **Pandurević** and his subordinate troops, and which **Pandurević** was instrumental in creating".[5850] The Prosecution contends that, while motive can be a relevant consideration in sentencing, credit should not be given for an objectively good outcome, absent a benevolent motive.[5851]

2074. The Prosecution further argues that there is nothing worthy of credit in the Two Interim Combat Reports.[5852] It contends that **Pandurević** did not protest the goals or the outcome of the murder operation in these reports and that they were not intended to, nor did they in fact, help the victims or meet **Pandurević**'s obligations under international law.[5853] The Prosecution also submits that his general good character was taken into consideration in mitigation of his sentence, contrary to the Trial Chamber's other findings and to the evidence, and further was impermissibly considered twice as a mitigating factor. Finally, the Prosecution submits that the Trial Chamber considered mitigating factors from the period 1992-1993, while ignoring aggravating factors from the same period.[5854]

2075. **Pandurević** responds that the Trial Chamber did not "double count" his good character as a mitigating factor[5855] but did accept that his actions in opening the corridor at Baljkovica was a "compelling" act that saved thousands of lives and was "worthy of massive reflection in his sentence".[5856] He also responds that the combat reports contributed to the "uncommon and extraordinary set of facts" [5857] in his case and "called for a substantial discount in his sentence".[5858]

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5849 Prosecution's Appeal Brief, para. 219.
5850 Prosecution's Appeal Brief, para. 220. See Appeal Hearing, AT. 534 (6 Dec 2013). See also Prosecution's Appeal Brief, para. 218.
5851 Prosecution's Appeal Brief, para. 220.
5852 Prosecution's Appeal Brief, para. 221. See Trial Judgement, para. 2221.
5853 Prosecution's Appeal Brief, para. 221.
5854 Prosecution's Appeal Brief, para. 222. See Trial Judgement, paras 2156, 2223.
5855 Pandurević's Response Brief, para. 278.
5856 Pandurević's Response Brief, para. 279, referring to Trial Judgement, paras 2219-2220.
5857 Pandurević's Response Brief, para. 280, referring to Trial Judgement, para. 2210. See also Appeal Hearing, AT. 579-580 (6 Dec 2013).
5858 Pandurević's Response Brief, para. 280.

2076. The Appeals Chamber notes that the Trial Chamber considered **Pandurević**'s act of opening the corridor,[5859] in direct contravention of his superiors' orders and with the knowledge that it would potentially put him in jeopardy, which resulted in the safe passage of the column and potentially saved thousands of lives, to be a "striking" act that should be taken into account as a mitigating factor.[5860] The Trial Chamber concluded that his action "stands out as an instance of courage and humanity in a period typified by human weakness, cruelty, and depravity"[5861] and "was a clear and compelling instance of assistance to potential victims".[5862] The Trial Chamber's consideration of this act as a mitigating factor did not rest on **Pandurević**'s motivation in carrying out the act. Rather, the Trial Chamber concluded that, regardless of his motives, his decision to open the corridor "objectively [...] saved thousands of lives".[5863] As indicated above, the Trial Chamber is endowed with broad discretion in determining what constitutes a mitigating circumstance.[5864] The Prosecution provides no authority for its argument that an objectively good outcome cannot be considered a mitigating factor, absent a benevolent motive. The Appeals Chamber accordingly finds no error in the Trial Chamber's determinations in this regard.

2077. With regard to the Prosecution's argument that the Trial Chamber erred in considering **Pandurević**'s opening of the corridor at Baljkovica as a mitigating factor, the Appeals Chamber notes that this decision, in contravention of his orders, put a stop, at least temporarily, to the Zvornik Brigade's involvement in implementing the VRS plan to destroy the column and as such saved many lives.[5865] This decision saved them not from the unilateral actions of **Pandurević** as such but from the concerted action of the VRS in which he was an agent. Given the Trial Chamber's broad discretion in determining what constitutes a mitigating circumstance, the Appeals Chamber considers that no discernible error has been demonstrated in this regard.

2078. The Trial Chamber also considered the Two Interim Combat Reports to be "brave acts"[5866] and considered them as mitigating factors,[5867] finding that "these reports represent the sole instance where a senior member of the VRS, in writing, challenged the Superior Command about the murder operation".[5868] Regardless of whether **Pandurević** in fact challenged the entire operation in these

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5859 Trial Judgement, paras 1873-1874 & fns 5626, 1877. See also Trial Judgement, para. 1887 & fn. 5673, para. 2219.
5860 Trial Judgement, para. 2219.
5861 Trial Judgement, para. 2219.
5862 Trial Judgement, para. 2220.
5863 Trial Judgement, paras 2219-2220.
5864 See *supra*, para. 2053.
5865 See Trial Judgement, para. 2219.
5866 Trial Judgement, paras 2221-2222.
5867 Trial Judgement, para. 2222.
5868 Trial Judgement, para. 2221. See also Trial Judgement, para. 1957.

reports,[5869] the Appeals Chamber is not convinced that the Trial Chamber's consideration of the reports as a mitigating factor is so unreasonable or plainly unjust as to require the Appeals Chamber's intervention.[5870]

2079. In relation to the consideration given to **Pandurević**'s good character, the Appeals Chamber notes that the Trial Chamber first made an overall observation that the fact that all the Accused "had been men of apparent good character before these events" would be considered generally as a mitigating circumstance.[5871] The Trial Chamber then considered **Pandurević**'s submissions on his good character, but afforded only "limited weight" to it as a mitigating factor.[5872] Reading the sentencing analysis as a whole, the Appeals Chamber considers that the Trial Chamber merely addressed the same issue, first generally and then specifically in response to **Pandurević**'s submission on the subject. The Appeals Chamber does not consider that this amounts to double-counting and can see no discernible error on the part of the Trial Chamber in this regard.

2080. Finally, the Appeals Chamber is not persuaded by the Prosecution's argument that the Trial Chamber ignored aggravating factors from the period 1992-1993. While the reports of 1993 referred to by the Prosecution were not specifically referenced in the Trial Judgement, there is no indication that the Trial Chamber completely disregarded these pieces of evidence.[5873] The Appeals Chamber notes that these reports refer to "groups of civilians and soldiers" and "a mixed column made of women, children and armed men" who were fired upon by **Pandurević**'s subordinates with artillery weapons and/or fell into the VRS ambush.[5874] It observes that the mere presence of civilians in the group of armed soldiers does not automatically mean that the group cannot constitute a legitimate target. In the absence of further information regarding these incidents, the relevance of this evidence to the determination of **Pandurević**'s sentence is not sufficiently clear to show that the Trial Chamber disregarded it. The Appeals Chamber thus considers that the Prosecution has not demonstrated any discernible error in this regard.

2081. For the foregoing reasons, the Appeals Chamber dismisses this aspect of the Prosecution's ground of appeal 3.

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5869 See Ex. P00329, "Zvornik Brigade Daily Interim Combat Report signed by Vinko Pandurević, 15 July 1995", para. 4; Ex. P00334, "Zvornik Brigade Interim Combat Report, signed by Pandurević, 18 July 1995", para. 4.

5870 See *supra*, para. 1962.

5871 Trial Judgement, para. 2156.

5872 Trial Judgement, para. 2223.

5873 See *supra*, para. 925.

5874 Ex. P04235, "Report of the Zvornik Brigade, 13 February 1993", p. 1; Ex. P04233, "Report of the Zvornik Brigade, 31 January 1993".

(b) Nikolić's circumstances did not mitigate a life sentence (Ground 8 in part)

2082. The Prosecution submits that the existence of mitigating circumstances does not preclude a life sentence when the gravity of the crimes so warrants, as in **Nikolić**'s case.[5875] It contends that the Trial Chamber exaggerated **Nikolić**'s partial acceptance of responsibility in mitigation of his sentence and that this factor does not justify a sentence less than life imprisonment.[5876] **Nikolić** responds that the Prosecution fails to point to a specific error committed by the Trial Chamber in its assessment of the mitigating factors.[5877]

2083. The Appeals Chamber notes that **Nikolić**'s partial acceptance of responsibility was only one of a number of factors accepted by the Trial Chamber as mitigating, together with his good character and his voluntary surrender to the Tribunal.[5878] However, the Trial Chamber afforded limited weight to each of these factors.[5879] While mitigating circumstances do not preclude the imposition of life imprisonment,[5880] there is no indication that the Trial Chamber considered that a sentence of life imprisonment was warranted in this case but for the existence of mitigating circumstances. Rather, in determining his sentence, the Trial Chamber took into account the gravity of **Nikolić**'s offence and the totality of his culpable conduct, his individual circumstances, aggravating and mitigating circumstances, and the general sentencing practice regarding prison sentences in the courts of the former Yugoslavia.[5881] On this basis, the Trial Chamber determined that the totality of factors to be considered in sentencing warranted a sentence that is lower than life imprisonment.

2084. The Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in determining **Nikolić**'s sentence by not properly taking into account all of the required factors. The Appeals Chamber therefore dismisses this aspect of the Prosecution's ground of appeal 8.

## F. Alleged Errors Relating to Comparison of Sentences

### 1. Alleged errors concerning the practice in the former Yugoslavia (Beara's Grounds 34 and 36)

2085. **Beara** submits that by imposing a life sentence on him the Trial Chamber violated the principle of legality and prohibition against *ex post facto* laws.[5882] Similarly, **Beara** submits that the

5875 Prosecution's Appeal Brief, para. 317. See also Prosecution's Appeal Brief, paras 318-320.
5876 Prosecution's Appeal Brief, para. 317. See also Prosecution's Reply Brief, para. 166.
5877 Nikolić's Response Brief, paras 247-248.
5878 Trial Judgement, paras 2175, 2177.
5879 Trial Judgement, paras 2175-2178.
5880 See *supra*, note 5799.
5881 Trial Judgement, paras 2171-2178, 2226.
5882 Beara's Appeal Brief, paras 318-320.

Trial Chamber erroneously considered the sentencing practices of the former Yugoslavia by referring to practices that came into effect after the crimes were committed.[5883] In support, he argues that at the time of the crimes in question the criminal code of the former Yugoslavia provided for a maximum custodial sentence of 20 years.[5884] He contends that by misapplying the maximum sentence allowable at the time, the Trial Chamber denied him the right to be fully informed and have notice of the applicable laws and penalties.[5885]

2086. The Prosecution responds that the Appeals Chamber has previously rejected the argument that a life sentence violates the principle of *nullem crimen sine lege* as the Tribunal is not bound by national sentencing practices.[5886] Furthermore, it submits that the possibility of a life sentence was reasonably foreseeable to **Beara**.[5887]

2087. The Appeals Chamber recalls that, although both the Statute as well as the Rules provide that a Chamber shall take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, trial chambers are not bound by such national practice.[5888] The Tribunal is thus not prevented from imposing a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia.[5889]

2088. At the time of the commission of the crimes in question, the Socialist Federal Republic of Yugoslavia ("SFRY") criminal code provided for a maximum custodial sentence of 20 years.[5890] However, it was not the harshest penalty provided for by that code. The most heinous crimes were punishable by the death penalty.[5891] Thus, since a direct comparison between the severity of life imprisonment and the death penalty was not possible, the Trial Chamber analysed the subsequent abolition of the death penalty in the region leading to an increase in maximum custodial sentences in the Federation of BiH to 20-40 years and in RS to life imprisonment.[5892] The Appeals Chamber recalls that when faced with an analogous challenge in the *Krstić* case it held that "[g]iven the coherence of that abolishment with this Tribunal's own sentencing powers as set out in Article 24,

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5883 Beara's Appeal Brief, paras 325-328.
5884 Beara's Appeal Brief, paras 320, 326, 328.
5885 Beara's Appeal Brief, paras 327-328.
5886 Prosecution's Response Brief (Beara), para. 319. See also Prosecution's Response Brief (Beara), para. 326.
5887 Prosecution's Response Brief (Beara), para. 328.
5888 Article 24(1) of the Statute; Rule 101(B)(iii) of the Rules; *Đorđević* Appeal Judgement, para. 955; *Šainović et al.* Appeal Judgement, para. 1830; *Lukić and Lukić* Appeal Judgement, para. 639; *Krstić* Appeal Judgement, paras 260, 262.
5889 *Krstić* Appeal Judgement, para. 262; *Čelebići* Appeal Judgement, para. 816. See *Đorđević* Appeal Judgement, para. 956.
5890 Trial Judgement, paras 2143, 2146.
5891 Trial Judgement, paras 2144-2145; Ex. P00411, "SFRY Criminal Code, Chapter XVI", Arts 141 and 142(1).
5892 Trial Judgement, para. 2146.

the Trial Chamber did not commit a discernible error in referring to the 1998 law of Bosnia-Herzegovina".[5893]

2089. Additionally, the Appeals Chamber recalls that in July 1995 when the crimes at issue took place, Rule 101(A) of the Rules was already in force, clearly constituting notice of a maximum custodial sentence of life imprisonment for the crimes falling within the jurisdiction of the Tribunal.

2090. Accordingly, the Appeals Chamber finds that **Beara** has failed to demonstrate that the Trial Chamber erred in law and his grounds of appeal 34 and 36 are therefore dismissed.

2. Alleged errors concerning the sentencing practice of the Tribunal and comparison with the sentences imposed on co-accused

(a) Beara's appeal (Grounds 37 and 41)

2091. **Beara** submits that the Trial Chamber failed to appreciate the sentencing practice of the Tribunal in previously adjudicated cases, notably in the *Blagojević and Jokić*, *Erdemović*, and *Deronjić* cases.[5894] In particular, **Beara** contends that the Trial Chamber erred when it placed no importance on the Prosecution's submission in the *Blagojević and Jokić* case belittling the responsibility of **Beara** compared to that of Vidoje Blagojević.[5895] **Beara** also submits that the Trial Chamber imposed an excessive sentence on him and erred by imposing disproportionately lower sentences on his co-accused in the present case.[5896]

2092. The Prosecution responds that **Beara** fails to address the differing bases on which Blagojević, Dragan Jokić, Dražen Erdemović, and Miroslav Deronjić were convicted.[5897] It contends that the Trial Chamber considered **Beara**'s argument concerning the Prosecution's submission in the *Blagojević and Jokić* case and that **Beara** fails to articulate an error in that respect.[5898] The Prosecution also submits that **Beara** fails to provide any support for his assertion that his sentence was disproportionate when compared to the sentences of his co-accused.[5899]

2093. The Appeals Chamber recalls that:

> sentences of like individuals in like cases should be comparable. While similar cases do not provide a legally binding tariff of sentences, they can be of assistance in sentencing if they involve the commission of the same offences in substantially similar circumstances. The relevance of

5893 *Krstić* Appeal Judgement, para. 261.
5894 Beara's Appeal Brief, para. 329.
5895 Beara's Appeal Brief, paras 329, 347. See Appeal Hearing, AT. 208-209 (3 Dec 2013). See also Beara's Reply Brief, para. 108.
5896 Beara's Appeal Brief, paras 346-347.
5897 Prosecution's Response Brief (Beara), para. 330.
5898 Prosecution's Response Brief (Beara), para. 331.
5899 Prosecution's Response Brief (Beara), para. 339.

> previous sentences is however often limited as a number of elements, relating, *inter alia*, to the number, type and gravity of the crimes committed, the personal circumstances of the convicted person and the presence of mitigating and aggravating circumstances, dictate different results in different cases such that it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another. This follows from the principle that the determination of the sentence involves the individualisation of the sentence so as to appropriately reflect the particular facts of the case and the circumstances of the convicted person.[5900]

It further recalls that previous sentences imposed by the Tribunal and the ICTR are but one factor to that may be taken into account when determining the sentence.[5901]

2094. The Appeals Chamber notes that the sentences of Vidoje Blagojević, Dragan Jokić, Dražen Erdemović, and Miroslav Deronjić were based on substantially different grounds than that of **Beara**.[5902] In view of these differences, the Appeals Chamber is not persuaded that previous ICTY sentencing practice would be of assistance in determining a sentence to fit the gravity of **Beara**'s crimes and conduct. Accordingly, **Beara** has failed to demonstrate that the Trial Chamber failed to give sufficient weight to prior sentencing practice in the exercise of its sentencing discretion.

2095. The Appeals Chamber also finds that **Beara** has failed to demonstrate that the Trial Chamber erred in attaching no importance to the Prosecution's submission in the *Blagojević and Jokić* case. Instead of relying on the submission made by one of the parties in a different case, it properly relied on the "overwhelming evidence" on record concerning **Beara**'s authority and his role in the events in Srebrenica in determining the appropriate sentence to be imposed on **Beara**.[5903]

2096. Finally, in asserting that his sentence was disproportionate to those received by his co-accused, **Beara** has failed to articulate specific reasoning in support. Since the scope of **Beara**'s criminal involvement as well as the aggravating and mitigating factors applicable to him differ from

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[5900] *Strugar* Appeal Judgement, para. 348 (internal references omitted). See *Đorđević* Appeal Judgement, para. 949; *Šainović et al.* Appeal Judgement, fn. 5947.

[5901] *Šainović et al.* Appeal Judgement, fn. 5947; *Krstić* Appeal Judgement, para. 248; *Kvočka et al.* Appeal Judgement, para. 681.

[5902] *Cf.* Regarding **Beara**: Trial Judgement, Disposition, Beara section. See Trial Judgement, paras 407, 475-492, 494-503, 527-539, 568, 992-995, 1081-1082, 1204-1206, 1255-1274, 1277, 1279, 1281-1293, 1305, 1313, 1329, 1331, 2164. Regarding Blagojević, convicted for aiding and abetting murder as a violation of the laws or customs of war and as a crime against humanity in relation to a single crime site, inhumane acts (forcible transfer) as a crime against humanity, as well as persecution (through murder, cruel and inhumane treatment of Bosnian Muslim civilians, terrorising of Bosnian Muslim civilians in Srebrenica and Potočari, and their forcible transfer) as a crime against humanity: *Blagojević and Jokić* Appeal Judgement, paras 95, 103-104, 113-114, 118, 124; *Blagojević and Jokić* Trial Judgement, para. 861, p. 304. Regarding Jokić, convicted for aiding and abetting murder as a violation of the laws or customs of war, extermination as a crime against humanity, and persecution (through murder) as a crime against humanity: *Blagojević and Jokić* Appeal Judgement, para. 143, 147-176. Regarding Erdemović, who pleaded guilty to a single count of murder as a violation of the laws or customs of war (regarding the Pilica Area Killings): *Erdemović* Sentencing Judgement, para. 8. Regarding Deronjić, who pleaded guilty to a single count of persecution (through ordering the attack on the village of Glogova, the killing of Bosnian Muslim civilians in Glogova, the forcible displacement of Bosnian Muslim civilians of Glogova from the municipality of Bratunac, the destruction of an institution dedicated to religion, and the destruction of Muslim civilian property in Glogova) as a crime against humanity: *Deronjić* Judgement on Sentencing Appeal, para. 4.

[5903] Trial Judgement, para. 2170.

his co-accused, an individualised approach to each of them is warranted.[5904] **Beara** has thus failed to demonstrate an error in this regard.

2097. For these reasons, **Beara**'s grounds of appeal 37 and 41 are dismissed.

(b) Nikolić's appeal (Sub-ground 1.4)

2098. **Nikolić** submits that the sentence imposed on him by the Trial Chamber reflects a significant disparity with the line of sentences passed in similar circumstances for the same offences.[5905] He specifically makes a comparison with the cases of other VRS officers convicted for the crimes related to Srebrenica, namely those of Jokić, Obrenović, M. Nikolić, and Krstić.[5906] The Prosecution responds that **Nikolić**'s submission should be dismissed because the cases he relies on are clearly distinguishable from his own.[5907]

2099. The Appeals Chamber notes that, contrary to **Nikolić**'s submissions, the cases of Jokić, Obrenović, and M. Nikolić have significant differences to his own.[5908] Moreover, although the cases of **Nikolić** and Krstić show certain similarities, they also differ with respect to the scope of convictions,[5909] crimes underlying them,[5910] the roles of the accused,[5911] as well as the existence of mitigating factors in Krstić's case,[5912] making a direct comparison of limited guidance at most. The Appeals Chamber therefore finds that **Nikolić** has failed to demonstrate that his sentence of 35 years' imprisonment reflects a significant disparity with the line of sentences passed in other cases so as to warrant appellate intervention.[5913] **Nikolić**'s sub-ground of appeal 1.4 is therefore dismissed.

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5904 See *supra*, paras 1961, 1993.

5905 Nikolić's Appeal Brief, paras 32, 44; Nikolić's Reply Brief, paras 22-24.

5906 Nikolić's Appeal Brief, paras 36-43; Nikolić's Reply Brief, paras 23-24. See also Appeal Hearing, AT. 281-282 (3 Dec 2013); AT. 288, 346-347 (4 Dec 2013); AT. 541 (6 Dec 2013).

5907 Prosecution's Response Brief (Nikolić), paras 33-38. See Prosecution's Response Brief (Nikolić), para. 39; Appeal Hearing, AT. 333 (4 Dec 2013).

5908 *Cf.* Regarding **Nikolić**: Trial Judgement, Disposition, Nikolić section. See Trial Judgement, paras 1047-1080, 1337-1343; 1387-1392, 1397-1415, 1417-1428, 2106. Regarding Jokić, convicted for aiding and abetting: murder as a violation of the laws or customs of war, extermination and persecution (through murder) as crimes against humanity: *Blagojević and Jokić* Appeal Judgement, para. 4, p. 137 (Disposition). Regarding Obrenović who pleaded guilty to a solitary count, namely persecution (through murder, cruel and inhumane treatment, terrorising the population, and destruction of property) as a crime against humanity: *Obrenović* Sentencing Judgement, paras 13, 29-37, 156. Regarding M. Nikolić who pleaded guilty to a solitary count of persecution (through murder, cruel and inhumane treatment, terrorising the civilian population, the destruction of property, and forcible transfer) as a crime against humanity: *M. Nikolić* Judgement on Sentencing Appeal, paras 2-3, p. 48 (Disposition).

5909 *Cf. Krstić* Appeal Judgement, paras 3, 275, pp. 87-88 (Disposition); *Krstić* Trial Judgement, paras 533, 538, 610, 616-617, 636, 644, 646, 676-677, 679, 684-685, 687, 727.

5910 *Cf. Krstić* Trial Judgement, paras 195-256.

5911 *Cf. Krstić* Appeal Judgement, para. 3, 266, 273.

5912 *Cf. Krstić* Appeal Judgement, paras 239, 253, 272-273.

5913 See *Strugar* Appeal Judgement, para. 349; *Naletilić and Martinović* Appeal Judgement, para. 615 and references cited therein.

(c) Pandurević's appeal (Sub-ground 6.1)

2100. **Pandurević** submits that the Trial Chamber should have had a greater regard to the principle of parity in relation to comparable cases in the determination of his sentence.[5914] In particular, he refers to the sentences imposed in the *Blagojević and Jokić*, *M. Nikolić*, *Obrenović*, *Borovčanin*, and *Erdemović* cases.[5915] **Pandurević** submits that these cases reveal a "distinct and narrow tariff band" for tactical level commanders convicted of murder or forcible transfer either through aiding and abetting, their failures as commanders or their direct involvement in the commission of these crimes.[5916] The Prosecution responds that the cases cited by **Pandurević** are not useful comparators as they involve many different factors.[5917]

2101. The Appeals Chamber notes the significant differences in circumstances which existed in the *Blagojević and Jokić*, *M. Nikolić*, *Obrenović*, and *Erdemović* cases,[5918] and the fact that **Pandurević**'s sentence of 13 years' imprisonment is less than the sentences imposed on the majority of them.[5919] The Appeals Chamber considers that comparisons to **Pandurević**'s case would be thus of limited assistance. Further, noting the particular circumstances of both **Pandurević**'s and Ljubomir Borovčanin's cases,[5920] the Appeals Chamber is also not persuaded that it has been demonstrated that the sentence imposed on Borovčanin in any way shows that the Trial Chamber erred in determining **Pandurević**'s sentence.

2102. The Appeals Chamber therefore finds that **Pandurević** has failed to demonstrate that the Trial Chamber committed a discernible error. **Pandurević**'s sub-ground of appeal 6.1 is therefore dismissed.

(d) Prosecution's appeal concerning Nikolić (Ground 8 in part)

2103. The Prosecution submits that **Nikolić**'s sentence of 35 years' imprisonment falls short compared to the sentences of his co-accused, **Popović** and **Beara**, with whom **Nikolić** acted "side by side" in Zvornik, and who both received sentences of life imprisonment.[5921] The Prosecution

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5914 Pandurević's Appeal Brief, para. 223.
5915 Pandurević's Appeal Brief, paras 220, 224-244, 247. See also Pandurević's Reply Brief, paras 81-82, 84.
5916 Pandurević's Appeal Brief, paras 241-242.
5917 Prosecution's Response Brief (Pandurević), paras 140, 143-145, 147, 148-150, 152, 156.
5918 *Cf.* Regarding Blagojević who was convicted for similar crimes: see *supra*, note 5902. Regarding Erdemović, Obrenović, and M. Nikolić, each of whom pleaded guilty, see *supra* notes 5902, 5908.
5919 For **Pandurević**'s sentence, see Trial Judgement, Disposition, Pandurević section. The Appeals Chamber notes that Vidoje Blagojević was sentenced to 15 years' imprisonment (*Blagojević and Jokić* Appeal Judgement, p. 137 (Disposition)); Momir Nikolić to 20 years' imprisonment (see *M. Nikolić* Judgement on Sentencing Appeal, p. 48 (Disposition)); Dragan Obrenović to 17 years' imprisonment (*Obrenović* Sentencing Judgement, para. 156); and Ljubomir Borovčanin to 17 years' imprisonment (Trial Judgement, Disposition, Borovčanin section). *Cf.* Erdemović who received a sentence of five years' imprisonment. *Erdemović* Sentencing Judgement, para. 23.
5920 *Cf.* Trial Judgement, paras 2181, 2186, 2191, 2210, Disposition, Borovčanin and Pandurević sections.
5921 Prosecution's Appeal Brief, para. 318.

argues that **Nikolić** does not deserve a reduction in sentence merely because **Popović** and **Beara** played a larger role than he did in the genocide as his conduct was sufficiently grave to justify the maximum sentence available.[5922] It contends that **Nikolić** is similarly situated to other accused before the ICTR who received sentences of life imprisonment.[5923] **Nikolić** responds that the ICTR cases invoked by the Prosecution are incomparable to his own case as they concern neither the same offences nor similar circumstances.[5924]

2104. The Appeals Chamber recalls that **Nikolić** was found guilty of aiding and abetting genocide, while his co-accused **Popović** and **Beara** were found guilty of committing genocide.[5925] The Appeals Chamber has consistently held that aiding and abetting is a form of responsibility that generally warrants a lower sentence than responsibility as a principal perpetrator.[5926] The Prosecution has failed to show that the Trial Chamber committed a discernible error in giving **Nikolić** a lower sentence than that of his co-accused.

2105. Further, a review of the sentencing practice of both this Tribunal and the ICTR reveals that **Nikolić**'s sentence of 35 years' imprisonment does not, as such, fall outside the general pattern of sentences imposed on an accused for aiding and abetting genocide.[5927] The Appeals Chamber therefore concludes that the sentence imposed by the Trial Chamber is not inconsistent with the sentencing practice of either this Tribunal or the ICTR.

2106. Additionally, the Appeals Chamber recalls that the sentencing practice in comparable cases is but one of several factors a trial chamber must consider in determining an appropriate sentence.[5928] The Appeals Chamber is satisfied that the Trial Chamber conducted a review of **Nikolić**'s individual circumstances, including the gravity of the crimes for which **Nikolić** was

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5922 Prosecution's Appeal Brief, para. 318.

5923 Prosecution's Appeal Brief, paras 301, 319; Prosecution's Reply Brief, para. 167.

5924 Nikolić's Response Brief, paras 194, 250-255. **Nikolić** also asserts that his sentence is higher than that of other VRS officers who were convicted for crimes committed at the same crime sites and for the same events. Nikolić's Response Brief, paras 256-258.

5925 Trial Judgement, para. 2171, Disposition, Nikolić, Popović, and Beara sections.

5926 *Krstić* Appeal Judgement, para. 268; *Vasiljević* Appeal Judgement, paras 102, 182 and references cited therein. See also *Kanyarukiga* Appeal Judgement, para. 280; *Ntawukulilyayo* Appeal Judgement, para. 244 and references cited therein.

5927 The Appeals Chamber notes that the following persons were found guilty of, *inter alia*, aiding and abetting genocide: Ntawukulilyayo – sentenced to 20 years' imprisonment. *Ntawukulilyayo* Appeal Judgement, para. 245 (Disposition); Rukundo – sentenced to 23 years' imprisonment. *Rukundo* Appeal Judgement, para. 270 (Disposition); Seromba – sentenced to 15 years' imprisonment. *Seromba* Trial Judgement, p. 104 (Disposition) (the Appeals Chamber subsequently found that he committed genocide and increased his sentence to life imprisonment. *Seromba* Appeal Judgement, para. 240 (Disposition)); Ngeze – sentenced to 35 years' imprisonment. *Nahimana et al.* Appeal Judgement, paras 1114-1115 (Disposition); Ndindabahizi – sentenced to life imprisonment. *Ndindabahizi* Appeal Judgement, para. 142 (Disposition); Gérard Ntakirutimana – sentenced to 25 years' imprisonment; and Elizaphan Ntakirutimana – sentenced to ten years' imprisonment. *Ntakirutimana and Ntakirutimana* Appeal Judgement, pp. 187-189 (Disposition); Krstić – sentenced to 35 years' imprisonment. *Krstić* Appeal Judgement, para. 275 (Disposition).

5928 See *supra*, para. 2093. See also *Rašić* Contempt Appeal Judgement, para. 29; *Krstić* Appeal Judgement, para. 250.

convicted, the nature and extent of his involvement, and the totality of his culpable conduct as well as any applicable aggravating and mitigating circumstances.[5929]

2107. For the foregoing reasons, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in the exercise of its sentencing discretion. This aspect of the Prosecution's ground of appeal 8 is therefore dismissed.

### G. Conclusion

2108. The Appeals Chamber has granted, in part, ground 24 of **Miletić**'s appeal concerning the Trial Chamber's erroneous double-counting of his use of authority within the VRS Main Staff as an aggravating circumstance. The impact of this finding on **Miletić**'s sentence, if any, will be considered in the section below.

2109. The Appeals Chamber has dismissed all other challenges concerning sentencing.

### H. Impact of the Appeals Chamber's Findings on Sentencing

2110. With respect to **Popović**, the Appeals Chamber recalls that it, Judge Niang dissenting, has reversed his convictions for genocide, extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity to the extent they concern the killing of six Bosnian Muslim men near Trnovo.[5930] At the same time, the Appeals Chamber, Judge Pocar dissenting, has entered a new conviction against **Popović** for conspiracy to commit genocide.[5931] The Appeals Chamber considers that **Popović**'s criminal responsibility as recalled above does not call for a revision of his sentence. In these circumstances, the Appeals Chamber affirms **Popović**'s sentence of life imprisonment.

2111. With respect to **Beara**, the Appeals Chamber recalls that it, Judge Niang dissenting, has reversed his convictions for genocide, extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity to the extent they concern the killing of six Bosnian Muslim men near Trnovo.[5932] At the same time, the Appeals Chamber, Judge Pocar dissenting, has entered a new conviction against **Beara** for conspiracy to commit genocide.[5933] The Appeals Chamber considers that **Beara**'s criminal responsibility as recalled above does not call for a revision of his sentence. In these circumstances, the Appeals Chamber affirms **Beara**'s sentence of life imprisonment.

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5929 See Trial Judgement, paras 2171-2178.
5930 See *supra*, paras 1069, 1444.
5931 See *supra*, paras 546, 557.
5932 See *supra*, paras 1069, 1444.
5933 See *supra*, paras 555, 557.

2112. With respect to **Nikolić**, the Appeals Chamber recalls that it, Judge Niang dissenting, has, *proprio motu*, reversed his convictions for genocide, extermination as a crime against humanity, murder as a violation of the laws or customs of war, and persecution as a crime against humanity to the extent they concern the killing of six Bosnian Muslim men near Trnovo.[5934] The Appeals Chamber considers that **Nikolić**'s criminal responsibility as recalled above does not call for a revision of his sentence. In these circumstances, the Appeals Chamber, Judge Niang dissenting, affirms **Nikolić**'s sentence of 35 years of imprisonment.

2113. With respect to **Miletić**, the Appeals Chamber recalls that it has reversed his convictions for persecution and inhumane acts (forcible transfer), respectively, as crimes against humanity in connection with the forcible transfer of the men who crossed the Drina River.[5935] At the same time, the Appeals Chamber has reversed the acquittal and, Judge Pocar dissenting, has entered a new conviction against **Miletić** for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari – *i.e.* killing of nine Bosnian Muslim men whose bodies were found near the DutchBat Compound and killing of one Bosnian Muslim man near the White House.[5936] The Appeals Chamber considers that **Miletić**'s criminal responsibility as recalled above calls for a limited revision of his sentence. The Appeals Chamber has also found that the Trial Chamber erred in considering **Miletić**'s use of his authority within the VRS Main Staff as an aggravating circumstance.[5937] In these circumstances, the Appeals Chamber reduces **Miletić**'s sentence from 19 years of imprisonment to a term of 18 years of imprisonment.

2114. With respect to **Pandurević**, the Appeals Chamber recalls that it, Judge Niang dissenting, has reversed his acquittals for aiding and abetting extermination and persecution through murder as crimes against humanity, and murder as a violation of the laws or customs of war committed against Bosnian Muslim prisoners and, Judge Pocar dissenting, has entered new convictions for these crimes.[5938] These convictions concern the killing of more than 1,000 Bosnian Muslim prisoners at Kozluk and the killing of between 1,000 and 2,000 Bosnian Muslim prisoners at the Pilica Cultural Centre and the Branjevo Military Farm.[5939] The Appeals Chamber also recalls that it, Judge Niang dissenting, has reversed **Pandurević**'s acquittal for aiding and abetting persecution through murder

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[5934] See *supra*, paras 1070, 1444.
[5935] See *supra*, paras 775, 785.
[5936] See *supra*, paras 1411, 1717-1718.
[5937] See *supra*, paras 2026, 2108.
[5938] See *supra*, paras 1804, 1836.
[5939] See *supra*, para. 1804. As the Appeals Chamber, Judge Pocar dissenting, has entered convictions for aiding and abetting, it has set aside **Pandurević**'s convictions under Article 7(3) of the Statute for murder as a crime against humanity and as a violation of the laws or customs of war for crimes committed by his subordinates at Kozluk and the Branjevo Military Farm from noon on 15 July to 16 July 1995. See *supra*, para. 1806.

as a crime against humanity as it relates to the ten Milići Prisoners, and, Judge Pocar dissenting, has entered a new conviction in this regard.[5940]

2115. The Appeals Chamber further recalls that it, Judge Niang dissenting, has reversed **Pandurević**'s acquittal under Article 7(3) of the Statute for persecution through cruel and inhumane treatment and, Judge Pocar dissenting, has entered a new conviction for his failure to take reasonable and necessary measures to prevent his subordinates from participating in this crime committed against 1,500 to 2,500 Bosnian Muslim prisoners at the Ročević and Kula Schools from noon on 15 July to 16 July 1995.[5941] The Appeals Chamber also recalls that it, Judge Niang dissenting, has reversed **Pandurević**'s acquittal, and, Judge Pocar dissenting, has entered new convictions, under Article 7(3) of the Statute for extermination and persecution through murder as crimes against humanity, and murder as a violation of the laws or customs of war for his failure to punish his subordinates who from 13 July to noon on 15 July 1995 aided and abetted these crimes against Bosnian Muslim prisoners detained at the Grbavci, Ročević, and Kula Schools, and committed or aided and abetted these crimes at Orahovac on 14 July 1995.[5942] Similarly, the Appeals Chamber, Judge Niang dissenting, has reversed **Pandurević**'s acquittal, and, Judge Pocar dissenting, has entered a new conviction under Article 7(3) of the Statute for persecution through cruel and inhumane treatment as a crime against humanity for his failure to punish his subordinates who from 13 July to 16 July 1995 aided and abetted this crime against the Bosnian Muslim prisoners who were detained at the Grbavci, Kula, and Ročević Schools, and transported to Orahovac and Kozluk.[5943]

2116. Finally, the Appeals Chamber also recalls the emphasis placed by the Trial Chamber on **Pandurević**'s actions which saved the lives of thousands of Bosnian Muslims.[5944] The Appeals Chamber considers that **Pandurević**'s criminal responsibility as recalled above does not call for a revision of his sentence. In these circumstances, the Appeals Chamber affirms **Pandurević**'s sentence of 13 years of imprisonment.

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5940 See *supra*, paras 1817, 1836.
5941 See *supra*, paras 1916, 1949.
5942 See *supra*, paras 1945-1947, 1949.
5943 See *supra*, paras 1947, 1949.
5944 See Trial Judgement, paras 2219-2222.

# XII. DISPOSITION

2117. For the foregoing reasons, **THE APPEALS CHAMBER,**

**PURSUANT TO** Article 25 of the Statute and Rules 117 and 118 of the Rules;

**NOTING** the respective written submissions of the parties and the arguments they presented at the appeal hearing on 2-6 December 2013;

**SITTING** in open session;

**WITH RESPECT TO VUJADIN POPOVIĆ,**

**GRANTS**, Judge Niang dissenting, **Popović**'s appeal regarding the killing of six Bosnian Muslim men near Trnovo and **REVERSES** his convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing near Trnovo;

**DISMISSES**, Judge Robinson dissenting in part, **Popović**'s appeal in all other respects;

**AFFIRMS** the remainder of **Popović**'s convictions under Counts 1, 3, 5, and 6;

**GRANTS**, Judge Niang dissenting, in part the Prosecution's ground of appeal 6 and **ENTERS**, Judge Pocar dissenting, a conviction against **Popović** for conspiracy to commit genocide (Count 2);

**AFFIRMS Popović**'s sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

**WITH RESPECT TO LJUBIŠA BEARA,**

**GRANTS**, Judge Niang dissenting, in part **Beara**'s ground of appeal 17 and **REVERSES** his convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing of six Bosnian Muslim men near Trnovo;

**DISMISSES Beara**'s appeal in all other respects;

**AFFIRMS** the remainder of **Beara**'s convictions under Counts 1, 3, 5, and 6;

**GRANTS**, Judge Niang dissenting, in part the Prosecution's ground of appeal 6 and **ENTERS**, Judge Pocar dissenting, a conviction against **Beara** for conspiracy to commit genocide (Count 2);

**AFFIRMS Beara**'s sentence of life-imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

**WITH RESPECT TO DRAGO NIKOLIĆ,**

**DISMISSES Nikolić**'s appeal in its entirety;

**REVERSES**, *proprio motu*, Judge Niang dissenting, **Nikolić**'s convictions for genocide (Count 1 in part), extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution as a crime against humanity (Count 6 in part) to the extent they concern the killing of six Bosnian Muslim men near Trnovo;

**AFFIRMS** the remainder of **Nikolić**'s convictions under Counts 1, 3, 5, and 6;

**DISMISSES**, Judge Niang dissenting in part, the Prosecution's appeal concerning **Nikolić** in its entirety;

**AFFIRMS**, Judge Niang dissenting, **Nikolić**'s sentence of 35 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

**WITH RESPECT TO RADIVOJE MILETIĆ,**

**GRANTS Miletić**'s sub-ground of appeal 6.2 and **REVERSES** his convictions for persecution and inhumane acts (forcible transfer) as crimes against humanity in connection with the forcible transfer of the men who crossed the Drina River (Count 6 in part and Count 7 in part);

**GRANTS** in part **Miletić**'s ground of appeal 24 concerning sentencing;

**DISMISSES Miletić**'s appeal in all other respects;

**AFFIRMS** the remainder of **Miletić**'s convictions under Counts 4, 6, and 7;

**GRANTS** the Prosecution's ground of appeal 9 and **ENTERS**, Judge Pocar dissenting, a conviction against **Miletić** for murder as a violation of the laws or customs of war for the "opportunistic" killings in Potočari (Count 5 in part);

**SETS ASIDE Miletić**'s sentence of 19 years of imprisonment and **IMPOSES** a sentence of 18 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention;

**WITH RESPECT TO VINKO PANDUREVIĆ,**

**DISMISSES**, Judge Niang dissenting in part, **Pandurević**'s appeal in its entirety;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 1(b) in part and **ENTERS**, Judge Pocar dissenting, new convictions against **Pandurević** for aiding and abetting extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution through murder as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners at the Ročević School, the Kula School, Kozluk, the Pilica Cultural Centre, and the Branjevo Military Farm;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 1(c) and **ENTERS**, Judge Pocar dissenting, a conviction against **Pandurević** for aiding and abetting persecution through murder as a crime against humanity (Count 6 in part) in relation to the Milići Prisoners;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 2(d) and **ENTERS**, Judge Pocar dissenting, a conviction against **Pandurević** under Article 7(3) of the Statute for persecution through cruel and inhumane treatment as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners at the Ročević and Kula Schools;

**GRANTS**, Judge Niang dissenting, the Prosecution's sub-ground of appeal 2(e) and **ENTERS**, Judge Pocar dissenting, convictions against **Pandurević** under Article 7(3) of the Statute for extermination as a crime against humanity (Count 3 in part), murder as a violation of the laws or customs of war (Count 5 in part), and persecution through murder as well as through cruel and inhumane treatment as a crime against humanity (Count 6 in part) for crimes committed against Bosnian Muslim prisoners who were detained at the Grbavci, Ročević, and Kula Schools, transported to Orahovac and Kozluk, and killed at Orahovac;

As a result, **SETS ASIDE Pandurević**'s conviction under Article 7(3) for murder as a crime against humanity (Count 4 in part) and murder as a violation of the laws or customs of war (Count 5 in part) for crimes committed by his subordinates at Kozluk and the Branjevo Military Farm from noon on 15 July to 16 July 1995;

**DISMISSES** the Prosecution's appeal concerning **Pandurević** in all other respects;

**AFFIRMS** the remainder of **Pandurević**'s convictions under Counts 4, 5, 6, and 7;

**AFFIRMS Pandurević**'s sentence of 13 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period he has already spent in detention.

**RULES** that this Judgement shall be enforced immediately pursuant to Rule 118 of the Rules;

**ORDERS**, Judge Niang dissenting in part, that, in accordance with Rules 103(C) and 107 of the Rules, the Appellants are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

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

| | | |
|---|---|---|
| Patrick Robinson<br>Presiding Judge | William H. Sekule<br>Judge | Fausto Pocar<br>Judge |
| Arlette Ramaroson<br>Judge | Mandiaye Niang<br>Judge | |

Judge Patrick Robinson appends a partially dissenting opinion.

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Mandiaye Niang appends separate and dissenting opinions.

Dated this thirtieth day of January 2015,
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

# XIII. PARTIALLY DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. I respectfully disagree with the finding of the Appeals Chamber that "**Popović** has failed to show that no reasonable trier of fact could have reached, as the only reasonable inference, the Trial Chamber's conclusion that the "lieutenant colonel" was in fact **Popović**",[1] as it relates to the latter Chamber's finding that **Popović** co-ordinated logistics "on-site" for mass executions at the Branjevo Military Farm and in Pilica on 16 July 1995. In my view, no reasonable trier of fact could, on the basis of the evidence before the Trial Chamber, have been satisfied beyond reasonable doubt that **Popović** was the "lieutenant colonel" who, on 16 July 1995: (1) joined eight members of the 10th Sabotage Detachment at the Standard Barracks and went with them to the Branjevo Military Farm but left when prisoners began to arrive; (2) returned to the Branjevo Military Farm and ordered the VRS soldiers deployed there to go to the Pilica Cultural Centre to participate in executions and left with the soldiers who volunteered; (3) instructed Dražen Erdemović and other 10th Sabotage Detachment members to go to the Pilica café where he announced "[w]ho remained alive has remained alive" after being told by a VRS soldier that "everything was finished".[2] On appeal **Popović** challenges the findings of the Trial Chamber.

2. For the purpose of identifying **Popović** as the person to whom the various activities and statements mentioned above were attributed, the only witness referred to by the Trial Chamber as giving direct evidence that the "lieutenant colonel" was in fact **Popović** was Dražen Erdemović. Erdemović at trial in 2007: (1) testified that the "lieutenant colonel" and two military officers joined him and a group of soldiers at the Standard Barracks, travelled with them to the Branjevo Military Farm, left the farm but that they had not yet left when the bus transporting prisoners arrived; (2) described the lining up and execution of prisoners at the Branjevo Military Farm; (3) testified that towards the end of the executions the "lieutenant colonel" and two other military officers returned; (4) testified that the "lieutenant colonel" told the soldiers that there were 500 people in the cultural hall in Pilica to be executed and some soldiers refused to go while some left with the "lieutenant colonel"; (5) testified that "lieutenant colonel" left instructions that the soldiers were to meet at the Pilica café; (6) described seeing several bodies in front of the Pilica Cultural Centre across from the Pilica café and hearing firing and explosions coming from the direction of the cultural centre; and (7) testified that the "lieutenant colonel" being told that everything was finished, stood up in the Pilica café and said "[w]ho remained alive has remained alive".[3] However, in December 1998, Erdemović was unable to identify **Popović** as the "lieutenant colonel" in a photo line-up. At the

1 Judgement, para. 1154.
2 Trial Judgement, paras 540-541, 1131-1133.
3 Dražen Erdemović, T. 10966-10975, 10982-10986 (4 May 2007).

trial, his description of the "lieutenant colonel", in the words of the Appeals Chamber "does not appear to be fully consistent with the description of **Popović** given by the Trial Chamber which specifically found that in July 1995, **Popović** had a moustache".[4] It is accepted that the Trial Chamber did not discuss or consider the description of the "lieutenant colonel" by Erdemović in arriving at its findings in this matter.[5] Instead the Trial Chamber relied on several pieces of circumstantial evidence which, in its view, sufficed to place **Popović** at the relevant place at the relevant time.[6]

3. In my view, the failure of the Trial Chamber to take account of Erdemović's clearly unhelpful evidence (to the Prosecution's case) as to the identification of the "lieutenant colonel" in conjunction with the six pieces of circumstantial evidence is, by reason of its significance for the overall identification of **Popović**, fatal to the Trial Chamber's consideration of the identification evidence and the conclusion it ultimately arrived at. No reasonable tribunal, having considered the six pieces of circumstantial evidence in the light of the evidence of the single Prosecution witness brought to provide direct evidence of identification, could be satisfied beyond reasonable doubt that the "lieutenant colonel" was **Popović**.

4. The Appeals Chamber's case-law (set out in paragraph 1151 of the Judgement) on the presumption that a trial chamber has evaluated all the evidence presented to it is inapplicable since it is fair to conclude that the Trial Chamber, not having discussed Erdemović's description of the "lieutenant colonel" anywhere in its judgement, has completely disregarded it in arriving at its finding that the "lieutenant colonel" was **Popović**. This conclusion is fortified by the fact that the Trial Chamber discussed all the other relevant aspects of the identification, that is, Erdemović's failure to identify **Popović** in a photo line-up and the six pieces of circumstantial evidence that it eventually relied upon. Its failure to discuss Erdemović's description of the "lieutenant colonel" is therefore glaring and conspicuous.

5. The Judgement finds that Erdemović's description of the "lieutenant colonel" was not clearly relevant to the overall finding,[7] and that the Trial Chamber accepted that, although Erdemović's description of the "lieutenant colonel" did not match **Popović**, this did not raise a reasonable doubt about its conclusion because of the traumatic circumstances surrounding the events and the passage of time. It is difficult to accept that the single piece of direct evidence referred to by the Trial Chamber with regard to the description of the "lieutenant colonel" would not be relevant to the Trial Chamber's "overall finding" on this issue. In my view, the Trial

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4 Judgement, para. 1151.
5 Judgement, paras 1151, 1154.
6 Trial Judgement, para. 1134. See Judgement, paras 1149, 1151, 1153.
7 Judgement, para. 1152.

Chamber ought properly to have weighed all the relevant evidence on identification, *i.e.* the direct evidence from Erdemović as well as the circumstantial evidence.

6. Notably, the Judgement in relation to the failure of Erdemović to identify **Popović** as the "lieutenant colonel", pinpoints the Trial Chamber's reference to "the traumatic circumstances in which Erdemović met **Popović** and the significant passage of time",[8] as "sufficient justification"[9] for Erdemović's failure to do so. However, this must be speculation on the part of the Trial Chamber as nowhere in the trial transcript is there any evidence of the circumstances in which he met **Popović** as being traumatic in the sense of having any adverse impact on Erdemović.[10] Certainly, Erdemović himself gave no such evidence. Moreover, the difficulty that a witness will understandably have in identifying an accused person a very long time after the relevant event has taken place is not an argument that can be properly advanced in support of the discharge by the Prosecution of its burden to establish the accused's identity beyond reasonable doubt; in fact, it is an argument which must properly be seen as weakening, not assisting - in the sense of making it easier to discharge its burden - the Prosecution's case. In other words, in a case where identification is an issue, the burden on the Prosecution to prove beyond reasonable doubt the identity of the accused does not become lighter with the passage of time; it remains constant. In such cases it would be appropriate for the Trial Chamber to warn itself of the need for caution in treating this evidence. Although the Trial Chamber did give such a warning[11] its findings do not suggest that it heeded the warning.

7. Moreover, the six pieces of circumstantial evidence on which the Trial Chamber relied for proof that the "lieutenant colonel", alleged by the Prosecution to have been in the Pilica area, was in fact **Popović**, are weak and of little evidential value. These are set out in paragraph 1149 of the Judgement.

8. The first piece of circumstantial evidence is **Popović**'s rank as "lieutenant colonel" at the relevant time. However, this is not a very strong piece of circumstantial evidence since it was Erdemović who testified that the person he saw was wearing the insignia of a lieutenant colonel;[12] but he was unable to identify **Popović** in a photo line-up and the Trial Chamber found that his description of the "lieutenant colonel" did not match **Popović**. In fact, the Trial Chamber totally disregarded his evidence in arriving at its conclusion. This evidence is only potentially useful if one accepts the weak and questionable sixth item of circumstantial evidence relied upon by the Trial Chamber - "the lack of evidence that any other lieutenant colonel was present in the area at the

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8 Judgement, para. 1152.
9 Judgement, para. 1152.
10 See Trial Judgement, para. 1135.
11 See Trial Judgement, paras 54-55.

relevant time".[13] One is asked on the basis of this lack of evidence as well as the other pieces of circumstantial evidence to conclude that **Popović** was the "lieutenant colonel". The reliance on this piece of circumstantial evidence is questionable because neither in the Trial Chamber's judgement nor on the record is there any reference to evidence from a witness that he or she did not see any other lieutenant colonel in the area. There is, therefore, no evidential basis for this inference.

9. I do not find the other pieces of circumstantial evidence to be very helpful. They serve only to place **Popović** in the general area of Pilica. But, to place him in the general area of Pilica is not enough to discharge the burden on the Prosecution to prove that **Popović** was the "lieutenant colonel" to whom the various activities and statements set out in paragraph one of this opinion were attributed.

10. I therefore disagree with the Appeals Chamber's finding that "**Popović** has failed to show that no reasonable trier of fact could have reached, as the only reasonable inference, the Trial Chamber's conclusion that the 'lieutenant colonel' was in fact **Popović**".[14]

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

Patrick Robinson
Presiding Judge

Dated this thirtieth day of January 2015,
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

12 Dražen Erdemović, T. 10966, 10980-10981 (4 May 2007).
13 Judgement, para. 1149.
14 Judgement, para. 1154.

# XIV. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber allows some of the Prosecution's grounds of appeal and enters new convictions on appeal under certain counts of the Indictment. As indicated in the body text of the Judgement, I disagree with the majority's decision to enter new convictions on appeal.

2. For the reasons already expressed in my dissenting opinions in the *Mrkšić and Šljivančanin*,[1] *Galić*,[2] *Semanza*,[3] *Rutaganda*,[4] *Setako*,[5] and *Gatete*[6] cases, I hereby reaffirm that I do not believe that the Appeals Chamber has the power to remedy an error of the Trial Chamber by subsequently entering a new conviction on appeal. The Appeals Chamber is bound to apply Article 24(2) of the Statute in compliance with fundamental principles of international human rights law as enshrined in, *inter alia*, the International Covenant on Civil and Political Rights of 1966 ("ICCPR").[7] Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Accordingly, the right to appeal a conviction should be granted to an accused before the Tribunal in all situations. However, the new convictions imposed in this case on appeal deny the appellants that right.

3. In this case, I believe that the Appeals Chamber had another avenue before it under Article 24 of the Statute. The option available to the Appeals Chamber was the one taken in the *Krstić* Appeal Judgement. In that case, the Appeals Chamber found that the trial chamber committed an error of law in disallowing the appellant's convictions for extermination and for persecutions as crimes against humanity, on grounds that they were impermissibly cumulative with his conviction for genocide based on the same facts.[8] However, rather than entering two new convictions on appeal against the appellant, the Appeals Chamber simply pronounced the trial chamber's findings erroneous and, in the Disposition, noted that the trial chamber had incorrectly disallowed the convictions.[9] The Appeals Chamber corrected the trial chamber's error of law without entering a new conviction and thus, the appellant's right to an appeal was not violated.

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[1] *Mrkšić and Šljivančanin* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, pp. 171-177, paras 1-13.
[2] *Galić* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.
[3] *Semanza* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 131-133, paras 1-4.
[4] *Rutaganda* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 1-4.
[5] *Setako* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, paras 1-6.
[6] *Gatete* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, pp. 90-91, paras 1-5.
[7] International Covenant on Civil and Political Rights, 16 December 1966, entered into force on 23 March 1976.
[8] *Krstić* Appeal Judgement, paras 219-229.
[9] *Krstić* Appeal Judgement, p. 87.

This approach was also adopted in, *inter alia*, the *Naletilić and Martinović*, *Stakić*, *Šainović et al.*, and *Karemera and Ngirumpatse* cases.[10]

4. In this case, the majority has not followed this approach. I agree that the Trial Chamber erred. However, I cannot agree to correct these errors using an approach which, for the reasons expressed here and in my above-mentioned dissenting opinions, is also an error. Therefore, I dissent with the majority's decision to enter new convictions on appeal in this case.

Done in English and French, the English text being authoritative

Judge Fausto Pocar

Dated this 30th day of January 2015,
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

[10] *Naletilić and Martinović* Appeal Judgement, paras 588-591, p. 207; *Stakić* Appeal Judgement, paras 359-360, 362, 364, 366-367, pp. 141-142; *Šainović et al.* Appeal Judgement, paras 1604, 1766, 1847; *Karemera and Ngirumpatse* Appeal Judgement, paras 713, 750.

# XV. SEPARATE AND DISSENTING OPINIONS OF JUDGE MANDIAYE NIANG

## A. Introduction

1. With five Defendants appealing their convictions and sentences along with the Prosecutor who also challenges many aspects of the Trial Chamber's findings, with a complex set of facts stemming from the Srebrenica and Žepa events of July 1995, as summarised in paragraph 2 of this judgement, this case is of particular magnitude in size. It is also of great legal significance in many respects, including as the first case before this Tribunal in which two Accused have been found guilty of genocide as main perpetrators at the first instance, while the acquittal of a third accused on the count of genocide is challenged.

2. Part of the complexity of this case rests on the Prosecutor's theory and the means by which he proposed to prove it. The alleged crimes stem to a large extent from two JCEs (to Murder and to Forcibly Remove) with some degree of overlap. The evidence in this case is of mixed nature and weight. Seemingly compelling documentary evidence coexists with other documentary evidence requiring context to have meaning. Witnesses with credibility issues, untested statements based on Rule 92 *bis* and *quater* and transcripts from other cases through judicial notice have also been heavily relied upon.

3. The Trial Chamber's difficult - yet natural - role was to unravel these evidentiary intricacies. It did so, including through inferences drawn from circumstantial evidence.

4. In a context of reliance on, among others, equivocal documents (intercepts), incomplete and controversial identification of Accused persons at crime scenes, and partially truthful witnesses, one may understand the urge of the persons convicted out of such a delicate process to challenge every pronouncement made by the Trial Chamber.

5. The Appellants did not resist this urge. Almost every finding of the Trial Chamber has been challenged, including findings that are neither the sole nor the necessary basis for the convictions entered into. In this process, the debate around the credibility of witnesses has been widely reopened, their propensity or interest to lie re-exposed, the true contextual meaning of documentary evidence (intercepts and Directives) re-discussed, the alibi of **Popović** and **Beara** re-submitted for new scrutiny. The interrelation between the different military organs, the level of responsibility of each Accused in the military chain of command, the extent of their information about specific events, the nature of their involvement in the drafting of documents, their alleged role as

coordinator, their signing or clearing authority, the difficulty in exercising authority in particular circumstances, all of these issues have been largely discussed.

6. The delicate role of the Appeals Chamber was to delineate the line between the impermissible re-litigation of facts on appeal and the legitimate challenge by Appellants of alleged fatal factual errors by the Trial Chamber.

7. I am not fully confident that this judgement has flawlessly carried out this task all along. It has made the commendable but ineffective choice to address each and every argument raised by the Appellants, including those that clearly re-litigate the facts.[1] It has also embarked upon the ambitious yet unnecessary endeavour to respond as many times as requested to repetitive arguments presented by different parties or from different angles and split arguments based on the same issue. This has lengthened the judgement and made it unnecessarily unwieldy.

8. I would have favoured a more synthetic approach whereby we would reconstruct and weed out the arguments and only address fully those that genuinely qualify as grounds of appeal, while the rest would be summarily dismissed.

9. I am mindful that the stakes are high and that no effort should be spared to scrutinise every argument of the Appellants. This, however, should not override the institutional limitations of the appeal review process when dealing with facts. The Appeals Chamber is not a trier of fact. It reviews only factual findings that are allegedly so erroneous that they led to a miscarriage of justice. And even when undertaking this limited endeavour, it must do so with great caution, due to the margin of deference it owes to the primary fact finder. This deference is not just a question of decorum. It stems from the fact that the Appeals Chamber is not as equipped as a trial chamber to assess and understand the evidence.

10. This principle is somewhat trite law and has been profusely recalled in this judgement. I am not sure, however, that this reminder has been anything more than a hollow statement in some instances. The judgement is indeed marred with factual details, which in my view were not for the Appeals Chamber to get so deeply involved in. While I agree that we must look at every instance where it is alleged that the Trial Chamber committed a fatal error, the submissions of the Appellants

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[1] See for example Appeal Judgement, para. 581. **Miletić** re-argues the content and consequences of Directive 7. See also paragraphs 630 *et seq.* re-litigating the humanitarian aid distribution. Ditto with the fuel supply (paragraph 650). See the second part of paragraph 1537 on the convoy approval process. See also the Prosecutor's and **Pandurević**'s pleadings from paragraph 1775 on the factual elements of the *mens rea* for aiding and abetting. The discussion is less about the Trial Chamber's findings than an attempt to make a fresh case based on their own understanding of the evidence. They place thereby the Appeals Chamber literally in the position of a trial chamber. Despite the attempts to stick to the Trial Chamber's findings in paragraph 1785, some slippage is noticeable (for example when rejecting **Pandurević**'s contention that he lost some authority). **Pandurević**'s arguments with respect to

in themselves provide sufficient guidance for the Appeals Chamber to determine whether it is dealing with a mere re-litigation of facts or a genuine ground of appeal. The numerous instances in which this judgement reaches the conclusion that the Appellant just disagrees with the Trial Chamber or tries to substitute his own interpretation of the evidence, are as many instances where the submissions could have been more effectively disposed of.[2]

11. More delicate are the instances where allegations of disregard of relevant evidence or wholly erroneous interpretation of the evidence seem genuine. While such allegations may warrant a close scrutiny of the evidence, that exercise should have been limited to ascertain whether the alleged error was committed or not. There are unfortunately many instances where the reassessment of the evidence has been stretched beyond the strict necessary exercise of an appellate review. This, I am afraid, may have exposed this judgement to a number of vulnerabilities.[3]

12. I am uncomfortable with the overall approach to the facts. This reservation does not mean, however, that I disown the findings associated with the somewhat erratic approach I criticise. I highlight below, as part of my separate or dissenting opinions, those portions of the reasoning and findings I disagree with.

## B. Separate Opinions

### 1. Evidence regarding the number of deceased following the fall of Srebrenica

13. **Popović**, **Beara**, and **Nikolić** have challenged the Trial Chamber's conclusions on the number of persons executed.[4] On the one hand, the Trial Chamber came up with a global number by aggregating the number of persons executed at the different execution sites, based on the specific evidence relevant to that site. On the other hand, the Trial Chamber referred to forensic and demographic evidence although that evidence did not link specific killings to a specific Accused.

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his superior responsibility are a mix of facts re-litigation and legal challenges. In many instances (for example paragraphs 1893-1894) the Appeals Chamber directly responds to the factual challenges.

[2] See for example **Miletić**'s argument under paragraph 740 and the response in paragraph 744 of the Appeal Judgement.

[3] In a number of instances the approach to the fact mirrors that of a trial chamber. I am concerned that errors may occur in this process, thus leading to possible new challenges including through motions for review. See for example Appeal Judgement, para. 1068, discussing and making inferences regarding Borovčanin's role in the co-ordination with the Scorpions Unit and the subsequent link with the JCE members. See paragraph 1733 on **Pandurević**'s awareness of **Popović**'s arrival and also on **Popović**'s journey to the Zvornik area. More generally the selective activism of the Appeals Chamber makes it difficult to grasp the overall rationale of the approach to the facts, deferring sometimes to the Trial Chamber's discretion (see paragraphs 1249, 1520-1521), and directly sorting out sometimes the alleged inconsistencies (see paragraphs 1272, 1344-1345).

[4] Popović's Appeal Brief (from paragraph 412 to 454), **Beara**'s appeal (grounds 5, 13, 14 and 17) and **Nikolić**'s appeal (sub-ground 4.4). See Appeal Judgement, generally, paras 254-342.

14. I am not convinced that any errors imputed to the Trial Chamber in this counting exercise would be so material to the reasoning of the Trial Chamber to affect its findings with respect to genocide and extermination as a crime against humanity.

15. The numbers dealt with are at best rough estimates with sometimes very wide margins.[5] The Appellants' challenges do not affect the large-scale nature of the massacres[6] and there is no numerical threshold required to conclude for genocide.[7] More importantly, it would appear that without discounting the importance of the numerical size of the victims, a decisive factor in concluding to the existence of a genocide in the context of the Srebrenica events was the drive to "eliminate the enclave and accomplish the goal of eliminating the Muslim presence in the entire region; ...[which would be] emblematic of the fate of all Bosnian Muslims".[8]

16. The Trial Chamber's ambiguous statement pointing to the possible relevance of the total number of persons executed to certain crimes attributed to **Popović** cannot negate its clear acknowledgement that "the number of persons executed... did not form an element of the crimes alleged in the Indictment."[9]

17. Judicial economy would be better served in my view with a summary dismissal of **Beara**'s, **Popović**'s and **Nikolić**'s relevant grounds of appeal.

2. Hearsay evidence and untested evidence

18. Different passages of this judgement reiterate the discretion of a trial chamber to rely on hearsay evidence.[10] I agree with this statement, particularly when associated with the appropriate precautions outlined in the Tribunal's case law.[11] I doubt, however, that this statement is compatible with the exclusion rule articulated to disqualify untested evidence admitted under Rule 92 *quater* as the main basis for a decisive finding.[12]

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5 See Appeal Judgement, paras 26-32, referring to a very large variation of persons killed. We acknowledge in paragraph 30 that so long as we deal with mass killings with an approximate number of victims, an alleged error on the number of victims does not affect the Defence's ability to challenge the charge.

6 Paragraph 338. See also paragraph 450 *in fine* showing clearly that the numerical counting was not a decisive factor in concluding that there was a genocide. See also Trial Judgement, para. 794, reciting all the direct killings. See the findings in paragraphs 1178-1180 of the Trial Judgement regarding the basis of **Popović**'s guilt for genocide through participation in the JCE to Murder. See also Trial Judgement, paras 1313-1318 for **Beara**'s genocidal intent. See also para. 866.

7 See, *e.g.*, *Brđanin* Appeal Judgement, paras 471-472 (recalling, *inter alia*, that there is no numerical threshold established with respect to the *actus reus* of extermination).

8 See Appeal Judgement, para. 416, and the reference to Trial Judgement, para. 865.

9 See Appeal Judgement, para. 257.

10 Appeal Judgement, paras 1276, 1307.

11 See Appeal Judgement, para. 392 & fn. 1077.

12 Appeal Judgement, paras 1222, 1226, 1264.

19. The rationale to assert the inadequacy of a Rule 92 *quater* statement to support alone a main finding of guilt rests on the consideration that it has not been tested through cross-examination and would thus be too unfair to the Defence. If such a rationale is to be upheld, then hearsay evidence should also be disqualified to serve the same purpose. Hearsay evidence, by its very nature, cannot be effectively tested through cross-examination. Yet we accept it.

20. I am therefore of the view that evidence admitted under Rule 92 *quater* should not be treated any lesser than hearsay evidence.[13] In fact the wording of Rule 92 *quater* (B) strikes already an appropriate balance in calling for great caution when using this untested evidence as a basis for a main finding of guilt, without however excluding formally such a possibility.[14]

21. One more reason for my reluctance to subscribe to the doctrine of exclusion is that it would also apply to evidence admitted under Rule 92 *quinquies* (A) (ii), including when the witness is unavailable as a result of intimidations from the Accused. Mischief would thus be rewarded twice.

22. My stand on this legal issue does not have any impact on the findings since the Majority's test has a higher threshold.

### 3. "Aiding and abetting" and "specific direction" (Pandurević's Appeal)

23. I agree with the finding reached in paragraph 1758. My view is more nuanced however, regarding the legal characterisation of "aiding and abetting". The review of state and international practices undertaken in the recent Tribunal case law is not conclusive as to any exclusive epithet when defining "aiding and abetting".[15]

24. The truth is that many operative criteria are available[16] and their appropriate use may vary depending on the particular circumstances of a case. When the alleged acts of abetting are too remote from the main offense or are so equivocal in their meaning to cast a shade as to their purpose, a specific enquiry to unveil their true meaning may be required. Whether that exercise is referred to as establishing "the knowledge" or "wilful support" of the crime, is for me a secondary issue, so long as the legitimacy of the enquiry is not called into question.[17]

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[13] Depending of course on the specific circumstances to be assessed by the judges with the precautions required.

[14] The specific language used is: "...this *may be* a factor against the admission of such evidence or that part of it" (emphasis added).

[15] See *Perišić* Appeal Judgement, paras 29-30.

[16] See *Šainović et al.* Appeal Judgement, paras 1623-1649.

[17] Judge Liu's dissenting opinion in *Perišić* (paragraphs 2-3 and more particularly paragraph 9) illustrates perfectly that the controversy was more about the Judges' views on the strength of the evidence than about the specific wording to characterise "aiding and abetting". Judge Ramaroson sat in both benches of *Perišić* and *Šainović*. She did not dissent to either; which is another illustration that she did not view a main inconsistency in the two doctrinal approaches.

25. The dispute over the appropriate words to characterise "aiding and abetting" has unfortunately occulted the main issue of "purposeful assistance" raised by **Pandurević**. The disagreement with the legal characterisation used by **Pandurević** should not detract the Majority from verifying whether the particular situation of the case qualifies as "aiding and abetting". Unfortunately it contents itself with reciting the law. I join the Majority only because I hold the view that the Trial Chamber's findings[18] sufficiently and adequately characterise **Pandurević**'s purposeful involvement in the forcible removal as "aiding and abetting", including by **Pandurević**'s own standard.

## C. Dissenting Opinions

### 1. Prosecutor's grounds of Appeal 6 and 7 pertaining to genocide

26. I disagree with the Majority's decisions granting the Prosecution's ground of appeal 6 pointing to the Trial Chamber's error when it refused to convict **Popović** and **Beara** for conspiracy to commit genocide in addition to the conviction for genocide.[19] I also disagree with the decision dismissing the Prosecutor's ground of appeal 7 seeking to reverse **Nikolić**'s acquittal on the count of genocide.[20]

### 2. Conspiracy to commit genocide

27. The Majority, upholding the Prosecutor's ground of appeal 6, considered that the Trial Chamber erred in law in refusing to convict **Popović** and **Beara** for conspiracy to commit genocide in addition to the convictions for genocide. I respectfully disagree.

28. I rather support the Trial Chamber's reasoning that **Popović**'s and **Beara**'s involvement in the JCE to Murder with genocidal intent was the basis of the conviction for genocide as well as for inferring an agreement to commit genocide. The Trial Chamber thus concluded that "the full criminality of the Accused is accounted for by a conviction for genocide".[21]

29. In reversing the Trial Chamber's findings, the Majority recalls that: "a trial chamber is bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person".[22] It goes on to stress that conspiracy to commit genocide and genocide are distinct crimes.

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18 See Trial Judgement, paras 1993-1994, 2010.
19 Appeal Judgement, paras 538, 546, 555.
20 Appeal Judgement, paras 529-530.
21 See Trial Judgement, para. 2127.
22 Appeal Judgement, para. 538.

30. I have my reservations with respect to the Majority's statement of the law carried over from the *Gatete* jurisprudence. But I do not need to enter into such a discussion in the particular circumstances of this case where it would be of little assistance. The problem I raise here is whether the crime of conspiracy to commit genocide can be held to be distinct from the crime of genocide when the latter rests on a JCE.

31. My humble view is that the JCE cannot be distinguished and let alone dissociated with the conspiracy. In fact, looking at the evidence upon which the Accused have been convicted for genocide, it is beyond dispute that the JCE to Murder and the conspiracy rest on the same ground. The genocide was only established through inferences described in the Trial Judgement as follows:

> The Trial Chamber finds the organised and systematic manner in which the executions were carried out, over a number of days, and the targeting of victims, presupposes the existence of a concerted agreement to destroy the Muslims of Eastern Bosnia. The conduct of members of the Bosnian Serb Forces was not merely similar, it was concerted and coordinated. This level of similarity of purpose and conduct could not be achieved but by prior agreement. Consequently, the Trial Chamber finds that the only reasonable inference to be drawn from the evidence is that, at least by 13 July 1995, members of the Bosnian Serb Forces, including members of the VRS Main Staff and Security Organs entered into an *agreement* and thus a *conspiracy* to commit genocide.[23]

These findings leave no doubt as to the overlap between the JCE to Murder and the conspiracy to commit genocide. The agreement being equated to conspiracy is the agreement which forms the JCE. The conspiracy may have been completed earlier but it is the same conspiracy that was followed through. Consequently, the conspiracy is totally subsumed into the wider JCE.[24] Therefore, I see no reason to fault the Trial Chamber in its holding that the full criminality of the Accused is accounted for by a conviction for genocide.

### 3. Nikolić's acquittal as main perpetrator of genocide

32. I would have granted the Prosecutor's ground of appeal 7 seeking the reversal of the Trial Chamber's acquittal of **Nikolić** as main perpetrator of genocide.

33. The scattered analysis of the Trial Chamber's findings, trailing on the Prosecutor's piecemeal argumentation has not simplified the disposal of this ground of appeal.

34. Paragraph 504 of this judgement reads as follows:

> [T]he Trial Chamber did consider **Nikolić**'s participation in, and key contributions to, the killings, with the knowledge that the killings would contribute to the destruction of a group. [The Trial Chamber recalled that] **Nikolić** made a significant contribution to the commission of the crimes

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[23] Paragraph 886 of the Trial Judgement, cited more extensively in paragraph 544 of the Appeal Judgement (emphasis added).

[24] The view that the JCE concept is to be distinguished from the definition of a specific crime is in my opinion totally impracticable. The choice of JCE as a mode of liability means that the crime was committed through a particular *modus operandi*. The JCE *modus operandi* is a commission by association to the action of others. I do not see how it can be feasible to separate the *actus reus* and *mens rea* from their implementing vehicle.

> within the scope of the JCE to Murder [and] concluded that as of the morning of 14 July 1995, the events that occurred were "more than sufficient" for [**Nikolić**] to conclude that the plan was not just to kill but to destroy. The Trial Chamber found that "**Nikolić** knew that this was a massive killing operation being carried out with a genocidal intent. His key contributions to the JCE to Murder are made concurrent with, and after the acquisition of this knowledge."

I disagree that these factual findings qualify more adequately as acts of complicity, thus brushing aside **Nikolić**'s responsibility as main perpetrator based, among other considerations, on his rank in the Military, his involvement less important compared to others and more decisively, because he was blindly dedicated to the security services.

35. **Nikolić**'s rank and the timing of his involvement do not preclude a finding of guilt as main perpetrator if it is established that he was an active member of the JCE. It also defies common sense, in my view, to hold that an active member of a JCE to Murder – which is the main means for the perpetration of genocide – can be relegated to the status of an accomplice on the ground that his involvement in the massive murders might have just been dictated by "his dedication to the Security Services [that led him] to doggedly pursue the efficient execution of his assigned tasks...".[25] The Majority's approach to this issue of intent appears at best erratic since in other instances the "blind dedication" is rejected as irrelevant to negate intent.[26]

36. I fully agree with **Nikolić** when he spotted the overall incoherence of the Trial Chamber's findings that holds against him the persecutory intent while rejecting the genocidal intent, yet grounded on the same facts.[27] The conceptual difference between genocide and persecution cannot explain this inconsistency. The heart of this inconsistency rests on deeper grounds than the legal apprehension of the criminal mindset. Both genocide and persecution require an ideological involvement of some sorts, referred to respectively as genocidal intent and discriminatory intent. When discarding **Nikolić**'s genocidal intent, the Trial Chamber entertained doubt about **Nikolić**'s ideological involvement. This is the real import of the reference to his "blind dedication to the security services". This finding is therefore irreconcilable with a finding of guilt for persecution which is also predicated upon an ideological involvement, to wit, the discriminatory intent.

37. I would have overturned the Trial Chamber's finding rejecting **Nikolić**'s genocidal intent and would have entered a finding of guilt alongside his guilt for persecution. I would have consequently vacated **Nikolić**'s conviction as accomplice for genocide.

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[25] Paragraph 527 of this Judgement.

[26] Paragraphs 1027 and 1028 reject the consideration of "blind dedication" by emphasising that "motive must be distinguished from intent" and that the "subordinate position of an accused is legally irrelevant to determine individual criminal responsibility".

[27] **Nikolić**'s ground of appeal 9, summarised in paragraph 718 of this Judgement.

4. The Trnovo killings and the common purpose (Beara's and Popović's appeals)

38. The Trial Chamber found that the Trnovo killings fell within the scope of the JCE to Murder. This conclusion was based on the fact that the killings occurred in July 1995, after the fall of Srebrenica, and the victims were Bosnian Muslim men from Srebrenica. The Trial Chamber "considere[d] it an unreasonable inference that within the same relative time period, in an adjoining area, there was a separate, distinct murder operation targeting precisely the same victims".[28] The Trial Chamber did not rely on any other evidence to support its findings.

39. Reviewing the Trial Chamber's finding, the Majority recalled the applicable law as follows:

> to hold a member of a JCE responsible for crimes committed by non members of the enterprise, it has to be shown that the crime can be imputed to the one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.[29]

The Majority concluded that the Trial Chamber's finding did not meet this requirement.

40. The Majority constructs too narrowly in my view the case law, which illustrates but does not exhaust all possible scenarios where criminal liability can attach to members of a JCE with respect to crimes committed by a non-member of a JCE. While the focus is here on the subjective link between a crime and the JCE it allegedly furthers, emphasis can equally be put on an objective link between the crime and the JCE.[30] The Trial Chamber's analysis was based on the objective link, namely the similarity of targets and the *modus operandi* of the killings, along with the unlikelihood of any other parallel murder operation underway in the neighbouring area. These considerations, consistent with Rule 93, which accepts the consistent pattern of conduct as a legitimate avenue to explore, provided sufficient ground to draw the only reasonable inference that the Trnovo killings were linked to the JCE to Murder. It was not necessary in the circumstances to add another subjective layer.

41. It is noteworthy to underscore that there are other instances in this judgement where the Majority accepts to draw a parallel between similar situations to enter a decisive finding.[31]

42. I would have upheld the Trial Chamber's finding that Trnovo killings were linked to the JCE. Consequently I would have not disturbed the related convictions of **Popović**, **Beara**, and **Nikolić**.

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28 Paragraph 1080 of the Trial Judgement.
29 Appeal Judgement, para. 1065.
30 *Brđanin* Appeal Judgement, para. 410,
31 See Appeal Judgement, para. 104, regarding the Kravica Supermarket killings and the reference to their similarity with other "opportunistic" killings. See paragraph 1053 on the Jadar River killings borrowing a similar approach. See also paragraph 1149 and particularly the factor n. 6 relied upon for the identification of **Popović**.

5. Pandurević's responsibility under aiding and abetting and command responsibility (Pandurević's grounds of appeal 1, 2, and 3; Prosecutor's grounds of appeal 1 and 2)

43. I disagree with a number of findings entered into as described hereunder.

(a) Aiding and abetting by omission the murder of the Milići Prisoners (Pandurević's Sub-ground of appeal 1.3)

(i) Defective notice of the charges

44. I disagree with the Majority that **Pandurević** received proper notice of this charge.[32] I do not see anywhere in the Indictment where the charge of aiding and abetting by omission was adequately pleaded and supported by the material facts.

45. It is a constant feature of our jurisprudence that the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.[33] Otherwise the indictment is defective.[34]

46. When it comes to modes of liability, the nature of the alleged responsibility of an accused should be unambiguous in the indictment.[35] To this end, the Prosecution has been repeatedly advised against the practice of merely parroting the language of Article 7(1) of the Statute unless it intends to rely on all of the modes of liability contained therein; [36] in which case the material facts relevant to each of those modes of liability must be spelt out in the indictment.[37] Where an accused is charged with aiding and abetting, the Prosecution must identify the accused's "particular course of conduct".[38]

47. The Trial Chamber found that **Pandurević** aided and abetted by omission the murder of the Milići Prisoners through a failure to discharge a legal duty.[39] The allegation of murder is associated in the Indictment with every mode of liability under Article 7(1).[40] The Prosecution was thus required to plead the material facts relevant to each of these modes of liability. A review of the most specific passages listed in paragraph 68 of this judgement shows that they fall short of providing the required notice. None of those passages is specific enough to clearly set apart material facts in support of complicity by omission and distinguishable from other forms of criminal liability. The

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32 Appeal Judgement, para. 68.
33 *Gotovina and Markač* Appeal Judgement, para. 45; *Mugenzi and Mugiraneza* Appeal Judgement, para. 116.
34 *Bagosora and Nsengiyumva* Appeal Judgement, para. 96 with further references. See also *Gotovina and Markač* Appeal Judgement, para. 45; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117.
35 *Blaškić* Appeal Judgement, para. 215.
36 *Simić* Appeal Judgement, para. 21
37 *Ibidem.*
38 *Blaškić* Appeal Judgement, para. 213.
39 Trial Judgement, paras 1981-1991.

material facts pleaded in paragraphs 30.15 and 39 of the Indictment, the most detailed facts with respect to **Pandurević**'s alleged conduct in furtherance of the murder of the Milići Prisoners,[41] could reasonably have been understood to support JCE and/or superior responsibility pursuant to Article 7(3).[42] They could equally have been understood to relate to aiding and abetting through "tacit approval and encouragement".

48. It is on account of this ambiguity that **Pandurević** suggested in his final brief that he opted to treat those equivocal material facts as underpinning the charge of Superior Responsibility (failure to prevent and punish)".[43] No further communication from the Prosecutor told him he was wrong.

49. One compounding factor of **Pandurević**'s possible confusion is the Prosecution's amendment of a similar charge of complicity by omission in order to clarify it with respect to the Accused Borovčanin. In paragraph 90 under the "Individual Criminal Responsibility" section of the Indictment, the allegations against **Pandurević** and Borovčanin pursuant to Article 7(1) of the Statute regarding the murder of the able-bodied Muslim men from Srebrenica are very similar. However, under paragraph 92 of the same section, Borovčanin is explicitly charged, "[a]s a separate and independent basis of liability under Article 7(1)", with, *inter alia*, aiding and abetting the physical perpetrators of the killings through his presence at or near the Kravica warehouse execution site along with his failure to intercede in order to protect prisoners there. The amended Indictment alleges that the factual allegations under paragraph 92 along with those described in paragraphs 30.4 and 43(a)(iii) of the Indictment "constituted a wilful failure to discharge his legal duty, resulting in liability under Article 7(1) as an omission". The Prosecution indicated that this amendment served the purpose of providing "an explanation of the legal characterisation of his conduct as omission".[44]

50. This amendment is more than an implicit admission from the Prosecution that there was a gap in the pleading under paragraph 90 of the "Individual Criminal Responsibility" section of the Indictment in respect of omission liability. In expressly clarifying the pleading with respect to Borovčanin, the Prosecution constructively eliminated any reasonable apprehension on the part of **Pandurević** that he was facing a similar charge.

51. I therefore believe that the Indictment is undoubtedly defective. This defect has not been cured, in the absence of any post-Indictment clarification. The prejudice associated with this defect

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40 Indictment, Count 5, p. 25, paras 88, 90.

41 See also Trial Judgement, para. 1981 & fn. 5909.

42 I note that the Prosecution acknowledged that its "primary argument was that Pandurević was a member of the JCE to murder". Prosecution's Response Brief (Pandurević), para. 41.

43 Pandurević's Final Brief, para. 1019.

44 *The Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Motion to Amend the Indictment Relating to Ljubomir Borovčanin, 22 March 2006, paras 2, 5.

is also inherent in **Pandurević**'s conviction for a charge he was not prepared to defend against.[45] Having never been clear that this charge was proffered against him, he could not have raised the defect of the Indictment before the Trial Chamber.

52. Accordingly, I would have granted sub-ground 1.3 of **Pandurević**'s appeal and reversed his conviction,[46] for aiding and abetting by omission the murder of the Milići Prisoners.

(ii) Aiding and abetting extermination, murder, and persecution

53. Assuming that the charges on omission were not defective, I would still not uphold **Pandurević**'s conviction.[47] And for the same reasons outlined below, I disagree with the Majority with respect to the overturning of his acquittal for aiding and abetting persecution with respect to the Milići Prisoners[48] and murder, extermination, and persecution with respect to the JCE to Murder.[49]

54. It is noteworthy to recall the findings in this judgement leading to the rejection of the Prosecution's ground of appeal seeking to overturn the Trial Chamber's finding dissociating **Pandurević** with the JCE to Murder. Paragraphs 1387 to 1393 read as follows:

> The Trial Chamber found that **Pandurević** had no knowledge of the murder operation before he returned to the Standard Barracks at noon on 15 July 1995. At this point, the murder operation was well under way and several thousands prisoners had already been executed.
>
> The Appeals Chamber also observes that **Pandurević** was sent back to the Zvornik sector to deal with the problem on the Zvornik Brigade's combat lines and that he was ordered to block or destroy the column and prevent its joinder with the ABiH 2nd Corps. When he returned to the Standard Barracks on 15 July 1995, his main focus was on this problem, and he discussed how to deal with it with his staff. While Obrenović did inform him about the murder operation at the 15 July Meeting, this information was not very detailed and was eclipsed by the difficult military situation in which the Zvornik Brigade was operating.
>
> The Appeals Chamber thus observes that, although **Pandurević**'s subordinates were, *inter alia*, assisting in guarding the prisoners, **Pandurević**'s influence over the crimes in which his subordinates participated was limited, given that the murder operation was ordered, administered, and executed by the VRS Main Staff and was nearly concluded by the time he became aware of its occurrence. Furthermore, **Pandurević**'s ability to react was somewhat restricted due to the military crisis that demanded his immediate attention.
>
> With regard to the factors that, in the Trial Chamber's view, tended to negate **Pandurević**'s alleged intent, the Appeals Chamber assumes *arguendo* that the impetus for opening the corridor may have been triggered by the serious military situation facing the Zvornik Brigade. If so, it is

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45 **Pandurević** is quite right in positing that his Defence had been impaired with respect to the charge of complicity by omission. One relevant issue illustrative of this impairment is the specific findings of the Trial Chamber with respect to the removal of the Milići Prisoners. Covering this issue could have called for a more thorough investigation of **Pandurević**'s whereabouts on 23 and 24 July as well as his particular circumstances with respect to his ability to act.

46 See Trial Judgement, paras 1991, 2110.

47 See Appeal Judgement, para. 1759.

48 See Appeal Judgement, para. 1817.

49 See Appeal Judgement, para. 1804.

> notable that it was nevertheless in contradiction to superior orders and effectively saved the lives of thousands. The former is also true for the exchange of prisoners that saved over a hundred lives.
>
> With regard to the Milići Prisoners, whom **Popović** took from the Zvornik Brigade's custody on or around 23 July 1995 and who were later executed, the Trial Chamber found that **Pandurević**'s conduct prior to their removal from the Zvornik Brigade's infirmary, in particular his request for instructions and assistance, showed his intent to exchange them, not to murder them.
>
> The Appeals Chamber further notes in this respect that **Pandurević** made an attempt to protect those prisoners while they were still in the Zvornik Brigade's infirmary. The Trial Chamber also established that **Popović** was acting on Mladic's orders when he took custody of the prisoners and that "nothing in the evidence shows that **Pandurević** was present at the clinic at that time, or that he ordered their release into the custody of **Popović**".
>
> In addition, the Trial Chamber found that at a briefing at the Standard Baracks on 23 July 1995, **Pandurević** demanded that "part of the prisoners who were held in the Zvornik Brigade detention be evacuated as soon as possible to Balković. The Trial Chamber also found that in **Pandurević**'s conversation with Obrenović following the briefing, they both expressed their frustration and concern about the situation of the prisoners and the executions in the area, and discussed what they should have done and should do in response to the situation.
>
> The Appeals Chamber thus finds that **Pandurević**'s conduct as a whole during the relevant time frame is inconsistent with a mindset supporting the JCE to Murder.

In sharp contrast to the findings above, depicting a **Pandurević** sidetracked and overwhelmed, while doing his best to salvage what he could in a difficult and somewhat hostile environment, including by contravening orders, paragraphs 1785 *et seq.* describe **Pandurević**, with respect to the same murder operation, as being in full control of his brigade; a brigade actively involved in the murder operation. Paragraph 1796 goes on to state that **Pandurević** "actively followed the involvement of his subordinates in providing logistical support for the executions".

55. The Majority is certainly right in questioning the Trial Chamber's conclusion that there was no evidence linking **Pandurević** to the murder operation, in view of the findings recalled.[50] It, however, says nothing on the glaring inconsistencies and overall incoherence with respect to the picture offered of **Pandurević** and his brigade's conduct.

56. Capturing adequately **Pandurević**'s nature and extent of responsibility as a member of the JCE to Murder or as an aider and abettor cannot rest on the twist of the evidence, with respect to the same course of conduct. When concluding that **Pandurević**'s mindset was inconsistent with the support of the JCE, the Appeals Chamber based this conclusion on acts that appear to me as also incompatible with the mindset of an abettor.

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[50] It is also to be noted that the Majority does not only rely on the findings of the Trial Chamber. It also impermissibly makes its own findings in paragraph 1785. The last sentence of paragraph 1786 illustrates the same tendency. Its reasoning is also questionable. **Pandurević**'s absence during specific events cannot be said to be irrelevant when those events are referred to as part of the significant involvement of the brigade. If his absence is accepted the involvement of his brigade under his watch should be reassessed based only on the killings in Kozluk and the brigade's involvement therein. The one member of the brigade involved in actual killings (beyond guarding and burial) was in Kozluk.

57. The necessity to have a wholesale reading of an indictment which the Appeals Chamber has reminded time and again,[51] is also required when it comes to the evidence. An ambivalent reading of the evidence which permits to describe one course of conduct in opposite directions cannot be acceptable.

58. To correct the inconsistency, short of remanding the case for a new determination of this issue, I would confirm **Pandurević**'s acquittal.

(b) Pandurević's command responsibility

59. While noting the limited impact of the ultimate findings reached in this judgement with respect to **Pandurević**'s responsibility as a superior, I would like to record my disagreement with many aspects of the reasoning as well as the finding leading to **Pandurević**'s conviction for persecution through cruel and inhumane acts under Article 7(3) of the Statute.

60. It is acknowledged in paragraphs 1852 and 1856 that **Pandurević** did not incur any conviction for the period of 4 to 15 July (before noon) 1995. The Majority assumes, based on what I view as a wrong premise, that there might be an unwarranted shift in the burden of proof by the Trial Chamber regarding the "effective control" criterion, throughout the period of 4 to 17 July 1995.

61. Since it is not disputed that **Pandurević** returned to the Zvornik Brigade to re-assume his duties on 15 July, it can be presumed that he had effective control during the relevant period of 15 to 17 July 1995. *De jure* authority authorises a presumption of "effective control".[52] It was therefore unnecessary to undertake the ensuing lengthy analysis. Besides, even if such analysis were called for, it would be wrong to use the same standard throughout 4 to 17 July. During the period from 4 to 15 July, **Pandurević** received an assignment elsewhere and the Deputy Commander was in command.[53] **Pandurević**'s responsibility during that period, if any, should be analysed as arising out of a sporadic *de facto* authority. As such, it must be strictly limited to the level of contact and information **Pandurević** had with his brigade. It is not proper to extrapolate from those limited contacts and reach a finding that he could have known more and done better if he wished.[54]

62. A sporadic *de facto* authority should not be measured through its potential. It should be measured through its actual exercise. Otherwise a new responsibility would be generated, that

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51 See *Đorđević* Appeal Judgement, para. 588; *Bizimungu* Appeal Judgement, para. 99.

52 See *Čelebići* Appeal Judgement, para. 197: "In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced".

53 Paragraph 2030 of the Trial Judgement.

54 See Appeal Judgement, paras 1871, 1874-1876.

negates the legal effects of a decision altering a superior/subordinate relationship. Being on leave or on temporary reassignment legally relieves an official from any obligation associated with the duties from which leave or reassignment is granted. Of course if, despite the leave/reassignment, the superior goes out of his/her way to interfere with the management pertaining to the duties from which s/he is temporarily relieved, responsibility should be incurred. Such responsibility should, however, not be stretched to such extent to ignore that limited involvement. The consequences of **Pandurević**'s temporary reassignment are not a factual issue left to the determination of the Deputy Commander as the Majority suggests in paragraph 1875. This error affects the conclusion in paragraph 1878.

63. I also find erroneous the Majority's reasoning when addressing **Pandurević**'s contention that another authority "interrupted or negated" his command authority.[55]

64. The response provided in the last sentence of paragraph 1896 is speculative and without addressing the heart of the contention from **Pandurević** *in concreto*. **Pandurević**'s claim is that orders coming above his head have negated his authority. The reasoning in paragraphs 1897 and 1898 is not unhelpful. Not only the Majority indulges heavily in facts litigation as a Trial Chamber, it provides a lecture on good military conduct in *abstracto*. The citation of Exhibit P00409 (Regulations on Rules of War in SFRY) would be adequate only if put in the proper context of power balance between different levels of commandment in the SFRY hierarchy.

65. The focus has been wrongly put on the possibility of parallel or additional authority. This distorts the fundamental point raised by the Appellant. Rather than additional or parallel authority, the issue here is the predicament of an officer facing the counter-order of a higher authority. Not only the Majority fails to address this issue, it misses the opportunity to refresh the thinking about the Nuremberg Principles.[56]

(c) Pandurević's failure to prevent persecution through cruel and inhumane treatment and failure to punish the criminal acts

66. Assuming that the Majority was correct in identifying an error of law with the Trial Chamber's failure to make a finding on **Pandurević**'s failure to prevent the crime of persecution, I find that the Majority has gone beyond what is permissible in the reassessment of the facts.

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55 Appeal Judgement, para. 1890.

56 The point raised does have some similarity with Nuremberg Principle IV formulated by the International Law Commission, refusing exoneration based on a "Superior Orders" Defence with however, some caveats. This principle is controversial and has given rise to many inflexions in domestic and international judicial settings. See for example ICC Statute (Article 33) which is seen as redefining the principle.

Discussing the opportunity and timing of decisions, including in the margin of hours,[57] was not only outside the authority of the Appeals Chamber but was also unreasonable.

67. It was equally unreasonable for the Majority to overturn the Trial Chamber's careful assessment of the avenues available to **Pandurević** to meet his responsibility to punish. The Majority misses the point when reminding the necessity for action from Commanders when the Trial Chamber entered a specific finding concluding at the futility of a specific course of action based on the circumstances.[58] The Majority accepts that the determination of necessary and reasonable action is not a matter of law but a matter of evidence.[59] This acknowledgement is however immediately negated with the holding that the Trial Chamber "erred in law by failing to consider if the measures **Pandurević** took were in fact capable of contributing to an investigation or punishment…".[60]

68. This wrong premise becomes very convenient for the Majority to substitute to the Trial Chamber's findings its own assessment of the possible courses of action **Pandurević** could have envisaged.[61] In so doing the Majority operates on extremely fragile grounds. A review of the evidence on paper, let alone a secondary acquaintance with the evidence through the scattered findings of the Trial Chamber, is too limited to authorise the appeal judges to prescribe what ought to have been done in a delicate scene where context matters even more than facts.

69. I would not have disturbed the Trial Chamber's findings with respect to **Pandurević**'s duty to punish.

### 6. Sentencing

70. The Appeals Chamber is fully apprised of [REDACTED] the health of **Miletić** and **Nikolić** with [REDACTED].[62] This information has become available, at least for **Nikolić**,[63] following the appeal hearing. In the absence of any pleadings from the parties, a legitimate question is whether it is appropriate for the Appeals Chamber to consider *proprio motu* the health situation of these two convicts when reviewing their sentences.

71. This judgement is final, with no residual issue being reserved or remanded. Any factor relevant to guilt or sentence, if ignored here, would be ignored forever. With this in view, I would

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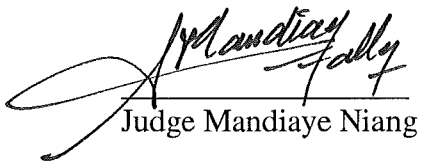
57 Appeal Judgement, para. 1914.
58 Appeal Judgement, para. 1931.
59 Appeal Judgement, para. 1932.
60 Appeal Judgement, para. 1933.
61 Appeal Judgement, paras 1936-1937, 1939-1940, 1942, 1944.
62 A complete dossier was submitted in the context of the requests for provisional release on compassionate grounds.

be inclined to consider *proprio motu* the health [REDACTED] of **Miletić** and [REDACTED] of **Nikolić** as mitigating factors. To support this stand some analogy can be drawn from Rule 115 of the Rules which permits to consider newly discovered evidence on appeal. This analogy has of course its limitations because, unlike in Rule 115, the health [REDACTED] has no bearing on the guilt. Besides, the parties have not confronted their views on this issue. A mitigating factor remains nevertheless an important element for the full adjudication of a case.

72. The judicial calendar and the imperatives of timely closure do not make it realistic to reopen the case for additional submissions. I would in this context rather preserve the Defence right for a full adjudication by taking into account *proprio motu* the new mitigating factors.[64] Applying an adequate sentence with due regard to the personal circumstances of the convict is a fundamental feature of any criminal proceedings. I would not refer such responsibility to any subsequent authority since the Appeals Chamber has not yet fully exhausted its jurisdiction.

73. While joining the Majority in the limited reduction of **Miletić**'s sentence, I would drastically reduce the sentence of **Nikolić**, so as to grant him immediate release following the rendering of this judgement and enable him to [REDACTED].

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



Judge Mandiaye Niang

Dated this thirtieth day of January 2015,
At The Hague,
The Netherlands.

**[Seal of the Tribunal]**

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[63] **Miletić**'s [REDACTED] prevented him from attending the appeal hearings. This suggests that his health [REDACTED] predated the hearings and could have been raised even if it was not part of the written submissions.

[64] Although the Prosecutor is not heard, his submissions against the Defence's respective requests for provisional release on compassionate grounds give a fair idea on his view.

# XVI. ANNEX I: PROCEDURAL HISTORY

1. The Trial Chamber delivered its Judgement in this case on 10 June 2010.[1] The Trial Chamber entered convictions and acquittals for **Popović**, **Beara**, **Nikolić**, Ljubomir Borovčanin, **Miletić**, Milan Gvero, and **Pandurević**.[2] On 28 June 2010, the President of the Tribunal granted Gvero's application for early release on humanitarian grounds.[3]

## A. Composition of the Appeals Chamber

2. On 24 June 2010, the President of the Tribunal assigned the following Judges to the Appeals Bench in this case: Judge Patrick Robinson, Presiding; Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, and Judge Andrésia Vaz.[4] Judge Robinson was assigned as the Pre-Appeal Judge.[5]

3. On 20 January 2011, the Pre-Appeal Judge denied **Nikolić**'s motion seeking the disqualification and withdrawal of Judge Liu Daqun from the appeal proceedings based on his prior role as the Presiding Judge in other cases.[6]

4. Judge Khalida Rachid Khan replaced Judge Liu Daqun on 7 March 2012.[7] Judge William H. Sekule and Judge Arlette Ramaroson replaced Judge Mehmet Güney and Judge Andrésia Vaz on 16 April 2013.[8] Judge Mandiaye Niang replaced Judge Khalida Rachid Khan on 31 October 2013.[9]

## B. Notices of Appeal

5. Following the Pre-Appeal Judge's decision to grant a joint motion for an extension of time to file notices of appeal,[10] **Popović**,[11] **Beara**,[12] **Nikolić**,[13] **Miletić**,[14] **Pandurević**,[15] and the

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1 *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 ("Trial Judgement").
2 Trial Judgement, Disposition.
3 *Prosecutor v. Milan Gvero*, Case No. IT-05-88-ES, Decision of President on Early Release of Milan Gvero, 28 June 2010 (confidential; made public on 29 June 2010), para. 20. See *Prosecutor v. Milan Gvero*, Case No. IT-05-88-T, Application for Early Release, 15 June 2010, paras 12-18.
4 Order Assigning Judges to a Case Before the Appeals Chamber, 24 June 2010, p. 2.
5 Order Assigning Judges to a Case Before the Appeals Chamber, 24 June 2010, p. 2.
6 Decision on Drago Nikolić Motion to Disqualify Judge Liu Daqun, 20 January 2011 (confidential), para. 16. See Motion on Behalf of Drago Nikolić Seeking Disqualification and Withdrawal of Judge Liu Daqun, 4 January 2011 (confidential), paras 26-27. See also Prosecution's Response to Motion on Behalf of Drago Nikolić Seeking Disqualification and Withdrawal of Judge Liu Daqun, 13 January 2011 (confidential); Defence Reply to Prosecution's Response to Motion on Behalf of Drago Nikolić Seeking Disqualification and Withdrawal of Judge Liu Daqun, 17 January 2011 (confidential).
7 Order Replacing a Judge in a Case Before the Appeals Chamber, 7 March 2012, p. 1.
8 Order Replacing Judges in a Case Before the Appeals Chamber, 16 April 2013, p. 1.
9 Order Replacing a Judge in a Case Before the Appeals Chamber, 31 October 2013, p. 1.
10 Decision on Joint Motion for Extension of Time to File Notice of Appeal, 25 June 2010, p. 2. See Joint Motion for an Extension of Time to File Notice of Appeal, 18 June 2010, para. 1.
11 Vujadin Popovi[ć]'s Notice of Appeal, 8 September 2010 (confidential); Public and Redacted Version of Vujadin Popovi[ć]'s Notice of Appeal, 24 February 2011 (made confidential); Notice of Withdrawal and Refiling of Public Redacted Version of Vujadin Popovi[ć]'s Notice of Appeal, 25 February 2011.

Prosecution[16] filed their notices of appeal on 8 September 2010. Borovčanin did not file a notice of appeal.

6. On 7 September 2010, the Pre-Appeal Judge granted in part Gvero's motion seeking a further extension of time to file his notice of appeal based on his medical condition, ordering Gvero to file his notice of appeal no later than 30 September 2010.[17] Following lengthy litigation on his fitness to participate in appellate proceedings,[18] Gvero filed his notice of appeal on 17 December 2012.[19] Following the death of Gvero,[20] on 7 March 2013 the Appeals Chamber dismissed as moot the Prosecution's motion to strike Gvero's second ground of appeal.[21]

## C. Appeal Briefs

### 1. Defence appeals

7. On 20 October 2010, the Pre-Appeal Judge granted in part motions filed by **Nikolić**, **Popović**, **Beara**, and **Miletić**, requesting extensions of time to file appeal briefs and leave to increase their word limits,[22] and ordered the following with respect to filing deadlines: appeal briefs

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12 Appellant, Ljubi[š]a Beara's Notice of Appeal, 8 September 2010.

13 Notice of Appeal on Behalf of Drago Nikolić, 8 September 2010 (confidential); Public Redacted Version of Notice of Appeal on Behalf of Drago Nikolić, 7 March 2011.

14 *Acte d'appel de la d[é]fense de Radivoje Mileti[ć]*, 8 September 2010. The English translation was filed on 24 September 2010.

15 Notice of Appeal on Behalf of Vinko Pandurevi[ć] Against the Judgment of the Trial Chamber Dated 10th June 2010, 8 September 2010 (confidential); Public Redacted Version of Notice of Appeal on Behalf of Vinko Pandurevi[ć] Against the Judgment of the Trial Chamber Dated 10th June 2010, 9 March 2011.

16 Prosecution's Notice of Appeal, 8 September 2010.

17 Decision on Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal, 7 September 2010, p. 3. See Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal, 3 September 2010, (public with confidential and *ex parte* annexes), paras 1, 6-8. Gvero filed a "Notice to Include Annex III to the Motion on Behalf of Milan Gvero for a Further Extension of Time to File Notice of Appeal from the [3] September 2010", 6 September 2010, which included an additional confidential and *ex parte* annex that was inadvertently omitted from Gvero's request filed on 3 September 2010. See also *R[é]ponse de la d[é]fense de Radivoje Mileti[ć] [à] la requête de Milan Gvero aux fins d'obtenir une prorogation additionnelle du d[é]lai pour le d[é]pôt de l'acte d'appel*, 6 September 2010. The English translation was filed on 7 September 2010. See also Prosecution's Response to Milan Gvero's Request for a Further Extension of Time to File Notice of Appeal, 6 September 2010, paras 1-2.

18 See *infra*, paras 19-24.

19 Notice of Appeal on Behalf of Milan Gvero, 17 December 2012 (confidential). See also Public Version of Notice of Appeal on Behalf of Milan Gvero, 19 February 2013.

20 See *infra*, paras 19-24.

21 Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013, para. 7. See Prosecution's Motion to Strike Ground Two from Gvero's Notice of Appeal, 19 December 2012 (confidential). See also Defence Response on Behalf of Milan Gvero to Prosecution Motion to Strike Ground Two from Gvero's Notice of Appeal, 2 January 2013 (confidential); Prosecution's Reply to Gvero's Response to Prosecution's Motion to Strike Ground Two from Gvero's Notice of Appeal, 7 January 2013 (confidential).

22 Motion on Behalf of Drago Nikolić Seeking a Variation of Time and Word Limits to File Appellant's Brief, 14 September 2010 (confidential), paras 28-29; Vujadin Popovi[ć]'s Motion for Extension of Time to File Appeal Brief and Variation of Word Limits, 15 September 2010 (confidential), para. 8; Motion on Behalf of Ljubi[š]a Beara Joining "Vujadin Popovi[ć]'s Motion for Extension of Time to File Appeal Brief and Variation of Word Limits", 22 September 2010; *Requête de la d[é]fense de Radivoje Mileti[ć] aux fins d'obtenir une prorogation du d[é]lai pour le d[é]pôt du m[é]moire d'appel et une autorisation de d[é]passer le nombre limite de mots avec l'annexe confidentielle*, 20 September 2010 (partly confidential), para. 19. The English translation was filed on 23 September 2010 (partly confidential). See Prosecution's Consolidated Response to Defence Motions to Extend Time and Increase Word Limits

to be filed no later than 21 January 2011; respondent briefs to be filed no later than 4 April 2011; and briefs in reply to be filed no later than 2 May 2011.[23] The Pre-Appeal Judge further ordered that the appeal briefs were not to exceed 40,000 words each, the respondent brief(s) of the Prosecution was not to exceed 190,000 words, and the briefs in reply were not to exceed 12,000 words each.[24]

8. On 3 January 2012, the official BCS translation of the Trial Judgement was filed.[25] The Pre-Appeal Judge ordered that any motion seeking a variation of the grounds of appeal based upon the availability of the BCS translation of the Trial Judgement be submitted no later than 3 May 2012.[26] No motions seeking variation were filed.

(a) Popović's appeal

9. On 17 January 2011, the Pre-Appeal Judge denied without prejudice **Popović**'s motion requesting a further increase of the word limit of his appeal brief, on the basis that he had not adduced further exceptional circumstances.[27]

10. **Popović** filed his appeal brief on 21 January 2011.[28] The Prosecution filed its response to **Popović**'s appeal brief on 4 April 2011.[29] On 2 May 2011, **Popović** filed his reply brief.[30]

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for Appeal Briefs, 24 September 2010 (confidential), paras 3, 22-23; Combined Response of Vinko Pandurevi[ć] to Various Filings Concerning Extensions of Time for the Filing of Appeal Briefs, 28 September 2010 (confidential), paras 2-4. See also *Demande d'autorisation de r[é]plique et la r[é]plique de la d[é]fense de Radivoje Mileti[ć] [à] la r[é]ponse consolid[é]e du Procureur en date du 24 Septembre 2010*, 27 September 2010 (confidential). The English translation was filed on 5 October 2010 (confidential). See also Reply on Behalf of Drago Nikolić to Prosecution's Consolidated Response, 28 September 2010; Vujadin Popovi[ć]'s Reply to Prosecution's Consolidated Response to Defence Motions to Extend Time and Increase Word Limits for Appeal Briefs, 28 September 2010.

[23] Decision on Motions for Extension of Time and for Permission to Exceed Word Limitations, 20 October 2010, p. 6.

[24] Decision on Motions for Extension of Time and for Permission to Exceed Word Limitations, 20 October 2010, p. 7.

[25] *Tužilac v. Vujadina Popovića et al.*, Presuda, 3 January 2012.

[26] Order Setting a Time-Limit to File Any Motion Seeking a Variation of the Grounds of Appeal Following Translation of the Trial Judgement into the BCS Language, 3 January 2012, p. 1.

[27] Decision on Motion of Vujadin Popović for Permission to Further Exceed Word Limitation, 17 January 2011, pp. 2-3. See Vujadin Popović's Motion to Exceed the Word Limit in His Appeal Brief, 6 January 2011 (confidential), paras 1, 16. See also Prosecution's Response to Vujadin Popović's Motion to Exceed the Word Limit, 10 January 2011 (confidential); Vujadin Popović's Reply to Prosecution Response to Motion to Exceed Word Limit in Appeal Brief, 13 January 2011 (confidential).

[28] Appeal Brief on Behalf of Vujadin Popovi[ć], 21 January 2011 (confidential). See also Book of Authorities on Behalf of Vujadin Popovi[ć], 23 February 2011; Appeal Brief on Behalf of Vujadin Popovi[ć], 7 April 2011 (made confidential); Notice of Withdrawal and Refiling of Public Redacted Version of Appeal Brief on Behalf of Vujadin Popovi[ć], 12 April 2011 (made confidential); Second Notice of Withdrawal and Refiling of Public Redacted Version of Appeal Brief on Behalf of Vujadin Popovi[ć], 14 April 2011. See also Vujadin Popovi[ć]'s Motion for Variation of Time Limit to File Request to Vary Order of Arguments in Appeal Brief, with Vujadin Popovi[ć]'s Request to Vary the Order of Arguments in the Appeal Brief attached as Annex I, 24 January 2011; Prosecution's Response to Popović's Motion for Variation of Time Limit to File Request to Vary Order of Arguments in Appeal Brief, 26 January 2011; Prosecution's Response to Popović's Request to Vary the Order of Arguments in the Appeal Brief, 28 January 2011; Decision on Request of Vujadin Popović for Leave to Vary Order of Arguments in Appellant Brief and on Motion for Variation of Time Limit, 31 January 2011.

[29] Prosecution's Response Brief (Popović). The following is a list of all filings by the Prosecution relating to its responses to the appeals of **Popović**, **Beara**, **Nikolić**, **Miletić**, and **Pandurević**: Notice of Filing of Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević,

(b) Beara's appeal

11. **Beara** filed his appeal brief on 21 January 2011.[31] The Prosecution filed its response to **Beara**'s appeal brief on 4 April 2011.[32] **Beara** filed his reply brief on 2 May 2011.[33]

(c) Nikolić's appeal

12. On 12 January 2011, the Pre-Appeal Judge denied without prejudice **Nikolić**'s request to further increase the word limit of his appeal brief, finding that he had not demonstrated any additional exceptional circumstances requiring a further increase in the word limitation.[34]

13. **Nikolić** filed his appeal brief on 21 January 2011.[35] The Prosecution filed its response on 4 April 2011,[36] and **Nikolić** filed his reply on 2 May 2011.[37]

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4 April 2011 (confidential); Book of Authorities for Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 7 April 2011; Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 3 June 2011 (confidential); Notice of Filing of Redacted Public Version of the Prosecution Response to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 30 June 2011 (made confidential); Notice of Filing of Redacted Public Version of the Prosecution Response to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 13 July 2011 (made confidential); Second Corrigendum to Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 2 August 2011 (confidential); Notice of Filing of Redacted Public Version of the Prosecution Response to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 3 August 2011.

[30] Reply Brief on Behalf of Vujadin Popović, 2 May 2011 (confidential). See also Corrigendum to Brief in Reply on Behalf of Vujadin Popovi[ć] and Notice of Refiling of Vujadin Popovi[ć]'s Reply Brief, 18 May 2011 (confidential); Reply Brief on Behalf of Vujadin Popović, 6 July 2011.

[31] Appellant Ljubiša Beara's Appeal Brief, 21 January 2011 (confidential). See also Book of Authorities for Appellant Ljubiša Beara's Appeal Brief, 23 February 2011 (confidential); Appellant Ljubiša Beara's Notice of Fi[l]ing Public Redacted Version of Appeal Brief, 27 April 2011 (made confidential); Appellant Ljubiša Beara's Notice of Refi[l]ing Public Redacted Version of Appeal Brief, 10 June 2011 (made confidential); Appellant Ljubiša Beara's Notice of Re-classification and Re-filing of the Public Redacted Version of Appeal Brief, 16 June 2011.

[32] Prosecution's Response Brief (Beara). See *supra*, note 29.

[33] Appellant Ljubiša Beara's Reply Brief, 2 May 2011 (confidential). See also Appellant Ljubiša Beara's Notice of Fi[l]ing Public Redacted Version of Reply Brief, 7 July 2011.

[34] Decision on Motion of Drago Nikolić for Permission to Further Exceed Word Limitation, 12 January 2011, pp. 2-3. See Expedited Motion on Behalf of Drago Nikolić Seeking a Limited Variation of the Word Limit – with Confidential *Ex Parte* Annex, 4 January 2011 (public with confidential *ex parte* annex), para. 17. See also Prosecution's Response to Expedited Motion on Behalf of Drago Nikolić Seeking a Limited Variation of the Word Limit, 5 January 2011; Reply to Prosecution's Response to Expedited Motion on Behalf of Drago Nikolić Seeking a Limited Variation of the Word Limit, 6 January 2011.

[35] Appellant's Brief on Behalf of Drago Nikolić, 21 January 2011 (confidential). See also Corrigendum to Appellant's Brief on Behalf of Drago Nikolić, 9 February 2011 (confidential); Book of Authorities for Appellant's Brief on Behalf of Drago Nikolić (Annex B), 21 January 2011; Addendum to Book of Authorities for Appellant's Brief on Behalf of Drago Nikolić (Annex B), 27 January 2011; Appellant's Brief on Behalf of Drago Nikolić, 7 April 2011 (made confidential); Notice of Re-classification and Re-filing of Public Redacted Version of Appellant's Brief on Behalf of Drago Nikolić, 18 July 2011 (made confidential); Corrigendum to Appellant's Brief on Behalf of Drago Nikolić, 3 August 2011 (confidential); Second Notice of Re-classification and Re-filing of Public Redacted Version of Appellant's Brief on Behalf of Drago Nikolić, 3 August 2011. See also Motion on Behalf of Drago Nikolić Seeking Leave to File a Modified Brief in Reply, 9 May 2011 (public with confidential annex); Decision on Drago Nikolić's Motion for Leave to File a Modified Reply Brief, 26 May 2011.

[36] Prosecution's Response Brief (Nikolić). See *supra*, note 29.

[37] Brief in Reply on Behalf of Drago Nikolić, 2 May 2011 (confidential). See also Brief in Reply (Modified) on Behalf of Drago Nikolić, 8 May 2011 (confidential); Corrigendum to Brief in Reply on Behalf of Drago Nikolić and

(d) Miletić's appeal

14. On 18 January 2011, the Pre-Appeal Judge denied without prejudice **Miletić**'s motion requesting leave to further exceed the word limit of his appeal brief, finding that he had not demonstrated any reasons to re-evaluate the word limit.[38]

15. On 21 January 2011, **Miletić** filed his appeal brief.[39] The Prosecution filed its response to **Miletić**'s appeal brief on 4 April 2011.[40] **Miletić** filed his reply brief on 2 May 2011.[41]

(e) Pandurević's appeal

16. **Pandurević** filed his appeal brief on 21 January 2011.[42] The Prosecution filed its response to **Pandurević**'s appeal brief on 4 April 2011.[43] **Pandurević** filed his reply brief on 2 May 2011.[44]

(f) Gvero's appeal

17. Following lengthy litigation on his fitness to participate in appellate proceedings,[45] Gvero filed his appeal brief on 15 February 2013.[46]

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Notice of Re-filing of the Brief in Reply on Behalf of Drago Nikolić, 4 May 2011 (confidential); Public Redacted Version of Brief in Reply on Behalf of Drago Nikolić, 7 July 2011 (made confidential); Notice of Re-filing of Public Redacted Version of Brief in Reply on Behalf of Drago Nikolić, 18 July 2011.

[38] Decision on Motion of Radivoje Miletić for Permission to Further Exceed Word Limitation, 18 January 2011, pp. 2-3. See *Requête urgente de la d[é]fense de Radivoje Mileti[ć] aux fins d'obtenir une autorisation de d[é]poser un m[é]moire d'appel exc[é]dant le nombre de mots fixe*, 10 January 2011, paras 3-4, 9. The English translation was filed on 13 January 2011. See also Prosecution's Response to Radivoje Miletić's Motion for a Further Enlargement of the Word Limit, 11 January 2011; *Réplique de la d[é]fense de Radivoje Mileti[ć] a la r[é]ponse du Procureur du 12 Janvier 2011 relative au nombre de mots du m[é]moire d'appel*, 13 January 2011. The English translation was filed on 17 January 2011.

[39] *M[é]moire d'appel de la d[é]fense de Radivoje Mileti[ć]*, 21 January 2011 (confidential). The English translation was filed on 8 March 2011 and refiled with corrected version on 24 March 2011 (confidential). See also *Recueil de sources joint au m[é]moire d'appel de la d[é]fense de Radivoje Mileti[ć]*, 24 January 2011 (the English translation was filed on 27 January 2011); *Notification de la d[é]fense du G[é]n[é]ral Mileti[ć] relative au d[é]p[ô]t de la version publique et expurg[é]e du m[é]moire d'appel*, 6 April 2011 (made confidential); *Notification de la d[é]fense de Radivoje Mileti[ć] relative au d[é]pôt de la version publique et expurg[é]e corrig[é]e du m[é]moire d'appel*, 18 April 2011. The English translation was filed on 18 April 2011, included in the same submission as the French original.

[40] Prosecution's Response Brief (Miletić). See *supra*, note 29.

[41] *R[é]plique [à] la r[é]ponse du Procureur au m[é]moire d'appel de Radivoje Mileti[ć]*, 2 May 2011. The English translation was filed on 30 May 2011 (confidential). See also *Notification de la d[é]fense de Radivoje Miletić relative au d[é]pôt de la version publique et expurg[é]e de la r[é]plique depos[é]e le 2 Mai 2011*, 4 July 2011 (made confidential); *Notification de la D[é]fense de Radivoje Miletić relative au d[é]pôt de la version publique et expurg[é]e corrig[é]e de la r[é]plique depos[é]e le 2 Mai 2011*, 7 July 2011. The English translation was filed on 13 October 2011.

[42] Pandurević Appeal Brief Against the Judgment of the Trial Chamber of 10 June 2010, 21 January 2011 (confidential). See also Book of Authorities for Pandurević's Appeal Brief Against the Judgment of the Trial Chamber of 10 June 2010, 21 January 2011; Public Redacted Version of Pandurević Appeal Brief Against the Judgment of the Trial Chamber of 10 June 2010, 11 April 2011 (made confidential); Notice of Re-classification and Re-filing of the Public Redacted Version of Pandurević Appeal Brief Against the Judgment of the Trial Chamber of 10 June 2010, 12 April 2011.

[43] Prosecution's Response Brief (Pandurević). See *supra*, note 29.

[44] Pandurević Reply to Prosecution's Response Brief, 2 May 2011 (confidential). See also Notice of Re-filing and Re-filed Pandurević Reply to Prosecution's Response Brief, 6 May 2011 (confidential); Book of Authorities for Pandurević's Reply to Prosecution's Response Brief, 3 May 2011.

2. Prosecution's appeal

18. On 21 December 2010, the Duty Judge allowed the Prosecution to omit the grounds of appeal concerning Gvero from its appeal brief.[47] The Prosecution filed its appeal brief on 21 January 2011.[48] **Nikolić**,[49] **Popović**,[50] **Miletić**,[51] and **Pandurević**[52] filed their respective response briefs on 4 April 2011. **Beara** did not file a response brief. On 2 May 2011, the Prosecution filed its consolidated reply brief.[53] Following lengthy litigation on Gvero's fitness to participate in appellate proceedings,[54] the Prosecution filed its appeal brief against Gvero on 15 February 2013.[55]

## D. Gvero's Fitness to Participate in Appellate Proceedings and Termination of Proceedings

19. On 30 September 2010, Counsel for Gvero submitted that Gvero lacked the state of health to meaningfully participate in appellate proceedings,[56] and filed a medical report in support of this contention prepared by neuro-psychiatrist Professor Miroslav Kovačević.[57] On 13 December 2010, the Appeals Chamber ordered an independent verification of Gvero's medical condition by a

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45 See *infra*, paras 19-24.

46 Appeal Brief on Behalf of Milan Gvero Against the Trial Jud[ge]ment of 10 June 2010, 15 February 2013 (confidential); Public Redacted Version of Appeal Brief on Behalf of Milan Gvero Against the Trial Judgement of 10 June 2010, 19 February 2013.

47 Decision on Prosecution's Motion Seeking Clarification on Decision Relating to Gvero's Health Condition, 21 December 2010 (confidential), p. 2.

48 Prosecution Appeal Brief, 21 January 2011 (confidential). See also Book of Authorities for Prosecution's Appeal Brief, 21 January 2011; Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, 25 January 2011.

49 Respondent's Brief on Behalf of Drago Nikolić, 4 April 2011 (confidential). See also Corrigendum to Book of Authorities for Respondent's Brief on Behalf of Drago Nikolić, 8 April 2011; Public Redacted Version of Respondent's Brief on Behalf of Drago Nikolić, 28 June 2011 (made confidential); Notice of Re-classification and Re-filing of Public Redacted Version of Respondent's Brief on Behalf of Drago Nikolić, 5 July 2011.

50 Response Brief on Behalf of Vujadin Popovi[ć], 4 April 2011 (confidential); Response Brief on Behalf of Vujadin Popovi[ć], 20 June 2011.

51 *M[é]moire de l'intime r[é]ponse de la d[é]fense de Radivoje Mileti[ć] au m[é]moire d'appel du Procureur*, 4 April 2011. The English translation was filed on 11 April 2011.

52 Pandurević Response to Prosecution Appeal Brief, 4 April 2011 (confidential). See also Book of Authorities for Pandurević's Response to Prosecution Appeal Brief, 7 April 2011; Notice of Re-filing of the Pandurević Response to Prosecution Appeal Brief, 11 April 2011 (confidential); Public Redacted Version of Pandurević Response to Prosecution Appeal Brief, 30 June 2011.

53 Prosecution Consolidated Reply Brief, 2 May 2011 (confidential). See also Book of Authorities for Prosecution Consolidated Reply Brief, 3 May 2011; Notice of Filing of Redacted Public Version of Prosecution Consolidated Reply Brief, 6 July 2011.

54 See *infra*, paras 19-24.

55 Prosecution Appeal Brief (Grounds Against Milan Gvero), 15 February 2013.

56 Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 30 September 2010 (confidential with *ex parte* annexes), para. 16.

57 Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 30 September 2010 (confidential with *ex parte* annexes), Annex I (Specialist Report of Professor Miroslav Kovačević, dated 9 September 2010). See also Prosecution's Response to "Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition", 7 October 2010.

Tribunal-appointed neurologist and suspended appellate proceedings in relation to Gvero pending a determination of his capacity to meaningfully participate in appellate proceedings.[58]

20. On 1 March 2011, the Registry of the Tribunal filed a medical report prepared by a Tribunal-appointed neurologist, Dr. Jelis Boiten.[59] On 20 April 2011, the Appeals Chamber ordered Dr. Boiten to clarify his conclusions with respect to Gvero's medical condition.[60] On 3 May 2011, the Registry filed the clarification submitted by Dr. Boiten.[61] The Prosecution and Counsel for Gvero filed submissions with respect to the clarification, as ordered by the Appeals Chamber.[62] On 17 May 2011, Counsel for Gvero filed a request for an order to terminate the appellate proceedings in relation to Gvero on the basis of his alleged incapacity to participate therein.[63]

21. On 16 September 2011, the Appeals Chamber ordered an examination of Gvero's medical condition by a second Tribunal-appointed neuro-psychiatrist.[64] On 3 January 2012, the Registry filed a medical report prepared by the Tribunal-appointed neuro-psychiatrist, Dr. Joseph J. F. M. de Man.[65] The Prosecution and Counsel for Gvero filed submissions with respect to this report.[66]

22. On 17 April 2012, the Appeals Chamber ordered a supplementary examination of Gvero's medical condition by a third Tribunal-appointed neuro-psychologist, within the framework of Dr.

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58 Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 13 December 2010 (confidential), paras 14-15; Public Redacted Version of 13 December 2010 Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 16 May 2011, paras 14-15.

59 "Neurological report of the examination of Mr. Milan Gvero on behalf of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY)" dated 28 February 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Neurologist Report, 1 March 2011 (confidential and *ex parte*).

60 Decision on Prosecution's Motion Seeking Clarification of Neurologist's Conclusions, 20 April 2011 (confidential and *ex parte*), p. 4. See also Prosecution Motion Seeking Clarification of Neurologist's Conclusions, 9 March 2011 (confidential and *ex parte*); Defence Response to Prosecution Motion Seeking Clarification of Neurologist's Conclusions, 21 March 2011 (confidential and *ex parte*).

61 "Clarification of the Neurological Report of the Examination of Mr. Milan Gvero on Behalf of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY)" dated 28 April 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Neurologist Report, 3 May 2011 (confidential and *ex parte*).

62 Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr Jelis Boiten, 17 May 2011 (confidential and *ex parte*); Prosecution's Response to Defence Submission on Updated Neurologist's Report, 23 May 2011 (confidential and *ex parte*); Defence Reply to Prosecution Response to Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr. Jelis Boiten, 27 May 2011 (confidential and *ex parte*).

63 Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr Jelis Boiten, 17 May 2011 (confidential and *ex parte*), para. 21. See also Defence Reply to Prosecution Response to Defence Submission on Updated Expert Report by Registry Appointed Independent Neurologist Dr Jelis Boiten, 27 May 2011 (confidential and *ex parte*), para. 8.

64 Further Decision on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 16 September 2011 (confidential), pp. 3-4. See also Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist, 23 November 2011 (confidential); Corrigendum to "Order Releasing Confidential and *Ex Parte* Medical Reports Concerning Milan Gvero to [REDACTED] Neuro-Psychiatrist", 25 November 2011 (confidential).

65 "Neuropsychiatric Evaluation for the Purpose of the Administration of International Criminal Justice Regarding Mr. Milan Gvero" dated 30 December 2011, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 3 January 2012 (confidential and *ex parte*).

66 Defence Submission Regarding the Report of Dr de Man, 16 January 2012 (confidential and *ex parte*); Prosecution's Response to Defence Submission Regarding the Report of Dr. de Man, 20 January 2012 (confidential and

de Man's examination.[67] On 17 August 2012, the Registry filed the results of the supplementary neuro-psychological examination prepared by the Tribunal-appointed neuro-psychologist, Dr. Daniel A. Martell.[68] On 14 September 2012, the Registry filed a final medical report prepared by Dr. de Man.[69] The Prosecution and Counsel for Gvero filed submissions with respect to the evaluation and the report, as ordered by the Pre-Appeal Judge.[70]

23. On 30 November 2012, the Appeals Chamber found Gvero fit to participate in appellate proceedings, revoked the suspension of the appellate proceedings against him, and established a schedule for briefing.[71]

24. On 15 February 2013, Counsel for Gvero informed the Appeals Chamber that, on 3 February 2013, Gvero's medical condition had taken "a significant turn for the worse" and that he had been "completely incapacitated" since this date.[72] Gvero passed away on 17 February 2013 at the Military Medical Academy in Belgrade.[73] On 5 March 2013, Counsel for Gvero sought clarification as to whether certain orders remained extant and whether Counsel for Gvero were still

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*ex parte*); Defence Reply to Prosecution's Response to Defence Submission Regarding the Report of Dr de Man, 24 January 2012 (confidential and *ex parte*).

[67] Further Order on Motion by Counsel Assigned to Milan Gvero Relating to His Present Health Condition, 17 April 2012 (confidential), pp. 3-5.

[68] "Supplementary Neuropsychological Examination of Milan Gvero" dated 10 August 2012, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 17 August 2012 (confidential and *ex parte*).

[69] "Neuropsychiatric Evaluation for the Purpose of the Administration of International Criminal Justice Regarding Mr. Milan Gvero" dated 12 September 2012, appended to Registry Submission Pursuant to Rule 33 (B) Concerning Independent Medical Expert, 14 September 2012 (confidential and *ex parte*).

[70] Gvero Defence Submissions Concerning Two Medical Reports, 1 October 2012 (confidential and *ex parte*); Prosecution Response to Gvero Defence Submissions Concerning Two Medical Reports, 8 October 2012 (confidential and *ex parte*). See Decision on Request by Counsel for Milan Gvero for Access to Tribunal-Appointed Expert's Supplemental Examination and for Leave to File Related Submissions, 20 September 2012 (confidential), p. 2; Corrigendum to "Decision on Request by Counsel for Milan Gvero for Access to Tribunal-Appointed Expert's Supplemental Examination and for Leave to File Related Submissions", 21 September 2012 (confidential). See also Reply to Prosecution Response to Gvero Defence Submissions Concerning Two Medical Reports, 12 October 2012 (confidential and *ex parte*).

[71] Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 30 November 2012 (confidential and *ex parte*), paras 29-30; Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, paras 29-30. See also Decision on Milan Gvero's Motion to Rescind Decision in Part or for an Extension of Time to File Various Briefs, 13 December 2012 (confidential and *ex parte* status lifted by order of the Pre-Appeal Judge; see Order Lifting Confidential and *Ex Parte* Status of Decision on Milan Gvero's Motion to Rescind Decision in Part or for an Extension of Time to File Various Briefs, 16 January 2013), p. 3.

[72] Counsel submitted this information on 15 February 2013 in its Urgent Submission of Counsel to Accompany the Appeal Brief Filed on Milan Gvero's Behalf Concerning His Medical Condition, 18 February 2013 (confidential and *ex parte*), paras 6, 13.

[73] See "Certificate of Death" and "Excerpt from the Register of Deaths" for Milan Gvero, attached to Letter from the Deputy Director of the Republic of Serbia Office of the National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia dated 18 February 2013, 19 February 2013.

assigned to Gvero's case.[74] On 7 March 2013, the Appeals Chamber terminated the appellate proceedings with respect to Gvero and declared the Trial Judgement final in his regard.[75]

## E. Decisions Pursuant to Rule 115

25. On 1 June 2011, the Appeals Chamber dismissed as premature and without prejudice motions filed by **Popović**, **Nikolić**, **Miletić**, and **Pandurević** to extend the time in which to file a motion to present additional evidence pursuant to Rule 115 of the Rules.[76] Subsequently, **Popović**,[77] **Nikolić**,[78] and **Miletić**[79] filed a number of motions for the admission of additional evidence, which the Appeals Chamber dismissed.[80]

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74 Motion by Milan Gvero's Counsel Seeking Clarification of the Appeals Chamber Decision of 30 November 2012 and the Effect of Counsel's Assignment, 5 March 2013.

75 Decision Terminating Appellate Proceedings in Relation to Milan Gvero, 7 March 2013, paras 6-7.

76 Decision on Defence Requests for Extension of Time to File Motions Pursuant to Rule 115, 1 June 2011, para. 13. See Vujadin Popovi[ć]'s Motion for Enlargement of Time to File Rule 115 Motion, 10 May 2011 (public with confidential annex); Motion on Behalf of Drago Nikolić Joining "Vujadin Popović's Motion for Enlargement of Time to File Rule 115 Motion", 11 May 2011; *Requête de la d[é]fense de Radivoje Mileti[ć] aux fins d'obtenir une prorogation du d[é]lai pr[é]vu par l'article 115 de r[è]glement de proc[é]dure et de preuve*, 12 May 2011 (the English translation was filed on 17 May 2011); Pandurević Motion for the Extension of the Rule 115 Time-limit, 18 May 2011. See also Prosecution's Consolidated Response to the Motions to Extend the Time to File Rule 115 Applications, 20 May 2011; Vujadin Popovi[ć]'s Reply to Prosecution's Consolidated Response to Motions to Extend the Time to File Rule 115 Applications, 23 May 2011.

77 Vujadin Popovi[ć]'s Motion Pursuant to Rule 115, 2 June 2011 (confidential); Vujadin Popović's Consolidated Reply to the Prosecution's Response to Rule 115 Motion and Second Rule 115 Motion, 13 July 2011 (confidential); Vujadin Popovi[ć]'s Third Motion Pursuant to Rule 115, 15 August 2011 (confidential); Corrigendum to Vujadin Popovi[ć]'s Third Motion Pursuant to Rule 115, 20 September 2011 (confidential); Vujadin Popovi[ć]'s Fourth Motion Pursuant to Rule 115, 19 September 2011 (confidential); Vujadin Popović's Fifth Motion Pursuant to Rule 115, 2 September 2013 (confidential with confidential annexes); Vujadin Popović's Sixth Rule 115 Motion, 1 October 2013 (public with confidential annexes); Vujadin Popović's Seventh Rule 115 Motion, 11 November 2013 (public with confidential appendix and annexes); Vujadin Popović's Eighth Rule 115 Motion, 14 January 2014 (public with public annexes).

78 Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex, 19 September 2013 (public with confidential annex); Second Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal, 4 October 2013 (confidential with confidential annexes); Third Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal, 18 October 2013 (confidential with confidential annexes); Expedited Fourth Rule 115 Motion on Behalf of Drago Nikolić Seeking Admission of Additional Evidence on Appeal with Annex, 25 November 2013 (public with confidential annex).

79 *Requête de la d[é]fense de Radivoje Mileti[ć] aux fins d'admission d'un document en application de l'article 115 du r[č]glement de proc[é]dure et de preuve avec les annexes publiques et confidentielles*, 30 March 2012 (partially confidential, the English translation was filed on 11 April 2012); *Deuxi[č]me Requête de la d[é]fense de Radivoje Mileti[ć] aux fins d'admission d'un document en application de l'article 115 du r[č]glement de proc[é]dure et de preuve avec les annexes publique et confidentiel[]*, 7 May 2012 (partially confidential). The English translation was filed on 11 June 2012.

80 Decision on Vujadin Popović's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011; Decision on Radivoje Miletić's First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 15 April 2013; Decision on Vujadin Popović's Fourth Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 7 October 2013 (confidential); Decision on Drago Nikolić's First Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115 of the Rules, 19 November 2013; Decision on Vujadin Popović's Eighth Motion Pursuant to Rule 115, 29 April 2014; Decision on Vujadin Popović's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 2 May 2014 (confidential; public redacted version filed on 23 May 2014); Decision on Drago Nikolić's Second Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 June 2014 (confidential); Decision on Drago Nikolić's Third Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 8 July 2014 (confidential); Decision on Vujadin Popović's Sixth Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 22 July 2014; Decision on Drago Nikolić's Fourth Motion for Admission of Additional Evidence on

## F. Motions for Custodial Visit and Provisional Release

### 1. Pandurević's motions

26. On 22 February 2011, the Appeals Chamber granted **Pandurević**'s motion for provisional release on compassionate grounds in order to visit his mother in Bosnia and Herzegovina.[81] He was released from 23 February 2011 until 2 March 2011.[82]

27. On 11 January 2012, the Appeals Chamber granted **Pandurević**'s motion seeking provisional release to permit him to attend the mourning and memorial service of his mother.[83] He was released from 13 January 2012 to 25 January 2012.[84]

28. The Appeals Chamber dismissed **Pandurević**'s motion for a custodial visit to the Embassy of the Republic of Serbia in The Hague[85] and his motions for provisional release on 6 June 2012,[86] 14 March 2014,[87] and 12 December 2014.[88]

### 2. Popović's motions

29. On 11 December 2012, the Appeals Chamber dismissed **Popović**'s motion for custodial release.[89]

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Appeal Pursuant to Rule 115, 3 September 2014; Decision on Vujadin Popović's Seventh Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 4 December 2014.

81 Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential), para. 19; Urgent Motion on Behalf of the Accused Vinko Pandurević for Provisional Release Such as to Permit Him a Short and Urgent Visit to His Mother on Compassionate Grounds, 11 February 2011 (confidential). See also Correspondence from the Minister Counsellor – Liaison Officer for the Republika Srpska to the ICTY Regarding Mr. Pandurević's Provisional Release, 3 February 2012 (confidential).

82 Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential), para. 19.

83 Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2012; Urgent Motion on Behalf of Vinko Pandurević for Provisional Release Such as to Permit Him to Attend the Mourning and Memorial for His Mother, 21 December 2011 (confidential).

84 Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2012, para. 19. Provisional release was originally ordered from 13 January 2012 to 23 January 2012, but weather conditions made the return journey impossible on that date and as such the period of provisional release was extended by order. See Order Extending Pandurević's Provisional Release, 23 January 2012, p. 1.

85 Decision on Vinko Pandurević's Motion for Temporary Alteration of the Conditions of His Detention, 22 July 2011 (confidential; public redacted version filed on 9 November 2011); Motion on Behalf of Vinko Pandurevi[ć] for a Temporary Alteration in the Conditions of His Detention to Facilitate a Visit to the Serbian Embassy in The Hague, 8 December 2010 (confidential).

86 Decision on Motion on Behalf of Vinko Pandurević for Provisional Release, 6 June 2012; Motion on Behalf of Vinko Pandurević for Provis[i]onal Release, 23 May 2012 (confidential).

87 Decision on Vinko Pandurević's Motion for Provisional Release, 14 March 2014; Motion on Behalf of Vinko Pandurević for Provisional Release, 9 December 2013.

88 Decision on Vinko Pandurević's Renewed Motion for Provisional Release, 12 December 2014; Renewed Motion on Behalf of Vinko Pandurević for Provisional Release, 29 July 2014 (public with confidential annex).

89 Decision on Vujadin Popović's Application for Custodial Release on Compassionate Grounds, 11 December 2012 (confidential); Vujadin Popović's Application for Custodial Release on Humanitarian Grounds, 27 September 2012 (confidential with confidential annexes).

30. On 7 February 2013, the Appeals Chamber granted **Popović**'s motion for provisional release allowing him to attend his mother's memorial service.[90] He was released from 8 February 2013 to 10 February 2013.[91]

### 3. Nikolić's motions

31. On 7 November 2014, the Appeals Chamber granted **Nikolić**'s motion for provisional release on medical and humanitarian grounds.[92] He was released from 14 November 2014 to 25 January 2015.[93]

### 4. Miletić's motions

32. The Appeals Chamber dismissed **Miletić**'s motions for provisional release on 15 November 2013[94] and 7 February 2014.[95]

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[90] Decision on Urgent Prosecution Motion for a Declaration that the Additional Guarantees Offered by Republika Srpska are Insufficient for the Release of Vujadin Popović, 7 February 2013; Decision on Vujadin Popović's Urgent Motion for Custodial Release on Compassionate Grounds, 30 January 2013; Vujadin Popović's Urgent Motion for Custodial Release on Compassionate Grounds, 14 January 2013 (confidential with confidential annexes)

[91] Decision on Urgent Prosecution Motion for a Declaration that the Additional Guarantees Offered by Republika Srpska are Insufficient for the Release of Vujadin Popović, 7 February 2013, pp. 2-3; Correspondence from State re: Provisional Release of Mr. Popović, 7 February 2013 (confidential).

[92] Decision on Drago Nikolić's Motion for Provisional Release on Medical and Humanitarian Grounds, 7 November 2014 (confidential and *ex parte*). See also Corrigendum to "Decision on Drago Nikolić's Motion for Provisional Release on Medical and Humanitarian Grounds", 10 November 2014 (confidential and *ex parte*); Declaration of Judge Mandiaye Niang Appended to the Appeals Chamber's Decision on Drago Nikolić's Motion for Provisional Release on Medical and Humanitarian Grounds Dated 7 November 2014, 12 November 2014 (confidential and *ex parte*).

[93] Decision on Drago Nikolić's Motion for Provisional Release on Medical and Humanitarian Grounds, 7 November 2014 (confidential and *ex parte*), p. 5; Decision on Drago Nikolić's Motion for an Extension of his Provisional Release, 10 December 2014 (confidential and *ex parte*), p. 3. See Motion on Behalf of Drago Nikolić Seeking Extension of Provisional Release on the Basis of New Information with Confidential and Ex Parte Annex, 3 December 2014 (confidential and *ex parte* with confidential and *ex parte* annex); Letters of President of the National Council for Cooperation with the ICTY Ref No 4/0-2/12-14 dated 12 November and Ref No 4/0-2/16-14 dated 13 November 2014, addressed to the ICTY Appeals Chamber in response to the Decision dated [7] November 2014 granting provisional release to the accused Drago Nikolić, 5 December 2014 (confidential and *ex parte*). See also Letter of President of the National Council for Cooperation with the ICTY Ref No 4/0-2/12-14 dated 12 November 2014, sent to the ICTY [Appeals] Chamber regarding the Decision of the [Appeals Chamber] dated [7] November 2014 in the case of the accused Drago Nikolić, 13 November 2014 (confidential and *ex parte*).

[94] Decision on Radivoje Miletić's Urgent Motion for Provisional Release, 15 November 2013 (confidential and *ex parte*), p. 3. See also Dissenting Opinion of Judge Niang; *Requête Urgente de la d[é]fense de Radivoje Mileti[ć] aux fins de libert[é] provisoire avec les annexes confidentielles et* ex parte, 16 October 2013 (confidential and *ex parte*, the English translation was filed on 21 October 2013); *Addendum [à] la requête urgente de la d[é]fense de Radivoje Mileti[ć] aux fins de libert[é] provisoire avec une annexe confidentielle et* ex parte, 17 October 2013 (confidential and *ex parte*); *Second addendum [à] la requête urgente de la d[é]fense de Radivoje Mileti[ć] aux fins de libert[é] provisoire avec une annexe confidentielle et* ex parte, 28 October 2013 (confidential and *ex parte*). The English translations of the two addenda were both filed on 28 October 2013.

[95] Decision on Radivoje Miletić's Urgent Motion for Provisional Release, 7 February 2014 (confidential and *ex parte*); *Requête urgente de la d[é]fense de Radivoje Mileti[ć] aux fins de libert[é] provisoire avec les annexes confidentielles et ex parte*, 11 December 2013 (confidential and *ex parte*). The English translation was filed on 17 December 2013.

## G. Other Pre-appeal Decisions

33. On 7 February 2012, the Appeals Chamber granted a motion by the Prosecution[96] to rescind the protective measures of a witness known in the *Popović et al.* case as PW-162 (Srbislav Davidović).[97]

34. On 15 March 2012, the Appeals Chamber granted the Prosecution's motion[98] to lift the confidential status of all but 35 lines of the testimonies and exhibits related to PW-162/Srbislav Davidović.[99]

35. On 19 June 2013, the Appeals Chamber rescinded the protective measure of image distortion for PW-169.[100]

## H. Status Conferences

36. In accordance with Rule 65 *bis*(B) of the Rules, status conferences were held on 9 February 2011,[101] 9 June 2011,[102] 19 October 2011,[103] 10 February 2012,[104] 31 May 2012,[105] 26 September 2012,[106] 11 January 2013,[107] 9 May 2013,[108] 22 August 2013,[109] 3 April 2014,[110] 22 July 2014,[111] and 18 November 2014.[112]

## I. Appeal Hearing

37. On 3 October 2013, the Appeals Chamber issued a scheduling order for the appeal hearing in this case to take place on 2 to 13 December 2013.[113] On 6 November 2013, the Appeals Chamber issued an order inviting the Parties to discuss specifically identified issues during the appeal

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96 Prosecution's Urgent Motion to Rescind Protective Measures for Witness, 2 February 2012 (public with confidential annex).

97 Decision on Prosecution's Urgent Motion to Rescind Protective Measures for Witness, 7 February 2012. See also Registrar's Submission Pursuant to Rule 33(B) in Compliance with the "Order Relating to Prosecution's Urgent Motion to Rescind Protective Measures for Witness" Dated 3 February 2012, 6 February 2012 (confidential and *ex parte*).

98 Motion to Lift Confidential Status of Testimony and Exhibit Related to Srbislav Davidović, 23 February 2012.

99 Decision on Prosecution's Motion to Lift Confidential Status of Testimony and Exhibit Related to Srbislav Davidović, 15 March 2012.

100 Decision on Deputy Registrar's Notification Regarding Variation in Witness Protective Measures, 19 June 2014 (confidential and *ex parte*), p. 2.

101 See Scheduling Order, 2 February 2011.

102 See Scheduling Order, 5 May 2011.

103 See Scheduling Order, 6 September 2011. See also Order Re-Scheduling Status Conference, 4 October 2011.

104 See Scheduling Order, 9 January 2012.

105 See Scheduling Order, 2 May 2012.

106 See Scheduling Order, 27 August 2012.

107 See Scheduling Order, 22 November 2012.

108 See Scheduling Order, 14 March 2013.

109 See Scheduling Order, 21 June 2013.

110 See Scheduling Order, 12 March 2014.

111 See Scheduling Order, 30 May 2014.

112 See Scheduling Order, 10 October 2014.

hearing.[114] On 7 November 2013, the Appeals Chamber issued an order setting the agenda for the appeal hearing.[115] The Appeals Chamber heard the oral arguments of all parties on 2-6 December 2013.[116]

113 Scheduling Order for Appeal Hearing, 3 October 2013, p. 1.
114 Order for the Preparation of the Appeal Hearing, 6 November 2013, pp. 1-3.
115 Order for the Agenda of the Appeal Hearing, 7 November 2013.
116 Appeal Hearing, AT. 59-169 (2 Dec 2013), AT. 170-283 (3 Dec 2013). AT. 284-399 (4 Dec 2014), AT. 400-484 (5 Dec 2014), AT. 485-606 (6 Dec 2014).

# XVII. ANNEX II: GLOSSARY

## A. Filings in This Case

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|---|---|
| Beara's Appeal Brief | Appellant Ljubiša Beara's Appeal Brief, 21 January 2011 (confidential), 16 June 2011 (public) |
| Beara's Final Brief | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Defendant, Ljubisa [*sic*] Beara's Final Trial Brief, 30 July 2009 (confidential), 28 July 2010 (public) |
| Beara's Notice of Appeal | Appellant, Ljubisa [*sic*] Beara's Notice of Appeal, 8 September 2010 (public) |
| Beara's Reply Brief | Appellant Ljubiša Beara's Reply Brief, 2 May 2011 (confidential), 7 July 2011 (public) |
| Indictment | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Indictment, 4 August 2006 |
| Miletić's Appeal Brief | Appeal Brief of the Radivoje Miletić Defence, 24 March 2011 (confidential), 18 April 2011 (public). The original French versions were filed on 21 January 2011 (confidential) and 18 April 2011 (public) |
| Miletić's Notice of Appeal | Notice of Appeal by the Radivoje Miletić Defence, 24 September 2010 (public). The original French version was filed on 8 September 2010 |
| Miletić's Reply Brief | Reply to Prosecution's Response to Radivoje Miletić Appeal Brief, 30 May 2011 (confidential), 13 October 2011 (public). The original French versions were filed on 2 May 2011 (confidential) and 7 July 2011 (public). |
| Miletić's Response Brief | Respondent's Brief – Response of the Radivoje Miletic [*sic*] Defence to the Prosecutor's Appeal Brief, 11 April 2011 (public). The original French version was filed on 4 April 2011. |
| Nikolić's Appeal Brief | Appellant's Brief on Behalf of Drago Nikolić 21 January 2011 (confidential) (corrigenda 9 February 2011 and 3 August 2011 |

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| | (confidential)), 3 August 2011 (refiled, public) |
| Nikolić's Final Brief | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Final Trial Brief on Behalf of Drago Nikolić, 30 July 2009 (confidential, public), (corrigendum 15 September 2009) (public) |
| Nikolić's Notice of Appeal | Notice of Appeal on Behalf of Drago Nikolić, 8 September 2010 (confidential), 7 March 2011 (public) |
| Nikolić's Reply Brief | Brief in Reply (Modified) on Behalf of Drago Nikolić, 4 May 2011 (confidential), 9 May 2011 (modification), 18 July 2011 (public) |
| Nikolić's Response Brief | Respondent's Brief on Behalf of Drago Nikolić 4 April 2011 (confidential), 5 July 2011 (refiled, public) |
| Pandurević's Notice of Appeal | Notice of Appeal on Behalf of Vinko Pandurevic [*sic*] Against the Judgement of the Trial Chamber Dated 10th June 2010, 8 September 2011 (confidential), 9 March 2011 (public) |
| Pandurević's Appeal Brief | Pandurević Appeal Brief Against the Judgement of the Trial Chamber of 10 June 2010, 21 January 2011 (confidential), 12 April 2011 (public) |
| Pandurević's Reply Brief | Pandurević Reply to Prosecution's Response Brief, 6 May 2011 (refiled, confidential), 6 July 2011 (public) |
| Pandurević's Response Brief | Pandurević Response to Prosecution Appeal Brief, 11 April 2011 (confidential), 30 June 2011 (public) |
| Popović's Appeal Brief | Appeal Brief on Behalf of Vujadin Popovic [*sic*], 21 January 2011 (confidential), 14 April 2011 (refiled, public) |
| Popović's Notice of Appeal | Vujadin Popovic's [*sic*] Notice of Appeal, 8 September 2010 (confidential), 25 February 2011 (public) |
| Popović's Reply Brief | Reply Brief on Behalf of Vujadin Popović, 2 May 2011 (confidential) (confidential corrigendum 18 May 2011), 6 July 2011 (public) |

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| Popović's Response Brief | Response Brief on Behalf of Vujadin Popovic [*sic*], 4 April 2011 (confidential), 20 June 2011 (public) |
| Prosecution 12 May 2006 Motion | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Zdravko Tolimir, Radivoje Miletić, Milan Gvero, Vinko Pandurević, and Milorad Trbić*, Case No. IT-05-88-PT, Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis* and Attached Annexes A-D, 12 May 2006 (confidential) |
| Prosecution's Appeal Brief | Prosecution Appeal Brief, 21 January 2011 (confidential), 25 January 2011 (public) |
| Prosecution's Final Brief | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Final Trial Brief, 30 July 2009 (confidential) |
| Prosecution's Notice of Appeal | Prosecution's Notice of Appeal, 8 September 2010 (public) |
| Prosecution's Pre-Trial Brief | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Zdravko Tolimir, Radivoje Miletić, Milan Gvero, Vinko Pandurević, and Milorad Trbić*, Case No. IT-05-88-T, Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter* (E) (v) [*sic*], 28 April 2006 (confidential) |
| Prosecution's Reply Brief | Prosecution Consolidated Reply Brief, 2 May 2011 (confidential), 6 July 2011 (public) |
| Prosecution's Response Brief (Appellant) | Notice of Filling of Prosecution Responses to the Appeals of Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić and Vinko Pandurević, 4 April 2011 (confidential) (corrigenda 3 June 2011 and 2 August 2011), 3 August 2011 (refiled, public) |

## B. ICTY Judgements and Decisions

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|---|---|
| *Aleksovski* Appeal Judgement | *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 |
| *Blagojević and Jokić* Appeal Judgement | *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, |

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| | 9 May 2007 |
| *Blagojević and Jokić* Trial Judgement | *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 |
| *Blaškić* Appeal Judgement | *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 |
| *Blaškić* Trial Judgement | *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 |
| *Boškoski and Tarčulovski* Appeal Judgement | *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010 |
| *Brđanin* Appeal Judgement | *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 |
| *Brđanin* JCE III Appeal Decision | *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004 |
| *Čelebići* Appeal Judgement | *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić, and Esad Landžo (aka "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001 |
| *Čelebići* Trial Judgement | *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić, and Esad Landžo (aka "Zenga")*, Case No. IT-96-21-T, Judgement, 16 November 1998 |
| *Delić* Interlocutory Appeal Decision | *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008 |
| *Đorđević* Appeal Judgement | *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014 |
| *Erdemović* Sentencing Judgement | *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998 |
| *Furundžija* Appeal Judgement | *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 |
| *Galić* Appeal Judgement | *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 |
| *Gotovina and Markač* Appeal Judgement | *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Judgement, |

16 November 2012

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| *Hadžihasanović and Kubura* Appeal Judgement | *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008 |
| *Halilović* Appeal Judgement | *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007 |
| *Haradinaj et Al.* Appeal Judgement | *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-A, Judgement, 19 July 2010 |
| *Haraqija and Morina* Contempt Appeal Judgement | *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement on Allegations of Contempt, 23 July 2009 |
| *Hartmann* Contempt Appeal Judgement | *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011 |
| *Jelisić* Appeal Judgement | *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 |
| *Karadžić* Hostage-Taking Decision | *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.9, Decision on Appeal from Denial of Judgement of Acquittal for Hostage-Taking, 11 December 2012 |
| *Kordić and Čerkez* Appeal Judgement | *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 |
| *Krajišnik* Appeal Judgement | *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 |
| *Krajišnik* Trial Judgement | *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006 |
| *Krnojelac* Appeal Judgement | *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 |
| *Krstić* Appeal Judgement | *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 |
| *Krstić* Trial Judgement | *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 |
| *Kunarac et al.* Appeal Judgement | *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vukovič*, Case Nos. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 |
| *Kupreškić et al.* Appeal Judgement | *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović,* |

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| | *and Vladimir Šantić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 |
| *Kupreškić et al.* Trial Judgement | *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, and Vladimir Šantić*, Case No. IT-95-16-T, Judgement, 14 January 2000 |
| *Kvočka et al.* Appeal Judgement | *Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 |
| Judge Kwon Dissent | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Dissenting and Separate Opinions of Judge Kwon, 10 June 2010 |
| *Limaj et al.* Appeal Judgement | *Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu*, Case No. IT-03-66-A, Judgement, 27 September 2007 |
| *Lukić and Lukić* Appeal Judgement | *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 |
| *Martić* Appeal Judgement | *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 |
| *Martić* Decision of 14 September 2006 | *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 |
| *Martić* Trial Judgement | *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007 |
| *D. Milošević* Appeal Judgement | *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 |
| *Mrkšić and Šljivančanin* Appeal Judgement | *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 |
| *Mrkšić et al.* Trial Judgement | *Prosecutor v. Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgement, 27 September 2007 |
| *Naletilić and Martinović* Appeal Judgement | *Prosecutor v. Mladen Naletilić*, a.k.a. *"TUTA" and Vinko Martinović*, a.k.a. *"Štela"*, Case No. IT-98-34-A, Judgement, 3 May 2006 |
| *M. Nikolić* Judgement on Sentencing Appeal | *Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal,* |

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| | *8 March 2006* |
| *Obrenović* Sentencing Judgement | *Prosecutor v. Dragan Obrenović*, Case No. IT-02-60/2-S, Sentencing Judgement, 10 December 2003 |
| *Ojdanić* Jurisdiction Decision | *Prosecutor v. Milan Milutinović, Nikola Šainović, and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, 21 May 2003 |
| *Orić* Appeal Judgement | *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008 |
| *Perišić* Appeal Judgement | *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Judgement, 28 February 2013 |
| *Popović et al.* Decision of 12 September 2006 | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Prosecution's *Confidential* Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 12 September 2006 |
| *Popović et al.* Decision of 26 September 2006 | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 |
| *Popović et al.* Decision of 14 December 2007 | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007 |
| [REDACTED] | [REDACTED] |
| *Popović et al.* Decision of 19 February 2009 | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Zdravko Tolimir, Radivoje Miletić, Milan Gvero, Vinko Pandurević, and Milorad Trbić*, Case No. IT-05-88-T, Redacted Version of "Decision on Motion on Behalf of Drago Nikolić Seeking Admission of Evidence Pursuant to Rule 92 *Quater*", Filed Confidentially on 18 December 2008, 19 February 2009 |

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| *Popović et al.* Decision of 27 March 2009 | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Further Decision on Prosecution's Motion to Admit Evidence in Rebuttal and to Reopen Its Case, 27 March 2009 (confidential) |
| *Prlić et al.* November 2007 Appeal Decision | *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 |
| Judge Prost Separate Opinion | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Separate Opinion of Judge Prost, 10 June 2010 |
| *Rašić* Contempt Appeal Judgement | *Prosecutor v. Jelena Rašić*, Case No. IT-98-32/1-R77.2-A, Judgement, 16 November 2012 |
| *Šainović et al.* Appeal Judgement | *Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić*, Case No. IT-05-87-A, Judgement, 23 January 2014 |
| *Šešelj* Contempt Appeal Judgement 2010 | *In the Case Against Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010 (public redacted version) |
| *Simić* Appeal Judgement | *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 |
| *Stakić* Appeal Judgement | *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 |
| *Strugar* Appeal Judgement | *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 |
| *Strugar* Trial Judgement | *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 |
| *Tadić* Appeal Judgement | *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 |
| *Tolimir* Trial Judgement | *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 December 2012 |
| *Vasiljević* Appeal Judgement | *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 |

## C. ICTR Judgements and Decisions

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| *Akayesu* Appeal Judgement | *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 1 June 2001 |
| *Bagilishema* Appeal Judgement | *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 |
| *Bagosora and Nsengiyumva* Appeal Judgement | *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor*, Case No. ICTR-98-41-A, Judgement, 14 December 2011 |
| *Bikindi* Appeal Judgement | *Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgement, 18 March 2010 |
| *Bizimungu* Appeal Judgement | *Augustin Bizimungu v. The Prosecutor*, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 |
| *Gacumbitsi* Appeal Judgement | *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 |
| *Gatete* Appeal Judgement | *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012 |
| *Hategekimana* Appeal Judgement | *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 |
| *Kajelijeli* Appeal Judgement | *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005 |
| *Kalimanzira* Appeal Judgement | *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010 |
| *Kambanda* Appeal Judgement | *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000 |
| *Kamuhanda* Appeal Judgement | *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 |
| *Kanyarukiga* Appeal Judgement | *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-A, Judgement, 8 May 2012 |
| *Karemera and Ngirumpatse* Appeal Judgement | *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Judgement, 29 September 2014 |

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| *Karemera et al.* Decision on Judicial Notice | *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 |
| *Karera* Appeal Judgement | *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009 |
| *Kayishema and Ruzindana* Appeal Judgement | *Clément Kayishema and Obed Ruzindana v. The Prosecutor*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 |
| *Mugenzi and Mugiraneza* Appeal Judgement | *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Judgement, 4 February 2013 |
| *Muhimana* Appeal Judgement | *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 27 May 2007 |
| *Munyakazi* Appeal Judgement | *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 |
| *Musema* Appeal Judgement | *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Appeal Judgement, 16 November 2001 |
| First *Muvunyi* Appeal Judgement | *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008 |
| Second *Muvunyi* Appeal Judgement | *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 1 April 2011 |
| *Nahimana et al.* Appeal Judgement | *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 |
| *Nchamihigo* Appeal Judgement | *Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-2001-63-A, Judgement, 18 March 2010 |
| *Ndahimana* Appeal Judgement | *Grégoire Ndahimana v. The Prosecutor*, Case No. ICTR-01-68-A, Judgement, 16 December 2013 |
| *Ndindabahizi* Appeal Judgement | *Emmanuel Ndindabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007 |

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| *Ndindiliyimana et al.* Appeal Judgement | *Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, and Innocent Sagahutu v. The Prosecutor*, Case No. ICTR-00-56-A, Judgement, 11 February 2014 |
| *Niyitegeka* Appeal Judgement | *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004 |
| *Nizeyimana* Appeal Judgement | *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-00-55C-A, Judgement, 29 September 2014 |
| *Ntabakuze* Appeal Judgement | *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 |
| *Ntagerura et al.* Appeal Judgement | *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement, 7 July 2006 |
| *Ntakirutimana and Ntakirutimana* Appeal Judgement | *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 |
| *Ntawukulilyayo* Appeal Judgement | *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Judgement, 14 December 2011 |
| *Nzabonimana* Appeal Judgement | *Callixte Nzabonimana v. The Prosecutor*, Case No. ICTR-98-44D-A, Judgement, 29 September 2014 |
| *Renzaho* Appeal Judgement | *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011 |
| *Rukundo* Appeal Judgement | *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 |
| *Rutaganda* Appeal Judgement | *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 |
| *Semanza* Appeal Judgement | *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 |
| *Seromba* Appeal Judgement | *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 |
| *Seromba* Trial Judgement | *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-I, Judgement, 13 December 2006 |

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| *Setako* Appeal Judgement | *Ephrem Setako v. The Prosecutor*, Case No. ICTR-04-81-A, Judgement, 28 September 2011 |
| *Setako* Trial Judgement | *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Judgement and Sentence, 25 February 2010 |
| *Simba* Appeal Judgement | *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007 |
| *Zigiranyirazo* Appeal Judgement | *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Judgement, 16 November 2009 |

## D. Other Jurisprudence

### 1. ICJ

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| *Bosnia Genocide* ICJ Judgement | *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007 |

### 2. SCSL

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| *Taylor* Appeal Judgement | *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013 |

### 3. STL

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| STL-11-01/I Decision | Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011 |

## E. Table of Other Authorities

### 1. International legal instruments and commentaries

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|---|---|
| Additional Protocol I | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 |
| Additional Protocol II | Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 |
| Commentary on Additional Protocols | Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, 1987 |
| Geneva Convention IV | Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 |
| Genocide Convention | Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948 |
| ICC Elements of Crimes | ICC-ASP/1/3(part-II-B), 9 September 2002 |
| ICCPR | International Covenant on Civil and Political Rights, 16 December 1966 |
| ICC Statute | Rome Statute (A/CONF.183/9), 17 July 1998 |
| Practice Direction on Formal Requirements | Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002 |
| Statute | Updated Statute of the International Criminal Tribunal for the former Yugoslavia, as amended by UNSC Res. 1877 (7 July 2009), original adopted by UNSC Res. 827 (25 May 1993) |

### 2. Select list of other legal authorities

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|---|---|
| Genocide Convention: *The Travaux* | Hirad Abtahi and Phillippa Webb (eds.), *The Genocide Convention: The Travaux Préparatoires* (2008) |
| Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I | Customary International Humanitarian Law, Volume I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), ICRC, Cambridge |

University Press, 2005

3. Reports

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| Report of the Darfur Commission | Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005 |

## F. Table of Short Forms

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| 4:22 p.m. Intercept | Intercept of conversation between **Popović** and Y[6149] in which **Popović** said the "job is done", 17 July 1995, 16:22 hours (Ex. P01224a) |
| 6:29 p.m. Intercept | Intercept, 13 July 1995, 6:29 p.m. (Ex. P01144a) |
| 7:12 p.m. Intercept | Intercept of conversation between Bašević and Y, 16 July 1995, 19:12 hours (Ex. P01199a) |
| 8:00 a.m. Intercept | Intercept, 23 July 1995, 08:00 hours (Ex. P01309a) |
| 8:05 a.m. Intercept | Intercept, 23 July 1995, 08:05 hours (Ex. P01310a) |
| 9:04 a.m. Intercept | Intercept, 23 July 1995 (Ex. P01313a) |
| 9:16 p.m. Intercept | Intercept of conversation between **Popović** and Rašić, 16 July 1995, 21:16 hours (Ex. P01201a) |
| 10:09 a.m. Intercept | Intercept, 13 July 1995 10:09 a.m. (Ex. P01130a) |
| 11:11 a.m. Intercept | Intercept, 16 July 1995, 11:11 hours (Ex. P01187a) |
| 11:25 a.m. Intercept | Intercept, 13 July 1995, 11:25 a.m. (Ex. 7D2D00642) |
| 12 July Briefing Finding | The Trial Chamber's finding that **Miletić** was briefed in detail about all the developments and the situation in Srebrenica as soon as he arrived back on 12 July 1995 at Crna Rijeka |
| 12 July Conversation | A conversation between **Popović**, Svetozar Kosorić and M. Nikolić on 12 July 1995 regarding the planned execution of the Bosnian |

[6149] "Y" is used throughout the glossary to refer to unknown interlocutor(s).

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| | Muslim men from Potočari |
| 13 July Order | Mladić's order issued on the evening of 13 July 1995 in which he mandated secrecy by preventing the entry of all uninvited individuals into the area of combat operations and issuing a ban on giving information (VRS Main Staff order on prevention of leakage of military secrets, type-signed Mladić, 13 July 1995 (Ex. 5DP00035)) |
| 14 July Briefing | A briefing at the Standard Barracks at 3:00 p.m. on 14 July 1995 during which **Beara** spoke and PW-104 interpreted **Beara**'s words as seeking assistance from the Zvornik municipality in burying bodies |
| 14 July Meeting | A meeting between **Popović**, **Beara** and **Nikolić** on 14 July 1995 at around 8:00 a.m. at the Standard Barracks in Zvornik discussing the organisation and co-ordination of the murder operation |
| 14 July Radio Conversation | A 14 July 1995 radio conversation between PW-168 and Lazar Ristić |
| 15 July Meeting | A meeting at noon on 15 July 1995 at the Standard Barracks between **Pandurević** and Obrenović during which **Pandurević** was informed that, pursuant to an order from Mladić, **Beara** and **Popović** had brought large numbers of prisoners to the Zvornik area and were executing them |
| 15 July Report | Zvornik Brigade Interim Combat Report, signed by **Pandurević**, 15 July 1995 (Ex. P00329) |
| 16 July Combat Report | VRS Main Staff Daily Combat Report, type-signed Miletić, 16 July 1995 (Ex. P00050) |
| 16 July Intercept | Intercept, 16 July 1995, 16:15 hours (Ex. P01195a) (confidential). |
| 17 July Intercept | Intercept of conversation between Golić and Zlatar 1, 17 July 1995, 12:42 hours (Ex. P01218a) |
| 17 July Main Staff Order | 17 July 1995 Main Staff order to, *inter alia*, the Drina Corps Command, signed Mladić, and calling for three officers (Trkulja, Sladojević, and Stanković) to be sent from the VRS Main Staff to the Command of the Zvornik Infantry Brigade to assist in the joining of the VRS and MUP forces, the planning and coordination of |

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| | combat operations to block, crush and destroy lagging Muslim forces in the wider areas of Kamenica and Cerska (Main Staff order, re integration of operations to crush lagging Muslim forces, signed by Mladić, 17 July 1995 (Ex. P00927)) |
| 23 July Intercepts | Refers, collectively, to 8:00 a.m. Intercept (Intercept, 23 July 1995, 08:00 hours (Ex. P01309a)) and 8:05 a.m, Intercept (Intercept, 23 July 1995, 08:05 hours (Ex. P01310a)) |
| 23 July 1995 Co-ordination Intercept | Intercept 23 July 1995, 13:59 hours (Ex. P01315a) |
| 24 July 1995 Intercept | Intercept 24 July 1995, 19:24 hours (Ex. P01327a) |
| 24 July 1995 Agreement | An agreement by representatives of the ABiH and the VRS which provided for the withdrawal from Žepa of civilians and ABiH troops |
| 25 May Shelling | Shelling of Srebrenica by VRS forces on 25 May 1995 |
| 1999/2000 Meetings | Two meetings held in 1999 and 2000 at the Zvornik Brigade Headquarters wherein **Miletić** appealed to the attendees not to provide any information related to the events in Srebrenica to the Tribunal |
| 2004 Statement | Statement that M. Nikolić gave to the Commission of the Government of the RS on 17 September 2004 |
| 2005 List of Missing | List compiled by the Prosecution of 7,661 persons who went missing in Srebrenica around the time of its fall (Ex. P02413) |
| 2009 ICMP List of Deceased | List compiled by the ICMP of individuals whose remains have been exhumed in the Srebrenica Related Graves and identified (Ex. P04494 (confidential)) |
| ABiH | Army of Bosnia and Herzegovina |
| Attack | The attack directed against the Bosnian Muslim civilian populations of Srebrenica and Žepa |
| BCS | The Bosnian/Croatian/Serbian language |

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| Beara-Deronjić Argument | An argument sometime after 8:00 p.m. on 13 July 1995 between **Beara** and Deronjić at the Bratunac SDS Offices concerning whether prisoners should be killed in Bratunac |
| BiH | Bosnia and Herzegovina |
| Borovčanin Interview | OTP Interview of Borovčanin, 11 and 12 March 2002 (Ex. P02853) |
| Bratunac SDS Offices | The offices of the President of the Bratunac SDS |
| Bratunac SDS Offices Meeting | Meeting on 14 July 1995 between PW-162/Srbislav Davidović and officers at the Bratunac SDS Offices about procuring construction machinery from the brickworks in Bratunac municipality |
| Briefing | The combat readiness analysis briefing held on 29 and 30 January 1995 at the VRS Main Staff |
| BSF | Bosnian Serb Forces. Includes VRS forces, MUP forces, and paramilitary forces associated with the VRS and/or MUP |
| CJB | Public Security Centre[s] |
| CLSS | Conference and Language Services Section |
| Common Article 3 | Common Article 3 of the Geneva Conventions of 12 August 1949 |
| Convoy Procedure Finding | The Trial Chamber's finding that **Miletić** was one of the authorities who had a role in the convoy approval and notification procedure (for both humanitarian aid and UNPROFOR convoys) |
| CPS | Brigade Crime Prevention Service |
| Daily Main Staff Reports | Daily reports sent from the VRS Main Staff to Karadžić |
| Darfur Commission | International Commission of Inquiry on Darfur to the United Nations Secretary-General |
| Directive 7/1 Finding | The Trial Chamber's finding that Directive 7/1 was a continuation of the objectives of Directive 7 |
| DutchBat | Dutch Battalion |

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| Duty Officer's Notebook | Zvornik Brigade Duty Officer's Notebook, 29 May 1995 – 27 July 1995 (Ex. P00377) |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICMP | International Commission on Missing Persons |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 |
| ICTY | International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 |
| IDs | Identification documents |
| IKM | Forward command post |
| IKM Logbook | Zvornik Brigade Forward Command Post (IKM) Operations Duty Officer Logbook, 7 July 1995 – 5 October 1995 (Ex. P00347) |
| Infirmary Logbook | Zvornik Brigade Infirmary Logbook |
| Janc Report | Update to the Summary of Forensic Evidence – Exhumation of the Graves Related to Srebrenica – March 2009, by Dušan Janc, 13 March 2009 (Ex. P04490) |
| JCE | Joint criminal enterprise |
| JCE to Forcibly Remove | The JCE to forcibly remove the Bosnian Muslim populations from Srebrenica and Žepa, as found by the Trial Chamber |
| JCE to Murder | The JCE to murder the able-bodied Bosnian Muslim men from Srebrenica in July 1995, as found by the Trial Chamber |

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| Jokić-Miletić Intercept | A 14 July 1995 phone conversation between Dragan Jokić and **Miletić** in which the latter told the former to block the column (Intercept 14 July 1995, 22:27 hours (Ex. P01166a)) |
| Karadžić Directive | A document appointing Deronjić as the Civilian Commissioner for the Serbian Municipality of Srebrenica (Republika Srpska Presidential Directive 01-1340/95 (01-1350/95) (Ex. P00010)) |
| Karadžić Intercept | An intercepted conversation between Karadžić and Deronjić from around 8:00 p.m. on 13 July 1995 (Intercept, 13 July 1995, 20:10 hours (Ex. P01149a)) |
| Karadžić's 9 July Order | Karadžić's order of 9 July 1995 extending the offensive to include the capture of Srebrenica town (VRS Main Staff communication to the Drina Corps Command, regarding combat operations around Srebrenica, signed by Tolimir, 9 July 1995 (Exs. P00033, P00849)) |
| Kitovnice IKM | Zvornik Brigade IKM |
| Kozluk Killings | The execution of over 1,000 males at Kozluk on 15 July 1995, as found by the Trial Chamber |
| Krivače IKM | IKM in Krivače |
| Milići Prisoners | Ten wounded Bosnian Muslim prisoners from the Milići Hospital |
| Mladić's New Year's Speech | Mladić's 1996 New Year's celebration speech (Ex. 5D01441) |
| M. Nikolić-Nikolić Conversation | A conversation at around 8:30 p.m. on 13 July 1995 at the Kitovnice IKM between M. Nikolić and **Nikolić**, wherein the former informed the latter that thousands of Bosnian Muslims held in Bratunac would be sent to Zvornik to be detained and executed |
| MSF | *Médecins Sans Frontières* |
| MUP | Ministry of the Interior of RS |
| NATO | North Atlantic Treaty Organisation |
| Nikolić-Obrenović Conversation | A telephone conversation between **Nikolić** and Dragan Obrenović on the evening of 13 July 1995 during which **Nikolić** relayed to Obrenović that **Popović** had informed him of the large number of prisoners that would be |

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| | transferred to Zvornik in order to be executed on Mladić's orders and that **Nikolić** had been asked to assist |
| NIOD Report | Report of the Netherlands Institute for War Documentation |
| Obrenović-Miletić Conversation | A 15 July 1995 conversation between Obrenović and **Miletić** in which **Miletić** denied the former's request to open the corridor for the column to pass through VRS defence lines |
| OP | Observation Post |
| Pilica Area Killings | The execution of between 1,000 and 2,000 persons in the Pilica area (the Branjevo Military Farm and the Pilica Cultural Centre) on 16 July 1995, as found by the Trial Chamber |
| PJP | Special Police Units |
| POWs | Prisoners of War |
| Popović Instruction | The 14 July 1995 instruction that **Popović** gave to Dragan Jokić, the Zvornik Brigade Duty Officer at the Standard Barracks, not to record details concerning the Bosnian Muslim prisoners or to speak of them over the radio |
| Popović-Nikolić Conversation | A call made by **Popović** to **Nikolić** between 7:00 and 8:00 p.m. on 13 July 1995 during which the former asked the latter to prepare for prisoners coming to Zvornik from Bratunac, that the former and **Beara** would organise travel, and that the prisoners would be shot pursuant to Mladić's order |
| Regular Combat Reports | Regular (daily) reports from subordinate units to the VRS Main Staff |
| Reporting Finding | The Trial Chamber's finding that "[f]ollowing Karadžić's visit to the Drina Corps Command [on 28 June 1995], the Main Staff kept him updated on the combat readiness of the forces for the Srebrenica operation" |
| Ristić-PW-168 Conversation | A conversation between Lazar Ristić and PW-168, in which the former stated that on 15 July 1995, **Nikolić** offered new uniforms to the 4th Battalion soldiers to persuade them to participate in the Orahovac killings |

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| RS | Republika Srpska |
| Rules | Rules of Procedure and Evidence of the ICTY |
| RSK | Republic of Serbian Krajina |
| SBP | Special Police Brigades |
| Schabas Report | An expert report provided by Prof. William Schabas on "State Policy as an Element of the Crime of Genocide", referred to in Nikolić's Final Brief, (corrigendum 15 September 2009) (public), Annex D |
| SFRY | Socialist Federal Republic of Yugoslavia |
| SJB | Public Security Station |
| Srebrenica Related Graves | As of March 2009, the BiH Government and the ICMP had identified 73 graves in and around Srebrenica, and all but one exhumed: 31 primary graves, 37 secondary graves, and five graves for which no information was available as to whether they were primary or secondary |
| Standard Barracks | The Zvornik Brigade Headquarters |
| Stand-in Chief of Staff | Title used to describe an individual standing in for the Chief of Staff of the VRS Main Staff |
| Statement of Facts | M. Nikolić's Statement of Facts and Acceptance of Responsibility dated 6 May 2003 (Ex. C00001) |
| Subordinate Unit Reports | Regular Combat Reports and interim reports from subordinate units |
| Tabeau Memorandum | Internal memorandum from Ewa Tabeau to Peter McCloskey: ABiH Military Records Overlapping with 2005 OTP List of Srebrenica Missing, 24 July 2008 (Ex. 3D00457) |
| TG-1 | Tactical Group-1 |
| Third Hotel Fontana Meeting | Meeting held at approximately 10. a.m. on 12 July 1995 between the representatives of VRS, DutchBat, and Bosnian Muslims gathered in Potočari |
| Trial Chamber | Trial Chamber II of the Tribunal |
| Tribunal | ICTY |
| Trial Judgement | *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje* |

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| | *Miletić, Milan Gvero, and Vinko Pandurević*, Case No. IT-05-88-T, Judgement, 10 June 2010 (confidential and public redacted versions) |
| Two Interim Combat Reports | Refers, collectively, to Zvornik Brigade Interim Combat Report, signed by **Pandurević**, 15 July 1995 (Ex. P00329) and Zvornik Brigade Interim Combat Report, signed by **Pandurević**, 18 July 1995 (Ex. P00334) |
| UKRCoy | Ukrainian Company of UNPROFOR |
| UN | United Nations |
| UNDU | United Nations Detention Unit |
| UNHCR | United Nations High Commissioner for Refugees |
| UNMO | United Nations Military Observer |
| UNPROFOR | United Nations Protection Force |
| VRS | Army of the Republika Srpska |
| VRS Main Staff Order | A 13 July 1995 VRS Main Staff order that was forwarded to the Zvornik Brigade, in which Drina Corps commanders and some brigades were ordered to use secure channels to communicate information about captured or blocked groups (VRS Main Staff Order to the Drina Corps type-signed Milan Gvero, 13 July 1995 (Ex. P00045)) |
| Zvornik Brigade | The 1st Light Infantry Zvornik Brigade of the VRS |
| Zvornik Brigade Command Order | A telegram sent on 14 July by Zvornik Brigade Command ordering the 1st Battalion of the Zvornik Brigade to prepare the Kula School for the arrival of between 100 and 200 prisoners |

## G. Table of Abbreviations

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| BT | Transcript page from hearings before the Trial Chamber in *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T |

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| *Cf.* | Compare with |
| *E.g.* | *Exempli gratia* (for example) |
| *Et seq.* | *Et sequitur* (and following) |
| Ex. Pxxxxx | Prosecution trial exhibit |
| Ex. 1Dxxxxx | Defence trial exhibit for the Appellant Vujadin Popović |
| Ex. 2Dxxxxx | Defence trial exhibit for the Appellant Ljubiša Beara |
| Ex. 3Dxxxxx | Defence trial exhibit for the Appellant Drago Nikolić |
| Ex. 4Dxxxxx | Defence trial exhibit for the Accused Ljubomir Borovčanin |
| Ex. 5Dxxxxx | Defence trial exhibit for the Appellant Radivoje Miletić |
| Ex. 6Dxxxxx | Defence trial exhibit for the Accused Milan Gvero |
| Ex. 7Dxxxxx | Defence trial exhibit for the Appellant Vinko Pandurević |
| fn. | Footnote |
| KT | Transcript page from hearings before the *Krstić* Trial Chamber, *Prosecutor v Radislav Krstić*, IT-98-33-T |
| p. | Page |
| para. | Paragraph |
| paras | Paragraphs |
| pp. | Pages |
| T. | Transcript page from proceedings before the Trial Chamber in the present case |