(a cura di)
Fabio Iadeluca

Crimini di guerra e contro l'umanità

Fatti • Documenti • Prospettive

Liberare Maria dalle mafie

Dipartimento di analisi studio e monitoraggio dei fenomeni criminali e mafiosi

Dipartimento di analisi, studi e monitoraggio dei delitti ambientali, dell'ecomafia, della tratta degli esseri umani, del caporalato e di ogni altra forma di schiavitù

Approfondimenti
Volume V

Stragi, eccidi e relativi processi • Norme e Codici

Pontificia Academia Mariana Internationalis
Città del Vaticano

Elenco autori

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A Papa Francesco luce della nostra speranza

Sul tramontare del primo anno di guerra Noi, rivolgendo ad Essi le più vive esortazioni, indicammo anche la via da seguire per giungere ad una pace stabile e dignitosa per tutti. Purtroppo, l'appello Nostro non fu ascoltato: la guerra proseguì accanita per altri due anni con tutti i suoi orrori: si inasprì e si estese anzi per terra, per mare, e perfino nell'aria; donde sulle città inermi, sui quieti villaggi, sui loro abitatori innocenti scesero la desolazione e la morte. Ed ora nessuno può immaginare quanto si moltiplicherebbero e quanto si aggraverebbero i comuni mali, se altri mesi ancora, o peggio se altri anni si aggiungessero al triennio sanguinoso. Il mondo civile dovrà dunque ridursi a un campo di morte? E l'Europa, così gloriosa e fiorente, correrà, quasi travolta da una follia universale, all'abisso, incontro ad un vero e proprio suicidio?

Benedetto XV
Lettera ai Capi dei Popoli belligeranti (Estratto)
1° agosto 1917

Ringraziamenti

Il più grande ringraziamento va a Papa Francesco, che ha voluto il percorso dei Dipartimenti e degli Osservatori come segno della carità, della giustizia, della solidarietà e della verità che la Chiesa, guardando alla madre di Gesù, sente di dover annunziare a tutti i costi e con tutti.

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- Pres. Giovanni Mammone, Presidente Emerito della Corte di cassazione;
- On. Rosy Bindi, già Presidente della Commissione parlamentare antimafia;
- Proc. Maurizio Block, Procuratore generale militare della Corte di cassazione;
- Pres. Antonino Balsamo, Presidente del Tribunale di Palermo;
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- Prof. Avv. Francesco Paolo Tronca;
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- Dott. Giuseppe Albenzio, già Vice Avvocato generale dello Stato;

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- Cons. Marisa Manzini, Sostituto procuratore generale di Catanzaro;
- Cons. Giovambattista Tona, Consigliere presso la Corte d'Appello di Caltanissetta;
- Cons. Costantino De Robbio, Scuola Superiore della Magistratura di Firenze;
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- Cons. Simone Petralia, giudice del Tribunale di Caltanissetta;
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- Prof. Avv. Roberto De Vita, Direttore del Dipartimento Giustizia e Presidente dell'Osservatorio Cybersecurity dell'Eurispes;
- Prof. Francesco Callari, Professore presso l'Università degli Studi di Palermo;
- Gen. B. Antonio Zaccaria, Procura generale militare presso la Corte di Cassazione;
- Col. Sebastiano La Piscopia, Procura generale militare presso la Corte di Cassazione;
- Gianfranco Calandra, Accademico Pontificio;
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- Dott.ssa Federica Cabras, Accademico Pontificio;
- Avv. Marco Della Bruna, Docente aggiunto per la Scuola di Polizia Economico-Finanziaria della Guardia di Finanza, Componente dell'Osservatorio Cyber Security Eurispes.

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- alla Biblioteca della Pontificia Academia Mariana Internationalis presso la Santa Sede;
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- alla Biblioteca del Quirinale;
- alla Biblioteca del Senato della Repubblica e della Camera dei Deputati;
- alla Biblioteca Giuridica della Corte di cassazione;
- al Consiglio Superiore della Magistratura;
- all'Istituto per la Storia del Risorgimento d'Italia,
- alla Biblioteca Nazionale Centrale di Roma;

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Grazie di cuore.

Fabio Iadeluca

Nota del Presidente della PAMI

Nel suo magistero, Papa Francesco ripete accoratamente e senza stancarsi che la guerra è una sconfitta, riecheggiando quel che il suo predecessore, Pio XII (1939-1958), disse alla vigilia della seconda guerra mondiale (1939-1945): «Nulla è perduto con la pace. Tutto può esserlo con la guerra. Tornino gli uomini a comprendersi. Riprendano a trattare. Trattando con buona volontà e con rispetto dei reciproci diritti si accorgeranno che ai sinceri e fattivi negoziati non è mai precluso un onorevole successo»[1]. Nello stesso tempo, il Papa venuto dalla "fine del mondo" non smette di farsi voce di tutti coloro che vengono oppressi dai crimini contro l'umanità, perpetrati in sfregio di ogni ragionevolezza soprattutto dai movimenti terroristici, siano essi locali e/o globali, in nome e per conto di ideologie religiose e politiche aberranti.

Questo nuovo ed imponente lavoro del Dipartimento *Liberare Maria dalle mafie* e dei suoi quaranta *Osservatori* vuole sostenere la voce e il magistero del Pontefice a partire da colei che, nella fede, «fu tutt'altro che donna passivamente remissiva o di una religiosità alienante, ma donna che non dubitò di proclamare che Dio è vindice degli umili e degli oppressi e rovescia dai loro troni i potenti del mondo (cfr. *Lc* 1,51-53); [...] una donna forte, che conobbe povertà e sofferenza, fuga ed esilio (cfr. Mt 2,13-23): situazioni che non possono sfuggire all'attenzione di chi vuole assecondare con spirito evangelico le energie liberatrici dell'uomo e della società»[2].

L'autentica devozione mariana conduce sempre alla ricerca della giustizia e della pace, allo stesso modo con cui sostiene la cultura dell'incontro attraverso il dialogo, la conoscenza reciproca e la collaborazione. Non è un caso che uno dei titoli mariani più diffusi sia quello di *Regina della pace*. Esso ha progressivamente preso il posto di un altro titolo, *Regina delle vittorie*: titolo rivelatosi nel corso del tempo profondamente ambiguo, perché connesso ad un'idea di vittoria come annientamento del nemico. Idea che – come oggi vede chiaramente chi ha occhi per vedere – muove sia la spaventosa macchina dei crimini di guerra, sia quella altrettanto terribile dei crimini contro l'umanità: due facce della "pulizia etnica" con cui qualcuno pensa di risolvere alla radice tutto ciò che impedisce di *essere soli* e di fare, conseguentemente, quel che si vuole con il pianeta e le sue risorse.

Ai miti ricorrenti della terra, del sangue, della superiorità (morale, etnica, religiosa), delle esigenze economiche, va contrapposta l'umile forza della ragione: l'unica in grado di trasformare le armi in *parole* che hanno il sapore dell'alternativa alla legge (presunta) della forza, alla inevitabilità (stabilita da chi?) dello scontro, alla guerra come "luogo etico per eccellenza" (di quale etica?).

Di questa umile forza della ragione la devozione mariana non solo non ha paura, ma si fa annunciatrice in una società pluralista e multiculturale, impedendo che il discorso su Dio e sull'essere umano divenga appannaggio dei propagandisti, dei manipolatori, dei dittatori e di tutti coloro che «hanno bisogno di maltrattare gli altri per sentirsi importanti»[3] perché hanno liberamente scartato quella «gentilezza [che] è una liberazione dalla crudeltà che a volte penetra le relazioni umane, dall'ansietà che non ci lascia pensare agli altri, dall'urgenza distratta che ignora che anche gli altri hanno diritto a essere felici»[4].

Un grazie sincero al coordinatore dell'opera, l'infaticabile prof. Fabio Iadeluca, e a tutti coloro che hanno collaborato a questa ricerca nella sincera certezza che la pace e la giustizia sono sempre possibili; e che gli umani non sono condannati da chissà quale destino immutabile ad essere criminali.

Prof. Stefano Cecchin, OFM

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1 *Radiomessaggio ai governanti e ai popoli*, del 24 agosto 1939, in *Acta Apostolicae Sedis* 31 (1939), pp. 333-334.

2 Paolo VI, *Marialis cultus* 37, esortazione apostolica, del 2 febbraio 1974, in <https://www.vatican.va/content/paul-vi/it/apost_exhortations/documents/hf_p-vi_exh_19740202_marialis-cultus.html>, consultato il 25 marzo 2024.

3 Francesco, *Evangelii gaudium* 288, esortazione apostolica, del 24 novembre 2013, in <https://www.vatican.va/content/francesco/it/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html>, consultato il 25 marzo 2024.

4 Idem, *Fratelli tutti* 224, lettera enciclica, del 3 ottobre 2020, in <https://www.vatican.va/content/francesco/it/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html>, consultato il 25 marzo 2024.

Nota introduttiva del Direttore dei Dipartimenti e degli Osservatori presso la Pontificia Academia Mariana Internationalis

Questa nuova e ampia ricerca che vede l'instancabile impegno comune degli Accademici Pontifici del Dipartimento *Liberare Maria dalle mafie* e dei suoi quaranta *Osservatori*, della Procura generale militare presso la Suprema Corte di Cassazione, di vari Studiosi ed Esperti, nasce come servizio alla collettività, in particolare ai giovani, affinché possano rendersi conto di cosa realmente indichino le espressioni "crimini di guerra" e "crimini contro l'umanità", di quale sia la loro storia, di quali importanti cambiamenti culturali, politici e giuridici siano il segno, da quale finalità siano pervase. Siamo perciò davanti ad un'opera che, ancora una volta, intende promuovere un'educazione collettiva allo sviluppo di una giustizia che sappia mettere al suo centro la persona umana, con la sua dignità e i suoi diritti, senza avallare discriminazioni di alcun tipo. Una simile giustizia è infatti il presupposto di una pace autentica, fondata nella forza della ragione e non nelle ragioni della forza. Essa si situa nel cuore del "patto tra le generazioni" e ne svela l'intenzione profonda: proclamare la cultura della vita.

Una semplicissima ricerca sul sito della Santa Sede indica che la parola italiana "guerra" ritorna – al momento in cui scriviamo – 722 volte nel magistero di Papa Francesco, rispetto alle 303 occorrenze in san Giovanni Paolo II e alle 265 in Benedetto XVI. Mentre l'espressione italiana "crimini contro l'umanità" appare 63 volte in Papa Francesco, 24 volte in san Giovanni Paolo II, 34 in Benedetto XVI. Un dato che parla da sé e che dice qualcosa di drammatico sul momento storico che stiamo vivendo e che lo stesso Papa Francesco riassume così: «abbiamo smarrito la via della pace. Abbiamo dimenticato la lezione delle tragedie del secolo scorso. Abbiamo disatteso gli impegni presi come Comunità delle Nazioni e stiamo tradendo i sogni di pace dei popoli e le speranze dei giovani. Ci siamo rinchiusi in interessi nazionalisti, ci siamo lasciati inaridire dall'indifferenza e paralizzare dall'egoismo. Abbiamo preferito convivere con le nostre falsità, alimentare l'aggressività, sopprimere vite e accumulare armi. Abbiamo smarrito l'umanità, abbiamo sciupato la pace»[1].

Le pagine che seguono, dove si intrecciano documenti e approfondimenti, restituiscono il drammatico intreccio tra orrore e bellezza, tra la "banalità del male" e la "innovatività del bene" con cui persone, società e culture sono sempre confrontate, nel "piccolo" degli spazi individuali e nel "grande" degli spazi comunitari. Davanti a tutto ciò non è lecito, anche se possibile, nascondersi nel silenzio o, al contrario, aprire la caccia al capro espiatorio di turno cui addossare responsabilità che sono invece "strutturali" e "sistemiche". Occorre piuttosto accettare la sfida che un simile intreccio lancia alla libertà e alla coscienza, maturando sempre più la consapevolezza che la presenza dell'*altro* non è la ragione della mancanza del futuro, ma semmai, la sua condizione di possibilità: infatti, «"tutto è collegato" e "nessuno si salva da solo"»[2].

Se poi qualcuno si chiedesse cosa c'entri tutto questo con la devozione mariana, lasciamo la risposta all'icona di *Maria addolorata* e alle parole di Papa Francesco: «oggi, Madre santa, portiamo qui, sotto il tuo sguardo, tante madri che, come è successo a te, sono addolorate. Le madri che piangono i figli uccisi dalla guerra e dal terrorismo. Le madri che li vedono partire per viaggi di disperata speranza. Aiuta noi a fare un cammino di educazione e di purificazione, riconoscendo e contrastando la violenza annidata nei nostri cuori e nelle nostre menti e chiedendo a Dio che ce ne liberi»[3].

Prof. Gian Matteo Roggio, MS
Direttore dei Dipartimenti e degli Osservatori
della Pontifica Academia Mariana Internationalis Santa Sede

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1 Francesco, *Atto di consacrazione al Cuore Immacolato di Maria*, del 25 marzo 2022, in <https://www.vatican.va/content/francesco/it/prayers/documents/20220325-atto-consacrazione-cuoredimaria.html>, consultato il 25 marzo 2024.

2 Idem, *Laudate Deum* 19, esortazione apostolica, del 4 ottobre 2023, in <https://www.vatican.va/content/francesco/it/apost_exhortations/documents/20231004-laudate-deum.html>, consultato il 25 marzo 2024.

3 Idem, *Atto di venerazione all'Immacolata in Piazza di Spagna*, dell'8 dicembre 2023, in <https://www.vatican.va/content/francesco/it/apost_exhortations/documents/20231004-laudate-deum.html>, consultato il 25 marzo 2024.

Nota del Segretario della PAMI

Il 31 gennaio e il 1° febbraio 2024 a Città del Messico, Fra' Marco Mendoza, OFM, segretario del PAMI, ha partecipato al Congresso dal titolo: **DIALOGHI DALLE FRONTIERE DELLA CRIMINALITÀ ORGANIZZATA**, Cultura della legalità e povertà educativa

Il Congresso è stato organizzato dall'Istituto Messicano per la Giustizia (IMJUS) e dall'Istituto di Ricerca Giuridica dell'Università Nazionale Autonoma del Messico (UNAM).

Il primo giorno del Congresso è stato diviso in due momenti:

Primo momento: "Il complesso compito della prevenzione".

- Terrorismo e criminalità organizzata,
- Reti egemoniche di potere e traffico illecito. Il caso di Jalisco.
- Politiche pubbliche per la prevenzione del reclutamento di bambini e adolescenti, Ambiente e criminalità organizzata.

Secondo momento: "Modelli e strumenti di prevenzione".

- Sviluppo civile, educazione e povertà educativa: il ruolo dell'Accademia,
- Dal margine alla dignità: percorsi e sforzi in Messico per disimpegnare i giovani dalla criminalità organizzata,
- Disuguaglianza educativa in Messico,
- Reti di macro-criminalità in Messico,
- Criminalità organizzata in contesti elettorali.

Nella seconda giornata è stato presentato il libro "Combattere la mafia" Vol. I colloqui di Giovanni Falcone di Nando dalla Chiesa.

Sintesi dell'Intervento

Vi invito a fare un salto nel tempo, concentrandoci sugli scenari che si sono presentati negli ultimi decenni dell'istruzione in Messico. Il divario esistente tra ricchi e poveri si sta allargando sempre di più. Questo ha reso più evidente l'esistenza della disuguaglianza sociale e la mancanza di opportunità educative non solo nel nostro Paese, ma in tutto il mondo. Se vogliamo avere società giuste, dobbiamo affrontare la questione delle disuguaglianze e trovare strumenti, forse non per risolverle, ma per ridurle. Per colmare il gigantesco divario tra chi ha di più e chi ha di meno. Per cercare possibili soluzioni, non basta guardare alle disuguaglianze di oggi; è necessario anche studiare perché ci sono generazioni di genitori che hanno ereditato alcune disuguaglianze ai loro figli. In Messico è molto comune sentire la frase: "Darò ai miei figli quello che non ho avuto io" o meglio ancora: "Voglio che i miei figli studino per non soffrire quello che ho sofferto io". La grande domanda è perché, nonostante il grande desiderio di alcuni giovani di migliorarsi, la maggior parte di loro rimane solo con questo, con il desiderio.

Vi invito a rivolgere la nostra attenzione a questi quattro punti, che ritengo siano interconnessi. Questi 4 punti illustrano alcune delle fonti della disuguaglianza educativa nel nostro Paese.

1. Il contesto sociale in cui si nasce. È inconcepibile che anche in quella che può essere considerata la classe più bassa della scala economica sociale ci siano differenze. Nascere in un villaggio rurale indigeno non è la stessa cosa che nascere in un villaggio rurale "meticcio" (come viene chiamato in alcune regioni del Paese). Ho potuto constatarlo visitando alcuni villaggi della Sierra del Nayar.

2. Area geografica. Rispetto ad altri Paesi del mondo, il Messico è un territorio abbastanza vasto, con un'orografia fatta di zone di difficile accesso e dove, ancora oggi, vivono molte delle nostre popolazioni indigene. L'accesso ai beni di prima necessità è molto scarso. È anche incredibile che, in Messico, il centro e il nord del Paese siano aree con molte più opportunità di istruzione e sviluppo rispetto al sud.

3. Contesto economico. La scala economico-sociale nel nostro Paese è molto variegata, ma c'è una cosa che non possiamo negare: il denaro non compra la felicità, ma dà gli strumenti per raggiungerla. Quando si parla di disuguaglianza, vengono in mente immagini di contesti geografici, sociali ed economici, ad esempio qui a Città del Messico è sconvolgente vedere il complesso edilizio di Santa Fe e a soli 500 metri le case di

San Mateo Tlaltenango. Pensate ai giganteschi svantaggi educativi di bambini che vivono a soli 500 metri di distanza l'uno dall'altro ma che sembrano vivere in universi diversi. Dobbiamo abbandonare l'idea che chi nasce povero molto probabilmente morirà povero. Qui vorrei aprire una grande parentesi, per parlare di come l'educazione cattolica in Messico si sia trasformata a poco a poco in educazione privata e sia ora destinata a coloro che hanno il maggior potere d'acquisto. In Messico abbiamo l'Università Iberoamericana e l'Università Anáhuac, università cattoliche di qualità che ultimamente sono destinate a un piccolo gruppo di giovani provenienti da famiglie con grande potere d'acquisto. Nel nostro Paese, l'istruzione privata è un investimento a lungo termine, poiché entrare in una cerchia così ristretta comporta il vantaggio di avere delle conoscenze, e si può notare che qui in Messico molte delle migliori posizioni imprenditoriali sono occupate da "l'amico di un amico che è il figlio del direttore o del proprietario di tale e tale azienda". L'educazione privata d'élite, per così dire, sta avanzando molto velocemente e ciò che genera è l'ampliamento delle disuguaglianze. Le istituzioni che offrono istruzione privata sono di grande aiuto allo Stato, che ha l'obbligo di fornire istruzione a tutti i cittadini, ma nel nostro Paese lo Stato offre un'istruzione pubblica di scarsa qualità, il che costringe le classi sociali più elevate a risolvere questa carenza cercando un'istruzione privata per i propri figli, Quando questo accade, è una specie di trappola perché implica che forse gli individui con più potere economico e che possono influenzare le politiche pubbliche non sono più interessati all'istruzione pubblica, quindi non esercitano più pressione sullo Stato, e senza questa pressione lo Stato continua a offrire un'istruzione pubblica di qualità molto bassa e i poveri devono accontentarsi di questo. Perché non c'è altro.

4. Il sesso con cui si è nati. Molte persone che si considerano "progressiste" sono sorprese di sapere che ci sono tre benedizioni che un ebreo è obbligato a recitare ogni giorno, prestiamo attenzione alla seconda: "Benedetto sei tu Signore per NON avermi fatto un gentile; Benedetto sei Signore tu per NON avermi fatto una donna; Benedetto sei tu Signore per NON avermi fatto un ignorante". Ad eccezione degli uomini che vivono nelle grandi città del nostro Paese, credo che la maggior parte dei cittadini messicani di sesso maschile, anche se non lo recitano ogni giorno, viva secondo questo principio. Il maschilismo messicano è anche una delle cause principali della disuguaglianza educativa. Possiamo pensare che si tratti di una pratica degli anni Cinquanta, ma anche oggi in Messico ci sono genitori che investono di più nell'istruzione dei figli maschi che delle figlie femmine.

A questi quattro punti si aggiunge l'indifferenza e la mancanza di interesse da parte dei governi. Un governo che dice di voler porre fine alla povertà e alla criminalità e non investe nell'istruzione è un governo che vi sta mentendo. Alla Pontificia Accademia Mariana Internazionale, l'istituzione che rappresento, siamo convinti che la migliore arma per combattere le disuguaglianze educative ed economiche e la criminalità organizzata sia l'istruzione. L'accesso a un'istruzione di qualità è una necessità urgente in tutto il mondo, ma ancora più urgente in Paesi con alti tassi di violenza come il nostro.

Promuoviamo una società in cui tutti i bambini, in quanto esseri umani e cittadini del mondo, abbiano esattamente le stesse opportunità e la stessa qualità di vita. È inconcepibile che in una società così avanzata esistano ancora disuguaglianze associate a condizioni che le persone non hanno scelto. Questo non fa che riflettere l'ingiustizia in cui sono state costruite le nostre società. Non basta riunirsi per riflettere sulle disuguaglianze, occorre che le istituzioni pubbliche, la società civile e le Chiese uniscano le forze e inizino a prendere provvedimenti con azioni concrete, altrimenti continueremo a essere indebitati con i bambini e i giovani messicani e continueremo a perdere la battaglia contro la povertà e la disuguaglianza, che vanno di pari passo con la criminalità organizzata.

Fra' Marco Mendoza, OFM,
Segretario del PAMI

Introduzione

Cari Ambasciatori,

c'è una parola che risuona in modo particolare nelle due principali feste cristiane. La udiamo nel canto degli angeli che annunciano nella notte la nascita del Salvatore e la intendiamo dalla voce di Gesù risorto: è la parola "pace". Essa è primariamente un dono di Dio: è Lui che ci lascia la *sua* pace (cfr. *Gv* 14,27); ma nello stesso tempo è una nostra responsabilità: «Beati gli operatori di pace» (*Mt* 5,9). Lavorare per la pace. Parola tanto fragile e nel contempo impegnativa e densa di significato. Ad essa vorrei dedicare la nostra riflessione odierna, in un momento storico in cui è sempre più minacciata, indebolita e in parte perduta. D'altronde, è compito della Santa Sede, in seno alla comunità internazionale, essere voce profetica e richiamo della coscienza.

Alla vigilia di Natale del 1944, Pio XII pronunciò un celebre Radiomessaggio ai popoli del mondo intero. La Seconda guerra mondiale stava avvicinandosi alla conclusione dopo oltre cinque anni di conflitto e l'umanità – disse il Pontefice – avvertiva «una volontà sempre più chiara e ferma: fare di questa guerra mondiale, di questo universale sconvolgimento, il punto da cui prenda le mosse un'era novella per il rinnovamento profondo»[1]. Ottant'anni dopo, la spinta a quel "rinnovamento profondo" sembra essersi esaurita e il mondo è attraversato da un crescente numero di conflitti che lentamente trasformano quella che ho più volte definito "terza guerra mondiale a pezzi" in un vero e proprio conflitto globale.

Non posso in questa sede non ribadire la mia preoccupazione per quanto sta avvenendo in Palestina e Israele. Tutti siamo rimasti scioccati dall'attacco terroristico del 7 ottobre scorso contro la popolazione in Israele, dove sono stati feriti, torturati e uccisi in maniera atroce tanti innocenti e molti sono stati presi in ostaggio. Ripeto la mia condanna per tale azione e per ogni forma di terrorismo ed estremismo: in questo modo non si risolvono le questioni tra i popoli, anzi esse diventano più difficili, causando sofferenza per tutti. Infatti, ciò ha provocato una forte risposta militare israeliana a Gaza che ha portato la morte di decine di migliaia di palestinesi, in maggioranza civili, tra cui tanti bambini, ragazzi e giovani, e ha causato una situazione umanitaria gravissima con sofferenze inimmaginabili.

Ribadisco il mio appello a tutte le parti coinvolte per un cessate-il-fuoco su tutti i fronti, incluso il Libano, e per l'immediata liberazione di tutti gli ostaggi a Gaza. Chiedo che la popolazione palestinese riceva gli aiuti umanitari e che gli ospedali, le scuole e i luoghi di culto abbiano tutta la protezione necessaria.

Auspico che la Comunità internazionale percorra con determinazione la soluzione di due Stati, uno israeliano e uno palestinese, come pure di uno statuto speciale internazionalmente garantito per la Città di Gerusalemme, affinché israeliani e palestinesi possano finalmente vivere in pace e sicurezza.

Il conflitto in corso a Gaza destabilizza ulteriormente una regione fragile e carica di tensioni. In particolare, non si può dimenticare il popolo siriano, che vive nell'instabilità economica e politica, aggravata dal terremoto del febbraio scorso. La Comunità internazionale incoraggi le Parti coinvolte a intraprendere un dialogo costruttivo e serio e a cercare soluzioni nuove, perché il popolo siriano non abbia più a soffrire a causa delle sanzioni internazionali. Inoltre, esprimo la mia sofferenza per i milioni di rifugiati siriani che ancora si trovano nei Paesi vicini, come la Giordania e il Libano.

A quest'ultimo rivolgo un particolare pensiero, esprimendo preoccupazione per la situazione sociale ed economica in cui versa il caro popolo libanese, e auspico che lo stallo istituzionale che lo sta mettendo ancora più in ginocchio venga risolto e che il Paese dei Cedri abbia presto un Presidente.

Rimanendo nel continente asiatico, desidero richiamare l'attenzione della Comunità internazionale pure sul Myanmar, chiedendo che vengano messi in campo

[1] *Radiomessaggio natalizio ai popoli del mondo intero*, 24 dicembre 1944.

tutti gli sforzi per dare speranza a quella terra e un futuro degno alle giovani generazioni, senza dimenticare l'emergenza umanitaria che ancora colpisce i Rohingya.

Accanto a queste situazioni complesse, non mancano anche segni di speranza, come ho potuto sperimentare nel corso del viaggio in Mongolia, alle cui Autorità rinnovo la mia gratitudine per l'accoglienza che mi hanno riservato. Allo stesso modo, desidero ringraziare le Autorità ungheresi per l'ospitalità durante la mia visita al Paese nell'aprile scorso. È stato un viaggio nel cuore dell'Europa, dove si respirano storia e cultura e dove ho saggiato il calore di molte persone, ma dove si avverte anche la vicinanza di un conflitto che non avremmo ritenuto possibile nell'Europa del XXI secolo.

Purtroppo, dopo quasi due anni di guerra su larga scala della Federazione Russa contro l'Ucraina, la tanto desiderata pace non è ancora riuscita a trovare posto nelle menti e nei cuori, nonostante le numerosissime vittime e l'enorme distruzione. Non si può lasciare protrarre un conflitto che va incancrenendosi sempre di più, a detrimento di milioni di persone, ma occorre che si ponga fine alla tragedia in atto attraverso il negoziato, nel rispetto del diritto internazionale.

Esprimo preoccupazione anche per la tesa situazione nel Caucaso Meridionale tra l'Armenia e l'Azerbaigian, esortando le parti ad arrivare alla firma di un Trattato di pace. È urgente trovare una soluzione alla drammatica situazione umanitaria degli abitanti di quella regione, favorire il ritorno degli sfollati alle proprie case in legalità e sicurezza e rispettare i luoghi di culto delle diverse confessioni religiose ivi presenti. Tali passi potranno contribuire alla creazione di un clima di fiducia tra i due Paesi in vista della tanto desiderata pace.

Se volgiamo ora lo sguardo all'Africa, abbiamo davanti agli occhi la sofferenza di milioni di persone per le molteplici crisi umanitarie in cui versano vari Paesi sub-sahariani, a causa del terrorismo internazionale, dei complessi problemi socio-politici, e degli effetti devastanti provocati dal cambiamento climatico, ai quali si sommano le conseguenze dei colpi di stato militari occorsi in alcuni Paesi e di certi processi elettorali caratterizzati da corruzione, intimidazioni e violenza.

In pari tempo, rinnovo un appello per un serio impegno da parte di tutti i soggetti coinvolti nell'applicazione dell'Accordo di Pretoria del novembre 2022, che ha messo fine ai combattimenti nel Tigray, e nella ricerca di soluzioni pacifiche alle tensioni e alle violenze che assillano l'Etiopia, nonché per il dialogo, la pace e la stabilità tra i Paesi del Corno d'Africa.

Vorrei pure ricordare i drammatici eventi in Sudan, dove purtroppo, dopo mesi di guerra civile, non si vede ancora una via di uscita; nonché le situazioni degli sfollati in Camerun, Mozambico, Repubblica Democratica del Congo e Sud Sudan. Proprio questi due ultimi Paesi ho avuto la gioia di visitare all'inizio dello scorso anno, per portare un segno di vicinanza alle loro popolazioni sofferenti, seppure in contesti e situazioni diversi. Ringrazio di cuore le Autorità di entrambi i Paesi per l'impegno organizzativo e per l'accoglienza riservatami. Il viaggio in Sud Sudan ha avuto peraltro un carattere ecumenico, essendo stato accompagnato dall'Arcivescovo di Canterbury e dal Moderatore dell'Assemblea generale della Chiesa di Scozia, a testimonianza dell'impegno condiviso delle nostre Comunità ecclesiali per la pace e la riconciliazione.

Sebbene non vi siano guerre aperte nelle Americhe, fra alcuni Paesi, per esempio tra il Venezuela e la Guyana, vi sono forti tensioni, mentre in altri, come in Perù, osserviamo fenomeni di polarizzazione che compromettono l'armonia sociale e indeboliscono le istituzioni democratiche.

Desta ancora preoccupazione la situazione in Nicaragua: una crisi che si protrae nel tempo con dolorose conseguenze per tutta la società nicaraguense, in particolare per la Chiesa Cattolica. La Santa Sede non cessa di invitare ad un dialogo diplomatico rispettoso per il bene dei cattolici e dell'intera popolazione.

Eccellenze, Signore e Signori,

dietro questo quadro che ho voluto tratteggiare brevemente e senza pretese di

esaustività, si trova un mondo sempre più lacerato, ma soprattutto si trovano milioni di persone – uomini, donne, padri, madri, bambini – i cui volti ci sono per lo più sconosciuti e che spesso dimentichiamo.

D'altra parte, le guerre moderne non si svolgono più solo su campi di battaglia delimitati, né riguardano solamente i soldati. In un contesto in cui sembra non essere osservato più il discernimento tra obiettivi militari e civili, non c'è conflitto che non finisca in qualche modo per colpire indiscriminatamente la popolazione civile. Gli avvenimenti in Ucraina e a Gaza ne sono la prova evidente. Non dobbiamo dimenticare che le violazioni gravi del diritto internazionale umanitario sono crimini di guerra, e che non è sufficiente rilevarli, ma è necessario prevenirli. Occorre dunque un maggiore impegno della Comunità internazionale per la salvaguardia e l'implementazione del diritto umanitario, che sembra essere l'unica via per la tutela della dignità umana in situazioni di scontro bellico.

All'inizio di quest'anno risuona quanto mai attuale l'esortazione del Concilio Vaticano II, nella *Gaudium et spes*: «Esistono, in materia di guerra, varie convenzioni internazionali, che un gran numero di nazioni ha sottoscritto per rendere meno inumane le azioni militari e le loro conseguenze. [...] Tutte queste convenzioni dovranno essere osservate; anzi le pubbliche autorità e gli esperti in materia dovranno fare ogni sforzo, per quanto è loro possibile, affinché siano perfezionate, in modo da renderle capaci di porre un freno più adatto ed efficace alle atrocità della guerra»[2]. Anche quando si tratta di esercitare il diritto alla legittima difesa, è indispensabile attenersi ad un uso proporzionato della forza.

Forse non ci rendiamo conto che le vittime civili non sono "danni collaterali". Sono uomini e donne con nomi e cognomi che perdono la vita. Sono bambini che rimangono orfani e privati del futuro. Sono persone che soffrono la fame, la sete e il freddo o che rimangono mutilate a causa della potenza degli ordigni moderni. Se riuscissimo a guardare ciascuno di loro negli occhi, a chiamarli per nome e ad evocarne la storia personale, guarderemmo alla guerra per quello che è: nient'altro che un'immane tragedia e "un'inutile strage"[3], che colpisce la dignità di ogni persona su questa terra.

D'altra parte, le guerre possono proseguire grazie all'enorme disponibilità di armi. Occorre perseguire una politica di disarmo, poiché è illusorio pensare che gli armamenti abbiano un valore deterrente. Piuttosto è vero il contrario: la disponibilità di armi ne incentiva l'uso e ne incrementa la produzione. Le armi creano sfiducia e distolgono risorse. Quante vite si potrebbero salvare con le risorse oggi destinate agli armamenti? Non sarebbe meglio investirle in favore di una vera sicurezza globale? Le sfide del nostro tempo travalicano i confini, come dimostrano le varie crisi – alimentare, ambientale, economica e sanitaria – che stanno caratterizzando l'inizio del secolo. In questa sede, reitero la proposta di costituire un Fondo mondiale per eliminare finalmente la fame[4] e promuovere uno sviluppo sostenibile dell'intero pianeta.

Tra le minacce causate da tali strumenti di morte, non posso poi tralasciare di menzionare quella provocata dagli arsenali nucleari e dallo sviluppo di ordigni sempre più sofisticati e distruttivi. Ribadisco ancora una volta l'immoralità di fabbricare e detenere armi nucleari. Al riguardo, esprimo l'auspicio che si possa giungere al più presto alla ripresa dei negoziati per il riavvio del *Piano d'azione congiunto globale*, meglio noto come "Accordo sul nucleare iraniano", per garantire a tutti un futuro più sicuro.

Per perseguire la pace, tuttavia, non è sufficiente limitarsi a rimuovere gli strumenti bellici, occorre estirpare alla radice le cause delle guerre, prime fra tutte la fame, una piaga che colpisce tuttora intere regioni della Terra, mentre in altre si verificano ingenti sprechi alimentari. Vi è poi lo sfruttamento delle risorse naturali, che arricchisce pochi, lasciando nella miseria e nella povertà intere popolazioni, che sarebbero i beneficiari

[2] Cost. past. *Gaudium et spes sulla Chiesa nel mondo contemporaneo* (7 dicembre 1965), 79.

[3] Cfr Benedetto XV, *Lettera ai Capi dei Popoli belligeranti* (1° agosto 1917).

[4] Cfr Lett. enc. *Fratelli tutti sulla fraternità e l'amicizia sociale* (3 ottobre 2020), 262.

naturali di tali risorse. Ad esso è connesso lo sfruttamento delle persone, costrette a lavorare sottopagate e senza reali prospettive di crescita professionale.

Tra le cause di conflitto vi sono anche le catastrofi naturali e ambientali. Certamente vi sono disastri che la mano dell'uomo non può controllare. Penso ai recenti terremoti in Marocco e in Cina, che hanno causato centinaia di vittime, come pure a quello che ha colpito duramente la Turchia e parte della Siria e che ha lasciato dietro di sé una tremenda scia di morte e distruzione. Penso pure all'alluvione che ha colpito Derna in Libia, distruggendo di fatto la città, anche a causa del concomitante crollo di due dighe.

Vi sono però i disastri che sono imputabili anche all'azione o all'incuria dell'uomo e che contribuiscono gravemente alla crisi climatica in atto, come ad esempio la deforestazione dell'Amazzonia, che è il "polmone verde" della Terra.

La crisi climatica e ambientale è stata oggetto della *XXVIII Conferenza degli Stati parte alla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici* (COP28), tenutasi a Dubai il mese scorso, alla quale mi rincresce di non aver potuto partecipare personalmente. Essa è iniziata in concomitanza con l'annuncio dell'Organizzazione Meteorologica Mondiale che il 2023 è stato l'anno più caldo rispetto ai 174 anni precedentemente registrati. La crisi climatica esige una risposta sempre più urgente e richiede il pieno coinvolgimento di tutti quanti, così come dell'intera comunità internazionale[5].

L'adozione del documento finale alla COP28 rappresenta un passo incoraggiante e rivela che, di fronte alle tante crisi che stiamo vivendo, vi è la possibilità di rivitalizzare il multilateralismo attraverso la gestione della questione climatica globale, in un mondo in cui i problemi ambientali, sociali e politici sono strettamente connessi. Alla COP28 è emerso chiaramente come quello in corso sia il decennio critico per fronteggiare il cambiamento climatico. La cura del creato e la pace «sono le tematiche più urgenti e sono collegate»[6]. Auspico, pertanto, che quanto stabilito a Dubai porti a «una decisa accelerazione della transizione ecologica, attraverso forme che [...] trovino realizzazione in quattro campi: l'efficienza energetica; le fonti rinnovabili; l'eliminazione dei combustibili fossili; l'educazione a stili di vita meno dipendenti da questi ultimi»[7].

Le guerre, la povertà, l'abuso della nostra casa comune e il continuo sfruttamento delle sue risorse, che sono alla radice di disastri naturali, sono cause che spingono pure migliaia di persone ad abbandonare la propria terra alla ricerca di un futuro di pace e sicurezza. Nel loro viaggio mettono a rischio la propria vita su percorsi pericolosi, come nel deserto del Sahara, nella foresta del Darién al confine tra Colombia e Panama, in America centrale, nel nord del Messico, alla frontiera con gli Stati Uniti, e soprattutto nel Mare Mediterraneo. Questo, purtroppo, è diventato nell'ultimo decennio un grande cimitero, con tragedie che continuano a susseguirsi, anche a causa di trafficanti di esseri umani senza scrupoli. Tra le tante vittime, non dimentichiamolo, ci sono molti minori non accompagnati.

Il Mediterraneo dovrebbe essere piuttosto un *laboratorio di pace*, un «luogo dove Paesi e realtà diverse si incontrino sulla base dell'umanità che tutti condividiamo»[8], come ho avuto modo di sottolineare a Marsiglia, nel corso del mio viaggio, per il quale ringrazio gli organizzatori e le Autorità francesi, in occasione dei *Rencontres Méditerranéennes*. Davanti a questa immane tragedia finiamo facilmente per chiudere il nostro cuore, trincerandoci dietro la paura di una "invasione". Dimentichiamo facilmente che abbiamo davanti persone con volti e nomi e tralasciamo la vocazione propria del *Mare Nostrum*, che non è quella di essere una tomba, ma un luogo di incontro e di arricchimento reciproco fra persone, popoli e culture. Ciò non toglie che

5 fr Esort. ap. *Laudate Deum a tutte le persone di buona volontà sulla crisi climatica* (4 ottobre 2023).

6 *Discorso alla Conferenza degli Stati parte alla Convenzione quadro delle Nazioni Unite sui cambiamenti climatici*, 2 dicembre 2023.

7 *Ibid*.

8 *Discorso alla Sessione conclusiva dei «Rencontres Méditerranéennes»*, Marsiglia, 23 settembre 2023, 1.

la migrazione debba essere regolamentata per accogliere, promuovere, accompagnare e integrare i migranti, nel rispetto della cultura, della sensibilità e della sicurezza delle popolazioni che si fanno carico dell'accoglienza e dell'integrazione. D'altra parte occorre pure richiamare il diritto di poter rimanere nella propria Patria e la conseguente necessità di creare le condizioni affinché esso possa effettivamente esercitarsi.

Dinanzi a questa sfida nessun Paese può essere lasciato solo, né alcuno può pensare di affrontare isolatamente la questione attraverso legislazioni più restrittive e repressive, approvate talvolta sotto la pressione della paura o per accrescere il consenso elettorale. Accolgo perciò con soddisfazione l'impegno dell'Unione Europea a ricercare una soluzione comune mediante l'adozione del nuovo Patto sulla Migrazione e l'Asilo, pur rilevandone alcuni limiti, specialmente per ciò che concerne il riconoscimento del diritto d'asilo e per il pericolo di detenzioni arbitrarie.

Cari Ambasciatori,

la via della pace esige il rispetto della vita, di ogni vita umana, a partire da quella del nascituro nel grembo della madre, che non può essere soppressa, né diventare oggetto di mercimonio. Al riguardo, ritengo deprecabile la pratica della cosiddetta maternità surrogata, che lede gravemente la dignità della donna e del figlio. Essa è fondata sullo sfruttamento di una situazione di necessità materiale della madre. Un bambino è sempre un dono e mai l'oggetto di un contratto. Auspico, pertanto, un impegno della Comunità internazionale per proibire a livello universale tale pratica. In ogni momento della sua esistenza, la vita umana dev'essere preservata e tutelata, mentre constato con rammarico, specialmente in Occidente, il persistente diffondersi di una cultura della morte, che, in nome di una finta pietà, scarta bambini, anziani e malati.

La via della pace esige il rispetto dei diritti umani, secondo quella semplice ma chiara formulazione contenuta nella Dichiarazione Universale dei Diritti Umani, di cui abbiamo da poco celebrato il 75° anniversario. Si tratta di principi razionalmente evidenti e comunemente accettati. Purtroppo, i tentativi compiuti negli ultimi decenni di introdurre nuovi diritti, non pienamente consistenti rispetto a quelli originalmente definiti e non sempre accettabili, hanno dato adito a colonizzazioni ideologiche, tra le quali ha un ruolo centrale la teoria del *gender*, che è pericolosissima perché cancella le differenze nella pretesa di rendere tutti uguali. Tali colonizzazioni ideologiche provocano ferite e divisioni tra gli Stati, anziché favorire l'edificazione della pace.

Il dialogo, invece, dev'essere l'anima della Comunità internazionale. L'attuale congiuntura è anche causata dall'indebolimento di quelle strutture di diplomazia multilaterale che hanno visto la luce dopo il secondo conflitto mondiale. Organismi creati per favorire la sicurezza, la pace e la cooperazione non riescono più a unire tutti i loro membri intorno a un tavolo. C'è il rischio di una "monadologia" e della frammentazione in "club" che lasciano entrare solo Stati ritenuti ideologicamente affini. Anche quegli organismi finora efficienti, concentrati sul bene comune e su questioni tecniche, rischiano una paralisi a causa di polarizzazioni ideologiche, venendo strumentalizzati da singoli Stati.

Per rilanciare un comune impegno a servizio della pace, occorre recuperare le radici, lo spirito e i valori che hanno originato quegli organismi, pur tenendo conto del mutato contesto e avendo riguardo per quanti non si sentono adeguatamente rappresentati dalle strutture delle Organizzazioni internazionali.

Certamente dialogare richiede pazienza, perseveranza e capacità di ascolto, ma quando ci si adopera nel tentativo sincero di porre fine alle discordie, si possono raggiungere risultati significativi. Penso ad esempio all'*Accordo di Belfast*, noto anche come *Accordo del Venerdì Santo*, firmato dai Governi britannico e irlandese, di cui lo scorso anno si è ricordato il 25° anniversario. Esso, ponendo fine a trent'anni di violento conflitto, può essere preso ad esempio per spronare e stimolare le Autorità a credere nei processi di pace, nonostante le difficoltà e i sacrifici che richiedono.

La via della pace passa per il dialogo politico e sociale, poiché esso è alla base della

convivenza civile di una moderna comunità politica. Il 2024 vedrà la convocazione di elezioni in molti Stati. Le elezioni sono un momento fondamentale della vita di un Paese, poiché consentono a tutti i cittadini di scegliere responsabilmente i propri governanti. Risuonano più che mai attuali le parole di Pio XII: «Esprimere il proprio parere sui doveri e i sacrifici, che gli vengono imposti; non essere costretto ad ubbidire senza essere stato ascoltato: ecco due diritti del cittadino, che trovano nella democrazia, come indica il suo nome stesso, la loro espressione. Dalla solidità, dall'armonia, dai buoni frutti di questo contatto tra i cittadini e il governo dello Stato, si può riconoscere se una democrazia è veramente sana ed equilibrata, e quale sia la sua forza di vita e di sviluppo»[9].

È perciò importante che i cittadini, specialmente le giovani generazioni che saranno chiamate alle urne per la prima volta, avvertano come loro precipua responsabilità quella di contribuire all'edificazione del bene comune, attraverso una partecipazione libera e consapevole alle votazioni. D'altronde la politica va sempre intesa non come appropriazione del potere, ma come «forma più alta di carità»[10]e dunque del servizio al prossimo in seno a una comunità locale o nazionale.

La via della pace passa pure attraverso il dialogo interreligioso, che innanzitutto richiede la tutela della libertà religiosa e il rispetto delle minoranze. Duole, ad esempio, constatare come cresca il numero di Paesi che adottano modelli di controllo centralizzato sulla libertà di religione, con l'uso massiccio di tecnologia. In altri luoghi, le comunità religiose minoritarie si trovano spesso in una situazione sempre più drammatica. In alcuni casi sono a rischio di estinzione, a causa di una combinazione di azioni terroristiche, attacchi al patrimonio culturale e misure più subdole come la proliferazione delle leggi anti-conversione, la manipolazione delle regole elettorali e le restrizioni finanziarie.

Preoccupa particolarmente l'aumento degli atti di antisemitismo verificatisi negli ultimi mesi; e ancora una volta sono a ribadire che questa piaga va sradicata dalla società, soprattutto con l'educazione alla fraternità e all'accoglienza dell'altro.

Parimenti preoccupa la crescita della persecuzione e della discriminazione nei confronti dei cristiani, soprattutto negli ultimi dieci anni. Essa riguarda non di rado, seppure in modo incruento ma socialmente rilevante, quei fenomeni di lenta marginalizzazione ed esclusione dalla vita politica e sociale e dall'esercizio di certe professioni che avvengono anche in terre tradizionalmente cristiane. Nel complesso sono oltre 360 milioni i cristiani nel mondo che sperimentano un livello alto di persecuzione e discriminazione a causa della propria fede, e sono sempre di più quelli costretti a fuggire dalle proprie terre d'origine.

Infine, la via della pace passa per l'educazione, che è il principale investimento sul futuro e sulle giovani generazioni. Ho ancora vivo il ricordo della Giornata Mondiale della Gioventù svoltasi in Portogallo nell'agosto scorso. Mentre ringrazio nuovamente le Autorità portoghesi, civili e religiose, per l'impegno profuso nell'organizzazione, conservo nel cuore l'incontro con più di un milione di giovani, provenienti da ogni parte del mondo, pieni di entusiasmo e voglia di vivere. La loro presenza è stata un grande inno alla pace e la testimonianza che «l'unità è superiore al conflitto»[11] e che è «possibile sviluppare una comunione nelle differenze»[12].

Nei tempi moderni, parte della sfida educativa riguarda un uso etico delle nuove tecnologie. Esse possono facilmente diventare strumenti di divisione o di diffusione di menzogna, le cosiddette *fake news*, ma sono anche mezzo di incontro, di scambi reciproci e un importante veicolo di pace. «I notevoli progressi delle nuove tecnologie dell'informazione, specialmente nella sfera digitale, presentano dunque entusiasmanti

[9] Cfr. *Radiomessaggio natalizio ai popoli del mondo intero*, 24 dicembre 1944.

[10] Pio XI, *Udienza ai dirigenti della Federazione Universitaria Cattolica*, 18 dicembre 1927.

[11] Esort. ap. *Evangelii gaudium* (24 novembre 2013), 228.

[12] *Ibid*.

opportunità e gravi rischi, con serie implicazioni per il perseguimento della giustizia e dell'armonia tra i popoli»[13]. Per questo motivo ho ritenuto importante dedicare l'annuale *Messaggio per la Giornata Mondiale della Pace* all'intelligenza artificiale, che è una delle sfide più importanti dei prossimi anni.

È indispensabile che lo sviluppo tecnologico avvenga in modo etico e responsabile, preservando la centralità della persona umana, il cui apporto non può né potrà mai essere rimpiazzato da un algoritmo o da una macchina. «La dignità intrinseca di ogni persona e la fraternità che ci lega come membri dell'unica famiglia umana devono stare alla base dello sviluppo di nuove tecnologie e servire come criteri indiscutibili per valutarle prima del loro impiego, in modo che il progresso digitale possa avvenire nel rispetto della giustizia e contribuire alla causa della pace»[14].

Occorre dunque una riflessione attenta ad ogni livello, nazionale e internazionale, politico e sociale, perché lo sviluppo dell'intelligenza artificiale si mantenga al servizio dell'uomo, favorendo e non ostacolando, specialmente nei giovani, le relazioni interpersonali, un sano spirito di fraternità e un pensiero critico capace di discernimento.

In tale prospettiva acquisiscono particolare rilevanza le due Conferenze Diplomatiche dell'Organizzazione Mondiale della Proprietà Intellettuale, che avranno luogo nel 2024 e alle quali la Santa Sede parteciperà come Stato membro. Per la Santa Sede, la proprietà intellettuale è essenzialmente orientata alla promozione del bene comune e non può svincolarsi da limitazioni di natura etica dando luogo a situazioni di ingiustizia e indebito sfruttamento. Speciale attenzione va poi prestata alla tutela del patrimonio genetico umano, impedendo che si realizzino pratiche contrarie alla dignità dell'uomo, quali la brevettabilità del materiale biologico umano e la clonazione di esseri umani.

Eccellenze, Signore e Signori,

in quest'anno la Chiesa si prepara al Giubileo che inizierà il prossimo Natale. Ringrazio in particolare le Autorità italiane, nazionali e locali, per l'impegno che stanno profondendo nel preparare la città di Roma ad accogliere numerosi pellegrini e consentire loro di trarre frutti spirituali dal cammino giubilare.

Forse oggi più che mai abbiamo bisogno dell'anno giubilare. Di fronte a tante sofferenze, che provocano disperazione non soltanto nelle persone direttamente colpite, ma in tutte le nostre società; di fronte ai nostri giovani, che invece di sognare un futuro migliore si sentono spesso impotenti e frustrati; e di fronte all'oscurità di questo mondo, che sembra diffondersi anziché allontanarsi, il Giubileo è l'annuncio che Dio non abbandona mai il suo popolo e tiene sempre aperte le porte del suo Regno. Nella tradizione giudeo-cristiana il Giubileo è un tempo di grazia in cui sperimentare la misericordia di Dio e il dono della sua pace. È un tempo di giustizia in cui i peccati sono rimessi, la riconciliazione supera l'ingiustizia, e la terra si riposa. Esso può essere per tutti - cristiani e non cristiani - il tempo in cui spezzare le spade e farne aratri; il tempo in cui una nazione non alzerà più la spada contro un'altra, né si imparerà più l'arte della guerra (cfr *Is* 2,4).

È questo l'augurio, cari fratelli e sorelle, l'augurio che formulo di cuore a ciascuno di voi, cari Ambasciatori, alle vostre famiglie, ai collaboratori e ai popoli che rappresentate. Grazie e buon anno a tutti![15]

Papa Francesco

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[13] *Messaggio per la LVII Giornata Mondiale della Pace* (8 dicembre 2023), 1.

[14] *Ibid*., 2.

[15] Cfr. Discorso del Santo Padre Francesco ai membri del corpo Diplomatico accreditato presso la Santa Sede per la presentazione degli auguri del nuovo anno, Aula della Benedizione, lunedì, 8 gennaio 2024.

Un anno fa in questa stessa circostanza concludevo il mio saluto auspicando il ripristino di una pace giusta per l'Ucraina.

Dobbiamo invece constatare, purtroppo, che non soltanto Kiev è ancora impegnata a difendersi dall'inaccettabile aggressione russa, ma che molte altre aree del nostro globo sono oggi in condizioni di maggiore precarietà rispetto allo scorso anno.

Come non era difficile immaginare, a causa dello sconvolgimento di valori indotto dall'attacco alle regole della comunità internazionale, l'aggressione alla stabilità e alla pace si è riverberata in negativo in tutte le aree del globo e su tutti i dossier, da quello del contrasto alle mutazioni climatiche a quello della sicurezza alimentare – con il pericolo di rendere popolazioni del mondo più povere e meno sicure – a quello dello spazio che rischia di trasformarsi, da ambito di collaborazione scientifica a vantaggio dell'umanità, in ambito, oltre che di competizione commerciale, di contrapposizione militare, con drammatiche prospettive per il pianeta su cui, tutti, viviamo.

Lo stato del mondo sul finire di questo 2023 ci impone di superare la superficiale sottovalutazione con cui si assiste al moltiplicarsi delle crisi e dei drammi umani che comportano.

Il Medio Oriente è nuovamente sconvolto da una spirale di violenza a seguito dei proditori attacchi terroristici mossi da Hamas contro inermi cittadini israeliani.

Assassinii e brutalità verso cui rinnovo la più forte e ferma condanna della Repubblica Italiana.

La situazione a Gaza è stata definita dai vertici delle Nazioni Unite come "apocalittica" e i resti dei territori sotto l'Autorità Nazionale Palestinese sono, anch'essi, in preda a gravi sofferenze, per le violenze che le persone subiscono.

In Europa, la guerra di Mosca contro l'Ucraina continua a provocare sofferenze indicibili alla popolazione civile e conseguenze drammatiche a livello mondiale.

L'impegno della comunità internazionale in Africa si è dimostrato insufficiente a frenare l'ondata di focolai di crisi.

Così il deterioramento del quadro securitario nel Sahel ha aggravato ulteriormente l'emergenza umanitaria in atto.

Gli scontri in Sudan hanno provocato migliaia di vittime nonché milioni di sfollati interni e di rifugiati.

Il succedersi delle crisi rischia di distogliere l'indispensabile attenzione da altre situazioni foriere di non meno gravi sofferenze: penso alle bambine e alle donne afgane ostaggio dei talebani; alle giovani e ai giovani iraniani le cui aspirazioni sono quotidianamente concusse e soffocate.

Queste sofferenze assumono a volte caratteri ancor più intollerabili.

Poche settimane fa, in occasione della Giornata mondiale del fanciullo, l'Unicef Italia ha pubblicato un rapporto, i cui numeri inchiodano alle responsabilità della comunità internazionale, dimostrando inequivocabilmente le insufficienze palesate dalla sua azione.

In oltre due anni di guerra - rileva quel rapporto - 6,4 milioni bambini ucraini sono risultati bisognosi di assistenza umanitaria. In Siria sono più di 13.000 i bambini che hanno perso la vita o sono stati feriti nel lungo conflitto interno; quasi altrettante sono le piccole vittime in Yemen. Ad Haiti la stragrande maggioranza di bambini vive sotto il controllo di gruppi armati e rischia ogni giorno la morte, il ferimento, il reclutamento.

A questi teatri si aggiunge la più recente barbarie che poc'anzi ricordavo: la ferocia di Hamas contro i bambini inermi. Neppure i neonati sono stati risparmiati quel giorno. Ci colpiscono dolorosamente le oltre 5.000 piccole vittime innocenti nella striscia di Gaza.

Una comunità internazionale che non riesce a proteggere i suoi figli, che non è in grado di recare aiuto umanitario neanche ai fanciulli, appare inumana.

Ci allarmiamo per i danni inflitti al nostro pianeta da virus o da catastrofi naturali ma dobbiamo constatare che il pericolo maggiore arriva dagli sciagurati comportamenti di alcuni governi, da forze paramilitari, da gruppi terroristici.

Impossibile non riconoscere la chiaroveggenza del Pontefice, Francesco, che già dieci anni orsono ha parlato per la prima volta di una "guerra mondiale a pezzi".

Quel monito, oggi più che mai attuale, non deve essere ignorato e richiede una più consapevole lettura della realtà.

Questi frammenti di guerra, infatti, rischiano di creare false prospettive, ingannando la nostra capacità di analisi e di comprensione.

Signore e signori Ambasciatori,

a fronte di uno scenario che sembrerebbe implicare la fine di un sistema basato su regole condivise, alcuni osservatori parlano di "un'età del caos", in un mondo in cui tutto è permesso, dove l'atto di aggressione non è più censurato come violazione ma, al contrario, viene addirittura giustificato per pretesi interessi nazionali.

L'ondata di destabilizzazione delle regole adottate dalla comunità internazionale, e che portò alla creazione delle Nazioni Unite, è davanti a tutti noi.

I pretesti sono i più diversi: con approccio inammissibile c'è chi giustifica gli attacchi come desiderio di costruire un nuovo ordine internazionale, più rispettoso di nuovi equilibri affacciatisi.

Il mondo in questi decenni è cambiato ma l'esito dei conflitti non lo condurrebbe mai a un ordine più rispettoso e più giusto.

Se si desidera realizzare regole e istituzioni più rispondenti è certamente produttivo ed efficace procedere all'impresa quando si è in pace.

È la pari dignità tra tutti i soggetti internazionali il principio su cui impostare i rapporti tra gli Stati. Con un cambio di paradigma, che sposti definitivamente l'accento dalla competizione alla cooperazione.

Il modello non può essere quello delle conferenze internazionali che si limitino, di volta in volta, a fotografare contingenti rapporti di forza.

Dobbiamo essere consapevoli che il nostro pianeta, per sopravvivere, ha indispensabile necessità di un sistema multilaterale, capace di sviluppare ulteriormente forme di collaborazione e di integrazione.

Non si tratta di una difesa pregiudiziale dell'attuale sistema multilaterale: le Organizzazioni Internazionali di cui oggi disponiamo non sono state disegnate per affrontare tutte le sfide che abbiamo davanti e, riflettendo gli equilibri usciti dalla Seconda guerra mondiale, spesso non sono state in grado di registrare le novità, perdendo efficacia.

La soluzione, tuttavia, non consiste nell'accentuarne i difetti, rischio insito in alcune riforme ipotizzate, cristallizzando, ad esempio, nuove categorie di serie A e serie B per i membri del Consiglio di Sicurezza dell'Onu.

Dall'Organizzazione delle Nazioni Unite, all'Organizzazione mondiale del commercio, dall'Organizzazione mondiale della sanità, al regime sul controllo degli armamenti nucleari, queste e altre istituzioni hanno bisogno di essere aggiornate e rafforzate.

Delle loro carenze tutti paghiamo un prezzo.

Sarebbe tuttavia errato ritenere che la soluzione a tali carenze risieda nello smantellamento delle regole della globalizzazione: i limiti del multilateralismo odierno sono, infatti, riconducibili, in grande misura, alla volontà politica espressa dagli Stati che ne fanno parte.

Indebolire l'architettura internazionale darebbe libero campo a forze puramente distruttive laddove un multilateralismo efficace, fondato su principi di eguaglianza, trasparenti, responsabili e rappresentativi, sarebbe al contrario di grande vantaggio.

La sfida principale è proprio quella della rappresentatività.

Le voci di chi oggi non si sente sufficientemente ascoltato vanno prese in adeguata considerazione, a partire dalle legittime esigenze dei Paesi più poveri, più fragili, perché sono quelli le cui popolazioni patiscono maggiormente i contraccolpi delle crisi che si susseguono.

Aggiornare le regole significa rendere più autentica la testimonianza dei valori sot-

tesi alla nostra convivenza civile.

Abbiamo da poco celebrato il 75° anniversario della Dichiarazione Universale dei Diritti dell'Uomo – come ricordava il Decano – un documento che non costituisce appannaggio di una sola cultura o di un singolo gruppo di Paesi ma esprime il patrimonio di valori comuni e condivisi dell'umanità.

Assumere come guida la tutela dei diritti umani rende le società più forti, resilienti ed eque anche nei rapporti fra le nazioni.

Il "pilastro" dei diritti umani è funzionale al raggiungimento degli obiettivi di sviluppo sostenibile che le Nazioni Unite si sono date a partire dagli ambiti della pace e sicurezza e della lotta alla povertà e alle disuguaglianze.

Lo stesso va detto per i principi fondanti lo Stato di diritto.

La tragedia della Seconda guerra mondiale spinse al cambiamento, al negoziato per un ordine internazionale che non fosse basato sul diritto del più forte.

La "guerra mondiale a pezzi", porta a un mondo in pezzi.

Si innalzano muri, si attenta alla libertà di navigazione e di approdo.

Per evitare di essere trasformata in conflitti di più ampie proporzioni, deve spingere a ricercare un fattore comune da cui riprendere le fila di un confronto che consenta una proficua riforma strutturale del multilateralismo.

I pericoli di oggi hanno nomi diversi da quelli di ottant'anni fa, ma non sono meno temibili, e dovrebbero indurci ad agire, subito, insieme.

L'indebolimento del multilateralismo non poteva accadere in un momento peggiore, in cui tutte le sfide più grandi del ventunesimo secolo sono di carattere globale.

Dalle pandemie ai cambiamenti climatici, dalla sicurezza cibernetica al governo dell'intelligenza artificiale, dalla lotta alla povertà alla proliferazione nucleare, tutte le minacce a cui dobbiamo far fronte richiedono multilateralismo e cooperazione internazionale.

Ci guardano i cittadini dei nostri Paesi, attenti a disuguaglianze e ingiustizie sociali, economiche, generazionali, di genere o etniche.

Signore e signori Ambasciatori,

ho tracciato un quadro realista, con molteplici ombre che vi gravano.

Vanno, comunque, colti alcuni spiragli positivi sulla strada della cooperazione internazionale.

Il 2023 ha visto l'inclusione dell'Unione Africana come membro permanente del G20: è il riconoscimento della legittima aspirazione degli oltre cinquanta Stati africani a svolgere un ruolo più rilevante e crescente nella scena internazionale.

È, allo stesso tempo, un concreto passo per inserire una parte così importante e vitale del mondo all'interno delle dinamiche planetarie.

È significativo che quest'atteso riconoscimento - che anche l'Italia ha sempre sostenuto - sia avvenuto sotto la Presidenza di un importante Paese asiatico, l'India, e che toccherà a un grande Paese dell'America Latina, il Brasile, presiedere il primo G20 allargato all'Unione Africana.

L'Unione Europea ha deciso di procedere, dopo anni di ritardi, sulla strada del ricongiungimento con molti dei Paesi europei candidati a farne parte.

Si tratta di un percorso a volte impervio, ma il cui profondo significato storico e politico riveste grande rilievo.

Allargamento significa inclusione, accettazione delle differenze, solidarietà, valori agli antipodi rispetto alle pulsioni neo-imperialiste che provengono, in questo periodo, da Mosca.

Oltre ad ampliare il numero dei suoi membri, l'Unione Europea dovrà mettere mano a quel complesso di riforme istituzionali necessarie per porla in grado di affrontare, con efficacia e tempestività, le sfide del nostro tempo, offrendo l'esempio di una comunità che, attraverso il dialogo e il negoziato, contribuisce in maniera ancora più rilevante alla causa della pace e della collaborazione internazionali.

Numerose – ripeto – sono le istanze che l'agenda internazionale propone e di gran-

de impatto le scelte che una comunità come l'Unione Europea può compiere, a partire dal clima.

Le iniziative recentemente assunte in sede europea in materia di Intelligenza Artificiale, per la definizione di standard e di regole, sono un esempio di buone pratiche a vantaggio di tutta la comunità internazionale.

Positivi segnali sono giunti anche dalla COP28: la comunità internazionale ha raggiunto un ampio consenso sul progressivo abbandono dei combustibili fossili.

Siamo adesso chiamati a dare rapida e concreta attuazione a quanto deciso, consapevoli che il ritardo accumulato è già molto e il costo di nuove esitazioni ricadrebbe, moltiplicato, sulle future generazioni.

Vi è la piena presa di coscienza che mentre si perseguono gli obiettivi di lungo periodo, bisogna sostenere i Paesi che più sono colpiti dai cambiamenti climatici. L'Italia parteciperà con 100 milioni di euro al nuovo fondo globale per le perdite e i danni, volto a fornire aiuto ai Paesi vulnerabili per superare le distruzioni causate dai cambiamenti climatici.

Il 2023 ha visto anche l'ingresso della Finlandia nell'Alleanza Atlantica e il raggiungimento di un'intesa per il prossimo ingresso della Svezia.

Il tema della sicurezza in un mondo sempre più interconnesso e senza più distanze riguarda i popoli sotto qualunque latitudine.

La parabola della NATO – un'organizzazione che ha ritrovato centralità e vigore nell'emergenza drammatica e imprevista di una guerra in Europa – testimonia quanto sia importante non abbandonare la strada del multilateralismo.

Va confermata la volontà di dialogo, nel rispetto del diritto internazionale, tra le strutture di sicurezza per perseguire la pace attraverso il multilateralismo, trovando il coraggio per riformarlo, ampliarlo, anche nella sua architettura.

Sul terreno degli impegni internazionali della Repubblica Italiana permettetemi di citare la Presidenza del G7, che si appresta ad assumere nel 2024.

Come è costume del nostro Paese, la ricerca del dialogo ne costituirà un elemento portante.

L'Italia non farà venire meno il proprio impegno per creare fiducia e spazi di collaborazione. Per raggiungere risultati di rilievo avremo bisogno del sostegno di tutti voi, che nel prossimo anno seguirete da Roma l'azione del nostro Paese[16].

Il Presidente della Repubblica
Sergio Mattarella

Nell'introdurre questa nuova opera dal titolo *Crimini di guerra e contro l'umanità Fatti, Documenti e Prospettive*, a cura del sottoscritto, realizzato dal Dipartimento di analisi studio e monitoraggio dei fenomeni criminali e mafiosi e dal Dipartimento di analisi, studi e monitoraggio dei delitti ambientali, dell'ecomafia, della tratta degli esseri umani, del caporalato e di ogni altra forma di schiavitù, edita dalla Pontificia Accademia Mariana Internazionale presso la Santa Sede, non potevo iniziare senza fare riferimento al grido di dolore e di allarme lanciato da Papa Francesco e dal Presidente della Repubblica Sergio Mattarella, che in due momenti diversi, ma importanti fra loro, ovvero l'incontro con gli ambasciatori di tutto il mondo, hanno manifestato la loro preoccupazione per la situazione che si è venuta a creare con la guerra in Ucraina, iniziata con l'invasione della Russia nel febbraio 2022 e giunta ormai al secondo anno dove si contano centinaia di migliaia di morti (civili e militari) da ambo le parti con conseguenze drammatiche a livello mondiale, nell'evocare ogni giorno lo spettro di una guerra atomica!, e lo scoppio del conflitto tra Israele e la Palestina del 7 ottobre 2023, dopo l'attacco dell'organizzazione islamico-palestrinese di Hamas che ha sparato dalla striscia di Gaza, quest'ultima

[16] Intervento del Presidente della Repubblica Sergio Mattarella in occasione della Cerimonia per lo scambio degli auguri di fine anno con il Corpo Diplomatico, Palazzo del Quirinale, 15 dicembre 2023.

sottoposta dal 2006 al controllo israeliano dello spazio aereo, delle acque territoriali e dell'accesso attraverso i varchi, un'enorme quantità di missili nel Sud di Israele oltre a far entrare le sue milizie armate sul terreno dove sono stati feriti, torturati e uccisi in maniera atroce centinaia di soldati e innocenti e molti sono stati presi in ostaggio, determinando, la durissima reazione militare di Israele nella striscia di Gaza con la morte di decine di migliaia di palestinesi, in maggioranza civili, tra cui tanti bambini, ragazzi e giovani, causando, altresì, una situazione umanitaria gravissima con sofferenze inimmaginabili tanto da essere definita una "situazione apocalittica" dai vertici delle Nazioni Unite. Senza pensare, inoltre che questa guerra va ad aggravare ancora di più gli equilibri in una regione fragile e carica di tensioni: oltre un milione di palestinesi che vivevano a nord di Gaza sono stati costretti dagli israeliani a lasciare le loro case per trasferirsi a sud entro 24 ore, dopo che si sono visti bloccare i rifornimenti di cibo, elettricità e carburante.

Quello che sta accadendo mette in risalto tutta la sua drammaticità con i dati forniti dall'Agenzia delle Nazioni Unite per il soccorso e l'occupazione dei rifugiati palestinesi nel vicino Oriente (UNRWA, *UN Relief and Works Agency for Palestine Refugees in the Near East*), i quali evidenziano che ci sono circa 6 milioni di rifugiati palestinesi registrati nel mondo e circa 1,5 milioni di loro vivono in 58 campi profughi riconosciuti in Giordania, Libano, Siria e Palestina (Striscia di Gaza e Cisgiordania). Ma la situazione risulta essere ancora più grave, in quanto non tutti i rifugiati palestinesi sono registrati presso UNRWA e molti possono vivere fuori da questi campi o in altri Paesi o in campi profughi non ufficiali come avviene in Giordania, in Libano in Siria, nella Striscia di Gaza e in Cisgiordania[17].

Come dichiarato in più occasioni da papa Francesco da tempo il mondo è *attraversato da un crescente numero di conflitti che lentamente trasformano quella che ho più volte definito terza guerra mondiale a pezzi in un vero e proprio conflitto globale,* dove, purtroppo, la logica della "guerra" sta prevalendo sulla "logica della pace" fra i popoli, tanto da essere sottolineato dal Presidente della Repubblica Sergio Mattarella: *Impossibile non riconoscere la chiaroveggenza del Pontefice, Francesco, che già dieci anni orsono ha parlato per la prima volta di una "guerra mondiale a pezzi". Quel monito, oggi più che mai attuale, non deve essere ignorato e richiede una più consapevole lettura della realtà.*

Troppi sono i conflitti che minano la pace nel mondo: Ucraina-Russia, Israele-Palestina, la tesa situazione nel Caucaso Meridionale tra l'Armenia e l'Azerbaigian, in Siria, in Giordania, in Libano, nello Yemen, in Myanmar, il deterioramento ed l'instabilità in vari Paesi africani è stato aggravato ulteriormente dall'emergenza umanitaria dovuta alla guerra in atto in Burkina Faso, in Camerun, nel Ciad, in Etiopia, in Libia, nel Malì, in Mozambico, nel Niger; mentre ci sono situazioni di crisi in: Nigeria, Repubblica Centroafricana, Repubblica del Congo, Sahara Occidentale, Somalia, Sudan, Sudan del sud, Algeria, Burundi, Costa d'Avorio, Egitto, Eritrea, Senegal, Tunisia, Uganda, Zimbabwe. Inoltre, oltre alle vittime dobbiamo evidenziate il dramma degli sfollati in Africa: quasi 28 milioni interni a 11 Paesi, come osservato dallo CeSPI[18]:

1. Il conflitto in Burkina Faso: è tra il governo e vari gruppi armati, tra cui lo Stato Islamico nel Grande Sahara (ISGS). Il conflitto ha causato quasi 2 milioni di sfollati interni.
2. Il conflitto in Camerun: è tra il governo e il gruppo armato Boko Haram. Il conflitto ha causato quasi un milione di sfollati interni.
3. Il conflitto in Ciad: è tra il governo e il gruppo armato Fronte per il cambiamento e la concordia in Ciad (FACT). Il conflitto ha causato quasi 400.000 sfollati interni.
4. La guerra del Tigray (Etiopia): è tra il governo e il Fronte di liberazione del popolo tigrino (FLPT), è in corso dal 2020 e ci sono quasi 4 milioni di sfollati interni.
5. Il conflitto in Mali: è tra il governo e vari gruppi armati, tra cui lo Stato Islamico nel Grande Sahara (FIGS) e al-Qaeda nel Maghreb Islamico (AQMI). Il conflitto ha causato quasi mezzo milione di sfollati interni.
6. Il conflitto in Nigeria: è tra il governo e vari gruppi armati, tra cui Boko Haram e la Provincia dello Stato Islamico dell'Africa Occidentale. Il conflitto ha causato oltre 3,6 milioni di sfollati interni.
7. Il conflitto in Repubblica Centrafricana (RC): è tra il governo e vari gruppi armati, tra cui i Seleka e gli Anti-Balaka. Il conflitto ha causato oltre mezzo milione di sfollati interni.
8. Il conflitto nella Repubblica democratica del Congo (RDC): è un conflitto complesso e multiforme che dura dal 1996. Il conflitto ha causato 5,7 milioni di sfollati interni.
9. Il conflitto in Somalia: è tra il governo e vari gruppi armati, tra cui al-Shabaab. Il conflitto ha causato

[17] Cfr. Atlante geopolitico 2023, Treccani, Roma, pp. XV e XVI.

[18] Zupi M., Osservatorio di Politica Internazionale, Approfondimento CeSPI, I conflitti armati dimenticati, 24 luglio 2024, p.12.

quasi 4 milioni di sfollati interni.

10. Il conflitto in Sudan: è tra il governo e vari gruppi armati, tra cui il Movimento di liberazione del popolo sudanese del Nord (MLPS-N). Il conflitto ha causato oltre 3,5 milioni di sfollati.
11. Il conflitto nel Sudan del sud: è tra il governo e vari gruppi armati. Il conflitto ha causato oltre 2,2 milioni di sfollati interni.

Inoltre, sebbene non vi siano guerre aperte nelle Americhe, fra alcuni Paesi, per esempio tra il Venezuela e la Guyana, vi sono forti tensioni, mentre in altri, come in Perù, osserviamo fenomeni di polarizzazione che compromettono l'armonia sociale e indeboliscono le istituzioni democratiche, desta ancora preoccupazione la situazione in Nicaragua, l'emergenza in Equador, in Haiti, in Honduras, le recenti tensioni tra Serbia e Kosovo in Europa, o nel quadrante asiatico, in Afghanistan da quando i talebani sono tornati al potere nell'agosto 2021, è sprofondato in una crisi umanitaria di proporzioni enormi, aggravata recentemente dai terremoti che hanno colpito la provincia di Herat, le tensioni in Iran, nelle Filippine, in Indonesia e Thailandia o la delicata situazione della Corea del Nord dove non passa giorno che il dittatore Kim Jong-un, dopo aver ridotto alla fame il suo popolo a discapito dell'incremento delle spese in armamenti, non evochi uno scenario atomico contro la Corea del Sud o contro il Giappone o contro gli Stati Uniti, le relazioni sempre tese tra India e Pakistan che attestano una rivalità storica tra i due Paesi dove in settant'anni di storia, le due nazioni "separate alla nascita" nel 1947, sono state protagoniste di tre guerre, oltre a conflitti di più breve durata e incidenti di confine che hanno visto i rispettivi eserciti opporsi in schermaglie e scontri a fuoco e nonostante che nel 2003 i due paesi hanno formalmente firmato un accordo di cessate il fuoco dopo una escalation di violenze negli anni Novanta, per non parlare poi, dei difficili rapporti tra gli Stati Uniti e la Cina e della spinosa questione dell'indipendenza di Taiwan che la Cina rivendica di annettere anche con la forza, dove si segnalano ripetuti sconfinamenti dello spazio aereo da parte di bombardieri e di unità navali da parte delle due potenze.

Si deve osservare che oggi il numero dei conflitti violenti a livello globale è il più alto dalla fine della Seconda guerra mondiale e a pagarne le conseguenze sono innanzitutto le persone - circa 2 miliardi - che vivono in aree interessate da eventi bellici.

Lo scenario che ormai si va via delineando nel mondo di sofferenza, morte, distruzione mette in risalto che attualmente ci sono 55 conflitti armati tra i vari stati, di cui 8 hanno raggiunto il livello di guerra e 22 sono stati internazionalizzati, il che significa che una o entrambe le parti hanno ricevuto il supporto di truppe da uno Stato straniero. Anche se non si tratta di guerre che hanno la stessa rilevanza della guerra in Ucraina, concorrono a fare del 2022 l'anno più letale dai tempi del genocidio in Ruanda nel 1994. Non dimentichiamo che lil conflitto in Etiopia è stato definito quello più letale registrato nel periodo successivo al 1989 nel mondo, con oltre 101.000 vittime. A completare un quadro preoccupante e che fa riflettere sul delicato momento che l'umanità sta vivendo è anche il dato dei conflitti armati non statali che ha raggiunto il livello record per il 2022: l'UCDP[19] ha registrato 82 conflitti; 9 su 10 non statali più letali dell'anno si sono verificati in Messico, dove i cartelli della droga rivali si combattono per il controllo del territorio dagli anni Ottanta. Ultimamente, la violenza alle bande si è intensificata anche in Brasile, Haiti, Honduras ed El Salvador[20].

Questa lunga scia di conflitti sta provocando milioni e milioni di sfollati, rifugiati e richiedenti asilo e altre persone che la comunità internazionale deve proteggere.

In un quadro geopolitico che a oggi appare complesso e in mutamento, i conflitti e le tensioni in atto hanno infatti il potenziale di incidere sul livello della minaccia terroristica a livello nazionale, regionale e globale.

Al riguardo, si osserva che con riferimento alle dinamiche interne al terrorismo jihadista, queste risultano sempre più caratterizzate da una strategia di "delocalizzazione" delle attività da parte di DAESH e al Qaida a favore delle rispettive filiali periferiche. Tale approccio fornisce maggiori garanzie di resilienza, consentendo alle due organizzazioni di adattarsi meglio ai diversi contesti territoriali e di far fronte all'eliminazione di figure centrali di vertice[21]. Il jihad globale appare infatti perfettamente "sintonizzato" su alcune delle principali sfide poste da un mondo in rapida trasformazione. Si pensi al cambiamento climatico, "moltiplicatore" di crisi e minacce in quanto oltre a impattare trasversalmente su settori sensibili come la geopolitica, la sicurezza alimentare, idrica, economica e sociale, incide a cascata anche sull'espansione del terrorismo. Il Sahel è in tal senso una

[19] UCDP: Uppsala Conflict Data Program è un programma di collazionamento ed elaborazione di dati sui conflitti armati nel mondo gestito dall'Università di Uppsala, in Svezia.

[20] Cfr. Atlante geopolitico 2023 cit., p. XVIII.

[21] Presidenza del Consiglio dei ministri, Sistema di informazione per la difesa della Repubblica, relazione annuale 2023, sulla politica per l'informazione per la sicurezza, p. 47.

regione emblematica[22].

Alla Vigilia di Natale del 1944, Pio XII pronunciò un celebre Radiomessaggio ai popoli del mondo intero. La Seconda guerra mondiale stava avvicinandosi alla conclusione dopo oltre cinque anni di conflitto e l'umanità - disse il Pontefice - avvertiva «una volontà sempre più chiara e ferma: fare di questa guerra mondiale, di questo universale sconvolgimento, il punto da cui prenda le mosse un'era novella per il rinnovamento profondo»[23].

Ma purtroppo le vicende degli ultimi tempie e i nuovi equilibri geopolitici che si sono delineati stanno portando ad un ritorno di quello che pensavano non succedesse più: lo spettro della guerra atomica con tutte le sue atrocità! Ecco Papa Francesco come si è espresso sul ricorso di un possibile scenario di guerra atomica: *Non posso non ricordare la supplica con cui nel 1962 san Giovanni XXIII chiese ai potenti del suo tempo di frenare un'escalation bellica che avrebbe potuto trascinare il mondo nel baratro del conflitto nucleare. Non posso dimenticare la forza con cui san Paolo VI, intervenendo nel 1965 all'Assemblea generale delle Nazioni Unite disse: Mai più la guerra! Mai Più la guerra! O, ancora, i tanti appelli per la pace di san Giovanni Paolo II, che nel 1991 ha definito la guerra "un'avventura senza ritorno*[24].

E proprio per cercare di riportare alla mente l'immane tragedia della Seconda guerra mondiale con le stragi perpetrate, con oltre 60 milioni di morti e dei genocidi e conflitti armati che hanno martoriato il XX secolo (Ruanda e dell'ex Jugoslavia fra tutti), che è stato realizzato questo dizionario, indirizzato in particolare ai giovani, affinché possano rendersi conto di cosa realmente indichino le espressioni "crimini di guerra" e "crimini contro l'umanità", di quale sia la loro storia, di quali importanti cambiamenti culturali, politici e giuridici siano il segno, da quale finalità siano pervase, con un *focus* particolare sull'importanza dei Tribunali penali internazionali. Giova far presente che la repressione dei crimini internazionali, anche se prevista, è stata affidata per lungo tempo ai soli tribunali interni. Esempi isolati devono essere considerati i Tribunali penali internazionali di Norimberga (creato con l'Accordo di Londra del 1945, c.d. Carta di Londra) e di Tokyo (creato per effetto di una decisione datata 19 gennaio 1946 del gen. MacArthur, c.d. Carta Atlantica del Tribunale Militare Internazionale per l'Estremo Oriente), istituiti dopo la Seconda guerra mondiale per giudicare i crimini perpetrati dai tedeschi nei territori occupati e dai giapponesi in Estremo Oriente. Entrambi i tribunali devono essere considerati un organo comune delle potenze vincitrici che, in quanto, occupanti, esercitano in Germania ed in Giappone un potere quasi sovrano. La costituzione dei tribunali penali internazionali è abbastanza recente e hanno giurisdizione su individui accusati di aver commesso un crimine internazionale. Sono stati istituiti, con risoluzione del Consiglio di sicurezza delle Nazioni Unite, due tribunali *ad hoc*: uno per giudicare i crimini commessi nell'ex Jugoslavia (ris. 808-1993) a partire dal 1991 e l'altro per giudicare i crimini commessi in Ruanda durante il conflitto civile del 1994 (ris.995-1994). Entrambi i Tribunali erano destinati a cessare le loro funzioni entro il 2014 con la conclusione dei processi degli imputati più significativi, anche se, il Tribunale per il Ruanda ha cessato di funzionare il 2015, mentre quello della ex Jugoslavia nel 2017 (Consiglio di sicurezza ris. 2329-2016). Inoltre, per evitare che alcuni crimini rimanessero impuniti, è stata istituita, con apposita risoluzione del Consiglio di sicurezza delle Nazioni Unite, una struttura più agile, il *Meccanismo internazionale residuale per i Tribunali criminali*, formato da due sezioni, già in funzione, e rispettivamente una per i crimini di competenza del Tribunale del Ruanda e l'altra per il Tribunale della ex Jugoslavia.

Al riguardo, si osserva che i Tribunali per la ex Jugoslavia e il Ruanda devono essere considerate delle strutture create *ad hoc*, di carattere temporaneo e limitativo, ed è per questo che la comunità internazionale, di fronte a scenari "criminali" sempre più frequenti dovuti ai mutamenti geopolitici che si susseguono, ha inteso il bisogno di istituire con una Corte penale internazionale, con sede all'Aja, una struttura permanente e universale. Lo Statuto della Corte è stato adottato a Roma il 17 luglio 1998, in una conferenza internazionale che ha visto la partecipazione di Stati ed è entrato in vigore il 1° luglio 2002. Il nostro Paese solo nel 2012 ha provveduto ad adottare una legge con cui si dispone l'adeguamento con procedimento ordinario, limitato peraltro alle sole disposizioni relative alla cooperazione con la Corte[25] (L. 20 dicembre 2012, n.237) (vds. Approfondimenti).

Inoltre, come osservato da Ronzitti (2021) si deve fare cenno anche ai Tribunali "ibridi" o "internazionalizzati" che vengono istituiti da un accordo tra lo Stato territoriale e le Nazioni Unite o in conseguenza di una

[22] Presidenza del Consiglio dei ministri, rel. cit. p. 48.

[23] *Radiomessaggio natalizio ai popoli del mondo intero*, 24 dicembre 1944.

[24] Papa Francesco, *Contro la guerra. Il coraggio di costruire la pace*, Corriere della Sera, Libreria Editrice Vaticano, Solferino, Milano, 2022, pp. 8.9.

[25] Cfr. Ronzitti N., *Diritto internazionale dei conflitti armati*, Giappichelli, Torino, pp.241-242.

risoluzione dell'autorità internazionale che amministra il territorio sotto mandato delle Nazioni Unite. Fanno parte della composizione di questi tribunali i giudici dello Stato territoriale e dai giudici nominati dalle Nazioni Unite o dall'Autorità che amministra il territorio, quindi di composizione mista. Questi tribunali, di regola, fanno parte del processo di *post conflict peace building*, avente lo scopo di ricostruire il tessuto istituzionale di uno Stato o di un territorio, alla fine del conflitto armato internazionale o di una guerra civile. L'istituzione di un tribunale internazionalizzato a seguito di un accordo tra lo Stato territoriale e Nazioni Unite è solido essere preceduto da una risoluzione del Consiglio di Sicurezza[26]. Rientrano in questa tipologia la Corte Speciale per la Sierra Leone, la Corte Speciale di Timor Est, le Camere straordinarie delle Corti in Cambogia per la persecuzione dei crimini commessi durante il periodo della Kampuchea Democratica (nome ufficiale della Cambogia durante il regime dei Khmer Rossi, 1975-79) e le Camere straordinarie africane in Senegal che nel 2016 hanno condannato l'ex dittatore ciadiano Hissène Habrè.

L'opera realizzata dall'instancabile impegno comune degli Accademici Pontifici del Dipartimento *Liberare Maria dalle mafie* e dei suoi quaranta *Osservatori*, della Procura generale militare presso la Suprema Corte di Cassazione, di vari Studiosi ed Esperti, edito dalla Pontificia Accademia Mariana Internazionale presso la Santa Sede, è strutturata in sei volumi di approfondimento e un volume di saggi**,** con aggiornamenti semestrali:

- Saggi;
- Approfondimenti, vol. I: Cronologia della Seconda guerra mondiale, Ebrei, ebraismo e leggi razziali, Le suppliche alla Sagra Congregazione degli Affari ecclesiastici straordinari;
- Approfondimenti, vol. II: Le suppliche alla Sagra Congregazione degli Affari ecclesiastici straordinari;
- Approfondimenti, vol. III: Stragi, eccidi e relativi processi;
- Approfondimenti, vol. IV: Stragi, eccidi e relativi processi;
- Approfondimenti, vol. V: Stragi, eccidi e relativi processi, Norme e Codici
- Approfondimenti, vol. VI: Norme e Codici.

Fabio Iadeluca, Accademico Pontificio
Coordinatore dei Dipartimenti e degli Osservatori
della Pontifica Academia Mariana Internationalis Santa Sede

[26] Cfr. Ronzitti N., *op. cit*., p.247.

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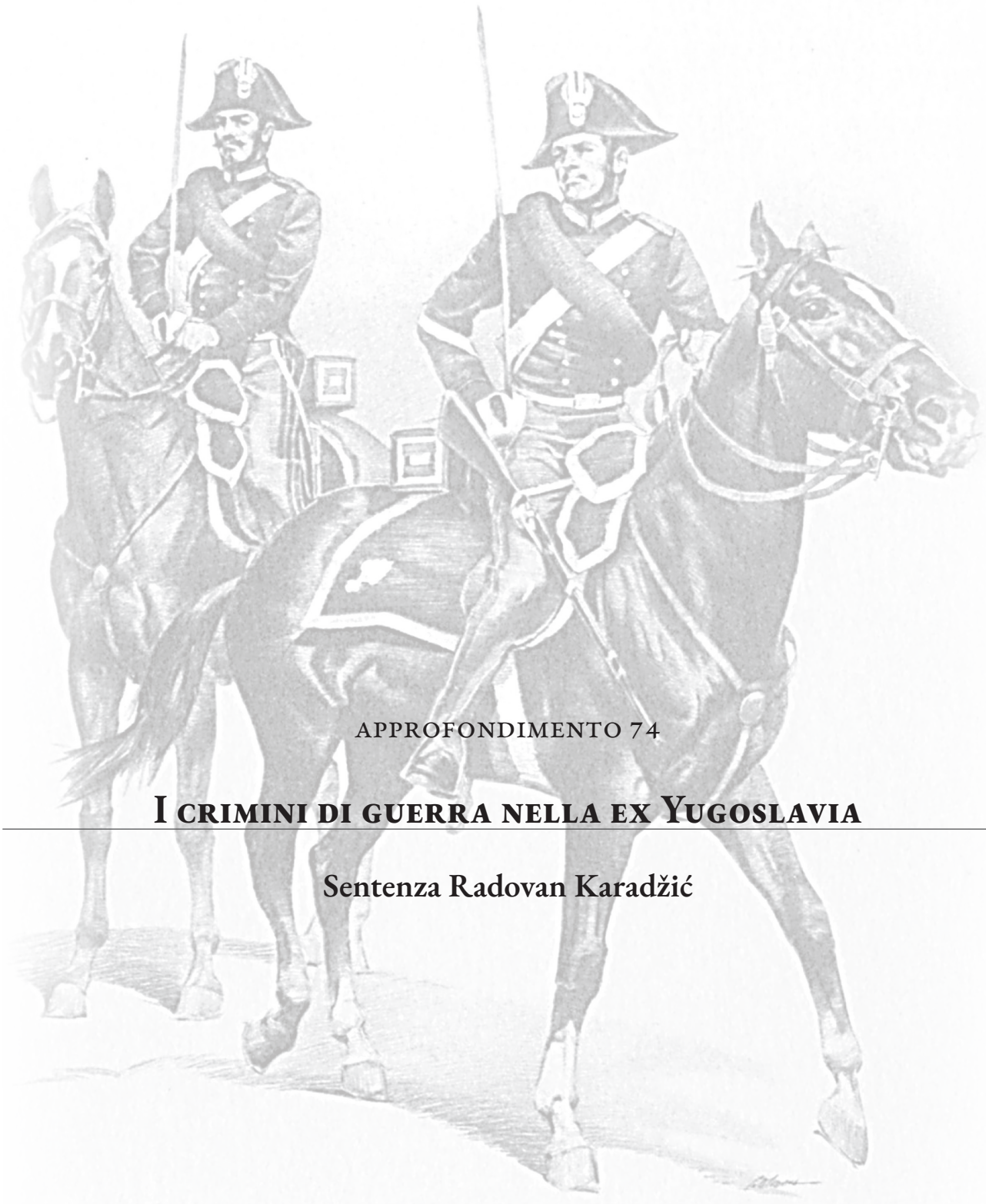

APPROFONDIMENTO 74

I crimini di guerra nella ex Yugoslavia

Sentenza Radovan Karadžić

Fonte: ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/MICT-13-55-A/JUD283R0000522215.pdf

Tribunale internazionale per la ex Jugoslavia. Ergastolo del 20 marzo 2019

L'ex capo politico dei serbi di Bosnia era stato condannato in primo grado il 24 marzo 2016 a 40 anni di reclusione per genocidio e crimini di guerra e contro l'umanità compiuti a Srebrenica, a Sarajevo e nel resto della Bosnia-Erzegovina – uccisioni, deportazioni, persecuzioni, torture – durante il conflitto armato del 1992-1995.

UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-55-A
Date: 20 March 2019
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Vagn Prüsse Joensen, Presiding**
Judge William Hussein Sekule
Judge José Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana
Judge Ivo Nelson de Caires Batista Rosa

Registrar: **Mr. Olufemi Elias**

Judgement of: **20 March 2019**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC REDACTED

JUDGEMENT

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy

Counsel for Mr. Radovan Karadžić:

Mr. Peter Robinson
Ms. Kate Gibson

CONTENTS

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seized of appeals of Mr. Radovan Karadžić ("Karadžić") and the Office of the Prosecutor of the Mechanism ("Prosecution") against the Judgement in the case of *Prosecutor v. Radovan Karadžić*, which was issued on 24 March 2016 by the Trial 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 ("Trial Chamber" and "ICTY", respectively).

I. INTRODUCTION

A. Background

2. Karadžić was born on 19 June 1945 in the municipality of Šavnik, Republic of Montenegro.[1] He was a founding member of the Serbian Democratic Party ("SDS") and served as its President from 12 July 1990 to 19 July 1996.[2] Karadžić also acted as President of the National Security Council of the Serbian Republic of Bosnia and Herzegovina ("SerBiH"), which was created on 27 March 1992 and held sessions until around May 1992.[3] On 12 May 1992, Karadžić was elected as President of the Presidency of the Serbian Republic of Bosnia Herzegovina.[4] From 17 December 1992, he was President of *Republika Srpska* ("RS") and Supreme Commander of its armed forces ("VRS").[5]

3. The Trial Chamber convicted Karadžić pursuant to Articles 7(1) and 7(3) of the Statute of the ICTY ("ICTY Statute") of genocide, crimes against humanity, and violations of the laws or customs of war.[6]

4. The Trial Chamber found that Karadžić participated in a joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina between October 1991 and 30 November 1995 ("Overarching JCE"),[7] and held him guilty, under the first form of joint criminal enterprise, of persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity.[8] It also convicted him, under the third form of joint criminal enterprise, for the crimes of persecution,

[1] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Judgement, 24 March 2016 (confidential; public redacted version filed on 24 March 2016) ("Trial Judgement"), para. 2.
[2] Trial Judgement, para. 2.
[3] Trial Judgement, para. 2.
[4] Trial Judgement, para. 2. On 12 August 1992, the Serbian Republic of Bosnia Herzegovina was renamed *Republika Srpska*. *See* Trial Judgement, paras. 50, 78, 160.
[5] Trial Judgement, para. 2.
[6] *See* Trial Judgement, paras. 3524, 4937-4939, 5849, 5850, 5992, 5993, 5996-5999, 6001-6010, 6022, 6071.
[7] *See* Trial Judgement, paras. 3447, 3462-3464, 3505, 3511, 3512, 3524, 5996, 6002-6007.

extermination, and murder as crimes against humanity as well as murder as a violation of the laws or customs of war.[9]

5. The Trial Chamber also held that, between late May 1992 and October 1995 when the hostilities in Sarajevo ceased, Karadžić participated in a joint criminal enterprise to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling ("Sarajevo JCE").[10] It found him guilty under the first form of joint criminal enterprise of murder as a crime against humanity, and murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war.[11]

6. The Trial Chamber further found that Karadžić participated in a joint criminal enterprise to eliminate Bosnian Muslims in Srebrenica in 1995 ("Srebrenica JCE"),[12] and found him guilty, under the first form of joint criminal enterprise, of genocide, persecution, extermination, and other inhumane acts (forcible transfer) as crimes against humanity and murder as a violation of the laws or customs of war.[13] The Trial Chamber also convicted Karadžić as a superior under Article 7(3) of the ICTY Statute for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war.[14]

7. Finally, the Trial Chamber concluded that, between 25 May and June 1995, Karadžić participated in a joint criminal enterprise with the purpose of taking United Nations ("UN") personnel hostage to compel the North Atlantic Treaty Organization ("NATO") to abstain from conducting air strikes against Bosnian Serb targets ("Hostages JCE").[15] It found Karadžić guilty under the first form of joint criminal enterprise of the crime of hostage-taking as a violation of the laws or customs of war.[16]

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[8] *See* Trial Judgement, paras. 3524, 5996, 6002, 6006, 6007.
[9] *See* Trial Judgement, paras. 3521, 3524, 5996, 6002-6005. Noting that murder and extermination as crimes against humanity are impermissibly cumulative, the Trial Chamber only entered convictions for extermination as a crime against humanity for incidents related to the Overarching JCE where both crimes were established on the basis of the same incident. *See* Trial Judgement, paras. 2446-2464, 6022-6024, n. 20574.
[10] *See* Trial Judgement, paras. 4644, 4647-4649, 4676, 4678, 4708, 4891, 4892, 4932, 4936-4939, 5997.
[11] *See* Trial Judgement, paras. 4939, 5997, 6004, 6005, 6008, 6009.
[12] *See* Trial Judgement, paras. 5724, 5731, 5736, 5737, 5739-5745, 5810, 5811, 5814, 5821, 5822, 5831, 5849, 5998.
[13] *See* Trial Judgement, paras. 5849, 5850, 5998, 6002-6005, 6007.
[14] *See* Trial Judgement, paras. 5837, 5848, 5850, 5998, 6002-6005. With respect to the Srebrenica JCE, the Trial Chamber noted that murder and extermination as crimes against humanity are impermissibly cumulative and did not enter convictions for murder as a crime against humanity as these incidents were subsumed under extermination as a crime against humanity. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574.
[15] *See* Trial Judgement, paras. 5962, 5973, 5992, 5993, 5999. The Trial Chamber specified that the common purpose of the Hostages JCE lasted until the last of the UN personnel was released on 18 June 1995. *See* Trial Judgement, para. 5962.
[16] Trial Judgement, paras. 5993, 5999, 6010.

8. The Trial Chamber sentenced Karadžić to 40 years of imprisonment.[17]

B. The Appeals

9. Karadžić originally presented 50 grounds of appeal challenging his convictions and sentence;[18] however, he has either expressly or implicitly withdrawn four of those grounds of appeal.[19] He requests that the Appeals Chamber vacate each of his convictions and enter a judgement of acquittal or, alternatively, order a new trial, or reduce his sentence.[20] The Prosecution responds that Karadžić's appeal should be dismissed in its entirety.[21]

10. The Prosecution advances four grounds of appeal challenging some of the Trial Chamber's findings and the sentence imposed on Karadžić.[22] It requests that the Appeals Chamber: (i) reclassify Karadžić's convictions entered pursuant to the third form of joint criminal enterprise in relation to the Overarching JCE under the first form of joint criminal enterprise; (ii) find Karadžić guilty of genocide in relation to the Overarching JCE; and (iii) increase his sentence.[23] Karadžić responds that the Prosecution's appeal should be dismissed in its entirety.[24]

11. The Appeals Chamber heard oral submissions of the parties regarding their appeals on 23 and 24 April 2018.[25]

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[17] Trial Judgement, paras. 6070, 6072.
[18] *See* Karadžić Notice of Appeal, pp. 2-16; Karadžić Appeal Brief, pp. 5-238.
[19] The Appeals Chamber observes that, in his reply brief, Karadžić expressly withdraws Grounds 22 and 46 of his appeal. Karadžić Reply Brief, paras. 105, 254. The Appeals Chamber further observes that Karadžić has not addressed Grounds 32 and 35 in his appeal brief or reply brief. The Appeals Chamber therefore finds that Karadžić has abandoned these grounds and will not consider them. *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, nn. 28, 29.
[20] *See* Karadžić Notice of Appeal, p. 3; Karadžić Appeal Brief, paras. 856, 857; Karadžić Reply Brief, paras. 261, 262. *See also* T. 23 April 2018 pp. 87, 92; T. 24 April 2018 pp. 278, 300.
[21] *See* Prosecution Response Brief, paras. 2-10, 499. *See also* T. 23 April 2018 pp. 165-236.
[22] *See* Prosecution Notice of Appeal, paras. 1-25; Prosecution Appeal Brief, paras. 1-180; Prosecution Reply Brief, paras. 1-75.
[23] Prosecution Notice of Appeal, paras. 8, 15, 23, 25; Prosecution Appeal Brief, paras. 4-8, 48, 77, 147, 180; Prosecution Reply Brief, para. 1. *See also* T. 24 April 2018 pp. 278-296, 305-311.
[24] Karadžić Response Brief, para. 231. *See also* T. 24 April 2018 pp. 296-305.
[25] T. 23 April 2018 pp. 84-236; T. 24 April 2018 pp. 237-316. *See also* Scheduling Order for Appeal Hearing and Status Conference, 27 February 2018.

II. STANDARDS OF APPELLATE REVIEW

12. The Mechanism was established pursuant to UN Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY.[26] The Statute and the Rules of Procedure and Evidence of the Mechanism ("Statute" and "Rules", respectively) reflect normative continuity with the Statutes and the Rules of Procedure and Evidence of the ICTR and the ICTY ("ICTR Rules" and "ICTY Rules", respectively).[27] The Appeals Chamber considers that it is bound to interpret the Statute and the Rules of the Mechanism in a manner consistent with the jurisprudence of the ICTR and the ICTY.[28] Likewise, where the respective Rules or Statutes of the ICTR or the ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.[29]

13. While not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR and the ICTY Appeals Chambers and depart from them only for cogent reasons in the interest of justice, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[30] It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure.[31]

14. Article 23(2) of the Statute stipulates that the Appeals Chamber may affirm, reverse, or revise decisions taken by a trial chamber. The Appeals Chamber recalls that an appeal is not a trial

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[26] UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), paras. 1, 4, Annex 1, Statute of the Mechanism ("Statute"), Preamble, Article 1. *See also* Security Council Resolution 1966, Annex 2, Article 2(2); *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6.

[27] *See, e.g.*, *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6. *See also Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case Nos. IT-08-91-A & MICT-13-55, Decision on Karadžić's Motion for Access to Prosecution's Sixth Protective Measures Motion, 28 June 2016, p. 2; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012"), para. 5.

[28] *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[29] *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[30] *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968; *Bizimungu* Appeal Judgement, para. 370; *Đorđević* Appeal Judgement, paras. 23, 24; *Galić* Appeal Judgement, para. 117; *Rutaganda* Appeal Judgement, para. 26; *Aleksovski* Appeal Judgement, para. 107. *Cf. Munyarugarama* Decision of 5 October 2012, para. 5 (noting the "normative continuity" between the Rules and the Statute of the Mechanism and the ICTY Rules and ICTY Statute and that the "parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice").

de novo.[32] The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[33] These criteria are set forth in Article 23 of the Statute and are well established in the jurisprudence of both the ICTR and the ICTY.[34]

15. 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.[35] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[36] 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.[37] 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.[38]

16. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[39] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be

[31] *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968, *Bizimungu* Appeal Judgement, para. 370; *Đorđević* Appeal Judgement, para. 24; *Galić* Appeal Judgement, para. 117; *Aleksovski* Appeal Judgement, para. 107.
[32] *Šešelj* Appeal Judgement, para. 12. *See also Stanišić and Župljanin* Appeal Judgement, para. 17; *Đorđević* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 13.
[33] *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Stanišić and Župljanin* Appeal Judgement, para. 17; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[34] *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Stanišić and Župljanin* Appeal Judgement, para. 17; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[35] *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Stanišić and Župljanin* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[36] *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Stanišić and Župljanin* Appeal Judgement, para. 18; *Tolimir* Appeal Judgement, para. 9.
[37] *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Stanišić and Župljanin* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[38] *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Stanišić and Župljanin* Appeal Judgement, para. 18; *Tolimir* Appeal Judgement, para. 9.
[39] *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Stanišić and Župljanin* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.

confirmed on appeal.[40] 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.[41]

17. When considering alleged errors of fact, 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.[42] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[43] 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 caused a miscarriage of justice.[44] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[45]

18. The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.[46] 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.[47] Nevertheless, considering that, at trial, it is the Prosecution that bears the burden 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

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[40] *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Stanišić and Župljanin* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.

[41] *Šešelj* Appeal Judgement, para. 14. *See also Prlić et al.* Appeal Judgement, para. 20; *Stanišić and Župljanin* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 31; *Tolimir* Appeal Judgement, para. 10; *Popović et al.* Appeal Judgement, para. 18.

[42] *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21; *Stanišić and Župljanin* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.

[43] *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21; *Stanišić and Župljanin* Appeal Judgement, para. 20; *Tolimir* Appeal Judgement, para. 11.

[44] *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 21; *Stanišić and Župljanin* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.

[45] *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 22; *Stanišić and Župljanin* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.

[46] *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21; *Nzabonimana* Appeal Judgement, para. 10.

[47] *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21; *Nzabonimana* Appeal Judgement, para. 10.

against acquittal than for a defence appeal against conviction.[48] Whereas a convicted person must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt,[49] the Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated.[50]

19. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[51] 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.[52]

20. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[53] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[54] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[55]

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[48] *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21; *Nzabonimana* Appeal Judgement, para. 10.
[49] *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21.
[50] *Šešelj* Appeal Judgement, para. 16. *See also, e.g., Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21.
[51] *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also, e.g., Prlić et al.* Appeal Judgement, para. 25; *Stanišić and Župljanin* Appeal Judgement, para. 25; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.
[52] *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also, e.g., Prlić et al.* Appeal Judgement, para. 25; *Stanišić and Župljanin* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.
[53] *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Stanišić and Župljanin* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.
[54] *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Stanišić and Župljanin* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.
[55] *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also, e.g., Prlić et al.* Appeal Judgement, para. 24; *Stanišić and Župljanin* Appeal Judgement, para. 24; *Nyiramasuhuko et al.* Appeal Judgement, para. 35.

III. THE APPEAL OF RADOVAN KARADŽIĆ

A. Fairness of the Trial Proceedings

1. Alleged Violation of the Right to Self-Representation (Ground 1)

21. Since his transfer to the ICTY and throughout the trial proceedings, Karadžić elected to conduct his own defence rather than accept representation by counsel.[56] While being a self-represented accused, Karadžić benefited from the assistance of a number of legal advisors and assistants.[57] On 27 January 2014, the Trial Chamber granted the Prosecution's objection against Karadžić's presentation of his testimonial evidence in "narrative form" and decided that Karadžić's testimonial evidence should be led in examination-in-chief by Karadžić's legal advisor.[58] On 20 February 2014, Karadžić informed the Trial Chamber of his decision not to testify.[59]

22. Karadžić submits that the Trial Chamber violated his right to self-representation by requiring him to be questioned by counsel when testifying and not allowing him to testify in "narrative form".[60] He submits that the Trial Chamber failed to recognize that any restriction on the fundamental right to self-representation should be limited to the minimum extent necessary, made no attempt to balance the restriction against a valid justification for pursuing it, and committed an error of law by imposing the particular mode of presenting evidence on the basis of "standard practice" without considering whether this was suitable to hearing the evidence of an accused.[61] In Karadžić's view, the Trial Chamber erred by forcing him to choose between his right to self-representation and his right to testify, which ultimately "meant that it convicted [him] without hearing from him".[62] Karadžić contends that the only remedy for the Trial Chamber's error is a new trial.[63]

23. In response, the Prosecution submits that Karadžić's attempt to blame his decision not to testify on the Trial Chamber's decision on the form of his testimony was raised for the first time on

[56] Trial Judgement, para. 6125; T. 17 September 2008 p. 43.
[57] Trial Judgement, para. 6125; T. 17 September 2008 pp. 43, 58.
[58] T. 27 January 2014 pp. 45933, 45935, 45936.
[59] T. 20 February 2014 p. 47541.
[60] Karadžić Notice of Appeal, p. 4; Karadžić Appeal Brief, paras. 3-17; T. 23 April 2018 pp. 93-98; T. 24 April 2018 pp. 240-242. *See also* Karadžić Reply Brief, paras. 5, 9. In support of his submissions, Karadžić relies on domestic jurisprudence and a dissenting opinion in the *Blagojević and Jokić* Appeal Judgement. *See* Karadžić Appeal Brief, paras. 10-12, 14-17; T. 23 April 2018 p. 96.
[61] Karadžić Notice of Appeal, p. 4; Karadžić Appeal Brief, paras. 5-11; T. 23 April 2018 pp. 96, 97. *See also* Karadžić Reply Brief, para. 9.
[62] Karadžić Appeal Brief, paras. 12-17; T. 23 April 2018 pp. 93-95, 97.
[63] Karadžić Appeal Brief, para. 17; T. 23 April 2018 pp. 93, 97, 98.

appeal and, as such, should not be considered, and is otherwise unsubstantiated, contradicted by the record, and fails to show a breach of his rights.[64]

24. Karadžić replies that he was not required to seek a second ruling on the form of his testimony or certification to appeal to preserve the issue for appellate review, particularly given the importance of ensuring a self-represented accused's "full" exercise of the right to a fair trial.[65] Karadžić also argues that the Trial Chamber's duty to ensure a fair trial was not mitigated because of the legal assistance he was receiving for the purposes of his trial.[66]

25. The Appeals Chamber notes that Karadžić did not raise his arguments about the alleged breach of his right to represent himself during trial or seek reconsideration or certification to appeal the impugned decision.[67] In this respect it 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 its right to raise the issue on appeal.[68] However, in view of the fundamental importance of the right to self-representation, the Appeals Chamber holds that it would not be appropriate to apply the waiver doctrine to Karadžić's allegation of error and will consider the matter.[69]

26. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them, including as to the modalities of the presentation of evidence.[70] This discretion, however, must be exercised in accordance with Article 20(1) of the ICTY Statute, which requires trial chambers to ensure that trials are fair and conducted with full

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[64] *See* Prosecution Response Brief, paras. 11-16; T. 23 April 2018 pp. 170-173. *See also* T. 24 April 2018 p. 279.
[65] Karadžić Reply Brief, paras. 9, 10. *See also* T. 23 April 2018 pp. 93-95; T. 24 April 2018 pp. 240, 241.
[66] T. 24 April 2018 pp. 239, 240.
[67] Karadžić suggests that he linked his right to testify in narrative form with his right to self-representation when litigating the issue before the Trial Chamber. *See* T. 24 April 2018 p. 241, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Defence Submission of Order of Witnesses for February and March 2014, 18 December 2013, para. 3, n. 2; T. 20 February 2014 p. 4753[6]. However, the submissions he highlights fail to reflect that Karadžić objected to the manner in which the Trial Chamber decided his testimony would be presented on the basis that it violated his right to self-representation. Indeed, Karadžić did not respond to the Prosecution's motion that Karadžić not be allowed to testify in narrative form and subsequent submissions were presented on his behalf reflecting acquiescence to the Trial Chamber's decision on this issue. *See* T. 27 January 2014 p. 45934; T. 20 February 2014 pp. 47535-47537. When Karadžić indicated that he would not testify, he provided no indication that it was because the Trial Chamber's decision infringed upon his right to represent himself. *See* T. 20 February 2014 p. 47541.
[68] *See, e.g., Prlić et al.* Appeal Judgement, para. 165; *Nyiramasuhuko et al.* Appeal Judgement, paras. 63, 1060, n. 157; *Popović et al.* Appeal Judgement, para. 176; *Bagosora and Nsengiyumva* Appeal Judgement, para. 31. *See also Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ("*Orić* Decision of 17 February 2016"), para. 14.
[69] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007 ("*Nahimana et al.* Decision of 5 March 2007"), para. 15, n. 47.
[70] *Ndahimana* Appeal Judgement, para. 14 and references cited therein.

respect for the rights of the accused.[71] Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[72]

27. The right of an accused to represent himself, which is guaranteed by the ICTY Statute and has been held to be an "indispensable cornerstone of justice", is nonetheless not absolute and may be subject to certain limitations.[73] In this respect, any limitation must be guided by the proportionality principle, that is, it must serve a sufficiently important aim that is compatible with the ICTY Statute and not impair the right more than necessary to accomplish such aim.[74]

28. In the impugned decision, the Trial Chamber relied on its discretion pursuant to Rule 90(F) of the ICTY Rules to control the mode and order of eliciting the testimony of witnesses and presenting evidence so as to make it effective for the ascertainment of truth and avoid needless consumption of time.[75] It also relied on Rule 85(B) of the ICTY Rules, which sets out the procedure for examination-in-chief by requiring "the party calling a witness to examine such witness in-chief".[76] The Trial Chamber observed that Karadžić's "sole" rationale for seeking to testify in "narrative form" was to save time allocated to his defence case.[77] The Trial Chamber considered that the standard procedure for hearing witnesses before the Tribunal, in "question-and-answer format", which was applied throughout Karadžić's case, produced structured and focused testimony, facilitated cross-examination, allowed the parties to raise timely objections where appropriate, and assisted the Chamber to retain control over the presentation of evidence.[78] In the Trial Chamber's view, Karadžić had failed to substantiate that the mode of testifying he proposed

[71] *See, e.g.*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 ("*Mladić* Decision of 22 October 2013"), para. 12; *Ndahimana* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 18. *See also* Article 21 of the ICTY Statute.
[72] *Prlić et al.* Appeal Judgement, para. 26; *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.
[73] Article 21(4)(d) of the ICTY Statute; *Šešelj* Appeal Judgement, para. 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey, 12 February 2010, para. 27; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision of 1 November 2004"), paras. 11-13.
[74] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to be Present at Trial, 5 October 2007 ("*Karemera et al.* Decision of 5 October 2007"), para. 11, *referring to Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("*Zigiranyirazo* Decision of 30 October 2006"), para. 14. *See also Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Decision on Assignment of Standby Counsel for the Appeal Hearing, 11 October 2017, p. 2; *Milošević* Decision of 1 November 2004, paras. 17, 18. *Cf. Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003 ("*Limaj et al.* Decision of 31 October 2003"), para. 13.
[75] T. 27 January 2014 p. 45934.
[76] T. 27 January 2014 p. 45935.
[77] T. 27 January 2014 p. 45935.
[78] T. 27 January 2014 p. 45935.

would be more effective than the standard procedure and the Trial Chamber saw no reason for departing from its well-established practice when it came to the accused's testimony.[79]

29. The Appeals Chamber considers that Karadžić has failed to demonstrate that the Trial Chamber's decision that his testimonial evidence be led by his legal advisor rather than be presented in narrative form interfered with his right to represent himself.[80] While Karadžić points to submissions made by his legal advisor that the decision essentially imposed his legal advisor as his "counsel" for the purpose of Karadžić's examination,[81] this does not demonstrate that the decision curtailed his right to represent himself. Specifically, Karadžić does not show, for example, that the decision impacted his ability as a self-represented defendant to control the preparation and execution of his examination-in-chief, including the organization and substance of the questions to be asked by his legal advisor and the evidence elicited. The Appeals Chamber considers that the Trial Chamber's decision respected Karadžić's right to self-representation and the right to testify and finds no merit in his argument that he was forced to choose between the two.

30. Based on the foregoing, the Appeals Chamber dismisses Ground 1 of Karadžić's appeal.

[79] T. 27 January 2014 p. 45935.
[80] The Appeals Chamber considers that Karadžić's submissions based on non-binding authorities, namely domestic jurisprudence and a dissenting opinion in an ICTY appeal judgement, do not demonstrate error by the Trial Chamber. *See* Rule 89(A) of the ICTY Rules; *Stanišić and Župljanin* Appeal Judgement, paras. 598, 974.
[81] *See* Karadžić Appeal Brief, para. 4; Karadžić Reply Brief, para. 9.

2. Alleged Violation of the Right to be Present at Site Visits (Ground 2)

31. In May 2011 and June 2012, the Trial Chamber conducted two site visits to locations in and around Sarajevo and Srebrenica with the stated objective of gaining familiarity with the topography and facilitating its determination of the charges.[82] The Trial Chamber stated in the Trial Judgement and its decisions related to the site visits that the purpose of the site visits was not to gather evidence or receive submissions by the parties.[83] On this basis, it rejected Karadžić's requests to be present at the site visits, finding that it was not necessary or appropriate for him to participate, although he was entitled to nominate a member of his defence team to accompany the Trial Chamber during the site visits.[84] In so doing, the Trial Chamber noted the security concerns posed by Karadžić's presence and the need to keep confidential any aspect of the site visit preparations "given the extreme security concerns in relation thereto."[85] The Trial Chamber found that, given the stated purpose of the site visits, the fact that no evidence would be gathered, and that the parties would not be making submissions during the site visits, the site visits would not breach Karadžić's right to be tried in his own presence as envisaged in Article 21(4)(d) of the ICTY Statute.[86] A delegation which included Karadžić's and the Prosecution's representatives accompanied the Trial Chamber on the site visits.[87]

32. Karadžić argues that the Trial Chamber violated his rights to be present at his trial and to represent himself by conducting the site visits, gathering evidence, and entertaining submissions in his absence.[88] In particular, Karadžić submits that, during the site visit to Sarajevo, the Trial Chamber heard from the parents of a sniping incident victim, the owner of a house from which snipers fired, the chief repairman at a shelling incident location, the owner of a house involved in a shelling incident, the priest of a church used in a sniping incident, and the owner of property under which the Sarajevo tunnel was built.[89] He also submits that a Prosecution Trial Attorney gave

[82] Trial Judgement, para. 6175.
[83] Trial Judgement, nn. 11956, 12567, 13021; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Order on Submissions for a Site Visit, 15 November 2010 ("Sarajevo Site Visit Order"), para. 6; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Site Visit, 28 January 2011 ("Sarajevo Site Visit Decision"), paras. 11-13; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Second Site Visit, 10 February 2012 ("Srebrenica Site Visit Decision"), paras. 7, 8.
[84] Sarajevo Site Visit Order, paras. 2, 6; Sarajevo Site Visit Decision, paras. 12, 13; Srebrenica Site Visit Decision, para. 8.
[85] Sarajevo Site Visit Decision, paras. 8, 15; Srebrenica Site Visit Decision, para. 11.
[86] Sarajevo Site Visit Decision, para. 12; Srebrenica Site Visit Decision, para. 7.
[87] Trial Judgement, para. 6175.
[88] Karadžić Notice of Appeal, pp. 2, 4; Karadžić Appeal Brief, paras. 18-30; T. 23 April 2018 p. 98. *See also* Karadžić Reply Brief, paras. 11-15, 18. In support of his submissions, Karadžić relies on domestic jurisprudence. *See* Karadžić Appeal Brief, paras. 25-28. Karadžić also contends that the Trial Chamber erred by failing to explore whether security measures could have allowed him to attend the site visits. *See* Karadžić Appeal Brief, para. 29.
[89] Karadžić Appeal Brief, para. 20, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Registry Minutes on Site Visit Conducted Between 17 May and 20 May 2011, 21 July 2011 ("Sarajevo Site Visit Minutes"), pp. 12-14, 18, 23, 25.

evidence about how crime scenes in Sarajevo had changed since the events and that both parties made submissions at almost all visited locations.[90] In addition, he maintains that, during the site visit to Srebrenica, a Prosecution Trial Attorney made "mini-closing arguments on what had occurred at the various locations, characterising Prosecution witness testimony and explaining the significance of Prosecution exhibits to the Judges."[91] Karadžić contends that the observations made during the site visits affected the Trial Chamber's overall assessment of the events and its findings and that the only adequate remedy for this violation of his fair trial rights would be a new and fair trial.[92]

33. The Prosecution responds that the Trial Chamber properly conducted the site visits without Karadžić given their non-evidentiary purpose and correctly concluded that Karadžić's right to be present at trial was not violated by them.[93] The Prosecution also submits that the impugned decisions were informed by the Registry's assessment that Karadžić's presence would have jeopardised the safety of all attendees.[94] In addition, the Prosecution argues that Karadžić fails to demonstrate that the Trial Chamber gathered evidence or heard improper submissions during the site visits or that the impugned decisions had any impact on the Trial Chamber's verdict.[95]

34. Karadžić replies that the claim that the infringement of his right to be present was necessary due to "security concerns" is flawed as it was based on vague submissions by the Registry that did not identify any specific risk.[96] He also submits that the erroneous impugned decisions impacted the Trial Judgement as the site visits assisted the Trial Chamber in its fact-finding, were deemed important enough to consume two weeks of trial time and significant costs, and the suggestion that the Judges would have dutifully disregarded any improperly received information is unrealistic.[97]

35. The Appeals Chamber recalls that Article 21(4)(d) of the ICTY Statute guarantees the fundamental right of an accused to be tried in his presence. This right is not absolute, however, and may be subject to limitations.[98] As with other qualified statutory rights of an accused, including the right to be self-represented, any limitation on the right of the accused to be tried in his presence

[90] Karadžić Appeal Brief, para. 21, Annex B. *See also* T. 23 April 2018 p. 98.
[91] Karadžić Appeal Brief, para. 21. *See also* T. 23 April 2018 p. 98.
[92] Karadžić Appeal Brief, para. 30.
[93] *See* Prosecution Response Brief, paras. 17-26. *See also* T. 23 April 2018 pp. 172, 173.
[94] Prosecution Response Brief, paras. 17, 25.
[95] Prosecution Response Brief, paras. 17, 27; T. 23 April 2018 p. 169. *See also* T. 23 April 2018 pp. 172, 173.
[96] Karadžić Reply Brief, paras. 16, 17.
[97] Karadžić Reply Brief, paras. 19, 20.
[98] *Karemera et al.* Decision of 5 October 2007, para. 11; *Milošević* Decision of 1 November 2004, paras. 12, 13.

must serve a sufficiently important aim that is compatible with the ICTY Statute and must not impair the right more than necessary to accomplish such aim.[99]

36. In considering whether to conduct the two site visits, the Trial Chamber relied on Rule 4 of the ICTY Rules, providing that a "Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice".[100] The two site visits thus took place in the context of the Trial Chamber's exercise of its functions remotely in the interests of justice. The Trial Chamber dismissed Karadžić's request to be present during the site visit to Sarajevo, holding that his presence would not be appropriate or necessary, since the purpose of the visit was not to gather evidence or hear submissions but rather to enable the Trial Chamber to familiarise itself with the locations referred to in the Indictment.[101] Subsequently, the Trial Chamber denied Karadžić's request to reconsider this decision, reiterating the purpose of the visit and noting that no evidence would be gathered and that the parties would be requested to refrain from making submissions during the visit.[102] For the same reasons, the Trial Chamber denied Karadžić's request to be present during the site visit to Srebrenica.[103] In the Trial Chamber's view, given the limited purpose of the site visits, Karadžić's right to be tried in his presence would not be violated.[104] The Trial Chamber also made provisions for Karadžić to be represented by a legal advisor of his choice during the site visits.[105]

37. In its impugned decisions, the Trial Chamber considered the security concerns relating to the site visits. It expressly took note of the Registry submission that "the presence of the Accused during a site visit would jeopardise the security and safety of all persons involved, including that of the Accused himself".[106] It also decided to keep confidential any aspect of the site visit preparations "given the extreme security concerns in relation thereto".[107] In view of the above, the Appeals Chamber finds no error in the Trial Chamber's consideration that conducting the site visits in

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[99] *Karemera et al.* Decision of 5 October 2007, para. 11, *referring to Zigiranyirazo* Decision of 30 October 2006, para. 14. *See also Milošević* Decision of 1 November 2004, paras. 17, 18. *Cf. Limaj et al.* Decision of 31 October 2003, para. 13.

[100] Sarajevo Site Visit Decision, para. 9; Srebrenica Site Visit Decision, para. 6. *See also* Sarajevo Site Visit Order, para. 9.

[101] Sarajevo Site Visit Order, para. 6; Sarajevo Site Visit Decision, para. 12.

[102] Sarajevo Site Visit Decision, para. 12. *See also* Sarajevo Site Visit Decision, Annex A.

[103] Srebrenica Site Visit Decision, para. 7.

[104] Sarajevo Site Visit Decision, para. 12; Srebrenica Site Visit Decision, para. 7.

[105] Sarajevo Site Visit Decision, paras. 6, 13; Srebrenica Site Visit Decision, paras. 2, 8; Sarajevo Site Visit Order, paras. 6, 11(ii); Sarajevo Site Visit Minutes, p. 2; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Registry Minutes on Site Visit Conducted Between 5 and 8 June 2012, 13 July 2012 ("Srebrenica Site Visit Minutes"), p. 2. The Appeals Chamber notes that, in requesting the Trial Chamber to reconsider its decision as to his presence at the Sarajevo site visit, Karadžić submitted that, should the Trial Chamber decline to allow him to participate in the visit, his legal associate accompany the Trial Chamber on his behalf, and that, with respect to the second visit, Karadžić requested that he be present or, in the alternative, be represented by his legal advisor. *See* Sarajevo Site Visit Decision, para. 6; Srebrenica Site Visit Decision, para. 2.

[106] *See* Sarajevo Site Visit Decision, para. 8.

Sarajevo and Srebrenica in the presence of Karadžić would inevitably pose a considerable security risk for Karadžić as well as the other participants in the site visit delegations.[108] The Appeals Chamber therefore finds that the Trial Chamber's decision to conduct the site visits without Karadžić being present served the sufficiently important aim of ensuring its ability to perform its functions in the given circumstances and did not impair his right more than necessary to accomplish it.[109]

38. A review of the minutes of the site visits as recorded by the Registry suggests that, during the visits, both parties made submissions,[110] for instance on the respective defence lines of the Army of the Republic of Bosnia and Herzegovina ("ABiH") and the Bosnian Serb forces.[111] At times the parties agreed,[112] but mostly they contested each other's submissions.[113] On occasion, the Trial Chamber allowed the parties to draw its attention to matters dealt with in evidence already admitted on the trial record, to refresh its recollection.[114] In addition, during the site visit to Sarajevo, the Trial Chamber met the mother of a victim of a sniping incident listed in the Indictment who indicated the place where her daughter had been shot and explained the changes to the scene since the incident and the personal circumstances of her family at present.[115] The Trial Chamber also heard from an employee of the Public Broadcasting Service of Bosnia and Herzegovina, who explained the circumstances surrounding the shelling of the Bosnia and Herzegovina TV building,[116] and the owner of the house under which the tunnel that linked two Sarajevo neighbourhoods was built, who explained how the tunnel was used during the war.[117]

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[107] Sarajevo Site Visit Decision, para. 15; Srebrenica Site Visit Decision, para. 11.
[108] *Cf. Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo, 4 February 2003 ("*Galić* Decision of 4 February 2003"), paras. 12, 13.
[109] The Appeals Chamber notes that Karadžić submitted to the Trial Chamber that he believed that "a site visit would be beneficial" and that the Trial Chamber, having considered the matter, decided that the site visit would assist its determination of the charges in the Indictment. *See* Sarajevo Site Visit Order, paras. 2, 5; Sarajevo Site Visit Decision, paras. 1, 2, 4, 5, 11; Srebrenica Site Visit Decision, para. 2.
[110] *See, e.g.*, Srebrenica Site Visit Minutes, pp. 3, 4, 9, 10.
[111] Sarajevo Site Visit Minutes, p. 3.
[112] Sarajevo Site Visit Minutes, pp. 7 ("[t]he Parties agreed that it was the VRS that controlled this building"), 21 ("[t]here was agreement between the Parties with regard to the direction of the victim's travel at the time of the incident").
[113] Sarajevo Site Visit Minutes, pp. 3, 7, 8, 16 ("[t]he Defence disagreed with the Prosecution on the direction of fire, the direction of movement of the victim, and the exact location of the [Sniping Incident F-5]"), 17 ("[t]he Defence disputed the existence of a line of sight from the location to the scene of the Sniping Incident F1 […] The Prosecution then summarised Mr. Hogan's evidence with leave of the Trial Chamber"), 20 ("[t]he Defence disagreed with the location of the victim as alleged by the Prosecution"), 21("[t]he Prosecution disagreed and referred the Trial Chamber to the evidence on the record to support their case"), 22 ("[t]he parties disagreed on the origin of fire"); Srebrenica Site Visit Minutes, p. 12 ("[t]he Defence contested the Prosecution's figures on the number of prisoners alleged to have been executed at the site").
[114] Sarajevo Site Visit Minutes, pp. 17, 20, 21; Srebrenica Site Visit Minutes, p. 17.
[115] Sarajevo Site Visit Minutes, p. 12.
[116] Sarajevo Site Visit Minutes, p. 14.
[117] Sarajevo Site Visit Minutes, p. 25.

39. The Appeals Chamber finds that the minutes of the site visits therefore reveal the exchange of submissions between the parties and the Trial Chamber's interactions with various persons at some of the sites. The minutes also confirm that, although the impugned decisions indicated that the purpose of the site visits was not to gather evidence or hear submissions but to enable the Trial Chamber to familiarize itself with the locations referred to in the Indictment, the conduct during the visits did not comply with the limitations imposed by the Trial Chamber. Consequently, the Appeals Chamber finds that the two site visits formed part of the trial proceedings,[118] and that, in light of the conduct during them, the site visits violated Karadžić's right to be tried in his presence. The Appeals Chamber will proceed to examine whether Karadžić suffered prejudice as a result of this violation.

40. The Appeals Chamber considers that Karadžić's absence from the site visits did not materially prejudice him. As noted above, the Trial Chamber provided for Karadžić to be represented at the site visits by the legal advisor of his choice.[119] In addition, it allowed him sufficient opportunity, both before the visits as well as thereafter, to make submissions as to the sites visited and their importance to his case, and to raise any concerns as to the fairness of the procedure followed. Moreover, a review of the Trial Judgement and the references to the site visits therein confirms that the Trial Chamber restricted its use of any observations made during the site visits to facilitating its understanding of the topography of the various locations referred to in the Indictment in assessing the evidence on the trial record.[120] Although Karadžić submits that "[t]he observations made during the site visit undoubtedly affected the Trial Chamber's overall assessment of the events, and its findings in the judgement",[121] he does not point to any concrete disadvantage or prejudice suffered as a result of the site visits having been conducted in his absence.[122]

41. The Appeals Chamber reiterates that any violation of the right to a fair trial of an accused requires a remedy.[123] The nature and form of the effective remedy should be proportional to the gravity of the harm suffered.[124] The Appeals Chamber also recalls that, in situations where a

[118] *See also Galić* Decision of 4 February 2003, para. 15.
[119] The Appeals Chamber also notes that the Trial Chamber recalled the Registry's submission that other self-represented accused have been represented during site visits by their legal associates. *See* Sarajevo Site Visit Decision, para. 8.
[120] Trial Judgement, paras. 3659, 3807, 3931, nn. 11956, 12567.
[121] Karadžić Appeal Brief, para. 30.
[122] The Appeals Chamber also considers that Karadžić's reliance on non-binding and distinguishable domestic authorities in support of his submissions does not demonstrate error by the Trial Chamber.
[123] *Nyiramasuhuko et al.* Appeal Judgement, para. 42; *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Decision of 13 September 2007"), para. 24. *See also Kajelijeli* Appeal Judgement, para. 255.
[124] *Nyiramasuhuko et al.* Appeal Judgement, para. 42, n. 120 and reference cited therein.

violation of the accused's fair trial rights has not materially prejudiced the accused, a formal recognition of the violation may be considered an effective remedy.[125] For the reasons set out above, the Appeals Chamber considers that its recognition of the violation of Karadžić's right to be present during the site visits constitutes an effective remedy.

42. Based on the foregoing, the Appeals Chamber dismisses Ground 2 of Karadžić's appeal.

[125] *Nyiramasuhuko et al.* Appeal Judgement, para. 42 and references cited therein.

3. Alleged Errors Related to Defects in the Indictment (Grounds 3-5)

43. During the pre-trial phase of the proceedings, the Trial Chamber rejected a motion filed by Karadžić arguing that the Indictment was defective with respect to Count 11 (hostage-taking as a violation of the laws or customs of war).[126] The Trial Chamber observed that the Indictment alleged that UN personnel were taken hostage in order to compel NATO to abstain from conducting airstrikes against Bosnian Serb military targets and that these UN personnel were threatened with death and/or injury during their detention.[127]

44. Days before the closing arguments and after the filing of the parties' final trial briefs, Karadžić filed a subsequent motion before the Trial Chamber challenging the notice provided in the Indictment in relation to, *inter alia*, Counts 4 (extermination as a crime against humanity), 7 (deportation as a crime against humanity), and 11.[128] The Trial Chamber considered that Karadžić had failed to provide a reasonable explanation as to why his objections were not raised earlier, and concluded that the motion was untimely and that he therefore bore the burden of demonstrating that the alleged defects in the Indictment materially impaired his ability to defend himself.[129] The Trial Chamber found that Karadžić had not met this burden, because he made "no attempt to show how the alleged defects in fact materially impaired his ability to defend himself or caused him any prejudice".[130] The Trial Chamber also determined that the relevant counts had been pleaded "with sufficient specificity".[131]

45. The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of: (i) extermination as a crime against humanity based, in part, on the killings of 45 persons in

[126] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 ("Decision of 28 April 2009"), paras. 65, 66. Karadžić was granted certification to appeal the Trial Chamber's findings concerning the pleading of Count 11 and the ICTY Appeals Chamber rejected the appeal without ruling on this aspect of the Trial Chamber's decision. *See generally Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("Decision of 9 July 2009").
[127] Decision of 28 April 2009, para. 65.
[128] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Relief from Defects in the Indictment, 30 September 2014 ("Decision of 30 September 2014"), paras. 6, 7, 9, 20.
[129] Decision of 30 September 2014, paras. 20, 22. Specifically, the Trial Chamber concluded that all of the challenges Karadžić raised in relation to, *inter alia*, Counts 4, 7, and 11, which did not concern evidence introduced by the Prosecution, could have been raised in the pre-trial phase when he filed prior motions challenging the Indictment. *See* Decision of 30 September 2014, para. 20.
[130] Decision of 30 September 2014, para. 23. The Trial Chamber further held that Karadžić had "mounted a large defence", having called "over 240 witnesses and tendering thousands of exhibits", and that he had led "evidence on the very issues he claims he had no notice of". *See* Decision of 30 September 2014, para. 24. With respect to the charges of extermination, deportation, and hostage-taking specifically, the Trial Chamber pointed to several paragraphs of Karadžić's final trial brief containing his challenges to the relevant charges. *See* Decision of 30 September 2014, n. 52, *referring to, inter alia, Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Defence Final Trial Brief, 29 August 2014 (confidential; public redacted version filed on 24 September 2014) ("Karadžić Final Trial Brief"), paras. 2725, 2726, 2785-2796, 2797-2961, 3353-3373.
[131] Decision of 30 September 2014, para. 25.

Bijeljina in April 1992 (Count 4);[132] (ii) deportation as a crime against humanity based on deportations of Bosnian Muslims from the municipalities of Bijeljina, Zvornik, Bosanski Novi, and Foča, as well as Bosnian Muslims and Bosnian Croats from the municipality of Prijedor (Count 7);[133] and (iii) hostage-taking as a violation of the laws or customs of war with respect to the detention of UN peacekeepers and military observers from 25 May 1995 to 18 June 1995 (Count 11).[134]

46. Karadžić argues that he received insufficient notice of the charges in Counts 4, 7, and 11 in the Indictment and requests that his convictions for extermination, deportation, and hostage-taking be overturned.[135] The Appeals Chamber will consider each of these challenges in turn. Before doing so, the Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide adequate notice to the accused.[136] If an indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charges.[137]

47. As recalled above, the Trial Chamber found that Karadžić's objections to the Indictment were untimely and therefore required him to demonstrate that any alleged defects materially impaired his ability to defend himself.[138] On appeal, Karadžić does not challenge that his objections at trial to the notice provided in the Indictment in relation to, *inter alia*, Counts 4, 7, and 11 were untimely. Consequently, and in view of the fact that Karadžić's contentions on appeal mirror those that were determined to be untimely at trial,[139] the Appeals Chamber finds that, to the extent that Karadžić identifies material defects in the Indictment which were not cured, he must demonstrate that his ability to defend himself was materially impaired.[140]

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[132] Trial Judgement, paras. 2460, 2462, 2463, 3524, 5618-5620, 6003.
[133] Trial Judgement, paras. 2466, 2468, 2474, 2481, 3524, 6006.
[134] Trial Judgement, paras. 5951, 5962, 5992-5994, 6010.
[135] *See* Karadžić Notice of Appeal, p. 4; Karadžić Appeal Brief, paras. 35, 41, 47.
[136] *See Prlić et al.* Appeal Judgement, paras. 27, 67; *Ngirabatware* Appeal Judgement, para. 115 and references cited therein.
[137] *See Prlić et al.* Appeal Judgement, para. 96; *Ngirabatware* Appeal Judgement, para. 116 and references cited therein.
[138] *See* Decision of 30 September 2014, para. 22.
[139] For extermination, *compare Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Relief from Defects in the Indictment, 28 August 2014 ("Motion of 28 August 2014"), paras. 22, 23 *with* Karadžić Appeal Brief, paras. 31-33. For deportation, *compare* Motion of 28 August 2014, para. 26 *with* Karadžić Appeal Brief, paras. 36, 37. For hostage-taking, *compare* Motion of 28 August 2014, paras. 33-35 *with* Karadžić Appeal Brief, paras. 42, 43.
[140] *See Prlić et al.* Appeal Judgement, paras. 30, 100. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, paras. 45, 46.

(a) Count 4 (Extermination)

48. Karadžić contends that the Indictment alleged 83 incidents of killing without specifying which of them were charged as extermination under Count 4 and that the Prosecution Pre-Trial Brief did not cure this defect.[141] He submits that, had he known which exact incidents were charged as extermination, he could have challenged, for example, whether the 45 persons killed in Bijeljina in April 1992 were civilians or whether some had been taking an active part in the hostilities.[142]

49. The Prosecution responds that the incidents supporting Karadžić's extermination conviction were sufficiently pleaded and that, in any event, he has not demonstrated that his defence was materially impaired by any alleged defect.[143]

50. The Appeals Chamber observes that the Indictment expressly identified every incident of killing as supporting Count 4 of the Indictment,[144] including the killings in Bijeljina in April 1992 which underpin, in part, Karadžić's conviction for extermination.[145] The Appeals Chamber therefore dismisses Karadžić's contentions as they relate to Count 4 of the Indictment.

(b) Count 7 (Deportation)

51. Karadžić submits that the Indictment, as well as subsequent Prosecution submissions, impermissibly alleged deportation and inhumane acts (forcible transfer) interchangeably.[146] He contends, in particular, that the Prosecution failed to specify which population transfers charged in the Indictment were across a *de facto* or a *de jure* state border so as to constitute the crime of deportation, as opposed to inhumane acts (forcible transfer).[147] Because of this omission, he argues that, in his final trial brief, he only challenged two incidents of population transfer from Kozluk and Bosanski Novi under the belief that they were charged as deportation whereas the Trial Chamber convicted him of deportation for four other incidents.[148]

52. The Prosecution responds that the Indictment sufficiently pleaded the crimes of inhumane acts (forcible transfer) and deportation and that it provided further details of borders allegedly

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[141] Karadžić Appeal Brief, paras. 31-33. *See also* Karadžić Reply Brief, para. 21.
[142] Karadžić Appeal Brief, para. 34. *See also* Karadžić Reply Brief, paras. 22, 23.
[143] Prosecution Response Brief, paras. 31, 32. *See also* Prosecution Response Brief, para. 28.
[144] *See* Indictment, paras. 63, 66.
[145] *See* Indictment, para. 63(a); Scheduled Incident A.1.
[146] Karadžić Appeal Brief, paras. 36-38.
[147] Karadžić Appeal Brief, para. 36. Karadžić highlights several cases where the pleading of the charge of deportation was found to be insufficient. *See* Karadžić Appeal Brief, para. 39, *referring to Đorđević* Appeal Judgement, paras. 598, 599, *Kordić and Čerkez* Appeal Judgement, paras. 155-163, *Šainović et al.* Appeal Judgement, para. 263.
[148] Karadžić Appeal Brief, para. 40. *See also* Karadžić Reply Brief, para. 26.

crossed in its pre-trial submissions.[149] It also contends that Karadžić has not shown that his defence was materially impaired as he defended against deportation and inhumane acts (forcible transfer) on the same basis, namely that the movements were voluntary and that he was not responsible for them.[150]

53. Karadžić replies that the Prosecution does not dispute that the Indictment does not specify which displacements constituted deportation and which constituted inhumane acts (forcible transfer) and reiterates that the Appeals Chamber should find the Indictment defective on this basis.[151] He further contends that the Prosecution's references to its pre-trial submissions fail to demonstrate that this defect was cured.[152] He emphasizes that his defence was materially impaired as he never had the opportunity to argue that the element of crossing a border was not satisfied in relation to his deportation convictions that were not based on transfers from Kozluk and Bosanski Novi.[153]

54. The Appeals Chamber observes that the Indictment alleged that the forcible displacements of Bosnian Muslims and Bosnian Croats from the "Municipalities", which included, *inter alia*, Bijeljina, Zvornik, Bosanski Novi, Foča, and Prijedor, constituted the crimes of deportation and inhumane acts (forcible transfer).[154] The Indictment further alleged that such displacements occurred "either across a *de facto* or *de jure* border or internally without the crossing of a *de facto* or *de jure* border".[155]

55. The Appeals Chamber also notes that the Trial Chamber, when considering Karadžić's challenges to the Indictment at the close of trial, found that a high degree of specificity was not required in view of the fact that the crime base was of a large scale and long duration and because Karadžić was a high ranking official who was not alleged to be a physical perpetrator or proximate

[149] Prosecution Response Brief, para. 33.
[150] Prosecution Response Brief, para. 34.
[151] Karadžić Reply Brief, para. 24.
[152] Karadžić Reply Brief, para. 25. As further evidence that the defective pleading of deportation was not cured by the Prosecution's submissions, Karadžić suggests that, during closing arguments, even the Trial Chamber expressed confusion as to what events were charged as deportation. *See* Karadžić Reply Brief, para. 25, *referring to* T. 7 October 2014 pp. 48071, 48072.
[153] Karadžić Reply Brief, para. 26.
[154] *See* Indictment, paras. 48, 69, 71, 72.
[155] *See* Indictment, para. 69 ("As described below, between March 1992 and 30 November 1995, Serb Forces and Bosnian Serb Political and Governmental Organs forcibly displaced Bosnian Muslims and Bosnian Croats from areas within the Municipalities and within Srebrenica in which they were lawfully present either across a *de facto* or *de jure* border or internally without the crossing of a *de facto* or *de jure* border.").

to many of the alleged events.[156] Consequently, it considered, *inter alia*, that Count 7 was pleaded with sufficient specificity in the Indictment.[157]

56. The Appeals Chamber finds no error in the Trial Chamber's determination that the Indictment sufficiently pleaded the crime of deportation and recalls that, in relation to the alleged forcible displacements of Bosnian Muslims and Bosnian Croats, Karadžić was provided with the requisite notice as the "Municipalities" were identified in the Indictment and the Indictment stated that such displacements occurred "either across a *de facto* or *de jure* border or internally without the crossing of a *de facto* or *de jure* border".[158] The Appeals Chamber further considers that the allegations were pleaded with sufficient specificity, particularly considering that the expulsions resulted from a number of attacks over a prolonged period of time and that Karadžić was not alleged to have directly participated in such expulsions.[159] The Appeals Chamber likewise considers, in view of the established practice allowing cumulative charging, that the Prosecution was not required to distinguish in the Indictment which events resulted in deportation as opposed to inhumane acts (forcible transfer).[160]

57. Based on the foregoing, the Appeals Chamber dismisses Karadžić's contentions as they relate to Count 7 of the Indictment.

(c) Count 11 (Hostage-Taking)

58. Karadžić submits that a threat to kill, injure, or continue to detain prisoners is an essential element of hostage-taking and that the Indictment failed to allege the verbal conduct constituting it.[161] He stresses that the Prosecution was not excused from pleading this particular charge with more specificity in view of the breadth of the charge, because Karadžić's alleged responsibility only concerned "a handful of specific acts in a small area within a narrow time frame".[162] He argues that

[156] Decision of 30 September 2014, para. 25.
[157] Decision of 30 September 2014, para. 25.
[158] *See* Indictment, paras. 48, 69, 71, 72.
[159] *Cf. Naletilić and Martinović* Appeal Judgement, para. 24 ("Whether particular facts are material depends on the nature of the Prosecution case. […] [L]ess detail may be acceptable if the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.") (internal quotations and references omitted). *See also Prlić et al.* Appeal Judgement, para. 91 ("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.").
[160] *See Simba* Appeal Judgement, para. 276; *Naletilić and Martinović* Appeal Judgement, para. 103.
[161] Karadžić Appeal Brief, paras. 42, 44, 45. Karadžić cites several authorities for the proposition that when a verbal statement constitutes "an element of the crime", such conduct must be pleaded with specificity in the indictment. *See* Karadžić Appeal Brief, para. 44, *referring to Kanyarukiga* Appeal Judgement, para. 76 (concerning the mode of participation of planning), *Muvunyi* Appeal Judgement of 29 August 2008, para. 121 (concerning direct and public incitement to commit genocide), *Nahimana et al.* Appeal Judgement, para. 405 (concerning direct and public incitement to commit genocide).
[162] Karadžić Appeal Brief, para. 43.

he was prejudiced as his conviction for this crime was based on threats made by him and third persons that were not pleaded in the Indictment.[163]

59. The Prosecution responds that the Indictment identified the relevant threats related to the hostage-taking count and that its pre-trial submissions provided additional notice in this respect.[164] It further responds that Karadžić has not shown that his defence was materially impaired by any pleading defect.[165]

60. Karadžić replies that the Indictment failed to specify the dates, locations, and form of threats, or who was responsible for making them, and that the Prosecution's pre-trial submissions did not cure the failure to sufficiently plead the verbal conduct necessary to establish the *actus reus* of hostage-taking.[166] He contends that his defence was materially impaired as he assumed that his own pre-detention statements were the operative threats and that he did not elicit exculpatory evidence due to this misunderstanding.[167]

61. The Appeals Chamber observes that Count 11 alleges that between 26 May 1995 and 19 June 1995 "Bosnian Serb Forces" detained over 200 UN peacekeepers and military observers and that "[t]hreats were issued to third parties, including NATO and UN commanders, that further NATO attacks on Bosnian Serb military targets would result in the injury, death, or continued detention of the detainees".[168] As noted above, the Trial Chamber, on two occasions, found that the Indictment was not defective with respect to the pleading of this count.[169] When concluding that the elements of hostage-taking had been established, and, in particular, the *actus reus* of the crime, the Trial Chamber determined that, while UN personnel were detained, "Bosnian Serb Forces threatened to kill, injure, or continue to detain them unless NATO ceased its air strikes" and that "[t]hese threats were communicated by the Bosnian Serb Forces to the detained UN personnel and to UNMO and UNPROFOR headquarters".[170]

62. The Appeals Chamber finds no error in the conclusions of the Trial Chamber that the Indictment was sufficiently precise with respect to Count 11, particularly as it concerned the pleading of the *actus reus* of the crime of hostage-taking. Specifically, contrary to Karadžić's contention, the Indictment provided the material facts supporting the charge, that is the operative

[163] Karadžić Appeal Brief, para. 46.
[164] Prosecution Response Brief, paras. 35, 37. The Prosecution disputes that the authorities cited by Karadžić establish a "bright-line rule about pleading 'operative verbal conduct'". Prosecution Response Brief, para. 35.
[165] Prosecution Response Brief, para. 38.
[166] Karadžić Reply Brief, paras. 27, 28.
[167] Karadžić Reply Brief, para. 29.
[168] *See* Indictment, para. 86.
[169] *See supra* paras. 43, 44.

verbal conduct as it relates to the *actus reus* of hostage-taking.[171] The Appeals Chamber considers that no further specificity was required, given the limited time frame alleged for the crime as well as the fact that the Indictment identified Bosnian Serb forces as having physically taken UN personnel hostage.[172] In this respect, the Appeals Chamber emphasizes that the Prosecution is obligated "to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven".[173] To the extent Karadžić argues that greater specificity of pleading was required because the *actus reus* of the crime of hostage-taking was established based on verbal threats issued by him, the Appeals Chamber notes that the Trial Chamber only relied upon the threats made by others, namely the Bosnian Serb forces, in finding that the crime of hostage-taking occurred.[174]

63. Consequently, the Appeals Chamber dismisses Karadžić's contentions concerning Count 11 of the Indictment.

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[170] Trial Judgement, para. 5944.

[171] *See* Indictment, para. 86 ("Between approximately 26 May 1995 and 19 June 1995, Bosnian Serb Forces detained over two hundred UN peacekeepers and military observers in various locations, including Pale, Sarajevo, Banja Luka, and Goražde and held them at various locations in the RS, including locations of strategic or military significance in order to render the locations immune from NATO air strikes and to prevent air strikes from continuing. Threats were issued to third parties, including NATO and UN commanders, that further NATO attacks on Bosnian Serb military targets would result in the injury, death, or continued detention of the detainees. Some of the detainees were assaulted or otherwise maltreated during their captivity.").

[172] In any event, the Appeals Chamber observes that the Prosecution's Pre-Trial Brief contains information suggesting that Bosnian Serb forces threatened UN personnel in the course of their apprehension and detention. *See*, *e.g.*, Prosecution Pre-Trial Brief, paras. 255, 257. Read in conjunction with the witness statements cited in support of this information, the Prosecution provided additional information related to threats from Bosnian Serb forces to detained UN personnel and UN headquarters. *See* Prosecution Pre-Trial Brief, n. 637, *referring to* Witness Statement of KDZ213, 6 September 1995, ERN:0033-8078-0033-8084, at 0033-8079, Witness Statement of KDZ253, 3 August 1995, ERN:0033-3479-0033-3483, at 0033-3481; Prosecution Pre-Trial Brief, n. 648, *referring to* Witness Statement of KDZ112, 18 March 1998, ERN:0065-0781-0065-0800, at 0065-0792, Witness Statement of KDZ259, 3 March 1998, ERN:0065-0712-0065-0736, at 0065-0721, 0065-0723, 0065-0724. Likewise, information that Bosnian Serb forces threatened UN personnel was also included in the Prosecution Rule 65 *ter* Witness List. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Submission Pursuant to Rule 65 *ter* (E)(i)-(iii), 18 May 2009 (public with partly confidential appendices) ("Prosecution Rule 65 *ter* Submissions"), Appendix II (confidential) ("Prosecution Rule 65 *ter* Witness List of 18 May 2009"), pp. 319, 320, 327, 337, 348, 355. In these circumstances, Karadžić fails to demonstrate that he was given insufficient notice with respect to the pleading of the threats forming, in part, the *actus reus* of the crime of hostage-taking.

[173] *Prlić et al.* Appeal Judgement, para. 27; *Niyitegeka* Appeal Judgement, para. 193; *Kupreškić et al.* Appeal Judgement, para. 88.

[174] *See* Trial Judgement, para. 5944, *referring to* Trial Judgement, paras. 5871, 5872, 5874–5876, 5880, 5890, 5894, 5895, 5899, 5902, 5914, 5915, 5917. The Appeals Chamber notes that, contrary to Karadžić's submission, the Trial Chamber did not rely on threats issued by Karadžić in order to establish the *actus reus* of the crime of hostage-taking and rejects his contention that further specificity in the Indictment was required with respect to verbal threats issued by him. *See* Trial Judgement, para. 5944, *referring to* Trial Judgement, paras. 5871, 5872, 5874–5876, 5880, 5890, 5894, 5895, 5899, 5902, 5914, 5915, 5917. Although paragraph 5961 of the Trial Judgement in the legal findings section for hostage-taking refers to threats issued by him, this evidence was used to support findings on the common criminal purpose of the hostage-taking joint criminal enterprise but not to establish the *actus reus* of the crime. *See* Trial Judgement, paras. 5957-5962. Karadžić's submissions do not demonstrate that the Indictment was deficient as it concerned the common criminal purpose of the hostage-taking joint criminal enterprise or his contributions to it. *See* Indictment, paras. 25-29. *Cf. Nizeyimana* Appeal Judgement, paras. 315-317. Moreover, any deficiency in the Indictment in this respect would have been cured through the provision of timely, clear, and consistent notice as Karadžić's conduct of issuing threats is also referred to in the Prosecution Pre-Trial Brief's section on the crime of hostage-taking. *Compare* Trial Judgement, para. 5961 *with* Prosecution Pre-Trial Brief, para. 247.

(d) Conclusion

64. Based on the foregoing, the Appeals Chamber dismisses Grounds 3 through 5 of Karadžić's appeal.

4. Alleged Errors in Failure to Limit the Scope of the Trial and to Remedy Disclosure Violations (Ground 6)

65. Karadžić argues under Ground 6 of his appeal that the Trial Chamber's failure to limit the scope of the trial and to properly remedy repeated disclosure violations by the Prosecution led to an "unmanageable and unfair trial".[175] Each of these contentions will be addressed in turn below.

(a) Scope of the Trial

66. On 16 February 2009, the Trial Chamber granted, in part, the Prosecution's request for leave to amend the First Amended Indictment and denied Karadžić's request to limit the charges in the proposed second amended indictment.[176] The Trial Chamber held that according to Rule 50 of the ICTY Rules, the Prosecution can request amendments to an indictment and a trial chamber may grant or deny such request once it has heard the parties, but "an attempt [...] to impose its will to effect wholesale restriction" of an indictment would exceed the scope of its discretion.[177] On 22 July 2009, following the filing of the Third Amended Indictment,[178] the Trial Chamber ordered the Prosecution to propose reductions to its case pursuant to Rule 73 *bis* (D) of the ICTY Rules,[179] which the Prosecution did on 31 August 2009.[180] On 8 October 2009, the Trial Chamber approved the Prosecution's proposals and reduced the number of crime sites and incidents charged in the Indictment.[181] While acknowledging its disappointment with the Prosecution's reluctance to identify further crime sites and incidents that could be excluded from the scope of the trial,[182] the Trial Chamber did not order further reductions.[183] On 27 January 2012, the Trial Chamber rejected Karadžić's request to exclude from the scope of the Indictment allegations concerning a number of

[175] Karadžić Appeal Brief, para. 112; T. 23 April 2018 pp. 98-106.
[176] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion to Amend the First Amended Indictment, 16 February 2009 ("Decision of 16 February 2009"), para. 54.
[177] *See* Decision of 16 February 2009, para. 37.
[178] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009.
[179] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order to the Prosecution under Rule 73 *bis* (D), 22 July 2009 ("Order of 22 July 2009"), paras. 5, 7.
[180] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Submission Pursuant to Rule 73[ ]*bis* (D), 31 August 2009 (public with confidential Appendix A and public Appendix B) ("Prosecution Submission of 31 August 2009"). On 8 September 2009, the Trial Chamber invited the Prosecution to propose further reductions to the Indictment. *See* T. 8 September 2009 p. 451. On 18 September 2009, the Prosecution declined to propose any further reductions, arguing that the removal of additional counts, crime sites, or incidents would have an adverse impact on its ability to fairly present its case. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Second Submission Pursuant to Rule 73[ ]*bis* (D), 18 September 2009 (public with confidential Appendix A), paras. 1, 22.
[181] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on the Application of Rule 73 *bis*, 8 October 2009 ("Decision of 8 October 2009"), paras. 6, 7, 11.
[182] Decision of 8 October 2009, para. 5.
[183] Decision of 8 October 2009, paras. 5, 6.

Sarajevo-related shelling and sniping incidents that were excluded from the pending ICTY trial against Ratko Mladić at the Prosecution's request.[184]

67. Karadžić argues that the Trial Chamber erred when it declined to reduce the scope of the trial either under Rule 50 or under Rule 73 *bis* of the ICTY Rules.[185] In particular, Karadžić submits that the Trial Chamber erred as a matter of law in concluding in its Decision of 16 February 2009 that it lacked the authority to approve amendments to an indictment at the request of the defence or *sua sponte*.[186] According to Karadžić, nothing in the text of Rule 50 of the ICTY Rules or the jurisprudence interpreting it limits the nature or scope of amendments to an indictment that may be approved or rejected by a trial chamber.[187] Karadžić also points out that, in the *Mladić* case, the Prosecution took a contrary position to the Trial Chamber's Decision of 16 February 2009 and argued that, under Rule 50 of the ICTY Rules, a trial chamber has the power to sever an indictment and order the trial to proceed only on some of the initial charges.[188]

68. Karadžić further argues that the Trial Chamber erred in its Decision of 8 October 2009 when it refused to use its discretion under Rule 73 *bis* of the ICTY Rules to reduce the scope of the Prosecution's case, which, in turn, set the stage for an unmanageable and unfair trial.[189] According to Karadžić, Rule 73 *bis* of the ICTY Rules provides several ways by which a trial chamber may reduce the scope of a trial to make it more manageable.[190] In this case, Karadžić contends that, even though the Trial Chamber invited the Prosecution to propose reductions to the scope of the indictment, it did not order reductions beyond those proposed by the Prosecution, and declined to remove from the indictment allegations about incidents that were excluded from the almost identical indictment in the *Mladić* case.[191]

69. The Prosecution responds that Karadžić fails to demonstrate that the scope of the trial caused him prejudice or that the Trial Chamber abused its discretion under Rules 50 and 73 *bis* of

[184] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Strike Scheduled Sarajevo Shelling and Sniping Incidents, 27 January 2012 ("Decision of 27 January 2012"), paras. 7-12.
[185] Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 49, 53, 112; T. 23 April 2018 pp. 99, 100.
[186] Karadžić Appeal Brief, paras. 49, 52.
[187] Karadžić Appeal Brief, para. 52.
[188] Karadžić Appeal Brief, paras. 50, 51, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Consolidated Prosecution Motion to Sever Indictment, to Conduct Separate Trials and to Amend Resulting Srebrenica Indictment (public with public and confidential annexes), 16 August 2011, paras. 21, 22.
[189] Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 53, 56, 60; T. 23 April 2018 pp. 99, 100. In support of his arguments concerning the risks to the fairness of a trial that emanate from the approval of broad indictments, Karadžić cites to excerpts from articles and books by former ICTY judges and staff members. *See* Karadžić Appeal Brief, paras. 58, 59 and references cited therein.
[190] Karadžić Appeal Brief, para. 54 (stating that only in "very exceptional circumstances […] a case cannot be reduced within the terms of Rule 73 *bis*").
[191] Karadžić Appeal Brief, paras. 55, 57, *referring to* Decision of 27 January 2012, para. 12. In his reply, Karadžić adds that the Prosecution "concedes" that the Trial Chamber had the power to reduce the scope of the Indictment and submits

the ICTY Rules.[192] It contends that the Trial Chamber correctly held that Rule 50 of the ICTY Rules "is not the appropriate mechanism" for a defence request to sever an indictment or reduce the scope of the trial, which is consistent with the Prosecution's position in the *Mladić* case.[193] The Prosecution further argues that the Trial Chamber did substantially reduce the scope of the trial at the Rule 73 *bis* (D) stage, and that, instead of identifying any error, Karadžić attempts to link the Rule 73 *bis* decision to the volume of disclosure in his case.[194] The Prosecution contends that this argument is "misconceived" as any "reasonably representative" charges against Karadžić would have necessitated an enormous amount of disclosure given, *inter alia*, his position and his role in designing criminal policies.[195]

70. The Appeals Chamber observes that Rule 50(A)(i)(c) of the ICTY Rules states that "the Prosecutor may amend an indictment after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties". According to the plain language of this provision, once a case is assigned to a trial chamber, the indictment may be amended at the Prosecution's request with the leave of the trial chamber or a Judge of the chamber. While a trial chamber has ample discretion to grant or deny the Prosecution's request, it may only exercise this discretion after the Prosecution first seeks an amendment to the indictment. As the Trial Chamber correctly held, it is the prerogative of the Prosecution to request amendments to an indictment and a trial chamber cannot modify an indictment *sua sponte* – let alone at the behest of the defence, as Karadžić sought to do in this case.[196]

71. Contrary to Karadžić's arguments, the Prosecution's position in the *Mladić* case was anything but inconsistent with this interpretation of Rule 50 of the ICTY Rules. In that case, it was the Prosecution – not the defence – that requested the severance of the charges against Mladić.[197] The Appeals Chamber finds no error in the Trial Chamber's conclusion that Rule 50 of the ICTY Rules was not the "appropriate mechanism" to effect a reduction in the scope of the case at the request of the Defence, because, under Rule 50 of the ICTY Rules, the Chamber lacked the power

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that its repeated failure to comply with disclosure obligations, despite its "protestations of good faith", is proof of the unmanageable scope of the Indictment. *See* Karadžić Reply Brief, para. 32.

[192] Prosecution Response Brief, paras. 41, 43, 44. *See also* T. 23 April 2018 pp. 173-179.

[193] Prosecution Response Brief, para. 43.

[194] Prosecution Response Brief, para. 44.

[195] Prosecution Response Brief, para. 44.

[196] *See* Decision of 16 February 2009, paras. 37, 39.

[197] *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment, 13 October 2011, para. 2. The Trial Chamber was also correct in finding that Karadžić's reliance on a decision in the case of *Prosecutor v. Milan Milutinović et al.* was equally misplaced, since, unlike this case, the Trial Chamber in that case was seized of: (i) a request from the Prosecution for leave to amend the indictment; and (ii) motions by two of the accused pursuant to Rule 72 (A) of the ICTY Rules. *See* Decision of 16 February 2009, para. 38, *referring to Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-PT, Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment, 22 March 2006.

to order reductions beyond those requested by the Prosecution.[198] The Trial Chamber correctly drew a distinction between: (i) the amendment of an indictment pursuant to Rule 50 of the ICTY Rules (which can only be requested by the Prosecution); (ii) the modification of an indictment following a successful defence motion pursuant to Rule 72 of the ICTY Rules, including a motion under Rule 72(A)(iii) of the ICTY Rules for the severance of counts or the conduct of separate trials; and (iii) the Trial Chamber's discretion to invite the Prosecution pursuant to Rule 73 *bis* of the ICTY Rules to reduce the number of counts charged in the indictment.[199] The Appeals Chamber, therefore, dismisses Karadžić's challenges to the Trial Chamber's interpretation of Rule 50 of the ICTY Rules in the Decision of 16 February 2009.

72. Equally without merit is Karadžić's assertion that the Trial Chamber, in the Decision of 8 October 2009, abused its discretionary power under Rule 73 *bis* (D) of the ICTY Rules, which provides that:

> [a]fter having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.

The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them.[200] This discretion, however, must be exercised in accordance with Articles 20(1) and 21 of the ICTY Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[201] Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[202]

73. In this case, the Trial Chamber ordered the Prosecution to propose reductions to the size of the case, pursuant to Rule 73 *bis* of the ICTY Rules,[203] and then, having reviewed the proposals, ordered the exclusion of specific crime sites and incidents from the scope of the trial.[204] While the Trial Chamber limited itself to considering and granting the Prosecution's proposals and did not

[198] Karadžić Appeal Brief, para. 50; Decision of 16 February 2009, paras. 37, 39.
[199] Decision of 16 February 2009, para. 38.
[200] *Prlić et al.* Appeal Judgement, para. 26; *Šainović et al.* Appeal Judgement, para. 29. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 137; *Ndahimana* Appeal Judgement, para. 14.
[201] *See, e.g., Mladić* Decision of 22 October 2013, para. 12; *Ndahimana* Appeal Judgement, para. 14; *Galić* Appeal Judgement, para. 18.
[202] *Prlić et al.* Appeal Judgement, para. 26; *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.
[203] Decision of 8 October 2009, paras. 2, 3, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, T. 8 September 2009 p. 451; Order of 22 July 2009, para. 7.
[204] Decision of 8 October 2009, paras. 6, 11.

order, *sua sponte*, the exclusion of additional crime sites and incidents, there is no indication that the Trial Chamber's restraint in the exercise of its discretion rendered Karadžić's trial unmanageable or unfair.

74. Karadžić's reliance on the exclusion of certain Sarajevo-related incidents from the scope of the *Mladić* case is also misplaced. In that case, it was the Prosecution that proposed the exclusion of those incidents from the scope of the indictment.[205] In this case, the Prosecution did not propose the exclusion of the same incidents from the Indictment. On appeal, Karadžić's complaint focuses on the Trial Chamber's refusal to exercise its discretion to exclude from the Indictment incidents that the Prosecution did *not* seek to exclude. Furthermore, as the Trial Chamber correctly found, "while the case against Mladić overlaps with these proceedings [in the *Karadžić* case] to a significant extent, there are also a number of differences between them, such as the fact that the two accused held different positions during the conflict […] [and this] divergence alone may be sufficient to account for a variation in the incidents charged and the necessity to lead evidence on a greater number of incidents [in the *Karadžić* case]".[206]

75. In the preamble of Ground 6 of his appeal, Karadžić generally alleges that the scope of the trial "caused the disclosure violations, which the Chamber failed to remedy", thus resulting in a violation of his fair trial rights.[207] In the view of the Appeals Chamber, this contention is cursory and unsubstantiated. In his submissions on appeal, Karadžić points to nothing that establishes a causal (or other) link between the Prosecution's disclosure violations and the scope of the case, and does not substantiate his allegation – as will be further explained in the following section – that the Trial Chamber utterly "failed to remedy" those violations so as to cause irreparable harm to his fair trial rights.[208]

76. In view of the foregoing, the Appeals Chamber finds that Karadžić has failed to demonstrate any impairment of his fair trial rights as a result of the Trial Chamber's decision to order reductions in the Indictment only to the extent proposed by the Prosecution.

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[205] Decision of 27 January 2012, para. 1. *See* Prosecution Submission of 31 August 2009.
[206] Decision of 27 January 2012, para. 8.
[207] Karadžić Appeal Brief, p. 17.
[208] *See infra* Section III.A.4(b).

(b) Disclosure Violations

77. Throughout the trial, Karadžić filed 108 motions alleging that the Prosecution violated its disclosure obligations under Rules 66 and/or 68 of the ICTY Rules.[209] On a number of occasions, the Trial Chamber found that the Prosecution violated its disclosure obligations pursuant to Rule 66(A)(ii) and/or Rule 68 of the ICTY Rules.[210] The Trial Chamber considered, however, that

[209] Trial Judgement, paras. 6154-6156. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, 108th Motion for Finding of Disclosure Violation and for Remedial Measures, 14 March 2016 (public with confidential annexes) ("108th Disclosure Motion").

[210] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's 107th Disclosure Violation Motion, 14 March 2016 ("Decision on 107th Disclosure Motion"), paras. 17, 18; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's 104th and 105th Disclosure Violation Motions, 18 February 2016 ("Decision on 104th and 105th Disclosure Motion"), paras. 26, 31, 32, 36; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's 102nd and 103rd Disclosure Violation Motions, 4 November 2015, paras. 33, 35, 40; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's One Hundredth Disclosure Violation Motion, 13 July 2015 ("Decision on One Hundredth Disclosure Motion"), paras. 15, 19; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions, 8 June 2015, paras. 11, 12, 15, 17, 19; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of "Decision on Accused's Ninety-Third Disclosure Violation Motion" Issued on 13 October 2014, 20 March 2015 ("Decision on Ninety-Third Disclosure Motion"), paras. 16, 21; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninety-Sixth Disclosure Violation Motion, 21 January 2015, paras. 8, 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninety-Fifth Disclosure Violation Motion, 5 December 2014, paras. 10, 13; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninety-Fourth Disclosure Violation Motion, 13 October 2014 ("Decision on Ninety-Fourth Disclosure Motion"), paras. 14, 19; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninety-First Disclosure Violation Motion, 7 May 2014, paras. 15, 17, 20; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Ninth and Ninetieth Disclosure Violation Motions, 16 April 2014, paras. 20, 21; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Eighth Disclosure Violation Motion, 18 March 2014, paras. 10, 12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Seventh Disclosure Violation Motion, 10 March 2014, paras. 12, 16; T. 3 March 2014 p. 47546; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Fifth Disclosure Violation Motion, 21 January 2014 ("Decision on Eighty-Fifth Disclosure Motion"), paras. 20, 24; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Fourth Disclosure Violation Motion, 16 January 2014, paras. 14, 16; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Third Motion for Finding of Disclosure Violation, 21 November 2013 (confidential), paras. 10, 13; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighty-Second Disclosure Violation Motion, 7 November 2013, paras. 18, 19, 22; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eightieth and Eighty-First Disclosure Violation Motions, 9 July 2013, paras. 14, 18, 20; T. 9 May 2013 p. 38097; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013 ("Decision on Seventy-Seventh and Seventy-Eighth Disclosure Motions"), paras. 18, 20, 25; T. 29 January 2013 pp. 32881, 32882; T. 17 January 2013 p. 32151; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventy-First Disclosure Violation Motion, 1 June 2012 ("Decision on Seventy-First Disclosure Motion"), paras. 10, 11, 14; T. 15 March 2012 pp. 26316, 26317; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of "Decision on Accused's Sixty-Seventh and Sixty-Eighth Disclosure Violation Motions" Issued on 1 March 2012, 1 March 2012, paras. 17, 22, 33, 37; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixty-Fifth Disclosure Violation Motion, 12 January 2012, paras. 16, 26; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, paras. 25, 27, 29, 31, 37; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Fifty-Ninth Disclosure Violation Motion, 14 October 2011, paras. 10, 14; T. 8 September 2011 p. 18638; T. 19 August 2011 p. 17484; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Fifty-Fifth Disclosure Violation Motion, 19 August 2011, paras. 11, 14; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Fifty-Third and Fifty-Fourth Disclosure Violation Motions, 22 July 2011 ("Decision on Fifty-Third and Fifty-Fourth Disclosure Motions"), paras. 13, 14, 17; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Fifty-First and Fifty-Second Disclosure Violation Motions, 7 July 2011 ("Decision on Fifty-First and Fifty-Second Disclosure Motions"), paras. 17, 19; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011 ("Decision on Forty-Ninth and Fiftieth Disclosure Motions"), paras. 38, 42, 46, 51, 55; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Forty-Seventh Motion for Finding of

no remedies were warranted as no violation resulted in demonstrable prejudice to Karadžić.[211] Notwithstanding, the Trial Chamber repeatedly reprimanded the Prosecution for its failure to adhere to its disclosure obligations.[212] In certain instances, it required the Prosecution to explain failures to adhere to its disclosure obligations and steps taken to ensure compliance with them, and ordered it to take independent remedial action to avoid further violations.[213] The Trial Chamber also suspended proceedings in certain instances and delayed the testimony of Prosecution witnesses to

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Disclosure Violation and for Further Suspension of Proceedings, 10 May 2011 ("Decision on Forty-Seventh Disclosure Motion"), paras. 14-16, 26; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Forty-Sixth Disclosure Violation Motion, 20 April 2011, paras. 8, 10; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Forty-Third to Forty-Fifth Disclosure Violation Motions, 8 April 2011, paras. 25, 27, 28, 32, 34, 37; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011, paras. 25, 28, 34, 38-40; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Thirty-Second, Thirty-Third, Thirty-Fifth and Thirty-Sixth Disclosure Violation Motions, 24 February 2011, paras. 17, 21; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011, paras. 9, 12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-Ninth Disclosure Violation Motion, 11 January 2011 ("Decision on Twenty-Ninth Disclosure Motion"), para. 12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventeenth *bis* and Twenty-Eighth Disclosure Violation Motions, 16 December 2010, paras. 21, 23; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-Seventh Disclosure Violation Motion, 17 November 2010, para. 13; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010 ("Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions"), paras. 27, 31, 35, 44; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions, 2 November 2010 ("Decision on Eighteenth to Twenty-First Disclosure Motions"), paras. 31, 35, 37, 45; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 30 September 2010 ("Decision on Seventeenth Disclosure Motion"), paras. 18, 22; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Eleventh to Fifteenth Motions for Finding of Disclosure Violations and for Remedial Measures, 24 September 2010, paras. 27, 28, 30, 33, 34-36, 39, 43; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010 ("Decision on Ninth and Tenth Disclosure Motions"), paras. 17, 18, 20; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures, 18 August 2010, paras. 16, 20; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010 ("Decision on Third, Fourth, Fifth, and Sixth Disclosure Motions"), paras. 28, 29, 40, 42; *Prosecutor v. Radovan Karadžić* Case No. IT-95-5/18-T, Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures, 17 June 2010 ("Decision on Second Disclosure Motion"), para. 12.

[211] Trial Judgement, paras. 6155, 6156. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for New Trial for Disclosure Violations, 3 September 2012 ("Decision on Motion for New Trial"), paras. 14, 17; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Second Motion for New Trial for Disclosure Violations, 14 August 2014 ("Decision on Second Motion for New Trial"), paras. 13, 15, 17.

[212] Decision on Fifty-First and Fifty-Second Disclosure Motions, para. 17; Decision on Forty-Seventh Disclosure Motion, para. 25; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Fifth Suspension of Proceedings, 17 March 2011 ("Decision on Fifth Suspension of Proceedings Motion"), para. 9; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Fourth Suspension of Proceedings, 16 February 2011 ("Decision on Fourth Suspension of Proceedings Motion"), paras. 10, 13; T. 10 February 2011 pp. 11474, 11475; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, para. 42; Decision on Eighteenth to Twenty-First Disclosure Motions, para. 39; Decision on Seventeenth Disclosure Motion, para. 22; Decision on Ninth and Tenth Disclosure Motions, para. 23; Decision on Second Disclosure Motion, paras. 13-15, 17-19.

[213] *See* Decision on Ninety-Fourth Disclosure Motion, paras. 16, 19; Decision on Ninety-Third Disclosure Motion, paras. 20, 21; Decision on Eighty-Fifth Disclosure Motion, para. 24; Decision on Seventy-Seventh and Seventy-Eighth Disclosure Motions, paras. 23, 25; Decision on Forty-Ninth and Fiftieth Disclosure Motions, paras. 54, 55; Decision on Third, Fourth, Fifth, and Sixth Disclosure Motions, para. 47; Decision on Second Disclosure Motion, para. 15. *See also* Decision on Fifty-Third and Fifty-Fourth Disclosure Motions, paras. 6, 16; *Prosecutor v. Radovan Karadžić*, Case

allow Karadžić time to review extensive Prosecution disclosures or belatedly disclosed material relevant to the prospective witnesses.[214]

78. At the end of the Prosecution case and at the close of trial, Karadžić requested that the Trial Chamber order a new trial either as a sanction for the Prosecution's failure to adhere to its disclosure obligations or as a remedy for the cumulative prejudice resulting therefrom.[215] When dismissing this request at the conclusion of the Prosecution case, the Trial Chamber held that it was cognizant of the cumulative effect of disclosure violations and that it had taken measures to ensure that Karadžić's preparations for trial had not been prejudiced and that his fair trial rights had not been compromised.[216] Specifically, the Trial Chamber noted that it had suspended proceedings, delayed the testimony of Prosecution witnesses, imposed deadlines on the Prosecution to review and disclose material, and required the Prosecution to provide detailed reports on its disclosure practices.[217] Furthermore, the Trial Chamber emphasized that, although it found that disclosure violations had occurred, Karadžić had not been prejudiced as a result of them.[218]

79. When denying Karadžić's renewed request for a new trial after the conclusion of the Defence case, the Trial Chamber acknowledged that disclosure violations continued to occur during the Defence case but noted that none had prejudiced Karadžić individually or on a cumulative basis.[219] The Trial Chamber again highlighted the remedial measures taken to ensure that Karadžić's preparations for trial were not prejudiced and that the cumulative effect of disclosure violations did not compromise his right to a fair trial.[220]

80. Karadžić argues that, although finding that the Prosecution violated its disclosure obligations on 82 occasions, the Trial Chamber excused such violations and failed to provide

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No. IT-95-5/18-PT, Decision on Accused Motion for Disclosure of Rule 68 Material Obtained under Rule 70(B) and Order on Prosecution Disclosure Report, 15 January 2009, pp. 2-4.

[214] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Modification of Delayed Disclosure: Witnesses KDZ320, KDZ456, KDZ523 and KDZ532, 23 September 2011 (confidential) ("Decision on Delayed Disclosure of 23 September 2011"), paras. 22, 24; Decision on Forty-Seventh Disclosure Motion, paras. 24, 26; Decision on Forty-Ninth and Fiftieth Disclosure Motions, para. 52, *referring to* T. 3 June 2011 pp. 14202-14204; Decision on Fifth Suspension of Proceedings Motion, para. 10; Decision on Fourth Suspension of Proceedings Motion, paras. 12-14; T. 10 February 2011, pp. 11474-11476; Decision on Twenty-Ninth Disclosure Motion, paras. 13, 17, 18; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, paras. 41, 43, *referring to* T. 3 November 2010 pp. 8907, 8908; Decision on Eighteenth to Twenty-First Disclosure Motions, paras. 43, 45; Decision on Seventeenth Disclosure Motion, para. 7, *referring to* T. 13 September 2010 pp. 6593, 6594; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Suspension of Proceedings, 18 August 2010 ("Decision on Suspension of Proceedings"), para. 8; Decision on Third, Fourth, Fifth, and Sixth Disclosure Motions, paras. 30, 31, *referring to* T. 21 June 2010 p. 3941; T. 22 June 2010 pp. 4022, 4023.

[215] Decision on Motion for New Trial, para. 4; Decision on Second Motion for New Trial, paras. 4, 11.

[216] Decision on Motion for New Trial, paras. 14-16. *See also* Trial Judgement, para. 6154.

[217] Decision on Motion for New Trial, paras. 14-16.

[218] Decision on Motion for New Trial, para. 17.

[219] Decision on Second Motion for New Trial, paras. 12, 13, 15, 17. *See also* Trial Judgement, para. 6156.

[220] Decision on Second Motion for New Trial, paras. 16, 17.

effective remedies, rendering his trial unfair.[221] Specifically, Karadžić argues that the Trial Chamber erroneously rejected his requests: (i) to exclude evidence; (ii) to require certification by the Prosecution; (iii) to issue warnings and sanctions; (iv) to appoint a special master; (v) to order access to the Prosecution's database; (vi) to order a reduction in the scope of the case; (vii) to hold an evidentiary hearing; (viii) to recall Prosecution witnesses; and (ix) to order a new trial.[222] Karadžić highlights jurisprudence from the ICTR and the ICTY allowing for analogous remedies[223] and alleges that, had the Trial Chamber sanctioned the Prosecution or provided remedies for such violations, it could have curtailed or eliminated the Prosecution's deficient disclosure practices.[224] Instead, Karadžić submits, the Trial Chamber's "inadequate" response to the disclosure violations created a climate of impunity resulting in the Prosecution's continued violation of its disclosure obligations to the detriment of his right to a fair trial.[225]

81. Karadžić also contends that the Trial Chamber erred in assessing the prejudice caused by the Prosecution's disclosure violations.[226] Specifically, he submits that the Trial Chamber erroneously required him to demonstrate that he suffered prejudice, whereas, in light of relevant jurisprudence, the Trial Chamber should have independently examined whether prejudice existed once any disclosure violation had been established or required the Prosecution to demonstrate that his defence was not materially impaired due to any such violation.[227] In this regard, Karadžić contends that Prosecution disclosure violations are analogous to failures to provide sufficient notice in an indictment, and that, when such violations have been established at trial, the Prosecution should bear the burden of demonstrating that the accused's ability to prepare a defence was not materially impaired.[228]

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[221] Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 61, 62, 73, 77, 84; Karadžić Reply Brief, para. 38; T. 23 April 2018 pp. 99-106. Karadžić points, in particular, to the following disclosure violations: (i) all witness statements under Rule 66(A)(ii) of the ICTY Rules were ordered to be disclosed by 7 May 2009 but, between June and December 2010, the Prosecution disclosed 388 witness statements, including some that had been in its possession for 10 to 15 years; (ii) between September and November 2010, the Prosecution disclosed 20,000 pages of material, which it had obtained in January 2010; and (iii) on 31 January 2011, 28 February 2011, and 31 March 2011, after the start of the trial, the Prosecution disclosed another 75,500 pages and 379 hours of videotaped witness interviews. *See* Karadžić Appeal Brief, paras. 63, 64, 68. Karadžić argues that monthly Prosecution reports reflect that by mid-May 2011, 269,550 pages of exculpatory material were disclosed after the trial began in October 2009. Karadžić Appeal Brief, para. 68. *See also* T. 24 April 2018 pp. 242, 243.
[222] Karadžić Appeal Brief, paras. 63, 70, 71. *See also* Karadžić Appeal Brief, paras. 62, 64.
[223] *See* Karadžić Appeal Brief, para. 73.
[224] Karadžić Appeal Brief, paras. 73, 74. *See also* Karadžić Appeal Brief, paras. 75, 76; T. 23 April 2018 pp. 99, 100.
[225] *See* Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 74, 76, 77, 84; T. 23 April 2018 pp. 103-105. *See also* Karadžić Appeal Brief, paras. 75, 76. Karadžić supports this argument by referring to ICTY and ICTR Appeals Chamber judgements and decisions emphasizing the importance of the Prosecution's disclosure obligations. *See* Karadžić Appeal Brief, paras. 78-83.
[226] *See* Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 85-87; Karadžić Reply Brief, para. 33.
[227] Karadžić Appeal Brief, paras. 87-92, 95, 99, 100, 111.
[228] Karadžić Appeal Brief, paras. 91, 92.

82. Karadžić further argues that, by not requiring the Prosecution to demonstrate that his defence had not been materially impaired, the Trial Chamber failed to account for prejudice he in fact suffered as a result of the Prosecution's disclosure violations.[229] Specifically, he submits that his trial was unduly delayed as the Trial Chamber was required to order 14 weeks of adjournments to remedy the disclosure violations.[230] Karadžić further contends that by disclosing 78 percent of the total exculpatory material after the trial began, the Prosecution: (i) deprived him of his ability to review the material and develop a coherent defence strategy before trial; and (ii) disrupted his ability to completely review disclosed material as well as conduct other aspects of his defence in the midst of trial.[231] Finally, Karadžić submits that, in over 79 instances, the late disclosure prevented him from confronting Prosecution witnesses with exculpatory material or prior statements.[232] Karadžić points to disclosure violations related to [REDACTED],[233] Herbert Okun, and Vitomir Žepinić to support this argument.[234] In view of these alleged errors and prejudice he suffered, Karadžić requests a new trial.[235]

83. The Prosecution responds that the number of disclosure violations found by the Trial Chamber is not meaningful in view of the Trial Chamber's additional finding that Karadžić employed a litigation tactic of accumulating judicial determinations of disclosure violations without regard to whether he suffered any prejudice from them.[236] In this regard, the Prosecution asserts that Karadžić: (i) simply lists remedies that he requested in relation to disclosure violations without demonstrating any error in the decisions; and (ii) ignores the various remedies provided by the Trial Chamber to ensure his right to a fair trial, including various adjournments granted so that the Defence could absorb the disclosures made, as well as the Trial Chamber's repeated finding that the Prosecution acted in good faith.[237]

84. The Prosecution also argues that the Trial Chamber correctly placed the burden on Karadžić to demonstrate that he suffered prejudice from disclosure violations.[238] In particular, the

[229] Karadžić Notice of Appeal, p. 5; Karadžić Appeal Brief, paras. 95, 100, 111.
[230] Karadžić Appeal Brief, para. 86. *See also* Karadžić Reply Brief, para. 34.
[231] Karadžić Appeal Brief, paras. 93, 95, 96, 99; Karadžić Reply Brief, para. 35. Karadžić highlights the cases *United States v. Gil*, *R. v. Ward*, and *Prosecutor v. Anto Furundžija* to suggest that disclosure of exculpatory material on the eve of or after trial has commenced is inherently prejudicial. Karadžić Appeal Brief, paras. 94-99, *referring to United States v Gil*, 297 F.3d 93, 106 (2d Cir. 2002), *R v. Ward*, [1993] 1 WLR 619, 642; Karadžić Reply Brief, para. 35, *referring to Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Decision, 16 July 1998, para. 19.
[232] Karadžić Appeal Brief, paras. 100, 101; Karadžić Reply Brief, para. 36.
[233] [REDACTED].
[234] Karadžić Appeal Brief, paras. 106-110; Karadžić Reply Brief, para. 37.
[235] Karadžić Appeal Brief, para. 112.
[236] Prosecution Response Brief, paras. 39, 40, 46. The Prosecution further submits that Karadžić recounts "empty statistics describing numbers of pages disclosed and disclosure violations found, all devoid of reference to the content of the material". Prosecution Response Brief, para. 52. *See also* T. 23 April 2018 pp. 173-177.
[237] Prosecution Response Brief, paras. 50, 51, 53; T. 23 April 2018 pp. 173, 174, 176, 177.
[238] Prosecution Response Brief, para. 47.

Prosecution contends that Karadžić's references to notice jurisprudence do not provide cogent reasons to depart from the "established law" applicable to Rule 68 disclosure violations.[239] It further contends that Karadžić has not shown that disclosure violations: (i) affected his right to a trial without undue delay;[240] (ii) prejudiced his trial preparation strategy;[241] (iii) impaired his ability to cross-examine witnesses;[242] or (iv) prejudiced his ability to elicit exculpatory evidence from [REDACTED], Witness Okun, or Witness Žepinić.[243] The Prosecution, therefore, submits that the Trial Chamber "actively safeguarded the fairness of the proceedings" and that Karadžić failed to demonstrate that he suffered prejudice from the disclosure violations.[244]

85. The Appeals Chamber recalls that decisions concerning disclosure pursuant to Rules 66 and 68 of the ICTY Rules as well as remedies for disclosure violations relate to the general conduct of trial proceedings and therefore fall within the discretion of the trial chamber.[245] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[246] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[247]

86. The Appeals Chamber first turns to Karadžić's contention that the Trial Chamber erroneously rejected his requests for the following remedies to disclosure violations: (i) to exclude evidence; (ii) to require certification by the Prosecution; (iii) to issue warnings and sanctions; (iv) to appoint a special master; (v) to order access to the Prosecution's database; (vi) to order a reduction in the scope of the case; (vii) to hold an evidentiary hearing; (viii) to recall Prosecution witnesses; and (ix) to order a new trial. By simply listing his requests for remedies that the Trial Chamber denied, Karadžić's contentions on appeal fail to demonstrate any error invalidating the relevant decisions.

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[239] Prosecution Response Brief, paras. 47, 48. *See also* T. 23 April 2018 p. 168.
[240] Prosecution Response Brief, paras. 54, 55. *See also* T. 23 April 2018 pp. 177, 178.
[241] Prosecution Response Brief, paras. 56-59.
[242] Prosecution Response Brief, paras. 60, 61.
[243] Prosecution Response Brief, paras. 61-66; T. 23 April 2018 p. 175.
[244] Karadžić Appeal Brief, paras. 39, 45, 46, 51, 53. *See also* T. 23 April 2018 pp. 178, 179.
[245] *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14; *Ndindiliyimana et al.* Appeal Judgement, para. 22.
[246] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[247] *See, e.g., Prlić et al.* Appeal Judgement, para. 26; *Ndahimana* Appeal Judgement, para. 14; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013 ("*Mladić* Decision of 12 November 2013"), para. 9; *Lukić and Lukić* Appeal Judgement, para. 17; *Renzaho* Appeal Judgement, para. 143.

87. Furthermore, the Appeals Chamber finds that Karadžić fails to demonstrate that the cumulative impact of the Trial Chamber's denial of his requests for such remedies created a climate of impunity resulting in the Prosecution's continued violation of its disclosure obligations to the detriment of his right to a fair trial. Karadžić's submissions ignore the various remedies provided by the Trial Chamber to ensure that his trial preparations were not prejudiced and that his fair trial rights were guaranteed.[248]

88. The Appeals Chamber turns to Karadžić's submission that the Trial Chamber erroneously required him to establish prejudice resulting from disclosure violations rather than independently examine whether prejudice occurred or require the Prosecution to demonstrate that his defence was not materially prejudiced. The Appeals Chamber recalls that, if the Defence satisfies the Chamber that the Prosecution failed to comply with its disclosure obligations under Rule 68 of the ICTY Rules,[249] the Chamber must examine whether the Defence was prejudiced by that failure before considering whether a remedy is appropriate.[250] The onus is on the Defence to substantiate its claim of alleged prejudice from the disclosure violation.[251] Karadžić's argument to the contrary is not supported by applicable jurisprudence and the Appeals Chamber therefore finds that Karadžić has not demonstrated that the Trial Chamber erred in its assessment of the "prejudice" requirement with respect to disclosure violations.

89. With respect to Karadžić's contention that the adjournments necessary to remedy disclosure violations caused undue delay in his proceedings, the Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 21(4)(c) of the ICTY Statute and protects an accused against *undue* delay, which is determined on a case-by-case basis.[252] A number of factors are relevant to this assessment, including the length of the delay, the complexity of the proceedings,

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[248] Specifically, the Trial Chamber, in light of certain disclosure violations, ensured that the relevant Prosecution witnesses would not appear until Karadžić had had sufficient time to review the disclosure. Furthermore, Karadžić's argument also fails to sufficiently consider the suspensions ordered by the Trial Chamber in view of belated and extensive disclosure in the midst of proceedings. *See*, *e.g.*, Decision on Fifth Suspension of Proceedings Motion, paras. 9, 10; Decision on Fourth Suspension of Proceedings Motion, paras. 12, 14; T. 10 February 2011, pp. 11474, 11475; Decision on Suspension of Proceedings, paras. 7, 8.

[249] Karadžić's submissions focus on the Trial Chamber's misapplication of the burden as it relates to disclosure violations of Rule 68 of the ICTY Rules. *See* Karadžić Appeal Brief, paras. 88, 89.

[250] *See Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014 ("*Ngirabatware* Decision of 15 April 2014"), para. 13. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 39; *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Motions for Relief for Rule 68 Violations, 24 September 2012 ("*Mugenzi and Mugiraneza* Decision of 24 September 2012"), para. 8.

[251] *See*, *e.g.*, *Ngirabatware* Decision of 15 April 2014, para. 23 ("As a result, the Appeals Chamber is not satisfied that Mr. Ngirabatware has substantiated his claim that the Prosecution's failure to timely disclose this material resulted in 'serious prejudice' warranting sanctions.") (internal citation omitted).

[252] *Šešelj* Appeal Judgement, para. 41. *Cf. Nyiramasuhuko et al.* Appeal Judgement, para. 346 and references cited therein (referring to Article 20(4)(c) of the ICTR Statute).

the conduct of the parties, the conduct of the relevant authorities, and the prejudice to the accused, if any.[253]

90. Bearing this in mind, the Appeals Chamber is not persuaded that the suspensions ordered by the Trial Chamber unduly delayed the proceedings or resulted in *per se* prejudice to Karadžić. Suspensions due to extensive disclosure in the midst of proceedings are precisely the remedy that may be necessary to ensure an accused's right to a fair trial.[254] In this case, the orders suspending the proceedings expressly sought to strike a balance between Karadžić's right to a trial without undue delay and his right to have adequate time and facilities for the preparation of his defence.[255] The relevant decisions provided Karadžić the time to review and incorporate newly disclosed material into his trial preparations and instructed the Prosecution to devote its resources to reviewing information in its possession to ensure that all necessary disclosure was complete.[256] Finally, Karadžić has not shown that the individual or cumulative duration of any suspensions ordered unduly delayed the proceedings.

91. The Appeals Chamber turns to Karadžić's submission that the Trial Chamber failed to sufficiently consider the inherent prejudice caused by the fact that 78% of the exculpatory material was disclosed after the trial began.[257] The Appeals Chamber observes that disclosure under Rule 68 of the ICTY Rules is a continuous obligation that does not require disclosure prior to the commencement of trial but "as soon as practicable".[258] Karadžić does not substantiate his general contentions that he was deprived of the ability to develop a coherent defence strategy before trial due to disclosure during the trial or show how disclosure in the midst of his proceedings prejudiced

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[253] *Šešelj* Appeal Judgement, para. 41. *Nyiramasuhuko et al.* Appeal Judgement, para. 346 and references cited therein.

[254] *See, e.g., The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006, para. 7 ("If a Rule 68 disclosure is extensive, parties are entitled to request an adjournment in order to properly prepare themselves. The authority best placed to determine what time is sufficient for an accused to prepare his defence is the Trial Chamber conducting the case.") (internal citations omitted).

[255] *See* Decision on Forty-Seventh Disclosure Motion, paras. 24, 26; Decision on Fifth Suspension of Proceedings Motion, paras. 6, 9; Decision on Fourth Suspension of Proceedings Motion, paras. 8, 12; T. 10 February 2011 pp. 11474-11476; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, paras. 39-41; T. 3 November 2010 pp. 8907, 8908; Decision on Seventeenth Disclosure Motion, paras. 7, 22; T. 13 September 2010 pp. 6593, 6594; Decision on Suspension of Proceedings, para. 8.

[256] *See* Decision on Forty-Seventh Disclosure Motion, paras. 22-24; Decision on Fifth Suspension of Proceedings Motion, para. 9; Decision on Fourth Suspension of Proceedings Motion, paras. 7, 10-13; T. 10 February 2011 pp. 11474, 11475; Decision on Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Motions, paras. 39-43; T. 3 November 2010 pp. 8907, 8908; Decision on Seventeenth Disclosure Motion, para. 7; T. 13 September 2010 p. 6593; Decision on Suspension of Proceedings, para. 7. *See also* Decision on Seventy-First Disclosure Motion, para. 10.

[257] The Appeals Chamber observes that the Prosecution rejects Karadžić's claim that the Prosecution "did not disclose[] exculpatory evidence before trial" and argues that reference to 78% misleadingly "conflates exculpatory material disclosed under Rule 68(i) and 'relevant material' disclosed under Rule 68(ii)". Prosecution Response Brief, para. 59. The Prosecution further suggests that "[t]he vast majority of Rule 68(i) material was disclosed by the March 2011 deadline for Rule 68 disclosure" imposed on it by the Trial Chamber and more than 18 months prior to the commencement of the Defence case. *See* Prosecution Response Brief, para. 59.

his ability to review exculpatory material as well as conduct other aspects of his defence. He does not, for example, identify how his trial strategy would have been altered had all disclosure occurred before the commencement of trial. Similarly, Karadžić does not point to exculpatory material that he was unable to identify or assimilate into his defence or identify other tasks related to his defence that he was unable to undertake as a result of disclosure in the midst of trial.

92. Karadžić's contentions also fail to account for the resources and legal assistance available to him during his pre-trial and trial proceedings in order to, *inter alia*, review and assimilate extensive Prosecution disclosures.[259] Likewise, Karadžić's submissions fail to account for the suspensions of proceedings and delays in the presentation of Prosecution witnesses that the Trial Chamber ordered for the purpose of ensuring his right to a fair trial.[260]

93. Finally, Karadžić's attempt to demonstrate prejudice suffered by not receiving all exculpatory material prior to the commencement of his trial fails to demonstrate error in the Trial Chamber's repeated determinations that Karadžić had not been prejudiced by disclosure violations because:

> (1) the subject matter of the disclosed material was of limited length or not of such significance and the Accused had sufficient time to review that material before the testimony of the affected witnesses; (2) the Accused already possessed similar if not identical material, failed to use that material during his cross-examination or some of the material had already been admitted into evidence; (3) the Accused had already cross-examined witnesses on the subject matter of the disclosed material; (4) the Accused would have the opportunity to tender the material during his defence case, from the bar table or through another witness; (5) the material pertained to reserve, 92 *bis* or 92 *quater* witnesses which did not require additional time to prepare for cross-examination; or (6) the Accused could seek to recall a witness if he showed good cause.[261]

94. Turning to Karadžić's submission that, in 79 instances, late disclosure prevented him from confronting Prosecution witnesses with exculpatory material or prior statements, the Appeals

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[258] *See 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. 29; *Blaškić* Appeal Judgement, paras. 263, 267.

[259] *See, e.g.*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on Defence Team Funding, 31 January 2012, paras. 39, 40, 44, 45; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.7, Decision on Appeal from Decision on Motion for further Postponement of Trial, 31 March 2010, paras. 25, 27, 28; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion for Postponement of Trial, 26 February 2010, paras. 26, 38-40; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, paras. 35, 38, 45, 46, 55, 56. The resources available to Karadžić during the pre-trial and trial phases of his proceeding, which exceeded what is normally available in domestic or most international criminal trials, undermine Karadžić's reliance on jurisprudence emanating from the domestic proceedings in support of the proposition that disclosure on the eve or after the start of trial is inherently prejudicial. *Cf. Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 23 (recalling that "domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings").

[260] *See supra* para. 77.

Chamber observes that Karadžić only referred to three specific instances in which, in his view, the Trial Chamber's decisions on disclosure constituted discernible error resulting in prejudice to him.[262] The three instances concerned late disclosure in relation to [REDACTED], Witness Okun, and Witness Žepinić.

95. The Appeals Chamber observes that, in a decision issued 10 days before the issuance of the Trial Judgement, the Trial Chamber refused to entertain Karadžić's motion alleging a disclosure violation relating to a statement given by [REDACTED] as the motion was filed after a deadline for filing applications related to alleged disclosure violations set by the Trial Chamber.[263] The Appeals Chamber notes that the submissions before the Trial Chamber demonstrated that Karadžić received the statement from the Prosecution on 1 March 2016, days after the 26 February 2016 deadline.[264] Karadžić therefore could not have complied with the filing deadline and the Appeals Chamber consequently finds that the Trial Chamber committed a discernible error in refusing to adjudicate Karadžić's contentions relating to a potential Rule 68 violation in this instance. By not adjudicating the merits of Karadžić's motion alleging a disclosure violation relating to a statement given by [REDACTED], the Trial Chamber failed to determine whether the Prosecution breached its disclosure obligations in this respect and, if so, whether that breach prejudiced Karadžić. The Appeals Chamber will proceed to assess whether the Trial Chamber's discernible error resulted in prejudice to Karadžić.

96. The Appeals Chamber recalls that, to establish that the Prosecution is in breach of its disclosure obligations, the applicant must: (i) identify specifically the material sought; (ii) present a *prima facie* showing of its probable exculpatory nature; and (iii) prove that the material requested is in the custody or under the control of the Prosecution.[265] The Prosecution received the statement in December 2012 and disclosed it to Karadžić more than three years later.[266] The Appeals Chamber considers that, in the absence of any explanation, the disclosure did not occur as soon as

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[261] Decision on Motion for New Trial, para. 17 (internal citations omitted). *See also* Decision on Second Motion for New Trial, para. 13.
[262] Karadžić simply lists the relevant decisions and asserts that "when shifting the burden to the Defence, the Trial Chamber erroneously evaluated the impact of undisclosed Prosecution witnesses' prior statements and exculpatory material on those witnesses' credibility." Karadžić Appeal Brief, para. 100, *referring to* Annex D.
[263] *See* Decision on 107th Disclosure Motion, paras. 14, 15.
[264] 108th Disclosure Motion, para. 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Response to 108th Motion for Finding of Disclosure Violation and for Remedial Measures, 18 March 2016 (public with confidential Appendix B) ("Response to 108th Disclosure Motion"), para. 8.
[265] *Mugenzi and Mugiraneza* Appeal Judgement, para. 39; *Mugenzi and Mugiraneza* Decision of 24 September 2012, para. 8; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011, para. 15.
[266] *See* Response to 108th Disclosure Motion, para. 8.

practicable.[267] Having considered the arguments presented at trial and on appeal,[268] the Appeals Chamber is satisfied that the statement contains potentially exculpatory material.[269] Consequently, Karadžić has established that the Prosecution violated its disclosure obligation under Rule 68 of the ICTY Rules in relation to this statement.[270]

97. With respect to prejudice, Karadžić contends that, if the statement was disclosed in a timely manner, he could have cross-examined or recalled [REDACTED] on information in it with the possible result of successfully impeaching his credibility.[271] Specifically, he notes that [REDACTED] testified that he attended a meeting with Karadžić at which [REDACTED].[272] Karadžić observes that the Trial Chamber relied on evidence of this meeting to find that Karadžić was a member of a joint criminal enterprise to terrorize civilians.[273] Karadžić highlights that the belatedly disclosed statement contains no mention of the meeting.[274] Karadžić further argues that the statement was uniquely probative of the witness's recollection as it was the first statement given and was provided before the witness agreed to testify for the Prosecution.[275]

98. The Appeals Chamber observes that the Trial Chamber recalled [REDACTED] that Karadžić was present at a meeting between 20 and 28 May 1992, "most probably in the last week of May", when Mladić proposed to use "all the equipment and arms" available to "massively bombard Sarajevo" and that, while [REDACTED], Karadžić did not.[276] [REDACTED] also reflected that, had Karadžić opposed Mladić during this meeting, the subsequent shelling of Sarajevo on 28 and 29 May 1992 would not have occurred.[277] [REDACTED], as recalled by the Trial Chamber, further indicated that [REDACTED].[278] [REDACTED] also provided evidence concerning the bombardment of Sarajevo around 6 June 1992.[279] The Trial Chamber relied on this evidence, in part, in finding Karadžić criminally responsible for the shelling of Sarajevo identified in Scheduled

[267] The Prosecution's response at trial in no way explains this otherwise significant delay. *See* Response to 108th Disclosure Motion, para. 8.
[268] *See, e.g.*, 108th Disclosure Motion, Annex C (confidential), paras. 30-34; Response to 108th Disclosure Motion, Annex B (confidential), paras. 1-3. *See also supra* paras. 80-84.
[269] In particular, the Appeals Chamber notes that [REDACTED]'s statement does not make reference to Karadžić's presence at the meeting in late May 1992 at which [REDACTED] or to any war crimes that had occurred in Sarajevo. The Appeals Chamber considers these omissions as potentially exculpatory.
[270] In view of this finding, the Appeals Chamber finds it unnecessary to determine whether the late disclosure of this statement was in violation of Rule 66(A)(ii) of the ICTY Rules.
[271] Karadžić Appeal Brief, para. 105.
[272] Karadžić Appeal Brief, para. 103.
[273] Karadžić Appeal Brief, para. 103.
[274] Karadžić Appeal Brief, para. 104.
[275] Karadžić Appeal Brief, para. 105.
[276] Trial Judgement, paras. 4023, 4721.
[277] Trial Judgement, para. 4721.
[278] Trial Judgement, para. 4726.
[279] Trial Judgement, para. 4048.

Incidents G.1 and G.2 through his participation in the Sarajevo JCE from late May 1992 until October 1995.[280]

99. Examining whether Karadžić suffered prejudice from the disclosure violation, the Appeals Chamber considers that Karadžić was deprived of the opportunity to cross-examine [REDACTED] on the fact that the belatedly disclosed statement contains no mention of the May 1992 meeting. Notably, [REDACTED] was the sole Prosecution witness to provide evidence that, during the late May 1992 meeting, Mladić proposed to use "all the equipment and arms" available to "massively bombard Sarajevo" and that Karadžić did not oppose Mladić's proposal.[281] When viewed in context, however, the Appeals Chamber does not consider that the omission of the meeting from the statement necessarily reflects an inconsistency with [REDACTED]. The statement was taken [REDACTED].[282] In relevant respects, the questions asked of [REDACTED] focused primarily on [REDACTED].[283] The questions did not expressly seek to elicit information related to the role [REDACTED] or the VRS in the shelling or sniping of Sarajevo or how decisions were reached to conduct such operations.[284]

100. In light of the above, and considering that the primary purpose of the statement was to [REDACTED] rather than, for example, gather information related to a criminal investigation, the Appeals Chamber considers that Karadžić has not demonstrated that the statement was materially inconsistent [REDACTED]. Consequently, the Appeals Chamber finds that Karadžić did not suffer prejudice as a result of the Prosecution's failure to disclose [REDACTED] statement in a timely manner or as a result of the Trial Chamber's error in refusing to entertain Karadžić's motion alleging a disclosure violation relating to this statement.

101. With respect to Witness Okun, the Appeals Chamber observes that the Trial Chamber determined that the Prosecution had violated its obligations under Rules 66(A)(ii) and 68 of the ICTY Rules to disclose in a timely manner a statement given to the Prosecution in 1995.[285] The Trial Chamber noted that, with respect to the issue of Karadžić's command and control, Witness Okun's observations in the statement were "vague and expressed in general terms" but reflected

[280] Trial Judgement, paras. 4021-4028, 4048, 4052-4055, 4721, 4725, 4736, 4939, 4940.
[281] Trial Judgement, paras. 4023, 4721.
[282] 108th Disclosure Motion, Annex B (confidential), p. 10.
[283] 108th Disclosure Motion, Annex B (confidential), pp. 18-20.
[284] The statement only briefly and generally covers information from [REDACTED]. *See* 108th Disclosure Motion, Annex B (confidential), pp. 18-20. Furthermore, although [REDACTED], the Appeals Chamber does not consider aspects of the statement [REDACTED] or the view that [REDACTED] to be in contradiction with [REDACTED]. The evidence [REDACTED] with the bombardment of Sarajevo is general and the statement does not focus on the conduct of Karadžić or Mladić as it relates to such activities.
[285] Decision on One Hundredth Disclosure Motion, paras. 3, 14, 15.

that "the most difficult period to establish command and control was between February and May 1992" and that, when asked to provide examples of command and control by Karadžić, Witness Okun stated that "it was hard to say".[286] The Trial Chamber found that Karadžić should have had the opportunity to cross-examine Witness Okun with this statement and that the Prosecution's belated disclosure prejudiced him.[287] Consequently, the Trial Chamber refused to rely on Witness Okun's evidence pertaining to Karadžić's command and control when determining the charges against him.[288]

102. Karadžić contends that this remedy was insufficient as his inability to cross-examine Witness Okun with this statement prevented him from "destabilis[ing]" or "discredit[ing] [Witness Okun] more generally", which could have led to the Trial Chamber assigning less or no probative value to Witness Okun's evidence.[289] Instead, Karadžić argues that he was prejudiced as the Trial Chamber relied "heavily" on Witness Okun's evidence to determine that he was a member of the joint criminal enterprises to expel non-Serbs from the municipalities and to terrorise the citizens of Sarajevo.[290]

103. The Appeals Chamber observes that excluding relevant parts of the Prosecution evidence may be an appropriate remedy for a disclosure violation and that, in this regard, the exclusion of evidence for disclosure violations is an extreme remedy that should not be imposed unless the defence has demonstrated sufficient prejudice to justify such a remedy.[291] In this case, the Trial Chamber expressly recognized that Karadžić was prejudiced and that the disclosure violation "deprived" him of an opportunity to challenge Witness Okun during his cross-examination by reference to the statement.[292] The Trial Chamber addressed this prejudice by not relying on parts of Witness Okun's evidence, namely by excluding evidence pertaining to Karadžić's command and control as well as other evidence that did not "strictly" relate to the period between February and May 1992 discussed in the statement.[293] While Karadžić suggests that he could have used this material to destabilise and discredit Witness Okun generally and raise doubts with regard to other aspects of his evidence that the Trial Chamber relied upon,[294] the Appeals Chamber observes that these aspects of Witness Okun's evidence were supported by contemporaneous documentation or

[286] Decision on One Hundredth Disclosure Motion, para. 16.
[287] Decision on One Hundredth Disclosure Motion, para. 16.
[288] Decision on One Hundredth Disclosure Motion, para. 17.
[289] Karadžić Appeal Brief, para. 107.
[290] Karadžić Appeal Brief, para. 107.
[291] *See Karemera and Ngirumpatse* Appeal Judgement, para. 437; *Bizimungu et al.* Trial Judgement, para. 174.
[292] Decision on One Hundredth Disclosure Motion, paras. 16, 17.
[293] Decision on One Hundredth Disclosure Motion, para. 17.
[294] *See* Karadžić Appeal Brief, para. 107, n. 151, *referring to* Trial Judgement, paras. 2662, 2740, 2823, 3543, 4660, 4675, 4813, 4853, 4854, 4894, 4908, 4929.

formed part of a larger body of evidence relied upon by the Trial Chamber in its assessment of the take-over of the municipalities and Sarajevo.[295] Considering the above, the Appeals Chamber finds that Karadžić does not demonstrate discernible error in the remedy provided by the Trial Chamber.[296]

104. As concerns Witness Žepinić, the Trial Chamber found that the Prosecution violated its obligations under Rules 66(A)(ii) and 68 of the ICTY Rules in, *inter alia*, failing to timely disclose that, during an interview with the Prosecution in September 1996 ("Žepinić Interview"), Witness Žepinić stated that the Bosnian government intelligence service was responsible for shelling the Markale Market.[297] Witness Žepinić, initially listed but not called by the Prosecution, was called as a witness by the Defence.[298] The Trial Chamber concluded that Karadžić was not prejudiced, finding that the belatedly disclosed material: (i) was not significant; and (ii) included information of marginal probative value and/or information that was duplicative of material which Karadžić already possessed.[299]

105. Karadžić contends that the Trial Chamber erred in finding that the late disclosure of the Žepinić Interview did not cause him prejudice.[300] He submits that prejudice is evident as the Trial Chamber concluded that there was insufficient evidence to establish that Bosnian Muslims killed their own citizens, and contends that Witness Žepinić's evidence to the contrary could have raised reasonable doubt with respect to the Trial Chamber's findings that Bosnian Serbs were responsible for all shelling incidents.[301] Karadžić argues that, had the Prosecution disclosed the Žepinić Interview when required, he could have elicited first-hand evidence that Bosnian Muslims killed their own citizens.[302]

106. The Appeals Chamber notes that the Trial Chamber considered other evidence that Bosnian forces fired a shell into the Markale Market.[303] Moreover, the Appeals Chamber observes that,

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[295] *See* Trial Judgement, paras. 2655-2696, 2817-2838, 3541-3546, 4655-4675, 4813, 4851-4855, 4893-4936.
[296] In this respect, the Appeals Chamber recalls that it is within a trial chamber's discretion to assess any inconsistencies in the testimonies of witnesses and that the presence of inconsistencies in the evidence does not, *per se*, require a reasonable trier of fact to reject it as unreliable. *See Prlić et al.* Appeal Judgement, paras. 201, 598; *Ntawukulilyayo* Appeal Judgement, para. 73 and references cited therein.
[297] Decision on 104th and 105th Disclosure Motion, paras. 10, 31. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, 105th Motion for Finding of Disclosure Violation and for Remedial Measures, 1 February 2016 ("105th Disclosure Motion"), para. 2.
[298] Karadžić Appeal Brief, para. 108. *See also* T. 14 February 2013 pp. 33628-33660; T. 13 February 2013 pp. 33572-33626.
[299] Decision on 104th and 105th Disclosure Motion, para. 33.
[300] Karadžić Appeal Brief, paras. 109-111; T. 23 April 2018 pp. 102, 103.
[301] Karadžić Appeal Brief, paras. 109, 110; T. 23 April 2018 pp. 102, 103.
[302] Karadžić Appeal Brief, para. 110; T. 23 April 2018 pp. 102, 103.
[303] *See* Trial Judgement, para. 4511 and references cited therein. *See also* Trial Judgement, para. 4516 ("Having said that, the Trial Chamber accepts evidence of Fraser, Harland, KDZ185, and other Prosecution witnesses that there were

when asked how he knew that Bosnian forces were responsible for shelling the Markale Market, Witness Žepinić stated that "an inspector" advised him of this during a visit to his former office.[304] The Appeals Chamber also notes the Prosecution's contention that "Žepinić subsequently told the Defence that he was actually referring to an attack on Vase Miskina Street on 27 May 1992", which was not a Scheduled Incident, and that this is not contested in the Karadžić Reply Brief.[305] In this regard, the Appeals Chamber considers that the Žepinić Interview does not reflect that Witness Žepinić had first-hand knowledge that the Bosnian intelligence service bombed the Markale Market.[306] Under the circumstances, Karadžić fails to demonstrate that the Trial Chamber committed a discernible error in finding that the belated disclosure of the Žepinić Interview did not cause him prejudice.[307]

107. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in not adjudicating the merits of Karadžić's motion alleging a disclosure violation relating to a statement given by [REDACTED] but concludes that this error did not result in prejudice to him. The Appeals Chamber further finds that Karadžić has not demonstrated error in relation to the Trial Chamber's decisions on Prosecution disclosure violations and Karadžić's requests for a new trial.

(c) Conclusion

108. For the foregoing reasons, the Appeals Chamber dismisses Ground 6 of Karadžić's appeal.

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some incidents where [the] Bosnian Muslim side targeted its own territory, usually near the Presidency building, for political purposes.").

[304] *See* 105th Disclosure Motion, Annex A, pp. 5, 6.

[305] *See* Prosecution Response Brief, para. 65, *referring to* 105th Disclosure Motion, Annex B, RP. 94478, 94477.

[306] *See* 105th Disclosure Motion, Annex A, pp. 5, 6.

[307] To the extent Karadžić contends that this evidence would have shown that ABiH forces launched a mortar attack on Vase Miskina Street on 27 May 1992, the Appeals Chamber observes that Karadžić was not charged with this attack. *See* Trial Judgement, nn. 13356, 15114. In addition, the Trial Chamber received other evidence that this attack was not launched by the VRS. *See* Trial Judgement, para. 4857, nn. 15114, 16610. The Appeals Chamber finds that Karadžić does not demonstrate prejudice in this respect either.

5. Alleged Errors in Taking Judicial Notice of Adjudicated Facts (Ground 7)

109. In five decisions, the Trial Chamber took judicial notice of 2,379 adjudicated facts pursuant to Rule 94(B) of the ICTY Rules.[308] Karadžić submits that in doing so, the Trial Chamber: (i) violated the presumption of innocence and impermissibly shifted the Prosecution's burden of proof; and (ii) erroneously relied on adjudicated facts for which evidence in rebuttal had been admitted.[309] The Appeals Chamber will address these contentions in turn.

(a) Presumption of Innocence and Burden of Proof

110. Karadžić submits that the Trial Chamber erred in taking judicial notice of adjudicated facts as this practice violates the presumption of innocence enshrined in Article 21(3) of the ICTY Statute and international human rights instruments.[310] Relying on opinions of former ICTY Judges and academic literature, Karadžić contends that taking judicial notice of adjudicated facts inappropriately imposes rebuttable presumptions in favour of the Prosecution and shifts the Prosecution's burden to prove its case beyond reasonable doubt to the accused who has to elicit evidence to rebut them.[311]

111. Karadžić asserts that the Prosecution's burden to prove each element of a crime beyond reasonable doubt is not limited to proving the acts, conduct, and mental state of the accused, but also includes proving that the crime charged was committed and who the perpetrator was.[312] Karadžić further submits that taking judicial notice of adjudicated facts from cases in which crimes were found to have been committed and perpetrators were identified is unsafe as the accused in

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[308] Trial Judgement, paras. 25, 6165; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("Decision of 14 June 2010 on Fifth Motion for Judicial Notice"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010 ("Decision of 14 June 2010 on Fourth Motion for Judicial Notice"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 October 2009 ("Decision of 9 October 2009 on Second Motion for Judicial Notice"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009 ("Decision of 9 July 2009 on Third Motion for Judicial Notice"); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009 ("Decision of 5 June 2009 on First Motion for Judicial Notice").

[309] Karadžić Notice of Appeal, pp. 2, 5, 6; Karadžić Appeal Brief, paras. 134, 141; T. 23 April 2018 pp. 101-110. Karadžić's contention that the Trial Chamber erred in taking judicial notice of an excessive number of adjudicated facts will be addressed in connection with Ground 16. *See* Karadžić Appeal Brief, paras. 115, 135.

[310] Karadžić Appeal Brief, paras. 116, 117, *referring to* Article 14(2) of the ICCPR and Article 6(2) of the ECHR. *See also* Karadžić Reply Brief, para. 41; T. 23 April 2018 pp. 106-110. *See also* T. 24 April 2018 pp. 243, 244.

[311] Karadžić Appeal Brief, paras. 120, 122, 124, 126, 133. *See also* Karadžić Reply Brief, paras. 41-43; T. 23 April 2018 pp. 101-110; T. 24 April 2018 pp. 243, 244. Karadžić asserts that the Trial Chamber made adverse findings based on adjudicated facts and that in many instances adjudicated facts were the sole source for the Trial Chamber's factual findings. *See* Karadžić Appeal Brief, para. 114. While Karadžić generally points to paragraphs in the Trial Judgement, he fails to develop his arguments or articulate the precise allegation of error committed by the Trial Chamber. His submissions therefore fail to satisfy the burden on appeal and the Appeals Chamber summarily dismisses them. To the extent Karadžić develops this argument in Ground 31 of his appeal, the Appeals Chamber will evaluate it in connection with the submissions made in support of that ground of appeal.

[312] Karadžić Appeal Brief, paras. 127, 128. *See also* Karadžić Reply Brief, para. 44.

those cases may have had little incentive to contest the existence of crimes and focused their defence on arguing that they were not responsible for the perpetrators of the crimes.[313]

112. Karadžić also argues that taking judicial notice of adjudicated facts contradicts the principle that two trial chambers, each acting reasonably, are entitled to reach different conclusions on the same evidence, and deprives the accused of the possibility that the trial chamber which took judicial notice of adjudicated facts would have reached a different conclusion had it heard the evidence itself.[314]

113. In response, the Prosecution submits that the Trial Chamber correctly took judicial notice of adjudicated facts in accordance with the ICTY Rules and relevant jurisprudence, from which Karadžić has not demonstrated cogent reasons to depart.[315]

114. Karadžić replies that the "cogent reasons" standard does not apply as the legality of the practice has never been challenged, that the practice has only been applied in the context of a limited number of adjudicated facts, and that the Prosecution's arguments are otherwise without merit.[316]

115. The Appeals Chamber observes that the Trial Chamber rejected Karadžić's argument that taking judicial notice of adjudicated facts is unlawful and inconsistent with international law.[317] It stated that Rule 94(B) of the ICTY Rules and related jurisprudence gave the Trial Chamber the discretion to take judicial notice of adjudicated facts, and that Karadžić did not point to any binding authority to substantiate his claim to the contrary.[318]

116. The Appeals Chamber recalls that decisions on taking judicial notice of adjudicated facts fall within the discretion of trial chambers.[319] In order to successfully challenge a discretionary

[313] Karadžić Appeal Brief, paras. 130, 131; T. 23 April 2018 pp. 106-110. In this respect, Karadžić highlights that, in the *Brđanin* and *Krajišnik* cases, for example, arguments were focused on the notion that the military, rather than the civilian authorities, committed crimes, and in the *Galić* case, in which the accused was a military official, arguments were focused on blaming civilian authorities. Karadžić asserts that taking judicial notice of adjudicated facts from these cases is prejudicial to him because he was charged with responsibility for *Republika Srpska's* military and civilian organs. *See* Karadžić Appeal Brief, para. 130; T. 23 April 2018 pp. 107, 108.
[314] Karadžić Appeal Brief, para. 132.
[315] Prosecution Response Brief, paras. 67-70; T. 23 April 2018 pp. 168, 179, 180. *See also* T. 23 April 2018 p. 169; T. 24 April 2018 p. 280.
[316] Karadžić Reply Brief, paras. 39-45.
[317] Decision of 5 June 2009 on First Motion for Judicial Notice, para. 11. *See also* Decision of 14 June 2010 on Fifth Motion for Judicial Notice, para. 15; Decision of 14 June 2010 on Fourth Motion for Judicial Notice, para. 17; Decision of 9 October 2009 on Second Motion for Judicial Notice, para. 17; Decision of 9 July 2009 on Third Motion for Judicial Notice, para. 13.
[318] Decision of 5 June 2009 on First Motion for Judicial Notice, para. 11.
[319] *Mladić* Decision of 12 November 2013, para. 9; *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 ("*Dragomir Milošević* Decision of 26 June 2007"), para. 5.

decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[320]

117. Rule 94(B) of the ICTY Rules provides that, at the request of a party or *proprio motu*, a trial chamber, after hearing the parties, may take judicial notice of adjudicated facts or documentary evidence from other proceedings of the ICTY relating to the matter at issue. Adjudicated facts are "facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding".[321] Judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of an accused.[322]

118. It is not disputed that the practice of taking judicial notice of adjudicated facts is well-established in the jurisprudence of the ICTY and the ICTR,[323] and it is accepted as a method of achieving judicial economy while ensuring the right of an accused to a fair and expeditious trial.[324] In this respect, a number of procedural safeguards are set out in the jurisprudence,[325] which are intended to ensure that trial chambers exercise their discretion cautiously and in accordance with the rights of the accused, including the right to be presumed innocent until proven guilty pursuant to Article 21(3) of the ICTY Statute.[326]

119. The Appeals Chamber observes that Karadžić does not contend that the Trial Chamber violated Rule 94(B) of the ICTY Rules or the jurisprudence of the ICTY interpreting it. Rather,

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[320] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.

[321] *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010 ("*Bagosora et al.* Decision of 29 October 2010"), para. 7; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al.* Decision of 16 June 2006"), para. 40.

[322] *Mladić* Decision of 12 November 2013, para. 25; *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 50.

[323] *See generally Bagosora et al.* Decision of 29 October 2010; *Dragomir Milošević* Decision of 26 June 2007; *Karemera et al.* Decision of 16 June 2006. *See also, e.g.*, *Tolimir* Appeal Judgement, paras. 23-26, 30-36; *Popović et al.* Appeal Judgement, paras. 622, 623.

[324] *Tolimir* Appeal Judgement, para. 23; *Mladić* Decision of 12 November 2013, para. 24; *Karemera et al.* Decision of 16 June 2006, para. 39.

[325] *Mladić* Decision of 12 November 2013, para. 25 ("[a] trial chamber must first determine whether a proposed adjudicated fact meets the admissibility criteria for judicial notice, and then consider whether, even if all admissibility criteria are met, it should nonetheless decline to take judicial notice on the ground that doing so would not serve the interests of justice […]. To be admissible, proposed adjudicated facts must [*inter alia*] not differ in any substantial way from the formulation of the original judgement; […] not be unclear or misleading in the context in which they are placed in the moving party's motion; […] not contain characterisations of an essentially legal nature; […] not be based on an agreement between the parties to the original proceedings; […] not relate to the acts, conduct, or mental state of the accused; and […] not be subject to pending appeal or review."); *Bagosora et al.* Decision of 29 October 2010, paras. 10 ("[…] facts shall not be deemed 'adjudicated' if they are based on guilty pleas or admissions voluntarily made by an accused during the proceedings"), 11, 12 ("[j]udicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings").

[326] *Mladić* Decision of 12 November 2013, para. 24; *Karemera et al.* Decision of 16 June 2006, paras. 47, 52.

Karadžić challenges the "constitutionality" of the practice of taking judicial notice of adjudicated facts, notwithstanding the express provision for it in the ICTY Rules.[327] The Appeals Chamber recalls that, where the respective Rules or Statute of the ICTY are at issue, it is bound to consider the relevant precedent when interpreting them.[328] This Appeals Chamber is presently being called upon to assess the propriety of decisions taken by an ICTY trial chamber, that was bound by the ICTY Rules and the ICTY Statute as well as by decisions of the ICTY Appeals Chamber.[329] Bearing this context in mind, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTY and the ICTR Appeals Chambers and depart from them only where cogent reasons in the interests of justice exist, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[330] Therefore, in order to succeed on appeal, Karadžić must demonstrate that there are cogent reasons in the interests of justice that justify departure from jurisprudence on judicial notice of adjudicated facts.

120. The Appeals Chambers of the ICTY and the ICTR have consistently held that judicial notice of adjudicated facts is merely a presumption that may be rebutted by defence evidence at trial.[331] Judicial notice of adjudicated facts "does not shift the ultimate burden of persuasion, which remains with the Prosecution" but only relieves the Prosecution of the initial burden to produce evidence on the given point.[332]

121. The Appeals Chamber notes that the concern that accused in other cases may have focused their defence on arguing that they were not responsible for the perpetrators of crimes rather than on contesting the existence of crimes is one of the reasons why judicial notice may not be taken of adjudicated facts from other cases relating to the acts, conduct, and mental state of the accused.[333] It is, nevertheless, permissible to take judicial notice of adjudicated facts relating directly or indirectly to an accused's guilt,[334] for example, of facts relating to the existence of a joint criminal enterprise,

[327] Karadžić Appeal Brief, paras. 116, 134; T. 23 April 2018 p. 108.
[328] *See Munyarugarama* Decision of 5 October 2012, para. 6.
[329] *See Aleksovski* Appeal Judgement, paras. 112, 113.
[330] *Šešelj* Appeal Judgement, para. 11; *Stanišić and Župljanin* Appeal Judgement, para. 968; *Bizimungu* Appeal Judgement, para. 370; *Đorđević* Appeal Judgement, para. 23; *Galić* Appeal Judgement, para. 117; *Rutaganda* Appeal Judgement, para. 26; *Aleksovski* Appeal Judgement, para. 107. *Cf. Munyarugarama* Decision of 5 October 2012, para. 5 (noting the "normative continuity" between the Mechanism's Rules and Statute and the ICTY Rules and the ICTY Statute and that the "parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice").
[331] *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 42.
[332] *Tolimir* Appeal Judgement, para. 24; *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 42.
[333] *Mladić* Decision of 12 November 2013, para. 80, *referring to Karemera et al.* Decision of 16 June 2006, para. 51.
[334] *Mladić* Decision of 12 November 2013, para. 81; *Karemera et al.* Decision of 16 June 2006, paras. 48, 53.

the conduct of its members other than the accused, and the conduct of physical perpetrators of crimes for which an accused is alleged to be criminally responsible.[335] This is as long as the burden remains on the Prosecution to establish the *actus reus* and the *mens rea* supporting the responsibility of the accused for the crimes in question by evidence other than judicial notice.[336] In addition, the discretion to accept adjudicated facts is limited by the need to ensure the accused's right to a fair and expeditious trial.[337] Apart from disagreeing with the case law, Karadžić fails to demonstrate that there are cogent reasons in the interests of justice to depart from consistent jurisprudence of the ICTR and the ICTY on this matter.

122. The Appeals Chamber does not consider that by taking judicial notice of the existence of a crime committed by Karadžić's alleged subordinates,[338] for example, the Trial Chamber relieved the Prosecution from proving the *actus reus* of the crimes charged in the Indictment. The Appeals Chamber recalls that there is a distinction between facts related to the conduct of physical perpetrators of a crime for which an accused is being alleged criminally responsible through another mode of liability and those related to the acts and conduct of the accused himself.[339] The burden remained on the Prosecution to establish by evidence other than judicial notice that Karadžić possessed the relevant *mens rea* and engaged in the required *actus reus* to be held responsible for the crimes established by way of judicial notice of adjudicated facts.

123. Finally, the Appeals Chamber finds without merit Karadžić's submission that judicial notice of adjudicated facts deprives an accused of the possibility that a trial chamber would reach a different conclusion had it heard the evidence itself. The Appeals Chamber recalls that adjudicated facts are not accepted as conclusive in proceedings involving parties who did not have the chance to contest them,[340] and, as noted above, are merely presumptions that may be rebutted with evidence at trial.[341]

124. Accordingly, the Appeals Chamber finds that Karadžić has failed to demonstrate that the practice of taking judicial notice of adjudicated facts is "unconstitutional" and that by taking judicial notice of adjudicated facts, the Trial Chamber violated the presumption of innocence and relieved the Prosecution of its burden of proof.

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[335] *Mladić* Decision of 12 November 2013, para. 81; *Karemera et al.* Decision of 16 June 2006, paras. 52, 53.
[336] *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, paras. 49, 52. *See also Mladić* Decision of 12 November 2013, para. 81.
[337] *Karemera et al.* Decision of 16 June 2006, paras. 41, 51, 52.
[338] *See* Karadžić Appeal Brief, para. 128.
[339] *Karemera et al.* Decision of 16 June 2006, para. 52.
[340] *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, paras. 40, 42.
[341] *Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 42.

(b) Rebuttal of Adjudicated Facts

125. Karadžić submits that the Trial Chamber erred in relying on adjudicated facts for which contrary evidence had been admitted.[342] Karadžić asserts that in instances where he introduced evidence to rebut adjudicated facts, the Trial Chamber preferred the adjudicated fact, finding his evidence not credible.[343] He contends that the presumption established by an adjudicated fact is rebutted once evidence which satisfies the relevance and probative value requirements of Rule 89(C) of the ICTY Rules is admitted.[344] It is then for the Prosecution to introduce evidence in support of the contested fact.[345] Karadžić asserts that the Trial Chamber erroneously imposed a "credibility" requirement on his rebuttal evidence and in weighing the credibility of such evidence against the adjudicated fact.[346] In doing so, the Trial Chamber shifted the burden of persuasion to Karadžić, requiring him not only to produce evidence rebutting the adjudicated fact, but also to persuade the Trial Chamber that his evidence was credible.[347]

126. The Prosecution responds that Karadžić does not show that the Trial Chamber erred in weighing adjudicated facts against countervailing evidence[348] or that he suffered any prejudice from the Trial Chamber's reliance on adjudicated facts.[349]

127. In reply, Karadžić maintains that the Trial Chamber's acceptance of adjudicated facts over Defence evidence which rebutted those facts is "unconstitutional".[350] He further contends that the impact of taking judicial notice of 2,379 adjudicated facts is not limited to findings based solely upon adjudicated facts.[351]

128. As noted above, facts judicially noticed pursuant to Rule 94(B) of the ICTY Rules are presumptions that may be rebutted with evidence at trial.[352] The Appeals Chamber recalls that an accused may rebut the presumption by introducing "reliable and credible" evidence to the

[342] Karadžić Appeal Brief, paras. 136, 141. *See also* Karadžić Reply Brief, para. 46; T. 23 April 2018 p. 109.
[343] Karadžić Appeal Brief, para. 136, *referring to* Trial Judgement, paras. 28, 630, 857, 859, 860, 862, 864, 865, 876, 892, 895, 902, 913, 916, 922, 985, 1071, 1120, 1195, 1269, 1374, 1400, 1429, 1447, 1450, 1477, 1582, 1604, 1619, 1631, 1764, 1777, 1778, 1910, 2731, 3672; T. 23 April 2018 p. 109.
[344] Karadžić Appeal Brief, paras. 137, 138.
[345] Karadžić Appeal Brief, paras. 137, 139.
[346] Karadžić Appeal Brief, paras. 137, 140.
[347] Karadžić Appeal Brief, para. 140.
[348] Prosecution Response Brief, paras. 67, 71, 72.
[349] Prosecution Response Brief, paras. 67, 73, 74; T. 23 April 2018 p. 169. The Prosecution also contends that Karadžić's submissions about the nature and extent of the Trial Chamber's reliance on adjudicated facts were misleading, inaccurate, and show no error. *See* Prosecution Response Brief, paras. 67, 72-74.
[350] Karadžić Reply Brief, para. 46.
[351] Karadžić Reply Brief, para. 47.
[352] *Dragomir Milošević* Decision of 26 June 2007, para. 16. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al.* Decision of 29 May 2009"), para. 13; *Karemera et al.* Decision of 16 June 2006, para. 42.

contrary.[353] The requirement that the evidence be "reliable and credible" must be understood in the proper context of the general standard for admission of evidence at trial set out in Rule 89(C) of the ICTY Rules: "[a] Chamber may admit any relevant evidence which it deems to have probative value".[354] Only evidence that is reliable and credible may be considered to have probative value.[355] It follows that what is required is the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.[356] The final evaluation of the reliability and credibility, and hence the probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.[357] In this context, the same piece of evidence can be assessed differently in different cases because of the availability of other evidence on the record.[358] A trial chamber has the obligation to assess the evidence and reach its own conclusion.[359]

129. In the Trial Judgement, the Trial Chamber stated:

> [w]here adjudicated facts and other evidence addressed the same subject matter, the Chamber assessed whether the other evidence was consistent with the adjudicated facts or rebutted them. Where the Chamber has accepted evidence that contradicts an adjudicated fact, it has considered the presumption of accuracy of the adjudicated fact to have been rebutted. The Chamber applied this principle where the Accused challenged an adjudicated fact and presented credible evidence to rebut or bring into question the accuracy of the adjudicated fact and where the evidence presented by the Prosecution on the point addressed by the adjudicated fact was internally contradictory or inconsistent with the adjudicated fact. […] The Chamber reiterates its approach […] to assess adjudicated facts in light of the totality of the evidence adduced at trial and more particularly to analyse whether other evidence in the record is consistent with or contradicts the adjudicated facts. Other evidence in the record was assessed for inconsistency with the adjudicated facts, and where reliable evidence contradicted an adjudicated fact, be it presented by the Accused or the Prosecution, the adjudicated fact was not used as the basis of a finding in this case.[360]

130. The Appeals Chamber considers that the Trial Chamber correctly stated the approach to assessing rebuttal of adjudicated facts and finds that Karadžić does not show that the Trial Chamber erroneously shifted the burden of persuasion to him.

131. The Appeals Chamber also finds that Karadžić's contention, that even where he introduced evidence to rebut an adjudicated fact, the Trial Chamber preferred the adjudicated fact and found his evidence not credible, fails to demonstrate error. The mere presentation of evidence seeking to rebut an adjudicated fact does not deprive a trial chamber of its discretion to assess the credibility or probative value of such evidence or prevent it from drawing conclusions from the relevant

[353] *Karemera et al.* Decision of 29 May 2009, para. 14; *Karemera et al.* Decision of 16 June 2006, paras. 42, 49. *See also Dragomir Milošević* Decision of 26 June 2007, para. 17.
[354] *Karemera et al.* Decision of 29 May 2009, para. 14.
[355] *Karemera et al.* Decision of 29 May 2009, para. 14.
[356] *Karemera et al.* Decision of 29 May 2009, para. 15.
[357] *Karemera et al.* Decision of 29 May 2009, para. 15.
[358] *Lukić and Lukić* Appeal Judgement, para. 261; *Karemera et al.* Decision of 29 May 2009, para. 19.
[359] *See Lukić and Lukić* Appeal Judgement, para. 261; *Karemera et al.* Decision of 29 May 2009, para. 22.

adjudicated fact. In this respect, Karadžić merely enumerates paragraphs of the Trial Judgement where he suggests the Trial Chamber "ascribed greater weight to the adjudicated facts than Defence evidence offered to rebut them" without explaining how the Trial Chamber erred in its assessment of the evidence on the record.[361]

132. Accordingly, Karadžić has failed to demonstrate that the Trial Chamber committed a discernible error in relying on adjudicated facts for which contrary evidence had been admitted.

133. For the foregoing reasons, the Appeals Chamber dismisses Ground 7 of Karadžić's Appeal.

[360] Trial Judgement, paras. 28, 30 (internal citations omitted).
[361] *See* Karadžić Appeal Brief, para. 114, n. 159.

6. Alleged Errors Related to the Admission of and Reliance on Rule 92 *bis* Evidence (Grounds 8 and 9)

134. On 29 May 2009, the Prosecution filed eight motions seeking to admit evidence from 238 proposed witnesses pursuant to Rule 92 *bis* of the ICTY Rules ("Rule 92 *bis* Motions").[362] On 18 June 2009, the Trial Chamber denied Karadžić's request that any response to these motions be delayed until his defence team could interview the witnesses whose testimony and statements the Prosecution sought to admit.[363] However, in light of the volume of material covered in the Rule 92 *bis* Motions, the Trial Chamber granted Karadžić's request for extensions of time, allowing him to respond to each of the eight motions on specified dates from 9 July 2009 through 13 August 2009.[364]

135. On 8 July 2009, the Trial Chamber denied Karadžić's request for certification to appeal the decision denying his request for extension of time to respond to the Rule 92 *bis* Motions until his defence team could interview the proposed witnesses.[365] Nevertheless, due to the volume of relevant material and the need for Karadžić to organize his resources, the Trial Chamber further delayed the deadlines to respond to each of the Rule 92 *bis* Motions to specified dates from 14 July 2009 through 31 August 2009.[366]

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[362] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Second Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses ARK Municipalities), 18 March 2010 (public with confidential annex) ("Decision of 18 March 2010"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Fourth Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* – Sarajevo Siege Witnesses, 5 March 2010 ("Decision of 5 March 2010"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 21 December 2009 (confidential) ("Srebrenica Decision of 21 December 2009"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Seventh Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Delayed Disclosure Witnesses, 21 December 2009 ("Delayed Disclosure Decision of 21 December 2009"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), 10 November 2009 (public with confidential annex) ("Decision of 10 November 2009"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 *bis* and 94 *bis*, 9 November 2009 ("Decision of 9 November 2009"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Sixth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*: Hostage Witnesses, 2 November 2009 (public with confidential annex) ("Decision of 2 November 2009"), para. 1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009 ("Decision of 15 October 2009"), para. 1. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order following upon Rule 65 *ter* Meeting and Decision on Motions for Extension of Time, 18 June 2009 ("Order of 18 June 2009"), para. 1; Trial Judgement, para. 6137.

[363] Order of 18 June 2009, para. 4.

[364] Order of 18 June 2009, paras. 4, 5, 18.

[365] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Motions for Extension of Time: Rule 92 *bis* and Response Schedule, 8 July 2009 ("Decision of 8 July 2009"), paras. 13, 14, 19.

[366] Decision of 8 July 2009, paras. 18, 19.

136. On 8 July 2009, Karadžić filed a single response to all of the Rule 92 *bis* Motions, arguing that he lacked the resources and access to the witnesses to respond adequately.[367] Consequently, he opposed all the Rule 92 *bis* Motions and requested, *inter alia*, cross-examination of all the witnesses.[368]

137. During a status conference on 23 July 2009, the Pre-Trial Judge, observing that decisions on the Rule 92 *bis* Motions were unlikely to be issued immediately and that Karadžić's investigations were ongoing, informed Karadžić that he would be able to file a response at any time before the respective decisions were issued.[369] During a pre-trial conference on 6 October 2009, the Pre-Trial Judge informed Karadžić that the decisions on the Rule 92 *bis* Motions would be issued in the coming weeks and that, if evidence of a witness was admitted under Rule 92 *bis* of the ICTY Rules and Karadžić wanted to supplement it with a statement from that witness, he could file a motion to that effect.[370] Karadžić filed further responses to some of the Rule 92 *bis* Motions, and the Trial Chamber rendered decisions on the motions between October 2009 and March 2010, *inter alia*, admitting statements and testimony from 124 witnesses without requiring their cross-examination ("Rule 92 *bis* Material").[371]

138. During trial, on 21 March 2011, the Trial Chamber denied Karadžić's request to issue subpoenas compelling eight witnesses whose prior statements and/or testimony had been admitted into evidence as part of the Rule 92 *bis* Material ("Eight Witnesses") to submit to interviews with the Defence.[372]

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[367] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Omnibus Response to Rule 92 *bis* Motions, 8 July 2009 ("Karadžić Response of 8 July 2009"), para. 2.
[368] Karadžić Response of 8 July 2009, paras. 3, 7.
[369] T. 23 July 2009 p. 370. *See also* Decision of 15 October 2009, para. 2. During the status conference, the Pre-Trial Judge received confirmations from the Prosecution and Karadžić that procedures were in place allowing Karadžić and his defence team to proceed to contact through the Registry, *inter alia*, witnesses identified in the Rule 92 *bis* Motions for the purpose of interviewing them. *See* T. 23 July 2009 pp. 340-342. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses, 15 July 2009.
[370] T. 6 October 2009 pp. 489, 490.
[371] Decision of 18 March 2010, paras. 8, 63; Decision of 5 March 2010, paras. 9, 11, 13, 77; Srebrenica Decision of 21 December 2009, paras. 7, 67; Delayed Disclosure Decision of 21 December 2009, paras. 9, 32; Decision of 10 November 2009, paras. 5, 47; Decision of 9 November 2009, paras. 2, 3, 27; Decision of 2 November 2009, paras. 4, 33; Decision of 15 October 2009, paras. 2, 32. The Trial Chamber subsequently admitted evidence from three additional witnesses Pursuant to Rule 92 *bis* of the ICTY Rules. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Milan Tupajić's Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 24 May 2012 ("Decision of 24 May 2012"), para. 27; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Second Motion for Admission of Slobodan Stojković's Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92 *bis*, 22 March 2012 (public with confidential annex) ("Decision of 22 March 2012"), para. 19; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Further Decision on Prosecution's First Rule 92 *bis* Motion (Witnesses for Eleven Municipalities), 9 February 2010 (public with confidential annex) ("Decision of 9 February 2010"), para. 44.
[372] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Compel Interviews: Sarajevo 92 *bis* Witnesses, 21 March 2011 ("Decision of 21 March 2011"), paras. 1, 19.

139. Karadžić submits that the Trial Chamber erred by dismissing his request to interview all the witnesses whose evidence the Prosecution sought to admit through the Rule 92 *bis* Motions and by refusing to allow adequate time for such interviews before deciding on the motions.[373] He argues that, where such statements or testimony are admitted without requiring cross-examination, principles of fairness and equality of arms require that the Trial Chamber take all steps necessary to facilitate interviews of the witnesses by the Defence "without limitation."[374]

140. Karadžić further submits that the Trial Chamber erred by denying his request to compel the Eight Witnesses to submit to interviews with the Defence.[375] He contends that, in view of controlling jurisprudence, subpoenas compelling these interviews should have been issued as the Trial Chamber found that each of the witnesses had knowledge of issues relevant to the trial.[376] Karadžić argues that by refusing to facilitate the requested interviews, the Trial Chamber violated the principle of equality of arms, given that the Prosecution had interviewed all of the witnesses during its long investigation with resources that far exceeded his.[377]

141. Finally, Karadžić submits that his trial was rendered unfair as the Trial Chamber relied solely on untested evidence admitted under Rule 92 *bis* of the ICTY Rules when making several findings in the Trial Judgement that led to a number of his convictions.[378] He contends that such findings are unfair and unsafe given his lack of opportunity to interview the witnesses and that the appropriate remedy is a new trial.[379]

142. The Prosecution responds that Karadžić does not demonstrate any error in the Trial Chamber's approach in relation to his request to interview all of the relevant witnesses prior to deciding the Rule 92 *bis* Motions or in denying his request to subpoena the Eight Witnesses.[380] It further argues that Karadžić fails to substantiate how findings based on evidence admitted pursuant

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[373] Karadžić Notice of Appeal, p. 6; Karadžić Appeal Brief, paras. 142, 145; Karadžić Reply Brief, paras. 48-50. Karadžić suggests that the Trial Chamber admitted evidence from 148 witnesses without requiring cross-examination under Rule 92 *bis* of the ICTY Rules. *See* Karadžić Appeal Brief, para. 142; Karadžić Reply Brief, paras. 48, 49. In his reply, Karadžić submits that his eventual ability to interview Witness KDZ486, who recanted his prior testimony and prompted the Prosecution to withdraw his evidence, demonstrates that admitting the Rule 92 *bis* Material without allowing Karadžić to question the relevant witnesses rendered such evidence unsafe. *See* Karadžić Reply Brief, para. 55.

[374] Karadžić Appeal Brief, paras. 144, 147; Karadžić Reply Brief, paras. 51-54. *See also* Karadžić Appeal Brief, paras. 145, 146, *referring to Tadić* Appeal Judgement, para. 52, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004 ("*Halilović* Decision of 21 June 2004"), paras. 10, 12, 15, *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, para. 15.

[375] Karadžić Notice of Appeal, p. 6; Karadžić Appeal Brief, para. 145.

[376] Karadžić Appeal Brief, paras. 143, 148, 149, *referring to Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision of 1 July 2003"), paras. 9, 10, 18.

[377] Karadžić Appeal Brief, para. 151.

[378] Karadžić Notice of Appeal, p. 6; Karadžić Appeal Brief, paras. 153, 154, n. 199.

[379] Karadžić Appeal Brief, para. 154.

[380] Prosecution Response Brief, paras. 76-80.

to Rule 92 *bis* of the ICTY Rules without an interview by the Defence are "unfair" or "unsafe" and that he has not demonstrated any prejudice or cogent reasons justifying departure from established appellate case law on this issue.[381]

143. The Appeals Chamber turns first to Karadžić's contentions concerning the decisions denying his requests for additional time to enable him to interview the witnesses prior to adjudicating the Rule 92 *bis* Motions as well as his request to subpoena the Eight Witnesses. These decisions relate to the general conduct of the trial, which are matters that fall within the discretion of the trial chamber.[382] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed discernible error resulting in prejudice to that party.[383]

144. As to Karadžić's contention that the Trial Chamber erred in refusing to facilitate defence interviews with the proposed witnesses before admitting their evidence, the Appeals Chamber observes that the Trial Chamber granted Karadžić extensions to respond to each of the Rule 92 *bis* Motions but determined that it was not necessary for him to interview the more than 225 proposed witnesses in order to file his responses.[384] The Appeals Chambers sees no error in this decision as nothing in Rule 92 *bis* of the ICTY Rules requires the relief Karadžić requested and Karadžić's motion provided only cursory justification as to why the interviews were necessary.[385] The Appeals Chamber finds that Karadžić does not demonstrate discernible error in the Trial Chamber's decision.

145. Furthermore, while Karadžić's arguments suggest that the Pre-Trial Judge and the Trial Chamber[386] failed to provide sufficient time and take all steps necessary to facilitate defence interviews of the witnesses prior to ruling on the Rule 92 *bis* Motions, the record outlined above demonstrates otherwise. On 18 June 2009, the Trial Chamber granted Karadžić's request to delay

[381] Prosecution Response Brief, paras. 81, 82; T. 23 April 2018 pp. 168, 169. *See also* T. 24 April 2018 p. 280.
[382] *See, e.g., Prlić et al.* Appeal Judgement, para. 26; Decision of 29 January 2013, para. 7; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.7, Decision on Jérôme-Clément Bicamumpaka's Interlocutory Appeal Concerning a Request for a Subpoena, 22 May 2008 ("*Bizimungu et al.* Decision of 22 May 2008"), para. 8; *Halilović* Decision of 21 June 2004, para. 6.
[383] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[384] Order of 18 June 2009, paras. 4, 18.
[385] Specifically, Karadžić stated that allowing his defence team to interview each of the witnesses would "identify facts which can be useful […] to the defence which are not apparent from the statements or testimony" and that such "facts" could justify arguments in his response to: (i) deny the relevant motion; (ii) grant the relevant motion but require the witness to attend for cross-examination; or (iii) grant the relevant motion but supplement it with written material including facts "which [Karadžić] would wish to elicit." *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Extension of Time to Respond to Rule 92 *bis* Motions, 8 June 2009, paras. 3, 5.
[386] Karadžić refers to errors committed by the Trial Chamber even where the relevant decisions were issued by the Pre-Trial Judge.

his responses to each of the motions.[387] Importantly, in its decision of 8 July 2009, the Trial Chamber granted additional extensions of time to respond to the Rule 92 *bis* Motions and indicated that Karadžić could request to delay any response "*vis à vis* a particular witness" where Karadžić had "provided a specific basis describing why he needed time to interview individual witnesses".[388] Karadžić makes no demonstration on appeal that he subsequently seized the Trial Chamber with such a request.

146. Moreover, instead of following the briefing schedule set by the Trial Chamber that allowed Karadžić to file individual responses to each of the Rule 92 *bis* Motions from 14 July 2009 through 31 August 2009, Karadžić chose to file a single response to all but one of the Rule 92 *bis* Motions nearly a week before the first response would have come due.[389] Weeks later, the Trial Chamber invited Karadžić to file further responses to each of the Rule 92 *bis* Motions at any time prior to the issuance of the relevant decisions, and Karadžić, in some instances, took advantage of this extension of time.[390] The Trial Chamber subsequently invited Karadžić to supplement the evidence of any witness whose transcripts and statements might be admitted through the Rule 92 *bis* Motions with a statement obtained by him pursuant to the same rule. Subsequent submissions before the Trial Chamber reflect that Karadžić was able to interview some of the witnesses whose evidence the Prosecution sought to admit through the Rule 92 *bis* Motions and that he sought to supplement the record with statements from these witnesses.[391] As Karadžić concedes, he was able to supplement the record with eight statements.[392] Viewed in this context, Karadžić's submissions fail to demonstrate that the Pre-Trial Judge or the Trial Chamber committed discernible error by failing to afford him sufficient time to allow him to interview witnesses before the Trial Chamber decided on the Rule 92 *bis* Motions.

147. Karadžić similarly fails to demonstrate that the impugned decision violated the principle of equality of arms. While he emphasizes that the Prosecution had interviewed each of the proposed witnesses identified in the Rule 92 *bis* Motions over the course of several years and that its resources far exceeded his, he ignores the fact that the equality of arms principle does not require

[387] Order of 18 June 2009, para. 18.
[388] Decision of 8 July 2009, paras. 14, 19 (emphasis added).
[389] *See* Karadžić Response of 8 July 2009, paras. 1, 7.
[390] Decision of 18 March 2010, para. 8; Decision of 5 March 2010, paras. 9, 11, 13; Srebrenica Decision of 21 December 2009, para. 7.
[391] Decision of 18 March 2010, para. 8; Decision of 5 March 2010, paras. 9, 11, 77; Srebrenica Decision of 21 December 2009, para. 7.
[392] Karadžić Appeal Brief, para. 143, n. 187. Karadžić's contention in reply that his ability to subsequently interview Witness KDZ486, who recanted his prior testimony and prompted the Prosecution to withdraw it, does not compel the conclusion that the Trial Chamber was required to allow Karadžić to interview all witnesses relevant to the Rule 92 *bis* Motions prior to adjudicating them nor does it demonstrate that all the Rule 92 *bis* Material was "unsafe". Rather, it shows that the Trial Chamber did not inhibit Karadžić's ability to interview such witnesses or challenge the Rule 92 *bis* Material where he discovered information relevant to its credibility or reliability.

material equality between the parties in terms of financial or human resources.[393] As reflected above, extensive relief was granted to Karadžić to organize his resources along with the possibility to request further relief in order to mount his defence with respect to the Rule 92 *bis* Motions due, in part, to the volume of evidence the Prosecution sought to admit. Karadžić fails to demonstrate any discernible error in this respect.

148. Turning to the denial of Karadžić's request to subpoena the Eight Witnesses to submit to interviews, the Appeals Chamber observes that Rule 54 of the ICTY Rules provides, *inter alia*, that a trial chamber may issue subpoenas "as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". In interpreting this provision, the Appeals Chamber of the ICTY has stated:

> The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused. As the Appeals Chamber [of the ICTY] has emphasized, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."
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> In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial." The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.[394]

The Appeals Chamber adopts this interpretation.[395]

149. The Appeals Chamber observes that the Trial Chamber denied Karadžić's request to issue subpoenas to interview the Eight Witnesses on the basis that he failed to establish that the information sought would materially advance his case and could not be obtained through calling or cross-examining other witnesses.[396] The Trial Chamber further rejected Karadžić's contention that the Eight Witnesses should be compelled to submit to interviews because they would not be cross-

[393] *Kalimanzira* Appeal Judgement, para. 34.
[394] *Halilović* Decision of 21 June 2004, paras. 6, 7 (internal references omitted).
[395] *See supra* Section II.
[396] Decision of 21 March 2011, paras. 13, 14, 16, 17.

examined in his trial.[397] In this respect, the Trial Chamber emphasized that six of the Eight Witnesses had been extensively cross-examined in prior proceedings and that the fact that the two others had not previously been cross-examined did not require their appearance for cross-examination.[398]

150. Karadžić does not point to any error in the Trial Chamber's analysis that led it to deny his request to subpoena the Eight Witnesses. Instead, he argues that, because the Trial Chamber admitted statements of the Eight Witnesses as part of the Rule 92 *bis* Material, it found that they had knowledge of issues relevant to the case.[399] The Appeals Chamber considers, however, that this does not demonstrate error in the Trial Chamber's finding that Karadžić failed to establish that the information sought through the subpoenas would materially advance his case.[400] Moreover, Karadžić's argument does not contest the Trial Chamber's consideration that he failed to establish that the information he sought from interviewing the Eight Witnesses could not be obtained through calling or cross-examining other witnesses.

151. Similarly, Karadžić fails to show that, simply because the Eight Witnesses were not subject to cross-examination in his trial, the Trial Chamber was required to grant his request to interview them. In any event, Karadžić has not provided any submissions as to how the denial of his request to compel the Eight Witnesses to submit to interviews prejudiced him in the presentation of his defence.[401] Consequently, Karadžić has not demonstrated discernible error with respect to this decision.

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[397] Decision of 21 March 2011, para. 15.
[398] Decision of 21 March 2011, para. 15, *referring to* Decision of 5 March 2010, para. 58.
[399] Karadžić Appeal Brief, para. 149.
[400] In particular, the Trial Chamber's analysis reflects its conclusion that Karadžić failed to establish that the witnesses would be able to provide the information he suggested they could provide. *See* Decision of 21 March 2011, paras. 13 ("None of [the Witnesses] have specialised military knowledge and therefore would not be able to determine whether there were specific military targets in the Sarajevo area with respect to the shelling incidents. With respect to the direction of fire for sniping incidents, the same reasoning applies."), 14 ("Without an additional basis as to why these Witnesses may provide further information on these topics, other than that already provided in their prior evidence, the Accused has not established that the information to be obtained from the interviews would materially assist his case.") (internal references omitted). The Trial Chamber's analysis also suggests that the information sought to be obtained from the interviews was cumulative of information contained in evidence that had already been admitted. *See* Decision of 21 March 2011, para. 13 ("In addition, a significant portion of the cross-examination of KDZ289, Slavica Livnjak, and Tarik Žunić in previous cases, which has been admitted in this case, already related to the general source and direction of fire, as well as to the issue of the VRS positions in the areas in and around Sarajevo.") (internal references omitted). *See also* Decision of 21 March 2011, para. 14.
[401] In this respect, the Appeals Chamber notes that none of the findings that Karadžić argues are based solely on untested evidence admitted under Rule 92 *bis* of the ICTY Rules was provided by the Eight Witnesses. *Compare* Karadžić Appeal Brief, n. 199 *with* Trial Judgement, paras. 4444, 4453, 4457 (concerning Witness KDZ036) *and* Trial Judgement, paras. 2281, 2282, 3621, 4480-4482, 4486, 4492, 4495, 4550, 4551, 4587 (concerning Witness KDZ079) *and* Trial Judgement, paras. 3645-3647, 3686, 3687, 3691-3693, 3702, 4551, 4587 (concerning witness KDZ090) *and* Trial Judgement, paras. 4043, 4049 (concerning Fatima Palavra) *and* Trial Judgement, paras. 4042, 4049 (concerning Zilha Granilo) *and* Trial Judgement, paras. 3621, 3645, 3767, 3768, 3770, 3771, 3783, 3787, 4056, 4587 (concerning Slavica Livnjak) *and* Trial Judgement, paras. 3621, 3645, 3746, 3747, 3749-3752, 3764, 3767, 3770, 3771, 4587

152. As to Karadžić's argument that his trial was rendered unfair because the Trial Chamber relied solely on "untested" Rule 92 *bis* Material when making several findings related to his convictions, Karadžić merely lists paragraphs of the Trial Judgement without articulating any particular error.[402] His submissions therefore fail to satisfy his burden on appeal and the Appeals Chamber summarily dismisses them.[403] To the extent Karadžić develops this argument in Ground 31 of his appeal, the Appeals Chamber will evaluate it in connection with the submissions made in support of that ground of appeal.

153. Based on the foregoing, the Appeals Chamber dismisses Grounds 8 and 9 of Karadžić's appeal.

(concerning Witness KDZ289) *and* Trial Judgement, paras. 3607, 3621, 3849-3851, 3856, 3878-3881, 3885, 4587 (concerning Tarik Žunić).

[402] *See* Karadžić Appeal Brief, n. 199. *See also* Karadžić Notice of Appeal, p. 6.

7. Alleged Errors in Dismissing Karadžić's Request to Call a Prosecution Witness for Cross-Examination (Ground 10)

154. The Trial Chamber admitted, pursuant to Rule 92 *bis* of the ICTY Rules Prosecution Witness Ferid Spahić's evidence concerning events in the municipality of Višegrad and an incident of killing Muslim civilians in June 1992 in the form of a statement and the transcripts of his testimony in earlier ICTY proceedings.[404] The Trial Chamber decided that the witness did not need to appear for cross-examination since his evidence did not bear directly upon Karadžić's responsibility and was not a critical element of the Prosecution's case.[405]

155. Subsequently, Karadžić requested the Trial Chamber to require the witness to appear for cross-examination so that he could elicit additional information, which was provided in an interview with his defence team and which, he argued, was favourable to his case.[406] According to Karadžić, the witness stated that, in his opinion, Karadžić, or two other persons, had invited the Yugoslav People's Army ("JNA") to Višegrad and had ordered that no killings should occur there, and that Karadžić "'was the only one who could have ordered [a particular JNA corps] not to kill anyone in Višegrad'".[407] The Trial Chamber denied Karadžić's request finding that he had failed to show that it was necessary to reconsider its earlier decision not to require the witness to appear.[408] The Trial Chamber reasoned, *inter alia*, that there was no reference to the acts and conduct of Karadžić in the witness's evidence as admitted on the trial record and the anticipated testimony concerning him was at best of a minor or generalised nature, consisted of the witness's personal opinion formed without any first-hand knowledge, and had no bearing on Karadžić's acts and conduct as charged in the Indictment.[409] The Trial Chamber also noted that Karadžić would have ample opportunity to present evidence on the issues he sought to prove through the witness either through other witnesses or by tendering documentary evidence.[410]

156. In the Trial Judgement, the Trial Chamber found Karadžić responsible for the killing of approximately 45 Bosnian Muslim civilians from Višegrad by Serb forces on 15 June 1992 on the basis of his participation in the Overarching JCE and convicted him in this respect of persecution

[404] Decision of 10 November 2009, paras. 12, 47(1)(a); Exhibits P60, P61.
[405] Decision of 10 November 2009, paras. 33, 35.
[406] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Call Witness Ferid Spahić for Cross-Examination, 6 April 2011 ("Decision of 6 April 2011"), paras. 1, 2, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Call Witness Fe[r]id Spahi[ć] for Cross Examination, 2 March 2011 ("Motion of 2 March 2011"), paras. 1, 4, 8.
[407] Decision of 6 April 2011, para. 3, *referring to* Motion of 2 March 2011, para. 5.
[408] Decision of 6 April 2011, paras. 11-14.
[409] Decision of 6 April 2011, paras. 12, 13.
[410] Decision of 6 April 2011, para. 13.

and extermination as crimes against humanity and murder as a violation of the laws or customs of war.[411]

157. Karadžić submits that the Trial Chamber erred in refusing to call Witness Spahić for cross-examination for lack of personal knowledge of Karadžić's orders or control over those committing crimes and that, in doing so, it deprived him of evidence that created reasonable doubt about his responsibility for the 15 June 1992 incident and his control over paramilitaries in Eastern Bosnia.[412] He contends that no other witness testified to these events and that the Trial Chamber convicted him for this incident solely upon Witness Spahić's evidence.[413]

158. Karadžić also argues that Rule 92 *bis* (A)(ii)(c) of the ICTY Rules provides that a written statement or transcript will not be admitted if there are any other factors which make it appropriate for the witness to attend for cross-examination and that the Trial Chamber should have considered that Witness Spahić was not cross-examined in prior proceedings on issues that could have advanced Karadžić's defence.[414]

159. In addition, Karadžić maintains that the impugned decision was part of a pattern that shows the double standards the Trial Chamber employed throughout the trial when admitting Prosecution evidence and excluding defence evidence that rendered his trial unfair and that the appropriate remedy for this is a re-trial.[415] In this respect, Karadžić submits that the Trial Chamber admitted evidence of Prosecution witnesses who had no direct personal knowledge of various matters but formed opinions from observing surrounding events.[416]

160. The Prosecution responds that the Trial Chamber rightly declined to order Witness Spahić's appearance for cross-examination since Karadžić had not shown that the evidence he sought to

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[411] Trial Judgement, paras. 1093, 2446, 2455, 2460, 2463, 2484, 3524, 6002, 6003, 6005, 6071. The Trial Chamber also found Karadžić responsible for murder as a crime against humanity with respect to this incident but did not convict him as it would be impermissibly cumulative of his conviction for extermination as a crime against humanity on the same basis. *See* Trial Judgement, paras. 2456, 2460, 2464, 6004, 6023, 6024, n. 20574.

[412] Karadžić Notice of Appeal, p. 6; Karadžić Appeal Brief, paras. 157, 158, 160. Karadžić also submits that "the Trial Chamber's approach stands in contrast to that adopted in [the *Mladić* case]". *See* Karadžić Appeal Brief, para. 161. The Appeals Chamber recalls that the manner in which the discretion to manage trials is exercised by a trial chamber should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another. *Nyiramasuhuko et al.* Appeal Judgement, para. 232; *Haradinaj et al.* Appeal Judgement, para. 39. Karadžić's cursory reference to the approach followed by another trial chamber fails to demonstrate any error of the Trial Chamber in this respect.

[413] Karadžić Appeal Brief, para. 157.

[414] Karadžić Appeal Brief, para. 158.

[415] Karadžić Appeal Brief, para. 162.

[416] Karadžić Appeal Brief, para. 159. Karadžić refers in this respect to Prosecution Witness David Harland's evidence that Karadžić had "pulled the spigot of terror in Sarajevo" and Prosecution Witness Herbert Okun's testimony that "the movement of the population couldn't come about except by forcible means". *See* Karadžić Appeal Brief, para. 159, *referring to* Exhibits P820, para. 39, P776, pp. 211, 212.

elicit would materially assist his case.[417] The Prosecution also contends that Karadžić makes "inapposite" comparisons with the Trial Chamber's admission of Prosecution evidence which was based on the concerned witnesses' high-level participation in the relevant events.[418] In addition, the Prosecution argues that Karadžić has not shown that Witness Spahić's proposed evidence would have affected the Trial Judgement and that, contrary to Karadžić's submission, the Trial Chamber relied on a variety of other evidence corroborating Witness Spahić's account.[419]

161. Karadžić replies that the Prosecution's submission that Witness Spahić lacked direct knowledge went to the weight of his proposed evidence and not its admissibility and maintains that the Trial Chamber's decision was "manifestly unfair" given that it attributed responsibility to him for the 15 June 1992 incident solely on the basis of this witness's prior statement.[420]

162. The Appeals Chamber recalls that Article 21(4)(e) of the ICTY Statute guarantees the right of the accused to examine or have examined the witnesses against him. However, this right is not absolute and may be limited, for instance, in accordance with Rule 92 *bis* of the ICTY Rules.[421] In this respect, a decision to accept evidence without cross-examination is one which trial chambers should arrive at only after careful consideration of its impact on the rights of the accused.[422] As with any issue regarding the admission or presentation of evidence, trial chambers enjoy broad discretion in this respect.[423]

163. Karadžić has failed to show discernible error in the Trial Chamber's decision to dispense with the witness's attendance for cross-examination. Contrary to Karadžić's submission, the Trial Chamber did not err in considering the information he sought to elicit from this witness as hearsay of low probative value. In particular, the Trial Chamber reasonably considered that the references to Karadžić that the witness was expected to make were "at most of a minor or generalised nature" and consisted "at best" of the witness's personal opinion.[424] In its view, such references were not founded on any first-hand knowledge as the witness did not personally know Karadžić or any other

[417] Prosecution Response Brief, paras. 83, 84.
[418] Prosecution Response Brief, para. 85.
[419] Prosecution Response Brief, para. 87; T. 23 April 2018 pp. 169, 189.
[420] Karadžić Reply Brief, paras. 56-58.
[421] *See Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić et al.* Decision of 23 November 2007"), paras. 41, 43, 52; *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* Decision of 14 September 2006"), paras. 12, 13.
[422] *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, 12 June 2003, para. 14. *See also Prlić et al.* Decision of 23 November 2007, para. 41.
[423] *See, e.g., Prlić et al.* Appeal Judgement, para. 143; *Prlić et al.* Decision of 23 November 2007, para. 8; *Martić* Decision of 14 September 2006, para. 6.
[424] Decision of 6 April 2011, paras. 12, 13.

high-ranking Bosnian Serb official, had held no position which would have allowed him to know the acts and conduct of Karadžić, and had played no specific role in the crimes charged in the Indictment other than being a survivor of an incident charged therein.[425] The Appeals Chamber also notes that Karadžić misrepresents the Trial Chamber's assessment when he contends that he was convicted solely on Witness Spahić's evidence. The impugned finding rested, in addition to the witness's evidence, on forensic and other documentary evidence.[426]

164. Karadžić also misconstrues the requirements of Rule 92 *bis* of the ICTY Rules and fails to show error in the Trial Chamber's application of the governing law. Contrary to his submission, Rule 92 *bis* of the ICTY Rules does not prohibit the admission of written evidence in circumstances where it might be appropriate for the witness to be cross-examined but provides instead that such circumstances would weigh against admission. The Trial Chamber did not err in considering that there was no reason for requiring the witness's attendance as the witness's anticipated evidence, which concerned underlying crime base events, did not appear to have "any" bearing on Karadžić's acts and conduct as charged and could not materially assist his case.[427] In addition, contrary to Karadžić's submission, the Trial Chamber considered that the witness had not previously testified on matters relevant to the defence in the current proceedings.[428] Karadžić therefore fails to show that the Trial Chamber abused its discretion by not considering a relevant factor in weighing whether the witness should be called for cross-examination.

165. Furthermore, Karadžić's submissions fail to show that the Trial Chamber applied a double standard in finding that the low probative value of the evidence he intended to elicit from Witness Spahić did not warrant his attendance for cross-examination.

166. Based on the foregoing, the Appeals Chamber dismisses Ground 10 of Karadžić's appeal.

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[425] Decision of 6 April 2011, paras. 12, 13.
[426] Trial Judgement, paras. 1090-1093.
[427] Decision of 6 April 2011, paras. 12, 13. The Appeals Chamber further observes that the Trial Chamber relied on Witness Spahić's evidence only in relation to Scheduled Incident A.14.2 concerning the crimes committed in Višegrad by Serb forces on 15 June 1992 and not in relation to Karadžić's acts and conduct. *See* Trial Judgement, paras. 1080-1093.
[428] Decision of 6 April 2011, para. 12 ("[…] the Accused seems to argue that some of the new information provided by the Witness during the interview goes to his acts, conduct, or mental state, and is favourable to his case, and that, in order to receive such information in evidence, the Witness should be called for cross-examination. The Chamber notes first that nowhere in the Witness's evidence (approximately 65 pages of transcript from the *Vasiljević* case and another similar number of pages of transcript from the *Lukić* case, as well as an eight page witness statement) was it able to find a reference to the acts and conduct of the Accused […]").

8. Alleged Errors in Excluding Defence Rule 92 *bis* Evidence (Grounds 11 and 12)

167. On 26 April 2012, as the trial was approaching the close of the Prosecution case, the Trial Chamber ordered Karadžić to file any motions for admission of evidence pursuant to Rule 92 *bis* of the ICTY Rules by 27 August 2012.[429] On 2 August 2013, after the reinstatement of Count 1 of the Indictment, the Trial Chamber ordered Karadžić to file his revised witness list no later than 18 October 2013.[430]

168. On 1 October 2013, Karadžić sought the admission of four witness statements related to the Sarajevo component of the case under Rule 92 *bis* of the ICTY Rules ("Sarajevo 92 *bis* Statements"), submitting that there was good cause for filing his motion out of time because the witnesses concerned had refused to testify following the Trial Chamber's denial of his requests to grant them protective measures.[431] On 6 November 2013, the Trial Chamber denied Karadžić's motion finding that he had failed to demonstrate good cause for not respecting the deadline and that, in any event, the witness statements did not contain the formal attestation certificates required under Rule 92 *bis* (B) of the ICTY Rules.[432]

169. On 18 March 2014, the Trial Chamber denied a number of motions filed by Karadžić in January and February 2014, which, *inter alia*, sought to admit the unsigned statements of eight prospective Defence witnesses who initially appeared on his witness list and whose evidence concerned the municipalities component of his case ("Municipalities 92 *bis* Statements").[433] With respect to the statements of Ranko Mijić, Nikola Tomašević, Srboljub Jovičinac, Božidar Popović, and Mladen Zorić, the Trial Chamber found that Karadžić's requests were filed after the 27 August 2012 deadline without good cause and declined to admit them on that basis.[434] The Trial Chamber further declined to admit statements from Miloš Tomović, Dragan Kalinić, and Predrag Banović, finding that these were not properly certified and that Karadžić had failed to show that the proposed witnesses would be willing to certify their statements despite their refusal to testify.[435]

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[429] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Scheduling Order on Close of the Prosecution Case, Rule 98 *bis* Submissions, and Start of the Defence Case, 26 April 2012 ("Scheduling Order of 26 April 2012"), para. 25.
[430] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions for Severance of Count 1 and Suspension of Defence Case, 2 August 2013 ("Decision of 2 August 2013"), paras. 14, 25.
[431] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Statements Pursuant to Rule 92[ ]*bis* (Sarajevo Component), 1 October 2013, paras. 1, 4, 11-24.
[432] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit Statements Pursuant to Rule 92 *bis* (Sarajevo Component), 6 November 2013 ("Decision of 6 November 2013"), paras. 7-13.
[433] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions for Admission of Evidence Pursuant to Rule 92 *bis*, 18 March 2014 (public with confidential annex) ("Decision of 18 March 2014"), paras. 42-44, 60-62, 67-69.
[434] Decision of 18 March 2014, paras. 42, 43, 60-62, *See also* Decision of 18 March 2014, para. 2, *referring to* Scheduling Order of 26 April 2012, para. 25.
[435] Decision of 18 March 2014, paras. 44, 68.

170. Karadžić submits that, in denying his request to admit the Sarajevo 92 *bis* Statements and the Municipalities 92 *bis* Statements, the Trial Chamber committed several errors which resulted in excluding evidence that cast doubt on a number of findings made against him.[436] He argues that the Trial Chamber applied a double standard and failed to consider whether granting his requests would cause prejudice to the Prosecution.[437] He contends in this respect that the Trial Chamber had consistently required him to show prejudice before considering a remedy for the Prosecution's disclosure violations and that ultimately no Prosecution evidence was excluded.[438] Karadžić also relies for support on the principles relevant to adding a witness to a party's witness list, arguing that "[i]f a new witness can be added because a party would not be prejudiced, then a witness listed from the beginning can have the mode of giving evidence varied where the opposing party would not be prejudiced."[439]

171. Karadžić also contends that the Trial Chamber unreasonably required him to anticipate that the Sarajevo witnesses would refuse to testify after being denied protective measures.[440] Similarly, he avers that the Trial Chamber erred in requiring him to foresee that the municipalities witnesses would refuse to testify after the Trial Chamber denied his requests to subpoena Mijić and Tomašević, allow Jovičinac to testify via video-link, or assign counsel to Banović for the purposes of his testimony.[441] He contends that this approach was inconsistent with the Trial Chamber's prior practice of granting out-of-time Prosecution requests to admit evidence under Rule 92 *bis* of the ICTY Rules.[442]

172. Karadžić further argues that the Trial Chamber erred in the impugned decisions by "retroactively" requiring him to have interviewed all potential defence witnesses between the end of the Prosecution's case and the deadline imposed in the Scheduling Order of 26 April 2012, which, given the large number of witnesses required to answer the Prosecution's case, would have been

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[436] Karadžić Notice of Appeal, pp. 6, 7; Karadžić Appeal Brief, paras. 163-210.
[437] Karadžić Appeal Brief, paras. 173-175.
[438] Karadžić Appeal Brief, paras. 173, 174.
[439] *See* Karadžić Appeal Brief, para. 175, *referring to Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Wesley Clark, 15 January 2007, para. 5, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Second Renewed Motion for Leave to Amend its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, paras. 7, 18, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Third Motion for Provisional Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92[ ]*bis*, 10 March 2005, paras. 4, 5, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to His Witness List, 14 October 2004, para. 18.
[440] Karadžić Appeal Brief, paras. 176, 177. Specifically, Karadžić claims that the Trial Chamber required him to foresee that: (i) the witnesses would require protective measures; (ii) the Trial Chamber would deny the requested protective measures; and (iii) the witnesses would thereafter refuse to testify. *See* Karadžić Appeal Brief, para. 177.
[441] Karadžić Appeal Brief, paras. 170, 176, 177.
[442] Karadžić Appeal Brief, para. 176, *referring to* Decision of 24 May 2012.

impossible to meet.[443] Karadžić also maintains that the Trial Chamber unreasonably denied him the flexibility to tender the witnesses' evidence in writing after seeing which evidence he managed to tender and the number of hours he had used to present his case by that point.[444]

173. In addition, Karadžić contends that the Trial Chamber erred in "speculating" in the impugned decisions that the witnesses were unlikely to verify their statements, departed from its prior practice of allowing Prosecution witness statements to be verified at a later stage, and acted inconsistently with its obligation to provide every practicable facility under the ICTY Statute and the ICTY Rules to assist a party in the presentation of its case.[445]

174. Finally, Karadžić maintains that the Trial Chamber failed to consider the impact of the reinstatement of Count 1 of the Indictment during the Defence case and erred in its Decision of 18 March 2014 by retroactively applying the 27 August 2012 deadline in respect of witnesses included in his supplemental witness list.[446]

175. The Prosecution responds that the decisions on the inadmissibility of the Sarajevo 92 *bis* Statements and the Municipalities 92 *bis* Statements were within the Trial Chamber's discretion to manage the proceedings.[447] In its submission, Karadžić's argument that the Trial Chamber should have considered prejudice is unsupported, was not raised at trial, and does not address the Trial Chamber's denial of the motions as out of time.[448] The Prosecution argues that Karadžić's submission that the Trial Chamber unreasonably required him to anticipate that the witnesses would refuse to testify, does not appreciate that he had failed to contact the relevant witnesses until long after the 27 August 2012 deadline expired.[449] The Prosecution also contends that Karadžić fails to show that the Trial Chamber erred in declining to admit the statements that failed to comply with the certification requirements of Rule 92 *bis* (B) of the ICTY Rules and fails to show cogent reasons justifying departure from established appellate case law on this issue.[450] Furthermore, the Prosecution submits that Karadžić does not demonstrate that the admission of these statements

[443] Karadžić Appeal Brief, para. 178.
[444] Karadžić Appeal Brief, para. 179. Moreover, Karadžić submits that the Trial Chamber instructed him to request subpoenas only when necessary and that "he cannot then be disadvantaged" for seeking to admit written evidence from some of these witnesses instead of requesting a subpoena for their appearance. *See* Karadžić Appeal Brief, para. 179.
[445] Karadžić Appeal Brief, paras. 180, 181.
[446] Karadžić Appeal Brief, paras. 182-184.
[447] Prosecution Response Brief, paras. 88, 89. *See also* Prosecution Response Brief, paras. 90-96.
[448] Prosecution Response Brief, paras. 89-91.
[449] Prosecution Response Brief, paras. 91, 92. Moreover, the Prosecution contends that Karadžić disregards the fact that the Trial Chamber assessed his Rule 92 *bis* motions on the merits when he showed that he had contacted the relevant witnesses before the deadline, which was consistent with the approach adopted with respect to similar requests from the Prosecution. Prosecution Response Brief, para. 91.
[450] Prosecution Response Brief, paras. 94-96; T. 23 April 2018 p. 168.

would impact the verdict given that they were cumulative of other evidence rejected by the Trial Chamber.[451]

176. Karadžić replies that although the proposed evidence was cumulative of other evidence on the trial record, the Trial Chamber ultimately rejected such other evidence as unreliable, self-serving, or inconsistent and submits that admission of the proposed evidence could have rectified any perceived weaknesses of the evidence on the trial record.[452]

177. Under Rule 92 *bis* of the ICTY Rules, a trial chamber may dispense with the attendance of a witness in person in certain circumstances and instead admit the witness's evidence in the form of a written statement. In addition, pursuant to Rule 127(A)(ii) of the ICTY Rules, a trial chamber may, on good cause being shown, recognize as validly done any act done after the expiration of a time prescribed on such terms, if any, as it is thought just. The Appeals Chamber observes that Karadžić challenges a decision related to the admission of evidence and requiring compliance with prescribed timelines, which are matters falling within a trial chamber's discretion.[453] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[454]

178. Karadžić submits that, in denying his requests to admit the relevant witness statements, the Trial Chamber committed several errors. However, he does not demonstrate that the Trial Chamber committed a discernible error in finding that he had failed to exercise due diligence so as to comply with the deadline for filing any motion for the admission of evidence pursuant to Rule 92 *bis* of the ICTY Rules and that he had failed to show good cause for the delay.[455] Contrary to his submission that the Trial Chamber applied a double standard, the Trial Chamber required both parties to comply with the deadlines set with regard to the presentation of their respective case.[456]

179. As to Karadžić's argument that the Trial Chamber erred in failing to consider whether granting his motions would prejudice the Prosecution, the Appeals Chamber finds no discernible

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[451] Prosecution Response Brief, paras. 88, 97-121.
[452] Karadžić Reply Brief, paras. 62-66.
[453] *See, e.g., Prlić et al.* Appeal Judgement, paras. 40, 143; *Nyiramasuhuko et al.* Appeal Judgement, para. 331; Decision of 22 October 2013, para. 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18- AR73.8, Decision on Appeal from Order on the Trial Schedule, 19 July 2010 para. 5; *Krajišnik* Appeal Judgement, para. 81; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against "*Décision portant attribution du temps à la défense pour la présentation des moyens à décharge*", 1 July 2008, para. 15.
[454] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[455] For instance, with respect to Zorić, the Appeals Chamber observes that the Trial Chamber found that Karadžić did not even attempt to put forth "any serious good cause argument for having failed to meet the 27 August [2012] [d]eadline". *See* Decision of 18 March 2014, para. 62.
[456] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Following on Status Conference and Appended Work Plan, 6 April 2009, para. 7(5); Scheduling Order of 26 April 2012, para. 22 (v).

error.[457] The Trial Chamber rejected his motions to admit the statements either because they did not comply with the deadline set in the Scheduling Order of 26 April 2012 and he had failed to show good cause to vary it or because he had not satisfied the certification requirements of Rule 92 *bis* (B) of the ICTY Rules. Considering that Karadžić requested the admission of these statements in motions filed more than a year after the deadline set by the Trial Chamber had expired, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion in rejecting his requests on this basis and without considering whether the Prosecution might be prejudiced by the admission of this evidence.

180. Moreover, in contending that the Trial Chamber erred or acted unreasonably in considering that he should have anticipated that the witnesses who provided the Sarajevo 92 *bis* Statements would refuse to testify after being denied protective measures, Karadžić fails to appreciate the broader context of the Trial Chamber's findings concerning his lack of due diligence.[458] In particular, the Decision of 6 November 2013 reflects that while the Trial Chamber considered that Karadžić should have anticipated the outcome of his request for protective measures and made contingency plans, it found that "[a]ll this should have been done well in advance of the [d]eadline".[459] Karadžić's argument does not demonstrate that it was unreasonable for the Trial Chamber to take into account his failure to act before the expiry of the deadline set in the Scheduling Order of 26 April 2012.

181. The same applies to Karadžić's contention that the Trial Chamber erred by considering that he should have anticipated that some of the witnesses who provided the Municipalities 92 *bis* Statements would refuse to testify after it denied his motions to: (i) subpoena Mijić and Tomašević; (ii) allow Jovičinac to testify *via* video-link; or (iii) assign counsel to Banović for the purposes of his testimony.[460] With regard to Mijić, Tomašević, and Jovičinac, the Trial Chamber found that Karadžić did not exercise due diligence based on his failure to address circumstances which could have been anticipated before the 27 August 2012 deadline.[461] Specifically, the Appeals Chamber observes that, with respect to Mijić and Tomašević, the Trial Chamber emphasized that Karadžić

[457] In addition, Karadžić's reliance on the requirement to consider any prejudice caused by disclosure violations before awarding a remedy or by a proposed addition of a witness to a party's witness list involves distinguishable circumstances that are not dispositive with respect to the Trial Chamber's consideration of his requests.
[458] *See* Decision of 6 November 2013, paras. 8-10.
[459] Decision of 6 November 2013, para. 9. The Appeals Chamber observes that this conclusion is further supported by the Trial Chamber's finding that the very reason for Karadžić's delay in filing his request was the result of "his failures and the failures of his defence team to focus and prepare the defence case efficiently." Decision of 6 November 2013, para. 8.
[460] Karadžić Appeal Brief, paras. 170, 176, 177. *See also* Decision of 18 March 2014, paras. 42, 43, 60, 67, 68.
[461] Decision of 18 March 2014, paras. 43, 60, 61.

first contacted them only after the 27 August 2012 deadline.[462] Similarly, in declining admission of Jovičinac's statement, the Trial Chamber considered that Karadžić had not only failed to meet the 27 August 2012 deadline, but had also failed to exercise due diligence by waiting until 20 January 2014 to request that the witness be heard *via* video link and then failed to provide adequate medical documentation in support of his request.[463] As to Banović, the Trial Chamber declined to admit his statement as it was not properly certified and Karadžić failed to show that compliance with the certification requirements was forthcoming.[464] Karadžić does not demonstrate any error in the Trial Chamber's analysis.

182. Similarly, Karadžić's argument that the Trial Chamber applied a double standard when admitting a Prosecution statement pursuant to Rule 92 *bis* of the ICTY Rules that was tendered out of time is without merit.[465] A review of the relevant decision shows that the Trial Chamber considered that the Prosecution had acted with due diligence with regard to the witness concerned.[466]

183. Moreover, the Appeals Chamber finds that Karadžić misrepresents the impugned decisions when he states that he was "retroactively" required to have interviewed all potential Defence witnesses by the 27 August 2012 deadline. Contrary to his submission, the Trial Chamber did not require him to have interviewed the witnesses before the said deadline but considered, in assessing whether he had acted diligently, the fact that he had not even made first contact with them before the deadline had expired.[467] To the extent that Karadžić argues that the deadline for submitting his

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[462] Decision of 18 March 2014, para. 60. The Appeals Chamber observes that [REDACTED]. Moreover, the Appeals Chamber observes that Karadžić had first contacted Mijić in October 2012, around a month and a half after the deadline had expired, and Tomašević in February 2013, around six months after the deadline had expired. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T Motion for Subpoena to Ranko Miji[ć], 15 November 2012, Annex A, RP. 68635; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena to Nikola Toma[š]evi[ć], 14 November 2013 ("Tomašević Motion of 14 November 2013"), Annex, RP. 80517.

[463] Decision of 18 March 2014, para. 60. The Trial Chamber further found that Karadžić did not exercise sufficient diligence when, in January 2014, he sought to admit the witness's evidence *via* video link as his request was out of time and he failed to show good cause for the delay and provide any medical documentation in support of the witness's inability to travel to The Hague, which were requirements he should have been aware of and should have anticipated before the 27 August 2012 deadline. *See* Decision of 18 March 2014, para. 60.

[464] Decision of 18 March 2014, para. 68.

[465] Karadžić Appeal Brief, para. 176, *referring to* Decision of 24 May 2012.

[466] *See* Decision of 24 May 2012, para. 21. In particular, the Appeals Chamber observes that, in the Decision of 6 November 2013, the Trial Chamber noted that the particular witness was contacted by the Prosecution "well in advance" of the start of the trial but having testified earlier in another ICTY case, he categorically refused to testify again. *See* Decision of 6 November 2013, n. 19, *referring to*, *inter alia*, Decision of 24 May 2012. Following the start of the trial, the Prosecution approached him again and, when he repeated his refusal to testify, the Prosecution requested and was granted a subpoena ordering him to testify. *See* Decision of 6 November 2013, n. 19, *referring to*, *inter alia*, Decision of 24 May 2012. In addition, the Appeals Chamber observes that, in admitting a Rule 92 *bis* statement by the witness, the Trial Chamber explicitly stated that it "decided to consider the [m]otion", despite being filed after the expiry of the applicable deadline, due to "the particular circumstances surrounding the [w]itness and his refusal to testify in this case." *See* Decision of 24 May 2012, para. 12.

[467] *See* Decision of 6 November 2013, para. 9, *referring to*, *inter alia*, T. 4 December 2012 p. 30895 ("It is also clear from the submission made before the Chamber that a large number of the [witnesses on Karadžić's witness list] have

Rule 92 *bis* witness statements was problematic, due diligence required him to raise any concerns in that respect at trial.[468] The Appeals Chamber also finds that, contrary to Karadžić's contention, the Trial Chamber did not unreasonably deny him the option of tendering the witnesses' evidence in writing, but rather required him to do so within a prescribed deadline.[469]

184. The Appeals Chamber now turns to Karadžić's contention that the Trial Chamber erred in excluding the relevant witness statements on the assumption that the witnesses were unlikely to verify them, whereas it allowed evidence tendered by the Prosecution to be verified at a subsequent stage.[470] In this regard, a review of the impugned decisions shows that the Trial Chamber considered that the relevant witness statements did not meet the requirements for admission since they were unsigned and did not contain the formal attestation certificate required under Rule 92 *bis* (B) of the ICTY Rules.[471] Since the witnesses had refused to testify, the Trial Chamber considered that there was no guarantee that they would sign the statements.[472] The Appeals Chamber finds that the Trial Chamber correctly distinguished the circumstances of these witnesses from previous occasions in which witnesses' willingness to cooperate was not in question and in which the Trial Chamber had provisionally admitted their statements under Rule 92 *bis* of the ICTY Rules pending compliance with the formal attestation requirements.[473] The Appeals Chamber therefore finds that

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never been contacted by the Defence and probably do not even know that they are on the accused's witness list. This is an extremely unsatisfactory state of affairs at this stage of the trial and is not conducive to its efficiency."). *See also* Decision of 18 March 2014, paras. 43, 60. In addition, the impugned decisions reflect the Trial Chamber's position that Karadžić should have considered using Rule 92 *bis* of the ICTY Rules to tender the witnesses' evidence in advance of the deadline. *See* Decision of 18 March 2014, para. 60; Decision of 6 November 2013, para. 9.

[468] The Appeals Chamber notes in this respect that the Trial Chamber responded to Karadžić's submission that it was impossible for him to meet the deadlines by repeatedly warning him that his original witness list was "causing concern as it, among other things, included a large number of witnesses whose evidence was completely or largely irrelevant to the charges in the indictment as well as unnecessarily repetitive" and noted "that the accused's problem with providing adequate factual summaries for his witness list stems from his failure to adequately revise what is a very unrealistic and excessive witness list [which] was compiled without the accused and his Defence team knowing what the listed witnesses will in fact testify about". *See* T. 4 December 2012 pp. 30894, 30896.

[469] Scheduling Order of 26 April 2012, para. 25.

[470] Karadžić Appeal Brief, para. 180.

[471] Decision of 18 March 2014, paras. 44, 68; Decision of 6 November 2013, paras. 11, 12.

[472] Decision of 18 March 2014, paras. 44, 68; Decision of 6 November 2013, paras. 11, 12. Specifically, the Appeals Chamber observes that with respect to the Sarajevo 92 *bis* Statements, the Trial Chamber considered that: (i) while the relevant witnesses did not want to testify without protective measures, the statements were tendered for admission; and (ii) these statements were created before its decisions denying protective measures to the relevant witnesses. *See* Decision of 6 November 2013, para. 11. As to the Municipalities 92 *bis* Statements, the Trial Chamber observed that Tomović and Kalinić refused to testify, even after they were informed that subpoenas would be requested, and that Karadžić did not provide any information demonstrating that the witnesses would agree to certify their statements. *See* Decision of 18 March 2014, para. 44. Further, as to Banović, the Trial Chamber noted that he refused to testify since he was concerned about the impact of his testimony on a plea agreement that he entered into with the Prosecution and that Karadžić made no attempts to show that the witness would agree to certify the contents of his statement. *See* Decision of 18 March 2014, para. 68.

[473] Decision of 18 March 2014, paras. 39, 44, 68; Decision of 6 November 2013, para. 11. *See* Decision of 5 March 2010, para. 77(C); Srebrenica Decision of 21 December 2009, para. 67(B)(4); Decision of 10 November 2009, para. 47(1)(c); Decision of 2 November 2009, para. 30. In this respect, the Appeals Chamber finds no merit in Karadžić's argument that the Registry declined to certify witness statements before the Trial Chamber admitted the relevant evidence. In support of his claim, Karadžić relies on his motion at trial to reconsider the decision denying the admission of prospective Defence Witness Dušan Đenadija's statement pursuant to Rule 92 *bis* of the ICTY Rules, which clearly

Karadžić fails to demonstrate discernible error in this respect. Although trial chambers are obliged to provide every practicable facility to assist parties in presenting their case, this obligation does not extend to allowing out-of-time motions in the absence of good cause or admitting evidence that does not meet the formal requirements for admission.

185. As to Karadžić's contention that the Trial Chamber erred in failing to consider the impact for his defence case of the reinstatement of Count 1 of the Indictment and in retroactively applying the 27 August 2012 deadline for witnesses included in his supplemental witness list, the Appeals Chamber observes that [REDACTED].[474] Karadžić fails to show any prejudice suffered by the reinstatement of Count 1. As to [REDACTED],[475] the Trial Chamber took no issue with respect to the timeliness of the request to admit his evidence under Rule 92 *bis* of the ICTY Rules, but rather rejected Karadžić's request finding that it was unlikely that the witness would verify his statement.[476] Specifically the Trial Chamber noted that, since Banović refused to testify because he was concerned about his right against self-incrimination, the same concerns "would equally apply whether his evidence is received orally or [in] writing."[477]

186. Based on the foregoing, the Appeals Chamber dismisses Grounds 11 and 12 of Karadžić's appeal.

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reflects that the relevant statement was certified by the Registry before the Trial Chamber's decision on its admission. *See Prosecutor v. Radovan Karadžić*, Case. No. IT-95-05/18-T, Motion for Reconsideration of Decision Denying Admission of Statement of Du[š]an [Đ]enadjia, 8 April 2014, para. 2.

[474] [REDACTED]. As to Zorić's statement, the Appeals Chamber observes that the Trial Chamber rejected Karadžić's argument that he showed good cause for his delay as this evidence primarily related to Count 1. *See* Decision of 18 March 2014, para. 62. However, considering that [REDACTED], Karadžić fails to show any error in the Trial Chamber's reasoning.

[475] [REDACTED].

[476] Decision of 18 March 2014, paras. 67, 68.

[477] Decision of 18 March 2014, para. 68.

9. Alleged Errors in Refusing to Admit Statements of Two Prospective Defence Witnesses (Ground 13)

187. At the close of the Prosecution case, the Trial Chamber ordered Karadžić to file a list of witnesses he intended to call and any motion for the admission of evidence pursuant to Rules 92 *bis* or 92 *quater* of the ICTY Rules by 27 August 2012.[478] On 2 August 2013, after the reinstatement of Count 1, the Trial Chamber ordered Karadžić to file his revised witness list no later than 18 October 2013.[479] On 8 January and 4 February 2014, pursuant to Rule 92 *bis* of the ICTY Rules, Karadžić sought the admission of written evidence of prospective Defence Witnesses Pero Rendić and Branko Basara, respectively, submitting that there was good cause for filing his motions out of time because the witnesses had refused to testify due to their respective health conditions.[480] On 6 and 19 February 2014, the Trial Chamber denied Karadžić's motions.[481] Specifically, considering that the requests fell under Rule 92 *quater* of the ICTY Rules, which governs situations where a witness cannot testify orally "by reason of bodily or mental condition",[482] the Trial Chamber found that Karadžić had failed to show that the two witnesses were unavailable to testify.[483]

188. Karadžić submits that the Trial Chamber erred in refusing to admit the evidence of the two witnesses on the basis of their unavailability to testify, a consideration which is not relevant under Rule 92 *bis* of the ICTY Rules under which he had sought the admission of their written evidence.[484] He asserts that the Trial Chamber adopted a double standard when it admitted the evidence of 148 Prosecution witnesses pursuant to Rule 92 *bis* of the ICTY Rules, without requiring

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[478] Scheduling Order of 26 April 2012, paras. 22, 25.
[479] Decision of 2 August 2013, paras. 14, 25.
[480] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Testimony of Branko Basara Pursuant to Rule 92[ ]*bis*, 4 February 2014 ("Motion to Admit Testimony of Branko Basara of 4 February 2014"), paras. 1-3, 13; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Testimony of Pero Rendi[ć] Pursuant to Rule 92[ ]*bis*, 8 January 2014 ("Motion to Admit Testimony of Pero Rendić of 8 January 2014"), paras. 1-3, 13.
[481] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit the Testimony of Branko Basara Pursuant to Rule 92 *bis*, 19 February 2014 ("Decision to Admit Testimony of Branko Basara of 19 February 2014"), para. 8; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit Testimony of Pero Rendić Pursuant to Rule 92 *bis*, 6 February 2014 ("Decision to Admit Testimony of Pero Rendić of 6 February 2014"), para. 11.
[482] Decision to Admit Testimony of Branko Basara of 19 February 2014, para. 4; Decision to Admit Testimony of Pero Rendić of 6 February 2014, para. 7.
[483] Decision to Admit Testimony of Branko Basara of 19 February 2014, paras. 6, 7; Decision to Admit Testimony of Pero Rendić of 6 February 2014, paras. 9, 10.
[484] Karadžić Notice of Appeal, p. 7; Karadžić Appeal Brief, paras. 211-216, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion to Admit the Evidence of Željka Malinović Pursuant to Rule 92[ ] *bis*, 8 September 2015 ("*Mladić* Decision of 8 September 2015"), paras. 10-13, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Request for Reconsideration of the Admission of Written Evidence of Witness No. 39 Pursuant to Rule 92 *bis*, 4 November 2011 ("*Tolimir* Decision of 4 November 2011"), paras. 20, 23, *The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-AR73.2, Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92[ ]*bis*, 8 March 2011 ("Nizeyimana Decision of 8 March 2011"), paras. 26, 29, 30. *See also* Karadžić Reply Brief, para. 67.

the Prosecution to show that they were unavailable.[485] Karadžić submits that the exclusion of the two witnesses' evidence rendered several of the Trial Chamber's findings unsafe and that a new trial should be ordered where their evidence could be admitted.[486]

189. The Prosecution responds that the statements of the two prospective Defence witnesses are irrelevant or have low probative value and that Karadžić fails to show that this evidence would have impacted the Trial Judgement.[487]

190. The Appeals Chamber recalls that decisions relating to the admission of evidence and the general conduct of trial proceedings fall within the discretion of the trial chamber.[488] The Appeals Chamber notes that, while Karadžić sought to admit the two witness statements under Rule 92 *bis* of the ICTY Rules, he justified filing the motions out of time on the basis of the witnesses' unavailability to testify due to their health conditions.[489] Consequently, the Trial Chamber found it more appropriate to consider his requests under Rule 92 *quater* of the ICTY Rules.[490] Both Rules 92 *bis* and 92 *quater* of the ICTY Rules concern the admission of written statements.[491] However, while Rule 92 *bis* of the ICTY Rules does not list the unavailability of a person to testify as a factor to consider in admitting written evidence, Rule 92 *quater* of the ICTY Rules specifically governs the admission of statements, including those in the form prescribed by Rule 92 *bis* of the ICTY Rules, of persons who are unable to testify, *inter alia*, "by reason of bodily or mental condition".[492] In light of the fact that Karadžić justified his late filings by relying on the witnesses' unavailability to testify due to their health condition and considering the specific applicability of Rule 92 *quater* of the ICTY Rules to such circumstances, the Appeals Chamber finds no error in the Trial

[485] Karadžić Notice of Appeal, p. 2; Karadžić Appeal Brief, paras. 216, 217.
[486] Karadžić Appeal Brief, paras. 218-222.
[487] Prosecution Response Brief, paras. 122-129; T. 23 April 2018 p. 169.
[488] *Prlić et al.* Appeal Judgement, paras. 26, 143, 151; *Nyiramasuhuko et al.* Appeal Judgement, para. 331; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010 ("*Prlić et al.* Decision of 1 July 2010"), para. 8; *Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010 ("*Kanyarukiga* Decision of 23 March 2010"), para. 7.
[489] Motion to Admit Testimony of Branko Basara of 4 February 2014, paras. 2, 3; Motion to Admit Testimony of Pero Rendić of 8 January 2014, paras. 2, 3.
[490] Decision to Admit Testimony of Branko Basara of 19 February 2014, para. 4; Decision to Admit Testimony of Pero Rendić of 6 February 2014, para. 7.
[491] The scope of Rule 92 *bis* (A) of the ICTY Rules is limited to evidence that goes to proof of a matter other than the acts and conduct of the accused, whereas Rule 92 *quater* of the ICTY Rules does not make such a distinction. However, under the latter rule, evidence that goes to proof of acts and conduct of an accused may be a factor against the admission of such evidence, or that part of it. *See Lukić and Lukić* Appeal Judgement, para. 565.
[492] *See also Prlić et al.* Decision of 23 November 2007, para. 48.

Chamber's exercise of its discretion to assess Karadžić's requests under this rule, rather than under Rule 92 *bis* of the ICTY Rules.[493]

191. The Appeals Chamber also rejects Karadžić's contention that the Trial Chamber adopted a double standard when it admitted evidence from Prosecution witnesses under Rule 92 *bis* of the ICTY Rules as he does not demonstrate that the circumstances were similar to his requests for the admission of the statements of Rendić and Basara.

192. Based on the foregoing, the Appeals Chamber dismisses Ground 13 of Karadžić's appeal.

[493] With respect to Karadžić's reliance on the *Mladić* Decision of 8 September 2015 and the *Tolimir* Decision of 4 November 2011, the Appeals Chamber notes that two trial chambers may exercise their discretion differently in managing trial proceedings as the manner in which such discretion is exercised should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another. *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 232; *Haradinaj et al.* Appeal Judgement, para. 39. The Appeals Chamber finds that Karadžić's cursory reference to the approach followed by other trial chambers fails to demonstrate any error of the Trial Chamber in this respect. Similarly, the Appeals Chamber is not persuaded by Karadžić's references to the *Nizeyimana* Decision of 8 March 2011 as the decision concerns a witness who was not available to testify for reasons other than those provided for under Rule 92 *quater* of the ICTY Rules.

10. Alleged Errors in Non-Admission of Evidence of a Prospective Defence Witness (Ground 14)

193. On 21 January 2014, under Rule 92 *quater* of the ICTY Rules, Karadžić sought the admission of the transcript of Borivoje Jakovljević's testimony given in another ICTY case.[494] Karadžić argued that Jakovljević was unavailable to testify because he suffered from memory loss after having had brain surgery and that, should further medical assessment of Jakovljević be required, this should be done at the Tribunal's expense.[495] On 17 February 2014, the Trial Chamber noted that, having examined the medical documentation submitted in support of Karadžić's request, it found no reference to a medical condition which would support Jakovljević's unavailability to testify and that, therefore, additional medical documentation was required before it could rule on the matter.[496] The Trial Chamber also observed that it was for Karadžić and not for the Trial Chamber to obtain all supporting material for his request.[497] On 18 February 2014, Karadžić's legal adviser informed the Trial Chamber that Jakovljević was not willing to retrieve additional medical records to support the motion and that, as a result, Karadžić had no further submissions on the motion.[498] On 25 February 2014, the Trial Chamber denied Karadžić's motion as it was not satisfied that Jakovljević was unavailable.[499] In particular, the Trial Chamber found that Karadžić had failed to demonstrate that Jakovljević suffered from any medical condition which would render him unavailable to testify in accordance with Rule 92 *quater* of the ICTY Rules.[500]

194. Karadžić submits that the Trial Chamber erred in denying his motion to admit the written evidence of Jakovljević under Rule 92 *quater* of the ICTY Rules.[501] He argues that the Trial Chamber erred in finding that the medical documentation he submitted in support of his request was insufficient to demonstrate that Jakovljević was unavailable to testify.[502]

195. Karadžić also maintains that the Trial Chamber erred in refusing to order an independent medical examination to assess Jakovljević's availability at the ICTY's expense.[503] He contends that Jakovljević was not willing to provide additional medical documentation at his own expense, and

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[494] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Testimony of Borivoje Jakovljević Pursuant to Rule 92[ ]*quater*, 21 January 2014 (public with confidential annexes) ("Motion of 21 January 2014"), paras. 1, 9, *referring to* Jakovljević's prior testimony in the case of *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T. The Trial Chamber had earlier denied Karadžić's request to admit Jakovljević's testimony under Rule 92 *bis* of the ICTY Rules. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit Statements Pursuant to Rule 92 *bis* (Srebrenica Component), 29 November 2013, paras. 15, 19.
[495] Motion of 21 January 2014, paras. 4, 6, 8; T. 17 February 2014 pp. 47227, 47228.
[496] T. 17 February 2014 p. 47228.
[497] T. 17 February 2014 p. 47228.
[498] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Admit Testimony of Borivoje Jakovljević Pursuant to Rule 92 *quater*, 25 February 2014 ("Decision of 25 February 2014"), para. 5.
[499] Decision of 25 February 2014, paras. 7-9.
[500] Decision of 25 February 2014, para. 7.
[501] Karadžić Notice of Appeal, p. 7; Karadžić Appeal Brief, paras. 223-232.
[502] Karadžić Appeal Brief, para. 227. *See also* Karadžić Reply Brief, para. 68.

that Karadžić, as an indigent accused, did not have the financial means to fund a medical examination.[504] Karadžić argues that the Trial Chamber was obliged to provide him every practicable facility available under the Statute and the Rules that could assist in the presentation of his case.[505] He also maintains that, by refusing to order a medical examination at the expense of the ICTY, the Trial Chamber violated the principle of equality of arms.[506] He asserts that, had Jakovljević been a Prosecution witness, the Prosecution would have been able to fund an independent medical examination and have his evidence admitted pursuant to Rule 92 *quater* of the ICTY Rules.[507]

196. Karadžić contends that the failure to admit Jakovljević's evidence led to the adverse findings that Mladić had indicated that Srebrenica prisoners were to be killed and that Karadžić had ordered prisoners to be transported to Zvornik to be killed.[508] Karadžić submits that the Appeals Chamber should order a re-trial at which Jakovljević's evidence could be admitted.[509]

197. The Prosecution responds that Karadžić fails to demonstrate that Jakovljević was unavailable to testify and shows no error in the decision denying admission of the transcript of Jakovljević's testimony.[510] The Prosecution submits that Karadžić mischaracterises Jakovljević's inconclusive recollections and fails to show that they would have altered the Trial Chamber's detailed findings had the transcript of his testimony been admitted.[511]

198. Rule 92 *quater* of the ICTY Rules permits the admission of written evidence from a person who is objectively unable to attend a court hearing, either because he is deceased or because of a physical or mental impairment.[512] An individual who is "theoretically able to attend" is not "unavailable" within the meaning of Rule 92 *quater* of the ICTY Rules.[513] The Appeals Chamber observes that Karadžić challenges a decision related to the admission of evidence, which is a matter

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[503] Karadžić Appeal Brief, para. 228. *See also* Karadžić Reply Brief, para. 68.
[504] Karadžić Appeal Brief, paras. 226, 229.
[505] Karadžić Appeal Brief, para. 229, *referring to Tadić* Appeal Judgement, para. 52. In particular, Karadžić argues that the Trial Chamber used its power under Rule 54 of the ICTY Rules to arrest witnesses who failed to appear for the Prosecution and should have used that same power to order Jakovljević's medical examination if it was not satisfied that his brain surgery rendered him unavailable to testify. *See* Karadžić Appeal Brief, para. 230.
[506] Karadžić Appeal Brief, para. 231.
[507] Karadžić Appeal Brief, para. 231.
[508] Karadžić Appeal Brief, para. 232. Karadžić also submits that the exclusion of Jakovljević's evidence also affected the Trial Chamber's findings on Witness Momir Nikolic's credibility. *See* Karadžić Appeal Brief, para. 232; Karadžić Reply Brief, para. 69.
[509] Karadžić Appeal Brief, para. 233.
[510] Prosecution Response Brief, paras. 130-135.
[511] Prosecution Response Brief, para. 136.
[512] *See Prlić et al.* Decision of 23 November 2007, para. 48.
[513] *See Prlić et al.* Decision of 23 November 2007, para. 48. *See also Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 26 October 2015, para. 20; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Motion to Admit the Evidence of Witness No. 39 Pursuant to Rule 92 *quater*, 7 September 2011, para. 30.

falling within a trial chamber's discretion.[514] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[515]

199. The Appeals Chamber finds that Karadžić has failed to show a discernible error in the Trial Chamber's assessment of the medical documentation provided in support of his request and in its denial of the request as unsubstantiated. As the Trial Chamber noted, the documentation made no reference to any medical condition rendering Jakovljević "unavailable" to testify within the meaning of Rule 92 *quater* of the ICTY Rules.[516] Therefore, the Trial Chamber's finding that the material before it did not demonstrate Jakovljević's unavailability to testify was not unreasonable.

200. As to Karadžić's contention that the Trial Chamber erred in declining to order an additional medical examination of Jakovljević at the expense of the Tribunal, the Appeals Chamber observes that the burden to demonstrate a witness's unavailability to testify for the purposes of Rule 92 *quater* of the ICTY Rules rests with the party asserting the witness's unavailability.[517] As noted above, Karadžić fails to demonstrate Jakovljević's unavailability to testify and the Trial Chamber was not required to order a medical examination to assist Karadžić in support of his motion. In addition, Karadžić fails to show that the interests of justice required the Trial Chamber to order an additional medical examination of Jakovljević at the Tribunal's expense. In this respect the Appeals Chamber notes that, contrary to Karadžić's claim, the Registrar did not find him indigent but only partially indigent[518] and that Karadžić could benefit from the Registry's legal aid scheme applicable to self-represented accused, which provided for reimbursement of expenses related to "the production of evidence for the defence and the ascertainment of facts" where appropriate.[519]

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[514] *See Prlić et al.* Appeal Judgement, paras. 143, 151; *Nyiramasuhuko et al.* Appeal Judgement, para. 331; *Prlić et al.* Decision of 1 July 2010, para. 8; *Kanyarukiga* Decision of 23 March 2010, para. 7.
[515] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[516] Decision of 25 February 2014, para. 7. *See also* Motion of 21 January 2014, Annex B (confidential).
[517] *See, e.g., Prosecutor v. Goran Hadžić*, Case No. IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater* (Herbert Okun), 22 February 2013, para. 11; *Tolimir* Decision of 7 September 2011, para. 25. *Cf. Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013, para. 21. The Appeals Chamber finds that Karadžić's reliance on case law related to a trial chamber's discretion to issue an arrest warrant for a witness who fails to appear and testify is not on point as it concerns a clearly distinguishable situation and fails to demonstrate error. *See* Karadžić Appeal Brief, para. 230.
[518] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Decision on Accused's Request for Review of Registrar's Decision on Indigence Issued on 25 February 2014, 3 December 2014, paras. 5, 57; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision, 11 October 2012 (public with public and confidential and *ex parte* Appendix II) ("Registrar Decision of 11 October 2012"), p. 4.
[519] *See* Directive on the Assignment of Defence Counsel, IT/73/REV. 11, 11 July 2006 ("ICTY Directive on the Assignment of Counsel"), Article 23 (B)(ii). *See also* Registrar Decision of 11 October 2012, p. 4 ("with the exception of [Karadžić's] contribution of €146,501.00, the expenses referred to in [Article] 23 […] of the [ICTY Directive on the Assignment of Counsel], as applicable to a self-represented accused and in accordance with the Remuneration Scheme, shall be borne by the Tribunal").

Nonetheless, Karadžić fails to demonstrate that he made any attempt to have such expenses authorized or covered by the Registry.

201. Karadžić's claim that, had the witness been a Prosecution witness, the Prosecution would have been able to fund further medical examinations and would have succeeded in having his evidence admitted, is speculative. Moreover, Karadžić misconstrues the requirements of the principle of equality of arms, which does not, as he asserts, require placing the Defence "in the same position as the Prosecution"[520] but rather provides that each party must have a reasonable opportunity to defend its interests under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.[521] The Appeals Chamber finds that Karadžić does not demonstrate on appeal that he did not have a reasonable opportunity to defend his interests in this respect.

202. Based on the foregoing, the Appeals Chamber finds that Karadžić fails to demonstrate a discernible error in the Trial Chamber's decision and the Appeals Chamber dismisses Ground 14 of Karadžić's appeal.

[520] Karadžić Appeal Brief, para. 231.
[521] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, 4 September 2008, para. 29. *See also Kalimanzira* Appeal Judgement, para. 34; *Nahimana et al.* Appeal Judgement, para. 173.

11. Alleged Errors in Refusal to Admit Evidence of an Unavailable Witness (Ground 15)

203. On 3 October 2012, the Trial Chamber denied Karadžić's request pursuant to Rule 92 *quater* of the ICTY Rules to admit a transcript of the Prosecution's interview of Rajko Koprivica, who had later died.[522] The Trial Chamber found that Koprivica's statement was of limited reliability and probative value and that it was not in the interests of justice to admit it.[523]

204. Karadžić submits that in refusing to admit Koprivica's statement, the Trial Chamber erroneously assessed the reliability of the evidence on the basis of its contents rather than of the circumstances of its production.[524] He contends that trial chambers have regularly admitted similar statements and that any inconsistencies in the evidence or perceived evasiveness of the witness should only be considered when weighing the evidence, not in assessing whether to admit it.[525] He argues that the statement provided compelling indicia of reliability because: (i) it was recorded verbatim, (ii) Koprivica was advised of his rights and given an opportunity to correct the transcript, and (iii) the interview was conducted by the Prosecution who thoroughly examined Koprivica's evidence.[526] Karadžić further submits that the exclusion of Koprivica's statement, which contained exculpatory information, was unfair as the Trial Chamber admitted other transcripts and statements tendered by the Prosecution that were produced in a similar manner, or statements that were not recorded verbatim and for which evasiveness or inconsistencies would not be apparent and that were produced in the absence of the Defence.[527]

205. Karadžić asserts that despite excluding Koprivica's evidence, the Trial Chamber referred to him numerous times in the Trial Judgement without providing Karadžić the opportunity to rebut allegations based on his evidence.[528] Karadžić contends that he was prejudiced because the Trial Chamber made adverse findings against him without considering Koprivica's exculpatory evidence.[529] He submits that to remedy the alleged error, the Appeals Chamber should order a new trial in which Koprivica's evidence could be considered.[530]

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[522] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Admission of Statement of Rajko Koprivica Pursuant to Rule 92 *quater*, 3 October 2012 ("Decision of 3 October 2012"), paras. 1, 6, 16, 18.
[523] Decision of 3 October 2012, para. 16.
[524] Karadžić Notice of Appeal, p. 7; Karadžić Appeal Brief, paras. 234, 235.
[525] Karadžić Appeal Brief, para. 235. *See also* Karadžić Reply Brief, para. 70.
[526] Karadžić Appeal Brief, para. 236.
[527] Karadžić Appeal Brief, paras. 237, 238.
[528] Karadžić Appeal Brief, para. 239.
[529] Karadžić Appeal Brief, paras. 240, 241. *See also* Karadžić Reply Brief, para. 71. Karadžić contends that the Trial Chamber excluded Koprivica's evidence in its findings concerning events in Vogošća municipality and his underlying responsibility. *See* Karadžić Appeal Brief, paras. 240, 241.
[530] Karadžić Appeal Brief, para. 242.

206. The Prosecution responds that the Trial Chamber correctly assessed reliability as a requirement for admission of evidence under Rule 92 *quater* of the ICTY Rules and properly exercised its discretion in denying the admission of Koprivica's statement.[531] It further submits that Karadžić fails to demonstrate that the non-admission of the statement prejudiced him or impacted the Trial Judgement.[532]

207. Karadžić replies that the Prosecution points to no jurisprudence where inadmissibility was found on the basis of inconsistent or evasive answers.[533] He further contends that Koprivica's evidence would have impacted the Trial Judgement considering the Trial Chamber's finding that the subject matter of the statement was relevant to the proceedings.[534]

208. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in the conduct of proceedings before them, including in determining the admissibility of evidence.[535] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[536]

209. Rule 92 *quater* (A) of the ICTY Rules allows for the admission of a written statement or transcript from a person who subsequently died, provided that the trial chamber finds from the circumstances in which the statement was made and recorded that it is reliable. To be admissible under Rule 92 *quater*, the proffered evidence must be relevant and have probative value as provided in Rule 89(C) of the ICTY Rules.[537] In order to assess whether proposed evidence satisfies both prerequisites, consideration must be given to its *prima facie* reliability and credibility.[538] An item of evidence may be so lacking in terms of indicia of reliability that it is not "probative" and is therefore inadmissible.[539] The final evaluation of the reliability and credibility, and hence the

[531] Prosecution Response Brief, paras. 137-139; T. 23 April 2018 p. 170.
[532] Prosecution Response Brief, paras. 137, 140; T. 23 April 2018 pp. 169, 170.
[533] Karadžić Reply Brief, para. 70.
[534] Karadžić Reply Brief, para. 71.
[535] *Prlić et al.* Appeal Judgement, para. 143; *Šainović et al.* Appeal Judgement, paras. 152, 161; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Decision of 12 January 2009"), para. 5; *Simba* Appeal Judgement, para. 19.
[536] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[537] *Lukić and Lukić* Appeal Judgement, para. 566; *Karemera et al.* Decision of 29 May 2009, para. 14; *Prlić et al.* Decision of 12 January 2009, para. 15.
[538] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 33; *Karemera et al.* Decision of 29 May 2009, para. 15; *Naletilić and Martinović* Appeal Judgement, para. 402.
[539] *Prlić et al.* Decision of 12 January 2009, para. 15; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović et al.* Decision of 30 January 2008"), para. 22; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 ("*Nyiramasuhuko* Decision of 4 October 2004"), para. 7; *Rutaganda* Appeal Judgement, para. 33.

probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.[540]

210. The Appeals Chamber observes that the Trial Chamber refused to admit Koprivica's statement because it contained "pervasive inconsistencies" and that, in many instances, Koprivica was either unable to recollect the events or communications in relation to certain questions or came across as highly evasive in his responses.[541] The Trial Chamber correctly considered the *prima facie* reliability of Koprivica's statement in determining its probative value as required pursuant to Rule 89(C) of the ICTY Rules.[542] In this respect, the Appeals Chamber recalls that the factors a trial chamber can consider in assessing whether an item of evidence has sufficient indicia of reliability to be admissible pursuant to Rule 92 *quater* of the ICTY Rules may vary[543] and that these have included the absence of manifest or obvious inconsistencies in a statement.[544] The Appeals Chamber finds that Karadžić does not demonstrate that the Trial Chamber committed a discernible error in taking into account the inconsistencies and evasiveness of Koprivica's responses in determining the reliability of his statement. In addition, Karadžić does not present any arguments showing that the Trial Chamber's finding that the statement contained pervasive inconsistencies was unreasonable.

211. Furthermore, Karadžić's allegation of unfair treatment on the basis that the Trial Chamber admitted statements taken during Prosecution interviews as well as statements that were not verbatim fails to identify any error. Karadžić's general submissions fail to demonstrate materially different treatment or that the Trial Chamber erred in the admission of such evidence. In this respect, the Appeals Chamber reiterates that the assessment of admissibility criteria must be done with respect to each tendered document.[545]

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[540] *Karemera et al.* Decision of 29 May 2009, para. 15; *Popović et al.* Decision of 30 January 2008, para. 22; *Nyiramasuhuko* Decision of 4 October 2004, para. 7.
[541] Decision of 3 October 2012, para. 15.
[542] Decision of 3 October 2012, paras. 15, 16.
[543] *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, 18 August 2008 (confidential) ("*Popović et al.* Decision of 18 August 2008"), para. 44.
[544] *See Lukić and Lukić* Appeal Judgement, n. 1633, *referring to, inter alia, Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 7; *Popović et al.* Decision of 18 August 2008, paras. 30, 31. *See also, e.g., Prosecutor v. Vujadin Popović et al.*, 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, para. 32; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on the Admission of Statements of Two Witnesses Pursuant to Rule 92 *quater*, 24 April 2008, para. 6; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8.
[545] *Prlić et al.* Decision of 12 January 2009, para. 25.

212. Similarly, Karadžić does not demonstrate error in the Trial Chamber's references to statements made by Koprivica in the Trial Judgement. While he contends that the Trial Chamber erred by relying on inculpatory evidence from Koprivica yet failed to consider exculpatory information that was contained in his statement that it refused to admit, Karadžić fails to demonstrate prejudice. Specifically, the Trial Chamber found that Koprivica's statement was insufficiently reliable and of limited probative value, and Karadžić, in this context, fails to demonstrate that any exculpatory elements contained in it could have impacted any findings in the Trial Judgement. Consequently, the Appeals Chamber finds that Karadžić's contentions in this respect are without merit.

213. For the foregoing reasons, the Appeals Chamber finds that Karadžić has failed to demonstrate that, in refusing to admit Koprivica's statement, the Trial Chamber committed a discernible error that resulted in prejudice to him.

214. Based on the foregoing, the Appeals Chamber dismisses Ground 15 of Karadžić's appeal.

12. Alleged Errors Concerning Admission of Adjudicated Facts and Written Evidence under Rules 92 *bis* and 92 *quater* (Ground 16)

215. In a series of decisions, the Trial Chamber took judicial notice of 2,379 adjudicated facts pursuant to Rule 94(B) of the ICTY Rules.[546] In addition, the Trial Chamber admitted written evidence from 142 witnesses pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules.[547] In reaching these decisions, the Trial Chamber in many instances rejected Karadžić's contention that the use of adjudicated facts and the admission of written evidence under Rules 92 *bis* and 92 *quater* of the ICTY Rules violated the presumption of innocence or shifted the burden of proof.[548] After the close of the Prosecution case, the Trial Chamber allocated Karadžić the same amount of time to present his case as was given to the Prosecution notwithstanding Karadžić's arguments that he should be given more time in view of the large number of judicially noticed adjudicated facts.[549] In affirming the decision on the time allocated for the Defence case, the ICTY Appeals Chamber held that the Trial Chamber had sufficiently evaluated the impact of the more than 2,300 adjudicated facts that had been admitted in his case.[550]

216. Karadžić contends that the cumulative effect of taking judicial notice of thousands of adjudicated facts, representing the testimony of hundreds of witnesses, and admitting the written evidence of nearly 150 Prosecution witnesses through Rules 92 *bis* and 92 *quater* of the ICTY Rules without requiring cross-examination violated his right to be presumed innocent and relieved

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[546] Decision of 14 June 2010 on Fifth Motion for Judicial Notice; Decision of 14 June 2010 on Fourth Motion for Judicial Notice; Decision of 9 October 2009 on Second Motion for Judicial Notice; Decision of 9 July 2009 on Third Motion for Judicial Notice; Decision of 5 June 2009 on First Motion for Judicial Notice. *See also* Trial Judgement, paras. 25, 6165.

[547] Decision of 24 May 2012; Decision of 22 March 2012; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazić Pursuant to Rule 92 *quater* and for Leave to Add Exhibits to Rule 65 *ter* Exhibit List, 9 January 2012; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babić) Pursuant to Rule 92 *quater*, 13 April 2010; Decision of 18 March 2010; Decision of 5 March 2010; Srebrenica Decision of 21 December 2009; Delayed Disclosure Decision of 21 December 2009; Decision of 10 November 2009; Decision of 9 November 2009; Decision of 2 November 2009; Decision of 15 October 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Motion for Admission of Evidence of KDZ290 (Mirsad Kučanin) Pursuant to Rule 92 *quater*, 25 September 2009 (public with confidential annex); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 *quater*, 25 September 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 *quater*, 20 August 2009 ("Decision of 20 August 2009"). *See also* Trial Judgement, para. 6137.

[548] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts, 14 September 2010, para. 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, paras. 21-23; Decision of 9 October 2009 on Second Motion for Judicial Notice, para. 53; Decision of 20 August 2009, para. 10; Decision of 5 June 2009 on First Motion for Judicial Notice, paras. 35, 36. *Cf.* Decision of 14 June 2010 on Fourth Motion for Judicial Notice, para. 97; Decision of 14 June 2010 on Fifth Motion for Judicial Notice, para. 55.

[549] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Time Allocated to the Accused for the Presentation of His Case, 19 September 2012, paras. 1, 10, 12.

[550] Decision of 29 January 2013, paras. 2, 18.

the Prosecution of its burden of proof, thus rendering his trial unfair.[551] Specifically, he argues that the Prosecution was no longer required to demonstrate the credibility of its evidence and that Karadžić was required to rebut each adjudicated fact with credible evidence of his own.[552]

217. Karadžić submits that no accused had to rebut so many adjudicated facts before and points to case law to suggest that the volume of adjudicated facts admitted in his trial, particularly when compared to the number of adjudicated facts admitted in other trials, prejudiced his ability to mount an effective defence.[553] Specifically, he argues that he was required to expend "scarce resources" investigating and rebutting adjudicated facts whereas the "better-resourced Prosecution" was relieved of its burden to prove them, allowing it to devote resources to other trial issues and creating "a further imbalance in the equality of arms".[554] Karadžić suggests that had the evidence of the witnesses whose statements and testimony were admitted without cross-examination as well as the testimony of the hundreds of witnesses relied upon to establish the adjudicated facts been presented *viva voce*, he would have benefited from an additional 18 months of preparation to challenge this evidence as well as a further 18 months to present evidence in his defence.[555] Instead, he submits, the evidence and adjudicated facts were "dumped into the record" with no allocation of additional time or resources for the Defence to contest it.[556] Karadžić requests that the Appeals Chamber order a new trial.[557]

218. The Prosecution responds that Karadžić fails to show any error in the relevant decisions concerning the admission of adjudicated facts or evidence pursuant to Rules 92 *bis* and 92 *quater* of

[551] *See* Karadžić Notice of Appeal, pp. 7, 8; Karadžić Appeal Brief, paras. 115, 135, 243, 245, 246, 256-260; T. 23 April 2018 pp. 110-113. Karadžić highlights that he requested a stay of proceedings based on similar arguments at the beginning of trial and contends that the Trial Chamber "missed the point" by finding that it was premature to determine to what extent the admission of adjudicated facts and evidence without cross-examination would affect the final judgement. *See* Karadžić Appeal Brief, paras. 253, 254, *referring to*, *inter alia*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Motion for Stay of Proceedings, 8 April 2010, para. 6.
[552] Karadžić Appeal Brief, para. 255; Karadžić Reply Brief, para. 72. Karadžić submits that the Trial Chamber "often preferred" the untested evidence of the Prosecution to the Defence's *viva voce* evidence. *See* Karadžić Appeal Brief, para. 259.
[553] Karadžić Appeal Brief, paras. 135, 243, 244, 248-251, 256, *referring to Mladić* Decision of 12 November 2013, para. 24, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Third Prosecution's Motion for Judicial Notice of Adjudicated Facts, signed on 23 July 2010, filed on 26 July 2010, para. 64, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts, 24 March 2005, para. 22, *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004, p. 3, n. 7, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 16 December 2003, para. 12. *See also* Karadžić Reply Brief, para. 73; T. 23 April 2018 pp. 110-113.
[554] Karadžić Appeal Brief, para. 255; T. 23 April 2018 pp. 110, 111.
[555] Karadžić Appeal Brief, para. 247.
[556] Karadžić Appeal Brief, para. 247.
[557] Karadžić Appeal Brief, para. 260.

the ICTY Rules.[558] It further argues that he does not demonstrate any prejudice, particularly as it concerns the cumulative effect of these decisions.[559]

219. The Appeals Chamber recalls that taking judicial notice of adjudicated facts or documentary evidence under Rule 94(B) of the ICTY Rules is a method of achieving judicial economy while ensuring the right of the accused to a fair, public, and expeditious trial.[560] Rule 94(B) of the ICTY Rules requires a trial chamber to hear the parties before deciding to take judicial notice.[561] Moreover, facts admitted under Rule 94(B) of the ICTY Rules are merely presumptions that may be rebutted by the defence with evidence at trial.[562] Consequently, judicial notice of adjudicated facts does not shift the ultimate burden of proof or persuasion, which remains squarely on the Prosecution.[563]

220. In deciding whether to take judicial notice of adjudicated facts, the Trial Chamber carefully considered not only general objections to taking judicial notice of the adjudicated facts, but conducted an in-depth assessment as to whether each proposed adjudicated fact satisfied the various requirements for judicial notice and whether a fact, despite having satisfied the aforementioned requirements, should be excluded on the basis that its judicial notice would not be in the interests of justice.[564] Karadžić was heard on each of these points. He has not identified any instance where the Trial Chamber erred in taking notice of a particular adjudicated fact or deviated from the proper procedure for doing so.[565] The fact that the Trial Chamber took judicial notice of considerably more adjudicated facts than in other cases does not, in itself, render the trial unfair as long as the Trial Chamber followed the procedure provided for in the ICTY Rules. In this respect, Karadžić's comparison of the number of judicially noticed adjudicated facts in his case with other cases fails to account for factors such as the unprecedented scope and size of his own trial in relation to others.

221. Karadžić has also not substantiated his claim that the Trial Chamber erred or violated his fundamental rights in admitting the written evidence of 142 witnesses pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules and Karadžić has not identified any particular error in the Trial Chamber's application of the rules in admitting such statements.

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[558] Prosecution Response Brief, paras. 141-145. *See also* T. 24 April 2018 p. 280.
[559] Prosecution Response Brief, paras. 141-144, 146, 147. *See also* T. 24 April 2018 p. 280.
[560] *Mladić* Decision of 12 November 2013, para. 24. *See also Setako* Appeal Judgement, para. 200; *Karemera et al.* Decision of 16 June 2006, para. 39.
[561] *Setako* Appeal Judgement, para. 200.
[562] *See Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 42.
[563] *See Dragomir Milošević* Decision of 26 June 2007, para. 16; *Karemera et al.* Decision of 16 June 2006, para. 42.
[564] *See supra* para. 215.
[565] Karadžić's challenges related to the Trial Chamber's allegedly erroneous reliance on adjudicated facts are discussed in Ground 31.

222. Turning to Karadžić's broader contentions as to the cumulative unfairness of the number of adjudicated facts taken and statements admitted under Rules 92 *bis* and 92 *quater* of the ICTY Rules, the Appeals Chamber is also not satisfied that the number of adjudicated facts or the volume of written evidence admitted without cross-examination impeded Karadžić's ability to mount an effective defence. In taking judicial notice, the Trial Chamber repeatedly considered Karadžić's contention that the sheer number of adjudicated facts which had been or might be judicially noticed would violate his presumption of innocence and shift the burden of proof.[566] Moreover, the Appeals Chamber of the ICTY held that, when determining the amount of time to be allocated to Karadžić's defence, the Trial Chamber had sufficiently evaluated the impact of the adjudicated facts that had been admitted in his case.[567]

223. Furthermore, Karadžić has not demonstrated how his "scarce resources" were impermissibly diverted as a result of the admission of adjudicated facts or written evidence pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules.[568] His contention that he would have benefited from an additional 36 months to mount his defence had the statements and testimony admitted pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules and the testimony supporting the adjudicated facts been presented *viva voce* is speculative and fails to demonstrate resulting prejudice. In this respect, Karadžić has not pointed to any witness that he was prevented from calling or explained how such evidence would have been essential to the proper presentation of his case.

224. Based on the foregoing, the Appeals Chamber dismisses Ground 16 of Karadžić's appeal.

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[566] *See supra* para. 215.
[567] *See supra* para. 215.
[568] *See* Karadžić Appeal Brief, para. 255.

13. Alleged Errors in Delayed Disclosure of Identities and Statements of Prosecution Witnesses (Ground 17)

225. On 5 June 2009, the Trial Chamber granted the Prosecution's request for delayed disclosure in relation to Prosecution Witnesses KDZ531 and KDZ532, allowing the Prosecution to withhold from Karadžić the identity of these witnesses and any material identifying them until 30 days prior to the date of their expected testimonies.[569] On 25 March 2010, the Trial Chamber denied Karadžić's request to modify the protective measures granted to Prosecution Witness KDZ492 in another case before the ICTY, namely, the delayed disclosure of the witness's identity and statements to the accused in that case until 30 days prior to the witness's testimony.[570] On 8 February 2012, the Trial Chamber denied Karadžić's motion alleging that the delayed disclosure of the identities and statements of the three witnesses violated Rules 66(A)(ii) and 69(C) of the ICTY Rules.[571]

226. Karadžić submits that the Trial Chamber erred in delaying disclosure of the identities and statements of Witnesses KDZ531, KDZ532 and KDZ492 until after the start of the trial, in violation of Rule 69(C) of the ICTY Rules.[572] He argues that the Trial Chamber misinterpreted the *Bagosora and Nsengiyumva* Appeal Judgement in concluding that "exceptional circumstances" for delayed disclosure did not exist in that case, and that it incorrectly distinguished the *Bagosora and Nsengiyumva* Appeal Judgement on the basis that it "involved augmenting existing protective measures rather than protective measures which had been imposed from the outset".[573] He further contends that, while the *Bagosora and Nsengiyumva* Appeal Judgement appears to be inconsistent with a previous ICTY Appeals Chamber decision in the *Šešelj* case which allowed for disclosure

[569] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009 ("Decision on Delayed Disclosure of 5 June 2009"), paras. 1, 17(iii). The Trial Chamber denied Karadžić's motion to reconsider the protective measures for Witness KDZ531 and his motion for certification to appeal this decision. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Application for Certification to Appeal Decision on Reconsideration of Protective Measures (KDZ531), 16 August 2011, paras. 3, 4, 14; T. 1 July 2011 pp. 15836-15838. The Trial Chamber also denied Karadžić's request to modify the delayed disclosure order in relation to Witness KDZ532. *See* Decision on Delayed Disclosure of 23 September 2011, paras. 1, 10, 24.

[570] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, 25 March 2010 ("Decision on Modification of Protective Measures of 25 March 2010"), paras. 1, 16, 20.

[571] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixty-Sixth Disclosure Violation Motion, 8 February 2012 ("Decision on Disclosure Violation of 8 February 2012"), paras. 1, 22.

[572] Karadžić Notice of Appeal, p. 8. *See* Karadžić Appeal Brief, paras. 261-273. Karadžić submits that the Prosecution [REDACTED]. *See* Karadžić Appeal Brief, para. 263, n. 386. *See also* Karadžić Reply Brief, paras. 75-78.

[573] Karadžić Appeal Brief, paras. 265, 266, *referring to Bagosora and Nsengiyumva* Appeal Judgement, paras. 80-85. *See also* Karadžić Reply Brief, paras. 75, 76.

after the start of trial,[574] the *Bagosora and Nsengiyumva* Appeal Judgement overruled this decision as the majority of judges in both cases were the same.[575]

227. Karadžić further submits that the delayed disclosure of the identities and statements of the three witnesses impaired his ability to prepare his defence.[576] In this respect, Karadžić contends that he had to prepare for the witnesses during trial with very limited resources and while receiving high volumes of disclosure materials from the Prosecution.[577] He argues that the delayed disclosure prevented him from effectively confronting the witnesses and impeaching their testimonies.[578] Karadžić claims that the three witnesses [REDACTED], and had he known their identities and the content of their testimony prior to the start of trial, he could have [REDACTED].[579]

228. Karadžić asserts that the Trial Chamber [REDACTED].[580] He adds that the Trial Chamber [REDACTED].[581] Karadžić submits that the Appeals Chamber should order a new trial to remedy the alleged error.[582]

229. The Prosecution responds that the Trial Chamber correctly granted delayed disclosure of the witnesses' identities after the commencement of trial in accordance with the jurisprudence and practice of the ICTY, which have not been overruled by the *Bagosora and Nsengiyumva* Appeal Judgement.[583] It further contends that Karadžić fails to demonstrate that the delayed disclosure prejudiced him or impacted the Trial Judgement.[584]

230. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them,[585] including on decisions concerning disclosure of evidence and protective measures for witnesses.[586] In order to successfully challenge a discretionary

[574] Karadžić Appeal Brief, para. 267, *referring to Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.6, Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008 ("*Šešelj* Decision of 24 January 2008"), para. 15.
[575] Karadžić Appeal Brief, para. 267.
[576] Karadžić Notice of Appeal, p. 8; Karadžić Appeal Brief, para. 261. *See also* Karadžić Reply Brief, para. 78.
[577] Karadžić Appeal Brief, paras. 268, 270.
[578] Karadžić Appeal Brief, para. 270.
[579] Karadžić Appeal Brief, para. 269.
[580] Karadžić Appeal Brief, para. 271. *See also* Karadžić Notice of Appeal, p. 8.
[581] Karadžić Appeal Brief, para. 272. *See also* Karadžić Notice of Appeal, p. 8.
[582] Karadžić Appeal Brief, para. 273.
[583] Prosecution Response Brief, paras. 148-150.
[584] Prosecution Response Brief, paras. 148, 151-156; T. 23 April 2018 pp. 169, 170.
[585] *Prlić et al.* Appeal Judgement, para. 26; *Šainović et al.* Appeal Judgement, para. 29. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 137; *Ndahimana* Appeal Judgement, para. 14.
[586] *Nyiramasuhuko et al.* Appeal Judgement, para. 431; *Karemera and Ngirumpatse* Appeal Judgement, para. 85; *Bagosora and Nsengiyumva* Appeal Judgement, para. 79.

decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.[587]

231. Rule 66(A)(ii) of the ICTY Rules provides in relevant part that, subject to Rules 53 and 69 of the ICTY Rules and within the time-limit prescribed by a trial chamber or a pre-trial Judge appointed pursuant to Rule 65 *ter* of the ICTY Rules, the Prosecution shall disclose to the Defence copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial. At the time of the Decision on Disclosure Violation of 8 February 2012, Rule 69 of the ICTY Rules provided that:

> (A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
>
> [...]
>
> (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.[588]

Rule 69(C) of the ICTY Rules was amended on 28 August 2012 to read:

> Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or defence.[589]

This remains the operative language of Rule 69(C) of the ICTY Rules. Rule 75(A) of the ICTY Rules provides that "[a] Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused".[590]

232. The Appeals Chamber observes that in the *Šešelj* Decision of 24 January 2008, the ICTY Appeals Chamber stated that it did "not accept [...] that Rule 69(C) must be interpreted as authorising delayed disclosure prior to the commencement of the opening of the trial only".[591] It reasoned that the purpose of Rule 69(C) of the ICTY Rules is to allow a trial chamber to grant protective measures that are necessary to protect the integrity of its victims and witnesses, subject to the caveat that such measures are consistent with the rights of the accused to have adequate time for

[587] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[588] IT/32/Rev. 46, 20 October 2011.
[589] IT/32/Rev. 47, 28 August 2012.
[590] This was the language of Rule 75(A) of the ICTY Rules at the time of the Decision on Disclosure Violation of 8 February 2012 and remains the operative language of this rule.
[591] *Šešelj* Decision of 24 January 2008, para. 15.

the preparation of his defence.[592] The ICTY Appeals Chamber then stated that "[t]here is no rule that the rights of the defence to have adequate time for preparation mandate that delayed disclosure be granted only with reference to the beginning of trial".[593] It concluded that "[t]he matter rather falls under the discretion of the Trial Chamber".[594]

233. On 14 December 2011, the ICTR Appeals Chamber in the *Bagosora and Nsengiyumva* case held that the trial chamber in that case had erred in ordering the prosecution to disclose the identity of protected victims and witnesses and their unredacted statements no later than 35 days before the expected date of their testimony, rather than prior to trial.[595] In interpreting a provision of the ICTR Rules that was identical to Rule 69(C) of the ICTY Rules, the ICTR Appeals Chamber stated that, while a trial chamber has discretion to order protective measures where it has established the existence of exceptional circumstances, "this discretion is still constrained by the scope of the Rules".[596] It emphasized that at the time of the trial chamber's decision in that case, the phrase "prior to the trial" was part of Rule 69(C) of the ICTR Rules.[597] It further stated that it did not consider that the trial chamber's "disregard for the explicit provision of the Rules was necessary for the protection of witnesses".[598] It noted a protective measures decision in the *Nsengiyumva* case prior to the joinder of the two cases[599] in which the trial chamber had ordered the temporary redaction of identifying information until witnesses were brought under the protection of the ICTR, but had nonetheless required that the defence be provided with unredacted witnesses statements within sufficient time prior to the trial.[600] It continued that "[a]t no point did the Trial Chamber indicate that any problems had arisen from this previous arrangement justifying a more restrictive disclosure schedule".[601]

234. In the Decision on Disclosure Violation of 8 February 2012, the Trial Chamber stated that the delayed disclosure orders granted or continued for the three witnesses were consistent with the well-established interpretation of Rule 69(C) of the ICTY Rules which allows for delayed

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[592] *Šešelj* Decision of 24 January 2008, para. 15.
[593] *Šešelj* Decision of 24 January 2008, para. 15.
[594] *Šešelj* Decision of 24 January 2008, para. 15.
[595] *Bagosora and Nsengiyumva* Appeal Judgement, paras. 83, 85.
[596] *Bagosora and Nsengiyumva* Appeal Judgement, para. 83.
[597] *Bagosora and Nsengiyumva* Appeal Judgement, para. 83. Rule 69(C) of the ICTR Rules was amended at the 12th Plenary Session held on 5 and 6 July 2002 so as to no longer include the wording "prior to the trial".
[598] *Bagosora and Nsengiyumva* Appeal Judgement, para. 84.
[599] The cases against Anatole Nsengiyumva and Théoneste Bagosora were originally undertaken separately and joined on 29 June 2000 along with the cases against Aloys Ntabakuze and Gratien Kabiligi. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 4.
[600] *Bagosora and Nsengiyumva* Appeal Judgement, para. 84, *referring to The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12-I, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses, delivered orally 26 June 1997, signed 17 November 1997, filed 3 December 1997, p. 4.
[601] *Bagosora and Nsengiyumva* Appeal Judgement, para. 84.

disclosure after the commencement of trial.[602] It further stated that the appropriate timing for the disclosure of a witness's identity depends on the circumstances of each case and that trial chambers have the discretion to order appropriate measures for the privacy and protection of victims and witnesses provided that the measures are consistent with the rights of the accused to have adequate time for the preparation of defence.[603] The Trial Chamber considered that the ICTR Appeals Chamber in the *Bagosora and Nsengiyumva* case found an error on the basis that the trial chamber in that case imposed a more restrictive schedule than that adopted in a previous decision without justifying the necessity for such augmentation of protective measures.[604] According to the Trial Chamber, the *Bagosora and Nsengiyumva* Appeal Judgement did not overrule the settled practice and interpretation of Rule 69(C) of the ICTY Rules such that orders delaying disclosure until after the commencement of trial are invalid.[605]

235. The Appeals Chamber considers that the Trial Chamber's conclusion was not erroneous. While the ICTR Appeals Chamber stated that a trial chamber's discretion to order protective measures is constrained by the scope of the Rules, which provided that such disclosure be made "prior to the trial", it did not rule out a deviation from this requirement for the purposes of a more restrictive disclosure schedule required for the protection of witnesses.[606] Thus, the Appeals Chamber does not consider that the *Bagosora and Nsengiyumva* Appeal Judgement overruled the *Šešelj* Decision of 24 January 2008 in which the ICTY Appeals Chamber concluded that the allowance for delayed disclosure until after the commencement of trial falls within a trial chamber's discretion to allow such protective measures that are necessary for the protection of witnesses, subject to safeguarding the rights of the accused.[607] In this respect the Appeals Chamber notes that

[602] Decision on Disclosure Violation of 8 February 2012, paras. 17, 19, 20, *referring to*, *inter alia*, *Šešelj* Decision of 24 January 2008, para. 15, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Order of Protection, 1 August 2006 ("*Popović et al.* Decision of 1 August 2006"), pp. 4-6, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002 ("*Brđanin* Decision of 12 December 2002"), paras. 8, 13.
[603] Decision on Disclosure Violation of 8 February 2012, paras. 17, 19.
[604] Decision on Disclosure Violation of 8 February 2012, para. 18.
[605] Decision on Disclosure Violation of 8 February 2012, paras. 18, 20.
[606] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 84. Specifically, the ICTR Appeals Chamber stated: "Furthermore, the Appeals Chamber does not consider that, as stated by the Trial Chamber, such disregard for the explicit provision of the Rules was necessary for the protection of witnesses." *Bagosora and Nsengiyumva* Appeal Judgement, para. 84.
[607] *Šešelj* Decision of 24 January 2008, para. 15. The Appeals Chamber observes the longstanding practice of ICTY trial chambers in allowing delayed disclosure after the commencement of trial. *See*, *e.g.*, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Motion to Compel Disclosure of Contact Information and on the Prosecution's Urgent Motion to Compel Production of Contact Information, 30 March 2009, para. 21; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision, 8 December 2006, p. 4; *Popović et al.* Decision of 1 August 2006, p. 6; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Prosecution's Motion to Amend its Rule 65 *ter* Witness List, 9 December 2005, pp. 5, 6; *Brđanin* Decision of 12 December 2002, p. 6; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, Case No. IT-00-39&40-PT, First Decision on Prosecution's Motion for Protective Measures for Sensitive Source Witnesses, 24 May 2002, paras. 7, 15, 19; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Order for Delayed Disclosure of Statements and Protective Measures, 19 March 1999, pp. 2, 3.

the ICTR Appeals Chamber in the *Bagosora and Nsengiyumva* Appeal Judgement did not refer to the decision of the ICTY Appeals Chamber in the *Šešelj* case and did not propose to depart from its reasoning. There is therefore no support in the *Bagosora and Nsengiyumva* Appeal Judgement for Karadžić's argument that it overruled the *Šešelj* Decision of 24 January 2008 on the point of delayed disclosure. Karadžić has therefore failed to demonstrate that the Trial Chamber based its decision on an incorrect interpretation of the governing law.

236. Turning to Karadžić's submission that his ability to prepare his defence was impaired by the delayed disclosure, the Appeals Chamber notes that the Trial Chamber was satisfied that the delayed disclosure would not unduly prejudice Karadžić's right to a fair trial.[608] To further ensure this, the Trial Chamber invited the Prosecution to schedule the testimony of these witnesses early in the presentation of its case.[609] With regard to Witness KDZ492, the Trial Chamber indicated that as the trial progressed, and upon disclosure of the identity and statements of the witness, Karadžić may request to recall the witness for further cross-examination "should he discover new areas of relevant questioning".[610] The Trial Chamber also granted Karadžić's request to postpone Witness KDZ492's testimony to allow additional time to prepare for the witness's evidence.[611]

237. The Appeals Chamber further observes that at least six months before the start of his trial on 26 October 2009, Karadžić was put on notice that the allegation that he created a policy to not investigate or prosecute crimes against non-Serbs was part of the Prosecution's case, as set out in the Prosecution's Interim Pre-Trial Brief filed on 8 April 2009.[612] Karadžić was also made aware as early as 18 May 2009 that the Prosecution intended to call the three witnesses to testify about the [REDACTED].[613] Therefore, Karadžić had ample time to begin preparing his defence on this issue prior to the disclosure of information relating to Witness KDZ531 on 18 May 2011, Witness KDZ492 on 22 August 2011, and Witness KDZ532 on 21 September 2011.[614] After these dates,

[608] Decision on Delayed Disclosure of 5 June 2009, para. 15.
[609] Decision on Modification of Protective Measures of 25 March 2010, para. 19; Decision on Delayed Disclosure of 5 June 2009, para. 15.
[610] Decision on Modification of Protective Measures of 25 March 2010, para. 18.
[611] T. 28 September 2011 pp. 19525, 19526; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Postpone Testimony of Witness KDZ492, 27 September 2011 (public with confidential annex), paras. 1, 5-7.
[612] *See* Trial Judgement, para. 6133; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Submission of Interim Pre-Trial Brief, 8 April 2009 (public with partly confidential appendices), para. 273. *See also* Prosecution Pre-Trial Brief, para. 273.
[613] Prosecution Rule 65 *ter* Witness List of 18 May 2009, pp. 28, 29, 33, 113.
[614] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 17 October 2011 (public with confidential appendices), Appendix B (confidential), RP. 55117; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 September 2011 (public with confidential appendices), Appendix A (confidential), RP. 53975, 53974, Appendix B (confidential), RP. 53941, 53940; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Periodic Disclosure Report with Confidential Appendices A, B and C, 15 June 2011 (public with confidential appendices), Appendix B (confidential), RP. 51052, 51051. The Appeals Chamber notes that the Trial

Karadžić had almost two months before Witness KDZ492's testimony, and six weeks before the testimonies of Witnesses KDZ531 and KDZ532.[615]

238. Furthermore, a review of Karadžić's conduct at trial reflects that, [REDACTED],[616] he thoroughly cross-examined them at trial,[617] *inter alia*, on the [REDACTED].[618] He also cross-examined the witnesses on [REDACTED],[619] [REDACTED][620] and [REDACTED].[621] Karadžić also relied extensively on the testimony of the three witnesses in his final trial brief[622] to demonstrate, *inter alia*, that [REDACTED],[623] [REDACTED],[624] [REDACTED],[625] and [REDACTED].[626] Consequently, Karadžić has failed to demonstrate that the delayed disclosure of the identities and statements of these witnesses impaired his ability to prepare his defence.

239. In any event, the Appeals Chamber is not persuaded that the testimony of the three witnesses had a decisive impact on the Trial Chamber's determination of Karadžić's responsibility. The Appeals Chamber notes that the Trial Chamber [REDACTED],[627] or in its findings concerning

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Chamber found that, while the transcript of Witness KDZ532's interview was disclosed on 21 September 2011, other materials relating to this witness were disclosed on 27 September 2011. *See* T. 28 September 2011 p. 19525.

[615] Witness KDZ492 testified on 18 and 19 October 2011. *See* T. 18 October 2011 pp. 20032-20127 (closed session); T. 19 October 2011 pp. 20128-20175 (closed session). Witness KDZ531 testified on 1 July 2011. *See* T. 1 July 2011 pp. 15839-15940 (closed session). Witness KDZ532 testified on 8 and 10 November 2011. *See* T. 8 November 2011 pp. 20994-21032 (closed session); T. 10 November 2011 pp. 21143-21184 (closed session).

[616] T. 1 July 2011 p. 15861 (closed session); T. 18 October 2011 p. 20048 (closed session); T. 8 November 2011 p. 21008 (closed session).

[617] *See* T. 1 July 2011 pp. 15861-15927 (closed session); T. 18 October 2011 pp. 20048-20127 (closed session); T. 19 October 2011 pp. 20128-20164 (closed session); T. 8 November 2011 pp. 21007-21032 (closed session); T. 10 November 2011 pp. 21143-21178 (closed session).

[618] *See*, *e.g.*, T. 1 July 2011 pp. 15879, 15880, 15911-15914 (closed session); T. 18 October 2011 pp. 20055-20060, 20062-20066, 20068-20070, 20085, 20115, 20116 (closed session); T. 19 October 2011 pp. 20137, 20163 (closed session); T. 8 November 2011 pp. 21008-21016, 21025-21031 (closed session); T. 10 November 2011 pp. 21144-21170, 21172, 21175-21178 (closed session).

[619] *See*, *e.g.*, T. 1 July 2011 pp. 15879, 15880, 15886-15892 (closed session); T. 18 October 2011 pp. 20065, 20066, 20087, 20088, 20091, 20095-20109, 20116, 20120, 20122, 20123 (closed session); T. 19 October 2011 pp. 20128-20132, 20152-20156 (closed session); T. 8 November 2011 pp. 21015-21025 (closed session); T. 10 November 2011 pp. 21170-21173 (closed session).

[620] *See*, *e.g.*, T. 18 October 2011 pp. 20109, 20119-20126 (closed session); T. 19 October 2011 pp. 20128-20132, 20152-20156 (closed session).

[621] *See*, *e.g.*, T. 18 October 2011 pp. 20091, 20098, 20103, 20119, 20120, 20122, 20123 (closed session); T. 19 October 2011 pp. 20128-20132 (closed session).

[622] *See*, *e.g.*, Karadžić Final Trial Brief, paras. [REDACTED].

[623] Karadžić Final Trial Brief, para. [REDACTED]. *See generally* Karadžić Final Trial Brief, paras. [REDACTED].

[624] Karadžić Final Trial Brief, paras. [REDACTED]. *See generally* Karadžić Final Trial Brief, paras. [REDACTED]. In this respect, Karadžić also relied upon the testimony of the three witnesses to [REDACTED]. *See* Karadžić Final Trial Brief, paras. [REDACTED]. *See generally* Karadžić Final Trial Brief, paras. [REDACTED].

[625] Karadžić Final Trial Brief, paras. [REDACTED]. *See generally* Karadžić Final Trial Brief, paras. [REDACTED].

[626] Karadžić Final Trial Brief, paras. [REDACTED]. *See generally* Karadžić Final Trial Brief, paras. [REDACTED].

[627] *See* Trial Judgement, paras. [REDACTED], and references cited therein.

[REDACTED].[628] Therefore, Karadžić fails to demonstrate that the delayed disclosure prejudiced him.

240. For the foregoing reasons, the Appeals Chamber finds that Karadžić fails to demonstrate error in the Trial Chamber's decision on the delayed disclosure of the identities and statements of Witnesses KDZ531, KDZ532, and KDZ492 until after the beginning of the trial.

241. Based on the foregoing, the Appeals Chamber dismisses Ground 17 of Karadžić's appeal.

[628] *See* Trial Judgement, paras. [REDACTED], and references cited therein.

14. Alleged Errors in Denying Protective Measures to Prospective Defence Witnesses and Granting Trial-Related Restrictions to Prosecution Witness Evidence (Ground 18)

242. On 1 November 2012, the Trial Chamber denied Karadžić's requests for protective measures in relation to prospective Defence Witnesses KW299 and KW543.[629] On 8 January 2013, the Trial Chamber granted the protective measure of image distortion for prospective Defence Witness KW402, but denied Karadžić's requests for the assignment of a pseudonym and use of voice distortion.[630] The Trial Chamber further denied Karadžić's request for protective measures for prospective Defence Witness KW392 on 14 February 2013.[631] None of these witnesses testified at trial.

243. On 15 December 2009, the Trial Chamber, pursuant to Rule 70 of the ICTY Rules, granted the request to allow Prosecution Witness KDZ240 to testify under certain conditions, including that the witness testify entirely in closed session.[632] In June and July 2011, the Trial Chamber rejected applications by Karadžić to reconsider and revoke the trial-related conditions imposed on Witness KDZ240's testimony.[633] Witness KDZ240 testified entirely in closed session.[634]

244. Similarly, on 15 April 2010, the Trial Chamber granted leave to allow Prosecution Witnesses KDZ182, KDZ185, KDZ196, KDZ304, and KDZ450 ("Five Rule 70 Witnesses") to testify under certain conditions, including the use of pseudonyms as well as image and voice distortion.[635] The Five Rule 70 Witnesses testified with these trial-related restrictions.[636]

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[629] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543, 1 November 2012 ("Decision of 1 November 2012"), paras. 13, 15.
[630] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW402, 8 January 2013 ("Decision of 8 January 2013"), paras. 7, 8.
[631] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Protective Measures for Witness KW392, 14 February 2013 ("Decision of 14 February 2013"), paras. 7, 8.
[632] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motions for Rule 70 Conditions Relating to KDZ240 and KDZ314, 15 December 2009 (confidential) ("Decision of 15 December 2009"), paras. 34, 42. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Motion to Vary Protective Measures or to Exclude Testimony of Witness KDZ240, 31 August 2009 (confidential), para. 22.
[633] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Revoke Protective Measures for KDZ240, 28 June 2011 (confidential) ("Decision of 28 June 2011"), para. 33; T. 4 July 2011 p. 15948 (closed session) ("Oral Decision of 4 July 2011").
[634] T. 4 July 2011 pp. 15957-16047 (closed session); T. 5 July 2011 pp. 16049-16154 (closed session); T. 6 July 2011 pp. 16156-16228 (closed session).
[635] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Second Motion for Rule 70 Conditions for French Witnesses, 15 April 2010 (confidential) ("Decision of 15 April 2010"), para. 15.
[636] T. 28 June 2010 pp. 4169, 4170 and 4171, 4172 (private session), 4172-4174 and 4174-4177 (private session), 4177-4179 and 4179-4182 (private session), 4182, 4183 and 4183-4187 (private session), 4187-4189 and 4189-4193, 4203, 4204 (private session), 4204, 4205 and 4206, 4207 (private session), 4207, 4208 and 4208-4212 (private session), 4212, 4213 and 4214 (private session), 4214-4221 and 4221-4224 (private session), 4224-4231 and 4231-4235 (private session), 4235-4238 and 4238-4242 (private session), 4242-4245 and 4245-4248 (private session), 4248-4254; T. 29 June 2010 pp. 4255-4264 and 4264, 4265 (private session), 4265-4267 and 4267-4270 (private session), 4270-4275 and 4275-4277 (private session), 4277-4287 and 4287, 4288 (private session), 4288-4290 and 4290-4292 (private session),

245. Karadžić submits that the Trial Chamber erred in: (i) denying the requested protective measures for prospective Defence Witnesses KW299, KW543, KW402, and KW392;[637] and (ii) allowing Prosecution Witnesses KDZ240, KDZ182, KDZ185, KDZ196, KDZ304, and KDZ450 to testify with trial-related restrictions imposed under Rule 70 of the ICTY Rules.[638] The Appeals Chamber shall address these contentions in turn.

(a) Denial of Protective Measures to Prospective Defence Witnesses

246. Karadžić submits that, in denying the requested protective measures for prospective Defence Witnesses KW299, KW543, KW402, and KW392, the Trial Chamber applied a double standard given that the Trial Chamber continued protective measures for a number of Prosecution witnesses who faced materially similar circumstances.[639] He contends that the Trial Chamber's error in this respect violated his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him and, consequently, the principle of equality of arms under Article 21(4)(e) of the ICTY Statute.[640]

247. Karadžić further argues that, in rejecting the requested protective measures for prospective Defence Witnesses KW299, KW543, KW402, and KW392, the Trial Chamber adopted an unduly narrow definition of "fear" by excluding legitimate bases, such as prospective Defence Witness

4292-4298 and 4298-4300 (private session), 4300, 4301 and 4301, 4302 (private session), 4302-4304 and 4305-4307 (private session), 4307-4310 and 4310, 4311 (private session), 4311-4324 and 4324-4328 (private session), 4328-4330, 4330-4334 (private session), 4334-4336; T. 30 June 2010 pp. 4340-4350 and 4350 (private session), 4351-4356 and 4356 (private session), 4357-4361 and 4361-4363 (private session), 4363-4386 and 4386-4394 (private session), 4394 and 4395, 4396 (private session), 4396-4400 and 4400, 4401 (private session), 4401; T. 18 January 2011 pp. 10439-10441 and 10441 (private session), 10442, 10443 and 10443, 10444 (private session), 10444, 10445 and 10445-10453 (private session), 10453-10458 and 10458 (private session), 10459-10462 and 10462, 10463 (private session), 10463-10472, 10477-10503 and 10503-10508 (private session), 10508-10518; T. 19 January 2011 pp. 10519-10537, 10540-10542 and 10542-10544 (private session), 10544-10546 and 10546-10548 (private session), 10548-10552 and 10552-10555 (private session), 10555, 10556 and 10556, 10557 (private session), 10557, 10558 and 10558-10561 (private session), 10561-10563 and 10563-10566 (private session), 10566-10576 and 10576 (private session), 10577-10586 and 10586-10596 (private session), 10597-10602 and 10603-10605 (private session), 10605-10607 and 10607, 10608 (private session), 10608-10613; T. 20 January 2011 pp. 10614-10629 and 10629-10632 (private session), 10632-10647 and 10647 (private session), 10648-10658 and 10659-10664 (private session), 10665-10668 and 10668-10670 (private session), 10670-10683 and 10683-10690 (private session), 10691-10697; T. 25 January 2011 pp. 10716-10738; T. 9 March 2011 pp. 13027-13030 and 13030, 13031 (private session), 13032, 13033 and 13033 (private session), 13034 and 13034 (private session), 13035-13039 and 13039, 13040 (private session), 13040-13043 and 13043-13046 (private session), 13046-13055, 13057-13068 and 13068, 13069 (private session), 13069, 13070 and 13070-13073 (private session), 13073 and 13074, 13075 (private session), 13075, 13076 and 13076-13078 (private session), 13078-13082 and 13082-13088 (private session), 13088-13105; T. 10 March 2011 pp. 13106-13125 and 13125, 13126 (private session), 13126-13130 and 13130-13132 (private session), 13132-13146 and 13146-13149 (private session), 13149-13151 and 13151, 13152 (private session), 13152, 13153 and 13153-13159 (private session), 13159-13164 and 13164 (private session), 13165-13167 and 13167-13170 (private session), 13170-13172 and 13172, 13173 (private session), 13173-13178 and 13178 (private session), 13179-13188.

[637] Karadžić Notice of Appeal, pp. 2, 8, 9; Karadžić Appeal Brief, paras. 274-288.

[638] Karadžić Notice of Appeal, pp. 2, 8, 9; Karadžić Appeal Brief, paras. 289-305.

[639] Karadžić Appeal Brief, paras. 274, 276-278, 280-282, 288; Karadžić Reply Brief, paras. 79-81.

[640] Karadžić Notice of Appeal, pp. 2, 8; Karadžić Appeal Brief, para. 283.

KW299's fear of property damage,[641] prospective Defence Witness KW402's fear of financial loss or economic harm,[642] and prospective Defence Witness KW392's fear of self-incrimination and increased likelihood of prosecution in the witness's home jurisdiction.[643]

248. Karadžić concludes that the erroneous denial of the requested protective measures resulted in prospective Defence Witnesses KW299, KW543, KW402, and KW392 refusing to testify on his behalf and prevented him from offering testimony casting doubt on evidence upon which the Trial Chamber relied to make adverse findings against him.[644]

249. The Prosecution responds that Karadžić does not demonstrate that the Trial Chamber erred in denying the protective measures for prospective Defence Witnesses KW299, KW543, KW402, and KW392, or that it applied a "double standard" in continuing protective measures granted in other cases for Prosecution witnesses.[645] It further contends that Karadžić seeks to blame the absence of these witnesses' evidence on the decision denying them protective measures whereas at trial he had failed to take basic steps to secure their evidence and fails to show any prejudice.[646]

250. Karadžić replies that the Trial Chamber's continuation of protective measures from other cases for Prosecution witnesses contrasted with the refusal to grant protective measures for Defence witnesses who sought them on similar grounds demonstrates that the Trial Chamber "contravened not only its own practice, but the practice of other Chambers."[647] He further submits that, contrary to the Prosecution's suggestion, he sought alternative means to present the witnesses' evidence, including through Rule 92 *bis* of the Rules.[648]

251. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them,[649] including in deciding whether to grant protective measures for witnesses.[650] In order to successfully challenge a discretionary decision, a

[641] Karadžić Appeal Brief, paras. 275-277, 280.
[642] Karadžić Appeal Brief, paras. 275, 276, 278, 280.
[643] Karadžić Appeal Brief, paras. 275, 276, 279. *See also* Karadžić Reply Brief, para. 83.
[644] Karadžić Appeal Brief, paras. 284-288. *See also* Karadžić Appeal Brief, paras. 163, 165, 185, 205, 206, 208, 209.
[645] Prosecution Response Brief, paras. 157, 160-164.
[646] Prosecution Response Brief, paras. 158, 165-168; T. 23 April 2018 pp. 167, 169.
[647] Karadžić Reply Brief, paras. 80, 81. Karadžić rejects the Prosecution's position that the witnesses' fears were speculative, positing that the witness who feared criminal prosecution was later prosecuted. Karadžić Reply Brief, para. 79.
[648] *See* Karadžić Reply Brief, para. 82.
[649] *Prlić et al.* Appeal Judgement, para. 26; *Šainović et al.* Appeal Judgement, para. 29. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 137; *Ndahimana* Appeal Judgement, para. 14.
[650] *Bagosora and Nsengiyumva* Appeal Judgement, para. 79. *See also The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73, Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 ("*Bizimungu et al.* Decision of 16 November 2005"), para. 3.

party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[651]

252. The Appeals Chamber rejects Karadžić's contentions that the Trial Chamber erred by applying a double standard in denying protective measures for Defence witnesses yet continuing protective measures granted in other cases for Prosecution witnesses. In this respect, Rule 75(A) of the ICTY Rules provides that a trial chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused, whereas Rule 75(F)(i) of the ICTY Rules requires a chamber to apply the protective measures ordered in prior ICTY proceedings *mutatis mutandis* to the proceeding before it unless and until they are rescinded, varied, or augmented.[652] Given these materially distinct considerations, the Trial Chamber's continuation of protective measures for Prosecution witnesses pursuant to Rule 75(F)(i) of the ICTY Rules has no bearing on the exercise of its discretion in denying protective measures to Defence witnesses under Rule 75(A) of the ICTY Rules. The Appeals Chamber therefore finds it unnecessary to consider Karadžić's comparisons of the circumstances of the Defence witnesses who were not granted protective measures with the circumstances of Prosecution witnesses whose prior protective measures were continued in his case. In view of the above, the Appeals Chamber also dismisses Karadžić's contention that the Trial Chamber violated his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him and the principle of equality of arms under Article 21(4)(e) of the ICTY Statute.

253. Turning to the remainder of Karadžić's contentions that the Trial Chamber applied an unduly narrow definition of "fear" when rejecting his requests for protective measures, a review of the protective measures decision related to prospective Defence Witnesses KW299 and KW543 reveals that the Trial Chamber considered, *inter alia*, the witnesses' fears relating to property and of

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[651] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.

[652] Notably, [REDACTED] the Prosecution witnesses referred to by Karadžić were granted protective measures by other trial chambers that were automatically continued in the Karadžić proceedings. *See* Karadžić Appeal Brief, Annex E. With respect to Witness KDZ532, where the Trial Chamber granted rather than continued protective measures, the Trial Chamber granted the witness the protective measures of, *inter alia*, assignment of pseudonym and testimony in closed-session, which Karadžić did not oppose, on the basis of the existence of a real risk to the safety and security of the witness and the witness's family. *See* Decision on Delayed Disclosure of 5 June 2009, paras. 2, 13, 15, 17. Karadžić does not demonstrate how this decision could show that the Trial Chamber applied a "double standard". With respect to the protective measures of other witnesses referred to by Karadžić, the Appeals Chamber notes that neither party sought to rescind or vary these measures in Karadžić's trial based on the absence of circumstances warranting their continuation. *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Notification of Protective Measures in Force for Witness KDZ163, 25 January 2010 (confidential), para. 2; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Fifth Notification of Protective Measures Currently in Force, 3 July 2009 (confidential), para. 2; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Fourth Notification of Protective Measures for Witnesses Currently in Force, 17 June 2009 (public with confidential Appendix A and confidential and *ex parte* Appendix B), para. 3; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, 30 October 2008, para. 34.

potential retaliation against family members.[653] However, it found the witnesses' concerns to be broad or speculative and unsupported by any specific incidents or concrete examples of how testifying without protective measures would give rise to an objective threat to their security or welfare.[654] The Trial Chamber therefore did not exclude the fear of property damage in assessing whether to grant protective measures to, *inter alia*, prospective Defence Witness KW299 but found that such fear was unsubstantiated. Having reviewed the information presented by Karadžić in his request for protective measures for prospective Defence Witness KW543, the Appeals Chamber is not persuaded that the Trial Chamber committed discernible error in finding that the information did not support a finding of an objective threat to his security or welfare or that of his family members.[655]

254. As regards prospective Defence Witness KW402, the Appeals Chamber finds that Karadžić fails to substantiate that the Trial Chamber excluded the possibility that fears related to financial loss and possible verbal and physical abuse would justify the imposition of protective measures. The Appeals Chamber notes that, to the contrary, the Trial Chamber considered the media coverage related to the case, the witness's frequent travel to Sarajevo and the strong likelihood of being recognized and harassed, and the possibility of losing the majority of his customers as "jeopardising his family's survival" in finding that these factors constituted an objectively grounded risk to his security or welfare should his image be recognized in the media.[656] On this basis, the Trial Chamber granted the witness the protective measure of image distortion.[657]

255. The Appeals Chamber finds no error in the Trial Chamber's decision to deny the requested assignment of a pseudonym or the use of voice distortion for prospective Defence Witness KW402.[658] The Appeals Chamber recalls that it was within the Trial Chamber's discretion to decide which protective measures provided for under Rule 75(B) of the ICTY Rules were the most appropriate to ensure the security of the witness based on the particular threats posed to the witness and the practical demands of the case.[659] In exercising this discretion to grant some but not all of the requested protective measures for prospective Defence Witness KW402, the Trial Chamber was mindful of the need to balance the right of the accused to a fair trial, the protection of victims and

[653] Decision of 1 November 2012, para. 13.
[654] Decision of 1 November 2012, para. 13.
[655] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Protective Measures for Witness KW-543, 12 October 2012 (public with confidential annex), RP. 66908.
[656] Decision of 8 January 2013, para. 7.
[657] Decision of 8 January 2013, paras. 7, 9.
[658] Decision of 8 January 2013, para. 8.
[659] *See Bizimungu et al.* Decision of 16 November 2005, para. 3.

witnesses, and the right of the public to access to information.[660] In light of the fact that the Trial Chamber found an objectively grounded risk to the security and welfare of the witness, it would have been within the discretion of the Trial Chamber to order additional protective measures. However, Karadžić has not demonstrated that the Trial Chamber committed a discernible error in denying the additional protective measures of assignment of a pseudonym and voice distortion for prospective Defence Witness KW402. The objective fear that the Trial Chamber found was established – which did not directly implicate the physical safety of the witness and the witness's family – did not require the imposition of all the protective measures sought by Karadžić.

256. As regards Karadžić's submission that the Trial Chamber erred in failing to recognize prospective Defence Witness KW392's fears of self-incrimination and increased likelihood of prosecution in the witness's home jurisdiction as legitimate bases upon which protective measures should have been ordered, the Appeals Chamber observes that the Trial Chamber considered that these concerns were speculative and unrelated to any objectively grounded risk to his security or welfare should the witness testify in open session.[661] Apart from alleging that the Trial Chamber's conclusion was "unreasonable", Karadžić has not substantiated how the Trial Chamber committed a discernible error in denying the requested protective measures for prospective Defence Witness KW392.

257. For the foregoing reasons, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber committed a discernible error in denying the protective measures for prospective Defence Witnesses KW299, KW543, KW402, and KW392.

(b) Trial-Related Restrictions under Rule 70 of the ICTY Rules

258. Karadžić argues that allowing Witness KDZ240 and the Five Rule 70 Witnesses[662] (collectively, the "Rule 70 Witnesses") to testify under certain conditions pursuant to Rule 70 of the ICTY Rules violated his right to a fair and public trial as enshrined in Article 21(2) of the ICTY Statute.[663] Karadžić highlights the impact that closed session testimony and concealing witnesses' identities from the public may have on the right to a fair trial.[664] In view of these concerns, Karadžić

[660] *See* Decision of 8 January 2013, paras. 4, 5, 7, 8. *See also Musema* Appeal Judgement, para. 68, *referring to Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, 2 August 1996, p. 4.
[661] Decision of 14 February 2013, para. 7.
[662] In his appeal brief, Karadžić only refers to four of the Five Rule 70 Witnesses. Karadžić Appeal Brief, para. 301.
[663] Karadžić Appeal Brief, paras. 289-291; Karadžić Reply Brief, para. 84. Karadžić emphasizes that Article 20(1) of the ICTY Statute and Rule 75(A) of the ICTY Rules demonstrate that the protection of victims and witnesses is secondary to the right of an accused to a fair and public trial. *See* Karadžić Appeal Brief, para. 292. *See also* Karadžić Appeal Brief, paras. 294, 295, 297.
[664] Karadžić Appeal Brief, paras. 294, 295. *Cf.* Karadžić Reply Brief, para. 84.

contends that the entity that had employed Witness KDZ240 failed to demonstrate that having the witness testify entirely in closed session was necessary to safeguard the safety and security of its personnel and the perception of its impartiality.[665] With respect to the Five Rule 70 Witnesses, Karadžić argues that their employer's stated security concerns were vague and did not justify withholding their identities.[666] By comparison, Karadžić suggests that UN personnel and journalists have testified at the ICTY for two decades "with no damage to their impartiality or safety", and that 30 UN military personnel testified for the Prosecution without requesting a pseudonym.[667]

259. Karadžić concludes that the Trial Chamber erred by failing to exclude the evidence of the Rule 70 Witnesses and notes that the Trial Chamber relied upon their testimony to make several adverse findings against him.[668] To remedy these errors, he requests a new trial.[669]

260. The Prosecution responds that Karadžić does not show that the Trial Chamber violated his right to a public trial or erred in its application of Rule 70 of the ICTY Rules when imposing certain restrictions with respect to the testimony of the Rule 70 Witnesses.[670] The Prosecution also submits that Karadžić distorts the record and ignores that he also requested and received protective measures under Rule 70 of the ICTY Rules with respect to a defence witness.[671]

261. Karadžić replies that the Prosecution fails to show good reasons for the protective measures granted for the Rule 70 Witnesses and argues that, contrary to the Prosecution's suggestion, he initially opposed conditions pursuant to Rule 70 of the ICTY Rules for his own witness until the Trial Chamber made it clear that no other means existed to obtain the witness's evidence.[672]

262. The Appeals Chamber recalls that the purpose of Rule 70 of the ICTY Rules is to encourage States and other entities and persons to share sensitive information with parties and the ICTY by providing certain guarantees of confidentiality with respect to the information they offer.[673] Those

[665] Karadžić Appeal Brief, paras. 298, 300. Karadžić also submits that [REDACTED]. Karadžić Appeal Brief, para. 299.
[666] Karadžić Appeal Brief, paras. 302, 303.
[667] Karadžić Appeal Brief, paras. 300, 301.
[668] Karadžić Appeal Brief, para. 304.
[669] Karadžić Appeal Brief, para. 305.
[670] Prosecution Response Brief, paras. 169, 170, 172-174.
[671] T. 23 April 2018 pp. 168, 169.
[672] *See* Karadžić Reply Brief, paras. 84, 85.
[673] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.6, Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador Robert Flaten, signed on 16 July 2007, filed on 17 July 2007 ("*Bizimungu et al.* Decision of 17 July 2007"), para. 17; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65[ ]*ter* Witness List, 20 April 2007, para. 18; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, signed on 23 October 2002, filed on 29 October 2002, para. 19. *See also The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.6, Order Lifting the Confidentiality of the Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador to Rwanda Issued on 16 July 2007, 19 April 2010.

providing information under Rule 70 of the ICTY Rules who show genuine interest in protecting the information in their possession may invoke this rule to ensure the protection of such information by requiring, *inter alia*, limitations on the scope of a witness's testimony or on the dissemination of that witness's testimony.[674] However, any such restrictions on the presentation of evidence at trial may only be allowed after the trial chamber has determined that the restrictions would not undermine the fairness of the trial.[675] In this respect, Rule 70(G) of the ICTY Rules provides that a trial chamber may exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.[676]

263. The Appeals Chamber rejects Karadžić's contentions that the Trial Chamber erred in granting trial-related restrictions because the entities providing information under Rule 70 of the ICTY Rules did not sufficiently justify their concerns about security or the perception of impartiality. In this respect, Rule 70 of the ICTY Rules does not place a burden on those providing information under this rule to substantiate their concerns. Rather, it is for the trial chamber to weigh the probative value of the information received on a confidential basis against the need to ensure a fair trial. Moreover, Karadžić's suggestion that other witnesses, similarly situated to the Rule 70 Witnesses, testified without limitations on the public disclosure of their evidence or their identities does not demonstrate that the Trial Chamber erred in the exercise of its discretion in allowing the Rule 70 Witnesses to testify with certain trial-related restrictions on their evidence.

264. The Appeals Chamber has reviewed the decisions issued by the Trial Chamber concerning the trial-related restrictions requested for the testimony of the Rule 70 Witnesses. Each of the decisions reflects that the Trial Chamber considered the probative value of the proposed evidence and whether the trial-related restrictions would undermine the fairness of the trial.[677] The Trial Chamber's analysis reflects consideration of the need, pursuant to Article 20(1) of the ICTY Statute, to ensure that the proceedings are conducted with full respect for the rights of the accused, including the right to a public trial as enshrined in Article 21(2) of the ICTY Statute.[678] Other than disagreeing with the Trial Chamber and presenting hypothetical risks that surround the hearing of evidence in closed session,[679] Karadžić demonstrates no error in the Trial Chamber's determination

[674] *See* Rules 70(C) and (D) of the ICTY Rules. *Cf. Bizimungu et al.* Decision of 17 July 2007, para. 17.
[675] *Bizimungu et al.* Decision of 17 July 2007, para. 17. *See also* Articles 20(1), 21(2), and 22 of the ICTY Statute; Rule 89(D) of the ICTY Rules.
[676] *See also* Rule 89(D) of the ICTY Rules.
[677] *See* Decision of 15 April 2010, paras. 11-14; Decision of 15 December 2009, para. 28. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution Motion for Rule 70 Conditions for Three Witnesses, 30 November 2009 (confidential) ("Decision of 30 November 2009"), para. 17.
[678] Decision of 15 April 2010, para. 7, *referring to*, *inter alia*, Decision of 15 December 2009, para. 21; Decision of 30 November 2009, para. 10.
[679] *See* Karadžić Appeal Brief, para. 295.

that allowing Witness KDZ240 to testify in closed session did not substantially outweigh his right to a fair trial.[680]

265. As concerns the Five Rule 70 Witnesses, the Trial Chamber concluded that the requested condition that each witness's testimony be given in a closed session would result in substantial unfairness to the trial outweighing the probative value of the witnesses' testimony.[681] The Trial Chamber instead allowed these witnesses to testify subject to "less strict conditions", including the assignment of a pseudonym as well as voice and image distortion.[682] In addressing Karadžić's objection, the Trial Chamber acknowledged that the public nature of a trial is more significantly impacted when voice and image distortion are used in conjunction with a pseudonym and assessed whether the witnesses' evidence should consequently be excluded in light of the obligation to ensure Karadžić's right to a fair trial.[683] Considering the relevance, probative value, nature and scope of the anticipated evidence, as well as the fact that a substantial proportion of the witnesses' evidence would be in the public domain, the Trial Chamber concluded that the probative value of the witnesses' evidence was not substantially outweighed by the need to ensure a fair trial.[684] Apart from disagreeing with the Trial Chamber's conclusion, Karadžić has failed to demonstrate that the Trial Chamber committed any error in so deciding.

266. Finally, and of principal importance as to whether intervention by the Appeals Chamber is warranted,[685] Karadžić's submissions on appeal in no way demonstrate that he suffered any prejudice as a result of the trial-related restrictions granted to the Rule 70 Witnesses.[686]

267. In view of the foregoing, the Appeals Chamber finds that Karadžić has not demonstrated any error in the decisions allowing the Rule 70 Witnesses to testify with trial-related restrictions.

(c) Conclusion

268. Consequently, the Appeals Chamber dismisses Ground 18 of Karadžić's appeal.

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[680] Decision of 15 December 2009, para. 34. Furthermore, Karadžić's contention that [REDACTED] is misplaced. In this respect, the Trial Chamber considered that the conditions pursuant to Rule 70 of the ICTY Rules served to protect the confidentiality of the source, the security of its personnel, and the perception of its impartiality rather than offer, *inter alia*, witness protection. *See* Decision of 28 June 2011, paras. 28-30; Decision of 15 December 2009, para. 33. *See also* Oral Decision of 4 July 2011. Karadžić demonstrates no error in this analysis.
[681] Decision of 15 April 2010, para. 3; Decision of 30 November 2009, para. 23.
[682] Decision of 15 April 2010, paras. 3, 11-15; Decision of 30 November 2009, paras. 23, 32.
[683] Decision of 15 April 2010, para. 10.
[684] Decision of 15 April 2010, paras. 10-12.
[685] Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement. *See, e.g., Prlić et al.* Appeal Judgement, para. 26; *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.
[686] For example, Karadžić provides no information as to how the trial-related restrictions hindered any investigation, cross-examination, or his ability to present evidence related to the testimony provided by the Rule 70 Witnesses.

15. Alleged Errors in Refusing to Subpoena Four Defence Witnesses (Ground 19)

269. During his Defence case, Karadžić sought to subpoena Nikola Tomašević and Srđan Forca, who, during the relevant periods of the Indictment, were Military Court judges in Banja Luka.[687] In his requests, Karadžić contended that each prospective witness would provide evidence countering the Prosecution allegations that: (i) there was a policy and practice of non-prosecution of crimes committed by Serbs against non-Serbs; and (ii) judicial decisions releasing suspects were part of a policy or joint criminal enterprise by the State or Karadžić.[688] Karadžić emphasized in his requests that the prospective witnesses issued two decisions resulting in the release of suspects that the Prosecution cited as evidence of such a policy.[689]

270. Karadžić further sought to subpoena Dragoš Milanković, former Armoured Battalion Commander for the First Sarajevo Brigade, and Miloš Tomović, Commander of the First Battalion in Foča.[690] With respect to Milanković, Karadžić argued in his motion that, in relation to the shelling incidents in Dobrinja as alleged in Scheduled Incidents G.4, G.5, and G.7 of the Indictment, the prospective witness was uniquely placed to testify that: (i) his armoured battalion had orders not to fire at civilians; (ii) it did not fire at civilians; (iii) it never engaged in indiscriminate or disproportionate shelling; and (iv) he was able to identify legitimate military targets near the locations shelled in Scheduled Incidents G.4, G.5, and G.7.[691] As regards Tomović, Karadžić's motion contended that Tomović's evidence would materially assist his defence as he was the "only witness […] Karadžić has identified who can testify to the military events in Fo[č]a and particularly the shooting from the [Aladža] mosque."[692]

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[687] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena to Sr[đ]an Forca, 6 December 2013 ("Forca Motion of 6 December 2013"), para.1; Tomašević Motion of 14 November 2013, para. 1.
[688] Forca Motion of 6 December 2013, paras. 6, 9, 10; Tomašević Motion of 14 November 2013, paras. 6-10. Karadžić further argued that the prospective evidence of Forca and Tomašević would refute allegations that Karadžić failed to punish crimes committed by his subordinates. *See* Forca Motion of 6 December 2013, para. 10; Tomašević Motion of 14 November 2013, para. 10.
[689] Forca Motion of 6 December 2013, para. 10; Tomašević Motion of 14 November 2013, para. 10.
[690] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena to Milo[š] Tomovi[ć], 17 December 2012 ("Tomović Motion of 17 December 2012"), para.1; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena to Drago[š] Milankovi[ć], 13 December 2012 ("Milanković Motion of 13 December 2012"), para. 1.
[691] *See* Milanković Motion of 13 December 2012, paras. 5-8. *See also* Karadžić Appeal Brief, paras. 308, 325, 326.
[692] Tomović Motion of 17 December 2012, para. 6.

271. The Trial Chamber denied these requests.[693] With respect to Tomašević and Forca, the Trial Chamber emphasized that their prospective testimony was similar in nature to other defence testimony about the investigation and prosecution of crimes by military courts,[694] and that they were not the only individuals who could testify about cases in which suspects were released.[695] Specifically as regards Tomašević, the Trial Chamber observed that his prospective evidence on the reasons why he chose to halt proceedings in one case mirrored evidence that was already on the record and would not add anything new.[696] It also concluded that his prospective evidence concerning the release of two individuals in another case was obtainable through other means.[697] As concerns Forca, the Trial Chamber highlighted that his decisions releasing suspects were already part of the record and concluded that there was no indication that his evidence would add anything new to the evidence already admitted.[698]

272. In denying Karadžić's requests to subpoena Milanković and Tomović, the Trial Chamber considered that their evidence pertained to clearly identified issues relevant to Karadžić's case and would be of material assistance to him.[699] However, it concluded that Karadžić should have investigated further whether members of Milanković's and Tomović's battalions or the VRS could have provided the relevant information.[700] The Trial Chamber denied each request on the basis that Karadžić had not demonstrated that the information sought was not obtainable through other means.[701]

273. On appeal, Karadžić submits that, in refusing to subpoena the four proposed witnesses, the Trial Chamber erred by adopting an overly restrictive interpretation of the forensic purpose requirement relevant to the issuance of subpoenas in cases before the ICTY.[702] In particular, Karadžić contends that the Trial Chamber erroneously relied on *dicta* from the *Halilović* Decision of 21 June 2004 and the *Krstić* Decision of 1 July 2003, cautioning against using the court's coercive powers to facilitate routine litigation duties or to merely ascertain if a person has

[693] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Miloš Tomović, 28 January 2013 ("Tomović Decision of 28 January 2013"), paras. 1, 14, 15; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Dragoš Milanković, 18 January 2013 ("Milanković Decision of 18 January 2013"), paras. 1, 15, 16; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Srđan Forca, 18 December 2013 ("Forca Decision of 18 December 2013"), paras. 1, 13, 14; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Nikola Tomašević, 11 December 2013 ("Tomašević Decision of 11 December 2013"), paras. 1, 14, 15.
[694] Forca Decision of 18 December 2013, para. 11; Tomašević Decision of 11 December 2013, para. 11.
[695] Forca Decision of 18 December 2013, paras. 11, 12; Tomašević Decision of 11 December 2013, para. 11.
[696] Tomašević Decision of 11 December 2013, para. 12.
[697] Tomašević Decision of 11 December 2013, para. 13.
[698] Forca Decision of 18 December 2013, para. 12.
[699] Tomović Decision of 28 January 2013, para. 13; Milanković Decision of 18 January 2013, para. 13.
[700] Tomović Decision of 28 January 2013, para. 14; Milanković Decision of 18 January 2013, para. 14.
[701] Tomović Decision of 28 January 2013, paras. 14, 15; Milanković Decision of 18 January 2013, paras. 14, 15.

information that may assist the defence.[703] In so doing, Karadžić argues that the Trial Chamber failed to assess the prospective witnesses' "unique position", preventing him from presenting the most probative evidence to support his defence.[704] Karadžić claims that, as a result, the Trial Chamber failed to provide him with adequate assistance to present his defence in violation of his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him under Article 21(4)(e) of the ICTY Statute.[705] Karadžić asserts that the Trial Chamber excluded evidence that contradicted its key findings and submits that a new trial should be ordered where the witnesses could be heard.[706]

274. The Prosecution responds that the Trial Chamber correctly applied the law in declining Karadžić's requests to subpoena the four prospective witnesses.[707] It contends that the Trial Chamber properly considered whether the evidence could be obtained by other means and correctly determined that it could.[708] The Prosecution further submits that Karadžić fails to demonstrate that the testimony of the four proposed witnesses would have altered the Trial Chamber's findings or otherwise impacted the verdict.[709]

275. Karadžić replies that the Trial Chamber's emphasis on whether the relevant information could be obtained by other means led it to ignore considerations such as the directness and credibility of the prospective evidence as well as the proposed witnesses' unique roles and positions, which constitutes a legal error.[710] He further highlights how the prospective evidence of Tomašević, Forca, Milanković, and Tomović directly contradicts inculpatory findings of the Trial Chamber and submits that the absence of their evidence rendered his trial unfair.[711]

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[702] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 315-318, *referring to Halilović* Decision of 21 June 2004, paras. 6, 7, 10, 15, *Krstić* Decision of 1 July 2003, paras. 10, 11.
[703] Karadžić Appeal Brief, paras. 316, 318, *referring to Halilović* Decision of 21 June 2004, para. 10, *Krstić* Decision of 1 July 2003, para. 11. *See also* Karadžić Reply Brief, paras. 87, 88.
[704] Karadžić Appeal Brief, paras. 323-326. *See also* Karadžić Reply Brief, paras. 86, 89-91, 93. Karadžić further contends that the Trial Chamber failed to sufficiently consider the credibility of the prospective witnesses' evidence and whether such evidence could corroborate or impeach existing evidence. *See* Karadžić Appeal Brief, paras. 319-322.
[705] Karadžić Appeal Brief, paras. 326-328.
[706] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 306, 311, 314, 328. *See also* Karadžić Reply Brief, paras. 92-94.
[707] Prosecution Response Brief, paras. 175-177.
[708] Prosecution Response Brief, paras. 176-181.
[709] Prosecution Response Brief, paras. 182-184.
[710] Karadžić Reply Brief, paras. 86-89.
[711] Karadžić Reply Brief, paras. 90-94. With respect to Tomović specifically, Karadžić argues that the Trial Chamber's determination that there was no indication that mosques were used for military purposes further demonstrates the prejudice he suffered by the Trial Chamber's denial of his request to subpoena Tomović. *See* Karadžić Reply Brief, para. 93.

276. The Appeals Chamber recalls that decisions on requests for subpoenas relate to the general conduct of the trial and fall within a trial chamber's discretion.[712] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed discernible error resulting in prejudice to that party.[713]

277. Rule 54 of the ICTY Rules provides, *inter alia*, that a trial chamber may issue subpoenas "as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial". In interpreting this provision, the Appeals Chamber of the ICTY has stated:

> The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused. As the Appeals Chamber [of the ICTY] has emphasized, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."
>
> In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means. The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial." The Trial Chamber's considerations, then, must focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair.[714]

The Appeals Chamber has adopted this interpretation.[715]

278. The Appeals Chamber finds that the Trial Chamber correctly recalled the applicable law and acted within the bounds of its discretion when considering whether the relevant information was obtainable through other means.[716] As it concerns Tomašević, Karadžić argues that the Trial

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[712] *See, e.g.*, Decision of 29 January 2013, para. 7; *Bizimungu et al.* Decision of 22 May 2008, para. 8; *Halilović* Decision of 21 June 2004, para. 6.
[713] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.
[714] *Halilović* Decision of 21 June 2004, paras. 6, 7, *referring to*, *inter alia*, *Krstić* Decision of 1 July 2003, paras. 10, 11 (internal references omitted).
[715] *See supra* para. 148.
[716] *See* Tomović Decision of 28 January 2013, paras. 7-10; Milanković Decision of 18 January 2013, paras. 7-10; Forca Decision 18 December 2013, paras. 5-8; Tomašević Decision of 11 December 2013, paras. 5-8. Karadžić's contentions that the Trial Chamber erred in not sufficiently considering the credibility of the prospective witnesses' evidence and whether such evidence could corroborate or impeach existing evidence are without merit. *See* Karadžić Appeal Brief, paras. 319-322. The Appeals Chamber observes that the evidentiary factors relevant to the issuance of subpoenas set out above are illustrative and not exhaustive. *See supra* paras. 148, 277. While it would have been within the Trial Chamber's discretion to consider the credibility of the prospective evidence or its capability to corroborate or impeach other evidence when adjudicating Karadžić's requests, the Trial Chamber was not required to do so. This is particularly

Chamber ignored that he was best placed to testify to his own rationale for releasing the prisoners in question.[717] However, Karadžić disregards the Trial Chamber's consideration that the prospective evidence as to why individuals were released in one case was already reflected in documentation admitted into the record.[718] Karadžić also demonstrates no error in the Trial Chamber's conclusion that information related to the second case was obtainable through other means, in view of evidence already on the record.[719] Therefore, Karadžić has not shown that the Trial Chamber committed a discernible error in denying his request to subpoena Tomašević.

279. With respect to Forca, Karadžić submits that he could have spoken directly as to whether the decisions he rendered were issued because of any policy of Karadžić that tolerated the commission of crimes by Serbs against non-Serbs.[720] As noted above, the Trial Chamber concluded that there was no indication that his evidence would add anything to the evidence on the record which already included, *inter alia*, the decisions issued by Forca.[721] Karadžić does not substantiate how the Trial Chamber erred in reaching this conclusion. Therefore, Karadžić does not demonstrate that the Trial Chamber committed a discernible error in denying his request to subpoena Forca.

280. As regards Milanković, Karadžić argues that the Trial Chamber failed to give adequate weight to his unique position as Battalion Commander when considering that others could have offered comparable evidence concerning the shelling of civilians in Dobrinja.[722] The Appeals Chamber observes that, in the impugned decision, the Trial Chamber held that it was not persuaded that the relevant information was obtainable only through Milanković since there must have been other members of the battalion operating in the area at the relevant time who could provide the information Karadžić sought.[723] The record reflects that Karadžić was able to obtain relevant evidence concerning the events in Dobrinja from Serb military officers who held positions similar to or higher than that of Milanković as well as evidence from personnel from the same brigade who

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the case in the circumstances under consideration where, in support of his requests for the issuance of subpoenas, Karadžić did not elaborate on the credibility of the evidence of the prospective witnesses or its ability to corroborate or impeach evidence on the record.

[717] Karadžić Appeal Brief, para. 323.

[718] Tomašević Decision of 11 December 2013, para. 12.

[719] Tomašević Decision of 11 December 2013, para. 13.

[720] Karadžić Appeal Brief, para. 313. The Appeals Chamber observes that Karadžić argues that Forca issued a total of four decisions that were cited by the Prosecution as evincing a policy of the non-prosecution of crimes against non-Serbs. *See* Karadžić Appeal Brief, para. 313. As Karadžić makes no showing that he referred to two of the four decisions when requesting to subpoena Forca at trial, the Appeals Chamber will not consider this aspect of his submissions for the first time on appeal.

[721] Forca Decision of 18 December 2013, paras. 11, 12.

[722] Karadžić Appeal Brief, paras. 325, 326. *See also* Karadžić Appeal Brief, paras. 307-309.

[723] Milanković Decision of 18 January 2013, para. 14.

were responsible for artilleries.[724] Karadžić has therefore not demonstrated that the Trial Chamber committed a discernible error in rejecting his request to subpoena Milanković.

281. With respect to Tomović, Karadžić emphasizes on appeal that, as Commander of the First Battalion in Foča, he was uniquely placed to provide evidence about the reasons for the events at issue in Foča, which, for example, lower ranking members of his battalion could not do.[725] The Appeals Chamber notes that in support of his request to subpoena Tomović, Karadžić did not argue that Tomović's prospective evidence was unique due to his position, but that he was the "only witness […] Karadžić ha[d] identified who [could] testify to the military events in Fo[č]a and particularly the shooting from the [Aladža] mosque."[726] In denying Karadžić's request, the Trial Chamber noted that the record reflected that Tomović's battalion had around 520 soldiers and that Karadžić did not explain why Tomović was the only witness he could identify despite the large size of the battalion.[727] Furthermore, the record reflects that Karadžić was able to present evidence about the events in Foča, including evidence that Bosnian Muslims were fighting from mosques and using them to store weapons and for training.[728] Karadžić therefore fails to demonstrate that the Trial Chamber committed a discernible error in denying his request to subpoena Tomović.

282. Having not demonstrated any discernible error in the Trial Chamber's decisions denying the requested subpoenas for the four prospective witnesses, the Appeals Chamber also dismisses Karadžić's allegation that the decisions violated his right to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him under Article 21(4)(e) of the ICTY Statute.[729] Based on the foregoing, the Appeals Chamber dismisses Ground 19 of Karadžić's appeal.

[724] *See* Exhibit D2341, paras. 7, 20, 21; Exhibit D2412, paras. 3, 6, 27; Exhibit D2479, paras. 26, 27; Exhibit D2562, paras. 1, 110, 111; Exhibit D2633, paras. 14, 15, 22, 23-30; Exhibit D2774, paras. 129-134; T. 22 October 2012 pp. 29152-29156; T. 28 January 2013 pp. 32711-32715; T. 18 April 2013 pp. 37367-37393, 37441-37443.
[725] Karadžić Appeal Brief, para. 324.
[726] Tomović Motion of 17 December 2012, para. 6. *See also* Karadžić Reply Brief, para. 93.
[727] Tomović Decision of 28 January 2013, para. 14.
[728] *See* Trial Judgement, paras. 927, 932.
[729] Karadžić Appeal Brief, paras. 326-328.

16. Alleged Errors in Refusing to Compel Ratko Mladić to Testify (Ground 20)

283. When Mladić declined to testify as a defence witness for Karadžić, Karadžić requested the Trial Chamber to issue a subpoena to compel him to testify.[730] The Trial Chamber granted Karadžić's request as he had sufficiently demonstrated that there was a good chance that Mladić would be able to give information which would materially assist his case and that specific aspects of Mladić's expected evidence could not be obtained through other means.[731] In particular, the Trial Chamber considered that Mladić, as the highest ranking officer in the VRS, was uniquely positioned to give evidence regarding the information he passed to Karadžić concerning many of the events alleged in the Indictment.[732] The Trial Chamber added that it remained within its discretion whether to compel a witness to answer particular questions and that, in exercising this discretion, it would be cognizant of the fact that Mladić's trial before the ICTY was pending and would ensure that his rights in that respect were safeguarded.[733] The Trial Chamber subsequently denied Mladić's request for leave to appeal this decision.[734]

284. When Mladić appeared to testify, the Trial Chamber denied his counsel's objections to his prospective testimony founded on health concerns and his right to remain silent since the indictment in his own case was "almost identical" to the indictment against Karadžić.[735] The Trial Chamber observed that both issues had been sufficiently dealt with when considering whether to subpoena Mladić and that there had been no subsequent developments.[736] When invited to make a solemn declaration before testifying, Mladić initially refused to do so.[737] Once he took the oath, the Trial Chamber informed him that, pursuant to Rule 90(E) of the ICTY Rules, he could object to answering any question if he believed that his answer might incriminate him.[738] However, the Trial Chamber noted that it could nonetheless compel him to answer, in which case the Tribunal would ensure that his compelled testimony would not be used in any case against him for any offence, except for the offence of giving false testimony.[739] Subsequently, and in response to the questions

[730] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Ratko Mladić, 11 December 2013 ("Decision on Motion to Subpoena Ratko Mladić"), paras. 1, 2.
[731] Decision on Motion to Subpoena Ratko Mladić, paras. 20, 22, 27.
[732] Decision on Motion to Subpoena Ratko Mladić, paras. 20, 22.
[733] Decision on Motion to Subpoena Ratko Mladić, para. 23 ("In exercising this discretion, [the Trial Chamber] will be cognizant of the fact that Mladić is currently on trial, and will ensure that his rights are safeguarded.").
[734] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Mladić Request for Certification to Appeal Subpoena Decision, 23 December 2013, paras. 4, 13, 14. The Trial Chamber also denied the Prosecution's and Mladić's motions for reconsideration of this decision. *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Urgent Motions for Reconsideration of Decision Denying Mladić Request for Certification to Appeal Subpoena Decision, 22 January 2014, paras. 5, 6, 22, 23.
[735] T. 28 January 2014 pp. 46041-46044.
[736] T. 28 January 2014 pp. 46043, 46044.
[737] T. 28 January 2014 pp. 46044-46046.
[738] T. 28 January 2014 pp. 46048, 46049.
[739] T. 28 January 2014 pp. 46048, 46049.

posed by Karadžić, Mladić repeated that he could not testify due to his health condition and invoked his right to remain silent.[740] The Trial Chamber decided not to compel Mladić to answer the questions in light of Mladić's right against self-incrimination as an accused whose trial was pending before the ICTY.[741]

285. Karadžić submits that the Trial Chamber erred by its "blanket" refusal to compel Mladić to testify in Karadžić's trial.[742] In his view, compelling Mladić to testify would not violate Mladić's right not to incriminate himself because his answers could not be used against him either directly or indirectly.[743] In addition, he argues that, had the appropriate guarantees been provided against the use of Mladić's evidence in his own case, Karadžić's need for Mladić's "critical" exculpatory evidence outweighed any interest Mladić may have had in declining to answer.[744] In particular, he argues that Mladić could speak to important issues concerning Karadžić's responsibility, including whether Karadžić was informed about the killings of prisoners from Srebrenica, whether the shelling and sniping of Sarajevo was directed at civilians and was part of a campaign of terror, and whether there was an agreement to expel Bosnian Muslims and Bosnian Croats residing in Serb-controlled areas.[745] Karadžić requests the Appeals Chamber to order a new trial at which Mladić's evidence could be heard.[746]

286. The Prosecution responds that Karadžić fails to show abuse of the Trial Chamber's discretion in refusing to compel Mladić to answer self-incriminating questions.[747] In particular, the Trial Chamber correctly balanced the competing interests at stake, namely the concrete risks to Mladić's fundamental right not to incriminate himself and the potential advantage of Mladić's testimony for Karadžić's case.[748] The Prosecution also argues that, even if Karadžić would obtain the denials sought from Mladić, this evidence would be duplicative of that given by other members of the relevant joint criminal enterprises and senior Bosnian Serb officials, which was found not credible in light of the overwhelming evidence to the contrary.[749]

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[740] T. 28 January 2014 pp. 46050-46054.
[741] *See* T. 28 January 2014 pp. 46051-46054.
[742] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 330, 344; T. 23 April 2018 pp. 113, 114, 116. *See also* Karadžić Appeal Brief, paras. 329-345; T. 23 April 2018 pp. 113-118; T. 24 April 2018 pp. 244, 245.
[743] Karadžić Appeal Brief, paras. 336, 340.
[744] Karadžić Appeal Brief, paras. 336, 340, 344; T. 23 April 2018 pp. 113-116.
[745] Karadžić Appeal Brief, paras. 341-345, *referring to* Trial Judgement, paras. 3437, 3439, 3440, 3447, 3464, 3465, 4891, 4928, 5805-5814, 5818-5821. *See also* T. 23 April 2018 p. 116.
[746] Karadžić Appeal Brief, para. 345; T. 23 April 2018 p. 118.
[747] Prosecution Response Brief, paras. 185-201. *See also* T. 23 April 2018 pp. 180-183.
[748] Prosecution Response Brief, paras. 185, 188-193. *See also* T. 23 April 2018 pp. 180-183.
[749] Prosecution Response Brief, paras. 197, 199, 201; T. 23 April 2018 p. 182. The Prosecution also argues that, had Karadžić considered Mladić's testimony so crucial, he could have sought to introduce it as additional evidence on appeal, given the significantly reduced risk of Mladić incriminating himself after the evidentiary phase of his case had ended and even less risk after Mladić was convicted. *See* T. 23 April 2018 pp. 182, 183.

287. Karadžić replies that the Prosecution exaggerates the difficulties in guaranteeing Mladić's rights in his own trial and fails to provide a reasonable justification for the Trial Chamber's decision not to compel Mladić to testify.[750] He also argues that the Prosecution underestimates the potential importance of Mladić's direct evidence for challenging the Trial Chamber's findings that: (i) Mladić had informed him about the Srebrenica events on 13 July 1995; (ii) Mladić presented a plan to shell Sarajevo indiscriminately during a meeting between 20 and 28 May 1992; and (iii) together with Mladić, Karadžić formulated a plan to expel Bosnian Muslims and Croats to form a homogenous Serb state.[751]

288. The Appeals Chamber recalls that Article 21(4)(g) of the ICTY Statute guarantees the fundamental right of an accused not to be compelled to testify against himself in the determination of any charge against him. Rule 90(E) of the ICTY Rules provides that a witness may object to making any statement which might tend to incriminate him and that a chamber may compel the witness to answer the question, in which case testimony compelled in this way will not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. The ICTY Appeals Chamber has held that compelling an accused to testify in proceedings which do not involve the determination of the charges against him under Rule 90(E) of the ICTY Rules is not in itself inconsistent with the right not to incriminate oneself given the absolute prohibition on direct or indirect use of self-incriminating statements so compelled in the proceedings against him.[752] Compelling a witness to answer a question which may incriminate him in such circumstances remains within a trial chamber's discretion.[753] This discretion, however, must be exercised consistently with Articles 20(1) and 21 of the ICTY Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[754]

289. The Appeals Chamber notes that, in deciding not to compel Mladić to answer the questions posed by Karadžić, the Trial Chamber had to balance Karadžić's right to obtain the attendance and examination of witnesses on his behalf with Mladić's right not to incriminate himself. Both of these rights are guaranteed by the ICTY Statute but neither is absolute and both may be subject to limitations.[755] Karadžić requested Mladić to confirm whether Mladić had informed him about the execution of prisoners from Srebrenica, whether they had agreed that the citizens of Sarajevo would

[750] Karadžić Reply Brief, paras. 96, 100; T. 23 April 2018 p. 115. *See also* T. 24 April 2018 p. 244.
[751] Karadžić Reply Brief, para. 97, *referring to* Trial Judgement, paras. 3266-3273, 4023, 4721, 5769, 5804. *See also* T. 24 April 2018 pp. 244, 245.
[752] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("Decision of 13 November 2013"), paras. 43, 45.
[753] *Cf. Ntagerura et al.* Appeal Judgement, para. 253.
[754] *See, e.g.*, Mladić Decision of 22 October 2013, para. 12; *Ndahimana* Appeal Judgement, para. 14.
[755] *See* Article 21(4) of the ICTY Statute; Decision of 13 November 2013, para. 36; *Furundžija* Appeal Judgement, para. 75.

be subjected to terror by shelling or sniping, what were the reasons for the shelling or sniping of Sarajevo, and whether there was an agreement between them to expel Bosnian Muslims and Bosnian Croats residing in Serb-controlled areas.[756] Answers to these questions would have been directly relevant to the charges against Mladić in his ongoing proceedings before the ICTY.[757] Notwithstanding the Trial Chamber's discretion to compel Mladić to testify in view of the safeguards afforded under Rule 90(E) of the ICTY Rules, the Appeals Chamber finds that in these circumstances the Trial Chamber did not err in declining to compel him to answer Karadžić's potentially incriminating questions.

290. Moreover, the Appeals Chamber finds that Karadžić does not show that, in safeguarding Mladić's right against self-incrimination, the Trial Chamber violated Karadžić's right to obtain the attendance and examination of witnesses on his behalf. The Appeals Chamber notes that the Trial Chamber facilitated Karadžić's request to obtain Mladić's attendance and examination. In particular, the Trial Chamber granted Karadžić's request to subpoena Mladić and, once Mladić appeared, it dismissed his objections over testifying and instructed him that he was to answer Karadžić's questions.[758] The Trial Chamber also warned Mladić that wilful refusal to comply with the terms of the subpoena could constitute contempt.[759] Nevertheless, in response to each of Karadžić's questions, Mladić repeatedly refused to testify.[760]

291. The Appeals Chamber also finds that Karadžić's speculative submission that Mladić would have provided "critical" exculpatory evidence fails to show error. Specifically, three out of the four substantive questions posed by Karadžić sought to elicit general denials of the existence and criminal purpose of the joint criminal enterprises charged in the Indictment.[761] However, the Trial Chamber observed in its decision to subpoena Mladić that such evidence would be duplicative of other evidence on the record, including evidence from other alleged members of the relevant joint criminal enterprises, and did not in itself warrant the issuance of a subpoena.[762] Karadžić's remaining substantive question sought to elicit evidence as to whether Mladić had informed him of the fate of prisoners from Srebrenica.[763] In this respect, the Appeals Chamber notes that the Trial

[756] T. 28 January 2014 pp. 46051-46054.
[757] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011.
[758] T. 28 January 2014 pp. 46044, 46045, 46051.
[759] T. 28 January 2014 pp. 46045, 46046.
[760] T. 28 January 2014 pp. 46050-46054.
[761] *See* T. 28 January 2014 pp. 46052-46054. The Appeals Chamber notes that Karadžić indicated that he only had six questions to put to Mladić, the first concerned the non-substantive issue of the positions Mladić held in his military career and one question was voluntarily withdrawn as moot. *See* T. 28 January 2014 pp. 46050, 46053, 46054.
[762] Decision on Motion to Subpoena Ratko Mladić, para. 21, n. 41, *referring to* evidence of Witnesses Milan Martić, Vojislav Šešelj, Vladislav Jovanović, Milorad Dodik, Momir Bulatović, Milenko Inđić, Ljubomir Borovčanin, Momčilo Krajišnik, John Zametica, Vujadin Popović, and Milenko Živanović.
[763] T. 28 January 2014 p. 46051.

Chamber had already heard evidence from other Bosnian Serb officials and military personnel, including high-ranking VRS officers, who denied passing such information to Karadžić.[764] Notwithstanding, in its judgement the Trial Chamber preferred to rely instead on ample evidence on the trial record demonstrating that Karadžić was informed about and had agreed to the executions of the detainees from Srebrenica.[765] In these circumstances, Mladić's expected evidence on this matter could not be considered critical.

292. In light of the above, the Appeals Chamber finds that Karadžić fails to show error in the Trial Chamber's decision not to compel Mladić to answer his questions. Consequently, the Appeals Chamber dismisses Ground 20 of Karadžić's appeal.

[764] The Trial Chamber heard the evidence of: (i) Witness Petar Salapura who stated that he never informed Karadžić either verbally or in writing that prisoners from Srebrenica were executed (T. 24 June 2013 pp. 40305, 40306); (ii) Witness Milenko Karišik who stated that he never reported to Karadžić about any unlawful killings or executions in Srebrenica after its fall (T. 2 July 2013 p. 40692); (iii) Witness John Zametica who stated that the civilian authorities and the Bosnian Serb Presidency knew nothing about the massacre in Srebrenica after the completion of the military operation there (T. 29 October 2013 p. 42483); (iv) Witness Tomislav Kovač who stated that he had no information as to whether Karadžić was informed of executions of prisoners of war and had not seen any written report containing information about the executions in Srebrenica that was sent to Karadžić (T. 4 November 2013 p. 42851); (v) Momčilo Krajišnik who stated that at a meeting on 14 July 1995 with Karadžić and Miroslav Deronjić no one spoke about any negative aspect of what happened in Srebrenica (T. 12 November 2013 pp. 43352, 43353); and (vi) Witness Zdravko Tolimir who denied informing Karadžić of the Srebrenica executions (T. 12 December 2013 pp. 45063, 45064).
[765] Trial Judgement, paras. 5756-5797.

17. Alleged Errors in Refusing to Assign Counsel to a Prospective Defence Witness (Ground 21)

293. On 16 January 2014, the Trial Chamber dismissed a request from Predrag Banović, a prospective Defence witness, to be assigned counsel for the purposes of his testimony in Karadžić's case.[766] The Trial Chamber considered that Banović, who was not a suspect, an accused, or a person detained under the authority of the ICTY, was not entitled to counsel under the ICTY Directive on the Assignment of Defence Counsel.[767] The Trial Chamber also found that there were no exceptional circumstances warranting the assignment of counsel to Banović for the purposes of his testimony in the proceedings against Karadžić.[768]

294. Karadžić then sought the admission of a statement by Banović pursuant to Rule 92 *bis* of the ICTY Rules, stating that the witness had refused to testify after being informed that the Trial Chamber would not assign counsel to assist him during his testimony.[769] The Trial Chamber denied Karadžić's request, noting that Banović had refused to testify because of his concerns about his right against self-incrimination and considered that the same concerns would equally apply should his evidence be received in writing.[770] The Trial Chamber was therefore not satisfied that Banović would agree to certify the contents of his statement and found that Karadžić had made no attempt to prove the contrary.[771]

295. Karadžić argues that the Trial Chamber erred in refusing to assign counsel to Banović.[772] He submits that Banović faced the risk of incriminating himself in his testimony, which could have been used against him to revoke his plea agreement with the Prosecution or in national proceedings.[773] Karadžić maintains that the Trial Chamber's reasoning was flawed because in denying the request it relied on the ICTY Directive on the Assignment of Counsel, violating the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[774] Karadžić argues that he was prejudiced by the Trial Chamber's decision, which deprived him of Banović's evidence

[766] T. 16 January 2014 pp. 45428, 45429.
[767] T. 16 January 2014 pp. 45428, 45429, *referring to* ICTY Directive on the Assignment of Counsel, Article 5 ("Without prejudice to the right of a suspect or an accused to conduct his own defence: (i) a suspect who is to be questioned by the Prosecutor during an investigation; (ii) an accused upon whom personal service of the indictment has been effected; and (iii) any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis*; shall have the right to be assisted by counsel.").
[768] T. 16 January 2014 p. 45429.
[769] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Admit Testimony of Predrag Banovi[ć] Pursuant to Rule 92[ ]*bis*, 11 February 2014, paras. 1, 2; Decision of 18 March 2014, para. 67.
[770] Decision of 18 March 2014, paras. 68, 69(f).
[771] Decision of 18 March 2014, para. 68.
[772] Karadžić Notice of Appeal, p. 9; Karadžić Appeal Brief, paras. 348, 350; Karadžić Reply Brief, para. 102.
[773] Karadžić Appeal Brief, para. 350; Karadžić Reply Brief, para. 101.
[774] Karadžić Appeal Brief, para. 348, *referring to* UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Doc A/Res/67/187, 28 March 2013, Guideline 8, para. 51. *See also* Karadžić Reply Brief, para. 102. Karadžić also relies on jurisprudence from the ICC and legislation from Germany and the United States. *See* Karadžić Appeal Brief, para. 349.

and led to adverse findings on issues about which Banović would have testified.[775] He submits that the Appeals Chamber should order a new trial in which Banović can be assigned counsel and testify.[776]

296. The Prosecution responds that, through his inaction, Karadžić waived his right to appeal the Trial Chamber's decision not to assign counsel to Banović as he did not file any motion on this matter or exhaust all available remedies to secure Banović's appearance.[777] In addition, the Prosecution argues that Karadžić shows no error in the decision and that the Trial Chamber was not required to assign counsel to Banović.[778] Finally, the Prosecution contends that Karadžić fails to demonstrate that Banović's testimony would have had any impact on the Trial Judgement.[779]

297. Karadžić replies that he did not waive his right to raise this matter on appeal as he was not required to re-submit Banović's request and that he did not have to subpoena Banović.[780]

298. The Appeals Chamber recalls that, in the absence of special circumstances, if a party raises no objection to a particular issue before the trial chamber when it could have reasonably done so, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[781] The Appeals Chamber notes that Karadžić did not challenge the impugned decision at trial and did not present to the Trial Chamber any of the detailed factual or legal submissions he makes on appeal. In addition, he fails to demonstrate any special circumstance warranting consideration of his submissions for the first time on appeal. The Appeals Chamber therefore finds that Karadžić has waived his right to raise this issue on appeal.

299. Consequently, the Appeals Chamber dismisses Ground 21 of Karadžić's appeal.

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[775] Karadžić Appeal Brief, para. 350.
[776] Karadžić Appeal Brief, para. 351.
[777] Prosecution Response Brief, para. 202; T. 23 April 2018 p. 167.
[778] Prosecution Response Brief, para. 203.
[779] Prosecution Response Brief, para. 205.
[780] Karadžić Reply Brief, paras. 103, 104.
[781] *See, e.g., Prlić et al.* Appeal Judgement, para. 165; *Nyiramasuhuko et al.* Appeal Judgement, paras. 63, 1060, n. 157; *Popović et al.* Appeal Judgement, para. 176; *Bagosora and Nsengiyumva* Appeal Judgement, para. 31. *See also Orić* Decision of 17 February 2016, para. 14.

18. Alleged Errors in Failing to Exclude the Testimony of War Correspondents (Ground 23)

300. On 20 May 2009 and 17 May 2010, the Trial Chamber denied two motions from Karadžić to exclude the testimony of war correspondents, finding that the testimonial privilege enjoyed by war correspondents is a matter that they personally may choose to exercise or not.[782]

301. Karadžić submits that the Trial Chamber erred in denying his motions to exclude the testimony of five retired war correspondents.[783] He argues that a qualified privilege for war correspondents exists at the ICTY pursuant to which a war correspondent may not be compelled to testify unless the party calling him or her demonstrates that the correspondent will give evidence that is important to the core issues of the case and which cannot be reasonably obtained by other means.[784] Karadžić contends that the news organization, rather than the journalist, holds the war correspondent privilege as the organization owns the information and controls its disclosure.[785] Karadžić further contends that the principles of employment and agency law as well as the corporate attorney-client privilege support the proposition that, as a journalist, a war correspondent does not have the authority to waive the privilege of confidentiality when the waiver implicates the news organization.[786] Karadžić claims that news organizations and not individual war correspondents are best placed to determine when to waive their privilege so as not to jeopardize their mandate and ability to operate in war zones, which, he argues, is the case for the International Committee of the Red Cross ("ICRC") whose employees cannot be compelled to testify absent a waiver from the organization.[787] Karadžić submits that the Trial Chamber "heavily relied" on the evidence of war correspondents in making certain findings concerning his participation in joint criminal enterprises,[788] and he requests that the Appeals Chamber order a new trial, at which their testimony would be excluded in the absence of a valid waiver of privilege.[789]

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[782] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused's Motion to Exclude Testimony of Aernout Van Lynden, 17 May 2010 ("Decision of 17 May 2010"), paras. 1, 4, 7; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion to Exclude Testimony of War Correspondents, 20 May 2009 ("Decision of 20 May 2009"), paras. 3, 4. The Appeals Chamber notes that Karadžić also raised objections to hearing the testimony of war correspondents on several occasions during the trial proceedings. *See* T. 13 December 2010 pp. 9749, 9750; T. 13 January 2011 p. 10067; T. 9 November 2011 p. 21033; T. 21 February 2012 pp. 24909, 24910.

[783] Karadžić Appeal Brief, paras. 384, 393; T. 23 April 2018 pp. 118, 119, 133, 134. *See also* T. 23 April 2018 pp. 125-127.

[784] Karadžić Appeal Brief, para. 385, *referring to Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin* Decision of 11 December 2002"), para. 50. *See also* Karadžić Reply Brief, paras. 107, 108.

[785] Karadžić Appeal Brief, paras. 386, 387. *See* T. 23 April 2018 pp. 118, 119. *See also* T. 23 April 2018 pp. 133, 134.

[786] Karadžić Appeal Brief, paras. 388, 389. *See also* Karadžić Reply Brief, para. 110.

[787] Karadžić Appeal Brief, paras. 390-392; T. 23 April 2018 pp. 118, 119. Karadžić submits that war correspondents, like ICRC employees, would be endangered through the perception that they can be forced to become witnesses against their interviewees. *See* Karadžić Appeal Brief, para. 392. *See also* Karadžić Reply Brief, paras. 108, 109.

[788] Specifically, Karadžić submits that the Trial Chamber relied on the evidence of war correspondents in finding the existence of the Sarajevo JCE and his intent to terrorize civilians in Sarajevo, and that he had the intent to expel

302. The Prosecution responds that the Trial Chamber correctly rejected Karadžić's claim that the news organization, rather than the journalist, holds the war correspondent privilege in accordance with the *Brđanin* Decision of 11 December 2002, from which Karadžić has not demonstrated cogent reasons to depart.[790] The Prosecution contends that Karadžić merely repeats his submissions at trial in this respect and that his remaining arguments, relying on inapposite case law, ignore the rationale underpinning the war correspondent privilege and are otherwise irrelevant.[791] The Prosecution contends that even if the Trial Chamber erred in its finding regarding the war correspondent privilege, Karadžić has failed to demonstrate any prejudice or present any information that the news organizations may have asserted this privilege or had any concerns about their journalists testifying before the ICTY.[792]

303. Karadžić replies that the *Brđanin* Decision of 11 December 2002 only involved the assertion of the war correspondent privilege, not its waiver, and that the Appeals Chamber never made a determination on whether war correspondents were free to testify without a waiver from their respective news organization.[793] He further contends that the Prosecution had the opportunity during the trial to seek waivers from the relevant news organizations when each war correspondent appeared in court but failed to do so.[794]

304. The Appeals Chamber recalls that trial chambers enjoy broad discretion in the conduct of proceedings before them, including in deciding on matters relating to the admission or presentation of evidence.[795] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[796]

305. The Appeals Chamber observes that, under this ground of appeal, Karadžić largely repeats the arguments he raised before the Trial Chamber.[797] The Appeals Chamber recalls that a party

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Bosnian Muslims and Croats as part of the Overarching JCE. *See* Karadžić Appeal Brief, para. 394; Karadžić Reply Brief, para. 112.

[789] Karadžić Appeal Brief, para. 394.

[790] Prosecution Response Brief, paras. 213-216; T. 23 April 2018 pp. 168, 183, 184.

[791] Prosecution Response Brief, paras. 215-219. The Prosecution submits that Karadžić's claim with respect to the ICRC privilege fails to acknowledge that the Appeals Chamber has held that while the ICRC, as an organization, holds an absolute privilege against the compelled testimony of its employees, war correspondents are free to testify voluntarily. *See* Prosecution Response Brief, para. 217.

[792] Prosecution Response Brief, para. 220. *See also* T. 23 April 2018 p. 169.

[793] *See* Karadžić Reply Brief, paras. 106, 107. Karadžić asserts that the fact the ICRC has an absolute privilege has no bearing on the issue of waiver of qualified privilege. *See* Karadžić Reply Brief, para. 108.

[794] Karadžić Reply Brief, para. 111.

[795] *See, e.g., Prlić et al.* Appeal Judgement, paras. 26, 143, 151; *Popović et al.* Appeal Judgement, paras. 74, 297; *Karemera and Ngirumpatse* Appeal Judgement, para. 27; *Šainović et al.* Appeal Judgement, paras. 152, 161.

[796] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.

[797] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Exclude Testimony of Aernout Van Lynden, 14 May 2010 ("Motion of 14 May 2010"), paras. 11-15; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Exclude Testimony of War Correspondents, 18 May 2009, paras. 2, 4, 9-18.

cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[798] The Appeals Chamber notes that the Trial Chamber already considered and dismissed Karadžić's argument that the testimonial privilege granted to war correspondents can only be waived by his or her employer news organization.[799] The Trial Chamber held that the settled jurisprudence of the ICTY allows war correspondents to waive their privilege if they choose to do so.[800] The Trial Chamber also rejected Karadžić's analogy between war correspondents and ICRC employees as unsupported and inconsistent with the ICTY's practice to hear war correspondents who are willing to give evidence.[801]

306. The Appeals Chamber notes that Karadžić's arguments before the Trial Chamber and on appeal ignore the fact that none of the news organizations for which the war correspondents worked sought to assert any qualified privilege and Karadžić has no standing to assert it on their behalf. On appeal Karadžić points to no binding authority or relevant jurisprudence in support of his contention that the Trial Chamber erred in denying his request to exclude the testimony of war correspondents.[802] Karadžić's argument that a qualified privilege for war correspondents is recognized in ICTY jurisprudence such that a war correspondent may not be compelled to testify unless a certain test is met is not on point as the correspondents in question were not being compelled to testify. Consequently, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber erred in rejecting his arguments or that it committed a discernible error.

307. For the foregoing reasons, the Appeals Chamber dismisses Ground 23 of Karadžić's appeal.

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[798] *See Šešelj* Appeal Judgement, paras. 17, 28; *Prlić et al.* Appeal Judgement, para. 128; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27.

[799] *See* Decision of 17 May 2010, paras. 2, 4, 5; Motion of 14 May 2010, paras. 11-14. *See also* Decision of 20 May 2009, para. 3.

[800] Decision of 17 May 2010, paras. 4, 5; Decision of 20 May 2009, para. 3, *referring to Brđanin* Decision of 11 December 2002.

[801] Decision of 17 May 2010, para. 5.

[802] The Appeals Chamber recalls that numerous war correspondents provided evidence before the ICTY. For example, Mr. Aernout van Lynden, who was the subject of the Decision of 17 May 2010, testified in the *Perišić*, *Martić*, *Mrkšić et al.*, *Slobodan Milošević*, and *Galić* cases before the ICTY. *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, T. 3 October 2008 pp. 460, 482, T. 6 October 2008 pp. 533, 553; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, T. 2 June 2006 pp. 4990, 4991; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, T. 23 January 2006 pp. 3075-3077, 3082, 3118, 3119, T. 24 January 2006 pp. 3160, 3161; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 15 September 2003 pp. 26693, 26694; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, T. 23 January 2002 p. 2085, T. 24 January 2002, pp. 2210, 2213, 2215. Other examples of war correspondents who testified before the ICTY include Morten Hvaal who testified in the *Perišić* case, Martin Bell who testified in the *Dragomir Milošević* case, Sead Omeragić who testified in the *Slobodan Milošević* case, Edward Vulliamy who testified in the *Stakić* case, and Jeremy Bowen who testified in the *Naletilić and Martinović* case. *See Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, T. 1 December 2008 pp. 2227, 2230, 2231; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, T. 26 April 2007 p. 5235; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 16 October 2003 pp. 27678, 27690; *Prosecutor v.*

Milomir Stakić, Case No. IT-97-24-T, T. 16 September 2002 pp. 7899, 7902; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-T, T. 15 November 2001 pp. 5770, 5772.

19. Alleged Error in Failing to Recognise Parliamentary Privilege (Ground 24)

308. On 7 November 2013, the Trial Chamber dismissed Karadžić's request to preclude the Prosecution from questioning Momčilo Krajišnik about any statements he made in sessions of parliament on the basis that he had failed to demonstrate that immunities and privileges that may be accorded to parliamentary statements in domestic jurisdictions apply in international criminal proceedings.[803]

309. Karadžić submits that the Trial Chamber erred in finding that the parliamentary privilege did not apply to statements made by him during Bosnian and *Republika Srpska* parliamentary assembly sessions in his trial.[804] As a result of this error, Karadžić argues that he was prejudiced as the Trial Chamber relied on such statements to make adverse findings against him.[805] He therefore requests that the Appeals Chamber order a new trial, in which statements made before parliament may not be used against him.[806]

310. The Prosecution responds that Karadžić has failed to demonstrate that the Oral Decision of 7 November 2013, which only addressed the issue of whether Krajišnik could be cross-examined on statements he made during assembly sessions, had any impact on the Trial Judgement.[807] The Prosecution further contends that Karadžić has waived any claim of privilege over his assembly statements since he did not appeal the Oral Decision of 7 November 2013 or claim that assembly records and statements, including his own, could not be admitted at trial and that there are no special circumstances warranting appellate intervention given that throughout the entire trial Karadžić benefited from expert legal advice.[808]

311. Karadžić replies that he has not waived the argument that the parliamentary privilege should apply to statements made by him before parliamentary assembly sessions and that, in any event, the Appeals Chamber should exercise its discretion to address it particularly given that, at trial, he was

[803] *See* T. 7 November 2013 p. 43150 ("Oral Decision of 7 November 2013").
[804] Karadžić Notice of Appeal, p. 10; Karadžić Appeal Brief, paras. 395, 402; T. 23 April 2018 pp. 120-122; T. 24 April 2018 pp. 245, 246. Karadžić states that, under the doctrine of parliamentary privilege, statements made in parliament by a member of parliament or a person appearing before it cannot be used against that person in civil or criminal actions and submits that the proceedings of a legislative body "are absolutely privileged and words spoken in the course of a proceedings in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution". *See* Karadžić Appeal Brief, paras. 396, 399.
[805] Karadžić Appeal Brief, paras. 395, 402, 405. Karadžić argues that those statements "permeated" the Trial Chamber's findings on the existence of the Overarching JCE and his responsibility, as well as its finding that he had genocidal intent in relation to Srebrenica. Karadžić Appeal Brief, paras. 403, 404.
[806] Karadžić Appeal Brief, para. 405.
[807] Prosecution Response Brief, paras. 221, 222. *See also* T. 23 April 2018 p. 169.
[808] Prosecution Response Brief, para. 221; T. 23 April 2018 pp. 167, 168, 184, 185; T. 24 April 2018 p. 279.

a self-represented accused.[809] He further disputes the Prosecution's contention that the parliamentary privilege does not apply to him.[810]

312. The Appeals Chamber recalls that, as a general principle, a party should not be permitted to refrain from objecting to a matter which was apparent during the course of the trial, only to raise it in the event of an adverse finding.[811] Further, it is settled jurisprudence that, if a party raises no objection to a particular issue before the 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 its right to adduce the issue as a valid ground of appeal.[812]

313. While Karadžić contests the Trial Chamber's holding regarding parliamentary privilege, he only refers to the Oral Decision of 7 November 2013, which only addressed the testimony of Krajišnik.[813] Karadžić, however, does not refer to any objection he made during his trial concerning the use of statements made by him in various parliamentary assembly sessions. This omission is glaring, particularly in view of the fact that, even prior to trial, the Prosecution indicated its intention to rely on his statements in parliamentary assembly sessions to prove that he was a member of the Overarching JCE.[814] Moreover, Karadžić's submissions before the Trial Chamber acknowledged that an accused may have to object to the introduction in his own trial of his statements made during parliamentary assembly sessions.[815]

314. Karadžić's submissions on appeal also appear at odds with the position he took concerning the use of statements made during parliamentary assembly sessions at trial. Specifically, Karadžić stated that "[w]e have no objection whatsoever to the admission of all the transcripts of all the [parliamentary assembly] sessions, regardless of whether they were public sessions or secret sessions, or, rather, ones closed to the public. Everything the Serbs did, we have no objection […]".[816] Furthermore, Karadžić cited to transcripts and minutes of parliamentary assembly sessions and tendered such transcripts and minutes for admission during the trial, many of which contained

[809] Karadžić Reply Brief, paras. 113-116, 119; T. 24 April 2018 pp. 240, 245, 246.
[810] Karadžić Reply Brief, paras. 117, 118; T. 24 April 2018 pp. 245, 246.
[811] *Musema* Appeal Judgement, para. 127.
[812] *See, e.g., Prlić et al.* Appeal Judgement, para. 165; *Nyiramasuhuko et al.* Appeal Judgement, paras. 63, 1060, n. 157; *Popović et al.* Appeal Judgement, para. 176; *Bagosora and Nsengiyumva* Appeal Judgement, para. 31. *See also Orić* Decision of 17 February 2016, para. 14.
[813] *See* Karadžić Appeal Brief, para. 395, n. 539.
[814] Prosecution Pre-Trial Brief, paras. 77-87. *See also* Prosecution Pre-Trial Brief, paras. 23, 26, 34, 42, 90, 92, 100, 104, 108, 123, 139-141, 151, 167, 187, 268. The Appeals Chamber notes that "Assembly" in the Prosecution Pre-Trial Brief refers to the "Assembly of the Serbian People of Bosnia-Herzegovina (*later* National Assembly of *Republika Srpska*)". *See* Prosecution Pre-Trial Brief, Appendix F, p. 2.
[815] *See* T. 6 November 2013 p. 43095.
[816] *See* T. 27 April 2010 p. 1712.

his own statements made during such sessions.[817] Moreover, Karadžić relied on such statements at trial and has continued to rely on them on appeal.[818]

315. In light of the above, the Appeals Chamber finds that Karadžić has waived his right to appeal this issue and has not demonstrated the existence of special circumstances that would warrant the consideration of this argument for the first time on appeal.

316. For the foregoing reasons, the Appeals Chamber dismisses Ground 24 of Karadžić's appeal.

[817] T. 15 April 2010 pp. 1245-1247; T. 27 April 2010 pp. 1712-1736; T. 10 June 2010 pp. 3661-3665; T. 15 July 2010 pp. 5202-5213; T. 20 August 2010 p. 6072; T. 30 June 2011 pp. 15742-15744; T. 24 April 2012 pp. 27927-27930. *See also* Exhibits D27, D82, D83, D84, D85, D86, D87, D88, D89, D90, D92, D115, D304, D456.
[818] Karadžić Final Trial Brief, paras. 67, 83, 85, 89, 269, 280; Karadžić Appeal Brief, paras. 474-476, 501-503, *referring to* Exhibits P961, P1403, D90.

20. Alleged Error in Excluding Defence Evidence on the Basis of the *Tu Quoque* Principle (Ground 25)

317. On 28 November 2012, the Trial Chamber considered the Prosecution's request to exclude parts of the proposed Rule 92 *ter* statement of Branislav Dukić, tendered by Karadžić, and decided to exclude the statement in its entirety.[819] The Trial Chamber noted that Dukić's statement concerned almost entirely crimes committed against Serbs and was not relevant to the charges in the Indictment while Dukić's references to the positions and military activity of the ABiH and the Bosnian Croat forces in and around Sarajevo were minimal and general in nature and, as such, did not warrant admission.[820] On 30 November 2012, the Trial Chamber considered that parts of the statement of Defence Witness Goran Sikiraš tendered by Karadžić, concerned crimes committed against Bosnian Serbs in Vogošća that were not relevant to the charges in the Indictment and reminded Karadžić that it would not admit "detailed *tu quoque* evidence under the guise of relevance".[821] The Trial Chamber admitted the remainder of the statement noting that it was "of some relevance to the background to the take-over of Vogošća".[822] Similarly, on 24 January 2013, 12 February 2013, and 31 May 2013, the Trial Chamber found that parts of the tendered statements of Defence Witnesses Milan Mandić, Vidomir Banduka, and Nenad Kecmanović related to crimes targeting Bosnian Serbs and, as such, were irrelevant to the charges in the Indictment and thus inadmissible.[823] The Trial Chamber admitted the remainder of these statements.[824]

318. Karadžić submits that the Trial Chamber erred in excluding relevant evidence on the incorrect basis that he was relying on *tu quoque* evidence.[825] Specifically, he maintains that the evidence was tendered to establish the existence of legitimate military targets in civilian areas, the aim of protecting Serb areas around Sarajevo, and that crimes committed at the local level were acts of revenge rather than organized crimes committed at the direction of members of the relevant joint criminal enterprise.[826] He argues that the Trial Chamber's error led to a number of adverse findings,

[819] T. 28 November 2012 pp. 30518, 30519.
[820] T. 28 November 2012 pp. 30518, 30519.
[821] T. 30 November 2012 pp. 30687, 30688.
[822] T. 30 November 2012 p. 30688.
[823] T. 24 January 2013 p. 32696; T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[824] T. 31 January 2013 pp. 33058, 33059; T. 12 February 2013 p. 33488, T. 31 May 2013 p. 39084.
[825] *See* Karadžić Notice of Appeal, pp. 10, 11; Karadžić Appeal Brief, paras. 406-424; Karadžić Reply Brief, paras. 120-122. Karadžić submits that the *tu quoque* principle is not a legitimate defence. *See* Karadžić Appeal Brief, para. 407, *referring to Kunarac et al.* Appeal Judgement, para. 87 ("when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.") (internal citations omitted).
[826] Karadžić Appeal Brief, para. 422; Karadžić Reply Brief, para. 121.

including that the Bosnian Serbs engaged in indiscriminate attacks on civilian objects in Sarajevo and intended to inflict terror on the civilian population, as well as to his convictions under Counts 3 through 10 of the Indictment.[827] He contends that the Appeals Chamber should order a re-trial in which the excluded evidence can be considered.[828]

319. The Prosecution responds that the Trial Chamber correctly denied admission of the proposed *tu quoque* evidence and that Karadžić failed to demonstrate a legitimate purpose for its admission.[829] The Prosecution submits that Karadžić fails to show abuse of the Trial Chamber's discretion in excluding the entirety of Dukić's evidence on the basis that his non-*tu quoque* evidence was vague, general, and thus of low probative value.[830] The Prosecution also argues that Karadžić fails to establish prejudice as he has not shown how the allegations of crimes against Serbs described in the excluded material were necessary to make his defence arguments given that they were duplicative of other evidence on the trial record that was duly considered by the Trial Chamber.[831]

320. Karadžić replies that the Prosecution's submission that the excluded statements duplicated other evidence ignores the importance of corroboration and undermines the Prosecution's "central

[827] Karadžić Appeal Brief, para. 423; Karadžić Reply Brief, para. 121. Karadžić maintains that, having excluded Dukić's evidence showing that the VRS was firing at military targets, the ABiH had turned buildings dedicated to civilian purposes in Sarajevo into artillery and sniping strongholds, and the ABiH in Sarajevo had heavy artillery weapons at its disposal, the Trial Chamber found that the Serbs continuously targeted civilians in Sarajevo and used disproportionate and indiscriminate fire, Sarajevo hospitals were not used for military purposes by the ABiH, ABiH locations were far from the site of a Scheduled Incident in the Indictment, and the majority of the ABiH's arsenal in Sarajevo consisted of small arms and mortars with small quantities of artillery weapons. *See* Karadžić Appeal Brief, paras. 409-411. He also maintains that, having excluded portions of Witness Sikiraš's evidence concerning the May 1992 attacks launched by Bosnian Muslims on Serbs in the Velešići area of Sarajevo, the Trial Chamber found that in May 1992 Mladić had ordered indiscriminate and disproportionate shelling of Muslim civilians in Velešići because no Serbs were there, and that the goal of the blockade of Sarajevo was to pressure the Muslim authorities and civilians. *See* Karadžić Appeal Brief, para. 412; Karadžić Reply Brief, para. 121. Karadžić also submits that the excluded evidence of Witnesses Kecmanović, Mandić, and Banduka corroborated other evidence showing that one of the main goals of the VRS in Sarajevo was to defend and protect Serb civilians and territories from ABiH attacks rather than terrorise the Muslim population in Sarajevo. *See* Karadžić Appeal Brief, paras. 413-416.

[828] Karadžić Appeal Brief, para. 424.

[829] *See* Prosecution Response Brief, paras. 224-236.

[830] Prosecution Response Brief, paras. 226, 229.

[831] Prosecution Response Brief, para. 227. Specifically, the Prosecution submits that the Trial Chamber relied on evidence on the trial record and noted in the Trial Judgement that the ABiH operated from civilian locations, including a hospital and a school referred to by Dukić in his proposed statement, and that Dukić's unsubstantiated assertions on types of ABiH weaponry were duplicative of evidence referred to in the Trial Judgement on this matter. *See* Prosecution Response Brief, paras. 230-232. The Prosecution also submits that Karadžić fails to explain how Witness Sikiraš's claim, which was similar to other evidence that was before the Trial Chamber, could have impacted the Trial Chamber's interpretation of Mladić's comment made during Scheduled Incident G.1 in which he ordered the shelling of Velešići and added that "there is not much Serb population [in Velešići]". *See* Prosecution Response Brief, para. 234. As to Witnesses Kecmanović, Mandić, and Banduka, the Prosecution maintains that the Trial Chamber admitted other evidence suggesting that the ABiH in Sarajevo aimed to protect and defend Serb territories around Sarajevo from ABiH attack, that Serbs in Sarajevo were being detained and mistreated, and evidence regarding Bosnian Muslim crimes in Hadžići, and that Karadžić fails to demonstrate how the excluded evidence would have altered the Trial Chamber's analysis. *See* Prosecution Response Brief, paras. 235, 236.

argument" as, in his view, the admission of similar evidence indicates its relevance to substantive issues in the proceedings.[832]

321. The Appeals Chamber recalls that, pursuant to Rule 89(C) of the ICTY Rules, trial chambers have discretion to admit relevant evidence that has probative value.[833] The admissibility of evidence related to crimes committed by adversaries depends on the purpose for which it is adduced and whether it tends to refute allegations made in the indictment, while it is for the defence to clarify to the trial chamber the purpose of tendering such evidence.[834] In determining the admissibility of evidence, trial chambers enjoy considerable discretion and the Appeals Chamber must accord deference to their decisions in this respect.[835] The Appeals Chamber's examination of challenges concerning a trial chamber's refusal to admit material into evidence is limited to establishing whether the trial chamber abused its discretion by committing a discernible error.[836]

322. The Appeals Chamber notes that the Trial Chamber thoroughly reviewed the proposed evidence and found that Karadžić had failed to demonstrate how the parts concerning crimes committed against Serbs related to an issue at trial.[837] Specifically, the Trial Chamber considered that the proposed evidence of Dukić included detailed descriptions of crimes committed against him and other Serbs, which were not relevant to the charges in the Indictment.[838] The Trial Chamber dismissed Karadžić's submission that Witness Sikiraš's evidence concerning crimes committed against Bosnian Serbs in Vogošća showed that Bosnian Serbs did not make unprovoked attacks there but participated "in a civil war in which each side attacked the other".[839] It found that the crimes on which Karadžić sought to rely were not relevant to the charges in the Indictment but admitted the parts of the witness's statement relating to the "take-over of Vogošća".[840] The Trial Chamber also found that two paragraphs in the proposed statement by Witness Mandić related to crimes targeting Bosnian Serbs and found these inadmissible as irrelevant.[841] In the same vein, the Trial Chamber found parts of Witness Banduka's and Witness Kecmanović's proposed statements

[832] Karadžić Reply Brief, para. 122.
[833] *Tolimir* Appeal Judgement, para. 564; *Kupreškić et al.* Appeal Judgement, para. 31.
[834] *See, e.g., Kunarac et al.* Appeal Judgement, para. 88, n. 104. *Cf. Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Praljak Defence Motion for Admission of Documentary Evidence, 1 April 2010 (originally filed in French, English translation filed on 23 April 2010), para. 80; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Decision on Defence Motion for Clarification of the Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination Pursuant to Rule 90 (H) of the Rules, 28 January 2004 (originally filed in French, English translation filed on 4 February 2004), p. 4; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999, p. 5.
[835] *Prlić et al.* Appeal Judgement, paras. 143, 151; *Šainović et al.* Appeal Judgement, paras. 152, 161.
[836] *Šainović et al.* Appeal Judgement, paras. 152, 161, *referring to Prlić et al.* Decision of 12 January 2009, para. 5.
[837] T. 28 November 2012 pp. 30518, 30519; T. 30 November 2012 pp. 30687, 30688; T. 24 January 2013 p. 32696; T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[838] T. 28 November 2012 p. 30518.
[839] T. 30 November 2012 pp. 30687, 30688. *See also* T. 30 November 2012 p. 30689.
[840] T. 30 November 2012 pp. 30687, 30688; Exhibit D2540, pp. 1-3.

that referred to detention facilities established by Bosnian Muslim authorities and the mistreatment of Serbs not relevant to the Indictment and, as such, inadmissible.[842] Having reviewed the proposed evidence, the Appeals Chamber is not convinced by Karadžić's submissions that the excluded parts "establish the existence of legitimate military targets", "the goal of protecting Serb areas", or that "crimes committed at the local level were acts of revenge".[843] Considering that it is for the party tendering material to show the indicia of relevance required for it to be admissible under Rule 89(C) of the ICTY Rules,[844] the Appeals Chamber finds that Karadžić fails to demonstrate discernible error on the part of the Trial Chamber in denying admission.

323. In addition, the Appeals Chamber notes that, contrary to Karadžić's submission, the scant references to material issues in Dukić's evidence were not excluded on *tu quoque* grounds but for their low probative value.[845] In particular, the Trial Chamber considered that his references to the positions and military activity of the ABiH and the Bosnian Croat forces in and around Sarajevo were not only minimal but also general in nature and were thus insufficient in and of themselves to warrant admission.[846] Having reviewed the references in question and considering that the criteria for admission of evidence set out in Rule 89(C) of the Rules are cumulative, that the tendering party bears the burden of showing that these are met, and the deference accorded to trial chambers on matters related to the admissibility of evidence,[847] the Appeals Chamber finds that Karadžić fails to demonstrate discernible error on the part of the Trial Chamber. The Appeals Chamber therefore finds that Karadžić fails to show that the Trial Chamber abused its discretion in concluding that the proposed evidence was not sufficiently relevant or probative to merit admission.

324. Based on the foregoing, the Appeals Chamber dismisses Ground 25 of Karadžić's appeal.

[841] T. 24 January 2013 p. 32696.
[842] T. 12 February 2013 p. 33424; T. 31 May 2013 pp. 39083, 39084.
[843] Karadžić Appeal Brief, para. 422.
[844] *Šainović et al.* Appeal Judgement, para. 162, *referring to Prlić et al.* Decision of 12 January 2009, para. 17.
[845] *See* T. 28 November 2012 pp. 30518, 30519.
[846] T. 28 November 2012 pp. 30518, 30519.
[847] *Prlić et al.* Appeal Judgement, para. 143; *Šainović et al.* Appeal Judgement, para. 163, *referring to Prlić et al.* Decision of 12 January 2009, para. 17.

21. Alleged Errors Concerning the Testimony of Radivoje Miletić (Ground 26)

325. On 9 May 2013, the Trial Chamber granted Karadžić's request to subpoena General Radivoje Miletić, the former VRS Chief of Administration, to testify.[848] The Trial Chamber considered that the issues upon which Miletić would provide evidence pertained to Karadžić's "responsibility for crimes committed pursuant to the alleged joint criminal enterprise to eliminate the Bosnian Muslims of Srebrenica [...] and his *mens rea* for the crime of genocide charged in Count 2 and for other crimes charged in Counts 3 to 8 of the Indictment" and, therefore, would "materially assist [Karadžić] with respect to those clearly identified issues relevant to his case."[849] The Trial Chamber further found that, by virtue of Miletić's former position, he was "uniquely situated" to give evidence about the specific identified issues and, given the scope of his anticipated evidence, it was "not obtainable through other means."[850] On 4 February 2014, Miletić requested that his testimony be postponed, stating that it would not be possible for him to testify due to health reasons,[851] and the Trial Chamber, *proprio motu*, vacated the subpoena after considering the impact on Miletić's health if he were to testify.[852]

326. On 18 February 2015, several months after the completion of closing arguments, Karadžić requested leave to re-open the Defence case to call Miletić.[853] On 3 March 2015, the Trial Chamber denied the request considering that there was "nothing before the Chamber which would suggest that Miletić's health condition [had] improved to such an extent that the medical issues which were the basis for vacating the subpoena, [were] no longer a concern."[854] The Trial Chamber also noted that "the decision whether or not to re-open a case at [a] very advanced stage of proceedings involves a very different assessment from the initial decision to subpoena a witness."[855]

327. Subsequently, on 14 April 2015, Karadžić renewed his request, submitting that Miletić's medical issues were no longer a concern[856] and that the probative value of his evidence outweighed

[848] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Subpoena Radivoje Miletić, 9 May 2013 ("Decision on Miletić's Subpoena"), paras. 1, 2, 17.
[849] Decision on Miletić's Subpoena, para. 13.
[850] Decision on Miletić's Subpoena, para. 14.
[851] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Request of Radivoje Miletić to Postpone His Court Appearance, 7 February 2014 (confidential), paras. 3, 7.
[852] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request by Radivoje Miletić to Postpone Date of Testimony, 13 February 2014 (confidential), paras. 11, 13.
[853] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Sixth Motion to Re-Open Defence Case: General Mileti[ć]'s Testimony, 18 February 2015 (confidential) ("Motion of 18 February 2015"), para. 1.
[854] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixth Motion to Re-open Defence Case, 3 March 2015 (confidential) ("Decision of 3 March 2015"), paras. 13, 15.
[855] Decision of 3 March 2015, para. 14.
[856] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to Re-Open Defence Case No. Six *bis*: General Mileti[ć] Testimony, 14 April 2015 (confidential) ("Motion of 14 April 2015"), paras. 1, 18, 21.

the impact that might result from any delay.[857] The Trial Chamber denied the renewed request, finding that the case was at an advanced stage, that there was "lack of detail" on the content of Miletić's proposed evidence, and that, in any case, nothing suggests that the evidence would have such probative value, in light of other evidence on the record.[858]

328. Karadžić submits that, by refusing to re-open the case and hear Miletić's evidence, the Trial Chamber abused its discretion and violated his right to a fair trial and that a new trial should be ordered where the evidence can be heard.[859] In particular, he contends that the Trial Chamber's emphasis on the late "stage of the deliberations" as a basis for rejecting the request resulted in an erroneous assessment.[860] He further contends that the Trial Chamber erred in its assessment of the probative value of the evidence.[861] He argues that Miletić's evidence was directly relevant to Karadžić's alleged knowledge of, agreement to, and participation in the joint criminal enterprise to kill Bosnian Muslim men as well as to Karadžić's intent to eliminate the Bosnian Muslims of Srebrenica.[862]

329. The Prosecution responds that the Trial Chamber's denial of Karadžić's request to re-open his case was a proper and reasonable exercise of its discretion[863] and that Karadžić has failed to show how Miletić's testimony would have impacted the Trial Judgement.[864] In particular, the Prosecution contends that the Trial Chamber properly assessed the probative value of Miletić's

[857] Motion of 14 April 2015, para. 20.
[858] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Sixth *Bis* Motion to Re-Open Defence Case, 7 May 2015 ("Decision of 7 May 2015"), paras. 15-17.
[859] Karadžić Appeal Brief, paras. 426, 445, 446; T. 23 April 2018 pp. 116-118. *See also* Karadžić Notice of Appeal, p. 11.
[860] Karadžić Appeal Brief, para. 437. In support of this argument, Karadžić suggests that the Trial Chamber failed to assess whether a party would be prejudiced, rather than whether the Trial Chamber itself would be inconvenienced, and argues that any delay resulting from hearing Miletić's evidence would have been "*de minimis*". Karadžić Appeal Brief, para. 437. Karadžić further argues that a survey of cases where proceedings were re-opened and resulted in similar or greater delays than that anticipated in his case reflects that the Trial Chamber's refusal to re-open the Defence case is contrary to precedent and demonstrates an abuse of its discretion. *See* Karadžić Appeal Brief, paras. 439-443.
[861] Karadžić Appeal Brief, paras. 428, 436.
[862] Karadžić Appeal Brief, paras. 430-436. *See also* Karadžić Reply Brief, paras. 124, 126, 128; T. 23 April 2018 pp. 116-118. Karadžić suggests that the Trial Chamber made "about-faces" in finding that Miletić's evidence lacked sufficient probative value to justify re-opening the case as it contradicted its earlier findings on the potential significance of the evidence in question, as set forth in the Decision on Miletić's Subpoena. Karadžić Appeal Brief, paras. 428, 429, 430, 432. In this respect, Karadžić observes that, when issuing the subpoena, the Trial Chamber found that "Mileti[ć] is uniquely situated to give evidence regarding the Accused's knowledge of and/or involvement in the alleged execution of prisoners from Srebrenica", yet, in denying the request to re-open the Defence case, found that "there was nothing to suggest that Mileti[ć]'s evidence would be so probative with respect to the issues of President Karadžić's *mens rea* for genocide and forcible transfer so as to warrant re-opening the defence case." Karadžić Appeal Brief, para. 429, *referring to* Decision on Miletić's Subpoena, para. 14; Decision of 7 May 2015, para. 16. *See also* Karadžić Reply Brief, paras. 124, 126, 128.
[863] Prosecution Response Brief, para. 237.
[864] *See* Prosecution Response Brief, paras. 237-244; T. 23 April 2018 pp. 185-188. The Prosecution submits that the fact that other trial chambers re-opened cases in different circumstances does not show that the Trial Chamber abused its discretion because, unlike in this case, in the other cases the trial chambers found the probative value of the proposed evidence to be sufficient to warrant re-opening despite any possible delays. *See* Prosecution Response Brief, para. 240.

evidence in light of other evidence already on the record.[865] The Prosecution also submits that Karadžić has not shown how Miletić's proposed evidence, which the Trial Chamber found lacking in probative value on the very issues for which Karadžić sought his testimony, could have impacted the Trial Judgement.[866] In this respect, it contends that Karadžić's submissions concerning the potential probative value of Miletić's evidence are contradicted by Miletić's Rule 65 *ter* Summary, which suggested minimal contact with Karadžić,[867] and that specific aspects of Miletić's proposed evidence are cumulative of evidence from other VRS officers which the Trial Chamber rejected.[868]

330. The Appeals Chamber recalls that matters related to the management of trial proceedings, including the decision to re-open a party's case, fall within the discretion of the trial chamber.[869] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[870]

331. In support of this ground of appeal, Karadžić highlights findings in the Trial Judgement and argues that Miletić's evidence was "directly relevant" to such findings.[871] In particular, Karadžić identifies three specific factual findings in the Trial Judgement as "crucial" to the Trial Chamber's ultimate determination of Karadžić's individual criminal responsibility for crimes committed in Srebrenica.[872] As discussed below, irrespective of whether the Trial Chamber erred in declining to re-open the Defence case to hear Miletić, the Appeals Chamber concludes that Karadžić has not demonstrated that Miletić's evidence could have impacted the Trial Chamber's findings with respect to Karadžić's individual criminal responsibility for the crimes in Srebrenica.

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[865] Prosecution Response Brief, para. 238. The Prosecution also suggests that Karadžić's submission that the Trial Chamber acted inconsistently in first issuing a subpoena for Miletić and then denying Karadžić's re-opening request ignores the fact that the decisions were made at markedly different stages of proceedings with the latter coming after the Trial Chamber had heard other Defence witnesses on similar topics and after it had already admitted some of the exhibits associated with Miletić. Prosecution Response Brief, para. 238.

[866] Prosecution Response Brief, para. 241. *See also* T. 23 April 2018 pp. 185-188.

[867] Prosecution Response Brief, para. 242, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Supplemental Rule 65 *ter* Summary and List of Exhibits for General Radivoje Mileti[ć], 18 June 2013 ("Miletić Rule 65 *ter* Summary"), p. 2. *See also* T. 23 April 2018 pp. 185-188.

[868] Prosecution Response Brief, paras. 243, 244. The Prosecution further argues that, in his own response to Karadžić's subpoena request, Miletić downplayed his knowledge and authority, claiming: (i) he was outside the "narrow command circle"; (ii) his knowledge of directives was limited to "technical aspects"; and (iii) he lacked first-hand knowledge of the July 1995 events in Srebrenica. Prosecution Response Brief, para. 241. The Prosecution also suggests that Miletić's conviction for his involvement in forcibly transferring Srebrenica Muslims and the finding that he told others to withhold relevant information from the ICTY limit the credibility of his proposed evidence. Prosecution Response Brief, para. 241.

[869] *See Prlić et al.* Appeal Judgement, paras. 26, 119; *Šainović et al.* Appeal Judgement, para. 29; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Re-open the Prosecution Case, 1 July 2010, para. 5; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008, para. 3.

[870] *Stanišić and Župljanin* Appeal Judgement, para. 470; *Nyiramasuhuko et al.* Appeal Judgement, paras. 68, 138, 185, 295, 431, 2467; *Popović et al.* Appeal Judgement, para. 131; *Nizeyimana* Appeal Judgement, para. 286.

[871] *See* Karadžić Appeal Brief, paras. 430-436.

[872] *See* Karadžić Appeal Brief, paras. 430-436, *referring to* Trial Judgement, paras. 5805, 5830, 5799.

332. Karadžić refers to the Trial Chamber's finding that he acquired knowledge of the VRS's plan to kill the prisoners from Srebrenica sometime before his conversation with Miroslav Deronjić on 13 July 1995, during which he manifested his agreement with the plan to kill the prisoners and ordered that they be transferred to Zvornik.[873] Karadžić suggests that Miletić was prepared to testify that: (i) "he never informed President Karad[ž]i[ć], either in writing or orally, that prisoners from Srebrenica would be, were being, or had been executed";[874] (ii) he "never saw any reference to killing prisoners from Srebrenica in any written VRS reports";[875] (iii) "never knew of any plan to kill prisoners from Srebrenica";[876] (iv) [REDACTED];[877] and (v) "based upon his knowledge of President Karad[ž]i[ć], he could not imagine that he would ever favour or condone the execution of prisoners".[878] This evidence, Karadžić asserts, was directly relevant to the Trial Chamber's findings of Karadžić's "knowledge of and agreement to the JCE to kill the men."[879]

333. The Appeals Chamber observes that the Trial Chamber found that Karadžić "adopted and embraced" the plan to kill Bosnian Muslim men and boys in Srebrenica during the intercepted conversation with Deronjić on the evening of 13 July 1995, when he issued what the Trial Chamber found to be a coded direction to transfer detainees to Zvornik where they would be executed.[880] It found that this conversation, along with various subsequent acts – including disseminating false information to the media, publicly congratulating units involved in the killing operation in Zvornik, and failing to initiate investigations or prosecutions of the direct perpetrators of the crimes committed in Bratunac and Zvornik – demonstrated Karadžić's agreement to the expansion of the objective of the joint criminal enterprise to encompass the killing of Bosnian Muslim males.[881]

334. The Appeals Chamber notes that Karadžić does not claim that Miletić could have testified as to the content of the relevant phone call or about Karadžić's subsequent acts upon which the Trial Chamber relied to infer his agreement to the killing of Bosnian Muslim males. While Karadžić asserts that [REDACTED], the Appeals Chamber notes that Karadžić has not explained how Miletić's [REDACTED] could have affected the Trial Chamber's consideration of the evidence of the intercepted conversation with Deronjić on the evening of 13 July 1995.

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[873] Karadžić Appeal Brief, para. 430, *referring to* Trial Judgement, para. 5805.
[874] Karadžić Appeal Brief, para. 431, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena: General Radivoje Mileti[ć], 2 April 2013, para. 7.
[875] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 2.
[876] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 2.
[877] Karadžić Appeal Brief, para. 431, *referring to* [REDACTED].
[878] Karadžić Appeal Brief, para. 431, *referring to* Miletić Rule 65 *ter* Summary, p. 3.
[879] Karadžić Appeal Brief, para. 432.
[880] Trial Judgement, paras. 5805, 5811.
[881] *See* Trial Judgement, paras. 5811-5814.

335. The Appeals Chamber also observes that, while the Trial Chamber could only make a positive determination about Karadžić's agreement to the expanded objective of the joint criminal enterprise encompassing the killing of Bosnian Muslim men and boys as of the conversation with Deronjić on the evening of 13 July 1995, it determined that Karadžić must have known about the plan to kill prior to the conversation.[882] In inferring both his prior knowledge and "contemporaneous" knowledge of the progress of the killings that followed the conversation with Deronjić, the Trial Chamber found that Karadžić was receiving relevant information from multiple channels.[883]

336. The Appeals Chamber therefore finds that Karadžić has not demonstrated that Miletić's proposed evidence about his own lack of knowledge of the killings or the fact that he himself did not inform Karadžić could have impacted the relevant findings of the Trial Chamber. Similarly, given that the Trial Chamber acknowledged that it did not receive evidence that written reports which reached Karadžić mentioned killings of Bosnian Muslim prisoners,[884] the Appeals Chamber finds that Karadžić has not demonstrated that Miletić's proposed evidence regarding lack of references to killings in written VRS reports could have affected the relevant conclusions. Finally, in light of the other and more concrete evidence relied upon by the Trial Chamber to make findings that Karadžić had knowledge of and agreed to the expanded purpose of the joint criminal enterprise, the Appeals Chamber finds that Karadžić has not demonstrated that Miletić's proposed evidence that "he could not imagine that [Karadžić] would ever favour or condone the execution of prisoners" could have impacted any of the relevant findings.

337. Karadžić also refers to what he describes as the Trial Chamber's finding that "Karad[ž]i[ć] opposed opening a corridor to allow the men from the column which had left Srebrenica to pass to Bosnian Muslim territory, and that this demonstrated that President Karadžić shared the intent to destroy the group."[885] He argues that Miletić "was privy to President Karad[ž]i[ć]'s inquiries to the VRS Main Staff about the corridor on 16 July" and "never received any information or impression

[882] Trial Judgement, para. 5811.
[883] *See* Trial Judgement, paras. 5801-5812, 5830.
[884] Trial Judgement, para. 5801. The Trial Chamber noted, however, that, beginning on 12 July 1995, the daily combat reports described the transport of the Bosnian Muslim population, the existence of the movement of the column attempting the reach Tuzla, as well as Bosnian Serb forces' attempts to block the progress of the column, and on 13 and 14 July 1995, the reports described capture and surrender of large numbers of men from the column and continuing efforts to block the progress of the column. It also noted Popović's direction to Jokić not to make a record of killings. *See* Trial Judgement, para. 5801.
[885] Karadžić Appeal Brief, para. 433, *referring to* Trial Judgement, para. 5830. *See also* Karadžić Reply Brief, para. 127.

that President Karad[ž]i[ć] wanted the corridor closed",[886] and therefore that his testimony could "have refuted the key element used to establish President Karad[ž]i[ć]'s genocidal intent."[887]

338. The Appeals Chamber observes that the closure of the corridor was not the "key element" relied upon by the Trial Chamber to infer that Karadžić shared "the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed."[888] The Trial Chamber relied upon a number of elements, including Karadžić's awareness that thousands of Bosnian Muslim men, constituting a very significant percentage of the Bosnian Muslim males from Srebrenica, were held by Serb forces in the Srebrenica area, and further, that despite Karadžić's contemporaneous knowledge of the killings, he agreed to and did not intervene to halt or hinder the killing aspect of the plan to eliminate between 13 and 17 July 1995; rather, he ordered that the detainees be moved to Zvornik where they were killed.[889] While the Trial Chamber did rely upon the fact that Milenko Karišik was promptly sent to investigate Vinko Pandurević's decision to open the corridor and the corridor was closed within a day,[890] in this respect, it also had regard to later actions of Karadžić in relation to the column and the corridor, noting that "although [Karadžić] touted the opening of the corridor when speaking to the international press, in a closed session of the Bosnian Serb Assembly held weeks later, [he] expressed regret that the Bosnian Muslim males had managed to pass through Bosnian Serb lines."[891] The Appeals Chamber therefore finds that Karadžić has not demonstrated that Miletić's proposed evidence could have impacted the relevant Trial Chamber findings.

339. Finally, Karadžić refers to what he describes as the Trial Chamber's finding that "by signing [the Directive for Further Operations No. 7 ("Directive 7")], and reducing the humanitarian aid that reached Srebrenica, President Karad[ž]i[ć] demonstrated his intent that the Bosnian Muslims be forcibly transferred from Srebrenica."[892] He argues that "General Mileti[ć] was the person in the VRS Main Staff responsible for issues relating to humanitarian aid and who drafted Directive 7" and, according to him, "there was no plan to reduce humanitarian aid to the enclave resulting from Directive 7 or any other order of President Karad[ž]i[ć]'s, and neither President Karad[ž]i[ć] nor the

[886] Karadžić Appeal Brief, para. 434, *referring to* Miletić Rule 65 *ter* Summary, p. 3[REDACTED]. *See also* Karadžić Reply Brief, para. 128.
[887] Karadžić Appeal Brief, para. 434. The Appeals Chamber notes that Karadžić adds, in reply, that: "General Miletić played a significant role in monitoring the column and the corridor. He denied a request to open the corridor, and later ordered an investigation into its opening. As such General Miletić was in a unique position to exonerate Karad[ž]i[ć] on the issues relating to President Karadžić's role in the corridor and his alleged intent to destroy Srebrenica's Muslims, and could have done so if allowed to testify." Karadžić Reply Brief, para. 128 (internal references omitted).
[888] Trial Judgement, para. 5830.
[889] Trial Judgement, paras. 5829, 5830.
[890] Trial Judgement, para. 5830.
[891] Trial Judgement, para. 5830. The Appeals Chamber notes that Karadžić's precise words were "in the end several thousand fighters did manage to get through" and that "[we] were not able to encircle the enemy and destroy them." *See* Trial Judgement, para. 5474, *referring to* Exhibit P1412, p. 17.
[892] Karadžić Appeal Brief, para. 435, *referring to* Trial Judgement, para. 5799.

VRS Main Staff ever gave any orders to reduce humanitarian aid to Srebrenica after March 1995."[893]

340. The Appeals Chamber observes that the paragraph of the Trial Judgement cited by Karadžić makes no mention of Karadžić's "intent that the Bosnian Muslims be forcibly transferred from Srebrenica" and contains no finding that such intent was demonstrated by Karadžić "signing Directive 7, and reducing the humanitarian aid that reached Srebrenica."[894] Rather, the paragraph in question addresses actions taken by Karadžić, which, in the Trial Chamber's view, established that he was a "directing force" in the events leading up to the take-over of Srebrenica.[895]

341. With respect to its analysis of and findings in relation to Directive 7 and its implementation, the Trial Chamber noted the reference in Directive 7 to "creat[ing] an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa"[896] and, further, that this language was repeated in the "Order for Defence and Active Combat Operations, Operative No. 7", issued several days after Directive 7 was disseminated to the various VRS corps on or around 18 March 1995.[897] The Trial Chamber considered and rejected the evidence of several VRS officers that this was never "implemented in practice," because, among other reasons, it was contradicted by other evidence showing that Directive 7 was implemented on the ground.[898]

342. The Trial Chamber then made a number of findings relating to the restrictions on humanitarian convoys imposed by Bosnian Serb forces and the denial of access to a number of areas, which had occurred in practice,[899] and concluded that this aspect of Directive 7 was indeed implemented.[900] The Trial Chamber further found that the humanitarian situation deteriorated in Srebrenica following the issuance of Directive 7.[901] In making these findings, the Trial Chamber relied on evidence from multiple sources, including humanitarian agencies and their representatives,

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[893] Karadžić Appeal Brief, para. 435, *referring to* Miletić Rule 65 *ter* Summary, p. 2; [REDACTED].
[894] *See* Trial Judgement, para. 5799.
[895] *See* Trial Judgement, para. 5799. In this context, the Trial Chamber referred to its findings that Karadžić implemented Directive 7 by restricting access to Srebrenica and that this restriction allowed him to maintain control over goods and personnel entering the enclave during the months and weeks leading to its take-over. Trial Judgement, para. 5799, *referring to* Trial Judgement, paras. 5756-5759.
[896] Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 10.
[897] Trial Judgement, para. 4981, *referring to* Exhibit P3040, pp. 5, 6.
[898] Trial Judgement para. 4982. *See also* Trial Judgement, paras. 5004-5035. The Trial Chamber also noted that Directive 7 stipulated that relevant State and military organs responsible for work with UNPROFOR and humanitarian organizations should "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." Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 14.
[899] *See* Trial Judgement, paras. 4989-4991.
[900] Trial Judgement, para. 4991.
[901] *See* Trial Judgement, paras. 4989-4992.

as well as the VRS and individual VRS officers.[902] The Appeals Chamber is therefore not persuaded that Miletić's evidence could have impacted the relevant Trial Chamber findings.

343. In light of the foregoing, the Appeals Chamber finds that Karadžić has not demonstrated that the Trial Chamber's decision to deny his request to re-open the case to hear Miletić could have impacted any of the relevant Trial Chamber findings. Therefore, Karadžić has not demonstrated that the Trial Chamber's decision resulted in prejudice to him.

344. Based on the foregoing, the Appeals Chamber dismisses Ground 26 of Karadžić's appeal.

[902] *See, e.g.*, Trial Judgement, paras. 4989, 4991, 4992 and references cited therein.

22. Alleged Violation of the Right to an Impartial Tribunal (Ground 27)

345. [REDACTED] and his written statement was admitted into evidence.[903] [REDACTED] gave evidence related to events [REDACTED].[904] In convicting Karadžić of Counts 3 through 8 of the Indictment, the Trial Chamber relied in part on [REDACTED] evidence, along with other evidence, in connection with its findings on [REDACTED],[905] [REDACTED],[906] [REDACTED],[907] and [REDACTED],[908] [REDACTED],[909] and [REDACTED].[910]

346. [REDACTED].[911] At the time, [REDACTED],[912] who later became a judge of the Trial Chamber in this case.[913] [REDACTED] was not present during [REDACTED] testimony.[914] The Trial Judgement does not indicate whether [REDACTED] recused himself from deliberating on [REDACTED] evidence. Although Karadžić was aware of [REDACTED], he did not raise the issue before the Trial Chamber.[915]

347. Karadžić submits that the Trial Chamber erred in failing to provide him with a fair and impartial trial and in finding him guilty on Counts 3 through 8 of the Indictment on the basis of the evidence of [REDACTED].[916] According to Karadžić, [REDACTED].[917]

348. Karadžić also submits that the Trial Chamber violated Rule 15(A) of the ICTY Rules for failing to recuse [REDACTED] from the deliberations [REDACTED].[918] In this respect, Karadžić argues that in the course [REDACTED].[919] As a result, Karadžić asserts that a properly informed observer would have reasonably apprehended bias and that his right to an impartial tribunal was consequently violated.[920] In support, Karadžić refers to national legislation on the disqualification

[903] [REDACTED].
[904] [REDACTED].
[905] [REDACTED].
[906] [REDACTED].
[907] [REDACTED].
[908] [REDACTED].
[909] [REDACTED].
[910] [REDACTED].
[911] [REDACTED].
[912] [REDACTED].
[913] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Regarding Composition of a Bench of the Trial Chamber, 4 September 2009, p. 2.
[914] *See* [REDACTED].
[915] Karadžić Appeal Brief, n. 633; Karadžić Reply Brief, para. 133. [REDACTED].
[916] *See* Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 447-460.
[917] Karadžić Appeal Brief, paras. 451, 459.
[918] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 450, 458.
[919] Karadžić Appeal Brief, paras. 449, 451, 457.
[920] *See* Karadžić Appeal Brief, paras. 450-452.

of a judge and to jurisprudence concerning withdrawal in order to avoid the apprehension of bias.[921] Karadžić submits that [REDACTED] should have withdrawn from the deliberations concerning [REDACTED] evidence and allowed the reserve judge to take his place.[922] According to Karadžić, [REDACTED] participation in deliberations on [REDACTED] evidence violated his right to an impartial tribunal.[923]

349. The Prosecution responds that before trial Karadžić had been informed about [REDACTED] and that this information might be relevant to his right to challenge the composition of the bench.[924] Upon receiving this information, Karadžić stated that he was considering how to respond.[925] The Prosecution contends that his failure to raise this issue at trial was a tactical choice which is highlighted by the fact that he sought disqualification of another judge and even the entire bench, but that he had never raised the issue of [REDACTED].[926] The Prosecution further argues that Karadžić waived his right to raise this issue since he failed to raise it at the appropriate time, which was during the trial.[927]

350. The Prosecution also submits that [REDACTED] is not one that would have affected his impartiality within the meaning of Rule 15(A) of the ICTY Rules.[928] According to the Prosecution, a reasonable observer would not apprehend bias since they would conclude that [REDACTED] was able to examine the evidence in "an unprejudiced and impartial manner".[929] In addition, the Prosecution asserts that a reasonable observer would have been aware that [REDACTED] ended long before the trial started and that [REDACTED] did not reflect his personal opinions.[930]

351. In reply, Karadžić maintains that he has not waived his right to raise the issue on appeal and that it has been the practice of the Appeals Chamber to treat the issue of bias as a special circumstance that would justify consideration of the merits on appeal.[931] Karadžić maintains that [REDACTED] did not disqualify him from the entire case but that he should not have participated

[921] Karadžić Appeal Brief, paras. 454-456 *referring to* 28 U.S.C. 455(a), (b)(2), *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), *United States v. Ferguson and Joseph*, 550 F. Supp. 1256, 1260 (1982), *Hadler v. Union Bank and Trust Co. of Greensburg*, 765 F. Supp. 976, 979 (1991), *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988), *Fried v. National Australia Bank* [2000] FCA 787.
[922] Karadžić Appeal Brief, para. 458.
[923] Karadžić Appeal Brief, para. 458.
[924] Prosecution Response Brief, paras. 245, 246.
[925] Prosecution Response Brief, para. 246.
[926] Prosecution Response Brief, para. 246; T. 23 April 2018 p. 167.
[927] Prosecution Response Brief, paras. 246, 247; T. 23 April 2018 p. 167.
[928] Prosecution Response Brief, para. 249.
[929] Prosecution Response Brief, paras. 248, 249.
[930] Prosecution Response Brief, para. 249.
[931] Karadžić Reply Brief, para. 132, *referring to Šainović et al.* Appeal Judgement, para. 182.

in the deliberations on the evidence [REDACTED].[932] Karadžić further replies that this error is not rendered harmless since the two remaining judges deliberated on the evidence and it is unknown to what extent [REDACTED] contributed to the deliberations.[933]

352. The right of an accused to be tried before an independent and impartial tribunal is an integral component of the fundamental right to a fair trial.[934] Impartiality is a required quality for a judge at the Tribunal, and a judge may not sit in any case in which he has, or has had, any association which might affect his impartiality.[935] The Appeals Chamber observes that, as a general rule, a judge should not only be subjectively free from bias but also that nothing surrounding the circumstances would objectively give rise to an appearance of bias.[936]

353. Rule 15 of the ICTY Rules prescribes a specific procedure for challenging the participation of a judge in a case on the grounds of bias. The Appeals Chamber recalls, however, that a presumption of impartiality attaches to judges of the Tribunal which cannot be easily rebutted.[937] Where allegations of bias are raised on appeal, there is a high threshold to reach in order to rebut the presumption of impartiality and it is for the appealing party alleging bias to set forth substantiated and detailed arguments in support of demonstrating the alleged bias.[938]

354. The Appeals Chamber observes that, shortly after the assignment of [REDACTED] to the case, the Trial Chamber provided Karadžić with specific information concerning [REDACTED], which highlighted the relevance of this information to a potential challenge to the composition of the bench.[939] After receiving this information, Karadžić stated in a submission that he would respond to this information after the Trial Chamber decided on the scope of the case.[940] Ultimately, Karadžić did not pursue this matter at trial. The Appeals Chamber finds that Karadžić's inaction at

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[932] Karadžić Reply Brief, paras. 133, 134.
[933] Karadžić Reply Brief, para. 136.
[934] *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 11 and references cited therein; *Furundžija* Appeal Judgement, para. 177.
[935] Article 13 of the ICTY Statute; Rule 15(A) of the ICTY Rules. The requirement of impartiality is also explicitly stated in Rule 14(A) of the ICTY Rules, pursuant to which, upon taking up duties, a Judge solemnly declares to perform his duties and exercise his powers "impartially and conscientiously".
[936] *Renzaho* Appeal Judgement, para. 21; *Rutaganda* Appeal Judgement, para. 39; *Furundžija* Appeal Judgement, para. 189; *Čelebići* Appeal Judgement, para. 682.
[937] *See, e.g., Renzaho* Appeal Judgement, para. 21; *Nahimana et al.* Appeal Judgement, para. 48; *Rutaganda* Appeal Judgement, para. 42.
[938] *Renzaho* Appeal Judgement, para. 23, *referring to The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009, para. 10, *Karera* Appeal Judgement, para. 254, *Nahimana et al.* Appeal Judgement, paras. 47-90, *Ntagerura et al.* Appeal Judgement, para. 135, *Rutaganda* Appeal Judgement, para. 43, *Furundžija* Appeal Judgement, paras. 196, 197.
[939] [REDACTED].
[940] *See Prosecutor v. Radovan Karadžić*, Case No IT-95-05/18-PT, Response to Prosecution's Second Rule 73 *bis* Submission, 30 September 2009, n. 3.

trial in the face of his awareness of [REDACTED], which was specifically brought to his attention by the Trial Chamber, demonstrates that he did not object to [REDACTED] participation in his case at trial on the basis of an alleged apprehension of bias and could result in the possible waiver of this argument on appeal. Notwithstanding, in view of the fundamental importance of an impartial tribunal, the Appeals Chamber holds that it would not be appropriate to apply the waiver doctrine to Karadžić's allegation of error and will consider the matter.[941]

355. The Appeals Chamber considers that a fair-minded observer with sufficient knowledge of the specific circumstances would not apprehend bias. An informed observer would know that, [REDACTED].[942] [REDACTED] More importantly, an informed observer would know that the ICTY was established to hear a number of cases related to the same overall conflict and that ICTY judges will be faced with oral and material evidence relating to the same facts which, as highly qualified professional judges, will not affect their impartiality.[943] Moreover, as a trial chamber judge, [REDACTED] had the obligation to withdraw from the case if he considered that [REDACTED] might have affected his impartiality in the present case given his access to confidential information [REDACTED].[944] [REDACTED], however, did not withdraw. In the absence of evidence to the contrary, it is assumed that, by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.[945]

356. In any event, the Appeals Chamber recalls that where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement.[946] Having not demonstrated circumstances giving rise to an objective appearance of bias, the Appeals Chamber further observes that Karadžić's submissions on appeal in no way demonstrate prejudice as a result of [REDACTED] participation in his proceedings. Karadžić provides no references to the assessment of [REDACTED] evidence in the Trial Judgement to support the suggestion that the Trial Chamber's deliberations were impermissibly influenced by information [REDACTED].

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[941] *Cf. Nahimana et al.* Decision of 5 March 2007, para. 15, *referring to Niyitegeka* Appeal Judgement, para. 200.
[942] [REDACTED].
[943] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, para. 15.
[944] *See* Rule 15(A) of the ICTY Rules.
[945] *Karera* Appeal Judgement, para. 378, *referring to Nahimana et al.* Appeal Judgement, para. 78.
[946] *Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Ndindiliyimana et al.* Appeal Judgement, para. 29; *Šainović et al.* Appeal Judgement, para. 29 and references cited therein.

357. For the foregoing reasons, the Appeals Chamber finds that Karadžić does not demonstrate that [REDACTED] participation in this case deprived him of his right to an impartial tribunal. The Appeals Chamber dismisses Ground 27 of Karadžić's appeal.

B. Municipalities

1. Alleged Errors in Finding the Existence of a Common Plan of the Overarching JCE (Ground 28)

358. The Trial Chamber concluded that between October 1991 and 30 November 1995, the Overarching JCE existed with a common plan to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in Bosnia and Herzegovina through the crimes of deportation, inhumane acts (forcible transfer), persecution (forcible transfer and deportation), and persecution through the underlying acts of unlawful detention and the imposition and maintenance of restrictive and discriminatory measures as crimes against humanity.[947] It found that by virtue of the functions and positions held by Karadžić and through the impact of his acts and omissions, he significantly contributed to the Overarching JCE.[948]

359. In particular, the Trial Chamber found that, between 1990 and 1991, Karadžić and the Bosnian Serb leadership had a political objective to preserve Yugoslavia and to prevent the separation or independence of Bosnia and Herzegovina.[949] The Trial Chamber further found that, from October 1991, after it was clear that Bosnia and Herzegovina was pursuing the path of independence, the focus of Karadžić and the Bosnian Serb leadership "shifted" to the establishment of a Bosnian Serb state with the creation of parallel governmental structures followed by the physical take-over of territories.[950]

360. In this context, the Trial Chamber considered that through the issuance of Variant A/B Instructions[951] and Strategic Goals,[952] Karadžić and the Bosnian Serb leadership advocated and

[947] Trial Judgement, paras. 3447, 3462, 3466, 3505, 3524, 3525. Specifically, the scope of the Prosecution's case concerned the Bosnian municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Višegrad, Sokolac, Vlasenica, Zvornik, Banja Luka, Bosanski Novi, Ključ, Prijedor, Sanski Most, Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća ("Overarching JCE Municipalities"). *See* Trial Judgement, para. 592.
[948] Trial Judgement, paras. 3467-3505, 3524.
[949] Trial Judgement, paras. 2651, 3435.
[950] Trial Judgement, paras. 2941-2944, 3435.
[951] The Trial Chamber found that the Variant A/B Instructions were issued by the SDS Main Board and distributed by Karadžić in December 1991 with the stated purpose to "carry out the results of the plebiscite at which the Serbian people in Bosnia and Herzegovina decide to live in a single state" and to "increase mobility and readiness for the defence of the interests of the Serbian people". The instructions were a means of creating Serb authority in both Variant A (Serb-majority) and Variant B (Serb-minority) municipalities and the first level of their implementation required, *inter alia*: (i) SDS municipal boards to "establish immediately Crisis Staffs of the Serbian People in the municipality"; (ii) the proclamation of an assembly of the Serbian people to be composed of Serbian representatives in the municipal assembly and presidents of SDS local boards; and (iii) an estimate of the number of active and reserve police, Territorial Defence units, and civilian protection units and to bring these units "to full manpower" and take necessary action for their engagement depending on developments. The second level of the implementation of the Variant A/B Instructions called for, *inter alia*, convening a session of the Serb municipal assembly, establishing a municipal executive board and municipal state or government organs, mobilising and re-subordinating all Serb police forces in co-ordination with the JNA command and staff, and ensuring the implementation of the order for mobilisation of the JNA. *See* Trial Judgement, paras. 2992, 2993, 2995-2999. The Trial Chamber found that the instructions formed the basis on

planned a "territorial reorganisation" to allow Bosnian Serbs to control a large part of the Bosnian territory[953] and which created the basis for the structures through which their criminal purpose could be achieved.[954] The Trial Chamber found that ethnic separation and the creation of a largely ethnically homogenous territorial entity were some of the core aspects of the Strategic Goals and that Karadžić and the Bosnian Serb leadership planned the military implementation of these goals through the take-over of territory and the forcible movement of the non-Serb population.[955]

361. The Trial Chamber further found that the Serb forces and the Bosnian Serb Political and Governmental Organs forcibly displaced Bosnian Muslims and Bosnian Croats from their residences to other locations in Bosnia and Herzegovina or other countries,[956] which resulted in the change of the ethnic composition of the Overarching JCE Municipalities.[957] In light of the systematic and organized pattern of crimes which were committed in each of the Overarching JCE Municipalities over a short period of time, the Trial Chamber concluded that these crimes were committed in a coordinated manner.[958]

362. Karadžić submits that the Trial Chamber erred in concluding that he was a member of a joint criminal enterprise since the record allowed another inference: that he was part of a "joint political enterprise" the aim of which was "political autonomy, not physical separation through forced displacements".[959] In support of this contention, Karadžić challenges the assessment of evidence in relation to the Overarching JCE and submits that the Trial Chamber erred: (i) by adopting a selective approach in the assessment of the evidence; (ii) in its assessment of his statements; and (iii) in finding that there was a systematic expulsion of non-Serbs from *Republika Srpska*.[960]

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which Bosnian Serb Crisis Staffs, Bosnian Serb municipal assemblies, and other parallel political and military structures were established at the municipal level. *See* Trial Judgement, paras. 3075, 3077. The Trial Chamber further found that the structures and organs created pursuant to the Variant A/B Instructions, particularly the Crisis Staff, had a central role in the Bosnian Serb take-over in the municipalities and maintaining Bosnian Serb authority once the take-over was concluded. *See* Trial Judgement, para. 3437, *referring to* Trial Judgement, paras. 3072-3096.

[952] The Trial Chamber recalled that on 12 May 1992, during the 16th session of the Bosnian Serb Assembly, Karadžić presented and the Bosnian Serb Assembly adopted the Strategic Goals which were: (i) separation from the other two national communities and the separation of states; (ii) creation of a corridor between Semberija and Krajina; (iii) creation of a corridor in the Drina Valley; (iv) creation of a border on the Una and Nereveta Rivers; (v) division of the city of Sarajevo into Serbian and Muslim parts; and (vi) access of SerBiH to the sea. *See* Trial Judgement, para. 2857.

[953] Trial Judgement, paras. 3435, 3437-3439, *referring to* Trial Judgement, paras. 2839-2856.

[954] Trial Judgement, para. 3439.

[955] Trial Judgement, para. 3439, *referring to* Trial Judgement paras. 2895-2903.

[956] Trial Judgement, paras. 3442, 3443.

[957] Trial Judgement, para. 3442.

[958] Trial Judgement, paras. 3441-3446.

[959] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 461-521.

[960] Karadžić Appeal Brief, paras. 461-521.

363. The Appeals Chamber will address Karadžić's allegations in turn. Before doing so, the Appeals Chamber recalls that trial chambers have a broad discretion in weighing evidence[961] and are best placed to assess the credibility of a witness and the reliability of the evidence adduced.[962] In the context of the deference accorded to a trier of fact with respect to the assessment of evidence, it is within a trial chamber's discretion, *inter alia*, to: (i) evaluate any inconsistencies that may arise within or among witnesses' testimonies and consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence;[963] (ii) decide, in the circumstances of each case, whether corroboration of evidence is necessary or to rely on uncorroborated, but otherwise credible, witness testimony;[964] and (iii) accept a witness's testimony, notwithstanding inconsistencies between the said testimony and the witness's previous statements, as it is for the trial chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.[965]

(a) Alleged Selective Approach in the Assessment of Evidence

364. In the section of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber found that Karadžić and the Bosnian Serb leadership advocated and worked toward "a territorial re-organisation which would allow the Bosnian Serb leadership to claim control and ownership of a large percentage of the territory in [Bosnia and Herzegovina]."[966] It also found that, from November 1991, Karadžić and the Bosnian Serb leadership "spoke against Bosnian Muslims being allowed to stay in Bosnian Serb claimed territory and emphasised the importance of taking control of power and the creation of separate municipalities and municipal structures."[967] In reaching these conclusions, the Trial Chamber relied on, *inter alia*, a number of speeches and statements made by Karadžić and members of the Bosnian Serb leadership reflecting their intent to separate Bosnian Muslims and Bosnian Croats from the Bosnian Serb claimed territories.[968]

365. In addition, in the section of the Trial Judgement titled "Investigation and prosecution of crimes committed against non-Serbs", the Trial Chamber concluded that there was a "systemic

[961] *Ngirabatware* Appeal Judgement, para. 69; *Šainović et al.* Appeal Judgement, para. 490.
[962] *Popović et al.* Appeal Judgement, para. 513; *Šainović et al.* Appeal Judgement, para. 464. *See also Lukić and Lukić* Appeal Judgement, para. 296.
[963] *Popović et al.* Appeal Judgement, para. 1228; *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Nzabonimana* Appeal Judgement, para. 319.
[964] *Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, paras. 125, 138; *Ntawukulilyayo* Appeal Judgement, para. 21; *Dragomir Milošević* Appeal Judgement, para. 215.
[965] *Lukić and Lukić* Appeal Judgement, para. 234; *Hategekimana* Appeal Judgement, para. 190; *Kajelijeli* Appeal Judgement, para. 96.
[966] Trial Judgement, para. 2839. *See also* Trial Judgement, paras. 2851, 2855, 3435.
[967] Trial Judgement, para. 2840.
[968] Trial Judgement, paras. 2716-2773.

failure" on the part of the Serb authorities to investigate and prosecute criminal offences committed against non-Serbs in the Overarching JCE Municipalities relying, *inter alia*, on evidence from Prosecution Witnesses Branko Đjerić and Milorad Davidović.[969] According to the Trial Chamber, the inadequate level of investigation and prosecution of such crimes was consistent with Karadžić's position that such matters could be delayed during the conflict.[970]

366. Karadžić submits that in finding that he advocated the separation of the Bosnian Muslim and Bosnian Serb population and the creation of a Bosnian Serb state, the Trial Chamber adopted a selective approach to interpreting the relevant evidence, isolating "phrases or passages and ascrib[ing] a sinister meaning to them."[971] He submits that the Trial Chamber's "systematically selective reliance on fragments of evidence" undermines its factual findings and the credibility of its overall inference that there was a common criminal plan.[972]

367. In this regard, he argues that whereas the Trial Chamber relied on his statement during the Bosnian Serb Assembly in July 1994 that Krajina would "take [the] appearance of a rotten apple" if their enemy was still there and that the primary strategic aim was "to get rid of the enemies in our house, the Croats and Muslims, and not to be in the same state with them any more",[973] other evidence referred to by the Trial Chamber shows that these statements "cannot reasonably be understood as being directed towards civilians".[974] Specifically, Karadžić points to his order in July 1994 that municipal authorities in Prijedor should ensure the protection of non-Serbs.[975] In his view, this evidence gives rise to the reasonable inference that, in speaking about "rotten apples", Karadžić was referring to combatants, rather than civilians.[976]

368. Karadžić also argues that while the Trial Chamber relied on a speech given during a Bosnian Serb Assembly in November 1994, where he referred to having "created new realities" to infer the Serb right to claim new territories,[977] another portion of the same exhibit reflects that he further stated that "we must create a state using all means above all those permitted and allowed, of course, with respect for human rights and international conventions [...] we have to respect the humanitarian law and we have to respect all the conventions."[978]

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[969] Trial Judgement, para. 3425. *See also* Trial Judgement, paras. 3411-3424.
[970] Trial Judgement, para. 3425. *See also* Trial Judgement, para. 3413.
[971] Karadžić Appeal Brief, paras. 469-480, 484.
[972] Karadžić Appeal Brief, para. 479. *See also* Karadžić Appeal Brief, paras. 469, 470.
[973] Karadžić Appeal Brief, para. 471, *referring to* Trial Judgement, paras. 2765, 2770.
[974] Karadžić Appeal Brief, paras. 471, 472.
[975] Karadžić Appeal Brief, para. 472, *referring to* Trial Judgement, para. 3403, Exhibit D4213.
[976] Karadžić Appeal Brief, para. 473.
[977] Karadžić Appeal Brief, para. 474, *referring to* Trial Judgement, paras. 2772, 3070.
[978] Karadžić Appeal Brief, para. 474, *referring to* Exhibit P1403, pp. 156, 159.

369. Likewise, Karadžić highlights that the Trial Chamber relied on evidence from the 31 March 1995 Supreme Command meeting where he spoke about "turning a blind eye to private agencies and arrangements through which Bosnian Muslims left for western Europe because in those situations 'no one can accuse us', whereas if a state institution was involved they would be accused of 'ethnic cleansing'" to support its conclusion that he advocated the inability to co-exist between Bosnian Serbs and non-Serbs.[979] In relying on that comment, Karadžić suggests that the Trial Chamber failed to give sufficient weight to another statement during the same meeting, wherein Momčilo Krajišnik said that "[o]ur policy is such as President Karadžić said […] not to ethnically cleanse them."[980]

370. Karadžić further argues that the Trial Chamber relied on two of his statements recorded in Ratko Mladić's diary in May 1992 where he said "then we clear the Posavina of Croats" and in June 1992 where he said that "the birth of a state and the creation of borders does not occur without war".[981] However, according to Karadžić, the Trial Judgement does not refer to other statements from the same meetings recorded in Mladić's diary in June 1992 where he said "we must not put the pressure to have people displaced" and that he told Mladić that he was going to sign an agreement to allow refugees to return to their homes,[982] which he later did.[983] In light of these considerations, Karadžić contends that the Trial Chamber erred in finding that the statements recorded in Mladić's diary in May and June 1992 were in "stark contrast" with his interview on 20 July 1990 where he said that "the Serbs and the Muslims will always live in a common state, and they know […] how to live together",[984] since, when viewed as a whole, these statements constitute corroborative evidence demonstrating that he never sought the creation of a homogeneous entity.[985]

371. Similarly, Karadžić contends that in concluding that Nikola Koljević, Vice President of *Republika Srpska*, called for the expulsion of Bosnian Muslims, the Trial Chamber did not consider a statement from Koljević during a Presidential Meeting in July 1992 where he proposed to build a law-abiding rather than an ethnically clean state.[986]

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[979] Karadžić Appeal Brief, para. 475, *referring to* Trial Judgement, paras. 2773, 2840, 2841, 2851, 2855.
[980] Karadžić Appeal Brief, para. 476, *referring to* Exhibit P3149, p. 66.
[981] Karadžić Appeal Brief, para. 477, *referring to* Trial Judgement, paras. 2733, 2875.
[982] Karadžić Appeal Brief, para. 477, *referring to* Exhibit P1478, pp. 98, 358, 359.
[983] Karadžić Appeal Brief, para. 477, *referring to* Exhibit P1479, p. 17.
[984] Karadžić Appeal Brief, para. 478, *referring to* Trial Judgement, paras. 2734-2737.
[985] Karadžić Appeal Brief, para. 478.
[986] *See* Karadžić Appeal Brief, para. 483, *referring to* Trial Judgement, para. 2721, Exhibit P1478, pp. 313, 314.

372. Karadžić lastly submits that the Trial Chamber adopted a similar piecemeal approach in assessing the evidence of Witnesses Đjerić and Davidović to conclude that Karadžić blocked efforts to prosecute war criminals and failed to address exculpatory evidence in their testimonies.[987]

373. The Prosecution responds that Karadžić misrepresents or ignores relevant findings and evidence and fails to demonstrate any error in the Trial Chamber's conclusion that he and the rest of the Bosnian Serb leadership advocated the separation of the population and the creation of a Bosnian Serb state.[988]

374. In reply, Karadžić maintains that the Trial Chamber selectively assessed the evidence and contends that the Prosecution misrepresents relevant evidence.[989]

375. The Appeals Chamber observes that in the section of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber addressed in detail a large amount of evidence, including speeches, statements, and conversations by Karadžić and the rest of the Bosnian Serb leadership explicitly referring to: (i) the inability of Bosnian Serbs to live or co-exist with Bosnian Muslims or Bosnian Croats; (ii) their intent to create ethnically pure or homogeneous areas, and (iii) the necessity to separate the population.[990]

376. Against this background, Karadžić takes issue with the assessment of five statements claiming that the Trial Chamber selectively relied on evidence consistent with the inference of guilt and points to other evidence which, in his view, is not consistent with this inference.[991] The Appeals Chamber finds that Karadžić's reference to other evidence on the record, which, in his view, is inconsistent with the Trial Chamber's conclusion, reflects mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. In this regard, the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[992]

377. Moreover, in light of the Trial Chamber's detailed analysis of the large amount of evidence in support of its conclusion that Karadžić advocated the creation of a Bosnian Serb state and the separation of the population, including evidence related to Karadžić's statements expressly

[987] *See* Karadžić Appeal Brief, paras. 480-482.
[988] Prosecution Response Brief, paras. 261-271. *See also* Prosecution Response Brief, paras. 255-260.
[989] Karadžić Reply Brief, paras. 137-145.
[990] *See, e.g.*, Trial Judgement, paras. 2716-2729, 2732, 2733, 2739, 2745, 2746, 2749, 2752, 2754-2757, 2770, 2772, 2773.
[991] Karadžić Appeal Brief, paras. 471-477, 483.
[992] *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

advocating such separation,[993] the Appeals Chamber fails to see how Karadžić's allegations of errors concerning a limited number of his statements could demonstrate that the Trial Chamber "systematically" adopted a selective approach to the evidence in its entire analysis concerning the common criminal plan. Furthermore, Karadžić does not provide any explanation as to how his contentions concerning the Trial Chamber's assessment of these five statements would necessarily disturb its overall conclusion that Karadžić advocated the separation between Bosnian Serbs, Bosnian Muslims, and Bosnian Croats.

378. Likewise, with respect to Karadžić's argument that the Trial Chamber selectively relied on the evidence of Witnesses Đjerić and Davidović when concluding that Karadžić failed to investigate and prosecute criminal offences committed against non-Serbs, the Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[994] Furthermore, Karadžić does not demonstrate how these allegations of errors could impact the Trial Chamber's overall finding that there was a systemic failure to investigate and prosecute criminal offences committed against non-Serbs in the municipalities during the conflict, which was based on considerable corroborating evidence,[995] and the Trial Chamber's conclusion concerning the common criminal purpose of the Overarching JCE.

379. Accordingly, Karadžić fails to show under this ground of appeal that the Trial Chamber adopted a selective approach to the assessment of evidence.

(b) Assessment of Karadžić's Statements

380. In assessing Karadžić's statements in relation to the Overarching JCE, the Trial Chamber found that while Karadžić envisaged the use of force and violence to take over power, he was cautious about the way this would be portrayed at the international level,[996] and observed a disjuncture in Karadžić's speeches and utterances depending on the different audiences addressed as well as a disjuncture between many such speeches and utterances and the reality on the ground.[997]

381. Karadžić argues that the Trial Chamber erred in the assessment of his statements, particularly, in finding that: (i) there was a disjuncture in his statements; (ii) the statements in the Bosnian Serb Assembly sessions were often for public consumption; and (iii) he was duplicitous in

[993] *See, e.g.*, Trial Judgement, paras. 2716-2720, 2723-2726, 2732, 2733, 2739, 2745, 2746, 2749, 2752, 2754-2757, 2770, 2772, 2773. *See also generally* Trial Judgement, paras. 2716-2773.
[994] *Lukić and Lukić* Appeal Judgement, para. 234; *Hategekimana* Appeal Judgement, para. 190; *Kajelijeli* Appeal Judgement, para. 96.
[995] *See* Trial Judgement, para. 3425. *See also* Trial Judgement, paras. 3411-3424.
[996] Trial Judgement, paras. 2715, 3084.

his dealings with the international community.[998] The Appeals Chamber will consider these allegations of error in turn.

(i) Disjuncture in Karadžić's Statements

382. In the section of the Trial Judgement titled "Reaction to proposed independence of [Bosnia and Herzegovina]", the Trial Chamber found that from October 1991, Karadžić's focus shifted from opposing the secession of Bosnia and Herzegovina to the creation of a Bosnian Serb state as an ethnically based entity.[999] The Trial Chamber also found that there was a "disjuncture between what [Karadžić] said in private conversations or before a Bosnian Serb audience and the tone he took in international negotiations where he was more conciliatory, spoke against the conflict, and claimed that the Serbs were the victims of propaganda."[1000]

383. In the part of the Trial Judgement titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber concluded that Karadžić and the Bosnian Serb leadership advocated and worked towards a territorial re-organization which would allow the Bosnian Serbs to claim control of a large part of the territory of Bosnia and Herzegovina.[1001] In support of this conclusion, the Trial Chamber found that, while in international settings and press conferences Karadžić spoke in favour of the interest of the minorities and denied the suggestion that people would be forced from their homes, Karadžić was informed of the displacement of non-Serbs from the municipalities which were taken-over and the drastic demographic changes resulting in the Serbs becoming the majority in these municipalities, and acknowledged that in undertaking the military operations, the Bosnian Muslim population had been concentrated in small areas.[1002] According to the Trial Chamber, this demonstrated the difference between Karadžić's public statements and the reality on the ground of which he was fully aware.[1003] The Trial Chamber also noted Karadžić's statements concerning the right of refugees to return and found that such statements demonstrated that he was conscious "of making public statements which were in accordance with international expectations and obligations, but which were at odds with the reality on the ground."[1004] In addition, the Trial Chamber also found that there was "a clear disjuncture"

[997] Trial Judgement, paras. 2715, 2847, 2849, 2852, 2853, 3085, 3094, 3095.
[998] Karadžić Appeal Brief, paras. 485-511.
[999] Trial Judgement, paras. 2711, 2712. *See also* Trial Judgement, paras. 2707-2710, 2713-2715.
[1000] Trial Judgement, para. 2715.
[1001] Trial Judgement, para. 2839. *See also* Trial Judgement, paras. 2840-2856.
[1002] Trial Judgement, para. 2847.
[1003] Trial Judgement, para. 2847.
[1004] Trial Judgement, para. 2852.

between Karadžić's public announcements made to international representatives and his speeches and policy advocating ethnic separation and the creation of an ethnically homogeneous state.[1005]

384. In the section of the Trial Judgement titled "Variant A/B Instructions and take-over of power", the Trial Chamber found that Karadžić played a leading role in the distribution and promotion of such instructions, which reflected his objectives from December 1991 onwards.[1006] In this regard, the Trial Chamber found that, in the context of the implementation of the Variant A/B Instructions, while Karadžić was making public statements about the protection of minorities, Bosnian Muslims continued to be subjected to forcible displacement.[1007] On this basis, the Trial Chamber concluded that there was "a disjuncture between [Karadžić]'s public statements and his private discourse in this regard".[1008] Likewise, the Trial Chamber further reiterated that Karadžić's statements and decisions concerning the protection of the rights of minorities "were often for the consumption of international public opinion" and were disingenuous, having regard to the reality on the ground in the Overarching JCE Municipalities.[1009]

385. Karadžić submits that the Trial Chamber erroneously found that a number of his speeches, conversations, and statements were disingenuous on the basis that there was a disjuncture between his public statements and his private discourse as such disjuncture is not supported by the record.[1010] According to Karadžić, the Trial Chamber was not able to point to "a pattern of exculpatory statements made in public, and inculpatory statements made in private" and that its "own findings point away from such a trend."[1011] In support of this contention, Karadžić argues that while, on the one hand, the Trial Chamber referred to statements that he made in private and in confidential orders which indicate that he never favoured a homogeneous entity,[1012] on the other, it "ascribed a criminal meaning" to various statements, speeches, interviews, and assembly meetings which instead were rendered in public.[1013]

[1005] Trial Judgement, para. 2853.
[1006] Trial Judgement, paras. 3073, 3074. *See also* Trial Judgement, paras. 3072, 3075-3096.
[1007] Trial Judgement, paras. 3083-3085.
[1008] Trial Judgement, para. 3085.
[1009] Trial Judgement, paras. 3094, 3095.
[1010] Karadžić Appeal Brief, paras. 485-511. *See* Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2635, 2636, 2638, 2640, 2641, 2646, 2681, 2696, 2700, 2703, 2719, 2723, 2734, 2735, 2737, 2738, 2740, 2741, 2743, 2744, 2749, 2763, 2768, 2774, 2789, 2795, 2796, 3023, 3028, 3031, 3051, 3052, 3054, 3055, 3057, 3062, 3063, 3094, 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403, 3405, 3409, 3419. *See also* Karadžić Appeal Brief, paras. 465-467.
[1011] Karadžić Appeal Brief, para. 488.
[1012] Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, paras. 2743, 2749, 2763, 2774, 3351, 3383, 3387, 3389, 3392, 3395, 3400, 3402, 3403, 3405, 3409, 3418, 3419.
[1013] Karadžić Appeal Brief, para. 489. Karadžić additionally contends that the Trial Chamber failed "to provide a quantitative analysis, or even a reasoned opinion, to support the finding that [his] public statements were commendable, while private statements reflected a common criminal plan." *See* Karadžić Appeal Brief, para. 490.

386. In addition, Karadžić contends that the Trial Chamber failed to consider evidence showing that his "private discourse revealed the same sentiments as those expressed in public".[1014] In his view, "the Trial Chamber was not entitled to make a finding that [he] spoke differently in public and private" without considering this evidence.[1015]

387. The Prosecution responds that the Trial Chamber correctly assessed Karadžić's statements and that he misrepresents the Trial Judgement, ignores relevant findings, and provides his own interpretation of the evidence without demonstrating an error in the Trial Chamber's reasoning.[1016] Specifically, the Prosecution argues that Karadžić challenges only one aspect of the Trial Chamber's reasoning, as the Trial Chamber ultimately found that his statements were disingenuous on the basis of the reality on the ground and in light of his knowledge of the crimes.[1017]

388. In his reply, Karadžić clarifies that it is not his argument that the Trial Chamber ignored his exculpatory statements, but rather that it "wrongly discount[ed] them due to a disjuncture which did not exist".[1018] In addition, he argues that the "disjuncture finding was not limited to the take-over of power" but was repeated throughout the Trial Judgement.[1019]

389. As a preliminary matter, the Appeals Chamber observes that Karadžić refers to 65 statements and orders that were assessed and rejected by the Trial Chamber in different portions of the Trial Judgement related to the Overarching JCE, namely in the sections titled "Reaction to proposed independence of [Bosnia and Herzegovina]",[1020] "Advocating separation of population and creation of a Bosnian Serb state",[1021] "Variant A/B Instructions and the take-over of power",[1022] and "Accused's knowledge of crimes and measures he took to prevent and punish them".[1023] Karadžić's contention appears to rest on the assumption that the Trial Chamber concluded that these

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[1014] Karadžić Appeal Brief, paras. 491-497, *referring to* Exhibits D3149, p. 7, D3162, p. 7, D3571, pp. 2-5, D4517, pp. 3, 4.
[1015] Karadžić Appeal Brief, para. 498.
[1016] Prosecution Response Brief, paras. 272-276. *See also* Prosecution Response Brief, paras. 255-260.
[1017] Prosecution Response Brief, para. 275, *referring to, inter alia*, Trial Judgement, paras. 3085, 3095.
[1018] Karadžić Reply Brief, para. 146.
[1019] Karadžić Reply Brief, para. 147. *See also* Karadžić Reply Brief, paras. 148-152.
[1020] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2681, 2696, 2700, 2703.
[1021] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2719, 2723, 2734, 2735, 2737, 2738, 2740, 2741, 2743, 2744, 2749, 2763, 2768, 2774, 2789, 2795, 2796.
[1022] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3023, 3028, 3031, 3051, 3052, 3054, 3055, 3057, 3062, 3063, 3094.
[1023] Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403 3405, 3409, 3419. The Appeals Chamber notes that Karadžić refers to some statements reflected in the section "Unity of the Serb people and promotion of Serb interests" which predate the establishment of the Overarching JCE. *See* Karadžić Appeal Brief, para. 485; Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 2635, 2636, 2638, 2640, 2641, 2646. In the absence of any explanation on the relevance of these statements in relation to his responsibility, the Appeals Chamber declines to consider Karadžić's allegation of error concerning the Trial Chamber's assessment of these statements.

65 utterances were disingenuous on the basis of a disjuncture between *all* his public statements and *all* his private conversations.[1024] However, after a careful review of the Trial Judgement, the Appeals Chamber is not convinced that the Trial Chamber's assessment of the statements or orders is based on such a conclusion.

390. For instance, with respect to the statements addressed in the section titled "Reaction to proposed independence of [Bosnia and Herzegovina]", the Trial Chamber found that there was a disjuncture between Karadžić's public statements during international negotiations, on the one hand, and what he said during private conversations and his statements pronounced before a Serb audience, on the other.[1025] Accordingly, contrary to Karadžić's arguments, the Trial Chamber did not find that there was a net discrepancy between all of Karadžić's public and private statements *per se*. Rather, it concluded that the disjuncture arose when comparing Karadžić's statements pronounced during international negotiations with those he made to Serbian audiences, in public or private settings.

391. Likewise, in the section titled "Advocating separation of population and creation of a Bosnian Serb state", the Trial Chamber did not reject the statements referred to by Karadžić on the basis that there was a disjuncture between his public statements and his private discourse, but rather because such utterances: (i) were made in a different environment and period when the Bosnian Serb leadership aimed at the unity of Yugoslavia; (ii) were in contrast with the reality on the ground of which he was fully aware; and (iii) contradicted other public speeches and policy which advocated ethnic separation and the creation of an ethnically homogeneous state.[1026]

392. With respect to the section titled "Variant A/B instructions and take-over of power", the Appeals Chamber notes that the Trial Chamber stated that there was a disjuncture between Karadžić's public statements and his private discourse concerning the protection of minorities.[1027] However, this finding principally concerned one statement from Karadžić that, while he was prepared "to let everything go to […] hell and that we take the express way", he also spoke about the necessity of taking a tactful approach to achieve the Bosnian Serb leadership's goals given the importance of not appearing as the aggressors to the international community.[1028] The Trial Judgement reflects that Karadžić's statements in favour of the minorities were found to be

[1024] Karadžić Appeal Brief, para. 486; Karadžić Reply Brief, para. 147.
[1025] Trial Judgement, para. 2715.
[1026] Trial Judgement, paras. 2736, 2739, 2745, 2752, 2753, 2789, 2847, 2852, 2853.
[1027] Trial Judgement, para. 3085.
[1028] Trial Judgement, para. 3084, *referring to* Trial Judgement, paras. 3023, 3024. The Appeals Chamber further notes that, in its conclusions concerning Karadžić's contribution to the Overarching JCE, the Trial Chamber clarified the impugned finding limiting the disjuncture to Karadžić's public statements to the *international observers* and his private discourse. *See* Trial Judgement, para. 3484 (emphasis added).

disingenuous because they were in contrast with the situation on the ground where Bosnian Muslims were forced out of the municipalities of Bosnia and Herzegovina taken over by Bosnian Serbs.[1029]

393. With respect to Karadžić's orders to improve the conditions of the non-Serb civilians and to punish crimes committed against them,[1030] the Trial Chamber repeatedly found that these instructions were deliberately ineffective, "otiose", and "minimal".[1031]

394. In light of these considerations, the Appeals Chamber finds that Karadžić's claim that the Trial Chamber erred in rejecting his statements in light of the fact that there was a disjuncture between all his public and private statements is based on a misrepresentation of the Trial Judgement. On the contrary, a review of the Trial Judgement shows that the Trial Chamber found these statements to be disingenuous on a different basis, namely that such utterances were: (i) inconsistent with those pronounced before a Serbian audience or during private conversations;[1032] (ii) at odds with the reality on the ground and the crimes committed by Bosnian Serbs against the Bosnian Muslims and Bosnian Croats of which Karadžić was fully aware;[1033] or (iii) deliberately ineffective, "otiose", and "minimal".[1034] Accordingly, Karadžić's contention that the Trial Chamber failed to point to a pattern of "exculpatory statements made in public, and inculpatory statements made in private" fails to show an error in the Trial Chamber's assessment of his statements.[1035]

395. The Appeals Chamber turns to Karadžić's contention that the Trial Chamber failed to consider four pieces of evidence from his private conversations to show that his "private discourse revealed the same sentiments as those expressed in public".[1036] The Appeals Chamber observes that

[1029] Trial Judgement, paras. 3085, 3094, 3095.
[1030] Karadžić Appeal Brief, Annex J, *referring to* Trial Judgement, paras. 3345, 3347, 3348, 3351, 3354, 3383, 3387, 3392, 3400, 3402, 3403 3405, 3409, 3419. *See also* Karadžić Appeal Brief, para. 489.
[1031] Trial Judgement, paras. 3399, 3403, 3410, 3413, 3420-3425, 3494-3496.
[1032] Trial Judgement, paras. 2715, 2853.
[1033] Trial Judgement, paras. 2847, 2853, 3094, 3095.
[1034] Trial Judgement, paras. 3399, 3403, 3410, 3413, 3420-3425, 3494-3496.
[1035] Karadžić Appeal Brief, para. 488. To the extent that Karadžić submits that some of the exculpatory statements assessed by the Trial Chamber were in fact pronounced in a private setting (Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, paras. 2743, 2749, 2763), the Appeals Chamber observes that Karadžić refers instead to statements pronounced during sessions of the Bosnian Serb Government and that the Trial Chamber found that such statements were issued as a means to ease the international political pressure concerning the treatment of non-Serbs in Bosnian Serb controlled territory and did not translate into the improvement of the situation. *See* Trial Judgement, paras. 2763, 2850, 2852. Karadžić also points to a conversation between him and Nikola Koljević in December 1991, to which the Trial Chamber referred in the section titled "Advocating separation of population and creation of a Bosnian Serb state", where he said that "we have no aims. We don't want to take what belongs to someone else; we just don't want them to take ours." *See* Karadžić Appeal Brief, para. 489, *referring to* Trial Judgement, para. 2774. The Appeals Chamber finds that, by merely referring to an excerpt of this conversation, Karadžić fails to show that this evidence contradicts the Trial Chamber's finding that he advocated physical separation or that it supports his contention that he never favoured the creation of a homogeneous entity. *See* Trial Judgement, paras. 2841-2856. Accordingly, he fails to show any error in the Trial Chamber's assessment of this evidence.
[1035] *See* Trial Judgement, para. 3095.
[1036] Karadžić Appeal Brief, paras. 491-497.

two pieces of this evidence are intercepted conversations pre-dating the existence of the Overarching JCE,[1037] or concerning a municipality not encompassed by the common criminal purpose.[1038] Accordingly, the Appeals Chamber finds that Karadžić fails to show that this evidence was of sufficient relevance to the Trial Chamber's finding that his statements were disingenuous in the context of the implementation of the Overarching JCE that it could have materially impacted the Trial Chamber's conclusion concerning the existence of the Overarching JCE and his responsibility for the relevant crimes.

396. Karadžić also relies on excerpts from an intercepted conversation on 26 October 1991 where he stated that the rights of Muslims and Serbs will be regulated based on reciprocity,[1039] and excerpts from another conversation where he stated that "Muslim civilians may stay where they are or go where they want" and that "civilians can stay and have no need to flee".[1040] While this evidence is not expressly discussed in the Trial Judgement, the Appeals Chamber recalls that a trial chamber need not refer to the testimony of every witness or every piece of evidence on the trial record.[1041] It is to be presumed that a 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.[1042] 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.[1043] If a trial chamber did not refer to specific evidence 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.[1044] Based on the totality of the evidence, and particularly in light of the vast number of intercepted conversations considered by the Trial Chamber where Karadžić warned and threatened the Bosnian Muslims against the independence of Bosnia and Herzegovina, advocated the creation of a Serbian state in Bosnia and Herzegovina, and maintained that the different nationalities could not live together,[1045] the Appeals Chamber is not convinced that the Trial Chamber failed to consider relevant evidence in this regard,

[1037] Karadžić Appeal Brief, para. 493, *referring to* Exhibit D3149, p. 7. The Appeals Chamber observes that this exhibit reflects an intercepted conversation which occurred on 23 July 1991, where Karadžić stated that, in regions where the Serbs were the majority, Muslims should be told not to be afraid as no one had anything against them. *See* Exhibit D3149, pp. 1, 7.
[1038] Karadžić Appeal Brief, para. 494, *referring to* Exhibit D3162, p. 7. The Appeals Chamber observes that this evidence reflects a conversation between Karadžić and Božidar Vucurević concerning the Bosnian Muslim community in the municipality of Trebinje. *See* Exhibit D3162, pp. 1, 7.
[1039] Karadžić Appeal Brief, para. 492, *referring to* Exhibit D4517, pp. 3, 4.
[1040] Karadžić Appeal Brief, para. 495, *referring to* Exhibit D3571, pp. 2-5.
[1041] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127.
[1042] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, n. 2527; *Kanyarukiga* Appeal Judgement, para. 127.
[1043] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100.
[1044] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 1410.

but rather that it considered that this evidence did not prevent it from reaching the conclusion that Karadžić's public statements were disingenuous.

397. Based on these considerations, the Appeals Chamber finds that Karadžić has failed to demonstrate any error in the Trial Chamber's assessment of his statements.

(ii) Statements During the Bosnian Serb Assembly Sessions

398. In discussing Karadžić's role in relation to the implementation of the Variant A/B Instructions, the Trial Chamber concluded that it would exercise caution in assessing the statements made during the Bosnian Serb Assembly sessions since "what was said at these sessions was often for public consumption and included rhetoric".[1046]

399. Karadžić submits that the Trial Chamber made inconsistent findings with respect to the nature of the Bosnian Serb Assembly sessions.[1047] He argues that while in certain parts of the Trial Judgement, the Trial Chamber found that "the Bosnian Serb Assembly was the forum for the official dissemination of instructions to which there was a high level of adherence",[1048] when confronted with statements he made in the assembly advocating peace and the equal treatment for Muslims, Croatians, and citizens of other religions and nationalities,[1049] it concluded that this assembly was the forum where he disseminated statements for public consumption.[1050] Karadžić submits that, as a result, the Trial Chamber erroneously disregarded exculpatory statements he made in the Bosnian Serb Assembly.[1051]

400. The Prosecution responds that Karadžić fails to show that the Trial Chamber entered contradictory findings on the nature of the statements made before the Bosnian Serb Assembly.[1052]

401. As a preliminary matter, the Appeals Chamber observes that, in alleging that the Trial Chamber disregarded his exculpatory statements, Karadžić refers to excerpts of exhibits which were discussed in detail by the Trial Chamber.[1053] The Appeals Chamber therefore finds that the Trial

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[1045] *See* Trial Judgement, paras. 2677-2680, 2683, 2686, 2693, 2708, 2719, 2730, 2739, 3023.
[1046] Trial Judgement, para. 3056. *See also* Trial Judgement, para. 3095.
[1047] Karadžić Appeal Brief, paras. 499-505. *See also* Karadžić Reply Brief, paras. 153-155.
[1048] Karadžić Appeal Brief, para. 505. *See also* Karadžić Appeal Brief, paras. 499, 500, *referring to* Trial Judgement, paras. 2944, 2946-2948, 2951.
[1049] Karadžić Appeal Brief, paras. 501-503, *referring to* Exhibits D90, pp. 45, 46, P961, p. 17, Trial Judgement, paras. 2696, 3054, 3055, 3334, 3356.
[1050] Karadžić Appeal Brief, paras. 504, 505, *referring to* Trial Judgement, para. 3056.
[1051] Karadžić Appeal Brief, paras. 499, 505.
[1052] Prosecution Response Brief, paras. 277-283.
[1053] *See* Trial Judgement, paras. 3052 (*referring to* Exhibit P961, pp. 16, 17), 3054 (*referring to* Exhibit D90, pp. 45, 46). *See also* Trial Judgement, paras. 3051, 3060, 3061, *referring to* Exhibits D90, P961.

Chamber has considered this evidence and will focus its analysis on whether the Trial Chamber's assessment of his statements was unreasonable.

402. The Appeals Chamber notes that Karadžić refers to a section of the Trial Judgement concerning his authority over the Bosnian Serb Assembly and governmental structures where the Trial Chamber found, *inter alia*, that the Bosnian Serb Assembly was the means through which Karadžić and the Bosnian Serb leadership sanctioned and disseminated their ideology and objectives and communicated instructions to municipal representatives.[1054] In this regard, the Appeals Chamber considers that the fact that the Trial Chamber found that this organ was used to disseminate instructions concerning the creation of a Serb entity in Bosnia and Herzegovina is not necessarily in contradiction with the conclusion that some of the public statements made in that context were made for public consumption.[1055]

403. Moreover, a review of the passage of the Trial Judgement to which Karadžić points in support of his argument reveals that the record supports the Trial Chamber's conclusion that "what was said at these sessions was often for public consumption and included rhetoric".[1056] In particular, in reaching this conclusion, the Trial Chamber relied on Krajišnik's statement during a session of the Bosnian Serb Assembly, that "I have discussed [the creation of a unified Serb state] openly, even though this is being recorded and even though the journalists might write it down".[1057] In addition, the Trial Chamber considered that, when asking Mladić to brief the Bosnian Serb Assembly on the military situation and their intentions, Karadžić told him to report "what can be said at a place like this".[1058] Based on these considerations and recalling the broad discretion afforded to the Trial Chamber in assessing the evidence on the record,[1059] the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude as it did.

404. Accordingly, the Appeals Chamber finds that Karadžić does not show that the Trial Chamber made an inconsistent finding in concluding that what was said at the Bosnian Serb Assembly sessions was often for public consumption and included rhetoric.

405. In light of the foregoing, Karadžić has failed to show that the Trial Chamber committed an error.

[1054] Karadžić Appeal Brief, para. 499, *referring to* Trial Judgement, para. 2944.
[1055] Trial Judgement, paras. 3056, 3095.
[1056] Trial Judgement, para. 3056.
[1057] Trial Judgement, para. 3056, *referring to* Exhibit P1357, p. 18.
[1058] Trial Judgement, para. 3056, *referring to* Exhibit D456, pp. 17, 18.
[1059] *Šainović et al.* Appeal Judgement, para. 490.

(iii) Duplicity in Dealing with the International Community

406. In its analysis concerning Karadžić's efforts in advocating the separation of the population and the creation of a Bosnian Serb state as well as his role in the issuance and the implementation of the Variant A/B instructions, the Trial Chamber found that Karadžić made statements in favour of the interests of minorities, denying forcible displacement, and that the Bosnian Serbs were not creating "an ethnically clean State".[1060] However, the Trial Chamber found that these statements were often for the "consumption of the international public opinion" and that there was a discrepancy between Karadžić's statements in international settings and the reality on the ground.[1061]

407. Karadžić submits that the Trial Chamber erred in concluding that he was duplicitous in dealing with the international community.[1062] He contends that the Trial Chamber relied on the uncorroborated evidence of Prosecution Witness David Harland, a UN official, who testified that Karadžić told the witness that "his aim was to redistribute the population so that the Serbs would control a single continuous block of territory and that large numbers of Muslims had to be removed", although such statement was not reflected in the witness's reports on Karadžić's meetings.[1063] Likewise, Karadžić avers that the Trial Chamber relied on the uncorroborated testimony of Prosecution Witness Hussein Ali Abdel-Razek, a UN official, who testified that Karadžić and other leaders of *Republika Srpska* stated in January 1993 that ethnic cleansing was necessary, although such statement did not appear in the witness's contemporaneous reports.[1064] Karadžić contends that, if he had made such statements and Witnesses Harland and Abdel-Razek did not report them, they failed in their duty to report "this alarming information to their superiors within the United Nations, so that immediate action could have been taken".[1065] Karadžić submits that if he had had the intent to ethnically cleanse Bosnian Muslims and Bosnian Croats, it was unlikely that he would have disclosed this to the two witnesses.[1066] He adds that, in any event, the Trial Chamber made contradictory findings by concluding that he was disingenuous with the "international interlocutors" while also confessing his true intentions to these witnesses.[1067]

[1060] Trial Judgement, paras. 2743, 2847, 2849, 3094, 3095.
[1061] Trial Judgement, paras. 2847, 2849, 3095.
[1062] Karadžić Appeal Brief, paras. 506-510.
[1063] Karadžić Appeal Brief, para. 506, *referring to* Trial Judgement, para. 2726.
[1064] Karadžić Appeal Brief, para. 507, *referring to* Trial Judgement, para. 2757.
[1065] *See* Karadžić Appeal Brief, para. 508.
[1066] Karadžić Appeal Brief, para. 509.
[1067] Karadžić Appeal Brief, para. 510.

408. The Prosecution responds that Karadžić fails to show that the Trial Chamber erred in finding that he was duplicitous in his dealings with the international community.[1068]

409. Karadžić replies that the Prosecution fails to address his contention of error on the part of the Trial Chamber, namely, that its findings that he was candid with international representatives and that he created a "false narrative" at meetings with them are inconsistent.[1069]

410. The Appeals Chamber turns to Karadžić's argument that the Trial Chamber erroneously relied on the evidence of Witnesses Harland and Abdel-Razek in finding that he was duplicitous in dealing with the international community. As a preliminary matter, the Appeals Chamber observes that Karadžić makes unclear assertions that the Trial Chamber relied on Witness Harland's and Witness Abdel-Razek's evidence concerning their conversation with him although they did not mention such statements in their reports, failing their professional duty by not reporting "this alarming information" to their superiors.[1070] To the extent that Karadžić claims that Witness Harland's and Witness Abdel-Razek's evidence was unreliable based on these circumstances, he does not explain how the fact that Witness Harland and Witness Abdel-Razek did not mention Karadžić's statements in their reports demonstrates an error in the Trial Chamber's assessment of their evidence.[1071] Karadžić merely disagrees with the Trial Chamber's assessment of the evidence without showing an error warranting appellate intervention.[1072]

411. Furthermore, Karadžić's allegation that the Trial Chamber made contradictory findings in concluding that he was disingenuous with the "international interlocutors" while also confessing his true intentions to Witnesses Harland and Abdel-Razek, reflects a misinterpretation of the Trial Judgement. The Appeals Chamber recalls that in finding discrepancies between Karadžić's statements in international settings and the reality on the ground, the Trial Chamber was referring to his public speeches, statements, and announcements before an international audience, rather than to

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[1068] Prosecution Response Brief, paras. 284-286. The Prosecution also argues that Karadžić's assertion that Witnesses Harland and Abdel-Razek failed to report their conversation with him fails to appreciate that they already knew that Karadžić and the Bosnian Serb Leadership were conducting an ethnic cleansing campaign as reflected in their repeated protest. *See* Prosecution Response Brief, para. 286.

[1069] Karadžić Reply Brief, para. 158. Karadžić also contends that the Prosecution's argument that Witnesses Harland and Abdel-Razek did not report their conversation with him because they already knew that Karadžić was conducting an ethnic cleansing campaign is not reasonable and "goes against the most basic principles of human rights monitoring and reporting." *See* Karadžić Reply Brief, para. 157.

[1070] Karadžić Appeal Brief, paras. 506-508.

[1071] *Cf. Ngirabatware* Appeal Judgement, para. 69; *Popović et al.* Appeal Judgement, para. 513; *Šainović et al.* Appeal Judgement, para. 464; *Lukić and Lukić* Appeal Judgement, para. 296; *Nahimana et al.* Appeal Judgement, para. 949.

[1072] To the extent that Karadžić argues that the Trial Chamber erred in relying on the evidence of Witnesses Harland and Abdel-Razek because of the lack of corroboration, the Appeals Chamber finds this argument without merit as a trial chamber has the discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony. *See Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, para. 138; *Ntawukulilyayo* Appeal Judgement, para. 21; *Dragomir Milošević* Appeal Judgement, para. 215.

his private discussions with members of the international community.[1073] In this regard, Witness Harland's and Witness Abdel-Razek's evidence concerns statements which occurred in private settings or closed meetings.[1074] The Appeals Chamber further observes that, consistent with the evidence of Witnesses Harland and Abdel-Razek, the Trial Chamber indeed acknowledged that in discussions with international representatives, Karadžić made it clear that he advocated the separation of people and believed that co-existence with the Bosnian Muslims and Bosnian Croats was not possible.[1075] Therefore, the Appeals Chamber finds that the evidence of Witnesses Harland and Abdel-Razek concerning their private discussions with Karadžić does not necessarily contradict the Trial Chamber's finding that Karadžić's statements favouring the interests of minorities and denying forcible displacement and the creation of "an ethnically clean State"[1076] were for the consumption of the international *public* opinion.[1077]

412. Accordingly, Karadžić has failed to show that the Trial Chamber committed any error in this regard.

(iv) Conclusion

413. For the foregoing reasons, the Appeals Chamber dismisses Karadžić's allegations of error concerning the Trial Chamber's assessment of his statements.

(c) Systematic Displacement of Minorities

414. The Trial Chamber found that there was an organized and systematic pattern of crimes committed in the area of the Overarching JCE Municipalities by the Serb forces and the Bosnian Serb Political and Governmental Organs against Bosnian Muslims and Bosnian Croats who were forcibly displaced to other locations or third countries.[1078] The Trial Chamber found no merit in Karadžić's argument that, in the majority of municipalities of *Republika Srpska*, non-Serbs were protected.[1079] Specifically, the Trial Chamber found that the municipalities where the crimes were committed, "and in relation to which the [Trial] Chamber was tasked with entering findings", were

[1073] Trial Judgement, paras. 2847, 2849, 3095.
[1074] *See* Exhibit P1258, pp. 6, 7. Notably, the Trial Chamber found that in private meetings, Karadžić was open and "candid about […] their territorial objectives even at the cost of lives and the displacement of thousands of people." *See* Trial Judgement, para. 2900.
[1075] Trial Judgement, paras. 2746, 2752, 2757, 2841.
[1076] Trial Judgement, paras. 2847, 2849, 3094, 3095.
[1077] Trial Judgement, paras. 2847, 2849, 3095.
[1078] Trial Judgement, paras. 3439-3447.
[1079] Trial Judgement, para. 3446, *referring to* Karadžić Final Trial Brief, paras. 966-972, 979.

of strategic importance to Karadžić and the Bosnian Serb leadership and formed part of Bosnian Serb claimed territory.[1080]

415. Karadžić submits that the Trial Chamber erred in concluding that there was a common plan in light of the systematic and organized manner in which the crimes were committed in the Overarching JCE Municipalities.[1081] He contends that displacement occurred in a minority of municipalities which is incompatible with the Trial Chamber's finding that the displacement of Bosnian Muslims and Bosnian Croats was systematic and organized.[1082] However, he recalls, the Trial Chamber dismissed his argument that the majority of municipalities were free from any apparent implementation of the plan on the basis that the "twenty municipalities in which these crimes were committed [...] were of strategic importance."[1083] Karadžić argues that the Trial Chamber erred in considering that all 20 municipalities were of strategic importance to him and the Bosnian Serb leadership since it had only found that three of the municipalities were of such importance.[1084] According to Karadžić, a reasonable trier of fact could not have discarded the reasonable inference that since non-Serbs were not expelled from the majority of the municipalities across Bosnia and Herzegovina, there was no policy to create a homogeneous entity from which non-Serbs would be expelled.[1085]

416. The Prosecution responds that the Trial Chamber reasonably found that the Serb forces as well as the Bosnian Serb Political and Governmental Organs engaged in a systematic and organized pattern of crimes, which resulted in the removal of the Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities.[1086] In particular, it contends that the Trial Chamber's conclusion that the Overarching JCE Municipalities were of strategic importance is reflected in various findings in the Trial Judgement and supported by the evidence on the record.[1087]

417. Karadžić replies that the Prosecution fails to refer to findings showing that all the Overarching JCE Municipalities were of strategic importance.[1088]

[1080] Trial Judgement, para. 3446. The Trial Chamber also concluded that even if there were no crimes committed in other municipalities not covered by the Indictment, it would not impact the Trial Chamber's finding that the crimes were committed in a systematic and organized manner in the Overarching JCE Municipalities. *See* Trial Judgement, para. 3446.
[1081] Karadžić Appeal Brief, para. 518.
[1082] Karadžić Appeal Brief, paras. 512, 513.
[1083] Karadžić Appeal Brief, para. 514.
[1084] Karadžić Appeal Brief, paras. 514-516.
[1085] Karadžić Appeal Brief, paras. 512, 518.
[1086] Prosecution Response Brief, para. 287. *See also* Prosecution Response Brief, paras. 255-260, 288, 289.
[1087] Prosecution Response Brief, para. 289.
[1088] Karadžić Reply Brief, paras. 159, 160. *See also* Karadžić Reply Brief, paras. 161, 162.

418. Contrary to Karadžić's contention, a review of the Trial Judgement reflects that the Trial Chamber found that most of the Overarching JCE Municipalities were strategically important.[1089]

419. In any case, the Appeals Chamber finds that the fact that crimes might not have occurred in municipalities other than the Overarching JCE Municipalities does not show an error in the Trial Chamber's conclusion with respect to the manner in which these crimes were committed in the Overarching JCE Municipalities. The Appeals Chamber recalls that the Trial Chamber based its finding that the relevant crimes were committed in a systematic manner on the considerations that crimes were committed throughout the Overarching JCE Municipalities in a similar and organized manner, in the context of planned and co-ordinated operations, in a short period of time, and resulted in "drastic changes to the ethnic composition of the towns".[1090] In particular, it observed that in many cases following the attacks or take-over by Serb forces, Bosnian Muslims and Bosnian Croats were given a limited amount of time to leave their homes before being transported out of the Overarching JCE Municipalities, while in other cases they were first unlawfully detained and later expelled.[1091] In addition, the Trial Chamber considered that, in a similar pattern, Serb forces and Bosnian Serb Political and Governmental Organs were involved in the systematic forced movement of Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities through the creation of an environment of fear caused by the various crimes committed against non-Serbs or through physical force, threat of force, and coercion.[1092]

420. Based on the similar manner and the short time in which crimes were committed, the Trial Chamber concluded that they were the result "of well planned and coordinated operations which involved the military take-over of Municipalities and the expulsion of non-Serbs".[1093] In light of these findings, the Appeals Chamber finds that Karadžić has failed to show that it was unreasonable for the Trial Chamber to find that there was an organized and systematic pattern of crimes committed by Serb forces and Bosnian Serb Political and Governmental Organs against Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities.

[1089] With the exception of Sokolac, Bosanski Novi, and Novo Sarajevo, the Trial Chamber discussed the strategic importance of the remaining Overarching JCE Municipalities. *See* Trial Judgement, paras. 599, 600 (concerning Bijeljina), 1099 (concerning Vlasenica), 2067 (concerning Hadžići), 2120 (concerning Ilidža), 2169, 2170 (concerning Novi Grad), 2292, 2293, 2295 (concerning Pale), 2356, 2357 (concerning Vogošća), 2800, 2802 (concerning Brćko, Foča, Prijedor and Sanski Most), 2806 (concerning Vlasenica and Bijeljina), 2807 (concerning Brćko), 2816 (concerning Bratunac, Rogatica, Srebrenica, Višegrad, Vlasenica and Zvornik), 2892 (concerning Bratunac, Rogatica, Prijedor, Vlasenica, Ključ, and Sanski Most).
[1090] Trial Judgement, paras. 3441-3445.
[1091] Trial Judgement, para. 3442.
[1092] Trial Judgement, para. 3443.
[1093] Trial Judgement, paras. 3444, 3445.

(d) Conclusion

421. Based on the foregoing, the Appeals Chamber dismisses Ground 28 of Karadžić's appeal.

2. Alleged Error Concerning Liability for Crimes in the Overarching JCE Municipalities under the Third Form of Joint Criminal Enterprise (Ground 29)

422. The Trial Chamber found that Karadžić was a member of and participated in the Overarching JCE, the common purpose of which was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian Serb claimed territory in the Overarching JCE Municipalities through the commission of deportation, inhumane acts (forcible transfer), and persecution through forcible transfer, deportation, unlawful detention, and the imposition and maintenance of restrictive and discriminatory measures.[1094] The Trial Chamber found that Karadžić shared the intent to commit the crimes falling within the scope of the common plan with other members of the Overarching JCE and that, through his position in the Bosnian Serb leadership and "involvement throughout the Municipalities", he contributed to the execution of the common plan from October 1991 until at least 30 November 1995.[1095] The Trial Chamber was not persuaded that there was sufficient evidence to demonstrate that other acts of persecution as charged in Count 3 of the Indictment or the crimes of extermination and murder charged in Counts 4, 5, and 6 of the Indictment that related to the Overarching JCE were included in the common plan or were intended by Karadžić.[1096]

423. Based on the nature of the common plan and the manner in which it was carried out, the Trial Chamber found that Karadžić could foresee that Serb forces might commit "violent and property-related crimes" against non-Serbs during and after the take-overs in the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1097] The Trial Chamber also found that the evidence of Karadžić's knowledge of violent criminal activity in the Overarching JCE Municipalities, including killings of non-Serb civilians and the forced displacement of thousands of Bosnian Muslims through the policy of harassment and discrimination by Bosnian Serbs, as well as his awareness of the violent criminal behaviour of armed groups, which resulted in rapes, thefts, killings, looting, and inhumane conditions in many detention centers, demonstrated that he was well aware of the nature of the environment in which the forcible displacement of non-Serbs occurred

[1094] Trial Judgement, paras. 1, 3462-3466, 3512.
[1095] Trial Judgement, paras. 3452, 3462, 3463, 3465. Specifically, the Trial Chamber found that Karadžić contributed to the commission of these crimes by promoting an ideology of ethnic separation, using rhetoric that amplified historical ethnic grievances and promoting propaganda to that effect, establishing the institutions used to carry out the objective of the common plan, and creating a climate of impunity for criminal acts committed against non-Serbs. *See* Trial Judgement, para. 3514.
[1096] Trial Judgement, para. 3466. *See also* Trial Judgement, para. 5. While such crimes were shown to have resulted from the campaign to forcibly remove the non-Serb population from the Overarching JCE Municipalities, the Trial Chamber considered that the evidence allowed for the reasonable inference that Karadžić did not intend them to be committed but did not care enough to stop pursuing the common plan. *See* Trial Judgement, para. 3466.
[1097] Trial Judgement, para. 3515.

and that paramilitaries, volunteers, and other irregular armed groups were being used to further the common purpose.[1098]

424. The Trial Chamber considered that Karadžić's "continued participation" in the Overarching JCE demonstrated that he acted in furtherance of the common plan "with the awareness of the possibility" that the other crimes might be committed either by members of the Overarching JCE or Serb forces who were used by him or other members to carry out the common plan, and that he "willingly took that risk".[1099] Such other crimes consisted of persecution through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, the establishment and perpetuation of inhumane living conditions in detention facilities as cruel or inhumane treatment, killings, forced labour at the frontline, the use of non-Serbs as human shields, the appropriation or plunder of property, the wanton destruction of private property including cultural and sacred sites, killings on a large scale, and extermination.[1100] On this basis, the Trial Chamber convicted Karadžić of crimes listed in Counts 3 to 6 of the Indictment under the third form of joint criminal enterprise.[1101]

425. Karadžić submits that there are cogent reasons for the Appeals Chamber to depart from the controlling *mens rea* standard upon which the Trial Chamber relied in convicting him of persecution, murder, and extermination under the third form of joint criminal enterprise.[1102] Specifically, he argues that the Appeals Chamber should depart from the *mens rea* standard of "awareness of the *possibility* that [such] crimes *might* be committed", given the recent reversal by the Supreme Court of the United Kingdom of the analogous standard in the case of *R v. Jogee*; *Ruddock v. The Queen* ("*Jogee*")[1103] and find that the correct *mens rea* standard for liability under the third form of joint criminal enterprise is "knowledge of the probability or substantial likelihood" that the crimes will be committed.[1104] Karadžić maintains that review of the *mens rea* standard applied by the ICTY is warranted given the finding of the Supreme Court of the United Kingdom that the standard that had been applied in England and Wales was erroneous and that the correct *mens rea* standard is the same as that applied to aiding, abetting, and instigating.[1105] He contends

[1098] Trial Judgement, paras. 3516-3518.
[1099] Trial Judgement, para. 3522.
[1100] Trial Judgement, para. 3521.
[1101] Trial Judgement, paras. 3522-3524, 6002-6005.
[1102] Karadžić Notice of Appeal, p. 11; Karadžić Appeal Brief, paras. 522-548.
[1103] *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7.
[1104] Karadžić Appeal Brief, paras. 523-548. In particular, Karadžić submits that his conviction under the third form of joint criminal enterprise erroneously conflates foresight with authorisation, which is what the Supreme Court of the United Kingdom described as the "wrong turn" in common law case law. He submits that *Jogee* corrected this error by setting the required *mens rea* as knowledge of the "probability or substantial likelihood" that the crimes will be committed. *See* Karadžić Appeal Brief, paras. 523, 530-532, 534, 535.
[1105] Karadžić Appeal Brief, paras. 523, 524, 529, 539.

that because the English law of complicity was considered authoritative in post-World War II cases and the ICTY Appeals Chamber relied upon it when defining the standard for liability under the third form of joint criminal enterprise in *Tadić*, in the wake of *Jogee* this standard is no longer "underpinned" by national law and the Appeals Chamber should depart from it.[1106] In addition, Karadžić contends that revision of the existing ICTY standard for liability under the third form of joint criminal enterprise is merited because it is "the most controversial" aspect of the ICTY's legal legacy, which has not been followed by the ECCC, ICC, SCSL, or STL and has been criticized in dissenting and extrajudicial opinions by ICTY Judges as well as in academic literature.[1107] He argues that his convictions related to the Overarching JCE Municipalities under the third form of joint criminal enterprise for Counts 3 to 6 of the Indictment should therefore be reversed.[1108]

426. The Prosecution responds that Karadžić fails to demonstrate cogent reasons for departing from well-settled appellate jurisprudence establishing and consistently reaffirming the standard required for the third form of joint criminal enterprise liability.[1109] It also asserts that Karadžić "fundamentally misconstrues" the relevance of English case law to the development of ICTY jurisprudence on the third form of joint criminal enterprise and ignores appellate case law distinguishing joint criminal enterprise liability from "aiding and abetting".[1110] In addition, the Prosecution argues that the change in English law under *Jogee*, which is neither binding on the Mechanism nor of persuasive authority, confirms the lack of consistency on common purpose liability across major domestic legal systems, particularly given that other common law jurisdictions have declined to follow *Jogee*.[1111] It also contends that the ECCC, SCSL, and STL decisions, academic opinions, and differences in the common purpose provisions of the ICC Statute relied upon by Karadžić are not binding on the Mechanism and have been found insufficient to justify a departure from ICTY jurisprudence.[1112] The Prosecution also submits that Karadžić seeks a reversal of his convictions without showing that the findings in this case would not satisfy a probability or substantial likelihood standard.[1113] In its submission, the Trial Chamber's findings

[1106] Karadžić Appeal Brief, paras. 524, 527-531, 540-548. Karadžić further argues that statutory versions of the third form of joint criminal enterprise liability in various common law jurisdictions including Canada, New Zealand, and parts of Australia, also require knowledge that the crime was "a *probable* consequence" of carrying out the common purpose. *See* Karadžić Appeal Brief, para. 547.
[1107] Karadžić Appeal Brief, paras. 541, 542, 546-548.
[1108] Karadžić Appeal Brief, p. 147. para. 548.
[1109] Prosecution Response Brief, paras. 290, 291, 293-297.
[1110] Prosecution Response Brief, paras. 291, 293, 296-299.
[1111] Prosecution Response Brief, paras. 293, 295, *referring to, inter alia*, the judgement of the High Court of Australia in *Miller v. The Queen*; *Smith v. The Queen*; *Presley v. The Director of Public Prosecutions* [2016] HCA 30 and of the Hong Kong Court of Final Appeal in *HKSAR v. Chan Kam-Shing* [2016] HKCFA 87.
[1112] Prosecution Response Brief, para. 298. The Prosecution also submits that the dissenting views of two ICTY judges to which Karadžić refers in his appeal brief pertain to the application of the third form of joint criminal enterprise to the evidence and not the standard itself. *See* Prosecution Response Brief, para. 299.
[1113] Prosecution Response Brief, para. 292.

show not only that the higher standard would be met, but also that Karadžić shared the intent for the crimes he was convicted of under the third form of joint criminal enterprise.[1114]

427. Karadžić replies that the Prosecution ignores that the ICTY principles on the third form of joint criminal enterprise "are grounded in English law", particularly the concepts of joint enterprise, furtherance of a common criminal design, and the foreseeability standard.[1115] According to Karadžić, in developing the applicable principles, the ICTY Appeals Chamber expressly relied on the leading English case of *R v. Powell*,[1116] which was reversed by *Jogee*.[1117] He further submits that the reluctance of other international tribunals to apply the principles related to the third form of joint criminal enterprise provides additional reasons to re-examine its scope in light of *Jogee*.[1118]

428. On 25 September 2017, the Appeals Chamber accepted *amicus curiae* observations on the relevance of *Jogee* to applicable jurisprudence on the *mens rea* of the third form of joint criminal enterprise.[1119] On 25 October 2017, the Prosecution filed its response to the *amicus curiae* observations.[1120] Karadžić filed no response.[1121]

429. The *amici* submit that, although not binding, *Jogee* is persuasive authority as it highlights that the ICTY Appeals Chamber in *Tadić* overlooked the possibility that foresight should be treated as an evidential factor rather than a legal element.[1122] This distinction led the Supreme Court of the United Kingdom to correct a misstatement of law that had permeated the common law for over thirty years in treating foresight as a sufficient legal requirement of *mens rea* when assessing an accused's responsibility for extended crimes perpetrated outside the execution of a common criminal purpose.[1123] The Supreme Court of the United Kingdom found that, instead, foresight should be treated as evidence of intent and that, in truth, the English common law never recognized an "extended" common purpose doctrine.[1124] In the *amici*'s submission, the fact that the ICTY Appeals Chamber in *Tadić* appears not to have recognized this distinction suggests that its formulation of *mens rea* elements was pronounced *per incuriam* or otherwise on the basis of an incorrect legal principle as the consideration of foreseeability as a legal element is neither evident

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[1114] Prosecution Response Brief, para. 292, *referring to* Prosecution Appeal Brief, paras. 21-24.
[1115] Karadžić Reply Brief, para. 163.
[1116] *R v. Powell and Daniels*; *R v. English* [1999] 1 AC 1.
[1117] Karadžić Reply Brief, para. 164, *referring to* the Separate Opinion of Judge Shahabuddeen in *Krajišnik* Appeal Judgement, para. 33.
[1118] Karadžić Reply Brief, para. 165.
[1119] Decision on a Request for Leave to Make Submissions as *Amicus Curiae*, 25 September 2017, p. 2.
[1120] Prosecution Response to *Amicus Curiae* Submissions of 24 August 2017, 25 October 2017.
[1121] *See* T. 10 October 2017 p. 10 (indicating that Karadžić did not wish to file a response).
[1122] Request for Leave to Make Submissions as *Amicus Curiae*, 24 August 2017, Annex ("*Amicus Curiae* Submissions on *Jogee*"), paras. 2-5, 15-29, 31-35.
[1123] *Amicus Curiae* Submissions on *Jogee*, paras. 8, 12-14, 33.
[1124] *Amicus Curiae* Submissions on *Jogee*, paras. 12, 14.

in, nor evidenced by, the sources of customary international law upon which it relied or its analysis of these sources.[1125] This "inadvertent shortcoming" in *Tadić* gives rise to compelling reasons to review it and determine whether foreseeability exists as a legal element distinguishing the third category of common purpose liability in customary international law, or alternatively, whether foresight should be treated only as a factual consideration relevant to proof of intent, as was the case in *Jogee*.[1126] In their submission, although common law and customary international law doctrines of joint liability are not the same, this does not detract from the significance of the distinction recognized in *Jogee*, which points to errors of history and logic relevant to both jurisdictions.[1127]

430. The *amici* also submit that Karadžić's submission that the principles of the third form of joint criminal enterprise are grounded in English law is an overstatement but that this, however, does not detract from the importance of *Jogee* to the law of the *ad hoc* tribunals.[1128] *Jogee*'s relevance lies in its assessment of underlying principles of complicity and accessorial liability and the similar characteristics of the cases it considered as the sources of customary international law cited in support of *Tadić*'s formulation of the *mens rea* for the third form of joint criminal enterprise.[1129] In their submission, it is the reliance in *Tadić* on domestic jurisprudence to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems that now gives impetus to revisit the distinction between the legal element and factual consideration recognized in *Jogee* and overlooked in *Tadić*.[1130] Lastly, the *amici* add that following *Jogee* would not result in convictions being overturned as evidence relied upon to infer foresight may likewise be indicative of the requisite intent.[1131]

431. The Prosecution responds that the Appeals Chamber should either give the *Amicus Curiae* Submissions on *Jogee* no weight or exercise its discretion to reject them.[1132] In particular, it submits

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[1125] *Amicus Curiae* Submissions on *Jogee*, paras. 34, 35. The *amici* observe that since there is no support for treating foreseeability as a legal element rather than factual consideration in the discussion in *Tadić* of relevant authorities, the *Tadić* approach represents unnecessary judicial creativity and a legal development that could not have been predicted, which as such, contravenes the principle of *nullum crimen sine lege*. *See Amicus Curiae* Submissions on *Jogee*, para. 35.
[1126] *Amicus Curiae* Submissions on *Jogee*, paras. 3, 8, 38.
[1127] *Amicus Curiae* Submissions on *Jogee*, para. 6. In particular, the *amici* observe that convicting an accused on the basis of his intent to commit a crime within the scope of a common purpose plus the foreseeability of an extended crime creates a lower subjective threshold applicable to the accused for the extended crime than to the principal perpetrator of the extended crime. *See Amicus Curiae* Submissions on *Jogee*, para. 35.
[1128] *Amicus Curiae* Submissions on *Jogee*, para. 30.
[1129] *Amicus Curiae* Submissions on *Jogee*, para. 7.
[1130] *Amicus Curiae* Submissions on *Jogee*, para. 31.
[1131] *Amicus Curiae* Submissions on *Jogee*, para. 37.
[1132] Prosecution Response to *Amicus Curiae* Submissions of 24 August 2017, 25 October 2017 ("Prosecution Response to *Amicus Curiae* Submissions"), paras. 1, 9-11, *referring to, inter alia*, Information Concerning the Submission of *Amicus Curiae* Briefs, Doc. No. IT/122/Rev.1, 16 February 2015, para. 9 (b) (suggesting that this provision in the ICTY

that the brief provides no cogent reasons to depart from well-established jurisprudence, fails to show that the *Tadić* Appeal Judgement, in which the relevant *mens rea* standard was first articulated, was wrongly decided, and argues that the parallels sought to be drawn between the third form of joint criminal enterprise and English accessorial liability are inapt as these concepts address different types of liability with different legal elements operating within different legal systems.[1133] The Prosecution also argues that the *Amicus Curiae* Submissions on *Jogee* fail to show that the ICTY Appeals Chamber misinterpreted the relevance of foresight in the cases it relied upon and the discussion of a handful of the cases considered in *Tadić* – based only on the extracts of those cases as reproduced in the *Tadić* Appeal Judgement – does not show that the *mens rea* of the third form of joint criminal enterprise was pronounced *per incuriam* or constitute a cogent reason to depart from established jurisprudence.[1134]

432. In examining whether liability for the crimes falling outside the scope of the Overarching JCE could be imposed on Karadžić pursuant to the third form of joint criminal enterprise liability, the Trial Chamber noted that it had to determine whether it was reasonably foreseeable to him that any of these crimes "might be committed" if he acted in furtherance of the common plan and that "he willingly took that risk".[1135] In this respect, the Trial Chamber recalled that the assessment of what was reasonably foreseeable to Karadžić had to be made on the basis of his individual knowledge and that it had to be established that "the possibility of any of these crimes being committed was sufficiently substantial as to be foreseeable to [him]".[1136]

433. The Appeals Chamber notes that this statement of the relevant applicable law is consistent with settled appellate case law of the ICTY.[1137] For liability under the third form of joint criminal enterprise, it is required that an accused had the intent to commit the crimes that form part of the common purpose of the joint criminal enterprise and to participate in a common plan aimed at their commission, as well as that it was foreseeable to him or her that a crime falling outside the common purpose might be perpetrated by any other member of the joint criminal enterprise, or one or more of the persons used by the accused or other members of the joint criminal enterprise to further the common purpose, and that the accused willingly took the risk that the crime might occur by joining

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is persuasive authority for the proposition that the Appeals Chamber retains the authority to "reject" the *amici* submissions).

[1133] Prosecution Response to *Amicus Curiae* Submissions, 25 October 2017, para. 2.

[1134] Prosecution Response to *Amicus Curiae* Submissions, 25 October 2017, paras. 2, 6.

[1135] Trial Judgement, para. 3513.

[1136] Trial Judgement, para. 3513.

[1137] *See, e.g., Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.4, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, 25 June 2009 ("*Karadžić* Decision on JCE III Foreseeability"), paras. 15, 16, 18.

or continuing to participate in the enterprise.[1138] The Appeals Chamber recalls that the ICTY Appeals Chamber has consistently declined to apply a standard requiring foreseeability that the crime falling outside the common criminal purpose would "probably" be committed for liability under the third form of joint criminal enterprise to attach but recognized instead that the possibility that a crime could be committed must be sufficiently substantial.[1139] The Appeals Chamber also reiterates that, although not bound by decisions of the ICTY and the ICTR Appeals Chambers, in the interests of legal certainty, it should follow such previous decisions and depart from them only for cogent reasons in the interests of justice.[1140] This would be the case where the previous decision was decided on the basis of a wrong legal principle or was given *per incuriam*, that is, it was wrongly decided, usually because the judges were not well-informed about the applicable law.[1141]

434. The Appeals Chamber observes that it is not bound by the findings of other courts – domestic, international, or hybrid – or by the extrajudicial writings, separate or dissenting opinions of its Judges, or by views expressed in academic literature.[1142] On review of the judgement in *Jogee*, the Appeals Chamber does not find any cogent reason for departing from the Appeals Chamber's well-established jurisprudence. The Supreme Court of the United Kingdom and Judicial Committee of the Privy Council in *Jogee* changed the *mens rea* applicable in England and Wales and the jurisdictions bound by the jurisprudence of the Privy Council for accessorial liability resulting from participation in a joint enterprise.[1143] However, the form of individual criminal responsibility under the third type of joint criminal enterprise is "commission", resulting in liability

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[1138] *Stanišić and Župljanin* Appeal Judgement, para. 958; *Karemera and Ngirumpatse* Appeal Judgement, para. 634; *Šainović et al.* Appeal Judgement, para. 1557; *Ntakirutimana* Appeal Judgement, para. 467.

[1139] *Prlić et al.* Appeal Judgement, para. 3022; *Popović et al.* Appeal Judgement, para. 1432; *Šainović et al.* Appeal Judgement, paras. 1061, 1272, 1525, 1557, 1558; *Karadžić* Decision on JCE III Foreseeability, para. 18. The ICTR Appeals Chamber has held that the ICTY jurisprudence on the third form of joint criminal enterprise should be applied to the interpretation of the principles on individual criminal responsibility under the ICTR Statute. *See Ntakirutimana* Appeal Judgement, para. 468. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 634.

[1140] *See supra* paras. 13, 119.

[1141] *Stanišić and Župljanin* Appeal Judgement, para. 968.

[1142] *Stanišić and Župljanin* Appeal Judgement, paras. 598, 974, 975; *Popović et al.* Appeal Judgement, paras. 1437-1443, 1674; *Đorđević* Appeal Judgement, paras. 33, 38, 39, 50-53, 83; *Čelebići* Appeal Judgement, para. 24.

[1143] This joint case involved two separate appellants who had been convicted of murder on the basis of "parasitic accessory liability", after a co-defendant had killed the victim. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3. In the case of Jogee, he had been vocally encouraging the principal who subsequently stabbed the victim to death. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, para. 102. The judge directed the jury that Jogee was guilty of murder if he took part in the attack by encouraging the principal and realised that it was possible that his co-defendant might use the knife with intent to cause serious harm. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3, 104. In the case of Ruddock, liability was based on his participation in a robbery during which the principal cut the victim's throat. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 108, 109. The judge directed the jury that the prosecution had to prove a common intention to commit the robbery which included a situation in which Ruddock knew that there was a possibility that the principal might intend to kill the victim. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 2, 3, 114. The Supreme Court unanimously set the appellants' convictions aside and corrected the common law on "parasitic accessory liability" by holding that the proper mental element for establishing such liability is intent to assist or encourage and that foresight is simply evidence of such intent. *R v. Jogee* [2016] UKSC 8; *Ruddock v. The Queen* [2016] UKPC 7, paras. 79, 83, 87, 89, 90, 98, 99.

as a perpetrator, not as an accessory.[1144] In this sense, *Jogee* is not directly on point. The Appeals Chamber also notes that, in considering whether to find Karadžić liable, *inter alia*, as an accessory for the crimes in the Overarching JCE Municipalities, the Trial Chamber found that, on the basis of the evidence before it, the most accurate and appropriate characterisation of his liability was "commission" through joint criminal enterprise.[1145]

435. In addition, the Appeals Chamber does not find persuasive arguments that the shift in the law of England and Wales on this point warrants reconsideration and possible reversal of established appellate jurisprudence of the ICTY. Although the common law notion of liability due to participation in a joint enterprise may have been influential in the development of ICTY case law, Karadžić's argument that the relevant principles in ICTY jurisprudence were derived from English law is not accurate. The ICTY Appeals Chamber in the *Tadić* case extensively examined a series of post-World War II cases from various domestic jurisdictions concerning war crimes and concluded that the relevant *actus reus* and *mens rea* for liability under the three forms of joint criminal enterprise were firmly established in customary international law.[1146] With regard to the *mens rea* standard for the third form of joint criminal enterprise, it found that customary international law required that: (i) the accused could foresee that the crime not agreed upon in the common plan "might be perpetrated" by one or other members of the group; and (ii) the accused willingly took that risk.[1147] It also clarified that, what was required was intent to pursue the common plan in addition to "foresight that those crimes outside the criminal common purpose were likely to be committed".[1148] Thus, while the ICTY Appeals Chamber in *Tadić* considered domestic case law in determining customary international law,[1149] contrary to Karadžić's claim, it found that the relevant principles were derived from customary international law, not the law of England and Wales.[1150] A shift in the law of England and Wales and the jurisdictions bound by the Privy Council on this point therefore does not *per se* warrant the reversal of established appellate jurisprudence.

436. The ICTY Appeals Chamber in *Tadić* also assessed whether domestic legislation or case law could be relied upon as a source of international principles or rules under the doctrine of general principles of law recognized by the major legal systems of the world.[1151] Its survey led it to conclude that, although the common purpose doctrine "was rooted in the national law of many

[1144] *Šainović et al.* Appeal Judgement, para. 1260; *Krajišnik* Appeal Judgement, para. 662; *Kvočka et al.* Appeal Judgement, paras. 79, 80; *Vasiljević* Appeal Judgement, para. 102.
[1145] Trial Judgement, para. 3525.
[1146] *Tadić* Appeal Judgement, paras. 194-226.
[1147] *Tadić* Appeal Judgement, para. 228.
[1148] *Tadić* Appeal Judgement, para. 229.
[1149] *Tadić* Appeal Judgement, paras. 194-226.
[1150] *See also Tadić* Appeal Judgement, paras. 225, 226.
[1151] *Tadić* Appeal Judgement, para. 225.

States", major domestic jurisdictions did not adopt a common approach with regard to the third form of joint criminal enterprise and that therefore "national legislation and case law cannot be relied upon as a source of international principles or rules" in this context.[1152] The shift in the law in *Jogee*, which has not been followed in other common law jurisdictions,[1153] confirms rather than undermines the conclusion in *Tadić* that different approaches at a domestic level reflect that domestic case law, in such circumstances, cannot be relied upon as a source of international principles.[1154] The Appeals Chamber finds that the shift in *Jogee* does not provide a sufficient basis to revisit *Tadić* or the relevant *mens rea* standard as applied in established case law.

437. In light of the foregoing, the Appeals Chamber finds that the submissions of Karadžić and the *amici* fail to show that the shift in the law in *Jogee* constitutes a cogent reason warranting departure from the consistent jurisprudence on the *mens rea* element of the third category of joint criminal enterprise. Consequently, the Appeals Chamber dismisses Ground 29 of Karadžić's appeal.

[1152] *Tadić* Appeal Judgement, para. 225.
[1153] *See HKSAR v. Chan Kam-Shing* [2016] HKCFA 87, paras. 32, 33, 40, 58, 60, 62, 71, 98; *Miller v. The Queen, Smith v. The Queen, Presley v. The Director of Public Prosecutions* [2016] HCA 30, para. 43.
[1154] *Tadić* Appeal Judgement, para. 225 ("in the area under discussion [concerning the third form of joint criminal enterprise], national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above survey shows that this is not the case.").

3. Alleged Error in Convicting Karadžić of Conduct Not Charged in the Indictment (Ground 30)

438. The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of persecution as a crime against humanity by forcible transfer, based on the forcible displacement of a large number of Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities from their homes to other locations, both within the national boundaries of Bosnia and Herzegovina, as well as to Serbia, Croatia, or Montenegro.[1155] In this regard, the Trial Chamber found that, in many cases, Bosnian Muslims and Bosnian Croats had been forced to leave following the attack or take-over of their villages or towns by Serb forces, and that, in some cases, Bosnian Muslims and Bosnian Croats had been arrested and detained in detention facilities before being transported out of the Overarching JCE Municipalities.[1156] The Trial Chamber considered that, while the transfers of some detainees out of detention facilities were described as "exchanges", they predominantly concerned unlawfully detained civilians and therefore it found that they amounted to forced displacement.[1157]

439. Karadžić submits that the Trial Chamber erred by convicting him of persecution by forcible transfer of detained persons who were the subject of prisoner exchanges as such conduct was not charged in the Indictment, which only charged him with persecution by forcible transfer or deportation of Bosnian Muslims and Bosnian Croats from their homes.[1158] He contends that the Appeals Chamber should vacate his conviction for persecution that was based on prisoner exchanges and reduce his sentence accordingly.[1159]

440. The Prosecution responds that Karadžić was not convicted of an uncharged crime as the interim detention of some individuals before their displacement from the Overarching JCE Municipalities did not negate that they were originally removed from their homes, as charged, and that, as demonstrated by the Trial Chamber's findings, interim detention was part of the process of displacing people from their homes.[1160]

[1155] Trial Judgement, paras. 2465-2481, 2519-2521, 6002.
[1156] Trial Judgement, para. 2470.
[1157] Trial Judgement, para. 2470.
[1158] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 549, 550; Karadžić Reply Brief, paras. 166-168. Karadžić also submits that "[t]he [I]ndictment distinguished and separated crimes committed against persons in their homes (Schedule A) and crimes committed against persons in detention (Schedule B) [and that t]herefore, paragraph 60(f), with its language 'from their homes' did not include persons in detention". *See* Karadžić Appeal Brief, para. 551; Karadžić Reply Brief, para. 168.
[1159] Karadžić Appeal Brief, para. 552.
[1160] Prosecution Response Brief, paras. 300-303.

441. The Appeals Chamber recalls that a trial chamber can only convict an accused of crimes that are charged in the indictment.[1161] 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 and enable him or her to prepare a meaningful defence.[1162] An indictment need not have the degree of specificity of the evidence underpinning it; the degree of specificity required depends on the nature and scale of the alleged criminal conduct, including the proximity of the accused to the relevant events.[1163]

442. The Appeals Chamber observes that the Indictment charged Karadžić with "forcible transfer or deportation of Bosnian Muslims and Bosnian Croats from their homes within the Municipalities and from Srebrenica."[1164] Although it did not specify that the victims of forcible transfer or deportation included persons who had been detained and/or exchanged, the Indictment nonetheless charged that persecution as a crime against humanity was committed against Bosnian Muslims and Bosnian Croats in 21 geographical areas of Bosnia and Herzegovina claimed as Bosnian Serb territory over a period of more than three years.[1165] The Indictment further provided that, during and after the attacks and take-over of towns and villages in the Overarching JCE Municipalities and Srebrenica, Serb forces and Bosnian Serb political organs carried out persecutory acts against Bosnian Muslims and Bosnian Croats, including arbitrary arrests and detention, and established and controlled detention facilities where Bosnian Muslims and Bosnian Croats were detained.[1166] In this respect, the Indictment specified that these acts caused some Bosnian Muslims and Bosnian Croats to flee the municipalities in fear while others were physically driven out.[1167] Considering the nature of the charge, the sheer scale of the alleged crimes, and Karadžić's high-ranking position and alleged responsibility as a member of a joint criminal enterprise sharing the intent to commit such persecutory acts, the Appeals Chamber finds that the interim detention of some victims of forcible transfer before their expulsion from the Overarching JCE Municipalities was not a material fact that had to be pleaded in the Indictment.[1168]

[1161] *Ngirabatware* Appeal Judgement, para. 116; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Kupreškić et al.* Appeal Judgement, para. 113.
[1162] *Ngirabatware* Appeal Judgement, para. 32; *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al.* Appeal Judgement, paras. 213, 225, 262.
[1163] *Ngirabatware* Appeal Judgement, para. 32; *Šainović et al.* Appeal Judgement, paras. 225, 233; *Kvočka et al.* Appeal Judgement, para. 65; *Rutaganda* Appeal Judgement, para. 302.
[1164] Indictment, para. 60(f).
[1165] Indictment, paras. 48, 51, 52.
[1166] Indictment, paras. 52-54.
[1167] Indictment, para. 55.
[1168] The Appeals Chamber notes that, contrary to Karadžić's submissions, the Indictment did not make an overall distinction between crimes committed against persons in their homes and crimes committed against persons in detention. This distinction was only made with regard to killing incidents listed in Schedules A and B of the Indictment. *See* Indictment, RP. 26298 ("Schedule A, Killings Not Related to Detention Facilities"), 26294 ("Schedule B, Killings Related to Detention Facilities").

443. In any event, the Appeals Chamber is satisfied that, well in advance of the commencement of the trial, the Prosecution gave Karadžić notice of its allegation that the forcibly removed persons referred to in the Indictment included persons held in detention facilities or persons who were "exchanged". The Prosecution Pre-Trial Brief specified that the Bosnian Serb government had organized the expulsion of non-Serb civilians from Serb-claimed territories at the highest level of both the military and civilian structures, *inter alia*, by establishing a Central Exchange Commission that operated as a vehicle for the removals.[1169] The Prosecution's list of witnesses, which included a summary of anticipated evidence, explicitly provided that Prosecution witnesses would testify that civilians were arrested, transferred to detention centers, and later "exchanged" or transferred outside Serb claimed territories.[1170]

444. Furthermore, when opening its case, the Prosecution explicitly stated that:

> [witnesses] will describe […] how their municipalities were forcibly taken over by Serb forces […] how they were arrested or rounded up with other non-Serbs and sent to camps […]; how they were transferred from camp to camp in the network of detention facilities and camps that spanned the municipalities; how they were eventually exchanged, a euphemism for their expulsion from Bosnian Serb-controlled territory after signing documents relinquishing their property to the Bosnian Serb State.[1171]

The Prosecution also noted that its case was that "the establishment of the exchange system […] completed and perfected the process of removing [Bosnian Muslim and Bosnian Croat civilians] from the territories and ethnic purification".[1172]

445. Based on the foregoing, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred by convicting him of conduct that was not charged in the Indictment. Therefore, the Appeals Chamber dismisses Ground 30 of Karadžić's appeal.

[1169] Prosecution Rule 65 *ter* Submissions, Appendix I, Prosecution's Final Pre-Trial Brief (public with partly confidential appendices), paras. 94-97, 114, 115, 144-147; Prosecution Rule 65 *ter* Submissions Attachment Detailing Events in the Municipalities (confidential), [REDACTED].
[1170] Prosecution Rule 65 *ter* Submissions, Appendix II, Witness List (confidential), [REDACTED].
[1171] T. 27 October 2009 pp. 523, 524.
[1172] T. 27 October 2009 pp. 581, 582.

4. Alleged Errors Concerning Untested Evidence and Adjudicated Facts (Ground 31)

446. The Trial Chamber concluded that Karadžić significantly contributed to the furtherance of the common purpose of the Overarching JCE and shared the intent to expel Bosnian Muslims and Bosnian Croats from the Overarching JCE Municipalities.[1173] In the context of Karadžić's participation in the Overarching JCE, the Trial Chamber found that he was responsible for the crimes alleged as Scheduled Incidents in the Indictment[1174] related to the take-over of 20 municipalities located in Eastern Bosnia,[1175] the Autonomous Region of Krajina ("ARK"),[1176] and the Sarajevo area.[1177] As a result of these findings, the Trial Chamber found Karadžić responsible, pursuant to Article 7(1) of the ICTY Statute, for persecution, extermination, murder, deportation, and inhumane acts (forcible transfer) as crimes against humanity as well as murder as a violation of the laws or customs of war.[1178]

447. The Trial Chamber further found that Karadžić significantly contributed to the furtherance of the common purpose of the Srebrenica JCE and shared the intent to eliminate Bosnian Muslims in Srebrenica.[1179] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination and other inhumane acts (forcible transfer) as

[1173] Trial Judgement, paras. 3434-3524, 5996.
[1174] Trial Judgement, paras. 6002-6007.
[1175] Trial Judgement, paras. 596-1365. With respect to Eastern Bosnia, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Sokolac, Višegrad, Vlasenica, and Zvornik. *See* Trial Judgement, paras. 617-679 (with respect to the crimes committed in the municipality of Bijeljina), 733-791 (with respect to the crimes committed in the municipality of Bratunac), 799-833 (with respect to the crimes committed in the municipality of Brčko), 862-934 (with respect to the crimes committed in the municipality of Foča), 981-1040 (with respect to the crimes committed in the municipality of Rogatica), 1055-1074 (with respect to the crimes committed in the municipality of Sokolac), 1080-1093 (with respect to the crimes committed in the municipality of Višegrad), 1135-1222 (with respect to the crimes committed in the municipality of Vlasenica), 1254-1274, 1296-1365 (with respect to the crimes committed in the municipality of Zvornik).
[1176] Trial Judgement, paras. 1366-2061. With respect to the ARK, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Banja Luka, Bosanski Novi, Ključ, Prijedor, and Sanski Most. *See* Trial Judgement, paras. 1375-1430 (with respect to the crimes committed in the municipality of Banja Luka), 1451-1483 (with respect to the crimes committed in the municipality of Bosanski Novi), 1513-1568 (with respect to the crimes committed in the municipality of Ključ), 1617-1637, 1641-1657, 1664-1715, 1720-1735, 1739-1913 (with respect to the crimes committed in the municipality of Prijedor), 1952-1978, 1980-2035 (with respect to the crimes committed in the municipality of Sanski Most).
[1177] Trial Judgement, paras. 2062-2438. With respect to the Sarajevo Area, the Trial Chamber analysed evidence concerning crimes committed in the municipalities of Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća. *See* Trial Judgement, paras. 2095-2115 (with respect to the crimes committed in the municipality of Hadžići), 2136-2165 (with respect to the crimes committed in the municipality of Ilidža), 2189-2237 (with respect to the crimes committed in the municipality of Novi Grad), 2274-2288 (with respect to the crimes committed in the municipality of Novo Sarajevo), 2316-2352 (with respect to the crimes committed in the municipality of Pale), 2392-2438 (with respect to the crimes committed in the municipality of Vogošća).
[1178] Trial Judgement, paras. 3524, 5996, 6002-6007, 6022-6024, n. 20574.
[1179] Trial Judgement, paras. 5998, 6001-6007.

crimes against humanity and murder as a violation of the laws or customs of war for the crimes committed by Bosnian Serb forces in the execution of the Srebrenica JCE.[1180]

448. Karadžić submits that, in finding him responsible for the crimes related to 36 Scheduled Incidents that allegedly occurred in the context of the Overarching JCE and the Srebrenica JCE, the Trial Chamber violated his right to examine or have examined the evidence against him under Article 21(4) of the ICTY Statute.[1181] Specifically, he submits that, in reaching findings in support of these convictions, the Trial Chamber impermissibly relied solely or in a decisive manner on untested evidence in the form of adjudicated facts and/or evidence admitted pursuant to Rule 92 *bis* and *quater* of the ICTY Rules ("Rule 92 *bis* and *quater* evidence" or, separately, "Rule 92 *bis* evidence" and "Rule 92 *quater* evidence").[1182] The Appeals Chamber will consider these contentions in turn.

449. The Appeals Chamber recalls that under Article 21(4)(e) of the ICTY Statute an accused has the right to examine, or have examined, the witnesses against him. In relation to challenges to a trial chamber's reliance on evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules when the defendants did not have an opportunity to cross-examine the witness, the Appeals Chamber of the ICTY stated:

> [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. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration".[1183]

The Appeals Chamber adopts this statement of the law.

(a) Alleged Errors Concerning Adjudicated Facts

450. Karadžić submits that the Trial Chamber erred in convicting him for Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 based solely or in a decisive manner upon adjudicated facts and for convicting him in relation to Scheduled Incidents A.7.1, A.7.2, A.10.5,

[1180] Trial Judgement, paras. 5998, 6002-6005. Although the Trial Chamber found that Karadžić could be convicted of murder as a crime against humanity, it observed that convictions for this offense and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574. The Trial Chamber did not hold Karadžić responsible under Article 7(1) of the ICTY Statute for the killings and related acts of persecution of the Srebrenica JCE which occurred prior to his agreement on 13 July 1995. Rather, it entered a conviction under Article 7(3) of the ICTY Statute for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war for these events. *See* Trial Judgement, paras. 5831, 5833, 5848, 5850, 5998, 6002-6005.
[1181] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 553-569; T. 23 April 2018 pp. 112, 113.
[1182] Karadžić Appeal Brief, paras. 553-569; T. 23 April 2018 pp. 112, 113.

A.10.7, A.10.8, A.12.1, A.12.2, B.15.1, C.15.1, C.20.6, C.22.3, C.23.1, C.27.4, D.20, and E.1.1 based solely or decisively on a combination of adjudicated facts and untested Rule 92 *bis* and *quater* evidence.[1184] In his view, adjudicated facts, like Rule 92 *bis* and *quater* evidence, are untested evidence and cannot be relied upon solely or decisively when entering a conviction.[1185] Similarly, Karadžić argues that a finding based on a combination of adjudicated facts and Rule 92 *bis* and *quater* evidence must also be considered to be based upon untested evidence and, therefore, must require corroboration.[1186]

451. The Prosecution disputes Karadžić's argument that adjudicated facts are untested evidence and that they require corroboration before being relied upon in support of a conviction.[1187] It further argues that Karadžić's contention that the Trial Chamber erred in relying on adjudicated facts in combination with Rule 92 *bis* and *quater* evidence is similarly baseless and should be rejected.[1188]

452. The Appeals Chamber finds no merit in Karadžić's contention that the Trial Chamber erred in convicting him for Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 by relying solely or in a decisive manner upon adjudicated facts. Karadžić presents no argument suggesting that the Trial Chamber violated the well-established principle that adjudicated facts should not be admitted, and by extension, relied upon, if they concern the acts, conduct, or mental state of the accused. Furthermore, Karadžić fails to appreciate that adjudicated facts, within the meaning of Rule 94(B) of the ICTY Rules, are presumptions and are not equivalent to untested evidence requiring sufficient corroboration to be relied upon in support of conviction.[1189] Specifically, the Appeals Chamber recalls the jurisprudence of the ICTY Appeals Chamber that "by taking judicial notice of an adjudicated fact, a [trial] [c]hamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial,

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[1183] *Popović et al.* Appeal Judgement, para. 96 (internal references omitted). *See also Prlić et al.* Appeal Judgement, para. 137; *Martić* Appeal Judgement, para. 192, n. 486.
[1184] Karadžić Appeal Brief, paras. 555, 556; T. 24 April 2018 p. 247.
[1185] Karadžić Appeal Brief, paras. 557, 558; Karadžić Reply Brief, paras. 169, 170. To establish that adjudicated facts should be subject to the same limitations as untested evidence, Karadžić emphasizes that adjudicated facts, like Rule 92 *bis* evidence, cannot go to the acts and conduct of the accused and that the means of challenging adjudicated facts and untested evidence is the same. Karadžić Appeal Brief, para. 557; Karadžić Reply Brief, paras. 169, 170. Viewed in this light, Karadžić argues that adjudicated facts are the equivalent of untested evidence and that they therefore require sufficient corroboration before being relied upon in support of findings in support of conviction. Karadžić Appeal Brief, paras. 557, 558; Karadžić Reply Brief, paras. 169, 170.
[1186] Karadžić Appeal Brief, paras. 559, 560.
[1187] Prosecution Response Brief, paras. 305, 306. *See also* T. 23 April 2018 p. 188.
[1188] Prosecution Response Brief, para. 306.
[1189] In this respect, Karadžić's contentions that adjudicated facts can be equated to untested evidence, such as that admitted pursuant to Rule 92 *bis* of the ICTY Rules, on the basis that neither may go towards the acts, omissions, and mental state of the accused and that the means of challenging both is the same are not persuasive. Adjudicated facts under Rule 94(B) of the ICTY Rules are rebuttable presumptions that can only be accepted where, *inter alia*, they have been tested and established in another trial proceeding whereas the reliability and credibility requirements for admission of untested evidence pursuant to Rules 89(C) and 92 *bis* of the ICTY Rules are far less onerous. *Compare, mutatis mutandis, Bagosora et al.* Decision of 29 October 2010, para. 11 *with Nizeyimana* Decision of 8 March 2011, para. 7.

but which, subject to that presumption, may be challenged at that trial."[1190] Requiring corroboration of adjudicated facts after their admission would undermine the judicial economy function served by taking judicial notice of adjudicated facts,[1191] as judicial notice under Rule 94(B) of the ICTY Rules relieves the Prosecution of the initial burden of producing evidence on such facts.[1192] Moreover, adjudicated facts may relate to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible.[1193] In this context, trial chambers, after having reviewed the record as a whole, may rely on adjudicated facts to establish the underlying crime base when making findings in support of convictions.[1194]

453. Based on these considerations, Karadžić's blanket argument that the Trial Chamber erred by relying solely or in a decisive manner on adjudicated facts in relation to Scheduled Incidents A.5.4, A.12.4, B.15.3, C.10.4, C.10.5, and C.10.7 fails to demonstrate error on the part of the Trial Chamber. The Appeals Chamber similarly finds no error in respect of Karadžić's cursory argument that the Trial Chamber impermissibly relied upon a combination of adjudicated facts and Rule 92 *bis* and *quater* evidence with respect to Scheduled Incidents A.7.1, A.7.2, A.10.5, A.10.7, A.10.8, A.12.1, A.12.2, B.15.1, C.15.1, C.20.6, C.22.3, C.23.1, C.27.4, D.20, and E.1.1.

(b) Alleged Errors Concerning Rule 92 *bis* Evidence

454. Karadžić submits that the Trial Chamber impermissibly relied solely or in a decisive manner on untested Rule 92 *bis* evidence in entering convictions related to Scheduled Incidents A.10.2, A.10.3, A.10.4, A.10.6, A.14.2, B.1.1, B.13.1, B.13.3, B.20.4, C.20.5, C.20.7, C.22.5, C.27.3, C.27.5, and E.11.1.[1195] In support of this contention, Karadžić relies on the *Đorđević* Appeal Judgement which, in his view, reflects that any factual finding used in support of a conviction cannot rest solely or decisively on untested evidence.[1196] Moreover, he argues that the Appeals

[1190] *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 11, *quoting Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4. *Cf. Bagosora et al.*, Decision of 29 October 2010, para. 7; *Karemera et al.* Decision of 16 June 2006, para. 42. *See also Lukić and Lukić* Appeal Judgement, para. 261.
[1191] *See, mutatis mutandis, Karemera et al.* Decision of 16 June 2006, para. 39 ("Taking judicial notice of adjudicated facts under Rule 94(B) [of the ICTR Rules] is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial."). *See also Setako* Appeal Judgement, para. 200.
[1192] *See, mutatis mutandis, Karemera et al.* Decision of 16 June 2006, para. 42.
[1193] *See Mladić* Decision of 12 November 2013, para. 85.
[1194] In this regard, the Appeals Chamber observes that this is supported by the practice of trial chambers, which in a number of cases relied on adjudicated facts as the sole basis to establish findings concerning crime base incidents. *See, e.g., Stanišić and Župljanin* Trial Judgement, paras. 663, 664, 690; *Krajišnik* Trial Judgement, paras. 632-636; *Perišić* Trial Judgement, paras. 468-472.
[1195] Karadžić Appeal Brief, para. 554; T. 24 April 2018 p. 247. *See also* Karadžić Reply Brief, para. 171.
[1196] Karadžić Appeal Brief, para. 562.

Chamber of the ICTY erroneously departed from this principle when concluding in the *Popović et al.* Appeal Judgement that a trial chamber could rely solely or decisively on untested evidence with respect to a single incident insofar as the conviction on the relevant count was not based on that incident alone.[1197]

455. The Prosecution responds that Karadžić erroneously contends that the findings related to the Scheduled Incidents he identified are based solely or decisively on Rule 92 *bis* evidence since they are supported by adjudicated facts, corroborated by other evidence and findings demonstrating a corroborative pattern of conduct, and/or corroborated by other, non-Rule 92 *bis* evidence.[1198] Moreover, relying on the *Popović et al.* Appeal Judgement, the Prosecution contends that the counts upon which Karadžić has been convicted would stand even if the findings related to the identified Scheduled Incidents were overturned and, in this context, rejects the proposition that any of his convictions are based solely or decisively on untested evidence.[1199] The Prosecution also argues that Karadžić's disagreement with the *Popović et al.* Appeal Judgement does not show the existence of cogent reasons to depart from the principles established in it.[1200]

456. Karadžić replies that the Trial Chamber did not refer to corroborative evidence highlighted by the Prosecution and, therefore, made findings based on untested evidence.[1201] He further contends that corroborating evidence that the Prosecution relies on relates to general patterns of conduct and does not sufficiently corroborate whether a particular Scheduled Incident occurred or who the perpetrators were or if there is any link to the accused.[1202]

457. The Appeals Chamber observes that Karadžić and the Prosecution appear to interpret the *Popović et al.* Appeal Judgement to suggest that findings in support of a conviction may be based solely or decisively on untested Rule 92 *bis* evidence so long as they are not the only findings in support of a count or counts for which a defendant is convicted. In presenting such interpretation, however, both parties ignore that the *Popović et al.* Appeal Judgement, consistent with the approach

[1197] Karadžić Appeal Brief, paras. 563, 564, *referring to Popović et al.* Appeal Judgement, paras. 103, 104, *Stakić* Appeal Judgement, paras. 201, 202. *See also* Karadžić Appeal Brief, paras. 565-568.
[1198] Prosecution Response Brief, paras. 304, 309-311. *See also* T. 23 April 2018 p. 189 (identifying Scheduled Incident A.14.2 as an example where the Trial Chamber relied on a variety of evidence to corroborate the relevant Rule 92 *bis* evidence when making findings in support of conviction), T. 24 April 2018 p. 280 (arguing that the Defence "inflates" the number of findings allegedly based solely on untested evidence).
[1199] Prosecution Response Brief, paras. 304, 307, 308; T. 23 April 2018 p. 189. *See also* T. 23 April 2018 pp. 189, 190 (arguing that the *Đorđević* Appeal Judgement stands for the proposition that where untested evidence is corroborated by findings demonstrating a similar pattern of conduct, the relevant chamber's findings on that incident cannot be said to rest solely or decisively on untested evidence).
[1200] Prosecution Response Brief, para. 307, n. 1172.
[1201] Karadžić Reply Brief, para. 171.
[1202] Karadžić Reply Brief, para. 171; T. 24 April 2018 p. 247. *See also* T. 24 April 2018 pp. 247, 248 (highlighting that, with respect to Scheduled Incident A.14.2, all 55 references in that section of the Trial Judgement refer to the relevant Rule 92 *bis* evidence with only four footnotes citing to "a variety of other evidence").

taken in the *Đorđević* Appeal Judgement, reflects that evidence demonstrating a consistent pattern of conduct can provide sufficient corroboration in support of convictions based on evidence admitted pursuant to Rule 92 *bis* or 92 *quater* of the ICTY Rules.[1203] Consequently, the Appeals Chamber dismisses Karadžić's submission that the *Popović et al.* Appeal Judgement departs from previous ICTY jurisprudence in relation to the prohibition against the use of untested evidence as the sole or decisive basis in support of a conviction.

458. The Appeals Chamber turns to Karadžić's contentions that the Trial Chamber impermissibly made several findings in support of his convictions based solely or decisively on untested evidence. The Appeals Chamber recalls that the principle that no conviction can rest solely or decisively on untested evidence without sufficient corroboration stems from the fundamental right of the accused to examine, or have examined, the witnesses against him, which is enshrined in Article 21(4)(e) of the ICTY Statute.[1204] As Karadžić alleges a violation of his fair trial rights, he must demonstrate that such a violation occurred and show that it caused prejudice amounting to an error of law invalidating the trial judgement.[1205]

459. Turning to whether the Trial Chamber violated Karadžić's right under Article 21(4)(e) of the ICTY Statute in reaching findings related to Scheduled Incidents A.10.2, A.10.3, A.10.4, A.10.6, A.14.2, B.1.1, B.13.3, C.20.5, C.20.7, and C.27.3, the Appeals Chamber observes that the Trial Chamber expressly considered adjudicated facts and/or evidence other than Rule 92 *bis* and *quater* in reaching its conclusions when first making findings on these Scheduled Incidents.[1206] Karadžić's

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[1203] *See Popović et al.* Appeal Judgement, para. 104 ("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. The Appeals Chamber further observes that evidence that demonstrates a pattern of conduct may be used as corroborative evidence. 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. 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."); *Đorđević* Appeal Judgement, paras. 807 ("The Appeals Chamber considers Morina's evidence [which was admitted under Rule 92 *quater* of the ICTY Rules] – that Serbian forces set fire to the interior of the mosque in Landovica/Landovicë causing substantial destruction to its structure and minaret by use of an explosive device – to be a critical element of the Prosecution case and a vital link in demonstrating Đorđević's responsibility for the destruction of the mosque committed by Serbian forces."), 808 ("The Appeals Chamber notes, however, that the Trial Chamber found a consistent pattern of attack by the Serbian forces entering towns and villages on foot, beginning on 24 March 1999, and setting houses on fire and looting valuables. Particularly, it found that '[t]he same pattern continued in the following days, on 26 March 1999 in Landovica/Landovicë.' The Appeals Chamber, Judge Tuzmukhamedov dissenting, finds this pattern of attack by the Serbian forces to be corroborative of Morina's account in the admitted statement and transcript that the Serbian forces set fire to the interior of the mosque in Landovica/Landovicë. The Appeals Chamber therefore considers, Judge Tuzmukhamedov dissenting, that the Trial Chamber's conclusion is not based solely or in a decisive manner on Morina's 92 *quater* evidence, as other evidence supports Đorđević's conviction for the crime of persecutions through the destruction of the mosque in Landovica/Landovicë.") (internal citations omitted).

[1204] *See Đorđević* Appeal Judgement, para. 807; *Prlić et al.* Decision of 23 November 2007, para. 59.

[1205] *Šainović et al.* Appeal Judgement, para. 29; *Nyiramasuhuko et al.* Appeal Judgement, para. 346.

[1206] Specifically, the Appeals Chamber notes that with respect to Scheduled Incident A.10.2, concerning the killing of at least six Bosnian Muslims in the areas of Hambarine and Ljubija between 23 May and 1 July 1992 (Trial Judgement, paras. 1664-1677) the Trial Chamber also relied on adjudicated facts and forensic evidence. *See* Trial Judgement, paras.

general argument fails to demonstrate that the relevant findings were not independently supported by adjudicated facts and/or sufficiently corroborated by non-Rule 92 *bis* or *quater* evidence. Accordingly, the Appeals Chamber dismisses Karadžić's contention in this respect.

460. As concerns Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the relevant findings are based solely or decisively on untested Rule 92 *bis* or *quater* evidence. With respect to Scheduled Incident C.27.5, the Trial Chamber found that, from the end of May 1992, Bosnian Muslims detained at the Drinjača cultural center in Zvornik were subjected to threats, severe beatings, and were stabbed by

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1666 (*referring to* Adjudicated Facts 1034, 1036, 1060, 1061, 1286), 1667 (*referring to* Adjudicated Facts 1035, 1038, 1062, 1294), 1668 (*referring to* Adjudicated Facts 1034, 1061), 1669 (*referring to* Adjudicated Facts 1036, 1281, 1294), 1670 (*referring to* Adjudicated Fact 1061, Exhibits P4853, P646 (confidential)), 1675 (*referring to* Exhibit P646 (confidential)), 1676 (*referring to* Exhibits P4853, P4892, P646 (confidential)). With respect to Scheduled Incident A.10.3, where the Trial Chamber found that at least nine Bosnian Muslim men and women were killed by Serb forces in the village of Kamičani on or about 26 May 1992 (Trial Judgement, paras. 1641-1649), it also relied on adjudicated facts, [REDACTED], and evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1643, 1644 (*referring to* Adjudicated Facts 1034, 1063, 1288, [REDACTED]), 1646 ([REDACTED]), 1647 ([REDACTED]), 1648 ([REDACTED]). With respect to Scheduled Incident A.10.4, concerning the killing of at least eight Bosnian Muslim men by Serb forces in the village of Jaskići on or about 14 June 1992 (Trial Judgement, paras. 1650-1657), the Trial Chamber also relied on an adjudicated fact and forensic evidence. *See* Trial Judgement, para. 1656 (*referring to* Adjudicated Fact 1064, Exhibits P4853, P646 (confidential)). With respect to Scheduled Incident A.10.6, concerning the killing of at least 300 non-Serbs, including civilians, by Serb forces in the village of Bišćani and in the surrounding hamlets of Hegići, Mrkalji, Ravine, Duratovići, Kadići, Lagići, and Čemernica on or about 20 July 1992 (Trial Judgement, paras. 1693-1715), the Trial Chamber also relied upon adjudicated facts, forensic evidence, and evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1694 (*referring to* Adjudicated Fact 1073), 1696 (*referring to* Adjudicated Fact 1074, Exhibit P646 (confidential)), 1698 (*referring to* Exhibit P4853), 1701 (*referring to* Adjudicated Fact 1075), 1703 (*referring to* Adjudicated Facts 1076, 1077), 1705 (*referring to* Exhibit P646 (confidential)), 1706 (*referring to* Adjudicated Fact 1289), 1712 (*referring to* Adjudicated Fact 1071), 1713 (*referring to* [REDACTED]), 1714 (*referring to* Exhibits P4853, P4892, P6689, P6690). With respect to Scheduled Incident A.14.2, concerning the killing of approximately 45 Bosnian Muslim civilians near Paklenik in Sokolac municipality by Serb forces on 15 June 1992 (Trial Judgement, paras. 1080-1093), the Trial Chamber also relied on written statements of Defence witnesses and forensic evidence. *See* Trial Judgement, paras. 1084 (*referring to* Exhibit P5508), 1087 (*referring to* Exhibits P4902, P3291), 1088 (*referring to* Exhibits D3206, D3175), 1090-1092 (*referring to* Exhibits P4106, P4853, P4902). With respect to Scheduled Incident B.1.1, concerning the killing of six Bosnian Muslim men in Manjača (Trial Judgement, paras. 1411-1415), the Appeals Chambers notes that the Trial Chamber also relied on adjudicated facts and other evidence, including forensic evidence. *See* Trial Judgement, paras. 1412 (*referring to* Adjudicated Fact 583), 1413 (*referring to* Adjudicated Fact 584, Exhibits P6556, P3519, P3520), 1414 (*referring to* Exhibit P4853). With respect to Scheduled Incident B.13.3, concerning the killing of three detainees while performing forced labor at Kula Prison between 23 July and 24 November 1992 (Trial Judgement, paras. 2156-2158), the Appeals Chambers notes that the Trial Chamber also relied on an adjudicated fact and other evidence, including forensic evidence. *See* Trial Judgement, para. 2157 (*referring to* Adjudicated Fact 2640, Exhibits P4853, P4886). With respect to Scheduled Incident C.20.5, concerning the detention and mistreatments of Bosnian Muslims detained at Miška Glava Dom in the village of Miška Glava, Prijedor Municipality, by Serb forces from around 21 July to 25 July 1992 (Trial Judgement, paras. 1853-1861), the Trial Chamber also relied on adjudicated facts. *See* Trial Judgement, paras. 1854 (*referring to* Adjudicated Facts 1102, 1257, 1258), 1855 (*referring to* Adjudicated Fact 1259), 1858 (*referring to* Adjudicated Facts 1258, 1259, 1260). With respect to Scheduled Incident C.20.7, concerning the detention and mistreatment of non-Serb civilians in Prijedor barracks by Serb forces in June 1992 (Trial Judgement, paras. 1878-1885), the Trial Chamber also relied on adjudicated facts and on evidence that was subject to cross-examination. *See* Trial Judgement, paras. 1879 (*referring to* Adjudicated Facts 1102, 1264, [REDACTED]), 1882 ([REDACTED]). With respect to Scheduled Incident C.27.3, concerning the detention and mistreatment of Bosnian Muslims at the Alhos factory in April 1992 (Trial Judgement, paras. 1316-1320), the Trial Chamber also relied on adjudicated facts. *See* Trial Judgement, paras. 1317 (*referring to* Adjudicated Fact 2757), 1319 (*referring to* Adjudicated Fact 2758).

Serb forces.[1207] In relation to this incident, the Trial Chamber found Karadžić responsible for persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute.[1208] The Appeals Chamber, Judges Joensen and de Prada dissenting, observes that the Trial Chamber's findings concerning the mistreatment of the Bosnian Muslim detainees are supported entirely by a transcript of the testimony of KDZ072 in the *Šešelj* case,[1209] which the Trial Chamber admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1210]

461. The Prosecution argues that this evidence is further corroborated by the evidence of other witnesses and forensic evidence and that the relevant findings are also supported by an adjudicated fact.[1211] However, the Appeals Chamber observes that the Prosecution refers to evidence and an adjudicated fact relied on by the Trial Chamber in relation to Scheduled Incident B.20.1 concerning the killing of approximately 88 of the detainees at Drinjača cultural center which occurred following their mistreatment.[1212] While the killing of the detainees at Drinjača cultural center appears to have occurred soon after the event detailed in Scheduled Incident C.27.5, none of the evidence or the adjudicated fact referred to by the Prosecution directly corroborates the untested evidence of KDZ072 that the detainees were subjected to threats, severe beatings, and were stabbed by Serb forces.[1213]

462. The Prosecution, referring to the Trial Chamber's conclusions in relation to other Scheduled Incidents and legal findings, also argues that this Scheduled Incident is corroborated by "a pattern of similar conduct".[1214] Having reviewed the Scheduled Incidents referred to by the Prosecution, the Appeals Chamber considers that nothing contained in the Trial Chamber's analysis of them

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[1207] Trial Judgement, paras. 1329-1333. Specifically, the Trial Chamber found that on 30 May 1992 around 300 Muslim men, women, and children were detained at the Drinjača cultural center. *See* Trial Judgement, para. 1330. It also found that these detainees were guarded by Bosnian Serb soldiers and that, *inter alia*, the women and children were subsequently separated from the men. *See* Trial Judgement, para. 1331. Further, the Trial Chamber concluded that between 25 and 30 detainees in the Drinjača cultural center were beaten, mistreated, and verbally abused by a group of men wearing camouflage uniforms. *See* Trial Judgement, para. 1332.

[1208] Trial Judgement, paras. 2486, 2493, 2498, 2512-2518, 2522, 2529, 2530, 3505, 3512-3520, 6022.

[1209] *See* Trial Judgement, para. 1332, nn. 4611-4614, *referring to* Exhibit P425. With the exception of the photograph of the exterior of Drinjača cultural center reflected in Exhibit P99, the Trial Chamber's findings concerning the detention of the Bosnian Muslims, their numbers, and the separation of men from the women and children are based principally on Exhibit P425. *See* Trial Judgement, paras. 1330-1332.

[1210] Decision of 10 November 2009, para. 47(b).

[1211] *See* Prosecution Response Brief, para. 310, nn. 1196 ([REDACTED], P6405, pp. 6, 7), 1197 (*referring to* Adjudicated Fact 2762).

[1212] Trial Judgement, paras. 1336, 1337, nn. 4622, 4623, *referring to* Exhibits [REDACTED] P6405 (Marinko Vasilić's interview dated 21 October 2002), Adjudicated Fact 2762.

[1213] Specifically, the Appeals Chamber observes that the relevant excerpts of [REDACTED] and Exhibit P6405 only concern the execution and the collection of the corpses of the detainees at the Drinjača cultural center. *See* [REDACTED]; Exhibit P6405, pp. 6, 7. Similarly, Adjudicated Fact 2762 reflects the killing of ten detainees at Drinjača cultural center by the White Eagles. *See* Trial Judgement, para. 1336. *See* Decision of 14 June 2010 on Fourth Motion for Judicial Notice, para. 98; Appendix A, RP. 36244, item 2761.

[1214] *See* Prosecution Response Brief, paras. 309, 310, nn. 1199 (*referring to* Trial Judgement, paras. 1295-1353), 1200 (*referring to* Trial Judgement, paras. 2485, 2522, 2523, 3443-3445).

suggests that it relied upon this evidence or these findings as a corroborative pattern of conduct in relation to Scheduled Incident C.27.5.[1215] As concerns the legal findings, the Appeals Chamber observes that the legal findings on persecution as a crime against humanity[1216] refer to Scheduled Incident C.27.5 cumulatively with other Scheduled Incidents when describing the conditions of mistreatment of the detainees in detention centers in the Overarching JCE Municipalities.[1217] In the view of the Appeals Chamber, Judges Joensen and de Prada dissenting, this, however, does not demonstrate that the Trial Chamber relied on these incidents, alongside Scheduled Incident C.27.5, as a corroborative pattern of conduct in order to make findings beyond reasonable doubt in relation to Scheduled Incident C.27.5. Rather, the legal findings section recounts the previous findings concerning the various Scheduled Incidents for the purpose of determining whether they satisfy the requirements for this crime.[1218] In marked contrast to the *Popović et al.* and the *Đorđević* cases,[1219] the Appeals Chamber considers, Judges Joensen and de Prada dissenting, that the Trial Judgement does not provide any indication that the Trial Chamber relied on the findings or the underlying evidence as a pattern of similar conduct to corroborate the findings in relation to Scheduled Incident C.27.5, which are otherwise based on untested evidence.[1220] Consequently, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively upon the untested Rule 92 *bis* evidence in support of Karadžić's conviction based on Scheduled Incident C.27.5.[1221]

463. As to Scheduled Incident B.20.4, the Trial Chamber found that at least two men were killed at the Ekonomija Farm by Serb forces in May 1992 and found Karadžić responsible for murder as a crime against humanity (Count 5), murder as a violation of the laws or customs of war (Count 6), and persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute

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[1215] Trial Judgement, paras. 1329-1333. *See also* Trial Judgement, paras. 1295, 1301 (Scheduled Incidents B20.2, C.27.1), 1302-1307 (Scheduled Incident C.27.2), 1308-1311 (Scheduled Incident B.20.3), 1312-1315 (Scheduled Incident A.16.3), 1316-1320 (Scheduled Incident C.27.3), 1321-1328 (Scheduled Incident C.27.4), 1347-1349 (Scheduled Incident B.20.4), 1350-1353 (Scheduled Incident C.27.7).
[1216] *See* Trial Judgement, paras. 2482-2570.
[1217] *See*, *e.g.*, Trial Judgement, paras. 2486, 2491.
[1218] The references to Scheduled Incident C.27.5 in the legal findings section of the Trial Judgement reflect the Trial Chamber recalling findings it had already made in relation to each Scheduled Incident and provides no indication that it relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident C.27.5. *See* Trial Judgement, paras. 2485, 2486.
[1219] The *Popović et al.* Trial Judgement and the *Đorđević* Trial Judgement provide clear indication that the findings that were made based on untested evidence were corroborated by circumstantial evidence demonstrating a pattern of conduct. *See Popović et al.* Trial Judgement, para. 448 ("However, it should be noted that the circumstances described by PW-116 are analogous to those in other locations where 'opportunistic' killings have been found to have occurred."); *Đorđević* Trial Judgement, para. 2027.
[1220] Trial Judgement, paras. 1329-1333.
[1221] The Prosecution also highlights that, in his final trial brief, Karadžić conceded that these crimes occurred. *See* Prosecution Response Brief, para. 310, n. 1195, [REDACTED]. The Appeals Chamber does not consider Karadžić's submissions in his final trial brief as corroboration of untested evidence upon which the Trial Chamber relied.

for this incident.[1222] The Appeals Chamber, Judges Joensen and de Prada dissenting, observes that the Trial Chamber's findings concerning this Scheduled Incident rest entirely on the witness statement of Jusuf Avdispahić,[1223] admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1224] The Prosecution argues that the conviction underpinning Scheduled Incident B.20.4 also rests on an adjudicated fact and "a pattern of similar conduct".[1225] However, the Appeals Chamber observes that the Prosecution refers to an adjudicated fact referred to by the Trial Chamber in its findings about Scheduled Incident C.27.6 concerning different criminal conduct that occurred at the Ekonomija Farm, which the Trial Chamber distinguished from Scheduled Incident B.20.4.[1226]

464. Similarly, the Prosecution's reference to findings related to other Scheduled Incidents and legal findings to suggest that the event was corroborated by "a pattern of similar conduct" fails to demonstrate that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident B.20.4. Nothing contained in the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon the evidence or findings within them as a corroborative pattern of conduct in relation to Scheduled Incident B.20.4.[1227] The Appeals Chamber observes that the legal findings concerning murder as a violation of the laws or customs of war and as a crime against humanity[1228] refer to Scheduled Incident B.20.4 cumulatively with other scheduled incidents in analysing the intent of the perpetrators[1229] and the status of the victims.[1230] However, for the reasons articulated above, the Appeals Chamber, Judges Joensen and de Prada dissenting, is not persuaded that this cumulative review of findings related to various Scheduled Incidents reflects that the Trial Chamber relied upon a similar pattern of conduct as corroboration of its findings beyond reasonable doubt in relation to Scheduled Incident B.20.4.[1231] Accordingly, the

[1222] Trial Judgement, paras. 1347-1349, 2451, 2455, 2456, 2482-2484, 3505, 3512-3520, 6022.
[1223] Trial Judgement, paras. 1347-1349, *referring to* Exhibit P70, pp. 16, 17.
[1224] Decision of 10 November 2009, para. 47(d). Jusuf Avdispahić's evidence was first admitted under his pseudonym KDZ533 but was later made public. Decision of 9 February 2010, paras. 5, 44(3).
[1225] Prosecution Response Brief, paras. 309, 310, nn. 1202 (*referring to* Adjudicated Fact 2765, Trial Judgement, para. 1341), 1203 (*referring to* Karadžić Final Trial Brief, para. 1456, Trial Judgement, n. 4637), 1204 (*referring to* Trial Judgement, paras. 1296-1301, 1308-1311, 1334-1338, 1347-1349), 1205 (*referring to* Trial Judgement, paras. 2447, 2522, 2523, 3443-3445).
[1226] *See* Trial Judgement, paras. 1339-1346, n. 4658.
[1227] Trial Judgement, paras. 1347-1349. *See also* Trial Judgement, paras. 1296-1301 (Scheduled Incidents B.20.2, C.27.1), 1308-1311 (Scheduled Incident B.20.3), 1334-1338 (Scheduled Incident B.20.1), 1347-1349 (Scheduled Incident B.20.4).
[1228] *See* Trial Judgement, paras. 2446-2456.
[1229] Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.10.1, B.12.1, B.15.1, B.15.4, B.15.5, B.16.2, B.18.1, B.18.3, B.20.1, B.20.2, B.20.3, B.20.4 ("the [Trial] Chamber found that the victims (i) were shot by Serb Forces during their detention").
[1230] Trial Judgement, para. 2454, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.8.1, B.10.1, B.12.1, B.12.2, B.15.1-B.15.6, A.10.8, B.16.1, B.16.2, B.18.1-B.18.3, B.20.1, B.20.4, B.1.1-B.1.4, B.13.1 ("others were killed after being detained by Serb Forces in scheduled detention facilities").
[1231] The references to Scheduled Incident B.20.4 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication

Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively upon the untested Rule 92 *bis* evidence in support of Karadžić's convictions based on Scheduled Incident B.20.4.[1232]

465. As to Scheduled Incident B.13.1, the Trial Chamber found that, on or about 7 May 1992, Zlatan Salčinović and another detainee were beaten to death at Kula Prison by Serb forces and concluded that Karadžić was responsible for murder as a crime against humanity (Count 5), murder as a violation of the laws or customs of war (Count 6), and persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute for this incident.[1233] The Appeals Chamber observes that in reaching this finding the Trial Chamber principally relied on the witness statement of Mirsad Smajš,[1234] admitted pursuant to Rule 92 *bis* of the ICTY Rules without cross-examination.[1235] The Appeals Chamber, Judges Joensen and de Prada dissenting, further observes that, while forensic evidence corroborates the witness statement of Mirsad Smajš with respect to the killing of Zlatan Salčinović,[1236] the killing of the other detainee is based entirely on untested evidence.[1237]

466. The Prosecution argues that the findings underpinning Scheduled Incident B.13.1 are supported by other evidence and an adjudicated fact.[1238] However, the Appeals Chamber observes that the Prosecution refers to evidence pertaining to the general conditions of detention and treatment of detainees at Kula Prison,[1239] which was used in support of separate findings related to Scheduled Incident C.18.2 and concerns separate criminal conduct at Kula Prison.[1240] Furthermore, while the Prosecution also refers to the forensic evidence corroborating the death of Zlatan

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that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident B.20.4. *See* Trial Judgement, paras. 2448, 2451.

[1232] Furthermore, while the Prosecution suggests that Karadžić conceded the facts underpinning this incident in his final trial brief, the Appeals Chamber observes that such concession was limited to the crimes concerning Scheduled Incident C.27.6 rather than Scheduled Incident B.20.4. *See* Trial Judgement, nn. 4637, 4658, 4659.

[1233] Trial Judgement, paras. 2153-2155, 2447, 2451, 2455, 2456, 2482-2484, 3505, 3512-3524, 6022-6024.

[1234] Trial Judgement, paras. 2153-2155, *referring to* Exhibit P43, pp. 2, 3.

[1235] Decision of 15 October 2009, para. 32(a).

[1236] Trial Judgement, para. 2154, *referring to* Exhibit P4853, p. 89.

[1237] Trial Judgement, paras. 2153-2155.

[1238] Prosecution Response Brief, paras. 309, 310, nn. 1252 (*referring to* Witness Hajrudin Karić, T. 23 June 2011 p. 15307, Witness KDZ239, T. 15 September 2011 p. 18922, Trial Judgement, para. 2148, nn. 7328, 7329), 1253 (*referring to* Trial Judgement, para. 2146), 1254 (*referring to* Adjudicated Fact 2636, Trial Judgement, para. 2147), 1255 (*referring to* Trial Judgement, paras. 2141, 2147-2149).

[1239] The Appeals Chamber observes that the testimony of Witnesses Hajrudin Karić and KDZ239, who were subject to cross-examination, only identify that the detainees were subject to forced labor, including burying dead bodies, and that several prisoners who were deployed to work were killed. *See* T. 23 June 2011 p. 15307, T. 15 September 2011 p. 18922, T. 16 September 2011 p. 19004. The Appeals Chamber observes further that the relevant excerpts of Exhibit P1126 concern the inadequate conditions of accommodation, food, hygiene, and health of the detainees. *See* Exhibit P1126, pp. 1, 2. Adjudicated Fact 2636 refers to the fact that, in Kula Prison, detainees were regularly beaten. *See* Trial Judgement, para. 2147; Decision of 14 June 2010 on Fourth Motion for Judicial Notice, Appendix A, RP. 36259.

[1240] *Compare* Trial Judgement, paras. 2153-2155 *with* Trial Judgement, paras. 2136-2152.

Salčinović,[1241] the Appeals Chamber considers, Judges Joensen and de Prada dissenting, that this evidence does not corroborate the witness statement of Mirsad Smajš with respect to the killing of the second detainee.

467. Turning to the Prosecution's arguments that the Trial Chamber's conclusions in relation to Scheduled Incidents and legal findings demonstrate "a pattern of similar conduct",[1242] the Appeals Chamber finds that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident B.13.1.[1243] The Appeals Chamber observes that, in discussing its legal findings concerning murder as a violation of the laws or customs of war and as a crime against humanity,[1244] the Trial Chamber referred to Scheduled Incident B.13.1 cumulatively with other Scheduled Incidents when asserting that it "found that the victims [...] died as a result of severe beatings by Serb Forces during their detention".[1245] The Appeals Chamber, Judges Joensen and de Prada dissenting, reiterates that this passage of the Trial Judgement reflects the Trial Chamber's reference to its previous factual findings reached beyond reasonable doubt in the context of each Scheduled Incident and does not indicate that the Trial Chamber relied on a similar pattern of conduct in corroboration of the evidence underpinning Scheduled Incident B.13.1.[1246] Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively on untested evidence in support of Karadžić's convictions based on the killing of the second detainee in relation to Scheduled Incident B.13.1.

468. As concerns Scheduled Incident C.22.5, the Trial Chamber found that Faik Biščević and two other Muslim men detained at the Magarice military facility on or about 27 May 1992 were beaten and subjected to mistreatment by Serb forces.[1247] In relation to this incident, the Trial Chamber found Karadžić responsible for persecution as a crime against humanity (Count 3) pursuant to Article 7(1) of the ICTY Statute.[1248] In reaching these findings, the Trial Chamber relied on

[1241] *See* Prosecution Response Brief, para. 310, n. 1256, *referring to* Exhibit P4853.
[1242] *See* Prosecution Response Brief, paras. 309, 310, nn. 1257 (*referring to* Trial Judgement, paras. 2153-2158), 1258 (*referring to* Trial Judgement, paras. 2447, 2522, 2523, 3443-3445).
[1243] Trial Judgement, paras. 2153-2155 (Scheduled Incident B.13.1), 2156-2158 (Scheduled Incident B.13.3).
[1244] *See* Trial Judgement, paras. 2446-2456.
[1245] Trial Judgement, para. 2451.
[1246] The references to Scheduled Incident B.13.1 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident B.13.1. *See* Trial Judgement, paras. 2447, 2451.
[1247] Trial Judgement, paras. 2019-2024.
[1248] Trial Judgement, paras. 2485, 2491, 2498, 2507, 2512-2518, 2522, 2529, 2530, 2542, 3505, 3512-3524, 6022.

transcripts of Faik Biščević's testimony from the *Brđanin* and *Krajišnik* cases,[1249] which the Trial Chamber admitted without cross-examination under Rule 92 *quater* of the ICTY Rules.[1250]

469. According to the Prosecution, the untested evidence of Faik Biščević is further corroborated by Adjudicated Fact 2546 and evidence subject to cross-examination.[1251] However, the Appeals Chamber observes that the adjudicated fact and the evidence referred to by the Prosecution only concern the detention and the mistreatment of Faik Biščević.[1252] There is no evidence that corroborates the Trial Chamber's conclusions as they concern the mistreatment of the other two Muslim men.[1253]

470. The Prosecution further refers to findings concerning other Scheduled Incidents and the Trial Chamber's legal findings to suggest that a corroborative "pattern of similar conduct" supports this finding.[1254] The Appeals Chamber considers that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident C.22.5.[1255] The Appeals Chamber observes that, in discussing its legal findings on persecution as a crime against humanity,[1256] the Trial Chamber referred to Scheduled Incident C.22.5 cumulatively with other Scheduled Incidents when describing the conditions of mistreatment of the detainees in detention centers of the Overarching JCE.[1257] However, for the reasons stated above, the Appeals Chamber, Judges Joensen and de Prada dissenting, reiterates that these passages merely reference previous factual findings reached beyond reasonable doubt in the context of each Scheduled Incident and do not indicate that the Trial Chamber relied upon a similar pattern of conduct as corroborating the evidence underpinning Scheduled Incident C.22.5.[1258] Accordingly, the Appeals Chamber finds, Judges Joensen and de

[1249] Trial Judgement, paras. 2020 (*referring to* Exhibits P135, P122), 2021 (*referring to* Exhibit P135), 2022, 2023 (*referring to* Exhibits P135, P122).
[1250] *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 *quater*, 30 November 2009, para. 90(ii).
[1251] Prosecution Response Brief, para. 310, nn. 1247 (*referring to* Adjudicated Fact 2546, Trial Judgement, para. 2022), 1248 (*referring to* Exhibit P3395 (under seal), Trial Judgement, para. 2021).
[1252] Trial Judgement, paras. 2021, 2022. *See also* Exhibit P3395 (under seal); Decision of 14 June 2010 on Fourth Motion for Judicial Notice, Appendix A, RP. 36268.
[1253] Trial Judgement, para. 2022.
[1254] Prosecution Response Brief, paras. 309, 310, nn. 1249 (*referring to* Trial Judgement, paras. 1979-2024), 1250, (*referring to* Trial Judgement, paras. 2485, 2522, 2523, 3443-3445).
[1255] Trial Judgement, paras. 1979-1991 (Scheduled Incident C.22.1), 1992-1998 (Scheduled Incident C.22.2), 1999-2018 (Scheduled Incident B.17.1), 2019-2024 (Scheduled Incident C.22.5).
[1256] *See* Trial Judgement, paras. 2482-2570.
[1257] *See, e.g.*, Trial Judgement, paras. 2491, 2507, 2522, 2542.
[1258] The references to Scheduled Incident C.22.5 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident C.22.5. *See* Trial Judgement, paras. 2507, 2522.

Prada dissenting, that the Trial Chamber impermissibly relied solely and decisively on untested evidence in support of Karadžić's conviction based on Scheduled Incident C.22.5.

471. As to Scheduled Incident E.11.1, the Trial Chamber found that, following the fall of Srebrenica, members of the Bosnian Serb forces killed two Bosnian Muslim men near the town of Snagovo.[1259] The Trial Chamber convicted Karadžić, in part, for genocide (Count 2), extermination as a crime against humanity (count 4), and murder as a violation of the laws or customs of war (Count 6), pursuant to Article 7(1) of the ICTY Statute based upon this incident.[1260] The Appeals Chamber observes that in reaching this finding the Trial Chamber relied on the transcripts of the testimony of Witness KDZ365 in the *Popović et al.* case,[1261] which the Trial Chamber admitted under Rule 92 *bis* of the ICTY Rules without cross-examination.[1262]

472. The Prosecution argues that this evidence is further corroborated by other documentary evidence and by "a pattern of similar conduct".[1263] In this regard, the Appeals Chamber observes that the evidence referred to by the Prosecution only supports the untested evidence as it relates to the surrender of a group of Muslim men and that a group of police officers joined the Bosnian Serb forces; however, the evidence does not corroborate Witness KDZ365's evidence concerning the subsequent killing of two Bosnian Muslim men.[1264]

473. As to the Prosecution's contention that conclusions related to other Scheduled Incidents and contained in the legal findings demonstrate a "pattern of similar conduct" that corroborates Scheduled Incident E.11.1,[1265] the Appeals Chamber considers that none of the Scheduled Incidents referred to by the Prosecution suggests that the Trial Chamber relied upon them as evidence of a pattern of conduct in corroboration of Scheduled Incident E.11.1. As concerns the relevant legal findings, the Appeals Chamber observes that findings on murder and extermination as a crime against humanity and murder as a violation of the laws or customs of war[1266] refer to Scheduled Incident E.11.1 cumulatively with other Scheduled Incidents when describing the circumstances of the killings of Bosnian Muslim males.[1267] However, for the reasons explained above, the Appeals

[1259] Trial Judgement, paras. 5477-5481.
[1260] Trial Judgement, paras. 5607-5621, 5655-5673, 5744, 5831, 6022-6024, n. 20574. The Trial Chamber did not convict Karadžić for murder as a crime against humanity based on this event as it would be impermissibly cumulative of his conviction for extermination as a crime against humanity on this same basis. Trial Judgement, para. 6024, n. 20574.
[1261] Trial Judgement, paras. 5478-5480, *referring to* Exhibits P325 (under seal), P326 (under seal).
[1262] Delayed Disclosure Decision of 21 December 2009, para. 32(a).
[1263] *See* Prosecution Response Brief, paras. 309, 310, nn. 1268 (*referring to* Exhibit P4949), 1269 (*referring to* Trial Judgement, para. 5744).
[1264] *See* Exhibit P4949. *See also* Trial Judgement, para. 5480, n. 18724.
[1265] *See* Prosecution Response Brief, para. 310, n. 1269, *referring to* Trial Judgement, para. 5744.
[1266] *See* Trial Judgement, paras. 5607-5612.
[1267] *See, e.g.*, Trial Judgement, paras. 5609, 5610, 5615. The Prosecution's reference to paragraph 5744 of the Trial Judgement does not reflect that the Trial Chamber considered various findings to establish a corroborative pattern of

Chamber, Judges Joensen and de Prada dissenting, does not consider that the references to previous factual findings demonstrate that the Trial Chamber relied on evidence or findings of a similar pattern of conduct as corroboration for the evidence underpinning Scheduled Incident E.11.1.[1268] Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that the Trial Chamber erred in relying solely or decisively on untested evidence in support of Karadžić's convictions based on Scheduled Incident E.11.1.

474. Accordingly, the Appeals Chamber finds, Judges Joensen and de Prada dissenting, that Karadžić has established that the Trial Chamber violated his fundamental right to examine, or have examined, the witnesses against him under Article 21(4)(e) of the ICTY Statute by convicting him after having impermissibly relied solely or decisively on untested evidence in reaching findings in relation to Scheduled Incidents C.27.5, B.20.4, and E.11.1 as well as Scheduled Incident B.13.1 with respect to the killing of one detainee in Kula prison and Scheduled Incident C.22.5 in relation to the mistreatment of two Muslim men at the Magarice military facility. The Appeals Chamber finds that such violations prevented Karadžić from testing evidence related to these specific events which the Trial Chamber relied upon in convicting him. This has resulted in material prejudice invalidating the judgement to the extent that his convictions are based upon these findings. The Appeals Chamber, Judges Joensen and de Prada dissenting, considers that the only appropriate remedy is to set aside, in part, Karadžić's convictions to the extent they rely on these findings. The impact, if any, such errors may have had on Karadžić's sentence will be evaluated below.

(c) Conclusion

475. Based on the foregoing, the Appeals Chamber, Judges Joensen and de Prada dissenting, grants Ground 31 of Karadžić's appeal, in part, and reverses his convictions to the extent they rely on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1. The Appeals Chamber will examine the impact, if any, of this finding on Karadžić's sentence below.[1269] The Appeals Chamber dismisses the remainder of Ground 31 of Karadžić's appeal.

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conduct in relation to Scheduled Incident E.11.1 as this paragraph simply recalls previous findings reached beyond reasonable doubt.

[1268] The references to Scheduled Incident E.11.1 in the legal findings section of the Trial Judgement reflect that the Trial Chamber recalled findings it had already made in relation to each Scheduled Incident and provide no indication that the Trial Chamber relied upon a corroborative pattern of conduct in reaching findings in relation to Scheduled Incident E.11.1. *See* Trial Judgement, paras. 5607, 5609.

[1269] *See infra* Section V.D.

C. Sarajevo

1. Alleged Errors Relating to Findings of Indiscriminate or Disproportionate Shelling Attacks of Sarajevo (Ground 33)

476. The Trial Chamber found that the Sarajevo JCE, the primary purpose of which was to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the Sarajevo-Romanija Corps ("SRK"), came into existence in late May 1992 and continued to be implemented until October 1995.[1270] The Trial Chamber determined that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror among the civilian population of Sarajevo, and significantly contributed to the execution of the common plan.[1271] The Trial Chamber also concluded that Karadžić, together with the other members of the Sarajevo JCE, had the intent to commit murder, terror, and unlawful attacks against civilians.[1272] Pursuant to Article 7(1) of the ICTY Statute, the Trial Chamber convicted Karadžić of murder as a crime against humanity (Count 5) as well as murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war (Counts 6, 9, and 10, respectively).[1273]

477. In convicting Karadžić of crimes arising from the shelling of Sarajevo, the Trial Chamber relied, in part, on its findings that the shelling from 28 to 29 May 1992 and from 5 to 8 June 1992, described, respectively, as Scheduled Incidents G.1 and G.2 in the Indictment, was "indiscriminate" and "disproportionate".[1274] The Trial Chamber determined that Scheduled Incidents G.1 and G.2 occurred "in a purely urban setting where large concentrations of civilians and civilian buildings were closely intermingled with a number of military targets" and that the SRK shelling "targeted entire civilian neighbourhoods of Sarajevo, without differentiating between civilian and military targets".[1275] In addition, the Trial Chamber concluded that, "even if initially launched in response to Bosnian Muslim attacks originating from specific locations in Sarajevo, […] the shellings by the SRK [in Scheduled Incidents G.1 and G.2] were carried out in a disproportionate manner."[1276]

478. In light of these findings, the Trial Chamber inferred that Scheduled Incidents G.1 and G.2, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, were attacks "directed against civilians".[1277] This inference led the Trial Chamber to further conclude that Scheduled Incidents G.1 and G.2, along with other scheduled shelling and

[1270] Trial Judgement, paras. 4649, 4676.
[1271] Trial Judgement, para. 4891.
[1272] Trial Judgement, para. 4928.
[1273] Trial Judgement, paras. 4937-4939.
[1274] Trial Judgement, paras. 4053-4055.
[1275] Trial Judgement, para. 4053.
[1276] Trial Judgement, para. 4053.

sniping incidents, constituted the crime of unlawful attacks on civilians as a violation of the laws or customs of war and the crime of terror.[1278] In addition, the Trial Chamber determined that Scheduled Incident G.2, along with other scheduled shelling and sniping incidents, constituted murder as a crime against humanity and as a violation of the laws or customs of war.[1279]

479. Karadžić submits that, particularly as it relates to Scheduled Incidents G.1 and G.2, the Trial Chamber erred in its application of the principles of the law of armed conflict in finding that the shelling in Sarajevo was "indiscriminate" and "disproportionate".[1280] The Appeals Chamber addresses Karadžić's arguments in turn.

(a) Principle of Distinction

480. As recalled above, the Trial Chamber found that the shelling referred to in Scheduled Incidents G.1 and G.2 was indiscriminate.[1281] The Trial Chamber relied on this determination, in part, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, to infer that these attacks were "directed against civilians",[1282] and, on this basis, convicted Karadžić under Counts 5, 6, 9, and 10 of the Indictment for his participation in the Sarajevo JCE.[1283]

481. Karadžić submits that the Trial Chamber erred in its application of the principle of distinction in its analysis of the attacks referred to in Scheduled Incidents G.1 and G.2.[1284] He

[1277] Trial Judgement, para. 4623.
[1278] Trial Judgement, paras. 4628, 4635.
[1279] Trial Judgement, paras. 4612, 4618, n. 15512.
[1280] Karadžić Appeal Brief, paras. 570, 571, 574, 575, 583-585, 588, 589, 592, 595, 597, 598. *See also* Karadžić Notice of Appeal, pp. 2, 12. Karadžić also contends that the Trial Chamber's errors led it to the mistaken conclusion that there was a campaign to terrorize civilians in Sarajevo and that Karadžić shared the intent of this campaign. *See* Karadžić Appeal Brief, paras. 575, 598. Consequently, he argues that the Appeals Chamber should reverse his convictions under Counts 5, 6, 9, and 10 for crimes in Sarajevo. Karadžić Appeal Brief, para. 600.
[1281] Trial Judgement, paras. 4053-4055.
[1282] Trial Judgement, para. 4623.
[1283] Trial Judgement, paras. 4612, 4616, 4628, 4632, 4635, 4937-4939, n. 15512.
[1284] Although Karadžić also alleges that the Trial Chamber erred in finding that "the overall shelling campaign was indiscriminate", the Appeals Chamber observes that Karadžić only seeks to substantiate his arguments concerning the misapplication of the law of distinction in relation to Scheduled Incidents G.1 and G.2. *See* Karadžić Appeal Brief, paras. 570, 575, 578, 581, nn. 804, 815. Notably, the Trial Chamber also found that Scheduled Incidents G.4 and G.10 through G.15 were indiscriminate attacks. *See* Trial Judgement, paras. 4616, 4626, n. 15527. In finding them indiscriminate, the Trial Chamber relied, in part, on the fact that the weapons used in these attacks – modified air bombs – were "inherently inaccurate" and "not capable of targeting specific targets" and therefore "indiscriminate" by their very nature. Trial Judgement, paras. 4379, 4616, n. 15527. This type of attack is expressly prohibited under the laws or customs of war. Specifically, it amounts to the type of attack contemplated in Article 51(4)(b) of Additional Protocol I as an example of indiscriminate attack, that is, an attack which "employ[s] a method or means of combat which cannot be directed at a specific military objective". Karadžić does not allege error in the Trial Chamber's findings that the modified air bombs were an inherently "indiscriminate" weapon. The Appeals Chamber also observes that Scheduled Incident G.4 was found to be an example of indiscriminate fire. *See* Trial Judgement, para. 4087, n. 15527. The only argument Karadžić raises that implicates this incident is evidence about the presence of ABiH mobile mortars, which he refers to in support of a more general argument that the Prosecution failed to disprove that these were not the legitimate military objects being targeted at the time. *See* Karadžić Appeal Brief, paras. 580, 582, n. 822.

contends that, in light of universal State practice and the "very nature of *jus in bello*", the Trial Chamber was required to assess the existence of legitimate military objectives from the perspective of a reasonable military commander contemplating the attack.[1285] Instead, he submits, the Trial Chamber erroneously relied on the impressions of "observers and victims" in finding the shelling to be indiscriminate.[1286]

482. Karadžić also submits that the Prosecution was required to disprove that shells landing far from stationary military targets were not aimed at opportunistic mobile targets before the Trial Chamber could find that the shelling was indiscriminate.[1287] In view of Defence evidence concerning SRK reconnaissance operations in Sarajevo, evidence that the ABiH used mobile mortars and were moving throughout Sarajevo, and evidence that the SRK targeted the ABiH's mobile artillery, Karadžić argues that no reasonable trier of fact could have excluded the possibility that the SRK observed and fired on mobile military targets.[1288] With respect to Scheduled Incidents G.1 and G.2 specifically, he emphasizes evidence that ABiH forces were conducting combat operations throughout Sarajevo during the relevant periods and contends that the Trial Chamber erroneously found the attacks to be indiscriminate.[1289]

483. The Prosecution responds that, with respect to the alleged errors in the application of the principle of distinction, the Trial Chamber reasonably rejected Karadžić's claims that the SRK only targeted military objectives.[1290] It submits that Karadžić confuses the lens through which a trial chamber must assess the existence of a military objective with the types of evidence upon which a

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However, this brief argument fails to demonstrate error in the Trial Chamber's conclusion that the attack in Scheduled Incident G.4 was indiscriminate on the basis, in part, that, "even if the presence and the number of ABiH soldiers were known to the SRK units in advance, it must have been obvious to those launching the attack that large numbers of civilians would inevitably gather at the event given: (i) that the event involved a football match, that is, a purely civilian activity; (ii) the time of the event, that is, daytime and during a period of cease-fire; and (iii) the location of the event, that is, the middle of a residential area, surrounded by residential apartment blocks" and its finding that "the SRK's decision to fire two mortar shells at such an event, those shells being designed to suppress activity over a wide area, shows in turn that the SRK units in question did not take any precautionary measures in accordance with the laws of war". Trial Judgement, para. 4087.

[1285] Karadžić Appeal Brief, paras. 571-573, 575.

[1286] Karadžić Appeal Brief, paras. 571, 575. In this respect, Karadžić submits that the Trial Chamber erroneously relied on evidence from John Wilson, Pyers Tucker, Martin Bell, and victims to prove that attacks occurred in purely residential areas and far from military targets, such as barracks, police stations, or factories. Karadžić Appeal Brief, para. 574.

[1287] Karadžić Appeal Brief, paras. 576, 577, 582.

[1288] Karadžić Appeal Brief, paras. 579, 580.

[1289] Karadžić Appeal Brief, paras. 575, 581. Karadžić also suggests that the circumstances of the present case are comparable to those in the *Gotovina* case in which the ICTY Appeals Chamber found that the relevant trial chamber erred by failing to adequately explain how it was able to exclude the possibility of "targets of opportunity". Karadžić Appeal Brief, paras. 577, 578, *referring to Gotovina and Markač* Appeal Judgement, para. 63. *See also* T. 23 April 2018 p. 161 (arguing that ABiH forces abused civilian locations such as "neighborhoods", "UN Hospitals" and schools" by firing from them).

[1290] Prosecution Response Brief, paras. 315, 317. *See also* T. 23 April 2018 p. 221 (arguing that the Trial Chamber considered evidence that the ABiH forces provoked responses from the SRK and reasonably inferred from the indiscriminate or disproportionate nature of the attack that it was directed against the civilian population).

trial chamber may properly rely in making this assessment.[1291] It contends that Karadžić shows no error in the Trial Chamber's "military objective" analysis for Scheduled Incidents G.1 and G.2.[1292] The Prosecution also submits that the Trial Chamber reasonably found that the SRK shelling campaign targeted civilians and civilian areas, not ABiH mobile mortars.[1293] In this respect, the Prosecution suggests that Karadžić ignores the Trial Chamber's findings that the SRK forces shelled areas of Sarajevo other than those where the ABiH operated during Scheduled Incidents G.1 and G.2.[1294]

484. Karadžić replies that the victims and observers upon whose evidence the Trial Chamber relied were not in a position to know the anticipated military advantage from the attacks.[1295] He further submits that the Prosecution failed to exclude the possibility that mobile mortars could have been employed in areas other than those where the ABiH was known to operate during Scheduled Incidents G.1 and G.2.[1296]

485. The Appeals Chamber observes that, with respect to Scheduled Incidents G.1 and G.2, the Trial Chamber noted that military action launched in response to military attacks by the opposing party should be "directed at military targets".[1297] The Trial Chamber found, however, that the SRK shelling "targeted entire civilian neighbourhoods of Sarajevo, without differentiating between civilian and military targets".[1298] Consequently, the Trial Chamber determined the shelling to be "indiscriminate".[1299]

486. The Appeals Chamber recalls that the ICTY was bound to apply rules of international humanitarian law which are beyond any doubt part of customary international law.[1300] The Appeals Chamber further recalls that there is an absolute prohibition on the targeting of civilians in

[1291] Prosecution Response Brief, para. 315.
[1292] Prosecution Response Brief, para. 316, *referring to* Trial Judgement, para. 4053.
[1293] Prosecution Response Brief, paras. 320, 321. The Prosecution adds that Karadžić's reliance on the *Gotovina and Markač* Appeal Judgement is misplaced. *See* Prosecution Response Brief, para. 321.
[1294] Prosecution Response Brief, para. 320. The Prosecution also submits that Karadžić has not referred to any evidence that the shelling was aimed only at ABiH mobile mortars, that mobile mortars were observed, or that the SRK ordered the targeting of opportunistic mobile targets. *See* Prosecution Response Brief, para. 320.
[1295] Karadžić Reply Brief, para. 173. Karadžić emphasizes that both observers and witnesses acknowledged in their evidence that they were unaware of ABiH military positions and/or that the ABiH used civilian objects for military purposes. *See* Karadžić Reply Brief, paras. 174, 175.
[1296] Karadžić Reply Brief, para. 177. Karadžić emphasizes that "the holding of [the *Gotovina and Markač* Appeal Judgement is that] [w]here the Prosecution fails to prove that 'outlying impacts' landing 'far from military targets' were not aimed at mobile mortars known to be employed by the enemy, its evidence is insufficient". *See* Karadžić Reply Brief, para. 177.
[1297] Trial Judgement, para. 4053.
[1298] Trial Judgement, para. 4053.
[1299] Trial Judgement, paras. 4053-4055.
[1300] *Kordić and Čerkez* Appeal Judgement, para. 44; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 143, *referring to* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704, 3 May 1993, para. 34.

customary international law.[1301] However, while the Appeals Chamber of the ICTY has held that an indiscriminate attack may qualify as an attack directed against civilians or give rise to the inference that an attack was directed against civilians,[1302] the legal test underpinning the principle of distinction as applied in the law of armed conflict has not been articulated by the Appeals Chambers of the ICTY or the ICTR.[1303]

487. The Appeals Chamber observes that the principle of distinction is encapsulated in Additional Protocol I, and that key provisions of Additional Protocol I, including Articles 51 and 52, reflect customary international law.[1304] The Appeals Chamber further observes that Additional Protocol I has been relied upon to interpret provisions of the ICTY Statute.[1305] The Appeals Chamber therefore considers that, in this instance, the principle of distinction should be interpreted and applied in accordance with the relevant provisions of Additional Protocol I.

488. The Appeals Chamber observes that Article 51(4) of Additional Protocol I prohibits indiscriminate attacks, that is to say, attacks which are of a nature to strike military objectives and civilians or civilian objects without distinction.[1306] Thus, in accordance with the fundamental principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked.[1307] The widely accepted definition of "military objectives" is set forth in Article 52(2) of Additional Protocol I as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[1308]

489. The Appeals Chamber considers that, whether a "military advantage" could have been achieved from an attack requires an assessment of whether it was reasonable to believe, in the circumstances of the person(s) contemplating the attack, including the information available to the

[1301] *Blaškić* Appeal Judgement, para. 109.
[1302] *Dragomir Milošević* Appeal Judgement, para. 66; *Strugar* Appeal Judgement, para. 275.
[1303] The Appeals Chamber observes that, although the ICTY Appeals Chamber recently determined that a trial chamber erred in finding an attack to be indiscriminate, its analysis sets forth the legal framework applied to indiscriminate attacks only in passing and only as it relates to indiscriminate attacks based on the type of weaponry used. *See Prlić et al.* Appeal Judgement, para. 434.
[1304] *See Galić* Appeal Judgement, para. 87, *referring to Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002, para. 9; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *bis* Motions for Acquittal, 11 March 2005, para. 28. *See also Kordić and Čerkez* Appeal Judgement, para. 59, *referring to Blaškić* Appeal Judgement, para. 157.
[1305] *See, e.g., Kordić and Čerkez* Appeal Judgement, paras. 47, 48, 50, 53, 54, 58, 59, 62-65; *Blaškić* Appeal Judgement, paras. 69, 110, 111, 113, 145, 147, 151, 157, 632, 639, 652.
[1306] Articles 51(4) and (5) of Additional Protocol I provide examples as to what types of attacks are to be considered as indiscriminate.
[1307] *See* Article 52(2) of Additional Protocol I. *See also Galić* Trial Judgement, para. 51.
[1308] *See* Article 52(2) of Additional Protocol I. *Cf. Strugar* Appeal Judgement, para. 330.

latter, that the object was being used to make an effective contribution to military action.[1309] The relevant question is whether the attacker(s) could have reasonably believed that the target was a legitimate military objective, and a useful standard by which to assess the reasonableness of such belief is that of a "reasonable commander" in the position of the attacker(s).[1310]

490. Bearing in mind the applicable law, the Appeals Chamber turns to determine whether it was reasonable for the Trial Chamber to have concluded beyond reasonable doubt that the shelling referred to in Scheduled Incidents G.1 and G.2 was indiscriminate.

491. The Appeals Chamber observes that, in summarising the relevant evidence related to Scheduled Incidents G.1 and G.2, the Trial Chamber recalled threats issued by Mladić in May 1992, suggesting that Sarajevo would be subject to an attack of an indiscriminate nature should ABiH forces attack SRK positions in Sarajevo.[1311] In this respect, the Trial Chamber credited evidence [REDACTED].[1312] [REDACTED].[1313]

492. The Trial Chamber further recalled evidence of the orders Mladić issued in relation to the attacks alleged in Scheduled Incidents G.1 and G.2, which, in the Appeals Chamber's view, include clear intent to fire shells without regard for the principles of distinction and protection of civilian objects and the civilian population.[1314] For example, in relation to Scheduled Incident G.1, Mladić ordered an SRK artillery officer, to fire at the railway station and to "scatter them around".[1315]

493. In relation to Scheduled Incident G.1, the Trial Chamber noted evidence from General John Wilson, the then Chief Military Observer of the UN Protection Force ("UNPROFOR"), that the shelling on 28 May 1992 was widespread, and scattered around the city, but at the same time was

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[1309] *Cf. Galić* Trial Judgement, para. 51. *See also Boškoski and Tarčulovski* Trial Judgement, para. 356; *Strugar* Trial Judgement, para. 295. The Appeals Chamber observes that the ICRC commentary on Article 52 of Additional Protocol I highlights the lack of precise definitions offered and suggests that the text "largely relies on the judgment of soldiers who will have to apply these provisions." ICRC Commentary on Additional Protocol I, para. 2037.
[1310] *Cf. Dragomir Milošević* Appeal Judgement, para. 60.
[1311] Trial Judgement, paras. 4022 ("On 19 May 1992, Lieutenant-Colonel Janković of the JNA reported to Mladić that the ABiH was threatening the barracks and the JNA personnel inside; Mladić responded that if Jovan Divjak, a Serb General in the ABiH, attacked the Maršal Tito Barracks, Divjak 'would sentence first himself and then [the] entire Sarajevo to death.'"), 4023 (noting that during a meeting sometime between 20 and 28 May 1992 "Mladić proposed to use 'all the equipment and arms' available to 'massively bombard Sarajevo'"), 4024 ("On 25 May 1992, Mladić informed an unidentified JNA officer that '[i]f a single bullet is fired […] at Jusuf Džonlić barracks or Maršal Tito Barracks, or if a single soldier is wounded either at the front or in the barracks' he would 'retaliate against the town'. He further stated: 'Sarajevo will shake, more shells will fall on per second than in the entire war so far. […] You can endure more than they can. It is not my intention to destroy the town and kill innocent people. […] They should pull out the civilians, and if they want to fight we'll fight. It would be better to fight in the mountains than in the town, though.'"). *See also* Trial Judgement, para. 4000, nn. 13253, 13264.
[1312] [REDACTED]
[1313] [REDACTED]
[1314] For orders issued in relation to Scheduled Incident G.1, *see* Trial Judgement, paras. 4028, 4034, 4035. For orders issued by Mladić in relation to Scheduled Incident G.2, *see* Trial Judgement, para. 4041.
[1315] Trial Judgement, para. 4035, *referring to* Exhibit P1511.

focused on the center of the city and not related to any conflict on the confrontation line, and was an example of "indiscriminately directed fire" at the city, whereby there was no military value in the targets that were selected.[1316] Similarly, with respect to Scheduled Incident G.2, the Trial Chamber accepted the [REDACTED] observations that due to the nature of the weaponry employed by the SRK and Sarajevo's dense urban environment, "'[e]verything was being hit', including housing and accommodation buildings."[1317]

494. With respect to both scheduled incidents, the Trial Chamber recalled evidence of shells striking civilian objects such as houses and the state hospital as well as individual civilians, resulting in damage to civilian property as well as injuries and deaths.[1318] In several instances, the Trial Chamber noted that these locations were not near ABiH military installations, confrontations lines, and/or ABiH forces.[1319]

495. The Trial Chamber also recalled evidence of opposition to the attacks related to Scheduled Incident G.1 expressed by various Serb officials in the context of cease-fire negotiations.[1320] This included evidence from John Wilson that JNA commanders had sought to dissociate themselves from the shelling and had expressed their disapproval, and explained that Mladić was acting independently of the JNA.[1321] The Trial Chamber also noted that Slobodan Milošević had stated to UNPROFOR representatives, in response to an appeal from the UN Secretary-General to end the shelling related to Scheduled Incident G.1, that he disagreed with Mladić's actions and that he had been trying to contact Karadžić to use his influence to stop the "bloody, criminal" bombardment.[1322] Similarly, the Trial Chamber also noted evidence of Karadžić's agreement with UNPROFOR representatives that he would see Mladić in person to stop the bombardment.[1323]

496. As reflected above, contrary to Karadžić's suggestion, the Trial Chamber did not limit itself to the evidence of military observers and victims. Indeed, the Trial Chamber relied upon the evidence of [REDACTED] including, in particular, [REDACTED], in reaching its conclusion that the shelling was indiscriminate. In any event, the applicable legal test, used to determine whether an attack was appropriately directed at a military objective, does not render the evidence of military

[1316] Trial Judgement, para. 4029.
[1317] Trial Judgement, para. 4048.
[1318] For damage to civilian property and civilian injuries caused from shelling related to Scheduled Incident G.1, *see* Trial Judgement, paras. 4029-4033. For damage to civilian property and civilian injuries and deaths caused from shelling related to Scheduled Incident G.2, *see* Trial Judgement, paras. 4040, 4042-4046, 4049.
[1319] Trial Judgement, paras. 4029-4032, 4042-4046.
[1320] Trial Judgement, paras. 4034, 4036, 4037.
[1321] Trial Judgement, para. 4034.
[1322] Trial Judgement, para. 4036.

observers and victims irrelevant. The Trial Chamber was entitled to rely on such evidence in determining whether the attacker(s) reasonably could have believed that the targets were legitimate military objectives. The Appeals Chamber considers that Karadžić has not shown that the Trial Chamber's determinations that the attacks related to Scheduled Incidents G.1 and G.2 were indiscriminate were erroneous.

497. With regard to Karadžić's contention that the Prosecution was required to disprove that shells landing far from stationary military targets were not aimed at ABiH mobile targets, the Appeals Chamber notes that the evidence of ABiH mobile mortar activity cited by Karadžić is largely general in nature, rather than temporally and geographically specific to the scope of Scheduled Incidents G.1 and G.2.[1324] In addition, Karadžić's references to evidence that ABiH combat operations were ongoing during the attacks related to Scheduled Incidents G.1 and G.2 are mostly general in nature rather than related to the ABiH's use of mobile mortars specifically.[1325] Further, this evidence only demonstrates overlap between some, not all, of the various areas of Sarajevo, including civilian neighbourhoods, that the Trial Chamber found were shelled indiscriminately resulting in damage to civilian objects and civilian casualties, and the areas of ABiH combat activities.[1326]

498. The Appeals Chamber also observes that, in its discussion of the general nature of the shelling campaign, the Trial Chamber explicitly considered the ABiH's use of mobile mortars in civilian areas and considered the practice to be "illegal".[1327] Notwithstanding, it credited evidence from David Fraser of UNPROFOR that it would have been impossible for the SRK to locate the ABiH mobile mortar,[1328] and determined that there was a "low probability of the SRK response actually hitting and destroying the mobile mortar in question".[1329] It therefore concluded that the SRK units should have refrained from firing back if the mobile mortar was intermingled with

[1323] Trial Judgement, para. 4037. According to Witness Wilson, Karadžić further stated that the Serb forces were inexperienced and self-organized and therefore tended to "over-react" to attacks by the "Green Berets". *See* Trial Judgement, para. 4037.
[1324] *See* Karadžić Appeal Brief, para. 580, *referring to* Trial Judgement, paras. 3986, 4067, 4501, 4535. The Appeals Chamber also notes that notwithstanding specific Prosecution evidence of a number of incidents of fire on ostensibly civilian objects, such as houses and apartment buildings, resulting in both civilian casualties and the destruction of civilian objects, Karadžić did not argue in his final trial brief in relation to Scheduled Incidents G.1 and G.2 that the intended targets of attack were mobile mortars. Further, he did not argue, more generally, that these objects were otherwise legitimate military objects or in the vicinity of legitimate military objects other than through very general assertions. *See* Karadžić Final Trial Brief, paras. 1980-2001.
[1325] *See* Karadžić Appeal Brief, para. 581, *referring to* Exhibits D232, P998, D577, P2239.
[1326] *See* Karadžić Appeal Brief, paras. 580, 581, *referring to* T. 12 November 2012 p. 30056, Exhibits D232, P998, D577, P2239. *See also* Trial Judgement, paras. 4054, 4055. *Cf.* Trial Judgement, paras. 4028-4033, 4035, 4040-4046, 4049, 4053-4055.
[1327] *See*, *e.g.*, Trial Judgement, para. 4501.
[1328] Trial Judgement, para. 3990.
[1329] Trial Judgement, para. 4501.

civilians.[1330] The Trial Chamber also found that the nature of the SRK responses to alleged ABiH fire from mobile mortars indicated that the "aim was retaliation rather than that of neutralising the mortar in question".[1331]

499. In addition, the Trial Chamber noted the evidence of Francis Roy Thomas who testified that due to their limited range of fire, ABiH mortars located "too far into the city" could not reach the SRK positions, and therefore reasoned that any SRK fire deep into the city could not have been targeting mobile mortars.[1332] Further, and in relation to Scheduled Incident G.1 specifically, the Trial Chamber rejected the evidence of a Defence witness that ABiH forces fired mortars from positions in and around the State Hospital in May 1992, which was shelled during this attack.[1333]

500. In view of the above, the Appeals Chamber finds that Karadžić has not shown that the Trial Chamber's determination that the attacks related to Scheduled Incidents G.1 and G.2 were indiscriminate was erroneous due to an alleged failure to exclude the reasonable possibility that the attacks were aimed at the engagement of mobile mortars.[1334] To the contrary, the Trial Chamber's findings reflect that the SRK shelling targeted military objectives and civilian objects and the civilian population without distinction, notwithstanding the possibility that ABiH mobile positions may have been intermingled in civilian areas of Sarajevo.[1335] Karadžić's contentions on appeal do not undermine the reasonableness of this conclusion.

501. In light of the foregoing, the Appeals Chamber finds that Karadžić does not demonstrate any error in the Trial Chamber's conclusions that Scheduled Incidents G.1 and G.2 were indiscriminate attacks.

[1330] Trial Judgement, para. 4501 ("As for the use of mobile mortars by the ABiH from civilian areas, the [Trial] Chamber accepts that this practice caused difficulties to the SRK units and that it was illegal. However, the legality or otherwise of ABiH firing practices is only relevant to the allegations made in this case if they go to one of the main allegations in this case, such as showing that the SRK observed the principles of distinction during the conflict in Sarajevo. In that respect, the [Trial] Chamber agrees with Fraser that given the low probability of the SRK response actually hitting and destroying the mobile mortar in question, the SRK units should have refrained from firing back if the mobile mortar was intermingled with civilians.") (internal citation omitted).
[1331] Trial Judgement, para. 4501.
[1332] Trial Judgement, n. 13180.
[1333] Trial Judgement, n. 13403.
[1334] The Appeals Chamber considers that the circumstances of the present case are distinct from those of the *Gotovina* case, in which the ICTY Appeals Chamber found that the trial chamber had erred in failing to adequately explain how it was able to exclude the possibility of "targets of opportunity". *See Gotovina and Markač* Appeal Judgement, para. 63. *Cf.* Karadžić Appeal Brief, paras. 577, 578, *referring to Gotovina and Markač* Appeal Judgement, para. 63. In the *Gotovina* case, the Appeals Chamber emphasized that there was evidence that targets of opportunity were moving throughout the town of Knin and, further, that Croatian Army artillery had successfully hit one such target. *Gotovina and Markač* Appeal Judgement, para. 63. In the present case, as detailed above, there was an absence of evidence indicating that mobile mortars were active in all areas subjected to artillery fire in Scheduled Incidents G.1 and G.2 as well as considerable evidence that ABiH mobile mortars within Sarajevo could not be targeted with distinction from the civilian objects and civilians with which they were intermingled.
[1335] Trial Judgement, para. 4053.

(b) Principle of Proportionality

502. As recalled above, the Trial Chamber found that the shelling related to Scheduled Incidents G.1 and G.2 was disproportionate.[1336] The Trial Chamber relied on this determination, in part, along with subsequent scheduled shelling incidents that it found to be indiscriminate and/or disproportionate, to infer that these were attacks "directed against civilians",[1337] and, on this basis, entered convictions under Counts 5, 6, 9, and 10 of the Indictment for Karadžić's participation in the Sarajevo JCE.[1338]

503. Karadžić contends that, in finding the attacks in Scheduled Incidents G.1 and G.2 were disproportionate,[1339] the Trial Chamber failed to consider whether the military commanders launched the attacks with "the knowledge" that they would cause "excessive" collateral damage.[1340] Furthermore, Karadžić submits that the Trial Chamber erroneously evaluated whether incidental loss of life or injury to civilians and damage to civilian objects was "extensive" instead of applying the appropriate balancing test of assessing whether such injury and/or damage was "clearly excessive in relation to the concrete and direct overall military advantage".[1341] Specifically, he contends that the Trial Chamber omitted consideration of the importance of protecting JNA soldiers who were attacked in their barracks, the importance of defending Bosnian Serb positions in Hadžići, at Sarajevo airport, and the Jewish Cemetery, and the importance of preventing ABiH forces from de-blocking Sarajevo from the north and the west.[1342] He further argues that, in finding the attacks disproportionate, the Trial Chamber erroneously relied on the superior firepower of the SRK and Mladić's statement that "Sarajevo will shake with more shells fired than in the entire war so far" when, in fact, the attacks related to Scheduled Incidents G.1 and G.2 resulted in a limited number of casualties.[1343]

[1336] Trial Judgement, paras. 4053-4055.
[1337] Trial Judgement, para. 4623.
[1338] Trial Judgement, paras. 4612, 4616, 4628, 4632, 4937-4939, n.15512.
[1339] Similar to his submissions related to the principle of distinction, Karadžić generally argues that the Trial Chamber misapplied the principle of proportionality but only seeks to substantiate his contention through reference to the Trial Chamber's consideration of Scheduled Incidents G.1 and G.2. *See* Karadžić Appeal Brief, paras. 587, 588, 591, 596.
[1340] Karadžić Appeal Brief, paras. 592, 595, 597. Karadžić emphasizes that the ICRC Commentary on the Additional Protocols, domestic jurisprudence, State practice, and academic commentary reflect that the "knowledge element" is a question of "common sense and good faith", with military commanders being granted a "fairly broad margin of judgement". Karadžić Appeal Brief, para. 593.
[1341] Karadžić Appeal Brief, paras. 570, 583-587, 594, *referring to*, *inter alia*, Article 8(2)(b)(iv) of the Rome Statute, Article 51(5)(b) of Additional Protocol I. Karadžić emphasizes that injury to civilians may be "exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance". Karadžić Appeal Brief, para. 586.
[1342] Karadžić Appeal Brief, para. 588.
[1343] Karadžić Appeal Brief, paras. 589-591. Karadžić contrasts the number of casualties proven in relation to Scheduled Incidents G.1 and G.2 to the larger number resulting from the NATO bombing of Belgrade, which the ICTY's Office of the Prosecutor determined to be proportionate. Karadžić Appeal Brief, para. 591.

504. The Prosecution responds that Karadžić mischaracterizes the Trial Chamber's findings, arguing that it did not base its proportionality findings solely on the extent of the damage[1344] or the superiority of the SRK's heavy weaponry.[1345] Likewise, it disputes that the Trial Chamber failed to consider the SRK's tactical concerns.[1346] The Prosecution also suggests that the disproportionate nature of certain attacks was simply one of the factors relied upon by the Trial Chamber to infer that the SRK shelling was "directed against civilians".[1347] It further contends that it is "inherent in the [Trial] Chamber's conclusions" that, to the extent the perpetrators had any military objectives in mind, "they knew their attack would result in excessive civilian harm".[1348] Finally, the Prosecution submits that Karadžić's challenges to the Trial Chamber's proportionality findings would have no impact on his convictions as Scheduled Incidents G.1 and G.2 were also reasonably found to be indiscriminate attacks, which is a sufficient basis to infer that these attacks were directed against civilians.[1349]

505. Karadžić replies that the Trial Chamber applied the wrong test for the assessment of proportionality, arguing that the SRK's superior firepower and the fact that civilian structures were "extensively" damaged is not determinative and that the relevant question was whether the collateral damage was excessive in relation to the military advantage anticipated.[1350]

506. As noted above, the Trial Chamber inferred that Scheduled Incidents G.1 and G.2, along with all other incidents of indiscriminate and disproportionate shelling and sniping, amounted to attacks "directed against civilians".[1351] The Trial Chamber relied on this inference to establish the relevant *mens rea* and/or *actus reus* requirements for the crimes of murder, unlawful attack on civilians, and terror.[1352] However, the Appeals Chamber recalls that "the indiscriminate character of an attack can be indicative of the fact that the attack was indeed directed against the civilian population".[1353] Considering that the Appeals Chamber has affirmed the Trial Chamber's conclusions that the shelling related to Scheduled Incidents G.1 and G.2 was indiscriminate, an

[1344] Prosecution Response Brief, para. 326.
[1345] Prosecution Response Brief, paras. 326, 327.
[1346] Prosecution Response Brief, para. 328.
[1347] Prosecution Response Brief, para. 325.
[1348] Prosecution Response Brief, para. 324.
[1349] Prosecution Response Brief, paras. 329, 330.
[1350] Karadžić Reply Brief, para. 178.
[1351] Trial Judgement, para. 4623.
[1352] With respect to the crimes of unlawful attacks on civilians and terror as violations of the laws or customs of war, findings that the attacks were directed against civilians were used to establish the *actus reus* for each crime. *See* Trial Judgement, paras. 450, 459, 460, 4628, 4632. With respect to murder as a crime against humanity and as a violation of the laws or customs of war, the Trial Chamber observed that the scheduled incidents collectively reflected that civilians were either deliberately targeted or were the victims of indiscriminate and/or disproportionate attack and that the only reasonable inference to be drawn from the circumstances and the manner in which the victims were killed was that the perpetrators had the intent to kill. Trial Judgement, para. 4616. *See also* Trial Judgement, paras. 4612, 4614, n. 15512.
[1353] *Dragomir Milošević* Appeal Judgement, para. 66; *Strugar* Appeal Judgement, para. 275.

additional finding that the attacks were disproportionate is not necessary to sustain the Trial Chamber's inference that the attacks were "directed against civilians".

507. In addition, any error invalidating the conclusions that the attacks related to Scheduled Incidents G.1 and G.2 were disproportionate would not impact the Trial Chamber's findings that the Sarajevo JCE involved a campaign to terrorise civilians and the findings on Karadžić's participation in the Sarajevo JCE. The Trial Chamber's findings reflect that "disproportionate" attacks were simply one of several types of illegitimate attacks, and the Trial Chamber's conclusions on the Sarajevo JCE's intent to terrorise the civilian population would be sustained on the basis of all the shelling attacks found to be indiscriminate as well as the shelling and sniping attacks found to have been deliberate attacks on civilians.[1354] In finding that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror, and significantly contributed to the joint criminal enterprise, the Trial Chamber relied on factors entirely independent of the "disproportionate" nature of any particular attack.[1355] Finding that attacks related to Scheduled Incidents G.1 and G.2 were disproportionate is not necessary to sustain these findings.

508. In light of the above, the Appeals Chamber finds that it need not assess whether the Trial Chamber erred in finding that the shelling related to Scheduled Incidents G.1 and G.2 was disproportionate as any error in this respect would have no impact on the verdict and would not result in a miscarriage of justice.

(c) Conclusion

509. For the foregoing reasons, the Appeals Chamber dismisses Ground 33 of Karadžić's appeal.

[1354] *See* Trial Judgement, paras. 4497 ("throughout the conflict the SRK units engaged in deliberate, disproportionate, and indiscriminate shelling"), 4600 ("the SRK conducted a campaign of shelling and sniping of the city, including of its civilian population, with the intention to, *inter alia*, terrorise the civilian population of Sarajevo"). The Appeals Chamber further observes that, in determining that the campaign of shelling and sniping was conducted with the intention to terrorise the civilian population, the Trial Chamber emphasized: (i) the SRK's use of modified air bombs, which it had determined to be "indiscriminate" by their very nature; and (ii) sniping incidents, which it determined "by their very nature could have been nothing but deliberate attacks on civilians". Trial Judgement, paras. 4597, 4600.

[1355] *See* Trial Judgement, para. 4891. Factors relied upon were: (i) Karadžić's continuous support of Mladić who was central to the implementation of the Sarajevo JCE; (ii) Karadžić's involvement in military matters at the planning and operational levels; (iii) Karadžić's knowledge of attacks on civilians in Sarajevo and of indiscriminate or disproportionate SRK fire; (iv) Karadžić's failure to prevent the shelling and sniping or punish those responsible; (v) Karadžić's support for and promotion of SRK commanders involved in the shelling and sniping; and (vi) Karadžić's modulation of the campaign in accordance with political goals. *See* Trial Judgement, para. 4891.

2. Alleged Errors in Finding that the VRS Shelled Markale Market on 5 February 1994 (Ground 34)

510. The Trial Chamber found by majority, Judge Baird dissenting, that the SRK fired the 120 millimetre mortar shell that hit the "Markale" open-air market frequented by civilians in Sarajevo on 5 February 1994 causing the death of at least 67 people and injuring over 140.[1356] Its conclusion on the origin of fire was based on the following findings: (i) the shell came from above ground level and was fired from a north to north-easterly direction with an azimuth of 18 degrees, plus or minus five degrees;[1357] (ii) the shell's angle of descent was in the range between 55 and 65 degrees;[1358] (iii) the shell was fired on a charge higher than charge two;[1359] (iv) the angle of descent measured at the scene was not compatible with the higher angle of descent ABiH forces would have had to use to hit the market and such steeper angle would have placed the launching crew at significant risk;[1360] and (v) the shell was fired from the SRK side of the confrontation line in the area of Mrkovići, which was north to north-east of Markale and where the SRK kept 120 millimetre mortars.[1361] The Trial Chamber also accepted evidence that: (i) the ABiH had no mortars in the area it controlled within the determined direction of fire and concluded that it would have been nearly impossible to have used mobile mortars to fire at the market without being seen;[1362] (ii) the SRK had used mortar fire on other urban parts of Sarajevo just before the shelling of the market on 5 February 1994;[1363] and (iii) the upper echelons of Bosnian Serb leadership were trying to ensure control over the undisciplined firing by SRK forces into Sarajevo around the time of the incident.[1364]

511. The Trial Chamber's finding on the shell's angle of descent relied on the calculations of Prosecution Witnesses Berko Zečević and John Hamill who had investigated the scene and whose estimates "overlap[ped] to a great extent" and were "in line" with the angle determined by Defence Witness Zorica Subotić.[1365]

512. Karadžić submits that the Trial Chamber erred by calculating the shell's angle of descent on the basis of measurements taken after the crater was disturbed and, in doing so, unreasonably

[1356] Trial Judgement, paras. 4243, 4253.
[1357] Trial Judgement, para. 4245.
[1358] Trial Judgement, para. 4247.
[1359] Trial Judgement, para. 4248.
[1360] Trial Judgement, para. 4248.
[1361] Trial Judgement, para. 4249.
[1362] Trial Judgement, para. 4249.
[1363] Trial Judgement, paras. 4249, 4250.
[1364] Trial Judgement, para. 4250.
[1365] Trial Judgement, paras. 4181, 4188, 4190, 4247, 4248.

disregarded "a plethora of evidence" that the measurements were unreliable.[1366] In his view, the Trial Chamber unreasonably disregarded the findings of a UN expert investigation team, including the evidence of Witness Sahasair Khan, who was a member of the team, as well as the evidence of Prosecution Witness Richard Higgs, and the evidence of Defence Witnesses Derek Allsop and John Russell who concluded that there was no way to determine which side had fired the mortar.[1367] Karadžić also submits that the Trial Chamber unreasonably relied on the evidence of Witness Zečević who, as a former ABiH employee, "presumably" aimed to establish that the Bosnian Serbs were responsible for the shelling, who acknowledged that he had not used a "standard" method of measurement, and whom the Trial Chamber found mistaken in relation to another matter within his area of expertise concerning fuel air bombs.[1368] Karadžić argues that, given the error in calculating the angle of descent that could not be calculated, the Trial Chamber's finding that the Bosnian Serbs had fired the shell that landed on Markale market is unsafe and must be reversed.[1369]

513. The Prosecution responds that the Trial Chamber reasonably found that the SRK had fired the shell that struck Markale market and that its findings were supported by a comprehensive analysis of the technical evidence.[1370] In particular, the Prosecution contends that the Trial Chamber reasonably relied on the evidence of experts in crater analysis who agreed that a range for the angle of descent could be established and whose independent findings strongly overlapped and posits that Karadžić misconstrues the relevant evidence.[1371] The Prosecution also submits that the Trial Chamber reasonably relied on the evidence of Witness Zečević given his expertise and methodology and the fact that his calculations were corroborated by other evidence.[1372] The Prosecution also maintains that the Trial Chamber reasonably rejected contrary evidence.[1373]

514. The Appeals Chamber will first consider Karadžić's argument that the Trial Chamber erred by calculating the shell's angle of descent on the basis of measurements taken after the crater had

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[1366] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 601, 602, 606, 608-611, 621; Karadžić Reply Brief, paras. 180-184; T. 24 April 2018 p. 264.
[1367] Karadžić Appeal Brief, paras. 602, 605, 609, 615, 619, 620; T. 23 April 2018 p. 161.
[1368] Karadžić Notice of Appeal, p. 12; Karadžić Appeal Brief, paras. 606, 607, 615, *referring to* Trial Judgement, paras. 4413, 4437, 4452, 4473, 4491; T. 23 April 2018 p. 161, T. 24 April 2018 p. 264. *See also* T. 23 April 2018 p. 155.
[1369] Karadžić Appeal Brief, paras. 618-622; Karadžić Reply Brief, paras. 180-184; T. 24 April 2018 p. 264. *See also* T. 24 April 2018 pp. 264, 265 (contending that, on 5 February 1994, the stalls of the Markale market were empty and reports did not reflect that a single sales person was killed, raising the question as to why 500 people were there).
[1370] Prosecution Response Brief, paras. 331, 332, 340; T. 23 April 2018 p. 228. *See also* T. 23 April 2018 pp. 234, 235 (arguing that the findings in relation to this incident are further supported by the circumstantial evidence relied upon by the Trial Chamber).
[1371] Prosecution Response Brief, paras. 332, 335-340; T. 23 April 2018 pp. 232-234.
[1372] Prosecution Response Brief, paras. 331, 335, 338-340; T. 23 April 2018 pp. 228-234.
[1373] Prosecution Response Brief, paras. 341-343; T. 23 April 2018 pp. 220, 233, 235. The Prosecution also submits that Judge Baird's dissenting opinion on this point misinterprets the relevant findings by UN investigators who were unable to prove which party had fired the shell because they could not establish the number of charges used and not because, as Karadžić claims, it was impossible to calculate the angle of descent. *See* Prosecution Response Brief, para. 344, *referring to* Trial Judgement, Judge Baird's Dissenting Opinion, paras. 6081-6119.

been disturbed. In this respect, the Appeals Chamber notes that the Trial Chamber considered the evidence suggesting that measurements and estimates of the angle of descent were unreliable due to the crater having been disturbed and that it thoroughly explained its decision to nonetheless rely on the evidence of Witnesses Zečević and Hamill, whose estimates in its view overlapped to a great extent and were corroborated by the evidence of Witness Subotić.[1374] The Trial Chamber relied in particular upon the evidence of Witness Hamill, who stated that the fuse tunnel in Markale was sufficiently intact to take measurements and estimate the angle of descent.[1375] The Trial Chamber also took note of Witness Hamill's clarification that the UN team had used various methods to establish the direction of fire and that there was a remarkable consistency across their findings despite the fact that the investigators had proceeded independently and used different methods.[1376] The Trial Chamber found it significant that all but one of the estimated angle ranges on the trial record overlapped and that the one exception was the slightly higher angle calculated by Witness Russell, who had limited experience in crater analysis, had made his estimate quickly on the day of the incident and, when testifying, could not remember having taken any measurements.[1377]

515. The Appeals Chamber notes that Karadžić suggests that Witness Hamill concluded that it was impossible to determine where the mortar round was fired from because the crater had been disturbed in the days that elapsed between the impact and the analysis.[1378] However, the Appeals Chamber observes that Karadžić's submission is based on a selective reading of Witness Hamill's evidence. When Karadžić put to the witness that, because of the passage of time between the impact and the investigation, it was impossible to determine the origin of the mortar, Witness Hamill responded categorically that, to the contrary, as he had stated in his report, it was "very" possible to determine the "specific" direction from which the round originated without any ambiguity.[1379]

[1374] Trial Judgement, para. 4247.

[1375] Trial Judgement, para. 4194, *referring to*, *inter alia*, Exhibit P1994, p. 137 ("it was my view […] on examining the fuse tunnel that it was inherently – it was pretty well intact. It wasn't completely intact, but it was intact enough that I could make an estimate of the angle of incidence as being between 950 and 1.100 mils. That is within less than 10 degrees. A colleague of […] mine put it to between 1.000 and 1.100 mils. I would say that the fuse tunnel was fairly intact.").

[1376] Trial Judgement, para. 4194.

[1377] Trial Judgement, para. 4247, *referring to*, *inter alia*, the evidence of Witness Russell. The Appeals Chamber also notes that in considering Witness Russell's evidence and, in particular, his conclusion that "it was not possible to determine which side had fired the round as the minimum/maximum range straddled the confrontation line", the Trial Chamber noted that when put to him that firing tables for 120 millimeter shells indicated that the angle of descent remains the same regardless of the distance from which the shell is fired on different charges, Witness Russell accepted that, had he known this, he would have likely come to a different conclusion about the distance from which the shell was fired. *See* Trial Judgement, para. 4186, *referring to* T. 30 October 2012 pp. 29397-29400.

[1378] Karadžić Appeal Brief, para. 609.

[1379] T. 13 December 2010 p. 9693. As Witness Hamill had clarified in his report, "[i]t [was] not possible to state where the round was fired from, as it could have been fired at any one of a number of different charges, giving a different range. It was therefore not the difficulty with estimating more accurately the angle of descent that prevented a definitive conclusion as to the origin of fire but rather the lack of information on the charge used to fire the mortar, which was an essential element for calculating the distance the mortar had traveled before hitting the ground at the site of the incident." *See* Exhibit P1441, p. 25; Trial Judgement, para. 4194, *referring to* Exhibit P1994, pp. 132-133 ("[b]ecause

Karadžić also misrepresents the evidence of another member of the UN investigating team, Witness Khan, who acknowledged the difficulty in calculating accurately the angle of descent due to interferences at the scene by various investigators but stated that, nonetheless, his calculation of the direction to the firing position was "fairly accurate", because the approximate angle of descent was calculated on the basis of the approximate location of the shell's fins found in the crater.[1380] The Appeals Chamber observes that Karadžić's submission that another UN expert, Verdy, "did not attempt to measure the angle of descent because the previous team had disturbed the crater"[1381] is misleading as the said expert had provided an estimated angle of descent.[1382] In any event, the Trial Chamber did not rely on Verdy's calculations, having found flaws in his method.[1383]

516. As to Karadžić's contention that Witness Higgs concluded that there was no way to validly determine the origin of fire,[1384] the Appeals Chamber observes that Karadžić misconstrues his evidence. Witness Higgs testified that his team worked out the angle of descent from the minimum angle necessary for the mortar to clear the nearby buildings and land in the market and then calculated the six possible locations from which the mortar could have been fired using the six charges that could have been used.[1385] Having visited the six locations, Witness Higgs concluded that the mortar must have been fired using the two higher charges from farther behind the confrontation line in the village of Mrkovići which was supported by the mortar's tail fins being embedded in the crater at Markale and by the evidence of a bystander.[1386] The Appeals Chamber notes therefore that, contrary to Karadžić's submission, Witness Higgs concluded that the mortar was "possibly fired" from the SRK-controlled area of Mrkovići.[1387] In addition, the Appeals Chamber notes that, although the Trial Chamber found Witness Higgs reliable and credible, it nonetheless considered that his evidence was of limited value as the majority of his testimony was based on interpretation of reports compiled by investigation teams, appraising their methodology

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of the fact that it is impossible to determine, absolutely impossible to determine, the number of additional increments to the primary charge, then it is not possible with any sort of validity to say where the round was fired. However, what one can do if one has a good fuse tunnel and measures the incident angle, by consulting the range tables, one can work out six areas, in the case of a bomb like this which had six possibilities of different charges. If a mortar bomb had seven possibilities, for example, if it had seven charges, then there would be seven possible areas from which it could have been launched, all of them along the same line and all of them comprising effectively an oval area along that line"); T. 13 December 2010 p. 9694 ("it is simply not possible to determine the distance that the round has been fired from").

[1380] *Compare* Exhibit P1441, p. 23 *with* Karadžić Appeal Brief, para. 609 *and* Karadžić Reply Brief, para. 182.

[1381] Karadžić Appeal Brief, para. 604.

[1382] Exhibit P1441, p. 16.

[1383] Trial Judgement, para. 4246.

[1384] Karadžić Appeal Brief, para. 613 ("[h]e concluded that as there was no accurate angle of descent recorded, there was no way to validly determine which side had fired the mortar"), *referring to* T. 19 August 2010 p. 5983.

[1385] Trial Judgement, para. 4212, n. 14105, *referring to*, *inter alia*, T. 19 August 2010 pp. 5983, 6027.

[1386] Trial Judgement, para. 4212, n. 14101, *referring to*, *inter alia*, T. 19 August 2010 p. 6027, Exhibit P1437, p. 11.

[1387] Trial Judgement, para. 4212, n. 14102, *referring to* T. 19 August 2010 pp. 6026–6028.

and conclusions.[1388] Hence, in finding that the fire originated from Mrkovići, it relied upon Witness Higgs's evidence when corroborated by other witnesses.[1389]

517. As to Karadžić's submissions related to Witness Allsop who testified that the information available on site did not allow for an accurate calculation of the range from which the mortar was fired,[1390] the Appeals Chamber notes that the Trial Chamber duly considered his evidence and observed that, in light of his observations, it could not be certain that the speed of the shell as determined by Witness Zečević was absolutely accurate.[1391] However, it was satisfied that the wide margin of error allowed by Witness Zečević took into account all the possible factors referred to by Witness Allsop as capable of having a significant impact on the accuracy of the relevant calculation.[1392]

518. In light of the foregoing, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber made unreasonable findings in its assessment of the relevant evidence or erred in accepting the expert evidence suggesting that the angle of descent could be reliably estimated despite the interference with the crater at the scene of the incident.

519. With respect to Karadžić's submission that the Trial Chamber unreasonably relied on Witness Zečević's evidence as to the angle of descent, the Appeals Chamber notes that the Trial Chamber relied on Witness Zečević's evidence having found him credible, in possession of extensive technical expertise, and given that his evidence was corroborated by two other expert witnesses.[1393] Specifically, the Trial Chamber observed that Witness Zečević's estimates were corroborated by those of Witness Hamill, which with their margins of error overlapped to a great extent, as well as the estimates by Witness Subotić, which were determined on the basis of the fragment traces on the scene.[1394] The Trial Chamber also found significant the fact that Witness Zečević's estimate "contained the largest margin of error" compared to the other investigators.[1395]

520. The Appeals Chamber considers unsubstantiated Karadžić's cursory submission that Witness Zečević's evidence was tainted by his motive to demonstrate that the mortar was fired from

[1388] Trial Judgement, para. 4012.
[1389] *See* Trial Judgement, paras. 4012, 4248.
[1390] Trial Judgement, para. 4219.
[1391] Trial Judgement, para. 4248.
[1392] Trial Judgement, para. 4248.
[1393] Trial Judgement, para. 4247. The Trial Chamber noted that "Zečević is a mechanical engineer with years of experience in the weapons industry, including testing of weapons". *See* Trial Judgement, para. 4247, n. 14231.
[1394] Trial Judgement, para. 4247. *See also* Trial Judgement, para. 4216 ("[Witness Subotić] using another method, namely the density of the lateral beam of the fragment markings or splinter patterns on the asphalt, she calculated the angle of descent at between 64.6 and 70.32 degrees, that is, still within the range estimated by Zečević.").
[1395] Trial Judgement, para. 4247.

Bosnian Serb-held territory.[1396] As to Karadžić's contention that Witness Zečević "acknowledged" that he had not used a common method of measuring the angle of descent,[1397] the Appeals Chamber notes that, in order to calculate the angle of descent, Witness Zečević measured the depth of the penetration of the shell's stabiliser by returning the stabiliser to the scene and inserting it into the crater.[1398] Contrary to Karadžić's submission, the witness testified that, since the investigation, this method had become "standard" and was widely adopted in assessing operations in urban zones.[1399] In addition, the Trial Chamber considered the evidence of Defence Witness Steven Joudry, a trained artillery officer and instructor in gunnery and field techniques for crater analysis, who testified that re-inserting the stabiliser for the purposes of crater analysis was an "acceptable" and "reasonable way to come up with an estimate".[1400] Finally, with respect to Karadžić's argument that Witness Zečević was found to have erred in relation to another matter within his expertise related to fuel air bombs,[1401] the Appeals Chamber notes that the fact that the Trial Chamber preferred to rely on the testimony of other ballistic experts for the purposes of a different incident does not demonstrate that the Trial Chamber erred in relying on Witness Zečević's ballistic expertise or in its assessment of the probative value of his evidence on the angle of descent for the purposes of the Markale incident. In light of the above, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber's reliance on Witness Zečević's calculation of the angle of descent was unreasonable.

521. The Appeals Chamber finds that Karadžić has failed to demonstrate any error on the part of the Trial Chamber in its assessment of evidence and finding that SRK forces had fired the shell that landed on Markale market on 5 February 1994. Based on the foregoing, the Appeals Chamber dismisses Ground 34 of Karadžić's appeal.

[1396] Karadžić Appeal Brief, para. 606, *referring to* T. 22 February 2011 p. 12158. The Appeals Chamber notes that, in the transcript page Karadžić seeks to rely upon, the witness merely states: "I volunteered for this work, because I believed that the statements given on the previous day were not correct, and that it was, according to them, impossible to determine the origin of fire. So therefore I attempted, with my colleagues, to provide some additional information. The investigating judge who was on the spot authorised me and my colleagues to proceed with preparing this analysis".
[1397] Karadžić Appeal Brief, para. 607, *referring to* T. 24 February 2011 p. 12340.
[1398] Trial Judgement, para. 4181.
[1399] T. 24 February 2011 pp. 12339, 12340.
[1400] Trial Judgement, para. 4196; T. 30 October 2012 pp. 29344, 29345.
[1401] Karadžić Appeal Brief, para. 615, *referring to* Trial Judgement, paras. 4413, 4437, 4452, 4473, 4491.

3. Alleged Errors in Finding that Karadžić Shared the Common Purpose to Terrorize the Civilian Population of Sarajevo (Grounds 36 and 37)

522. As recalled above, the Trial Chamber found that the Sarajevo JCE, the primary purpose of which was to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the SRK, came into existence in late May 1992 and continued to be implemented until October 1995.[1402] The Trial Chamber determined that Karadžić shared the common purpose of the Sarajevo JCE, had the intent to spread terror among the civilian population of Sarajevo, and significantly contributed to the execution of the common plan.[1403] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of murder as a crime against humanity as well as murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war.[1404]

523. In concluding that Karadžić shared the common purpose of and significantly contributed to the Sarajevo JCE, the Trial Chamber relied on evidence and findings on: (i) his continuous support for Mladić, who was central in the implementation of the Sarajevo JCE; (ii) his direct involvement in the military matters in and around Sarajevo at the planning and operational levels; (iii) his knowledge of the attacks on civilians in Sarajevo and of indiscriminate or disproportionate SRK fire, together with his persistent denials and deflections of any SRK responsibility; (iv) his failure to prevent the shelling and sniping of civilians and to punish those responsible, despite being at the apex of control over the VRS and the SRK; (v) his support for and promotion of SRK commanders and units while aware of their involvement in the campaign of sniping and shelling of civilians; and (vi) his modulation of that campaign in accordance with his political goals.[1405]

524. Karadžić submits that, in finding that he shared the common purpose of the Sarajevo JCE, the Trial Chamber erred: (i) by relying on a meeting which never occurred; (ii) by disregarding evidence of his orders prohibiting the targeting of civilians; and (iii) in assessing his knowledge of the attacks on civilians.[1406] The Appeals Chamber will address his contentions in turn.

(a) Alleged Errors in Relation to the Late May 1992 Meeting

525. In discussing the shelling of Sarajevo city on 28 and 29 May 1992 as alleged in Scheduled Incident G.1 of the Indictment, the Trial Chamber relied on the evidence of [REDACTED] and found that Karadžić and the Bosnian Serb leadership attended a meeting which occurred sometime

[1402] Trial Judgement, paras. 4649, 4676.
[1403] Trial Judgement, para. 4891.
[1404] Trial Judgement, paras. 4937-4939.
[1405] Trial Judgement, para. 4891.

between 20 and 28 May 1992, "most probably in the last week of May", where Mladić outlined his plans to use "all the equipment and arms" available to "massively bombard Sarajevo".[1407] The Trial Chamber found that, [REDACTED], Karadžić and other members of the Bosnian Serb leadership remained silent.[1408] The Trial Chamber relied, in part, on this meeting in concluding that Karadžić supported Mladić and the SRK in the implementation of the Sarajevo JCE.[1409]

526. Karadžić submits that this meeting never occurred and [REDACTED].[1410] He further contends that the Trial Chamber's findings as to the date of this meeting are contradicted by evidence and by the Trial Chamber's acknowledgement that Karadžić was in Lisbon when this meeting was determined to have occurred.[1411] He further argues that the Trial Chamber ignored relevant evidence in that the meeting was not recorded in Mladić's diary, which contains "fastidious recording of meetings", and that this omission raises further reasonable doubt as to its occurrence.[1412] In sum, Karadžić submits that the Trial Chamber's conclusions regarding the meeting are "manifestly unsafe" and impact the Trial Chamber's finding that the common plan of the Sarajevo JCE materialized in late May 1992.[1413]

527. The Prosecution responds that the Trial Chamber correctly assessed the evidence and, in particular, argues that the evidence and findings of the Trial Chamber reflect that the meeting could have occurred on 20 May 1992.[1414] It contends that the meeting was neither the heart of the Sarajevo JCE nor marked the point when the common plan was implemented as the common plan materialized with the events of Scheduled Incident G.1 and Karadžić's agreement with it was demonstrated by his conduct before and after the meeting as described in the Trial Chamber's relevant unchallenged findings.[1415]

[1406] Karadžić Notice of Appeal, p. 13; Karadžić Appeal Brief, paras. 623-659.
[1407] Trial Judgement, paras. 4023, 4721.
[1408] Trial Judgement, paras. 4023, 4721.
[1409] Trial Judgement, paras. 4721, 4736. *See also* Trial Judgement, paras. 4718-4739.
[1410] Karadžić Appeal Brief, paras. 623-627, 631. In this respect, Karadžić further submits that the Trial Chamber's [REDACTED] further undermines the Trial Chamber's reliance on [REDACTED]. *See* Karadžić Appeal Brief, para. 627.
[1411] Karadžić Appeal Brief, paras. 628, 629.
[1412] Karadžić Appeal Brief, para. 630.
[1413] Karadžić Appeal Brief, para. 631.
[1414] Prosecution Response Brief, paras. 365-367, 369. The Prosecution further asserts that Karadžić's departure to Lisbon could have happened after 20 May 1992, as he was still in the region in the evening of 20 May 1992 when he signed the decree on general mobilization and since the evidence relied on by the Trial Chamber only stated that it was Colm Doyle, rather than Karadžić, who left for Lisbon on that day. It contends that any factual error on Karadžić's departure date could not be appealed as this did not result in a miscarriage of justice. *See* Prosecution Response Brief, para. 368; T. 23 April 2018 p. 223.
[1415] Prosecution Response Brief, paras. 363, 364, 370; T. 23 April 2018 pp. 223-225.

528. Karadžić replies that the Prosecution's suggestion that the meeting could have occurred on 20 May 1992 contradicts its position at trial and is unsupported by evidence.[1416] He further contends that the Trial Chamber's findings in relation to the meeting do not only impact its conclusion on Scheduled Incident G.1, but also on his contribution to the Sarajevo JCE and his support for Mladić and the SRK.[1417]

529. Turning to Karadžić's contention that the Trial Chamber failed to exercise sufficient caution when relying on the [REDACTED], Karadžić refers to a statement given voluntarily by the witness to the Prosecution, reflecting that he was cautioned by a representative of the Prosecution that, based on information in its possession, he may be [REDACTED].[1418] However, the Appeals Chamber does not consider that this general, precautionary admonition demonstrates that [REDACTED] was an accomplice witness with motives to implicate Karadžić.[1419] Notably, neither Karadžić's cross-examination of the witness nor his closing submissions reflect that the Trial Chamber should have treated this witness's evidence with caution due to any motivation to implicate Karadžić on the basis of any actual or potential criminal proceedings against the witness in relation to the events about which he testified.[1420]

530. The Appeals Chamber recalls that a trial chamber has broad discretion in weighing evidence,[1421] is best placed to assess the credibility of a witness and the reliability of the evidence,[1422] and may decide, in the circumstances of each case, whether corroboration of evidence is necessary or to rely on uncorroborated, but otherwise credible, witness testimony.[1423] The Trial

[1416] Karadžić Reply Brief, paras. 185, 186. In particular, Karadžić points to evidence from Mladić's diary that he noted meetings with [REDACTED] but made no notation concerning a meeting on 20 May 1992 and submits that the diary further indicated that Plavšić, who the Trial Chamber found attended the meeting, should be "pulled out of Sarajevo" on 20 May 1992, and therefore could not have been present at the meeting on this date. *See* Karadžić Reply Brief, para. 186, [REDACTED]. *See also* Karadžić Appeal Brief, para. 628. During the appeal hearing, Karadžić argued that, on 19 May 1992, he "had to travel by car to Belgrade" and that on 20 May 1992 he "was to fly to Lisbon and stay there until [27 May 1992]" and then "remain in Belgrade until [30 May 1992]." T. 24 April 2018 pp. 267, 268.
[1417] Karadžić Reply Brief, para. 187; T. 24 April 208 pp. 267, 268.
[1418] *See* Karadžić Appeal Brief, para. 626 [REDACTED].
[1419] *See Munyakazi* Appeal Judgement, para. 93 ("The Appeals Chamber has stated that the ordinary meaning of the term 'accomplice' is 'an association in guilt, a partner in crime'. The caution associated with accomplice testimony is most appropriate where a witness 'is charged with the same criminal acts as the accused'.") (internal references omitted).
[1420] *See, e.g.*, Karadžić Final Trial Brief, paras. 1642, 1688, 1703, 1853-1855, 1919, 1952, 1955, 1968, 1974, 1976, 1992, 1997, 2311; T. 8 September 2010 pp. 6339-6432 (closed session); T. 10 September 2010 pp. 6435-6548 (closed session); T. 13 September 2010 pp. 6551-6620, 6667-6670 (closed session). *See also* Karadžić Closing Arguments, T. 2 October 2014 pp. 47954, 47995-47997 (private session).
[1421] *Šainović et al.* Appeal Judgement, para. 490.
[1422] *Prlić et al.* Appeal Judgement, paras. 200, 708; *Stanišić and Župljanin* Appeal Judgement, para. 654; *Nyiramasuhuko et al.* Appeal Judgement, para. 1830; *Popović et al.* Appeal Judgement, para. 513; *Ngirabatware* Appeal Judgement, para. 69; *Šainović et al.* Appeal Judgement, para. 464.
[1423] *Prlić et al.* Appeal Judgement, para. 201; *Nyiramasuhuko et al.* Appeal Judgement, paras. 874, 949, 1340; *Popović et al.* Appeal Judgement, paras. 243, 1009; *Gatete* Appeal Judgement, paras. 125, 138; *Ntawukulilyayo* Appeal Judgement, para. 21.

Chamber stated that, in cases where it relied on the testimony of a single Prosecution witness on a material fact, it examined the evidence of the witness with the utmost caution before accepting it as a sufficient basis for a finding of guilt.[1424] In this respect, apart from disagreeing with the Trial Chamber's assessment of [REDACTED], Karadžić has not demonstrated that such evidence was not credible or that the Trial Chamber erred in relying on it.[1425]

531. With respect to the date of the meeting, the Trial Chamber considered that [REDACTED].[1426] The Trial Chamber nevertheless found that the meeting took place "some time between 20 to 28 May 1992, most probably in the last week of May" on the basis that: (i) [REDACTED].[1427]

532. The Appeals Chamber notes that the Trial Chamber also found that, "[o]n 20 May 1992, [Karadžić] travelled to Lisbon for about a week to attend the peace negotiations there".[1428] The Trial Chamber's findings also reflect that Karadžić was in Lisbon on 27 May 1992.[1429] The Appeals Chamber considers that, on their face, these findings could contradict the conclusion that Karadžić attended the meeting which occurred between 20 and 28 May 1992 and "most probably in the last week of May".[1430] The Appeals Chamber observes that the Trial Chamber's conclusion that Karadžić departed for Lisbon on 20 May 1992 is not supported by the evidence it relied upon to make that finding.[1431] To the contrary, the Appeals Chamber notes that other findings of the Trial Chamber, and the evidence it relied upon to make them reflect that Karadžić was in the Sarajevo area on 20 May 1992.[1432] Furthermore, and contrary to Karadžić's suggestion, evidence that Mladić had noted in his diary on 20 May 1992 that Plavšić and her family should be pulled out of Sarajevo[1433] is not inconsistent with the Trial Chamber's conclusion that this meeting took place as the meeting could have occurred on 20 May 1992 while Karadžić was in the Sarajevo area. In this

[1424] Trial Judgement, para. 12.
[1425] The Appeals Chamber recalls its conclusion that Karadžić has not demonstrated any prejudice due to the Trial Chamber's failure to admit a statement provided by [REDACTED]. *See supra* Section III.A.4(b). Karadžić does not demonstrate how this undermines the reasonableness of the Trial Chamber's reliance on [REDACTED].
[1426] Trial Judgement, para. 4023, n. 13366, *referring to*, *inter alia* [REDACTED].
[1427] Trial Judgement, para. 4023, n. 13366. *See also* Trial Judgement, n. 13478 [REDACTED].
[1428] Trial Judgement, para. 4026, n. 13380.
[1429] Trial Judgement, para. 4026.
[1430] Trial Judgement, para. 4023.
[1431] Trial Judgement, para. 4026, n. 13380, *referring to*, *inter alia*, Exhibit P918, pp. 25299, 25300 (testimony of Colm Doyle reflecting that he travelled to Lisbon on 20 May 1992 without specifying that Karadžić travelled to Lisbon that day).
[1432] *See*, *e.g.*, Trial Judgement, paras. 3145, *referring to*, *inter alia*, Exhibit P3919 (concerning a decision issued by the Presidency of the Serbian Republic of Bosnia and Herzegovina signed by Karadžić on 20 May 1992 and stamped "Sarajevo"), 3162, 4765, *referring to* Exhibit P2645 (concerning an order of 20 May 1992 signed by Karadžić and stamped "Sarajevo"). *See also* Trial Judgement, para. 253, *referring to*, *inter alia*, Exhibit P2617, p. 1 (concerning decisions taken by the Presidency of the Serbian Republic of Bosnia and Herzegovina on 20 May 1992).
[1433] [REDACTED]

regard, the Trial Chamber's findings are not contradictory and the record demonstrates that it was reasonable to conclude that Karadžić participated in this meeting, which occurred "some time between 20 and 28 May 1992, most probably in the last week of May".[1434]

533. Turning to Karadžić's contention that the Trial Chamber ignored relevant evidence that this meeting was not recorded in Mladić's diary, the Appeals Chamber recalls that it is not necessary for a trial chamber to refer to every piece of evidence on the trial record as long as there is no indication that it completely disregarded any particular piece of evidence.[1435] 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.[1436] If a trial chamber did not refer to specific evidence, 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.[1437] The Appeals Chamber observes that the Trial Chamber extensively considered the contents of Mladić's diary[1438] and it is not persuaded that the Trial Chamber ignored this evidence when assessing the occurrence of this meeting.[1439] Moreover, the Appeals Chamber is not persuaded that the absence of any entry as it relates to this meeting contradicts or undermines the reasonableness of the Trial Chamber's conclusions that it occurred.

534. For the foregoing reasons, the Appeals Chamber finds that Karadžić fails to demonstrate that the Trial Chamber committed any error in relying on [REDACTED] and finding that Karadžić and the Bosnian Serb leadership attended a meeting which occurred between 20 and 28 May 1992 and "most probably in the last week of May".

535. In any event, for the following reasons the Appeals Chamber considers that Karadžić's suggestion that any error as it relates to the late May 1992 meeting would invalidate the verdict as it relates to the Sarajevo JCE is unpersuasive.[1440] The Trial Chamber found that the plan of sniping

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[1434] Trial Judgement, para. 4023.
[1435] *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 3100; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.
[1436] *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864; *Kvočka et al.* Appeal Judgement, para. 23.
[1437] *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 1410; *Kvočka et al.* Appeal Judgement, para. 23.
[1438] *See, e.g.*, Trial Judgement, paras. 4021, 4026, 4027, 4034, 4035. *See also* Trial Judgement, paras. 4041, 4506, 4548, 4568, 4661, 4665, 4666, 4670, 4673, 4683, 4724, 4727-4730, 4764, 4776, 4780-4784, 4791, 4794-4796, 4800-4804, 4813, 4819, 4823, 4827, 4837, 4871, 4873, 4876, 4906, 4907, 4909, 4910, 4912, 4923, 4927, 4936.
[1439] The Appeals Chamber is not persuaded that notations in Mladić's diary as it relates to [REDACTED] necessarily support the conclusion that the absence of any notation of a meeting with Karadžić on 20 May 1992 is an indication that it did not occur. [REDACTED].
[1440] *See* Karadžić Appeal Brief, para. 631. Karadžić submits that this meeting is "at the heart" of the Sarajevo JCE and that the common plan could not have materialised without it. Karadžić Appeal Brief, para. 631. In reply, Karadžić further argues that the Trial Chamber also relied upon the late May 1992 meeting in support of Karadžić's contributions to the Sarajevo JCE and his support for Mladić and the SRK. Karadžić Reply Brief, para. 187, *referring to* Trial Judgement, paras. 4023, 4721.

and shelling the city materialised in late May 1992 with Scheduled Incident G.1[1441] and this conclusion is not dependent upon Karadžić's participation in the late May 1992 meeting.[1442] Moreover, the Trial Chamber found that, prior to the late May 1992 meeting, Karadžić supported Mladić and his plan of shelling and sniping Sarajevo when he voted for him as the Commander of the VRS on 12 May 1992 during the 16th Session of the Bosnian Serb Assembly, after Mladić presented to him and the Bosnian Serb leadership his Sarajevo strategy, including the besieging and targeting of the city with a large number of heavy weapons.[1443] Furthermore, the Trial Chamber relied on other factors that were critical to finding Karadžić's agreement and contributions to the Sarajevo JCE that would remain undisturbed irrespective of the Trial Chamber's conclusions as to his participation in the late May 1992 meeting.[1444]

(b) Alleged Errors in Disregarding Evidence Prohibiting the Targeting of Civilians

536. In finding that Karadžić had the intent to commit murder, terror, and unlawful attacks on civilians in Sarajevo, the Trial Chamber relied, in part, on Karadžić's statements, orders, conversations, and activities.[1445] The Trial Chamber acknowledged that Karadžić occasionally issued orders for Bosnian Serb forces to stop the shelling and sniping in the city and to respect the laws of war.[1446] However, it found that Karadžić made no "genuine" effort to protect civilians from the attacks and only issued orders when pressured by the international community, under threat by NATO, or to "achieve his political goals".[1447] The Trial Chamber considered that, in light of the length of the siege of Sarajevo and of the SRK's campaign of sniping and shelling, such orders "were few and far between" and had no practical effect on the situation on the ground as they were never followed up by proper investigation and/or punishment for those who disobeyed them.[1448]

[1441] Trial Judgement, paras. 4649, 4892.
[1442] *See* Trial Judgement, paras. 4018, 4027-4035.
[1443] Trial Judgement, para. 4735. *See also* Trial Judgement, paras. 3984, 4661, 4719.
[1444] For example, the Trial Chamber relied on numerous events demonstrating Karadžić's support for Mladić's implementation of the Sarajevo JCE after the late May 1992 meeting. Specifically, the Trial Chamber found that Karadžić indirectly acknowledged the intensified campaign against Sarajevo when he defended Mladić's actions in a meeting with Morillon, Mackenzie, and Koljević on 30 May 1992. Trial Judgement, paras. 4037, 4723, 4736. Furthermore, the Trial Chamber also relied on Karadžić's acceptance of military directives signed by Mladić, a number of meetings where he and Mladić discussed their plans for Sarajevo, and on Mladić's promotion by Karadžić to the rank of a Colonel General on 28 June 1994 despite the objections of the international community to Mladić's and the SRK's actions in Sarajevo. Trial Judgement, paras. 4724, 4727-4729, 4731, 4736. The Trial Chamber found that aside from Mladić, Karadžić also showed support for other SRK officers who were members of the Sarajevo JCE such as Stanislav Galić and Dragomir Milošević by promoting them and also relied on findings as to the authority Karadžić exercised over the SRK since May 1992. Trial Judgement, paras. 4707, 4708, 4711, 4718, 4719, 4732, 4733, 4738, 4752, 4891. The Trial Chamber's conclusions as they pertain to the common plan and Karadžić's contributions to it further demonstrate that Karadžić's liability through his participation in the Sarajevo JCE is dependent upon numerous acts and omissions over the course of years. *See* Trial Judgement, paras. 4676, 4891.
[1445] Trial Judgement, para. 4928.
[1446] Trial Judgement, para. 4934. *See also* Trial Judgement, para. 4927, *referring to, inter alia*, Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv.
[1447] Trial Judgement, paras. 4927, 4934. *See also* Trial Judgement, para. 4866.
[1448] Trial Judgement, para. 4934.

According to the Trial Chamber, the fact that Karadžić did not exercise his extensive influence more regularly and rigorously indicated that the cessation of attacks on civilians was not in his interest.[1449] The Trial Chamber concluded that these orders did not undermine its finding that Karadžić possessed the requisite intent to commit murder, terror, and unlawful attacks on civilians.[1450]

537. Karadžić submits that no reasonable trier of fact could have found that he possessed the intent to commit murder, terror, and unlawful attacks on civilians in Sarajevo, in light of the numerous orders he issued that reflected his dedication to protecting civilians.[1451] Karadžić argues that his orders to protect civilians were found credible by the Trial Chamber when making adverse findings as to his level of control, knowledge of crimes, and ability to modulate shelling.[1452] However, he submits that the Trial Chamber erroneously disregarded them when assessing his intent and erred in finding that his orders were: (i) not "genuine"; (ii) motivated by "political goals"; and (iii) "few and far between" and that he failed to exert his influence "more regularly and rigorously".[1453] He argues that these conclusions are incompatible with the Trial Chamber's own findings as well as the record and demonstrate the unreasonableness of the Trial Chamber's evaluation of his intent.[1454]

538. The Prosecution responds that the Trial Chamber reasonably found that Karadžić's orders to protect civilians were not genuine, were politically motivated, and were too few and far in between.[1455]

539. Karadžić replies that the Prosecution fails to provide evidence that he ordered, approved, or favoured indiscriminate or disproportionate shelling or targeting of civilians.[1456]

[1449] Trial Judgement, para. 4934.
[1450] Trial Judgement, para. 4934.
[1451] Karadžić Appeal Brief, paras. 633, 634, 640.
[1452] Karadžić Appeal Brief, para. 636.
[1453] Karadžić Appeal Brief, paras. 635, 636, 638, 639.
[1454] Karadžić Appeal Brief, paras. 635-640. Karadžić argues that the genuineness of his orders to not target civilians is corroborated by private conversations admitted into the record repeating such instructions as well as the absence of any private conversations to the contrary. *See* Karadžić Appeal Brief, paras. 635, 639. He submits that it was inapposite for the Trial Chamber to consider his alleged "political goals" as these do not demonstrate that he wanted civilians to be targeted. *See* Karadžić Appeal Brief, para. 638. As regards the question whether his orders were "few and far between" or the finding that he did not exercise his influence "more regularly or rigorously", Karadžić argues that, in light of the Trial Chamber's reasoning that the chain of command between Karadžić and the SRK operated as intended and that the control system within the SRK and the Main Staff through to Karadžić functioned well, there would have been no need to re-issue orders or repeat to them to change "their weight or vigor". *See* Karadžić Appeal Brief, para. 637.
[1455] Prosecution Response Brief, paras. 357-362; T. 23 April 2018 pp. 225-227. *See also* T. 23 April 2018 p. 226 (emphasizing that, because the campaign targeting civilians in Sarajevo continued for over three years, Karadžić, as the Supreme Commander of the VRS, intended it to continue and that general instructions to protect civilians, on most occasions, were "mere lip service").
[1456] Karadžić Reply Brief, para. 191. He further contends that one of the orders was issued before there was international pressure concerning shelling. *See* Karadžić Reply Brief, para. 192, *referring to*, *inter alia*, Exhibit D232.

540. The Appeals Chamber recalls that, in determining Karadžić's intent with regard to the crimes of murder, terror, and unlawful attacks on civilians in relation to the Sarajevo JCE, the Trial Chamber assessed numerous statements and orders given by Karadžić and others, including those instructing Serb forces in Sarajevo not to target civilians or to respect the laws of war.[1457] The Trial Chamber noted and discussed in detail nearly all of the orders to which Karadžić refers.[1458] The Trial Chamber also found one of these orders to be of low probative value,[1459] and expressly considered other orders to which he refers in discussing the context of a cease-fire or the Scheduled Incidents concerning the sniping and shelling in Sarajevo.[1460] Karadžić therefore does not demonstrate that the Trial Chamber failed to assess this evidence.

541. The Appeals Chamber observes that the Trial Chamber did not expressly assess a directive contained in Exhibit D4618 to which Karadžić refers on appeal. However, the Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence on the trial record and that it is to be presumed that it evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[1461] In this respect, the Appeals Chamber notes that this exhibit, which concerns an order requiring all SRK units to cease fire and seek leave to open fire was issued as an implementation of an agreement between Karadžić and UNICEF, and consequently, is cumulative of other evidence discussed by the Trial Chamber that concerned orders issued either in the context of Karadžić engaging in the process of negotiating with foreign diplomats or agreeing to cease-fires.[1462] In light of the above, Karadžić does not demonstrate that the Trial Chamber erred by disregarding the orders to which he refers on appeal.

[1457] Trial Judgement, paras. 4927, 4928, 4934, *referring to*, *inter alia*, Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv. *See generally* Trial Judgement, paras. 4764-4798, 4869-4884.
[1458] Karadžić Appeal Brief, paras. 633-636, Annex N.
[1459] The Trial Chamber found that Exhibit D314 had low probative value as the document was undated and contained no stamp. *See* Trial Judgement, para. 4779, n. 16064. *See also* Trial Judgement, para. 4927, n. 16619.
[1460] *See* Trial Judgement, paras. 338 (*referring to*, *inter alia*, Exhibit D4564), 4834 (*referring to*, *inter alia*, Exhibit D700), 4873 (*referring to* Exhibit P2661). Karadžić also submits that the Trial Chamber failed to consider Exhibit D4836, which he mistakenly describes as the "SRK order implementing the Agreement of Complete Cessation of Hostilities with Bosnian Muslims" dated 3 January 1995. *See* Karadžić Appeal Brief, para. 633, Annex N, RP. 1673. To the extent that Karadžić is in fact referring to Exhibit D2786 (order from the Main Staff of the Army of *Republika Srpska* on the "implementation of the agreement on complete cessation of hostilities against the Muslim side" dated 1 January 1995), this evidence was similarly considered by the Trial Chamber in the context of a cease-fire agreement. *See* Trial Judgement, para. 410.
[1461] *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, paras. 187, 2937, 3039; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.
[1462] *See* Trial Judgement, n. 16620. *See also* Trial Judgement, paras. 410, 3606, 4783, 4859, 4872. Karadžić further argues that the Trial Chamber failed to consider that Exhibit D232, a military directive dated 6 June 1992 that included an admonishment that "maltreating of civilian unarmed population is strictly forbidden and prisoners must be treated pursuant to the Geneva Conventions", was issued before international pressure concerning the shelling was applied and failed to explain why, in this context, such a directive was not genuine. *See* Karadžić Reply Brief, para. 192. The Appeals Chamber notes that Karadžić points to this exhibit for the first time in his reply and could dismiss these arguments on this basis. In any event, his assertion that the direction was issued before the beginning of the siege on Sarajevo and before international pressure was placed on him is belied by the record relied upon by the Trial Chamber,

542. Turning to Karadžić's contentions that the Trial Chamber erred in determining that his orders were "not genuine", were "politically motivated" and "few and far between", and that he did not exercise his influence more "rigorously and regularly", the Appeals Chamber recalls that in so finding, the Trial Chamber considered statements and orders made by Karadžić, including private conversations to halt firing upon Sarajevo to which he refers on appeal.[1463] The Trial Chamber ultimately concluded that such statements and orders did not indicate that Karadžić disapproved of the sniping and shelling of Sarajevo, but rather that they were made at times when such conduct was inconvenient to him.[1464] With respect to, specifically, his private conversations to halt firing upon Sarajevo, the Trial Chamber concluded that such statements were made during times where he was being pressured by the international community or threatened with air strikes.[1465] The Trial Chamber also considered additional evidence of private conversations that led the Trial Chamber to determine that Karadžić "was duplicitous in his dealings with the international community" in relation to the attacks on Sarajevo.[1466] The Appeals Chamber considers that Karadžić simply offers an alternative interpretation of the record and the Trial Judgement without demonstrating the unreasonableness of the Trial Chamber's conclusion that his orders were "not genuine".

543. Similarly, the Appeals Chamber finds no merit in Karadžić's assertion that his political motivation was irrelevant in assessing his intent. The context in which Karadžić issued orders prohibiting the targeting of civilians in Sarajevo is directly relevant to whether his actions reflected a genuine concern for their safety. In this respect, the Trial Chamber reasonably found that Karadžić issued such orders while negotiating with foreign diplomats or when he had agreed to cease-fires,[1467] or when he was being pressured by the international community or threatened with air strikes, such as in the aftermath of the SRK's capture of Mt. Igman in 1993 and the first Markale incident in February 1994.[1468] Likewise, the Trial Chamber reasonably concluded that orders prohibiting the targeting of civilians did not indicate that Karadžić disapproved of the shelling and sniping of Sarajevo, but rather that they were conducted at times inconvenient to him.[1469] In this context, it was reasonable to determine that the relevant orders were "politically motivated" and to

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which reflects discussions with international actors to end the siege on Sarajevo started as early as 30 May 1992. *See*, *e.g.*, Trial Judgement, paras. 4036, 4037. Accordingly, this argument is dismissed.

[1463] Karadžić Appeal Brief, paras. 635, 638, 639, *referring to*, *inter alia*, Trial Judgement, paras. 4785, 4792, 4874, 4927, Exhibits D4510, P4802; Trial Judgement, para. 4927, *referring to*, *inter alia*, Trial Judgement, Sections IV.B.3.c.ii.D, IV.B.3.c.iv. nn. 16220, 16221.

[1464] Trial Judgement, para. 4927.

[1465] Trial Judgement, para. 4927, n. 16621 *referring to*, *inter alia*, Exhibits D4510, P4802.

[1466] *See*, *e.g.*, Trial Judgement, paras. 4905, 4931 (referring to evidence that Karadžić issued private orders to continue firing on Sarajevo after bringing bombing to a halt).

[1467] Trial Judgement, para. 4927, n. 16620, *referring to*, *inter alia*, Exhibits D4512, P836, D4507, D4508, D4610.

[1468] Trial Judgement, para. 4927, n. 16621, *referring to*, *inter alia*, Exhibits P1483, P4802, P4804, P846, D4510, D3521.

[1469] Trial Judgement, para. 4927.

consider this conclusion when assessing Karadžić's intent in relation to the crimes committed through the Sarajevo JCE.

544. Finally, the Appeals Chamber does not consider that the Trial Chamber's conclusions that Karadžić's orders were "few and far between" and that he did not exercise his influence more "regularly and rigorously" are incompatible with other findings that the chain of command between Karadžić and the SRK operated as intended and that the control system within the SRK and the Main Staff to Karadžić functioned well.[1470] Karadžić has not, for example, demonstrated the unreasonableness of the Trial Chamber's conclusions as to the length of the siege of Sarajevo, or the fact that his orders to stop the sniping and shelling in Sarajevo and to respect the laws of war had no practical effect on the situation on the ground as they were never followed up by proper investigation and/or punishment for those who disobeyed them.[1471]

545. In light of the above, Karadžić fails to demonstrate the unreasonableness of the Trial Chamber's assessment of his orders in determining his intent to commit murder, torture, and unlawful attacks on civilians in relation to the Sarajevo JCE.

(c) Alleged Errors in Assessing Karadžić's Knowledge of Attacks Against Civilians

546. The Trial Chamber found that Karadžić knew or had reason to know that the SRK was sniping and shelling the civilian population or launching indiscriminate and/or disproportionate attacks on Sarajevo.[1472] The Trial Chamber relied on evidence from representatives of the international community and some Defence witnesses that Karadžić regularly received information about the sniping and shelling incidents throughout the conflict.[1473] The Trial Chamber found that Karadžić was fully aware of the international community's statements about the situation in Sarajevo, the plight of civilians, and violations of international humanitarian law, as he attended meetings in which Security Council resolutions were discussed.[1474] The Trial Chamber further found that Karadžić was cognizant of numerous media reports regarding the situation in the city and had interactions with journalists who repeatedly brought to his attention instances of shelling and sniping of civilians.[1475]

[1470] *See* Trial Judgement, paras. 4764, 4862.
[1471] Trial Judgement, para. 4934.
[1472] Trial Judgement, paras. 4861, 4863, 4865, 4866.
[1473] Trial Judgement, paras. 4861, 4863, 4864. *See also* Trial Judgement, paras. 4813-4847.
[1474] Trial Judgement, para. 4861.
[1475] Trial Judgement, para. 4861. *See also* Trial Judgement, paras. 4848-4850.

547. Karadžić submits that the Trial Chamber erred in assessing his knowledge by focusing on information he received, rather than information he "reasonably believed".[1476] He contends that the Trial Chamber relied "heavily" on news reports and information from the international community, whom Karadžić, at the relevant time, considered biased against the Bosnian Serb leadership, and failed to give adequate weight to evidence from military sources within the VRS and the SRK, whom he "trusted far more than the international observers", that Bosnian Serb forces were acting lawfully.[1477] Karadžić contends that, even if the Trial Chamber correctly concluded that the VRS witnesses who "were willing to travel to The Hague 20 years later, take the solemn oath and testify that they only fired […] at military objectives" were lying, it is reasonable to conclude that this was the information they provided to Karadžić.[1478] Karadžić further submits that the Trial Chamber failed to adequately consider information he received from his own sources with respect to Scheduled Incidents G.4, G.7, G.8, and F.11 reflecting the lawfulness of the conduct of the VRS.[1479]

548. The Prosecution responds that, in light of the information that Karadžić received and evidence demonstrating his awareness, including documents from within the SRK/VRS, the Trial Chamber reasonably found that he knew that the SRK was shelling and sniping civilians.[1480]

549. In reply, Karadžić maintains that the Trial Chamber failed to consider the totality of the information he received.[1481] He submits that while some sources within the Bosnian Serb structures occasionally informed him on the targeting of civilians, these were isolated incidents and the evidence does not necessarily demonstrate that civilians were deliberately targeted.[1482] He further contends that he expressly disapproved attacks which he believed were disproportionate.[1483]

550. The Appeals Chamber notes that, in inferring Karadžić's knowledge about the sniping and shelling of the civilian population or the launching of indiscriminate and/or disproportionate attacks on Sarajevo, the Trial Chamber relied on Prosecution and Defence evidence and did not solely rely on evidence from international representatives and media reports.[1484] In particular, the Trial Chamber considered evidence from sources within the Serbian and Bosnian Serb civilian and military structures, including contemporaneous documentation, demonstrating Karadžić's

[1476] Karadžić Appeal Brief, paras. 641-659.
[1477] Karadžić Appeal Brief, paras. 642-650.
[1478] Karadžić Appeal Brief, para. 650.
[1479] Karadžić Appeal Brief, paras. 654-659, *referring to*, *inter alia*, Exhibits D1515, D340, P867, T. 5 March 2012 pp. 25735, 25736, T. 28 January 2013 pp. 32711, 32712.
[1480] Prosecution Response Brief, paras. 350-356. *See also* T. 23 April 2018 pp. 221, 222 (highlighting findings of the Trial Chamber supporting that Karadžić's conduct "clearly shows that he shared the common purpose of the Sarajevo JCE and that he intended to spread terror among the civilian population through the campaign of shelling and sniping").
[1481] Karadžić Reply Brief, paras. 188, 190.
[1482] Karadžić Reply Brief, para. 189.
[1483] Karadžić Reply Brief, para. 189.
[1484] Trial Judgement, para. 4861. *See*, *e.g.*, Trial Judgement, paras. 4813, 4817, 4820, 4821, 4823, 4825, 4827, 4846.

knowledge of the nature of the attacks on Sarajevo, including attacks on civilian populations.[1485] The Trial Chamber considered that its conclusion that he knew of the SRK's firing practices in Sarajevo was confirmed by the fact that Karadžić himself at times raised concerns and attempted to limit disproportionate attacks on the city.[1486] The Trial Chamber further considered, and rejected, Karadžić's arguments that some of the international representatives were biased and that their evidence was unreliable.[1487] The Trial Chamber also considered, and accepted, Karadžić's argument that the media was "somewhat unfavorable" to the Bosnian Serb side when reporting on the situation in Sarajevo.[1488] A review of the Trial Judgement therefore reveals that the Trial Chamber thoroughly considered Karadžić's position that he distrusted information he received from international representatives and the media.

551. Given the totality of the evidence considered by the Trial Chamber, the Appeals Chamber finds unpersuasive Karadžić's argument that the Trial Chamber erred by focusing on information he received, rather than information he "reasonably believed".

[1485] *See, e.g.*, Trial Judgement paras. 4051 ("[A]fter a detailed discussion during a meeting of the Bosnian Serb Presidency, attended by the Accused, Plavšić, Krajišnik, Koljević, Đerić and Mladić, it was concluded that 'the heavy artillery fire on the city [should] be halted'."), 4817 (where John Zametica, Karadžić's advisor on international relations, testified that Karadžić told him that Bosnian Serb sniping and shelling was "stupid", unnecessary, and did not give any military advantage to the Serbs and where Vladislav Jovanović, Foreign Minister of Serbia at the time, questioned Karadžić several times about why Sarajevo was kept under siege for so long and subjected to "all those snipers and misfortunes" and stated that Karadžić denied that the Bosnian Serbs had a policy of shelling Sarajevo and responded that the incidents were sporadic and caused by "a few frustrated individuals", or that the "Bosnian Muslims were responsible because they wanted to draw international attention".), 4820, 4823 ("On 8 September 1992, at a meeting between, *inter alios*, the Accused, Mladić and General Simonović, Simonović stated that the blockade of Sarajevo was justified but mass-scale use of artillery against cities was damaging, and recommended that the Bosnian Serbs should prevent the bombardment of cities."), 4825 ("On 9 December 1992, members of the SDC, including, *inter alios*, Slobodan Milošević, [Momir] Bulatović, and Dobrica Ćosić, met to discuss the war in BiH. At the meeting, Ćosić noted that the Serbian leadership had advised the Accused on numerous occasions that the shelling of Sarajevo was detrimental to the political position of the Bosnian Serbs. Bulatović testified that, although the Accused had fully agreed on every occasion, he was unable to solve the problem."), 4827 ("Galić testified that sometime during 1993 the Accused met with the SRK command and expressed concern about the disproportionate use of artillery. According to Galić, at these top-level meetings where the Accused was present, the topic of proportionality was always discussed. Galić noted that the Accused did not have to inform him that the disproportionate use of artillery by the SRK had caused civilian casualties, because 'everybody saw that, there was a war going on and that fire came from both sides'."), 4837 ("On 15 March 1994, at a meeting between, *inter alios*, the Accused, Mladić, and Slobodan Milošević in Belgrade, the Accused complained that '[o]ur idiots are firing on Sarajevo' and described the army as acting like a 'pampered prima donna'."), 4841 ("In early November 1994, during the 46th Bosnian Serb Assembly session, the Accused himself recounted the 'hard time' he had when 'that pointless shelling of Sarajevo was going on' and explained that people told him that sometimes soldiers get drunk and fire a number of shells into Sarajevo 'without aim and purpose'."), 4842 (referring to the SRK combat report of 7 April 1995, informing Karadžić of that attack on Famo and that "the enemy was adequately responded to whereby an [air bomb] was launched on the centre of Hrasnica"), 4846 ("[…] the Accused, Mladić, Plavšić, Krajišnik, Tolimir, and Gvero, among others, met with Slobodan Milošević, Bulatović, and Perišić, to discuss the upcoming peace conference. During this meeting, Milošević encouraged the Bosnian Serb leadership to criticize the shelling and the killing of innocent civilians in Sarajevo 'in a more severe way'."), 4861.

[1486] Trial Judgement, para. 4861. *See also* Trial Judgement, paras. 4827, 4837, 4841.

[1487] Trial Judgement, paras. 4887-4890.

[1488] Trial Judgement, para. 4564.

(d) Conclusion

555. Based on the foregoing, the Appeals Chamber dismisses Grounds 36 and 37 of Karadžić's appeal.

D. Srebrenica

1. Alleged Errors in Finding that Karadžić Shared the Common Purpose of Forcibly Removing Bosnian Muslims from Srebrenica (Grounds 38 and 39)

556. As recalled above, the Trial Chamber found that the Srebrenica JCE was established as Srebrenica fell on 11 July 1995, with a common plan to eliminate the Bosnian Muslims in Srebrenica – first through forcible removal of Bosnian Muslim women, children, and elderly men and later through the killing of the men and boys.[1496] The Trial Chamber further found that Karadžić shared the common purpose of the Srebrenica JCE, significantly contributed to the implementation of the common plan, and had the intent to commit the crimes carried out by the Serb forces following the fall of Srebrenica.[1497] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination, and inhumane acts (forcible transfer) as crimes against humanity, as well as murder as a violation of the laws or customs of war.[1498]

557. Karadžić submits that the Trial Chamber erred in finding that he shared the common purpose of eliminating the Bosnian Muslims in Srebrenica through forcible removal on the basis of: (i) Directive 7 issued by Karadžić on 8 March 1995; (ii) restriction of humanitarian aid; (iii) three orders he issued on 11 July 1995; and (iv) facts establishing forcible transfer.[1499] The Appeals Chamber will address these contentions in turn.

(a) The Issuance of Directive 7

558. The Trial Chamber found that, on 8 March 1995, Karadžić issued Directive 7,[1500] a strictly confidential directive that contained a passage ordering the Drina Corps to "create an unbearable

[1496] Trial Judgement, paras. 5726, 5755, 5849.
[1497] Trial Judgement, paras. 5814, 5821, 5822.
[1498] Trial Judgement, para. 5849. The Trial Chamber did not hold Karadžić responsible under Article 7(1) of the ICTY Statute for the killings and related acts of persecution of the Srebrenica JCE which occurred prior to his agreement on 13 July 1995. Rather, it entered a conviction under Article 7(3) of the ICTY Statute for persecution and extermination as crimes against humanity and murder as a violation of the laws or customs of war for these events. *See* Trial Judgement, paras. 5831, 5833, 5848, 5850, 5998, 6002-6005. Although finding that Karadžić could be convicted for murder as a crime against humanity, the Trial Chamber observed that convictions for this offence and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity for incidents related to the Srebrenica JCE. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574.
[1499] Karadžić Notice of Appeal, pp. 13, 14; Karadžić Appeal Brief, paras. 660-686. *See also* T. 23 April 2018 pp. 116, 117.
[1500] Directive 7 addressed the military and political situation following the Agreement on Complete Cessation of Hostilities, allocating tasks to the various corps of the VRS after describing the anticipated objectives of the Bosnian Muslim and Bosnian Croat forces, and tasking the Drina Corps with "complet[ing] physical separation of Srebrenica from Žepa […] as soon as possible, preventing even communication between individuals in the two enclaves". *See* Trial Judgement, paras. 4979-4981.

situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa".[1501] The Trial Chamber found that this passage indicated an intent to force the Bosnian Muslim population to leave Srebrenica and Žepa.[1502] It further found that at least by the time Directive 7 was issued, Karadžić and Mladić had devised a long-term strategy aimed at the eventual forcible removal of Bosnian Muslims from Srebrenica through the deliberate restriction of humanitarian aid as well as the targeting of the enclave by the Bosnian Serb forces.[1503]

559. Karadžić submits that the Trial Chamber erred in finding that he had the intent to remove the Bosnian Muslim population of Srebrenica by failing to consider his submission and supporting evidence that he signed Directive 7 without reading or being aware of the above-quoted passage.[1504] Karadžić contends that there is no evidence that he was aware of this passage and that during the trial, he presented evidence establishing that Directive 7 was prepared and stamped by the VRS, rather than his staff, and that he frequently signed documents without reading them.[1505] He argues that by failing to refer to his submission that he was unaware of the passage in the directive, the Trial Chamber failed to consider directly relevant evidence and provide a reasoned opinion.[1506]

560. The Prosecution responds that the Trial Chamber reasonably concluded that Karadžić shared the common purpose of eliminating the Bosnian Muslims in Srebrenica by forcible removal and that Directive 7 reflected his intent.[1507] The Prosecution contends that, apart from providing an alternative interpretation of isolated pieces of evidence, Karadžić fails to demonstrate any error.[1508]

561. Karadžić replies that the Prosecution failed to address his arguments on the Trial Chamber's error and contends that the instruction to make life unbearable for the inhabitants of Srebrenica was not one of the "main ingredients" of Directive 7.[1509]

562. The Appeals Chamber recalls that, while the Trial Chamber did not explicitly address Karadžić's contention that he had signed Directive 7 without reading the passage ordering the Drina Corps to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica and Žepa", it was not under an obligation to justify its findings in

[1501] Trial Judgement, para. 4980, *referring to* Exhibit P838, p. 10.
[1502] Trial Judgement, para. 5681.
[1503] Trial Judgement, para. 5684.
[1504] Karadžić Appeal Brief, paras. 662, 663, 666, 667.
[1505] Karadžić Appeal Brief, para. 662, *referring to* Karadžić Final Trial Brief, para. 3310, T. 4 July 2011 pp. 16042, 16043, T. 6 July 2011 p. 16203 (closed session), T. 8 February 2012 p. 24338, Exhibits D3682, D3695.
[1506] Karadžić Appeal Brief, paras. 663, 666. Karadžić further contends that the trial chamber in the *Popović et al.* case considered a report signed by Pandurević to be insufficient to conclude that he "possessed the necessary criminal intent to carry out the common purpose". *See* Karadžić Appeal Brief, para. 665, *referring to Popović et al.* Trial Judgement, para. 2003.
[1507] Prosecution Response Brief, paras. 371-378. *See also* T. 23 April 2018 pp. 186, 187.
[1508] Prosecution Response Brief, para. 372. *See also* Prosecution Response Brief, paras. 371, 373-378.

relation to every submission made during the trial or to refer to the testimony of every witness or every piece of evidence on the trial record as long as there is no indication that it completely disregarded any particular piece of evidence.[1510] 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.[1511] If a trial chamber did not refer to specific evidence, 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.[1512]

563. The Appeals Chamber notes that some of the evidence to which Karadžić points concerns his signing of documents, without referring to Directive 7.[1513] With respect to the evidence of Witnesses Bogdan Subotić and Gordan Milinić, the Appeals Chamber notes that Witness Subotić stated that "[Karadžić] would never knowingly put his signature under that disputable text of Directive number 7"[1514] and that Witness Milinić stated that Directive 7 did not go through the presidential procedure and archive, that neither Karadžić nor his Military Offices participated in drafting it, that the document did not bear his protocol numbers, and that Karadžić may have been tricked into signing it.[1515] While the Trial Chamber did not specifically discuss this evidence when assessing the implications of Directive 7 and Karadžić's role in issuing it, the Trial Chamber considered the evidence of these witnesses in other parts of the Trial Judgement.[1516] Recalling that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant

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[1509] Karadžić Reply Brief, paras. 197-199.
[1510] *Prlić et al.* Appeal Judgement, paras. 187, 329; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 3100; *Kanyarukiga* Appeal Judgement, para. 127; *Kvočka et al.* Appeal Judgement, para. 23.
[1511] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100.
[1512] *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, paras. 1308, 1410.
[1513] *See* Karadžić Appeal Brief, para. 662, *referring to* T. 4 July 2011 pp. 16042, 16043 (closed session) ([REDACTED]), [REDACTED], T. 8 February 2012 p. 24338 (where Witness Mira Mihajlović confirmed that Karadžić frequently signed "shorter" documents without reading them), Exhibit D3682, para. 22 (concerning Witness Gordan Milinić, stating that Karadžić used to sign documents without reading them).
[1514] Exhibit D3695, para. 233.
[1515] Exhibit D3682, paras. 21, 22.
[1516] With respect to T. 4 July 2011 (closed session), *see* Trial Judgement, nn. 4333, 4687, 10794, 10799, 16717, 16727, 16728, 16732. With respect to T. 6 July 2011 (closed session), *see* Trial Judgement, nn. 4704, 15317, 16222, 16252. With respect to T. 8 February 2012, *see* Trial Judgement, nn. 16325, 19618. With respect to Exhibit D3682, *see* Trial Judgement, nn. 703, 10056, 10086, 10151, 10873, 14085, 14086, 16374, 20656. With respect to Exhibit D3695, *see* Trial Judgement, nn. 624, 746, 954, 1049, 4467, 4468, 8847, 9330, 9371, 9841, 9842, 9844, 9869, 9878, 9921, 9925, 9966, 10035, 10042, 10043, 10053, 10054, 10058, 10106, 10112, 10128, 10132, 10133, 10134, 10145, 10224, 10225, 10238, 10244, 10247, 10250, 10367, 10368, 10430, 10607, 10684, 10730, 10731, 10812, 10827, 10900, 10931, 10937, 15292, 15302, 15323, 15326, 15929, 15991, 16016, 16607, 16608, 19616. The Trial Chamber considered the evidence of Gordan Milinić unreliable in certain regards as it was "marked by contradictions, bias, and indicators that he lacked candour". *See* Trial Judgement, nn. 10056, 10873, *referring to* Exhibit D3682. With regard to Bogdan Subotić's evidence, the Trial Chamber similarly found his evidence unreliable in certain regards as it was "marked by evasiveness, contradictions, and indicators of partisanship and bias". *See* Trial Judgement, nn. 9869, 9878, 9921, 10607, 10827, *referring to* Exhibit D3695. *See also* Trial Judgement, nn. 10244, 10931, 19616.

evidence as long as there is no indication that it completely disregarded any particular piece of evidence,[1517] the Appeals Chamber is not convinced that this evidence was not considered. Furthermore, the Trial Chamber extensively discussed the procedures and methods of, as well as Karadžić's role in, the drafting of the seven main VRS military directives issued between June 1992 and March 1995 in pursuance of the Strategic Goals, including Directive 7.[1518] The Trial Chamber found that the directives constituted "the highest level of political-military direction" for the conduct of the war, were "acts of command used by the highest echelons of command", and regulated the actions of the military forces by assigning tasks and setting guidelines governing the division of responsibilities between the army, police, and civilian protection.[1519] The Trial Chamber found that before signing the directives, upon receiving the proposed text from the Main Staff, Karadžić would provide guidelines, and revisions would be made in accordance with his instructions.[1520] The Trial Chamber found that Karadžić examined and approved all seven directives and considered, in particular, evidence that Karadžić told the Bosnian Serb Assembly in October 1995 that he "examined" and "approved" all of the directives.[1521] Furthermore, the Trial Chamber considered evidence that Karadžić stated that the attacks in Srebrenica and Žepa were based on "his Order No. 7" and that the objective of the operations was "to raise the temperature to the boiling point".[1522]

564. In light of the evidence considered by the Trial Chamber and discussed above, particularly on the importance of Directive 7 as "the highest level of political-military direction", Karadžić's role in the drafting process of the seven directives, including Directive 7, Karadžić's personal acknowledgment of the directive as his own, and his admission that he examined and approved it, the Appeals Chamber finds that the Trial Chamber did not err by failing to consider relevant evidence or to provide a reasoned opinion.[1523] Karadžić therefore fails to demonstrate that the Trial Chamber erred in relying upon the passage in Directive 7 ordering the Drina Corps to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of

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[1517] *Prlić* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308; *Stanišić and Župljanin* Appeal Judgement, para. 138.
[1518] *See* Trial Judgement, paras. 3152-3156.
[1519] *See* Trial Judgement, para. 3153.
[1520] *See* Trial Judgement, para. 3155, *referring to*, *inter alia*, T. 29 February 2012 p. 25495 (concerning the drafting of Directive 7), Exhibits P4444, p. 11992 (concerning the methodology of drafting directives), P1415, p. 84, P3149, p. 24 (where during the 14th session of Supreme Command of the Armed Forces of *Republika Srpska* on 31 March 1995, Karadžić stated "I think that every document of the Main Staff should be verified by the Supreme commander", to which Mladić replied "[…] every directive went through here for examination, we did every analysis in your presence").
[1521] Trial Judgement, para. 3155, *referring to*, *inter alia*, Exhibit P1415, p. 84.
[1522] Trial Judgement, n. 19623, *referring to*, *inter alia*, T. 7 March 2012 pp. 25938, 25939, Exhibit P4515, RP. 1075398.
[1523] The Appeals Chamber finds Karadžić reliance on a determination in the *Popović et al.* case that a report signed by Pandurević was insufficient to establish the necessary criminal intent unpersuasive. Karadžić fails to demonstrate the pertinence of this conclusion, which is based on a separate record and distinct circumstances, or how it reflects error in the Trial Chamber's reasoning.

Srebrenica and Žepa" in establishing Karadžić's intent to force the Bosnian Muslim population to leave Srebrenica and Žepa.

(b) Restriction of Humanitarian Aid

565. The Trial Chamber found that to accomplish the goals of the physical separation of Srebrenica from Žepa and to "create an unbearable situation of total insecurity with no hope of further survival or life for [their] inhabitants", Directive 7 ordered "relevant State and military organs responsible for work with UNPROFOR and humanitarian organisations" to:

> 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 while at the same time avoiding condemnation by the international community and international public opinion.[1524]

The Trial Chamber found that Karadžić implemented this order by restricting access to Srebrenica and limiting the amount of humanitarian aid and UNPROFOR re-supply convoys reaching the enclave.[1525] The Trial Chamber further found that, six days after the issuance of Directive 7, Karadžić issued a decision forming a State Committee for Co-operation with the UN and International Humanitarian Organisations ("State Committee"), which would be in charge of the approval of humanitarian convoys following prior consultations with him.[1526] Furthermore, the Trial Chamber noted that following the issuance of Directive 7, humanitarian aid deliveries fell considerably, the conditions in Srebrenica deteriorated to "disastrous levels", and, by the end of June 1995, some residents had died of starvation.[1527] According to the Trial Chamber, the restriction of access to Srebrenica, which was implemented by Mladić, allowed Karadžić to maintain control over goods and personnel entering Srebrenica during the period leading to its take-over.[1528] The Trial Chamber concluded, partly based on these considerations, that, by the time Directive 7 was issued, Karadžić and Mladić had devised a long-term strategy aimed at the eventual forcible removal of the Bosnian Muslims from Srebrenica through, *inter alia*, the deliberate restriction of humanitarian aid,[1529] and that Karadžić shared the common purpose of and significantly contributed to the Srebrenica JCE.[1530]

[1524] Trial Judgement, paras. 4980, 5681, *referring to* Exhibit P838, p. 14.
[1525] Trial Judgement, paras. 4989, 4991, 5756, 5799, 5817.
[1526] Trial Judgement, paras. 5756, 5757, 5799, *referring to* Exhibit P4543. The Trial Chamber noted that the State Committee was responsible for approving the passage of humanitarian aid convoys and the VRS was responsible for the UNPROFOR re-supply convoys and that Karadžić controlled the policy of restriction which was implemented by Mladić. *See* Trial Judgement, para. 5757.
[1527] Trial Judgement, paras. 4989-4992, 5758.
[1528] Trial Judgement, paras. 5756-5758, 5799, 5817.
[1529] Trial Judgement, paras. 5684, 5800.
[1530] Trial Judgement, paras. 5814, 5821. *See also* Trial Judgement, paras. 5756-5758, 5799, 5817.

566. Karadžić submits that the Trial Chamber erred in finding that the State Committee gave him control over convoys heading to Srebrenica and that he used that control to restrict humanitarian aid to the enclave.[1531] He contends that the Trial Chamber ignored evidence that the State Committee was created to ease restrictions in response to complaints from the international community.[1532] Karadžić further contends that the Trial Chamber's finding that there was a policy to reduce the supply of humanitarian aid following the issuance of Directive 7 in March 1995 is unsupported by the evidence.[1533] Karadžić submits that the Trial Chamber's conclusion that he restricted humanitarian aid to Srebrenica was not the only reasonable inference available from the evidence, proposing another possible inference that the obstructions to the convoys were caused by lower level soldiers without his or the State Committee's knowledge.[1534]

567. The Prosecution responds that the Trial Chamber reasonably concluded that Karadžić controlled the implementation of Directive 7 by reducing humanitarian aid deliveries to Srebrenica.[1535]

568. Karadžić replies that the Prosecution's arguments are unsupported, based on incorrect statistics, and otherwise unpersuasive.[1536]

569. With respect to Karadžić's submission that the Trial Chamber ignored evidence that the State Committee was created to "ease restrictions" in the delivery of humanitarian aid, the Appeals Chamber observes that the two exhibits to which Karadžić refers in support do not reflect this contention.[1537] Instead, they contain the correspondence in early March 1995 between Karadžić and Yasushi Akashi, UNPROFOR Special Representative of the UN Secretary-General, in which, *inter alia*, Akashi complained about the barring of medical convoys entering the enclaves and to which Karadžić responded that Akashi "greatly exaggerate[d]" the difficulties concerning the matter and

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[1531] Karadžić Appeal Brief, paras. 668-676. *See also* T. 24 April 2018 p. 272.
[1532] Karadžić Appeal Brief, para. 669, *referring to* Exhibits P2244, P2245. Karadžić claims that this evidence aligns with his policy to allow humanitarian convoys to pass without obstruction and is further corroborated by: (i) the State Committee's aim to improve cooperation with the UN and international humanitarian organisations; (ii) the fact that those appointed to the committee were civilians with humanitarian experience; and (iii) his letter to Mladić about the non-observance of a State Committee order for unimpeded passage of a UNHCR convoy, ordering immediate execution of such order and submission of a report explaining the delay. *See* Karadžić Appeal Brief, paras. 669-671, *referring to* Exhibits P4543, D3876.
[1533] Karadžić Appeal Brief, para. 673. Karadžić asserts that, to the contrary, the number of humanitarian convoys for Srebrenica increased after the issuance of Directive 7, that 93% of humanitarian aid was delivered to Srebrenica, and that, in April 1995, the UN reported convoy access to Srebrenica was unhindered and that the humanitarian situation in the enclave was satisfactory. *See* Karadžić Appeal Brief, para. 673. Karadžić adds that considering the State Committee's function to approve convoys, the Trial Chamber's finding that not all approved convoys arrived in Srebrenica is inconsistent with the finding that he used his control over the State Committee to restrict humanitarian aid. *See* Karadžić Appeal Brief, para. 674.
[1534] Karadžić Appeal Brief, paras. 675, 676.
[1535] Prosecution Response Brief, paras. 371, 379-383.
[1536] Karadžić Reply Brief, para. 200.
[1537] Karadžić Appeal Brief, para. 669, *referring to* Exhibits P2244, P2245.

that "where problems genuinely exist" they would "strive to eliminate them".[1538] Nowhere in these exhibits was any mention made of the State Committee.

570. In any event, the Appeals Chamber notes that the Trial Chamber did consider these exhibits in the Trial Judgement,[1539] as well as other evidence to which Karadžić refers, namely, his decision creating the State Committee[1540] and the letter he sent to Mladić concerning the non-observance of the State Committee's order for unimpeded passage of a UNHCR convoy.[1541] In light of these considerations, the Appeals Chamber finds that Karadžić has not demonstrated that the Trial Chamber disregarded relevant evidence.

571. The Appeals Chamber now turns to Karadžić's contention that the Trial Chamber's finding that there was a policy to reduce the supply of humanitarian aid following the issuance of Directive 7 in March 1995 was unsupported by evidence. The Appeals Chamber recalls that in reaching this conclusion, the Trial Chamber considered evidence showing that following the issuance of Directive 7, humanitarian aid deliveries decreased considerably, the conditions in Srebrenica deteriorated to "disastrous levels", and by the end of June 1995, some residents had died of starvation.[1542] The Trial Chamber further considered Karadžić's submission that there was no appreciable difference between the amounts of humanitarian aid delivered before and after the issuance of Directive 7 as well as most of the evidence which Karadžić claims demonstrates that the number of convoys for Srebrenica increased after the issuance of Directive 7.[1543] The Trial Chamber found, in light of the testimony of Witness Momir Nikolić, who stated that he received frequent requests that the amount of goods in UNHCR convoys "be halved",[1544] and considering a

[1538] *See* Exhibit P2245, p. 1. *See also* Exhibit P2244.
[1539] Trial Judgement, nn. 16811, 16847, 16848, 16492, 16574, 16575, 16811.
[1540] *See* Trial Judgement, para. 5757, *referring to* Exhibit P4543. *See also* Trial Judgement, paras. 173, 3256.
[1541] Trial Judgement, para. 3117, n. 10077 *referring to*, *inter alia*, Exhibit D3876. Karadžić's claims that "those appointed to the committee were civilians with humanitarian experience", is unsubstantiated and therefore dismissed without further consideration. *See* Karadžić Appeal Brief, para. 670, *referring to* Exhibit P4543, p. 3 (which is the decision on forming the State Committee as published in the Official Gazette of Republika Srpska that merely lists the appointed members of the committee).
[1542] Trial Judgement, paras. 4989-4992, 5758 and references cited therein. The Trial Chamber noted that following the issuance of Directive 7, the supply of fuel, electricity, and water in Srebrenica was limited or non-existent, that sanitation was dire and medical care insufficient, and that in early June 1995, the only food present in the enclave was what the residents were able to raise for themselves as humanitarian aid deliveries fell to 29.7% of targeted levels. *See* Trial Judgement, paras. 4989, 4991, *referring to*, *inter alia*, Exhibit P2443, p. 6. *See also* Exhibit P2443, p. 2 (where UNPROFOR reported on 6 July 1995 that while UNHCR convoys had unhindered access to Srebrenica until June 1995, access to the enclave became "sporadic" from then on, leading to an "increasingly difficult food situation", in which, for the month of June 1995, only some 30% of the targeted amount of food deliveries for Srebrenica was met).
[1543] Trial Judgement, para. 4991, n. 16836, *referring to*, *inter alia*, Exhibits D2067, D2068, D2069, D2070, D2072, D2073, D2075, D2076, D2077, D2116, D2117, D2119, D2120, D3932, D3957, P4452. The Appeals Chamber further observes that the Trial Chamber considered Exhibits P4190 and P831 in finding that the humanitarian situation worsened after the issuance of Directive 7. *See* Trial Judgement, para. 4989, nn. 16825, 16826.
[1544] The Trial Chamber noted that Momir Nikolić was the Chief of the Security and Intelligence Organ from November 1992 until the end of the conflict, reported to the Drina Corps Intelligence and Security Organ, and acted as liaison officer to UNMOs, UNPROFOR, and other international organizations in the Srebrenica area in 1995. *See* Trial Judgement, para. 197.

large amount of documentary evidence and witness testimony attesting to the deprivation visible in the enclave at the time, that even if such convoys were ostensibly authorized on paper, this did not mean that they ultimately arrived in Srebrenica.[1545] On this basis, recalling that the language of Directive 7 "specifically called on the Bosnian Serb Political and Governmental Organs and Bosnian Serb Forces to '*unobtrusively* […] reduce and limit the supply of material resources to the Muslim population'", the Trial Chamber found that Directive 7 was implemented.[1546] In light of the evidence considered by the Trial Chamber in concluding that Directive 7 was implemented through the reduction of the amount of humanitarian aid reaching Srebrenica, Karadžić has failed to demonstrate that the Trial Chamber's conclusion was unsupported or otherwise unreasonable.[1547]

572. With respect to Karadžić's contention that no reasonable trial chamber could have excluded the possibility that the obstructions to the convoys were caused by lower level soldiers without his or the State Committee's knowledge, Karadžić proposes an alternative conclusion without substantiating his argument or pointing to any basis for this conclusion in the trial record.

573. For the foregoing reasons, Karadžić has failed to demonstrate that the Trial Chamber erred in finding that Karadžić implemented Directive 7 by restricting access to humanitarian aid in Srebrenica.

(c) 11 July 1995 Orders

574. In finding that Karadžić shared the common purpose to eliminate the Bosnian Muslims in Srebrenica through forcible removal, and that he significantly contributed to the implementation of this common plan, the Trial Chamber considered, *inter alia*, three orders pertaining to the situation in Srebrenica issued by Karadžić immediately after the fall of the enclave on 11 July 1995. These were: (i) an order appointing Deronjić as civilian commissioner for Srebrenica ("Order Appointing Deronjić as Civilian Commissioner"), tasked to establish "the functions of the appointed municipal authority organs and ensure conditions for their efficient functioning" and the functioning of a Bosnian Serb Public Security Station ("SJB");[1548] (ii) an order to the *Republika Srpska* Ministry of Internal Affairs to form an SJB in "Serb Srebrenica" ("Order to Form an SJB in Srebrenica");[1549] and (iii) an order stating that, from then on, only the State Committee would give approval for humanitarian convoys following prior consultations with Karadžić ("Order on Approval of

[1545] Trial Judgement, para. 4991.
[1546] Trial Judgement, para. 4991, *referring to* Exhibit P838, p. 14.
[1547] Furthermore, in light of these considerations, the Appeals Chamber dismisses Karadžić's cursory contention – that the finding that not all convoys arrived in Srebrenica is inconsistent with the finding that he controlled the State Committee – as it is without merit and fails to identify any error.
[1548] *See* Trial Judgement, para. 5693, *referring to* Exhibit D2055. *See also* Trial Judgement, paras. 5761, 5817.
[1549] *See* Trial Judgement, paras. 226, 5693, 5761, *referring to* Exhibit P2994. *See also* Trial Judgement, para. 5817.

Humanitarian Convoys").[1550] The Trial Chamber found that the establishment of Bosnian Serb structures in Srebrenica, through the Order Appointing Deronjić as Civilian Commissioner and the Order to Form an SJB in Srebrenica, indicated that the removal of the enclave's Bosnian Muslim population was intended to be permanent.[1551] The Trial Chamber further found that the Order on Approval of Humanitarian Convoys allowed for increased oversight and control over humanitarian convoys and the restriction of their passage, and had the practical effect of limiting international access to the enclave.[1552]

575. Karadžić submits that, in finding that these orders demonstrated his intent that the Bosnian Muslims be permanently removed from Srebrenica, the Trial Chamber "failed to adopt a reasonable inference consistent with innocence".[1553] He contends that the Order Appointing Deronjić as Civilian Commissioner envisaged that Bosnian Muslims would remain in Srebrenica, as it instructed Deronjić to ensure that all citizens who participated in combat against the VRS be treated as prisoners of war and that the civilian population could freely choose where they would live.[1554] With respect to the Order to Form an SJB in Srebrenica, Karadžić asserts that the Trial Chamber failed to give a reasoned opinion in finding that it indicated an intent that the removal of the Bosnian Muslims was designed to be permanent.[1555] He further submits that the Trial Chamber's conclusion that the Order on Approval of Humanitarian Convoys had the effect of limiting international access to Srebrenica is not the only inference that could be drawn from the evidence, as another possible conclusion would have been that the order was aimed to improve the passage of convoys.[1556]

576. The Prosecution responds that the Trial Chamber reasonably relied on these orders in support of its finding that Karadžić shared the intent to permanently remove the Bosnian Muslim population from Srebrenica and that Karadžić proposes alternative interpretations of individual exhibits without showing any error.[1557]

577. The Appeals Chamber notes that the Trial Chamber did not solely rely on the Order Appointing Deronjić as Civilian Commissioner and the Order to Form an SJB in concluding that the establishment of Bosnian Serb structures in Srebrenica was intended for the permanent removal

[1550] Trial Judgement, paras. 5761, 5817, *referring to* Exhibit P5183.
[1551] Trial Judgement, para. 5694. *See also* Trial Judgement, paras. 5761, 5800, 5810, 5817.
[1552] Trial Judgement, para. 5817.
[1553] Karadžić Appeal Brief, paras. 677-686. *See also* Karadžić Reply Brief, para. 201.
[1554] Karadžić Appeal Brief, paras. 678, 679.
[1555] Karadžić Appeal Brief, para. 680.
[1556] *See* Karadžić Appeal Brief, paras. 681-686.
[1557] Prosecution Response Brief, paras. 384-387.

of the Bosnian Muslim population.[1558] Rather, the Trial Chamber's conclusion was based on the totality of the evidence, particularly in light of the Bosnian Serb rhetoric advocating the separation of the population along ethnic lines and asserting an inability to co-exist.[1559] Apart from offering alternative interpretations of two orders, Karadžić does not demonstrate the unreasonableness of the Trial Chamber's conclusion.

578. The Appeals Chamber turns to Karadžić's contention that the Trial Chamber erred in finding that the Order on Approval of Humanitarian Convoys had the effect of limiting international access to Srebrenica, as another possible inference would have been that the order was aimed to improve the passage of convoys. The Appeals Chamber recalls that it has upheld the Trial Chamber's finding that Karadžić implemented Directive 7 by restricting access to humanitarian convoys in Srebrenica during the period leading to its take-over through, *inter alia*, establishing the State Committee, and has rejected Karadžić's arguments on appeal that the Trial Chamber failed to consider that the State Committee was created to "ease restrictions" in the delivery of humanitarian aid.[1560] The Appeals Chamber observes that the Trial Chamber found that the Order on Approval of Humanitarian Convoys was "carried out as instructed", and that during this period the ICRC was unable to access Srebrenica.[1561] The Appeals Chamber finds that apart from repeating his argument already made at trial[1562] and disagreeing with the Trial Chamber's conclusion, Karadžić fails to demonstrate that the Trial Chamber's assessment of the Order on Approval of Humanitarian Convoys was unreasonable.

579. Karadžić has therefore failed to demonstrate the Trial Chamber erred in relying on the three orders he issued on 11 July 1995 in finding that he shared the common purpose to eliminate the Bosnian Muslims in Srebrenica through forcible removal.

(d) Facts Establishing Forcible Transfer

580. In assessing the crimes of deportation and inhumane acts (forcible transfer) as crimes against humanity, the Trial Chamber found, based on the totality of the evidence, that the circumstances arising from the imposition of restrictions on humanitarian aid pursuant to Directive 7, the attack on Srebrenica, as well as the atmosphere in Potočari, all of which resulted from the acts of Bosnian Serb forces, created a coercive environment in which the Bosnian Muslims had no

[1558] Trial Judgement, paras. 5693, 5694.
[1559] *See* Trial Judgement, paras. 5693, 5694, *referring to* Trial Judgement, Section IV.A.3.i.
[1560] *See supra* paras. 565-573.
[1561] Trial Judgement, paras. 5787, 5817.
[1562] Karadžić Appeal Brief, para. 683, *referring to* T. 2 October 2014 p. 47941.

viable alternative but to leave the enclave in order to stay alive.[1563] Furthermore, in finding that the Serb forces intended the forcible removal, the Trial Chamber considered, *inter alia*, Mladić's statement during a telephone conversation that "we'll evacuate them all—those who want to and those who don't want to".[1564]

581. Karadžić submits that he was not aware of any of the "*indicia* relied upon by the Trial Chamber" in finding that the transfer of Bosnian Muslims was forcible.[1565] He contends that he did not receive any reports concerning "undu[e]" restriction of humanitarian aid, the shelling of civilians in Srebrenica, or the coercive atmosphere in Potočari.[1566] He further argues that he was not privy to the conversation in which Mladić made the above-mentioned statement.[1567] Karadžić adds that in an interview with the newspaper *El País* on 13 July 1995, he stated that "Muslims were free to stay or go".[1568]

582. The Prosecution responds that Karadžić misunderstands the law, that the Trial Chamber properly based its conclusion that he shared the intent for forcible removal on the totality of the evidence, and that his knowledge did not depend on Mladić's above-mentioned statement.[1569] In addition, the Prosecution asserts that Karadžić's interview with *El País* supports rather than undermines his knowledge of the conditions resulting in forcible removal.[1570]

583. Karadžić replies that the Prosecution's references to his interview with *El País* are selective and taken out of context.[1571]

584. The Appeals Chamber recalls that the *mens rea* required for liability under the first category of joint criminal enterprise is that the accused shares the intent with the other participants to carry out the crimes forming part of the common purpose.[1572] The Appeals Chamber observes that the Trial Chamber concluded, based on evidence concerning Karadžić's conduct, including his interview with *El País*,[1573] that he knew about the concrete plan to eliminate Bosnian Muslims in

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[1563] Trial Judgement, para. 5633.
[1564] Trial Judgement, paras. 5637-5640.
[1565] Karadžić Appeal Brief, para. 688.
[1566] Karadžić Appeal Brief, paras. 687, 688.
[1567] Karadžić Appeal Brief, paras. 687, 688.
[1568] Karadžić Appeal Brief, para. 688.
[1569] Prosecution Response Brief, para. 390. The Prosecution contends that, in any event, Karadžić played a leading role in creating coercive conditions, and that he received constant reports regarding the situation on the ground. *See* Prosecution Response Brief, para. 390.
[1570] Prosecution Response Brief, para. 391.
[1571] Karadžić Reply Brief, para. 202.
[1572] *See Prlić et al.* Appeal Judgement, para. 1755; *Stanišić and Župljanin* Appeal Judgement, para. 915; *Popović et al.* Appeal Judgement, para. 1369; *Đorđević* Appeal Judgement, para. 468; *Munyakazi* Appeal Judgement, para. 160; *Brđanin* Appeal Judgement, para. 365.
[1573] *See* Trial Judgement, para. 5774. In particular, the Trial Chamber noted that during the interview, Karadžić stated that "very few Muslims can stay in Srebrenica because they are now beginning to realise that Srebrenica belongs to the

Srebrenica through forcible removal, shared the common purpose of the Srebrenica JCE, significantly contributed to the implementation of the common plan, and had the intent to commit the crimes carried out by the Serb forces following the fall of Srebrenica.[1574] Karadžić's alternative interpretation and selective reliance on the evidence fail to show that the Trial Chamber's conclusion was unreasonable.

585. Furthermore, the Appeals Chamber recalls that, while it was necessary for the Trial Chamber to find that Karadžić shared the intent to forcibly displace the population, the Trial Chamber was not required to establish that he intended the specific acts of coercion causing the forcible removal of Bosnian Muslims.[1575] Karadžić's contention that he was not aware of the circumstances which the Trial Chamber found created "a coercive environment in which the Bosnian Muslims had no other viable alternative but to leave the enclave in order to stay alive", does not therefore demonstrate error on the part of the Trial Chamber.

586. Based on these considerations, the Appeals Chamber finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he shared the intent to forcibly transfer the Bosnian Muslims from Srebrenica.

(e) Conclusion

587. Based on the foregoing, the Appeals Chamber dismisses Grounds 38 and 39 of Karadžić's appeal.

Serbian State", but that whoever wanted to stay in Srebrenica could do so, that the enclaves should disappear and that he was willing to put an end to the war "by political or military methods". *See* Trial Judgement, para. 5774, *referring to* Exhibit P2564, pp. 1-4.

[1574] Trial Judgement, paras. 5810, 5814, 5821-5831. *See also* Trial Judgement, paras. 5756-5813.

[1575] *Cf. Stanišić and Župljanin* Appeal Judgement, para. 917.

2. Alleged Errors in Finding that Karadžić Shared the Common Purpose of Eliminating the Bosnian Muslims of Srebrenica (Ground 40)

588. The Trial Chamber found that the Srebrenica JCE shared a common plan to eliminate the Bosnian Muslims in Srebrenica first through the forcible removal of Bosnian Muslims and later through the killing of Bosnian Muslim men and boys.[1576] The Trial Chamber found that Karadžić shared the common purpose of eliminating the Bosnian Muslims in Srebrenica with the other members of the joint criminal enterprise, including its expanded common purpose of killing Bosnian Muslim men and boys.[1577] It did so relying on Karadžić's knowledge of and participation in the plan of eliminating the Bosnian Muslims in Srebrenica by forcibly removing the women, children, and elderly men as of the evening of 11 July 1995, his subsequent agreement to the expansion of the plan to encompass the killing of the able-bodied men and boys on 13 July 1995, and his subsequent actions following the executions.[1578] The Trial Chamber also determined that Karadžić significantly contributed to the joint criminal enterprise.[1579] The Trial Chamber convicted Karadžić pursuant to Article 7(1) of the ICTY Statute of genocide, persecution, extermination and other inhumane acts (forcible transfer) as crimes against humanity, and murder as a violation of the laws or customs of war for the crimes committed by Bosnian Serb forces in the execution of the Srebrenica JCE.[1580]

589. Karadžić contends that the Trial Chamber erred in finding that he shared the Srebrenica JCE's expanded common purpose of the killing of able-bodied Bosnian Muslim men and boys.[1581] Specifically, he argues that the Trial Chamber erred by: (i) inferring that he ordered prisoners to be transferred to Zvornik where they were later killed in view of other reasonable inferences;[1582] (ii) inferring that he possessed contemporaneous knowledge of killings occurring in Srebrenica in view of the absence of any direct evidence supporting this conclusion and in light of evidence

[1576] Trial Judgement, paras. 5849, 5998.
[1577] Trial Judgement, paras. 5814, 5998.
[1578] Trial Judgement, para. 5814.
[1579] Trial Judgement, paras. 5821, 5998.
[1580] Trial Judgement, paras. 5833, 5837, 5848, 5850, 5998, 6002-6005. Although finding that Karadžić could be convicted for murder as a crime against humanity, the Trial Chamber observed that convictions for this offense and extermination as a crime against humanity would be impermissibly cumulative and only entered convictions for extermination as a crime against humanity for incidents related to the Srebrenica JCE. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574. Furthermore, as the Trial Chamber had only been able to determine that Karadžić agreed to the expanded common purpose as of his conversation with Deronjić on the evening of 13 July 1995, the Trial Chamber found that it could not hold Karadžić responsible through his participation in the joint criminal enterprise for crimes committed prior to that time. *See* Trial Judgement, para. 5831. Instead, it found him responsible for such crimes as a superior pursuant to Article 7(3) of the ICTY Statute. *See* Trial Judgement, paras. 5847, 5848, 5850, 5998.
[1581] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 690-745; Reply Brief, paras. 203-220; T. 23 April 2018 pp. 127-131, 134-139, T. 24 April 2018 pp. 249-261.
[1582] Karadžić Appeal Brief, paras. 693-727.

contradicting it;[1583] and (iii) relying on his actions subsequent to the executions in Srebrenica as a basis for establishing his intent.[1584] Karadžić asserts that the Trial Chamber's errors warrant reversals of his convictions for genocide as well as murder and extermination as crimes against humanity through his participation in the Srebrenica JCE.[1585] The Appeals Chamber will address these arguments in turn.

(a) Findings on Order to Transfer the Detainees to Zvornik Where They Were Executed

590. The Trial Chamber found that Karadžić "adopted and embraced" the expansion of the purpose of the joint criminal enterprise to entail the killing of Bosnian Muslim men and boys in Srebrenica, based in part, on an intercepted conversation with Miroslav Deronjić on the evening of 13 July 1995 in which Deronjić informed him that the Bosnian Serb forces had "about two thousand" Bosnian Muslim males in custody and expected that number to increase overnight.[1586] The Trial Chamber interpreted Karadžić's reference to the detainees as "goods" which had to be placed "inside the warehouses before twelve tomorrow" and further instruction "not in the warehouses over there, but somewhere else" as a coded direction to transfer the detainees to Zvornik, where they were executed.[1587] The Trial Chamber also found that the use of code by Karadžić and Deronjić demonstrated "malign intent" and that the intercepted conversation, in addition to Karadžić's "subsequent act", proved beyond reasonable doubt Karadžić's agreement to the expansion of the common purpose to include the killing of Bosnian Muslim males.[1588]

591. In concluding that Karadžić's conversation with Deronjić demonstrated that he ordered the detainees' transfer to Zvornik where they were executed,[1589] the Trial Chamber relied on the following evidence: (i) the intercept of a telephone conversation that took place on 13 July 1995 between Karadžić and Deronjić through an intermediary;[1590] (ii) the testimony of Witness KDZ126 who recorded this conversation;[1591] (iii) the fact that, in his final trial brief, Karadžić acknowledged that this telephone conversation took place, that Deronjić informed him of the large number of detainees in Bratunac,[1592] and did not dispute that the term "goods" referred to those detainees;[1593]

[1583] Karadžić Appeal Brief, paras. 728-740; T. 24 April 2018 pp. 251-257.
[1584] Karadžić Appeal Brief, paras. 728, 741-744; T. 23 April 2018 pp. 136-138. *See also* T. 24 April 2018 pp. 255-257.
[1585] Karadžić Appeal Brief, para. 745; T. 23 April 2018 p. 139; T. 24 April 2018 p. 259.
[1586] Trial Judgement, paras. 5772, 5805, 5811, 5814, 5829, 5830. The Appeals Chamber notes that, while the Trial Chamber could only make a positive determination about Karadžić's agreement to the expanded objective as of the conversation with Deronjić on the evening of 13 July 1995, it determined that Karadžić must have known about the plan to kill prior to the conversation. *See* Trial Judgement, paras. 5801-5809.
[1587] Trial Judgement, paras. 5710, 5772, 5805, 5811, 5818, 5830.
[1588] Trial Judgement, paras. 5805, 5814.
[1589] Trial Judgement, paras. 5311, 5312, 5710, 5712, 5772, 5773, 5805, 5818, 5830.
[1590] Trial Judgement, para. 5772, *referring to*, *inter alia*, Exhibit P6692, p. 1. *See also* Trial Judgement, para. 5311.
[1591] Trial Judgement, para. 5772, *referring to*, *inter alia*, T. 15 March 2012 pp. 26400-26403. *See also* Trial Judgement, para. 5311.
[1592] Trial Judgement, nn. 18019, 19396, *referring to*, *inter alia*, Karadžić Final Trial Brief, paras. 3025, 3026.

(iv) the testimony of Witness Momir Nikolić, who testified that later on the same day he heard Deronjić telling Beara that he had received instructions from Karadžić to transfer the detainees to Zvornik and that, by that stage, their understanding was that the detainees would be executed there;[1594] (v) the testimony of Witness Srbislav Davidović who had urged Deronjić to "use [his] connections" with Karadžić in order to have the buses with detainees moved from Bratunac;[1595] (vi) the testimony of Witness Milenko Katanić who stated that he believed that Karadžić had helped Deronjić to persuade Beara to send the prisoners to a location outside Bratunac;[1596] (vii) the testimony of Witness Borovčanin that, before speaking to Karadžić, Deronjić had complained to Beara about the detainees' presence in Bratunac;[1597] and (viii) the evidence of Witness KDZ320 that, on the following day during a briefing with VRS officers and municipal authorities, Beara stated that the VRS had to "get rid of" the detainees held in various locations in the Zvornik municipality and that he expected assistance from the municipality and instructed that his order originated from "two Presidents".[1598]

592. Karadžić submits that the Trial Chamber's finding that he shared the common purpose of eliminating the Bosnian Muslims in Srebrenica through the execution of able-bodied men and boys is unsafe.[1599] In this respect, he contends that the Trial Chamber erred by: (i) relying on the "uncorroborated hearsay testimony" of Prosecution Witness Momir Nikolić, a "plea-bargaining accomplice" to find that he ordered the prisoners transferred to Zvornik and that he shared the intent to kill;[1600] (ii) inferring that he ordered the prisoners transferred to Zvornik to be killed, which was not the only reasonably available inference on the evidence, and ignoring "a wealth" of evidence suggesting that he intended the detainees' transfer to the Batković camp;[1601] and (iii) inferring that

[1593] Trial Judgement, n. 19399, *referring to* Karadžić Final Trial Brief, paras. 3025-3027.
[1594] Trial Judgement, paras. 5312, 5805, n. 18024.
[1595] Trial Judgement, paras. 5709, 5710, 5773, n. 18024, *referring to*, *inter alia*, T. 9 February 2012 pp. 24415, 24416, 24452, 24453.
[1596] Trial Judgement, para. 5312, n. 18024, *referring to*, *inter alia*, T. 10 February 2012 p. 24496, Exhibit P4374, paras. 91-93. *See also* Trial Judgement, n. 19398.
[1597] Trial Judgement, paras. 5710, 5773, n. 19393, *referring to*, *inter alia*, Exhibit D3659.
[1598] Trial Judgement, paras. 5715, 5818, n. 19740.
[1599] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 690-745; Karadžić Reply Brief, paras. 203-220; T. 23 April 2018 pp. 127-131, 134-139; T. 24 April 2018 pp. 249-261. The Appeals Chamber notes that, in his notice of appeal, Karadžić refers to, *inter alia*, paragraphs 5818-5821, 5823, and 5824 of the Trial Judgement. *See* Karadžić Notice of Appeal, n. 46. These paragraphs contain findings on, *inter alia*, Karadžić's contribution to the Srebrenica JCE (*see* Trial Judgement, paras. 5818-5821) and Karadžić's intent for the crimes of inhumane acts (forcible transfer) and persecution (*see* Trial Judgement, paras. 5823, 5824). As Karadžić does not present or develop any challenge to these findings in his appeal brief, the Appeals Chamber will not consider this matter any further.
[1600] Karadžić Appeal Brief, paras. 697-703, 712-719, 724-725; Karadžić Reply Brief, paras. 207-209, 211; T. 23 April 2018 pp. 129-131, 134-136, 138, 139; T. 24 April 2018 pp. 258, 259.
[1601] Karadžić Appeal Brief, paras. 695-696, 704-711, 719, 720; Karadžić Reply Brief, paras. 204, 212, 213; T. 23 April 2018 pp. 129-131. In particular, Karadžić highlights academic papers suggesting that the Trial Chamber did not apply the requisite standard of proof when making findings on Karadžić's intent based on the 13 July 1995 conversation between him and Deronjić. Karadžić Appeal Brief, paras. 733, 734, 771; T. 24 April 2018 pp. 249, 250.

the use of code in his conversation with Deronjić demonstrated malign intent, which was not the only reasonable inference available from the evidence.[1602]

593. The Prosecution responds that the Trial Chamber's conclusion that Karadžić ordered the transfer of prisoners to Zvornik during the intercepted conversation with Deronjić is supported by: (i) the totality of the evidence; (ii) the terms used in that conversation; (iii) the fact that the prisoners were moved to Zvornik by Karadžić's subordinates who confirmed that they were following Karadžić's orders; (iv) Karadžić's continuous receipt of information and active oversight of the killing operation; and (v) Witness Momir Nikolić's evidence, which it contends finds considerable corroboration.[1603] The Prosecution also submits that the alternative version of events suggested by Karadžić rests on the suggestion that his subordinates engaged in a massive and elaborate conspiracy to prevent him from learning the fate of the prisoners which is implausible and contradicted by extensive evidence.[1604]

594. Karadžić replies that the Prosecution fails to demonstrate that it was unreasonable to infer that he had intended transferring the prisoners to Batković[1605] and that the use of code was to enable discussing the location of prisoners on unsecured lines.[1606]

595. The Appeals Chamber considers that, contrary to Karadžić's suggestion that the Trial Chamber "relied on [Witness] Momir Nikolić's uncorroborated testimony when making the crucial finding that [he] shared the intent to kill",[1607] the impugned finding does not rest solely on the uncorroborated evidence of Witness Momir Nikolić.

596. Nonetheless, the Trial Chamber's finding that Karadžić ordered the detainees' transfer to Zvornik relies substantially on the evidence of Witness Momir Nikolić.[1608] Witness Momir Nikolić testified that, having driven Beara to Bratunac to attend a meeting with Deronjić and Vasić on 13

[1602] Karadžić Appeal Brief, paras. 721-724; Karadžić Reply Brief, para. 206; T. 23 April 2018 p. 135.
[1603] Prosecution Response Brief, paras. 392-410; T. 23 April 2018 pp. 206-218.
[1604] Prosecution Response Brief, para. 397; T. 23 April 2018 pp. 217, 218. *See also* Prosecution Response Brief, paras. 412-419.
[1605] Karadžić Reply Brief, para. 212.
[1606] Karadžić Reply Brief, para. 206. [REDACTED] *See* Karadžić Reply Brief, para. 210. *See also* Karadžić Appeal Brief, para. 703. The Appeals Chamber notes that Vasić's testimony in the *Perišić* case was not admitted at trial and recalls that Karadžić has failed to satisfy the requirements for admitting Vasić's testimony in the *Perišić* case as additional evidence on appeal. *See* Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, paras. 6, 17, 19. Furthermore, [REDACTED].
[1607] Karadžić Appeal Brief, para. 713. *See also* Karadžić Appeal Brief, paras. 698, 719, 725, 726; T. 23 April 2018 pp. 129-131, 134-136.
[1608] Trial Judgement, paras. 5312, 5712, 5808, n. 18022. The Appeals Chamber notes that the Trial Chamber also relied on the evidence of Witnesses Katanić and Srbislav Davidović as it concerns the meeting between Deronjić and Beara in the early hours of 14 July 1995; however, having reviewed the excerpts relied upon by the Trial Chamber, none reflects direct knowledge of the meeting or the contents of its conversation. *See* Trial Judgement, nn. 18022, 18024, *referring*

July 1995, he waited in the reception area next to Deronjić's office from where he could follow the entire meeting at which it was openly agreed that the detainees were to be executed and Beara and Deronjić argued about where to kill the detainees.[1609] Witness Momir Nikolić also heard Deronjić stating that he had received instructions from Karadžić that all the Bosnian Muslim men being detained in Bratunac should be transferred to Zvornik,[1610] and that, eventually, Beara and Deronjić agreed to transfer the detainees to the area of responsibility of the Zvornik Brigade.[1611] The Trial Chamber noted Karadžić's challenge to Witness Momir Nikolić's evidence about this meeting as unreliable and unacceptable without corroboration.[1612] However, having assessed Witness Momir Nikolić's evidence, the Trial Chamber was satisfied of "the truthfulness and reliability of his account of the meeting".[1613]

597. The Appeals Chamber observes that the Trial Chamber noted that it had approached Witness Momir Nikolić's evidence with "the utmost caution" given that he was himself convicted of crimes arising from events charged in the Indictment and that it was alive to the possibility that he may have motive to implicate Karadžić.[1614] The Trial Chamber recalled that Witness Momir Nikolić testified before it, allowing it to observe his demeanour on direct and cross-examination, and that his evidence was weighed against the totality of the evidence.[1615] It noted the possible motives of Witness Momir Nikolić to lie and thoroughly considered a previous occasion when the witness told the Prosecution an "avowed lie" in one of his interviews.[1616] In this respect, it considered that the witness admitted that he did not speak the truth at the first available opportunity, and, having examined his explanation, was satisfied that, although unfortunate, this was not the result of any oblique motive to mislead but was rather caused by his wish to ensure the success of his plea agreement with the Prosecution.[1617] The Trial Chamber also considered the fact that the witness

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to, *inter alia*, T. 9 February 2012 pp. 24415, 24416, 24452, 24453, T. 10 February 2012 p. 24496, Exhibit P4374, paras. 91-93.

[1609] Trial Judgement, para. 5312, n. 18022.

[1610] Trial Judgement, para. 5312. *See also* T. 14 February 2012 p. 24679 ("[Deronjić] said, I have received instructions from President Karadžić according to which the prisoners in Bratunac should be transferred to Zvornik, and Deronjić then said that he did not want anyone killed in Bratunac. He said he had enough problems as it was and he didn't want this. That's what I heard […].").

[1611] Trial Judgement, para. 5312.

[1612] Trial Judgement, n. 18022.

[1613] Trial Judgement, n. 18022.

[1614] Trial Judgement, paras. 16, 17, 5056. In this respect, the Trial Chamber recalled that accomplice evidence is not *per se* unreliable, especially where it can be thoroughly cross-examined, and that therefore reliance upon such evidence is not a legal error. *See* Trial Judgement, para. 16, *referring to Krajišnik* Appeal Judgement, para. 146. The Trial Chamber also noted that it was bound to carefully consider the totality of the circumstances in which such evidence was tendered and explain its reasons for accepting the evidence of a witness who may have had motives or incentives to implicate the accused. *See* Trial Judgement, para. 16, *referring to Krajišnik* Appeal Judgement, para. 146.

[1615] Trial Judgement, para. 17.

[1616] Trial Judgement, paras. 5057, 5058.

[1617] Trial Judgement, para. 5058.

falsely identified himself in a photograph which had been shown to him.[1618] Nonetheless, it found that these incidents did not affect Witness Momir Nikolić's credibility, nor did they justify rejection of his evidence.[1619] In this respect, the Trial Chamber noted that the witness remained otherwise consistent throughout his various statements and testimonies.[1620]

598. The Appeals Chamber also notes that the Trial Chamber considered and rejected Karadžić's challenge to Witness Momir Nikolić's credibility.[1621] In this respect, the Appeals Chamber recalls that a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1622] Karadžić fails to demonstrate such error in the assessment of Witness Momir Nikolić's credibility. The Appeals Chamber also notes that Karadžić had ample opportunity to thoroughly cross-examine Witness Momir Nikolić.[1623] As to Karadžić's submission that Witness Momir Nikolić's evidence should be rejected as uncorroborated hearsay, the Appeals Chamber recalls that trial chambers have the discretion to rely on hearsay evidence.[1624] In these circumstances, the Appeals Chamber finds that Karadžić fails to show that it was unreasonable for the Trial Chamber to rely on Witness Momir Nikolić's evidence.

599. The Appeals Chamber now turns to Karadžić's argument that the Trial Chamber erred in inferring that he had ordered the detainees to be transferred to Zvornik instead of the Batković camp where, in his submission, they would be detained.[1625] The Appeals Chamber recalls that where a fact on which a conviction relies is established on the basis of an inference, that inference must be the only reasonable one available on the evidence.[1626]

600. The Appeals Chamber has considered the factors and evidence relied upon by Karadžić in support of his suggested alternative inference that he had directed the detainees' transfer to

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[1618] Trial Judgement, para. 5059.
[1619] Trial Judgement, para. 5060.
[1620] Trial Judgement, para. 5060.
[1621] Trial Judgement, n. 18022, *referring to* Karadžić Final Trial Brief, paras. 3039, 3040.
[1622] *Šešelj* Appeal Judgement, para. 17; *Prlić et al.* Appeal Judgement, paras. 25, 772, 1601; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12.
[1623] Trial Judgement, para. 17. *See also* T. 14 February 2012 pp. 24695-24727; T. 15 February 2012 pp. 24728-24813; T. 16 February 2017 pp. 24816-24896.
[1624] *Prlić et al.* Appeal Judgement, para. 1601; *Popović et al.* Appeal Judgement, para. 1307, *referring to Kalimanzira* Appeal Judgement, para. 96, *Karera* Appeal Judgement, para. 39. *See also Munyakazi* Appeal Judgement, para. 77.
[1625] *See* Karadžić Appeal Brief, paras. 695, 696, 704-711, 719, 720; Karadžić Reply Brief, paras. 204, 212, 213; T. 23 April 2018 p. 129.
[1626] *Prlić et al.* Appeal Judgement, para. 1709; *Nyiramasuhuko et al.* Appeal Judgement, paras. 650, 1509; *Mugenzi and Mugiraneza* Appeal Judgement, para. 136; *Stakić* Appeal Judgement, para. 219. *See also Muhimana* Appeal Judgement, para. 49.

Batković,[1627] but observes that Karadžić effectively reiterates his disagreement with the Trial Chamber's evaluation of the relevant evidence without demonstrating error in its conclusion that the only reasonable inference on the evidence was that his order was for the detainees to be transferred to Zvornik. Considering the Trial Chamber's findings on Karadžić's active oversight of the killing operation,[1628] the implementation of the plan by his subordinates,[1629] the role of his close associates on the ground,[1630] the fact that he maintained regular contact with them throughout the implementation of the killing operation,[1631] and the fact that the detainees were transferred to Zvornik where they were executed,[1632] the Appeals Chamber finds that the Trial Chamber committed no error in concluding that the only reasonable inference from the totality of the evidence was that Karadžić had ordered the detainees to be transferred to Zvornik.

601. The Appeals Chamber now turns to Karadžić's argument that the Trial Chamber erred in inferring "malign intent" from the use of code in his conversation with Deronjić.[1633] The Appeals Chamber notes that, contrary to Karadžić's suggestion, the Trial Chamber did not draw the inference of malign intent from the use of code alone, but rather considered that the "use of code to refer to the detainees, as well as the direction to move them toward Zvornik, demonstrate[d] the malign intent behind the conversation."[1634] The Appeals Chamber has already found that Karadžić failed to demonstrate error in the Trial Chamber's conclusion that he ordered the detainees transferred to Zvornik. It also notes that the alternative inference suggested by Karadžić, namely that "the use of code on unsecured lines when referring to the location of prisoners was […] so that the enemy would not know where the prisoners were being held and mount a rescue operation",[1635] does not explain why code would have been used for the detainees' destination if, as Karadžić submits,[1636] it was widely expected that the transfer would be to Batković. Rather, the use of code was consistent with the Trial Chamber's finding on the VRS direction to conceal the killing aspect of the plan by not making a record of the activities involving the killings or speak about it on the

[1627] Karadžić has argued in this respect that: (i) Batković was the usual place for taking detainees and that Deronjić would have understood his words "somewhere else" as referring to Batković (*see* Karadžić Appeal Brief, para. 696, 711); (ii) there were plans and preparations in place to transfer the detainees to Batković before 13 July 1995 (*see* Karadžić Appeal Brief, paras. 705, 707, *referring to* Exhibits D2197, D4124); (iii) Mladić informed the detainees that they would be given food and water and that afterwards they would decide whether to send them to Krajina, Fikret Abdić, or the Batković camp (*see* Karadžić Appeal Brief, para. 706); (iv) several witnesses testified that they had expected the detainees to be transferred to Batković (*see* Karadžić Appeal Brief, paras. 700, 708, 709); and (v) Defence Witness Radovan Radinović concluded that Karadžić was referring to Batković in his conversation with Deronjić as it was well known that the prisoners would be taken there (*see* Karadžić Appeal Brief, para. 710).
[1628] Trial Judgement, paras. 5760-5762, 5766, 5767, 5772, 5773, 5777, 5779, 5780, 5783, 5801-5804, 5806-5812, 5820.
[1629] Trial Judgement, paras. 5736, 5737, 5743, 5801-5805, 5809, 5820.
[1630] Trial Judgement, paras. 5761, 5763, 5779, 5780, 5805, 5806, 5808.
[1631] Trial Judgement, paras. 5780, 5781-5783, 5820.
[1632] Trial Judgement, paras. 5805, 5818.
[1633] Karadžić Appeal Brief, paras. 721-724; T. 23 April 2018 p. 135.
[1634] Trial Judgement, para. 5805.
[1635] Karadžić Appeal Brief, para. 721.

radio, reinforcing the reasonableness of the Trial Chamber's inference of malign intent.[1637] The Appeals Chamber therefore finds that Karadžić fails to demonstrate error on the part of the Trial Chamber in this respect.

(b) Contemporaneous Knowledge of the Killings

602. The Trial Chamber considered that Karadžić's shared intent for the Srebrenica JCE's expanded common purpose was reaffirmed by the fact that, from the moment he directed Deronjić to move the detainees to Zvornik, he was "actively involved in overseeing the implementation of the plan to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys."[1638] It found that, after his conversation with Deronjić, Karadžić continued to seek and was provided with information about developments on the ground from multiple sources.[1639]

603. Karadžić submits that the Trial Chamber erred in inferring that he had contemporaneous knowledge of the Srebrenica killings.[1640] Specifically, he argues that, for each of the findings that he was informed of the killings, the Trial Chamber "solely" relied on a series of inferences and ignored evidence that he had no knowledge of the killings and that the perpetrators had concealed the killings from him.[1641] Karadžić contends that, in the absence of any direct evidence or by ignoring evidence suggesting the contrary, the Trial Chamber erroneously inferred that Deronjić had informed Karadžić of the Kravica warehouse killings when they met on the afternoon of 14 July 1995 in Pale,[1642] and erroneously inferred that Kovač and Bajagić had informed him about the Srebrenica killings when their testimony reflected the opposite.[1643]

[1636] Karadžić Appeal Brief, paras. 696, 700, 703-711.
[1637] Trial Judgement, paras. 5734, 5801, n. 19426. *See also* Trial Judgement, para. 5184.
[1638] Trial Judgement, para. 5811.
[1639] Trial Judgement, paras. 5806-5809.
[1640] Karadžić Appeal Brief, paras. 729, 740; T. 24 April 2018 pp. 250, 251, 254, 255.
[1641] Karadžić Appeal Brief, paras. 729-732, 735-741; T. 24 April 2018 pp. 250-257. *See also* Karadžić Appeal Brief, paras. 731, 732, 739, 740, where Karadžić refers to: (i) his unsworn statement in which he denied knowledge of killings after the fall of Srebrenica (T. 16 October 2012 p. 28878); (ii) the lack of any direct evidence that Deronjić informed Karadžić about the Kravica warehouse killings during their meeting on 14 July 1995 and the evidence of Witnesses Katanić and Krajišnik who testified that during their meeting immediately following Karadžić's meeting with Deronjić there was no mention of killing men from Srebrenica (Exhibit D3561, para. 8; T. 12 November 2013 p. 43352); (iii) the evidence of 28 witnesses, including his staff, and high-ranking officials in the army, police, security services and assembly, who testified that Karadžić was not informed of the Srebrenica executions (T. 2 October 2014 p. 47949; Karadžić Final Trial Brief, paras. 3016-3149); and (iv) the intercepted conversation of 1 August 1995 in which Beara alludes to the fact that Karadžić might make an agreement for the inspection of exchange of prisoners, and expressed concern that they did not have any to exchange (Exhibits [REDACTED], P6696).
[1642] Karadžić Appeal Brief, para. 730; T. 24 April 2018 pp. 252-255.
[1643] Karadžić Appeal Brief, paras. 735, 736, *referring to* Exhibits D3960, para. 129, D3853, para. 36D; Karadžić Reply Brief, para. 216; T. 24 April 2018 p. 252 (also referring to evidence from Witness Karišik denying that he was aware of or informed Karadžić of executions during a meeting on 16 July 1995).

604. The Prosecution responds that there was considerable evidence demonstrating Karadžić's contemporaneous knowledge of the ongoing killing operation[1644] and that Karadžić demonstrates no error in the Trial Chamber's assessment and conclusions in this respect.[1645]

605. Karadžić replies that the evidence showing that he may have learned of the Kravica warehouse incident "after-the-fact" does not support the Trial Chamber's finding that he contemporaneously shared the expanded common purpose to kill Bosnian Muslim men and boys.[1646] He further replies that the Prosecution fails to identify any written report received by him that refers to the killings.[1647]

606. The Appeals Chamber notes that the Trial Chamber found that Karadžić sought, and was provided with, information through multiple channels on the progress of the killing plan over the course of 14 and 15 July 1995,[1648] and that he had "contemporaneous knowledge" of the ongoing killing operation.[1649] It found, in particular, that: (i) during a meeting on the morning of 14 July 1995, Karadžić and Deronjić discussed the killings at the Kravica warehouse and the implementation of Karadžić's order to transport the detainees from Bratunac to Zvornik;[1650] (ii) Kovač shared his knowledge and observations of the killing operations on 13 and 14 July 1995 in a meeting with Karadžić on the evening of 14 July 1995;[1651] and (iii) Bajagić reported to Karadžić on events in Srebrenica on 13 and 14 July 1995, during a meeting in the early hours of 15 July 1995.[1652]

607. The Trial Chamber also noted that, although it had not received evidence demonstrating that written reports that reached Karadžić mentioned killings of Bosnian Muslim detainees, it was "inconceivable" that the relevant information would have been withheld from him by his subordinates.[1653] It relied in this respect on its findings that: (i) whereas the daily combat reports as of 12 July 1995 described the transport of the Bosnian Muslim population, and the capture and surrender of large numbers of Bosnian Muslim men, subsequent reports made no mention of detainees; (ii) Popović had directed that no record be made of activities related to the killing aspect

[1644] Prosecution Response Brief, paras. 425-436; T. 23 April 2018 pp. 204-208, 213, 214, 216.
[1645] Prosecution Response Brief, para. 425. The Prosecution also submits that inferences are typical in relation to intent and knowledge, indications of which are rarely overt. *See* Prosecution Response Brief, para. 425, *referring to* Trial Judgement, para. 5825.
[1646] Karadžić Reply Brief, para. 214; T. 23 April 2018 p. 138.
[1647] Karadžić Reply Brief, para. 216; T. 24 April 2018 p. 251. *See also* T. 23 April 2018 p. 139.
[1648] Trial Judgement, paras. 5806-5809, 5820.
[1649] Trial Judgement, paras. 5812, 5820, 5823, 5829, 5830.
[1650] Trial Judgement, paras. 5807, 5808.
[1651] Trial Judgement, paras. 5781, 5806.
[1652] Trial Judgement, paras. 5783, 5809.
[1653] Trial Judgement, paras. 5801, 5802.

of the plan;[1654] (iii) Karadžić had a demonstrated interest in the unfolding events in Srebrenica; and (iv) the communication capacities between Karadžić and the VRS, MUP, and DB functioned properly.[1655]

608. The Trial Chamber also noted that it had no direct evidence on the meeting between Karadžić and Deronjić on 14 July 1995.[1656] Nevertheless, it found that during the meeting, Karadžić and Deronjić discussed the killings at the Kravica warehouse and the implementation of Karadžić's order to transport the detainees to Zvornik on the basis of the following: (i) Deronjić had been aware of the Kravica warehouse killings since the evening of 13 July 1995, and had participated in the efforts to bury the bodies of those killed;[1657] (ii) Karadžić and Deronjić had spoken on the evening of 13 July 1995 and Karadžić had ordered the detainees transferred to Zvornik;[1658] (iii) Karadžić and Deronjić had frequent communications, either by telephone or in person, during the Srebrenica operation;[1659] (iv) Deronjić's duties as civilian commissioner of Srebrenica required him to report the Kravica warehouse killings to Karadžić;[1660] and (v) Deronjić informed Witness Ljubislav Simić that he had informed Karadžić of the Kravica warehouse killings the day after the incident.[1661]

609. The Appeals Chamber considers that it was reasonable for the Trial Chamber to conclude that Deronjić had informed Karadžić of the Kravica warehouse killings at their meeting on 14 July 1995, particularly in light of its findings that Deronjić was appointed by Karadžić and reported directly to him and that Witness Simić provided specific evidence that Deronjić told him that he had informed Karadžić of the Kravica warehouse killings the day after they occurred.[1662] The Appeals Chamber therefore sees no error in the Trial Chamber's finding that the only reasonable inference

[1654] Trial Judgement, para. 5801.
[1655] Trial Judgement, para. 5802.
[1656] Trial Judgement, para. 5808.
[1657] Trial Judgement, para. 5808, n. 19748, *referring to* Trial Judgement, para. 5240 ("Borovčanin discussed with Miroslav Deronjić the incident at the Kravica Warehouse, including the fact that a number of detainees had been killed"), and the evidence of Witnesses Milenko Katanić, Jovan Nikolić, and Ljubislav Simić.
[1658] Trial Judgement, para. 5808, *referring to* Trial Judgement, para. 5772.
[1659] Trial Judgement, para. 5808, *referring to* the evidence of Witnesses Katanić and Ristić.
[1660] Trial Judgement, para. 5808, *referring to* the evidence of Witnesses Katanić and Simić.
[1661] Trial Judgement, para. 5808, *referring to* the evidence of Witness Simić. The Appeals Chamber notes that Karadžić argues that Witness Simić did not know whether Deronjić had reported to Karadžić on the Kravica warehouse incident or what Deronjić had told Karadžić about it. *See* Karadzic Reply Brief, para. 237. Having reviewed the evidence of Witness Simić, the Appeals Chamber notes that Karadžić fails to demonstrate error in the Trial Chamber's reliance on Witness Simić's evidence in this respect, particularly given Witness Simić's evidence that he had "found out that [Deronjić] had informed [Karadžić] about what had happened" (*see* T. 16 April 2013 p. 37293), he had heard from Deronjić that Deronjić had informed Karadžić of the incident at the Kravica warehouse and "supposed" therefore that Deronjic had indeed informed Karadžić about it (*see* T. 16 April 2013 p. 37307), and his confirmation that "[he] assumed with quite a bit of certainty that Miroslav Deronjić had heard of – about what had happened at Kravica and that it was his duty to inform [Karadžić]. […] However, when [he] spoke about it with [Deronjić], [he couldn't] recall at which point in time this was, [he] asked him, 'Did you send word? Did you spread information?' [Deronjić] said that he did" (*see* T. 16 April 2013 p. 37308).

from the evidence was that on 14 July 1995 Karadžić and Deronjić discussed the Kravica warehouse killings and the implementation of Karadžić's order of 13 July 1995.

610. With respect to the meeting Karadžić held with Witness Kovač on 14 July 1995, the Trial Chamber noted that Witness Kovač denied reporting to Karadžić on Srebrenica but found this evidence not credible.[1663] The Trial Chamber concluded that "the only reasonable inference" was that Kovač "shared the knowledge and observations he had gathered during his trip with [Karadžić]" when they met on 14 July 1995.[1664] In this respect, it relied on: (i) reports sent to Kovač on 12 and 13 July 1995 regarding the Srebrenica operation; (ii) the fact that Kovač and Karadžić had met on 13 July 1995; (iii) Kovač's presence in the Bratunac and Zvornik areas, as well as in Srebrenica on 13 and 14 July 1995; and (iv) the encounters he had with Mladić, Vasić, and Borovčanin.[1665]

611. Similarly, the Trial Chamber noted that Witness Bajagić had denied having any knowledge of the events in Srebrenica and informing Karadžić about them on 15 July 1995 but found his testimony "full of inconsistencies and contradictions" and considered it clearly established that he had "substantive knowledge" of events in Srebrenica prior to his meeting with Karadžić.[1666] It found, in particular, that he had seen detainees held at the Nova Kasaba football field and was prevented from taking photos of them and that he was informed of the Kravica warehouse killings after the fact.[1667] The Trial Chamber also noted the fact that Karadžić had "invited Bajagić to Pale", as well as "the extremely late hour of their meeting" and determined that the "only reasonable inference" was that Bajagić had reported to Karadžić the events in Srebrenica he had witnessed on 13 and 14 July 1995.[1668]

612. Regarding the inferences that Kovač and Bajagić had informed Karadžić of the events in Srebrenica, the Appeals Chamber sees no error in the Trial Chamber's credibility assessment of

[1662] *See* Trial Judgement, para. 5808.
[1663] Trial Judgement, paras. 5781, 5782. The Trial Chamber also noted "numerous internal inconsistencies" within Witness Kovač's testimony as well as with prior statements given under oath, and his "evasiveness and even intermittent combativeness […] throughout his testimony", and concluded that these arose from his efforts to minimize his own involvement in the events in Srebrenica. *See* Trial Judgement, para. 5766. In addition, the Trial Chamber found that Witness Kovač's own suggestion that he had issued an order for the police to cease communication with the VRS security organ so as not to be involved with any of their activities as "proof" of the contrary, and further, that his knowledge of the killing plan was supported by his warning to Borovčanin that MUP units in the field "should distance themselves from anything other than combat tasks." *See* Trial Judgement, para. 5782.
[1664] Trial Judgement, para. 5781.
[1665] Trial Judgement, para. 5781.
[1666] Trial Judgement, para. 5783. The Trial Chamber recalled that Witness Bajagić acknowledged that, on 13 July 1995, he had seen captured Bosnian Muslim men sitting at the Nova Kasaba football field, had been prevented from taking photos of them, and had met with Mladić, Salapura, and Kovač that same day. *See* Trial Judgement, para. 5783, n. 19647. It also recalled that Witness Bajagić conceded that he had heard about the Kravica warehouse killings while present at the Drina Corps Command in Vlasenica on 14 July 1995. *See* Trial Judgement, para. 5783.
[1667] Trial Judgement, para. 5783.

these witnesses and rejection of the part of their testimony in which they denied informing Karadžić.[1669] The Appeals Chamber finds no error in the Trial Chamber's conclusion that the only reasonable inference was that they had informed Karadžić.

613. The Appeals Chamber finds that Karadžić has failed to demonstrate error in the Trial Chamber's finding that he had contemporaneous knowledge of the killings and events on the ground in Srebrenica.

(c) The "Subsequent Acts"

614. In concluding that Karadžić shared the expanded common purpose of the Srebrenica JCE to kill Bosnian Muslim men and boys, the Trial Chamber noted that Karadžić, together with Mladić, embarked on an effort to disseminate false information about the fate of the Bosnian Muslim males and that Karadžić denied international organizations access to Srebrenica and the Bratunac and Zvornik areas.[1670] Given Karadžić's knowledge of the ongoing killing operation, the Trial Chamber found that the only reasonable inference was that Karadžić intended to shield the true actions of the Bosnian Serb forces from international attention and intervention.[1671] The Trial Chamber also observed that, from the point he ordered the detainees' transfer to Zvornik until the spring of 1996, Karadžić took no action to initiate investigations or prosecutions of the direct perpetrators of the crimes committed following the fall of Srebrenica and, by contrast, he praised the units of the Bosnian Serb forces involved in the killing operation in Zvornik and even referred to Mladić as a "legend".[1672]

615. Karadžić submits that the Trial Chamber's findings on his subsequent acts, that is disseminating false information, denying access to international organizations, and failing to prosecute, suffer from legal and factual errors.[1673] Specifically, he maintains that, without finding that he had instructed the detainees' transfer to Zvornik, the finding that the subsequent acts of disseminating "false information", denying international organizations access to the area, and failing to prosecute those responsible are baseless and cannot support the conclusion that he shared the intent of the expanded Srebrenica JCE.[1674]

616. The Prosecution responds that Karadžić fails to counter the finding that his failure to initiate investigations or prosecutions of the crimes demonstrates his intent, that he disregards relevant

[1668] Trial Judgement, para. 5783.
[1669] *See* Trial Judgement, paras. 5766, 5781-5783.
[1670] Trial Judgement, para. 5812.
[1671] Trial Judgement, para. 5812.
[1672] Trial Judgement, para. 5813.
[1673] Karadžić Appeal Brief, paras. 726-729, 741-744; T. 23 April 2018 pp. 136-138.

findings showing his involvement in the implementation of the killing operation and his dissemination of falsehoods to misdirect the international community, and that the Trial Chamber reasonably concluded that his efforts to deny international organizations access to the "missing" prisoners support its findings on his intent.[1675]

617. Karadžić replies that his subsequent acts are consistent with his position that he did not order the killing of the prisoners.[1676]

618. The Appeals Chamber notes that the Trial Chamber found that Karadžić and Mladić "embarked on an effort to disseminate false information about the fate of the Bosnian Muslim males as well as the conditions under which the remainder of the Bosnian Muslim population was transferred to Potočari."[1677] In this respect, the Trial Chamber found that, on 17 July 1995, Karadžić claimed in an interview with David Frost that civilians in Srebrenica had wanted to leave on their own and offered as proof a statement produced by Bosnian Serb representatives and signed by Nesib Mandžić, a Bosnian Muslim who had agreed to act as spokesperson for the Bosnian Muslim population, and Robert Franken, an officer of DutchBat.[1678] The Trial Chamber found that the 17 July 1995 statement could not be considered demonstrative of the population's genuine choice to leave the enclave given the prevailing circumstances in Potočari and in light of Witness Franken's testimony that the statement was "nonsense", "false", and that he had only signed it to ensure the evacuation of DutchBat.[1679] The Trial Chamber concluded that, given Karadžić's "nearly-contemporaneous knowledge of the ongoing killing operation, the only reasonable inference is that by disseminating false information, [he] intended to shield the true actions of the Bosnian Serb forces from international attention and intervention."[1680]

619. The Appeals Chamber recalls that it has already found that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he ordered prisoners to be transferred to Zvornik and that he had contemporaneous knowledge of the killings and events on the ground in Srebrenica. The Appeals Chamber considers that Karadžić's cursory and undeveloped submission that the Trial Chamber erred as he had "stated what he truly believed"[1681] fails to demonstrate error

[1674] Karadžić Appeal Brief, paras. 726-729, 741, 742; T. 23 April 2018 pp. 137, 138.
[1675] Prosecution Response Brief, paras. 437-443.
[1676] Karadžić Reply Brief, para. 217. Karadžić also submits that the Prosecution fails to explain why he would have sought to publicly take credit for the Srebrenica operation if he was aware that prisoners had been executed and that, had he known prisoners had been executed, it would have been "foolish and counterintuitive" to claim in his 17 July 1995 interview with David Frost that people he knew to be dead would soon be reaching "Muslim territory". *See* Karadžić Reply Brief, paras. 217, 218; T. 24 April 2018 pp. 256, 257.
[1677] Trial Judgement, para. 5812, *referring to* Trial Judgement, paras. 5786, 5787.
[1678] Trial Judgement, paras. 5042, 5043, 5128, 5129, 5786.
[1679] Trial Judgement, para. 5631.
[1680] Trial Judgement, para. 5812.
[1681] Karadžić Appeal Brief, para. 741.

in the Trial Chamber's finding that, by disseminating false information, he intended to shield the true actions of the Bosnian Serb forces from international attention and intervention.

620. As to Karadžić's challenge to the Trial Chamber's finding that he had denied international organizations access to Srebrenica and the Bratunac and Zvornik areas,[1682] the Appeals Chamber notes that the Trial Chamber found that Karadžić had received but did not reply to the request for access of UN staff to areas under Karadžić's control, which was made to him directly on 24 July 1995 by the Special Rapporteur of the Commission on Human Rights.[1683] In support of its finding, the Trial Chamber relied on the Special Rapporteur's letter,[1684] the Report of the UN Secretary General of 30 August 1995, which noted the letter and the fact that there was no response,[1685] and the intercept of a conversation between Karadžić and Danijela Sremac on 25 July 1995, which records that Sremac had discussed with Karadžić on 24 July 1995 the "attacks" by the Special Rapporteur to the media concerning the humanitarian situation in Srebrenica.[1686] The Appeals Chamber finds reasonable the Trial Chamber's conclusion that Karadžić was aware of the Special Rapporteur's request and that he did not allow international organizations access to the area at the relevant time. The Trial Chamber's finding in this respect is supported by its earlier findings that Karadžić had a keen interest in and actively monitored the international media's coverage of the events in Srebrenica and that it was inconceivable that his subordinates would not communicate to him relevant information reaching his office.[1687] Karadžić's submission that the Trial Chamber's finding is "untrue" because access to international organizations was granted in late July 1995[1688] does not demonstrate error. In any event, the fact that the ICRC was allowed to access the Batković camp in late July 1995 was expressly considered by the Trial Chamber, which noted that by that time the ICRC could only locate 164 detainees from Srebrenica.[1689]

621. The Appeals Chamber now turns to consider Karadžić's challenge to the Trial Chamber's finding that Karadžić took no action to initiate investigations or prosecutions of the direct perpetrators of the crimes committed following the fall of Srebrenica and instead congratulated the units of the Bosnian Serb forces involved in the killing operation.[1690] Specifically, it determined that neither his 23 March 1996 order, nor his 1 April 1996 order – which purported to establish formal

[1682] Trial Judgement, para. 5812, *referring to* Trial Judgement, para. 5788.
[1683] Trial Judgement, paras. 5812, 5788.
[1684] Trial Judgement, para. 5788, *referring to*, *inter alia*, Exhibit P6396.
[1685] Exhibit P5177, para. 38.
[1686] Trial Judgement, n. 19670, *referring to*, *inter alia*, Exhibit D4509, p. 3.
[1687] Trial Judgement, paras. 5801, 5802, 5812.
[1688] Karadžić Appeal Brief, paras. 743, 744; T. 23 April 2018 pp. 136, 137.
[1689] Trial Judgement, para. 5788.
[1690] Trial Judgement, para. 5813.

investigations of the Srebrenica events and accompanying violations[1691] – actually resulted in *bona fide* investigations or prosecutions.[1692] It also referred to a press release issued on 20 July 1995 by Karadžić's press office congratulating the VRS Main Staff, the Drina Corps Command, and the "staff of the Police Armed Forces" on the "brilliant victory in Srebrenica and Žepa" as well as Karadžić's praise of Mladić as a "legend".[1693] The Appeals Chamber notes that Karadžić fails to point to any alleged error of the Trial Chamber in this respect and, consequently, dismisses this challenge.

622. The Appeals Chamber finds therefore that Karadžić fails to show error in the Trial Chamber's finding on his "subsequent acts" or in the Trial Chamber's reliance on them to support its finding that he shared the expanded criminal purpose of the Srebrenica JCE.

(d) Conclusion

623. For the above reasons, the Appeals Chamber finds that Karadžić fails to demonstrate error in the Trial Chamber's finding that he agreed to the expansion of the common purpose to entail the killing of Bosnian Muslim men and boys of Srebrenica. Based on the foregoing, the Appeals Chamber dismisses Ground 40 of Karadžić's appeal.

[1691] Trial Judgement, paras. 5794, 5795.
[1692] Trial Judgement, para. 5813.
[1693] Trial Judgement, paras. 5789, 5813.

3. Alleged Errors in Finding the *Mens Rea* for Genocide (Ground 41)

624. The Trial Chamber found that the Srebrenica JCE shared a common plan to eliminate the Bosnian Muslims in Srebrenica, first through forcible removal and later through the killing of the men and boys.[1694] The Trial Chamber further found that Karadžić significantly contributed to this plan and shared with the other members of the Srebrenica JCE the intent for the crimes within its scope, including genocide.[1695] The Trial Chamber based its finding regarding Karadžić's intent on its conclusion that the only reasonable inference available on the evidence was that Karadžić shared with Mladić, Beara, and Popović the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed, which amounted to the intent to destroy the Bosnian Muslims in Srebrenica.[1696]

625. In reaching conclusions as to Karadžić's genocidal intent with respect to the Srebrenica JCE, the Trial Chamber relied, in part, on its findings that: (i) Karadžić was informed by Deronjić that the Bosnian Serb forces had "about two thousand" Bosnian Muslim males in custody and expected that number to increase";[1697] (ii) Karadžić must have learned from Kovač – either during their conversation on 13 July 1995 or during their subsequent meeting on 14 July 1995 – that most of the able-bodied Bosnian Muslim men had not gone to the UN Compound with their families but had fled through the woods;[1698] (iii) Karadžić received daily combat reports from the Main Staff, which after reporting on the capture and surrender between 12 and 14 July 1995 of large numbers of Bosnian Muslim males who had fled in a column, made no further mention of detainees;[1699] (iv) Karadžić knew that the thousands of Bosnian Muslim male detainees being held by the Bosnian Serb forces in the Srebrenica area constituted a very significant percentage of the Bosnian Muslim males from Srebrenica;[1700] (v) Karadžić agreed with and did not intervene to halt or hinder the killing aspect of the plan to eliminate the detainees between 13 and 17 July 1995 but ordered instead their transfer to Zvornik, where they were killed;[1701] (vi) once Karadžić was informed of the opening of a corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karišik was promptly sent to investigate and the corridor was closed within a day;[1702] and (vii) when speaking in a closed session of the Bosnian Serb Assembly weeks later, Karadžić expressed regret that Bosnian Muslim males had managed to pass through Bosnian

[1694] Trial Judgement, para. 5849.
[1695] Trial Judgement, paras. 5830, 5831, 5849, 5851.
[1696] Trial Judgement, para. 5830.
[1697] Trial Judgement, para. 5829.
[1698] Trial Judgement, para. 5829.
[1699] Trial Judgement, para. 5829.
[1700] Trial Judgement, para. 5829.
[1701] Trial Judgement, para. 5830.
[1702] Trial Judgement, para. 5830.

Serb lines.[1703] The Trial Chamber found that Karadžić's agreement to allow the local staff of UNPROFOR, which included Bosnian Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.[1704]

626. Karadžić submits that the Trial Chamber erred in inferring his genocidal intent due to its "mistaken" evaluation of the evidence and erroneous inferences that were not the only reasonable conclusions based on the evidence.[1705] Specifically, Karadžić contends that the Trial Chamber erroneously discounted his order that local Bosnian Muslims who worked with the UN be allowed to depart with UN personnel, reflecting that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed.[1706] Karadžić further argues that the Trial Chamber erred in finding that he sent Karišik to investigate and close the corridor near Zvornik that opened on 16 July 1995 to facilitate Bosnian Muslims to pass freely into Bosnian-Muslim territory.[1707] He submits that the relevant evidence suggested that the corridor would be open for 24 hours and that the VRS extended it for two more hours after Karišik's visit, undermining the conclusion that Karišik was sent to close it.[1708] Karadžić also contends that the Trial Chamber erroneously interpreted and relied upon his remarks before the Bosnian Serb Assembly on 6 August 1995 stating that "in the end several thousands fighters did manage to get through […] we were not able to encircle the enemy and destroy them".[1709] He argues that these remarks were made in the context of criticizing the army for conduct after the fall of Srebrenica and, particularly, directing resources to Žepa and being unable to defeat the column militarily.[1710] Finally, Karadžić submits that, the Trial Chamber erroneously equated knowledge about the executions in Srebrenica and lack of action to prevent them with finding that he possessed genocidal intent and argues that his genocide conviction must be reversed.[1711]

627. In response, the Prosecution submits that Karadžić fails to show that his order of 17 July 1995 to spare UNPROFOR's local staff undermines the Trial Chamber's finding that he had

[1703] Trial Judgement, para. 5830.
[1704] Trial Judgement, n. 19811.
[1705] Karadžić Notice of Appeal, p. 41, *referring to* Trial Judgement, paras. 5829, 5830, 5849, 6001; Karadžić Appeal Brief, paras. 746-749, 765, 766, 772; T. 23 April 2018 p. 139.
[1706] Karadžić Appeal Brief, paras. 750-752; T. 24 April 2018 p. 257.
[1707] Karadžić Appeal Brief, paras. 753-757, 764. *See also* T. 23 April 2018 p. 117.
[1708] Karadžić Appeal Brief, paras. 754-757.
[1709] Karadžić Appeal Brief, paras. 758-765.
[1710] Karadžić Appeal Brief, paras. 761, 762. Karadžić maintains that, even assuming that he had opposed opening the corridor [REDACTED], that would have been a military decision and not evidence of an intent to destroy Bosnian Muslims as such and points to the fact that neither Miletić nor Krstić were found to have genocidal intent. Karadžić Appeal Brief, para. 763, *referring to*, *inter alia*, *Krstić* Appeal Judgement, para. 134.
[1711] Karadžić Appeal Brief, paras. 746, 767-772, *referring to*, *inter alia*, *Krstić* Appeal Judgement, paras. 104, 111, 121, 129, *Popović et al.* Trial Judgement, para. 1414, *Popović et al.* Appeal Judgement, para. 503; T. 23 April 2018 pp. 138, 139; T. 24 April 2018 pp. 254, 255. In arguing that the record is insufficient to establish genocidal intent, Karadžić

genocidal intent.[1712] It also argues that, contrary to Karadžić's submission, the Trial Chamber reasonably found that he did not order the corridor to remain open when informed by Karišik that Muslims were leaving through it and reasonably relied on his regret at the escape of some Muslims as expressed before the Bosnian Serb Assembly in August 1995.[1713] The Prosecution further submits that the Trial Chamber's finding that Karadžić had the intent to destroy Srebrenica's Muslims was based on corroborated evidence.[1714] In particular, the Prosecution contends that Karadžić's multifarious contributions to the implementation of the plan to eliminate Srebrenica's Muslims from his position as President and Supreme Commander of the forces that perpetrated the genocide were reasonably found significant and that Karadžić was the sole person with the power to prevent the Bosnian Serb forces from moving the Bosnian Muslim males to Zvornik to be killed.[1715] The Prosecution also argues that the Trial Chamber's finding that Karadžić shared genocidal intent was based not only on his knowledge of the operation to eliminate Srebrenica's Muslims, but also on his shared intent for the expansion of the joint criminal enterprise to include the killing operation and his contribution to the crimes, including his order for the prisoners' transfer to Zvornik.[1716]

628. Karadžić replies that the Trial Chamber magnified its error concerning his order for the prisoners' transfer to Zvornik by disregarding his actions that saved UN local staff in Srebrenica from execution and finding that he had genocidal intent based on an inference that he had ordered or favoured closing a corridor for safe passage.[1717] He also argues that the Prosecution fails to refute his argument that the Trial Chamber erred in relying on his comments at the Bosnian Serb Assembly session on 6 August 1995 as he was referring to VRS military tactics and not the killing of civilians, which is evident from reading his remarks in full.[1718]

629. The Appeals Chamber notes that Karadžić's first submission challenges the Trial Chamber's conclusion that his agreement to allow the local staff of UNPROFOR, which included Bosnian

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further contends that the record fails to support a finding of aiding and abetting genocide. *See* Karadžić Appeal Brief, paras. 772-781.

[1712] Prosecution Response Brief, para. 451; T. 23 April 2018 p. 211.

[1713] Prosecution Response Brief, paras. 452, 453. *See also* T. 23 April 2018 pp. 208, 209. The Prosecution also submits that Karadžić's argument that Karišik's enquiries and the closing of the corridor were not connected is flawed as the Trial Chamber reasonably considered that Karadžić was informed by Karišik about the opening of the corridor, as shown by an intercepted conversation and a report, and regretted the escape of Muslims through it while the corridor was closed shortly thereafter. *See* Prosecution Response Brief, para. 453, *referring to*, *inter alia*, Trial Judgement, para. 5472. The Prosecution also submits that Karadžić fails to explain how any hypothetical military motive for "opposing the opening of the corridor" could undermine the Trial Chamber's conclusions concerning his genocidal intent. *See* Prosecution Response Brief, para. 454.

[1714] Prosecution Response Brief, paras. 446, 448, 449, 454. *See also* T. 23 April 2018 pp. 211, 218.

[1715] Prosecution Response Brief, paras. 447, 457, 462. *See also* T. 23 April 2018 pp. 203, 204, 211.

[1716] Prosecution Response Brief, paras. 450, 459. *See also* T. 23 April 2018 pp. 212-217.

[1717] Karadžić Reply Brief, paras. 221, 222, 232. Karadžić also argues that the Prosecution misconstrues his position as he never denied knowing about the opening of the corridor but rather denied that he was opposed to opening the corridor and favoured or ordered closing it. *See* Karadžić Reply Brief, paras. 223, 224.

[1718] Karadžić Reply Brief, para. 225.

Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.[1719] The Trial Chamber noted in this respect that the reason proffered by the Bosnian Serb forces for separating and taking custody of Bosnian Muslim males in Potočari, namely that they were to be screened for involvement in war crimes, would not have applied to the local staff of UNPROFOR.[1720] Karadžić maintains that his decision allowing such local staff to leave demonstrates that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed.[1721] In this respect, the Appeals Chamber reiterates that evidence of limited and selective assistance to a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide.[1722] Moreover, the Appeals Chamber considers reasonable the Trial Chamber's view that the pretext of screening for war crimes would not have applied to UNPROFOR staff. Consequently, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred in finding that allowing the local UNPROFOR staff to leave the UN compound did not raise doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.

630. Turning to Karadžić's submission that the Trial Chamber erred in finding that he wanted to close the corridor near Zvornik that opened on 16 July 1995 to facilitate Bosnian Muslims to pass freely into Bosnian-Muslim territory, the Appeals Chamber notes that Karadžić misrepresents the Trial Chamber's assessment and findings. Contrary to his submission, the Trial Chamber did not infer that Karadžić had wanted the corridor closed from the fact that he was in contact with Karišik about the corridor.[1723] As one element of its finding that Karadžić shared the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed, the Trial Chamber noted that, once Pandurević had opened the corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karišik was "promptly sent" to investigate and the corridor was closed within a day.[1724] In this respect, the Trial Chamber found that, shortly after Pandurević had notified the Drina Corps command that a corridor had been opened to allow civilians to pass through, an officer from the Main Staff, who stated that he was calling from "the boss […] the main head of state", told the Zvornik Brigade duty officer to have Pandurević inform the Main Staff immediately about what had been done.[1725] It also found that, on the same date, Karišik was dispatched to Zvornik and informed Karadžić that Pandurević had arranged for the opening of the

[1719] Karadžić Appeal Brief, paras. 750-752, *referring to*, *inter alia*, Trial Judgement, n. 19811; Karadžić Reply Brief, para. 222.
[1720] Trial Judgement, n. 19811.
[1721] Karadžić Appeal Brief, paras. 750-752; Karadžić Reply Brief, para. 222.
[1722] *Muhimana* Appeal Judgement, para. 32. *See also Rutaganda* Appeal Judgement, para. 537.
[1723] *See* Karadžić Appeal Brief, paras. 754-756.
[1724] Trial Judgement, para. 5830, *referring to* Trial Judgement, paras. 5470-5472, 5784.
[1725] Trial Judgement, para. 5784.

corridor and that the same evening and the following day reinforcements were sent to the area and the Main Staff sent three colonels to investigate Pandurević's decision to open the corridor.[1726] Having reviewed the Trial Chamber's findings, the Appeals Chamber finds that Karadžić fails to show that the Trial Chamber erred in its assessment of the evidence or drew unreasonable inferences warranting appellate intervention.

631. As to Karadžić's argument that the Trial Chamber misinterpreted his remarks before the Bosnian Serb Assembly on 6 August 1995, the Appeals Chamber notes that the Trial Chamber drew support for its finding that Karadžić shared the intent for every Bosnian Muslim male from Srebrenica to be killed from his expressed regret about the fact that some Bosnian Muslim males had managed to pass through Bosnian Serb lines.[1727] The Appeals Chamber finds that Karadžić merely provides an alternative interpretation of the evidence but fails to demonstrate that the Trial Chamber's interpretation of his statement or its reliance on it in establishing his intent was unreasonable.

632. Finally, contrary to Karadžić's claim, the Trial Chamber did not solely rely on his knowledge of executions and inaction to prevent them in finding that he had genocidal intent. The Trial Chamber's finding as to Karadžić's genocidal intent rests on Karadžić's knowledge of the executions as well as his agreement to implement the plan. This is demonstrated by his order for the detainees to be moved to Zvornik where they were killed and by his failure to intervene to halt or hinder the killings between the evening of 13 July and 17 July 1995.[1728]

633. In light of the foregoing, the Appeals Chamber finds that Karadžić has failed to demonstrate error in the Trial Chamber's finding on his *mens rea* for genocide.[1729] The Appeals Chamber dismisses Ground 41 of Karadžić's appeal.

[1726] Trial Judgement, para. 5784.
[1727] Trial Judgement, para. 5830.
[1728] Trial Judgement, paras. 5829, 5830.
[1729] As Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he possessed genocidal intent with respect to the Srebrenica JCE, the Appeals Chamber will not examine his submissions concerning his possible liability for "aiding and abetting" this crime.

4. Alleged Errors in Finding Karadžić Responsible as a Superior for Certain Killings (Grounds 42 and 43)

634. The Trial Chamber convicted Karadžić under Article 7(3) of the ICTY Statute for failing to take necessary and reasonable measures to punish the commission of the crimes of persecution and extermination as crimes against humanity, as well as murder as a violation of the laws or customs of war committed by his subordinates in the aftermath of the fall of the Srebrenica enclave.[1730] The Trial Chamber found that these crimes, which had occurred prior to Karadžić's agreement to the expansion of the means of eliminating the Bosnian Muslims in Srebrenica, included: (i) the killing of ten Bosnian Muslim men in Potočari on 13 July 1995;[1731] (ii) the killing of 15 Bosnian Muslim men on the bank of the Jadar River on 13 July 1995;[1732] (iii) the killing of 10 to 15 Bosnian Muslim men at Sandići Meadow on 13 July 1995;[1733] (iv) the killing of 755 to 1,016 Bosnian Muslim men at the Kravica warehouse on 13 and 14 July 1995;[1734] and (v) the killing of at least 50 Bosnian Muslim men in Bratunac town between 12 and 14 July 1995 and the killing of a man outside the Vuk Karadžić School in Bratunac on 13 July 1995.[1735] The Trial Chamber found that these killings were committed by forces subordinated to the VRS and operating under the command of Krstić, who was a direct subordinate of VRS Commander Mladić, who in turn was Karadžić's direct subordinate.[1736] It also found that Karadžić had *de jure* authority over the VRS in July 1995, which he exercised in fact, and that he also had the material ability to punish the perpetrators of the killings that occurred prior to the point at which he agreed to the killing aspect of the Srebrenica JCE on 13 July 1995.[1737]

635. The Trial Chamber was satisfied that Karadžić knew of the large-scale Kravica warehouse killings by the day after they were committed and that this had put him on notice that members of

[1730] Trial Judgement, paras. 5830, 5833, 5837, 5839-5848, 5850, 6002-6005. Although the Trial Chamber found that Karadžić could bear responsibility pursuant to Article 7(3) of the ICTY Statute in relation to genocide committed by his subordinates, it did not convict him on this basis as it had already convicted him of genocide under Article 7(1) of the ICTY Statute for his participation in the Srebrenica JCE. *See* Trial Judgement, paras. 5850, 6001. Furthermore, the Trial Chamber declined to convict Karadžić of murder as a crime against humanity under Article 7(3) of the ICTY Statute having determined that such a conviction would be impermissibly cumulative as he was also convicted for extermination as a crime against humanity on the same basis. *See* Trial Judgement, paras. 5607-5621, 5851, 6022-6024, n. 20574.
[1731] Trial Judgement, para. 5837, *referring to* Sections IV.C.1.d.v.A, IV.C.1.d.v.B. *See also* Trial Judgement, para. 5120.
[1732] Trial Judgement, para. 5837, *referring to* Section IV.C.1.e.iv.A.
[1733] Trial Judgement, para. 5837, *referring to* Section IV.C.1.e.iv.D.
[1734] Trial Judgement, paras. 5286, 5837, *referring to* Section IV.C.1.e.iv.C, para. 5233.
[1735] Trial Judgement, para. 5837. *See also* Trial Judgement, Section IV.C.1.e.v.B.
[1736] Trial Judgement, paras. 5839, 5840. The Appeals Chamber notes that Krstić was prosecuted at trial on the basis that Drina Corps troops, who were subordinate to him, carried out executions of Bosnian Muslims at Potočari, Jadar River, and Kravica Warehouse, and that these allegations were not proven beyond reasonable doubt. *See, e.g., Krstić* Trial Judgement, paras. 155, 200, 215, 623. Furthermore, the Appeals Chamber of the ICTY reversed findings that members of the Bratunac Brigade from the Drina Corps executed detainees at Branjevo Military Farm and the Pilica Cultural Dom on 16 July 1995. *Krstić* Appeal Judgement, para. 70. *See also Krstić* Appeal Judgement, para. 77.

the Bosnian Serb forces had killed hundreds of Bosnian Muslim detainees who had been in their custody following the fall of the Srebrenica enclave.[1738] On this basis, it found that Karadžić possessed sufficiently alarming information to justify further inquiry into whether other unlawful acts had been committed.[1739] It therefore found that Karadžić knew that crimes had been committed in the aftermath of the fall of Srebrenica and had reason to know that other crimes had also been committed.[1740]

636. The Trial Chamber also found that, once Karadžić became aware of the large-scale killings which had just occurred, not only did he take no steps to remove the perpetrators from service, but he joined in the killing aspect of the plan to eliminate.[1741] It therefore concluded that, in light of all the evidence, Karadžić had failed to punish his subordinates for the killings which had occurred prior to the point at which he joined the Srebrenica JCE on the evening of 13 July 1995.[1742]

637. Karadžić submits that the Trial Chamber erred in finding that he knew of the killings that occurred on 13 July 1995 and by convicting him as a superior in connection with them.[1743] Specifically, he submits that neither Deronjić nor Witness Kovač had informed him of the Kravica warehouse killings, their scale or criminal nature, or that no investigation would follow, and that the Trial Chamber failed to provide a reasoned opinion on the nature of the information conveyed by Deronjić to Karadžić and erred in excluding the reasonable inference that the relevant incident was not described by either Deronjić or Kovač in a way that could trigger Karadžić's obligation to punish the perpetrators.[1744] He also maintains that the Trial Chamber made no finding to the effect that Karadžić or Deronjić were aware of the other killing incidents and that therefore Karadžić cannot be held responsible for failing to punish the perpetrators for crimes he did not know about.[1745] Karadžić also argues that the Trial Chamber erred by inferring that, in his position as President, he knew or had reason to know of the crimes committed by his subordinates on 13 July

[1737] Trial Judgement, paras. 5841, 5842.
[1738] Trial Judgement, para. 5843.
[1739] Trial Judgement, para. 5843.
[1740] Trial Judgement, para. 5848.
[1741] Trial Judgement, para. 5845.
[1742] Trial Judgement, para. 5847.
[1743] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 782-798.
[1744] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 786, 789-794; Karadžić Reply Brief, para. 236. *See also* T. 24 April 2018 pp. 252, 253. Karadžić relies in support of his submission that the information may have been presented to him in a way that was not sufficiently alarming on evidence that, in his view suggests that: (i) Witness Ljubisav Simić did not know what Deronjić had told Karadžić about the incident, or even if Deronjić had spoken to Karadžić in Pale (*referring to* T. 16 April 2013 p. 37310); (ii) Witness Kovač had not seen any bodies when passing the Kravica warehouse (*referring to* T. 1 November 2013 pp. 42778, 42779); and (iii) the incident at the Kravica warehouse was seen at the time as a spontaneous response to an escape attempt by the prisoners (*referring to* T. 9 February 2012 p. 24413, T. 10 February 2012, p. 24506, Exhibits D3115, para. 40, D3126, para. 59, D3398, para. 79). *See* Karadžić Reply Brief, para. 237.

1995, when, in fact, his position would have made it less likely for him to have received information related to these crimes.[1746]

638. The Prosecution responds that the Trial Chamber correctly convicted Karadžić under Article 7(3) of the ICTY Statute in connection with killings committed prior to his adoption of the expanded plan to kill the Bosnian Muslim males and that the finding that he had sufficient notice of the killings at the relevant time was adequately explained, supported by the evidential record, and reasonable in light of Karadžić's involvement in the broader killing operation and events in Srebrenica.[1747] The Prosecution also submits that the Trial Chamber correctly applied the *mens rea* standard for liability under Article 7(3) of the ICTY Statute, given the Trial Chamber's finding that Karadžić's knowledge of the killing of hundreds of Bosnian Muslims at the Kravica warehouse by his subordinates was sufficiently alarming to justify inquiring into the possibility of other crimes.[1748]

639. In addition, the Prosecution argues that the Trial Chamber did not presume Karadžić's knowledge on the basis of his position as President but determined he had sufficient knowledge based on information he received about the killing operation.[1749] In its view, Karadžić's suggestion that special rules should apply to presidents ignores the *mens rea* requirements of Article 7(3) of the ICTY Statute, which apply regardless of an accused's position.[1750]

640. With regard to Karadžić's submission that the Trial Chamber erred in finding that he knew of the killings that occurred on 13 July 1995,[1751] the Appeals Chamber notes that Karadžić misrepresents the Trial Chamber's impugned finding. In particular, the Trial Chamber found that Karadžić knew about the Kravica warehouse killings and had reason to know that other killings had also been committed.[1752] Contrary to Karadžić's submission,[1753] the Trial Chamber was not required to find that Karadžić knew about the other killings that occurred on 13 July 1995. Its finding that he

[1745] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, para. 795; Karadžić Reply Brief, paras. 233-235, *referring to Bizimungu* Appeal Judgement, paras. 146, 252; *Ndindiliyimana et al.* Appeal Judgement, para. 396; *Orić* Appeal Judgement, paras. 59-60.
[1746] Karadžić Notice of Appeal, p. 14; Karadžić Appeal Brief, paras. 787, 788, 797, *referring to The United States of America v. Wilhelm von Leeb et al.*, US Military Tribunal Nuremberg, Trial Judgement, 27 October 1948 ("the *High Command* case"). Specifically, Karadžić argues that special caution is warranted when applying the principles of superior responsibility to a president and relies on the *High Command* case to argue that "[a] high commander cannot keep completely informed of the details of military operations of subordinates", "[h]e has the right to assume that details entrusted to responsible subordinates will be legally executed", and there "must be a personal neglect amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence." *See* Karadžić Appeal Brief, para. 787.
[1747] Prosecution Response Brief, paras. 463-465, 468-474. *See also* T. 23 April 2018 pp. 203-218.
[1748] Prosecution Response Brief, paras. 466, 467, 469.
[1749] Prosecution Response Brief, para. 467.
[1750] Prosecution Response Brief, para. 467.
[1751] Karadžić Appeal Brief, paras. 782, 783, 785, 795. *See also* Karadžić Reply Brief, para. 233.
[1752] Trial Judgement, paras. 5843, 5848.

possessed information putting him on notice of other possible killings by his subordinates sufficed to show that he had reason to know about them and for finding him responsible for them as a superior.[1754]

641. The Trial Chamber concluded that Karadžić knew of the large-scale Kravica warehouse killings by the day after they were committed by relying on its finding that he became aware of the expansion of the plan to eliminate to include the killing of Bosnian Muslim men and boys of Srebrenica sometime before the evening of 13 July 1995 and that he was specifically informed about the Kravica warehouse killings by Deronjić at least by the time they met on 14 July 1995.[1755] The Appeals Chamber has already dismissed Karadžić's submission that the Trial Chamber erred in finding that Deronjić had informed Karadžić of the Kravica warehouse killings at their meeting on 14 July 1995.[1756] It has also rejected his submission that the Trial Chamber erred in finding that Witness Kovač had informed him of the relevant events in Srebrenica.[1757] In claiming that he was not informed of the scale or criminal nature of the killings and had no reason to know about them, Karadžić merely disagrees with the Trial Chamber's findings and evaluation of the relevant evidence without demonstrating error.

642. The Appeals Chamber also dismisses Karadžić suggestion that the Trial Chamber failed to provide a reasoned opinion with respect to these findings. The Trial Chamber described the underlying factual findings and evidence on the record on which it relied to conclude that Karadžić had discussed the killings at the Kravica warehouse with Deronjić.[1758] In addition, Karadžić's claim that the Trial Chamber should have entertained the inference that the incident was not described to him in a way triggering his obligation to investigate and punish the perpetrators is neither persuasive nor reasonable on the basis of the record. In particular, his suggestion cannot be reconciled with the Trial Chamber's finding that it was "inconceivable", given the evidence demonstrating his interest in the unfolding events in Srebrenica, as well as on the proper functioning of the communication capacities between the various forces under his control, that information on the killing aspect of the plan would have been withheld from him by members of his

[1753] Karadžić Appeal Brief, para. 795.
[1754] Trial Judgement, para. 5843. *See Čelebići* Appeal Judgement, paras. 238 ("[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'"), 241 ("a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates"). *See also Prlić et al.* Appeal Judgement, para. 3174; *Blaškić* Appeal Judgement, para. 62; *Bagilishema* Appeal Judgement, para. 42.
[1755] Trial Judgement, para. 5843, *referring to* Trial Judgement, paras. 5808, 5811.
[1756] *See supra* paras. 602-609.
[1757] *See supra* paras. 610, 612.
[1758] *See* Trial Judgement, para. 5808 and references cited therein.

staff.[1759] Karadžić also fails to refer to any reliable evidence supporting the scenario that his subordinates omitted reporting to him the large-scale nature of the killings at the warehouse.[1760] As noted above, the Appeals Chamber finds that the Trial Chamber correctly determined that the receipt of information about the killing of 755 to 1,016 Bosnian Muslim men detained by forces under his control at the Kravica warehouse sufficed to trigger his obligation to investigate this and other related crimes in Srebrenica and punish the perpetrators.

643. Karadžić's contention that the Trial Chamber presumed he knew of crimes simply because he was "President" is also unpersuasive.[1761] The Trial Chamber assessed the specific circumstances and, as noted above, found that Karadžić knew of the large-scale killings that took place at the Kravica warehouse and reasonably determined that he had reason to know of other killings perpetrated by his subordinates.[1762] Karadžić fails to demonstrate any error in this respect.

644. In light of the above, the Appeals Chamber finds that Karadžić fails to demonstrate any error in the Trial Chamber's assessment of his *mens rea* for the purposes of finding him responsible as a superior in connection with the killings that occurred prior to Karadžić's agreement to the expansion of the means of eliminating the Bosnian Muslims in Srebrenica on 13 July 1995. Based on the foregoing, the Appeals Chamber dismisses Grounds 42 and 43 of Karadžić's appeal.

[1759] Trial Judgement, para. 5802.
[1760] Karadžić's reliance on Witness Kovač's denial of informing Karadžić about the killings (*see* Karadžić Appeal Brief, paras. 792, 793; T. 24 April 2018 p. 252) is unpersuasive given the Trial Chamber's findings on this witness's credibility. *See supra* paras. 610, 612.
[1761] The Appeals Chamber finds that the *High Command* case, on which Karadžić relies for the purpose of suggesting it was less likely that he would have been informed about crimes committed by his subordinates, is inapposite in view of the record the Trial Chamber relied upon to establish that he was, in fact, aware of the Kravica warehouse killings.
[1762] Trial Judgement, paras. 5801, 5802, 5804-5808, 5843. *See also* Trial Judgement, para. 585, *referring to Krnojelac* Appeal Judgement, para. 156, *Čelebići* Appeal Judgement, para. 239.

E. Hostage-Taking

1. Alleged Errors in Convicting Karadžić for Hostage-Taking (Grounds 44 and 45)

645. The Trial Chamber found that, between 25 May and 18 June 1995, the Hostages JCE existed with the common purpose of taking UNPROFOR and UNMO personnel ("UN Personnel") hostage in order to compel NATO to abstain from conducting air strikes against Bosnian Serb targets.[1763] It found that members of the Hostages JCE, which included Karadžić, Mladić, Krajišnik, and Manojlo Milovanović, implemented the common purpose themselves or by using members of the Bosnian Serb forces of the VRS and the MUP to act in furtherance of the common purpose.[1764] Specifically, the Trial Chamber found that, on 25 and 26 May 1995, following the NATO air strikes on Bosnian Serb military targets, the Bosnian Serb forces detained over 200 UN Personnel, took them to various locations including those of military significance, and threatened to harm, kill, or continue to detain them unless NATO ceased air strikes.[1765] The Trial Chamber further found that these threats were communicated to the detained UN Personnel as well as to UNPROFOR and UNMO headquarters.[1766] The Trial Chamber concluded that Karadžić significantly contributed to the Hostages JCE as "the driving force" and "active participant" in every aspect of the events and that he shared the common purpose and intent of the crime of hostage-taking along with other members of the Hostages JCE.[1767] The Trial Chamber convicted Karadžić under Count 11 of the Indictment for the crime of hostage-taking as a violation of the laws or customs of war, pursuant to his participation in the Hostages JCE.[1768]

646. Karadžić submits that the Trial Chamber erred in finding that he shared the common purpose and intent to commit hostage-taking as: (i) there was no evidence that he issued or approved threats to kill or injure the UN Personnel; and (ii) the UN Personnel were lawfully detained.[1769] The Appeals Chamber addresses these contentions in turn.

(a) Threats to Kill or Injure UN Personnel

647. In assessing whether Karadžić shared the common purpose of the Hostages JCE, the Trial Chamber found that Karadžić's own statements, acts, and conduct amounted to threats to injure, kill, or continue the detention of the UN Personnel and that the only reasonable inference based on the evidence was that he intended to detain the UN Personnel and issue threats while they were

[1763] Trial Judgement, paras. 5937, 5962.
[1764] Trial Judgement, para. 5962.
[1765] Trial Judgement, paras. 5937, 5941, 5944, 5945, 5951.
[1766] Trial Judgement, paras. 5937, 5944, 5946, 5961, 5970.
[1767] Trial Judgement, paras. 5973, 5992.
[1768] Trial Judgement, paras. 5951, 5993, 6010.

detained in order to stop further NATO air strikes.[1770] The Trial Chamber also found that Karadžić knew and approved the threats made by Mladić, Jovan Zametica, and others.[1771]

648. Karadžić submits that the Trial Chamber's finding that he intended to issue threats to injure or kill the UN Personnel was unsupported by evidence.[1772] He contends that the Trial Chamber failed to provide a reasoned opinion or give sufficient weight to the evidence that he ordered the VRS to treat the UN Personnel with "military respect".[1773] He further argues that the Trial Chamber erroneously characterized his acts, statements, and orders as "threats" despite the absence of "the communication of intention to harm".[1774] Karadžić asserts that the Trial Chamber erred in finding that he intended to issue threats on the basis of his statement that "any attempt to liberate [the UN Personnel] would be a slaughter", ignoring the reasonable inference that the statement refers to "casualties that would be taken by forces that might be sent to liberate them".[1775] He also submits that there is no evidence that he knew or approved threats made by Mladić or other VRS members.[1776]

649. The Prosecution responds that Karadžić's arguments ignore relevant evidence, findings, and legal authorities and fail to demonstrate that the Trial Chamber erred in concluding that he threatened to injure and kill the UN Personnel.[1777]

650. Karadžić replies that no express or implied threats of death or injury could be attributed to him.[1778]

651. The Appeals Chamber recalls that the Trial Chamber did not rely on threats issued by Karadžić when establishing the *actus reus* of the crime of hostage-taking.[1779] However, in assessing whether Karadžić shared the common purpose of the Hostages JCE, the Trial Chamber concluded

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[1769] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805-826.
[1770] Trial Judgement, paras. 5969-5973. *See also* Trial Judgement, paras. 5964-5968.
[1771] Trial Judgement, paras. 5961, 5970-5972.
[1772] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805-813. *See also* Karadžić Reply Brief, paras. 242-249, 253.
[1773] Karadžić Appeal Brief, paras. 806, 807.
[1774] Karadžić Appeal Brief, paras. 808-811, *referring to* The Oxford English Dictionary J. A. Simpson, E. S. C. Weiner, (Oxford University Press, 1989), Black's Law Dictionary 1480 (6th ed. 1990), State of California, Penal Code, Section 422, Criminal Code of Canada (R.S.C. 1985, c. C-46 as Amended), Section 264(1), Indian Evidence Act, 1872, (Act No. 1 of 1872), Chapter II, Section 24. Specifically, Karadžić contends that the order that the UN Personnel be placed at potential NATO targets does not constitute a threat. *See* Karadžić Appeal Brief, paras. 808, 811. *See also* Karadžić Reply Brief, paras. 244, 245.
[1775] Karadžić Appeal Brief, para. 812. Karadžić contends that the Trial Chamber misquoted him as he stated: "any attempt to liberate them **by force** would end in catastrophe. It would be a slaughter." *See* Karadžić Reply Brief, paras. 246-248.
[1776] Karadžić Appeal Brief, para. 813. *See also* Karadžić Reply Brief, para. 249.
[1777] Prosecution Response Brief, paras. 480-486.
[1778] Karadžić Reply Brief, paras. 242-250, 253.
[1779] *See supra* para. 62.

that Karadžić issued and intended to issue threats against the UN Personnel on the basis, *inter alia*, that Karadžić: (i) stated in a television interview that any attempt to liberate the UN Personnel would "end in catastrophe" and that it "would be a slaughter";[1780] (ii) in the same interview, threatened to escalate the Bosnian Serb response if the UN ordered more NATO air strikes;[1781] (iii) warned UNPROFOR that he would treat UN soldiers "as enemies" if NATO conducted air strikes;[1782] (iv) ordered Milovanović to activate the decision ordering the VRS to "arrest everything foreign in RS territory" and to treat military personnel as prisoners of war and "hold them as hostages";[1783] and (v) approved Milovanović's order to place detained UN Personnel at strategic locations of potential targets of the air strikes.[1784] In discussing the last point, the Trial Chamber referred to its detailed discussion about the content of this order, expressly quoting the instruction that the detainees were to be treated with military respect.[1785] Despite the evidence that Karadžić approved the order which contained this instruction, in light of the other factors taken into account by the Trial Chamber, the Appeals Chamber finds that Karadžić does not demonstrate that the Trial Chamber erred in concluding that he issued and intended to issue threats to injure, kill, or continue to detain the UN Personnel when assessing whether he shared the common purpose of the Hostages JCE. Specifically, Karadžić does not demonstrate that the Trial Chamber failed to give sufficient weight to the evidence that he approved the order to place detained UN Personnel at strategic locations of potential targets of the air strikes which contained the instruction that the UN Personnel were to be "treated properly with military respect" or that it did not provide a reasoned opinion.

652. The Appeals Chamber further considers unpersuasive Karadžić's argument that the Trial Chamber erred in concluding that he intended not only to detain UN Personnel, but also to issue threats to injure or kill them when it had heard no evidence of such threats or of any "communication of intention to harm". The Appeals Chamber recalls that the Trial Chamber concluded that Bosnian Serb forces detained UN Personnel following the NATO air strikes and relied upon Karadžić's approval of the order that UN Personnel be placed at potential targets, his statements that they should be held as hostages and that any attempt to liberate them "would be a slaughter", and his threats to escalate the Bosnian Serb response and treat UN Personnel as enemies if the UN ordered more NATO air strikes.[1786] The Appeals Chamber finds that Karadžić does not demonstrate that the Trial Chamber erred in concluding that his acts, statements, and orders were sufficient to demonstrate that he shared the common purpose of the Hostages JCE.

[1780] Trial Judgement, para. 5967.
[1781] Trial Judgement, para. 5967.
[1782] Trial Judgement, paras. 5964, 5965.
[1783] Trial Judgement, para. 5965.
[1784] Trial Judgement, para. 5966.
[1785] Trial Judgement, para. 5966, *referring to* Trial Judgement, para. 5860, Exhibit P2137.
[1786] Trial Judgement, paras. 5937, 5941, 5944, 5945, 5951, 5964-5967.

653. The Appeals Chamber turns to Karadžić's contention that there was no evidence supporting the Trial Chamber's finding that he knew or approved threats made by Mladić or other VRS members.[1787] The Trial Chamber found that Mladić, Zametica, and Krajišnik, who were Karadžić's "close subordinates", issued threats, made public statements, and showed videos of the UN Personnel being threatened, detained, and handcuffed in locations of potential NATO air strikes.[1788] The Trial Chamber concluded that given their relationship, the only reasonable inference is that Karadžić knew and approved these threats.[1789] In this respect, the Appeals Chamber recalls that the Trial Chamber found that: (i) Karadžić had the authority to control Mladić as the commander of the VRS, Karadžić and Mladić had a "superior and subordinate relationship within the chain of command", and Karadžić had *de jure* control over Mladić which was exercised "in fact" throughout the conflict;[1790] (ii) Krajišnik was considered Karadžić's "closest associate", shared a position of leadership with Karadžić in "The Presidency" of the Serbian Republic of Bosnia and Herzegovina, and communicated frequently with Karadžić who often sought his advice during negotiations;[1791] and (iii) Zametica was Karadžić's political and personal advisor who was privy to "everything that was important" in the Presidency and communicated with the international community on behalf of Karadžić.[1792] In view of these findings, the Appeals Chamber concludes that Karadžić does not demonstrate that the Trial Chamber erred in finding that, on the basis of Karadžić's relationship with Mladić, Zametica, and Krajišnik, the only reasonable inference is that he knew of and approved these threats. This conclusion is further supported by the Trial Chamber's finding that the threats were communicated in public.[1793]

654. Therefore, the Appeals Chamber finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that he shared the common purpose of the Hostages JCE and intended for threats to be issued against the UN Personnel in order to stop further NATO air strikes.

(b) Detention of UN Personnel

655. The Trial Chamber rejected Karadžić's argument that the UN Personnel were not protected under Common Article 3 because they were persons taking active part in the hostilities.[1794] It found that the UN Personnel were not persons taking active part in the hostilities as the UN and its peacekeeping forces were not a party to the conflict and that NATO's involvement in the conflict

[1787] Karadžić Appeal Brief, para. 813.
[1788] Trial Judgement, paras. 5961, 5970, 5972.
[1789] Trial Judgement, para. 5972.
[1790] Trial Judgement, paras. 3116, 3130, 3141, 3266-3268. *See also* Trial Judgement, paras. 5957, 5972, 5976, 5986, 5991.
[1791] Trial Judgement, paras. 3240-3245. *See also* Trial Judgement, paras. 5984, 5985.
[1792] Trial Judgement, paras. 4817, 4924, 5911, 5971.
[1793] Trial Judgement, paras. 5961, 5970.

did not change their status.[1795] The Trial Chamber further found that, even if the UN Personnel had been combatants prior to their detention, they were rendered *hors de combat* by virtue of their detention.[1796] Accordingly, it concluded that the UN Personnel were entitled to the protections under Common Article 3 which includes the prohibition against hostage-taking.[1797]

656. Karadžić submits that the Trial Chamber erred in law in not finding that unlawful detention is an element of hostage-taking.[1798] He argues that when involving a threat of continued detention, the crime of hostage-taking presupposes the detention to be unlawful,[1799] and that the Trial Chamber erred in convicting him of hostage-taking on this basis since the UN Personnel were lawfully detained as prisoners of war.[1800] He contends that their detention was lawful as UN peacekeepers are not at all times *hors de combat* and that the NATO air strikes rendered the UN Personnel combatants or otherwise persons taking direct part in hostilities.[1801]

657. The Prosecution responds that the UN Personnel were unlawfully detained and that, in any event, unlawful detention is not an element of hostage-taking.[1802] The Prosecution argues that irrespective of the status of the UN Personnel, their detention was unlawful in light of the purpose of or their treatment in detention.[1803] It contends that Karadžić ignores or misinterprets relevant authorities and fails to demonstrate any error.[1804]

658. Karadžić replies that the Prosecution essentially agrees that a threat for continued detention, rather than the detention itself, must be unlawful.[1805] He further opposes the contention that the lawfulness of detention depended on the treatment of detainees.[1806]

[1794] Trial Judgement, paras. 5942, 5943.
[1795] Trial Judgement, para. 5943.
[1796] Trial Judgement, para. 5943.
[1797] Trial Judgement, para. 5943.
[1798] *See* Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 820-825.
[1799] Karadžić Appeal Brief, paras. 820-825, *referring to, inter alia*, Decision of 28 April 2009, para. 65, International Committee of the Red Cross, Commentary on Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), 12 August 1949, 75 UNTS 287 (1958), The 1949 Geneva Conventions: A Commentary (Andrew Clapham, Paola Gaeta, and Marco Sassoli, eds., Oxford University Press, 2015), pp. 309-311, Article 191(1) of the Criminal Code of the Federation of Bosnia and Herzegovina, 2003, Bosnia and Herzegovina Official Gazette 3/03 with amendments to the Law as published in "Official Gazette of BiH" no. 32/03, 37/03 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15.
[1800] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 805, 814, 820, 822, 825. *See also* Karadžić Reply Brief, paras. 250-253.
[1801] Karadžić Notice of Appeal, p. 15; Karadžić Appeal Brief, paras. 815-820.
[1802] Prosecution Response Brief, paras. 487-490.
[1803] Prosecution Response Brief, paras. 489, 490. The Prosecution points to the Trial Chamber's findings that the UN Personnel were used as human shields and were subjected to death threats, physical abuse, and poor detention conditions. *See* Prosecution Response Brief, para. 489, *referring to* Trial Judgement, paras. 5857, 5860, 5872, 5874-5877, 5880, 5881, 5890, 5893-5896, 5899, 5905, 5909, 5910, 5914-5921, 5961, 5971, 5979, 5981.
[1804] Prosecution Response Brief, para. 487.
[1805] Karadžić Reply Brief, para. 251.
[1806] Karadžić Reply Brief, para. 252.

659. The Appeals Chamber recalls the absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention.[1807] In this respect, the ICTY Appeals Chamber had previously dismissed Karadžić's submission that the UN Personnel were not entitled to protection under Common Article 3.[1808] In the Decision of 11 December 2012, the ICTY Appeals Chamber explained that "[t]he fact that detainees are considered *hors de combat* does not render their detention unlawful in itself. Rather, their *hors de combat* status triggers Common Article 3's protections, including the prohibition on their use as hostages."[1809] Therefore, whether the detention of the UN Personnel was lawful or not would have no bearing on the applicability of the prohibition on hostage-taking under Common Article 3. Consequently, the Appeals Chamber dismisses Karadžić's argument that the Trial Chamber erred in not considering unlawful detention to be an element of hostage-taking. In light of these considerations, the Appeals Chamber finds it unnecessary to address Karadžić's remaining contentions.

660. The Appeals Chamber therefore finds that Karadžić has failed to demonstrate that the Trial Chamber erred in finding that the prohibition on hostage-taking applies to the UN Personnel in this case.

661. In light of the foregoing, the Appeals Chamber dismisses Grounds 44 and 45 of Karadžić's appeal.

[1807] *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 ("Decision of 11 December 2012"), paras. 16, 21; Decision of 9 July 2009, para. 22.

[1808] *See* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21. Common Article 3 provides, in relevant parts:

> (1) Persons 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 sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex birth or wealth or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) […]
> (b) taking of hostages; […]

[1809] Decision of 11 December 2012, para. 20.

IV. THE APPEAL OF THE PROSECUTION

A. Alleged Errors in Defining the Scope of the Common Purpose of the Overarching JCE (Ground 1)

662. The Trial Chamber found that, between October 1991 and 30 November 1995, Karadžić and other members of the Bosnian Serb leadership participated in the Overarching JCE, the aim of which was to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory and create an ethnically pure and contiguous Bosnian Serb state, through the crimes of deportation, inhumane acts (forcible transfer), and persecution through the underlying acts of forcible transfer, deportation, unlawful detention, and the imposition and maintenance of restrictive and discriminatory measures.[1810] The Trial Chamber also found that Karadžić and the other members of the Overarching JCE shared the intent for each of these crimes.[1811] The Trial Chamber thus convicted Karadžić pursuant to Article 7(1) of the ICTY Statute on the basis of the first form of joint criminal enterprise liability for each of these crimes.[1812]

663. With respect to other proven acts of persecution charged in Count 3 of the Indictment,[1813] as well as the crimes of murder and extermination as charged in Counts 4, 5, and 6 of the Indictment, the Trial Chamber found the evidence insufficient to demonstrate as the only reasonable inference that these crimes were included in the common plan or intended by Karadžić ("Excluded Crimes").[1814] Specifically, the Trial Chamber found that another reasonable inference available on the evidence was that, while Karadžić did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.[1815] However, in light of "the nature of the common plan and the manner in which it was carried out" as well as the information available to Karadžić prior to and during the execution of the common plan, the Trial Chamber concluded that Karadžić could foresee that the Serb forces might commit these crimes during and after the take-overs in the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1816] It determined that Karadžić's continued participation in the Overarching JCE until 1995 demonstrated that he acted in

[1810] Trial Judgement, paras. 3447, 3452, 3462-3466.
[1811] Trial Judgement, paras. 3447, 3452, 3462-3466.
[1812] Trial Judgement, para. 3524.
[1813] These include persecution through killings, cruel and/or inhumane treatment (through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, and the establishment and perpetuation of inhumane living conditions in detention facilities), forced labour at the frontline, the use of non-Serbs as human shields, the appropriation or plunder of property, and the wanton destruction of private property, including cultural and sacred sites. Trial Judgement, paras. 3512, 3521.
[1814] Trial Judgement, paras. 3466, 3512, 3521.
[1815] Trial Judgement, para. 3466.
[1816] Trial Judgement, paras. 3515, 3520, 3522.

furtherance of the common plan with the awareness of the possibility that the Excluded Crimes might be committed either by other members of the joint criminal enterprise or Serb forces who were used by him or other members, and that he willingly took that risk.[1817] It thus convicted Karadžić pursuant to Article 7(1) of the ICTY Statute on the basis of the third form of joint criminal enterprise liability for each of the Excluded Crimes.[1818]

664. The Prosecution submits that the Trial Chamber erred in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE and therefore erroneously found Karadžić liable for the Excluded Crimes pursuant to the third category, rather than the first category of joint criminal enterprise, which further led to "a flawed genocidal intent analysis".[1819] The Prosecution requests that the Excluded Crimes be reclassified as crimes committed pursuant to the first form of joint criminal enterprise, that Karadžić's genocidal intent under Count 1 of the Indictment be re-evaluated in this light and a conviction be entered in this respect, and that Karadžić's sentence be increased to reflect both the reclassification of his conviction under the first form of joint criminal enterprise and the Count 1 conviction.[1820]

665. Specifically, the Prosecution submits that the Trial Chamber: (i) erred in law by concluding that the other reasonable inference foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes;[1821] or (ii) erred in fact as its findings on Karadžić's and other members' of the joint criminal enterprise policies, objectives, knowledge, and conduct as well as on the implementation of the common purpose lead to the only reasonable conclusion that the Excluded Crimes formed part of the common purpose and that Karadžić shared the intent for them.[1822] The Appeals Chamber will address these contentions in turn.

1. Alleged Error in Law

666. The Prosecution submits that the Trial Chamber erred by concluding that another reasonable inference to a finding that Karadžić intended the Excluded Crimes was that he "did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Municipalities."[1823] The Prosecution asserts that the Trial Chamber adopted this conclusion despite noting that it had considered that Karadžić had received information about the commission of the

[1817] Trial Judgement, para. 3522.
[1818] Trial Judgement, paras. 3521, 3524.
[1819] Prosecution Notice of Appeal, paras. 3, 4; Prosecution Appeal Brief, paras. 4, 14, 47. *See also* T. 24 April 2018 pp. 281-286.
[1820] Prosecution Notice of Appeal, para. 8; Prosecution Appeal Brief, paras. 45, 46, 48. *See also* Prosecution Reply Brief, para. 16.
[1821] Prosecution Appeal Brief, paras. 12, 16.
[1822] Prosecution Appeal Brief, paras. 13, 19, 20.
[1823] Prosecution Appeal Brief, paras. 12, 15-17; T. 24 April 2018 pp. 284, 285.

Excluded Crimes by the Serb forces throughout the conflict and that he continued to act in furtherance of the common plan.[1824] The Prosecution contends that this alternative inference is consistent with shared intent and the Trial Chamber erred by concluding that it foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes.[1825] The Prosecution argues that the Trial Chamber failed to assess whether Karadžić's willingness to pursue the common purpose with the knowledge that it entailed the commission of the Excluded Crimes reflected his shared intent.[1826]

667. Karadžić responds that the Prosecution fails to show that the Trial Chamber committed a legal error in identifying another reasonable inference.[1827] He submits that the Trial Chamber applied the correct legal standard and did not foreclose the possibility of shared intent for the Excluded Crimes, rather, it considered whether he had intended the Excluded Crimes and concluded that, in light of all the evidence, a finding of intent was not the only reasonable one available.[1828] Karadžić adds that the Trial Chamber's finding that he "did not care enough to stop pursuing the common plan" does not equate to being "willing to pursue the common purpose" as ambivalence or passive acquiescence is not the same as willingness.[1829] He also argues that the Prosecution's submission that foreseeability and inaction amount to intent undermines the intent requirement for liability under the first form of joint criminal enterprise and would result in a finding of intent for every foreseeable crime.[1830]

668. The Prosecution replies that the Trial Chamber did not find that Karadžić was "ambivalent" about or passively acquiesced to the Excluded Crimes, but rather that he did not care enough about them.[1831] It contends that Karadžić ignores the Trial Chamber's findings about his active and persistent contributions to the joint criminal enterprise that demonstrate his "volition" in respect of these crimes.[1832]

669. The Trial Chamber observed that, when the Prosecution relied upon proof of a certain fact, such as the state of mind of the accused by inference, it considered whether that inference was the only reasonable inference that could have been made based on the evidence and that, where that

[1824] Prosecution Appeal Brief, para. 15; T. 24 April 2018 p. 284.
[1825] Prosecution Appeal Brief, paras. 12, 16; T. 24 April 2018 pp. 284, 285.
[1826] Prosecution Appeal Brief, para. 17; Prosecution Reply Brief, para. 7.
[1827] Karadžić Response Brief, paras. 15-28. *See also* T. 24 April 2018 pp. 296-298.
[1828] Karadžić Response Brief, paras. 16, 17, 26, 27, *referring to* Trial Judgement, para. 3466. *See also* Karadžić Response Brief, paras. 23-25; T. 24 April 2018 p. 297.
[1829] Karadžić Response Brief, paras. 18-21, 28. Karadžić further submits that the Trial Chamber performed the assessment the Prosecution claims that it failed to do and concluded that the evidence reflected ambivalence and not intent towards the means of achieving the agreed plans. *See* Karadžić Response Brief, paras. 24, 25.
[1830] Karadžić Response Brief, para. 22.
[1831] Prosecution Reply Brief, paras. 5, 6, 13; T. 24 April 2018 pp. 284, 285.
[1832] Prosecution Reply Brief, paras. 6, 7, 13, 14. *See also* T. 24 April 2018 pp. 281-285.

inference was not the only reasonable one, it found that the Prosecution had not proved its case.[1833] The Appeals Chamber finds that the Trial Chamber correctly set out the applicable law.[1834]

670. With respect to the Excluded Crimes, the Trial Chamber identified what, in its view, constituted another reasonable inference available on the evidence.[1835] In so concluding, the Trial Chamber noted that it had considered not only the evidence of Karadžić's intent for the crimes he was convicted of pursuant to the first form of joint criminal enterprise liability, but also evidence showing that Karadžić had received information about the perpetration of crimes committed by Serb forces against non-Serbs throughout the conflict, including certain Excluded Crimes, and continued to act in furtherance of the common plan. For instance, the Trial Chamber considered that Serb forces had killed approximately 45 non-Serb civilians in Bijeljina in April 1992 and approximately 200 non-Serb detainees at Korićanske Stijene in August 1992.[1836] In the Trial Chamber's view, these findings were consistent with the inference that "while [Karadžić] did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Municipalities".[1837] It therefore concluded that, while the Excluded Crimes resulted from the campaign to forcibly remove the non-Serb population from the Overarching JCE Municipalities, these crimes were not intended as part of the common plan.[1838]

671. Thus, contrary to the Prosecution's submission, the Trial Chamber did examine whether Karadžić intended the Excluded Crimes based on his knowledge of them and continued participation in the joint criminal enterprise but found that its findings and underlying evidence were consistent with intent pursuant to the third form of joint criminal enterprise, namely the willingness to pursue the common purpose with the understanding that the Excluded Crimes might be committed during and after the take-overs of the Overarching JCE Municipalities and the campaign to forcibly remove non-Serbs.[1839] In this respect, the Trial Chamber found that the Excluded Crimes "resulted from the campaign to forcibly remove the non-Serb population from the Municipalities" but that they were not "an intended part of the common plan".[1840] Rather, "[b]ased on the nature of the common plan and the manner in which it was carried out", it was "foreseeable to [Karadžić] that Serb Forces might commit violent and property-related crimes against non-Serbs during and after the take-overs in the Municipalities and the campaign to forcibly remove non-

[1833] Trial Judgement, para. 10, *referring to Vasiljević* Appeal Judgement, para. 120.
[1834] *See also Šainović et al.* Appeal Judgement, para. 995; *Rukundo* Appeal Judgement, para. 235.
[1835] Trial Judgement, para. 3466.
[1836] Trial Judgement, para. 3466.
[1837] Trial Judgement, para. 3466.
[1838] Trial Judgement, para. 3466.
[1839] Trial Judgement, paras. 3466, 3515.

Serbs."[1841] Viewed in this context, the Appeals Chamber is not persuaded by the Prosecution's argument that the Trial Chamber failed to consider that Karadžić could possess the *mens rea* for the Excluded Crimes based on his knowledge of them and his continued participation in the Overarching JCE. To the contrary, the Trial Chamber was not convinced based on the totality of the evidence that these circumstances demonstrated that his intent for the Excluded Crimes was the only reasonable inference.[1842]

672. The Appeals Chamber recalls that, while an accused's knowledge of particular crimes combined with continued participation in the execution of the common plan from which those crimes result may be a basis to infer that he or she shared the requisite intent for the crimes in question, this does not necessarily compel such a conclusion.[1843] Whether intent can be inferred depends on all the circumstances of the case.[1844] Further, where intent is inferred from circumstantial evidence, it must be the only reasonable inference available on the evidence.[1845]

673. Based on the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution fails to demonstrate that the Trial Chamber committed a legal error in assessing whether Karadžić possessed the requisite intent for the Excluded Crimes.

2. Alleged Error of Fact

674. The Prosecution submits that the Trial Chamber erred in fact by finding that the Excluded Crimes were "merely" foreseeable consequences of the implementation of the common plan, and that based on its findings on Karadžić's and other joint criminal enterprise members' policies, objectives, knowledge, and conduct as well as on the implementation of the common purpose, the only reasonable conclusion is that the Excluded Crimes formed part of the common purpose and Karadžić shared the intent for them.[1846] The Prosecution relies in particular on the Trial Chamber's

[1840] Trial Judgement, para. 3466.
[1841] Trial Judgement, para. 3515.
[1842] In its reply, the Prosecution suggests that the Trial Chamber failed to discuss clearly relevant factors, including that Karadžić was the foremost official in *Republika Srpska*, played a leading role in the joint criminal enterprise over many years and received information about the commission of the Excluded Crimes while actively facilitating their commission as a demonstration that it erred in finding that he did not possess the intent for the Excluded Crimes. Prosecution Reply Brief, para. 7. However, the Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement. *See Stakić* Appeal Judgement, para. 47.
[1843] *See, e.g., Popović et al.* Appeal Judgement, para. 1369; *Karemera and Ngirumpatse* Appeal Judgement, para. 632; *Krajišnik* Appeal Judgement, para. 202; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273. *See also Stanišić and Simatović* Appeal Judgement, para. 81; *Đorđević* Appeal Judgement, para. 512; *Krajišnik* Appeal Judgement, para. 697; *Kvočka et al.* Appeal Judgement, para. 243.
[1844] *See, e.g., Kvočka et al.* Appeal Judgement, para. 243. *See also Popović et al.* Appeal Judgement, para. 1369; *Krajišnik* Appeal Judgement, paras. 202, 697; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273.
[1845] *See, e.g., Šainović et al.* Appeal Judgement, para. 995; *Rukundo* Appeal Judgement, para. 235; *Kvočka et al.* Appeal Judgement, para. 237; *Vasiljević* Appeal Judgement, para. 120.
[1846] *See* Prosecution Appeal Brief, paras. 13, 18-46; T. 24 April 2018 pp. 281, 306.

findings that: (i) before the outbreak of the conflict, Karadžić threatened Bosnian Muslims with the "bloodbath" and mass destruction that his forces later wrought through the mass and systematic commission of the Excluded Crimes;[1847] (ii) Karadžić and the Bosnian Serb leadership were prepared to use force and violence against Bosnian Muslims and Bosnian Croats to achieve their permanent removal and knew that violence would be necessary to achieve it;[1848] (iii) Karadžić played the most important role in preparing the structures used to violently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-targeted areas;[1849] (iv) the Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organized pattern of crimes involving, in part, the Excluded Crimes of murder, cruel treatment, sexual violence, and wanton destruction;[1850] (v) the Excluded Crimes formed part of the *actus reus* of forcible transfer and deportation and extreme violence was employed from the outset to displace non-Serbs;[1851] (vi) Karadžić was informed of the crimes committed by the Bosnian Serb forces in implementing the common purpose but did not use his authority to put an end to them and instead pursued a policy of non-punishment and rewarding the perpetrators;[1852] and (vii) Karadžić continued to pursue the common purpose for over three years without altering his policies.[1853]

675. Karadžić responds that the Prosecution's submissions rest on the incorrect assumption that the Trial Chamber found that he knew that the Excluded Crimes were a necessary or an integral component of the joint criminal enterprise.[1854] He also argues that the findings that the members of the joint criminal enterprise were "prepared to use force and violence" to achieve their objective, or knew that "a potential conflict would be extremely violent" do not equate to a finding that Karadžić knew that the Excluded Crimes were necessary to achieve the common objective, or that he possessed the intent for those crimes.[1855] In addition, Karadžić maintains that the fact the Excluded Crimes were systematic, organized, or even at the "core" of the forcible transfer and deportation

[1847] Prosecution Appeal Brief, paras. 10, 19, 21-24, 46; T. 24 April 2018 pp. 282, 306.
[1848] Prosecution Appeal Brief, paras. 10, 19, 21-24, 44, 45; T. 24 April 2018 pp. 282, 283, 285. *See also* Prosecution Reply Brief, para. 10.
[1849] Prosecution Appeal Brief, paras. 25, 26; T. 24 April 2018 p. 282.
[1850] Prosecution Appeal Brief, paras. 10, 19, 27-32, 45, 46; T. 24 April 2018, pp. 281, 283.
[1851] Prosecution Appeal Brief, paras. 10, 30-32, 45. *See also* Prosecution Reply Brief, para. 12.
[1852] Prosecution Appeal Brief, paras. 10, 19, 33-42, 45. The Prosecution adds that Karadžić's denials and deflections to reports related to the Excluded Crimes and his disingenuous portrayal of the reality on the ground "encouraged" the commission of the Excluded Crimes. Prosecution Appeal Brief, paras. 38-42; Prosecution Reply Brief, para. 13; T. 24 April 2018 pp. 283, 284, 306-308, 310.
[1853] Prosecution Appeal Brief, paras. 10, 43. *See also* Prosecution Reply Brief, para. 14; T. 24 April 2018 pp. 283, 284, 306.
[1854] Karadžić Response Brief, para. 33; T. 24 April 2018 pp. 296, 297.
[1855] Karadžić Response Brief, paras. 35, 38, 40-42. Karadžić adds that in order to establish liability under the first form of joint criminal enterprise, the Prosecution must show that, in October 1991, each of the members of the joint criminal enterprise intended to commit each of the Excluded Crimes and that the Trial Chamber's findings do not support such a conclusion. Karadžić Response Brief, paras. 40-43; T. 24 April 2018 pp. 296-299.

does not mean that the joint criminal enterprise members intended them,[1856] and that the Trial Chamber was well aware of the Excluded Crimes, the scope and the manner in which they were carried out, as well as his reaction to information concerning them but was not convinced that their inclusion in the common plan was the only reasonable inference available.[1857]

676. The Prosecution replies that the Excluded Crimes were part of the joint criminal enterprise from its inception and, to demonstrate this, it relies on the Trial Chamber's findings concerning both the period before and after the criminal campaign began to show the existence of shared intent by October 1991.[1858] The Prosecution further contends that, rather than merely being concurrent with the common purpose, the Excluded Crimes were integral to it and, in fact, caused the displacement.[1859] It submits that it "defies logic" to conclude that Karadžić intended to forcibly displace the non-Serbs but did not intend that the acts constituting the "force" integral to their displacement would be committed.[1860] The Prosecution also argues that it does not rely on a specific finding of the Trial Chamber that Karadžić knew that the Excluded Crimes were necessary to achieve the common purpose, but rather on the fact that this conclusion flows from the combined effect of several findings, which demonstrate his threats of violence against non-Serbs civilians, his central role in pursuing an ethnically homogenous state, his knowledge that implementing this goal "would" result in violence, and his preparedness to use force and violence against non-Serbs to achieve it.[1861]

677. The Appeals Chamber observes that the Prosecution does not allege error in any of the Trial Chamber's underlying factual findings upon which its ultimate conclusion rests, that there was insufficient evidence to establish that the Excluded Crimes were included in the common purpose of the joint criminal enterprise and that Karadžić intended these crimes. Similarly, the Prosecution does not allege any failure to consider relevant evidence or suggest that insufficient weight was attributed to certain evidence with respect to either of those findings or to its ultimate conclusion. Rather, the Prosecution alleges that the relevant underlying findings compelled the conclusion that the Excluded Crimes were part of the common purpose and that Karadžić and the other members of

[1856] Karadžić Response Brief, paras. 44-46.
[1857] Karadžić Response Brief, paras. 47-49. Furthermore, Karadžić argues that even an unwavering and long-term commitment to a common plan does not establish intent for crimes that fell outside of it and the Prosecution fails to point to a finding on agreement by joint criminal enterprise members to expand it in the way the Prosecution suggests. Karadžić Response Brief, paras. 50, 51; T. 24 April 2018 pp. 297, 298. Karadžić also contends that the errors alleged by the Prosecution have no impact on the Trial Chamber's analysis of his genocidal intent. Karadžić Response Brief, paras. 59, 60.
[1858] Prosecution Reply Brief, para. 4.
[1859] Prosecution Reply Brief, para. 12.
[1860] Prosecution Reply Brief, para. 12.
[1861] Prosecution Reply Brief, para. 10. *See also* T. 24 April 2018 pp. 281-286.

the joint criminal enterprise intended these crimes and submits that the Trial Chamber failed to draw the only reasonably available conclusion from its factual findings.[1862]

678. The Appeals Chamber recalls that it 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.[1863] Furthermore, the Prosecution must show that, when account is taken of errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated.[1864] The Appeals Chamber will thus consider whether the Trial Chamber's factual findings to which the Prosecution refers demonstrate error in the Trial Chamber's conclusion that the Excluded Crimes were only "foreseeable" to Karadžić and the other members of the joint criminal enterprise and whether, in light of this alleged error, the only reasonable conclusion that the Excluded Crimes were part of the common purpose and that Karadžić and the other members of the joint criminal enterprise intended these crimes.

(a) Threats of Violence and Destruction, Knowledge that the Objective Required Violence and Continued Pursuit of the Objective, and Central Role in Preparing Structures for Violent Removal

679. The Appeals Chamber turns to the Trial Chamber's findings concerning various inflammatory speeches made by Karadžić and other members of the joint criminal enterprise in the lead-up to and during the conflict, which the Prosecution claims manifest the shared intent for the Excluded Crimes "even before the conflict broke out".[1865] The Appeals Chamber observes, that, within the context of assessing whether the threats and warnings delivered by Karadžić and other members of the joint criminal enterprise could be construed as evidence of intent to destroy the Bosnian Muslims or Bosnian Coats, the Trial Chamber referred to speeches and statements in which they spoke about the "disappearance", "annihilation", "vanish[ing]", "elimination", and "extinction" of the Bosnian Muslims and it did so "in the full context in which they were delivered and not in isolation."[1866] With respect to the "early speeches", the Trial Chamber found that these "were delivered mainly as a warning that Bosnian Muslims should not pursue a path to independence which was contrary to Bosnian Serb interests, and as a threat that if they did so there would be war which would lead to severe bloodshed."[1867] It also found that some of Karadžić's

[1862] *See, e.g.*, Prosecution Appeal Brief, paras. 13, 19, 20, 32, 45; Prosecution Reply Brief, paras. 8, 10-13.
[1863] *Šešelj* Appeal Judgement, paras. 103, 118; *Ngirabatware* Appeal Judgement, para. 10. *See also, e.g.*, *Prlić et al.* Appeal Judgement, para. 21; *Stanišić and Župljanin* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[1864] *Šešelj* Appeal Judgement, para. 16. *See also, e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32; *Popović et al.* Appeal Judgement, para. 21.
[1865] *See, e.g.*, Prosecution Appeal Brief, paras. 10, 19, 21-23, 44. *See also* T. 24 April 2018 pp. 282, 306.
[1866] Trial Judgement, para. 2599. *See also* Trial Judgement, paras. 2600-2605.
[1867] Trial Judgement, para. 2599.

statements "reflected how angry he was about the proposed moves towards the independence of [Bosnia and Herzegovina], which would lead to violence if Bosnian Serb demands were not met."[1868] The Trial Chamber further found that when Karadžić and the Bosnian Serb leadership issued the threats, "they envisaged that any attempt to circumvent the interests of the Bosnian Serbs would result in chaos and extreme violence" and concluded that the record showed that the Bosnian Serbs "were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives".[1869] In analyzing whether the threats could be construed as evidence of intent to destroy the Bosnian Muslims or Bosnian Croats, however, the Trial Chamber concluded that, in light of the totality of the evidence, this was not the only reasonable inference available.[1870]

680. The Appeals Chamber considers that this analysis highlights the Trial Chamber's careful consideration of statements relevant to the Prosecution's position that the Trial Chamber's findings demonstrate that Karadžić and the other members of the joint criminal enterprise possessed the intent to perpetrate the Excluded Crimes. The Appeals Chamber is not persuaded that the Trial Chamber ignored the import of these statements or others highlighted by the Prosecution[1871] when assessing whether Karadžić possessed the requisite intent for the Excluded Crimes[1872] or that the Trial Chamber's findings regarding the statements compel the conclusions that the Excluded Crimes formed part of the common purpose and that Karadžić and the other members shared the intent for these crimes.

681. The Appeals Chamber similarly finds that the Trial Chamber's findings – that Karadžić knew that a "potential" conflict would be violent, that the Bosnian Serbs were "prepared" to use "force" and "violence", and that Karadžić and the Bosnian Serb leadership were aware that the objective would result in "violence" – fall short of what is required to compel the conclusion that, at the time of the inception of the joint criminal enterprise, its members embraced the common purpose of achieving that objective through particular forms of unlawful violence, including specific crimes, such as, murder, extermination, torture, cruel or inhuman treatment, and wanton destruction and plunder, or that they shared the intent for each of these crimes.

682. Furthermore, the findings referred to by the Prosecution on Karadžić's "important" role in laying the groundwork for the joint criminal enterprise and continued pursuit of its objective from

[1868] Trial Judgement, para. 2599.
[1869] Trial Judgement, para. 2599.
[1870] Trial Judgement, paras. 2599-2605.
[1871] *See, e.g.*, Trial Judgement, paras. 2670-2672, 2675, 2677-2680, 2692, 2700, 2707, 2719, 2823, 2846, 3475, 3485, 3486. *See also* Trial Judgement, paras. 2663, 2664, 2706, 2728, 2766, 2789, 2798, 2870, 3272, 3273.

which the Excluded Crimes were excluded,[1873] do not lead to the inevitable conclusion that specific Excluded Crimes formed part of that common purpose and that the members of the joint criminal enterprise shared the intent for those crimes. Indeed, the Prosecution highlights the Trial Chamber's findings as to Karadžić's role in the formulation, distribution, and activation of the Variant A/B Instructions and the Strategic Goals in support of this argument but ignores the Trial Chamber's analysis that nothing in the Variant A/B Instructions or Strategic Goals "called for the commission of crimes *per se*."[1874] In this context, the Prosecution has not shown that Karadžić's role in laying the groundwork for the joint criminal enterprise in this manner compelled the Trial Chamber to conclude as the only reasonable inference that he and the other members of the joint criminal enterprise possessed the intent for the Excluded Crimes that were eventually committed. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber erred in its analysis of this matter.

(b) Findings Concerning Systematic Commission of Excluded Crimes and the *Actus Reus* of Deportation and Forcible Transfer

683. The Appeals Chamber turns to the Prosecution's reliance on the Trial Chamber's finding that the Excluded Crimes formed part of the *actus reus* of forcible transfer and deportation,[1875] and the submission that it "defies logic" to conclude that Karadžić intended to forcibly displace the non-Serbs but did not intend the commission of acts constituting the "force" integral to their displacement.[1876] In particular, the Prosecution highlights findings that many non-Serbs fled out of fear caused by "ongoing violence and various crimes committed against non-Serbs including, *inter alia*, killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments" and that many fled after attacks against their villages and homes by Serb forces.[1877] However, in this respect, the Appeals Chamber notes that the Trial Chamber's findings reflect that forcible displacement of non-Serbs supporting the *actus reus* of the crimes of forcible transfer and deportation was effected through crimes *within* the scope of the common purpose – *i.e.* unlawful detention and discriminatory measures.[1878] It also found that, in some cases, Bosnian Muslims and Bosnian Croats were first arrested and detained in detention facilities before being transferred out of the Overarching JCE Municipalities and that so-called prisoner "exchanges" amounted to forced

[1872] The Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement. *See Stakić* Appeal Judgement, para. 47.
[1873] Prosecution Appeal Brief, paras. 25, 26; T. 24 April 2018 p. 282.
[1874] Trial Judgement, para. 3439.
[1875] Prosecution Appeal Brief, paras. 10, 30-32, 45. *See also* Prosecution Reply Brief, para. 12.
[1876] Prosecution Reply Brief, para. 12.
[1877] *See* Trial Judgement, paras. 2468, 2470, 2475.

displacement.[1879] It further found that Karadžić and the Bosnian Serb leadership "shared the intent to unlawfully detain Bosnian Muslims and Bosnian Croats as one of the means through which they could achieve their objective of ethnic separation".[1880]

684. The Appeals Chamber does not accept the Prosecution's submission that there is an inherent lack of logic in the Trial Chamber's findings and that the Excluded Crimes were necessarily included in the common purpose of the joint criminal enterprise and that Karadžić and the other members shared the intent for those crimes. As acknowledged by the Prosecution, crimes that form part of the *actus reus* of deportation and forcible transfer need not themselves all fall within a common purpose encompassing these crimes.[1881] In this respect, the Appeals Chamber recalls that it is not required that members of a joint criminal enterprise agree upon a particular form through which the forcible displacement is to be effectuated or that its members intend specific acts of coercion causing such displacement, so long as it is established that they intended to forcibly displace the victims.[1882]

685. With respect to the Prosecution's reference to the findings that Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organized pattern of crimes involving murder, cruel treatment, sexual violence, and wanton destruction and its position that these crimes were at the core of the expulsion operations,[1883] the Appeals Chamber observes that the relevant Trial Chamber findings concern crimes committed during the take-over operations in the period from April to October 1992 and afterwards. The Appeals Chamber further observes that the Trial Chamber's findings reflect express consideration of the violent conduct when assessing the common plan of the joint criminal enterprise and its scope.[1884] It further considered Karadžić's knowledge of such violence and his continued participation in the joint criminal enterprise.[1885] In the view of the Appeals Chamber, the fact that the Excluded Crimes were committed systematically in the course of well-planned operations, and, along with the intended crimes and the general "ongoing violence", created an environment of fear in which Bosnian Muslims and Bosnian Croats were forced to flee, might support the conclusion that such crimes formed part of the common purpose of the joint criminal enterprise and that the members shared the intent for each of these crimes. However, as noted above, the Trial Chamber considered this possibility and the Appeals Chamber is not persuaded that it acted unreasonably in determining that

[1878] *See* Trial Judgement, para. 3465.
[1879] Trial Judgement, para. 2470.
[1880] Trial Judgement, para. 3465.
[1881] Prosecution Appeal Brief, n. 75.
[1882] *Stanišić and Župljanin* Appeal Judgement, para. 917.
[1883] Prosecution Appeal Brief, paras. 10, 19, 27-32, 45, 46; T. 24 April 2018 pp. 281, 283.
[1884] *See*, *e.g.*, Trial Judgement, paras. 3443, 3466.

such findings do not compel the conclusion that Karadžić and the other members of the joint criminal enterprise shared the intent for the Excluded Crimes specifically.

686. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber erred in this respect.

(c) Findings Concerning Knowledge of Excluded Crimes and the Continued Pursuit of the Common Purpose

687. The Appeals Chamber turns to the Trial Chamber's findings referred to by the Prosecution that Karadžić was informed of the crimes committed by the Bosnian Serb forces but did not use his authority to put an end to them and instead continued to pursue the common purpose for years and adopted a policy of non-punishment and rewarding the perpetrators.[1886] Having reviewed the findings in the Trial Judgement referred to by the Prosecution, the Appeals Chamber is not persuaded that the Trial Chamber ignored these findings when assessing Karadžić's intent with respect to the Excluded Crimes. The Trial Chamber explicitly considered the fact that Karadžić had received information about crimes, including the Excluded Crimes, committed against non-Serbs during the take-over operations but continued to act in pursuit of the common purpose, and concluded that a reasonable inference available on the evidence was that "while [Karadžić] did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan".[1887] The Trial Chamber further concluded that there was a systematic failure to investigate criminal offences committed against non-Serbs in the Overarching JCE Municipalities during the conflict, reflecting Karadžić's position that such matters could be delayed during the conflict.[1888] The Trial Chamber also found that Karadžić rewarded and promoted subordinates, who he knew committed crimes, and that this indicated that Karadžić "was indifferent to whether [the perpetrators] participated in criminal activity directed at non-Serbs during the conflict as long as the core objectives of the Bosnian Serbs were fulfilled".[1889]

688. The Prosecution contends that, by rewarding and promoting the perpetrators, Karadžić was expressing his support for, rather than indifference to, the fulfilment of the objectives of the common purpose through the Excluded Crimes.[1890] While this may be the case, the Appeals Chamber is not persuaded that no reasonable trier of fact could reach the conclusion that Karadžić's

[1885] Trial Judgement, paras. 3466, 3515.
[1886] Prosecution Appeal Brief, paras. 10, 19, 33-43, 45; Prosecution Reply Brief, paras. 13, 14; T. 24 April 2018 p. 283.
[1887] Trial Judgement, para. 3466.
[1888] Trial Judgement, para. 3425.
[1889] Trial Judgement, para. 3433.
[1890] Prosecution Appeal Brief, para. 40, *referring to*, *inter alia*, Trial Judgement, para. 3433.

acts and omissions might instead, as the Trial Chamber concluded, reflect his commitment to the crimes falling within the common purpose and his indifference towards the Excluded Crimes. The Appeals Chamber also recalls that, although knowledge of crimes in combination with failure to intervene to prevent them may be a basis for inferring intent, it does not compel such a conclusion.[1891]

689. With respect to the Prosecution's contention that Karadžić's failure to adequately prevent or punish crimes and his disingenuous portrayal of the reality on the ground "encouraged" the commission of the Excluded Crimes,[1892] the Prosecution acknowledges that a pertinent finding concerning Karadžić's failure to prevent crimes or punish perpetrators that it relies upon in support of this contention, concerns crimes found to fall within the scope of the joint criminal enterprise.[1893] The Prosecution asserts that the "predicate findings on Karadžić's false denials and disingenuous statements apply equally to [the Excluded] Crimes".[1894] Even if this were the case, however, in the view of the Appeals Chamber, the inaction or action as found by the Trial Chamber which might have encouraged or facilitated crimes does not necessarily equate to, or compel a finding of, intent for those crimes. It further does not compel a finding that other members of the joint criminal enterprise shared that intent. The Appeals Chamber therefore finds, Judge de Prada dissenting, that the Prosecution fails to show that the Trial Chamber committed any error in this respect.

(d) Cumulative Effect

690. Having concluded, Judge de Prada dissenting, that none of the individual categories of findings relied upon by the Prosecution leads to the conclusion that the only reasonable inference was that the Excluded Crimes formed part of the common purpose and that the members of the joint criminal enterprise shared the intent for those crimes, the Appeals Chamber now turns to consider whether these findings do so cumulatively.

691. The Appeals Chamber considers that the Trial Chamber's factual findings demonstrate that: (i) Karadžić and other joint criminal enterprise members issued various threats of violence and destruction in the lead up to and during the conflict, some of which contained highly inflammatory language; (ii) Karadžić and other joint criminal enterprise members were aware that a "potential" conflict would be violent, were "prepared" to use "force" and "violence" to achieve the objective of ethnic separation, and knew that achieving the objective would result in violence; (iii) both crimes

[1891] *Popović et al.* Appeal Judgement, para. 1385; *Blagojević and Jokić* Appeal Judgement, paras. 272, 273.
[1892] Prosecution Appeal Brief, paras. 38-42; T. 24 April 2018 pp. 283, 284.
[1893] *See* Prosecution Appeal Brief, para. 41. *See* Trial Judgement, para. 3501 ("[Karadžić's] failure to take adequate steps to prevent and punish criminal activity committed against non-Serbs in the Municipalities had the effect of encouraging and facilitating the JCE I Crimes.").

falling under the common purpose as well as the Excluded Crimes were committed systematically in the course of well-planned and coordinated operations, and the Excluded Crimes contributed to the deportation and forcible transfer and formed part of the *actus reus* of those crimes; (iv) Karadžić, along with several other members of the joint criminal enterprise, was informed from April 1992 onwards that the Excluded Crimes were being committed and portrayed a disingenuous reality of what was occurring or issued false denials as well as failed to act to prevent crimes or punish the perpetrators of them, and, in some cases, rewarded and promoted the perpetrators, and further, through his acts and omissions in this respect, encouraged and/or facilitated their commission; and (v) Karadžić, despite knowledge of the commission of the Excluded Crimes, continued to act in furtherance of the objective.[1895]

692. A reasonable trier of fact could find that these factual findings, considered cumulatively, support the conclusion that some or all of the Excluded Crimes formed part of the common purpose, and that Karadžić and some or all of the joint criminal enterprise members shared the intent to commit these crimes. The Appeals Chamber, Judge de Prada dissenting, finds, however, that the Trial Chamber did not err in finding that these factual findings do not compel this as the only reasonable conclusion.

3. Conclusion

693. In light of the Appeals Chamber's finding, Judge de Prada dissenting, that the Trial Chamber did not commit any error in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE, the Appeals Chamber finds it unnecessary to consider the Prosecution's argument that the erroneous conclusion on the scope of the common purpose led to a flawed genocidal intent analysis. For the foregoing reasons, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 1 of the Prosecution's appeal.

[1894] Prosecution Appeal Brief, para. 41, *referring* to Trial Judgement, para. 3504.
[1895] *See, e.g.*, Trial Judgement, paras. 2468-2470, 2599-2605, 2708, 2846, 3333-3336, 3341-3345, 3363, 3367, 3368, 3375, 3410, 3428-3432, 3443-3446, 3466, 3504, 3516-3518.

B. Alleged Errors in Not Finding that Bosnian Muslims and Bosnian Croats Were Subjected to Destructive Conditions of Life under Article 4(2)(c) of the ICTY Statute (Ground 2)

694. The Trial Chamber assessed the *actus reus* of genocide within the meaning of Articles 4(2)(a) through 4(2)(c) of the ICTY Statute with respect to the municipalities referred to in Count 1 of the Indictment ("Count 1 Municipalities").[1896] The Trial Chamber recalled that, when the same acts are charged under Articles 4(2)(b) and 4(2)(c) of the ICTY Statute, it was limited to considering conditions calculated to bring about physical destruction under Article 4(2)(c) of the ICTY Statute only when it had not found such conduct to amount to "causing serious bodily or mental harm" under Article 4(2)(b) of the ICTY Statute.[1897] Consequently, the Trial Chamber stated that it would "limit its assessment" to acts including "the imposition of inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities" which it had not considered in respect of Article 4(2)(b) of the ICTY Statute.[1898]

695. The Trial Chamber then found that, in all of the Count 1 Municipalities, Bosnian Muslim and Bosnian Croat detainees were held in terrible conditions, including severe over-crowding, stifling heat paired with lack of ventilation, inadequate or non-existent medical care, insufficient access to food and water, and poor hygienic conditions.[1899] Some detainees were forced to perform labour in dangerous conditions.[1900] The Trial Chamber further found that a number of detainees died as a result of these detention conditions and that others suffered lasting physical and psychological damage.[1901] Nevertheless, the Trial Chamber concluded that, "[w]hile the conditions in the detention facilities in the Count 1 Municipalities were dreadful and had serious effects on the detainees", the evidence did not demonstrate that the conditions "ultimately sought the physical destruction of the Bosnian Muslims and Bosnian Croats".[1902]

696. The Prosecution submits that the Trial Chamber erred in law by failing to provide a reasoned opinion and/or by improperly compartmentalizing its analysis of the evidence in determining that the elements of Article 4(2)(c) of the ICTY Statute had not been established.[1903] Alternatively, it contends that the Trial Chamber erred in fact by unreasonably concluding that the

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[1896] Trial Judgement, paras. 2578-2587. The Count 1 Municipalities are: Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica, and Zvornik. *See* Indictment, para. 38; Trial Judgement, para. 2571.
[1897] Trial Judgement, paras. 546, 2583, *referring to Brdanin* Trial Judgement, para. 905.
[1898] Trial Judgement, para. 2583, *referring to* Indictment, para. 40(c).
[1899] Trial Judgement, para. 2584 and references cited therein.
[1900] Trial Judgement, para. 2585 and references cited therein.
[1901] Trial Judgement, paras. 2580, 2584 and references cited therein.
[1902] Trial Judgement, para. 2587.
[1903] Prosecution Notice of Appeal, paras. 9, 12, 13; Prosecution Appeal Brief, paras. 51-69. *See also* Prosecution Reply Brief, para. 17.

elements of Article 4(2)(c) of the ICTY Statute had not been satisfied with respect to specific detention facilities within the Count 1 Municipalities.[1904] The Prosecution requests that the Appeals Chamber correct these errors by conducting its own analysis under Article 4(2)(c) of the ICTY Statute and finding that both the *actus reus* and *mens rea* of this form of genocide have been met in relation to the Count 1 Municipalities.[1905] The Appeals Chamber will address these arguments in turn.

1. Failure to Provide a Reasoned Opinion and/or Erroneously Compartmentalized Analysis

697. The Prosecution argues that the Trial Chamber erred in law by failing to provide a factual or legal basis for its conclusion that the evidence did not demonstrate that the conditions of detention in the Count 1 Municipalities ultimately sought the physical destruction of Bosnian Muslims and Bosnian Croats.[1906] It contends that the Trial Chamber ignored evidence directly supporting this conclusion and failed to consider illustrative factors demonstrating the objective probability that the conditions deliberately sought the destruction of these ethnic groups.[1907] The Prosecution concludes that these omissions amount to a failure to provide a reasoned opinion.[1908]

698. The Prosecution further contends that the Trial Chamber erroneously compartmentalized its assessment of whether the detention conditions sought the destruction of Bosnian Muslims and Bosnian Croats as meant under Article 4(2)(c) of the ICTY Statute by excluding from its consideration acts of killing or acts causing serious bodily or mental harm within the meaning of Articles 4(2)(a) and 4(2)(b) of the ICTY Statute, respectively, as well as other relevant evidence.[1909] In so doing, the Prosecution submits that the Trial Chamber failed to consider relevant context, including that: (i) detention conditions were rendered more destructive by the particular vulnerability of detainees and their exposure to the commission of other genocidal acts;[1910] and (ii)

[1904] Prosecution Notice of Appeal, paras. 9, 14; Prosecution Appeal Brief, paras. 51, 70-76. *See also* Prosecution Reply Brief, paras. 20, 22, 24-27.
[1905] Prosecution Appeal Brief, para. 57. The Prosecution further contends that, in failing to find that the elements under Article 4(2)(c) of the ICTY Statute had been established, the Trial Chamber's subsequent *mens rea* analysis failed to capture the destructive impact that mass incarceration in deplorable conditions had on the targeted communities in the Count 1 Municipalities. *See* Prosecution Appeal Brief, para. 50. It argues that, in light of the errors alleged in this ground of appeal, the Appeals Chamber should accordingly re-evaluate the genocidal intent with respect to Count 1. Prosecution Appeal Brief, para. 77; Prosecution Reply Brief, para. 27.
[1906] Prosecution Appeal Brief, paras. 51-53. *See also* Prosecution Appeal Brief, para. 50.
[1907] Prosecution Appeal Brief, paras. 54-56.
[1908] Prosecution Appeal Brief, para. 57.
[1909] Prosecution Appeal Brief, para. 58. The Prosecution contends that the Trial Chamber's compartmentalized assessment of Article 4(2)(c) of the ICTY Statute is contrary to the holistic assessment of evidence as required by ICTY jurisprudence. Prosecution Appeal Brief, para. 58, n. 220, *referring to Tolimir* Appeal Judgement, paras. 206, 210, 211, *Halilović* Appeal Judgement, para. 128.
[1910] Prosecution Appeal Brief, paras. 60-66.

such systematic, deadly violence demonstrates that the inhumane conditions suffered by all detainees were aimed at their ultimate physical destruction.[1911]

699. In response, Karadžić agrees that the Trial Chamber failed to provide a reasoned opinion in finding that the evidence did not demonstrate that the conditions of detention ultimately sought the physical destruction of Bosnian Muslims and Bosnian Croats under Article 4(2)(c) of the ICTY Statute.[1912] He further submits that, as argued by the Prosecution, murder and conduct resulting in serious mental and bodily harm may be considered as context when determining whether the evidence establishes "whether conditions of life were calculated to destroy the group" pursuant to Article 4(2)(c) of the ICTY Statute.[1913] However, he disputes the Prosecution's position that the record establishes beyond reasonable doubt that the elements of Article 4(2)(c) of the ICTY Statute are satisfied.[1914]

700. The Appeals Chamber recalls that a trial chamber is required to provide a reasoned opinion under Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.[1915] Consequently, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused.[1916] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1917]

701. The Appeals Chamber finds no merit in the parties' position that the Trial Chamber failed in its obligation to provide a reasoned opinion in concluding that the record did not establish the elements for genocide under Article 4(2)(c) of the ICTY Statute. The Trial Chamber set forth the governing law with respect to this form of genocide and considered, in particular, whether the conduct satisfied the *actus reus* requirements in order to assess Karadžić's responsibility for it.[1918] Furthermore, the Trial Chamber found, after a comprehensive review of the relevant evidence, that the *mens rea* for any form of genocide in relation to the Count 1 Municipalities had not been established.[1919] This comprehensive assessment stands in stark contrast to several instances where

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[1911] Prosecution Appeal Brief, paras. 61, 65-68.
[1912] Karadžić Response Brief, paras. 61, 63.
[1913] Karadžić Response Brief, para. 64.
[1914] Karadžić Response Brief, paras. 62, 78-95.
[1915] *Prlić et al.* Appeal Judgement, paras. 187, 990, 1778, 3099; *Stanišić and Župljanin* Appeal Judgement, para. 137; *Hadžihasanović and Kubura* Appeal Judgement, para. 13. *See, mutatis mutandis, Nyiramasuhuko et al.* Appeal Judgement, paras. 729, 1954; *Ndindiliyimana et al.* Appeal Judgement, para. 293 and references cited therein.
[1916] *Prlić et al.* Appeal Judgement, para. 3099, n. 423; *Stanišić and Župljanin* Appeal Judgement, para. 137; *Ndindiliyimana et al.* Appeal Judgement, para. 293; *Kordić and Čerkez* Appeal Judgement, para. 383.
[1917] *Ndindiliyimana et al.* Appeal Judgement, para. 293 and references cited therein. *See also Prlić et al.* Appeal Judgement, para. 1778.
[1918] *See* Trial Judgement, paras. 546-555, 2583-2587.
[1919] *See* Trial Judgement, paras. 2588-2625. *See also infra* Section IV.C.1.

the Appeals Chambers of the ICTY and ICTR have found failures to provide a reasoned opinion in reaching legal conclusions as to guilt or innocence.[1920]

702. The Appeals Chamber recalls that, in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1921] In this respect, the Appeals Chamber observes that the Prosecution does not point to relevant evidence that the Trial Chamber did not consider in the Trial Judgement. Rather, the Prosecution's argument suggests that the entirety of the Trial Chamber's analysis as to whether the elements of Article 4(2)(c) of the ICTY Statute had been established is set forth in paragraphs 2583 through 2587 of the Trial Judgement. Such reading of the Trial Judgement departs from the well-established principles that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence.[1922] 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.[1923] Viewed in this light, the Prosecution's extensive references in its appeal brief to findings made and evidence referred to elsewhere in the Trial Judgement undermine its position that the Trial Chamber disregarded relevant evidence or findings in concluding that the elements required under Article 4(2)(c) of the ICTY Statute had not been established in respect of the Count 1 Municipalities.[1924] Therefore, this contention is dismissed.

703. Similarly, the Appeals Chamber considers that the Prosecution misreads the Trial Judgement when arguing that the Trial Chamber erroneously compartmentalized its analysis with respect to Article 4(2)(c) of the ICTY Statute. The Prosecution takes issue with the statement in

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[1920] The Appeals Chambers of the ICTY and the ICTR have found failures to provide a reasoned opinion in instances where, for example, the Trial Chamber failed to: (i) make legal findings with respect to the relevant crimes for which a defendant was convicted (*see, e.g., Prlić et al.* Appeal Judgement, paras. 1778, 1779, 1789, 2019, 2020; *Bizimungu* Appeal Judgement, paras. 17-32); (ii) make *mens rea* and/or *actus reus* findings with respect to modes of liability upon which defendants were convicted or acquitted (*see, e.g., Ndindiliyimana et al.* Appeal Judgement, paras. 291-293, 316; *Stanišić and Župljanin* Appeal Judgement, paras. 139, 140; *Stanišić and Simatović* Appeal Judgement, paras. 79, 80); and (iii) make explicit factual findings upon which convictions were entered (*see, e.g., Prlić et al.* Appeal Judgement, paras. 3113, 3114; *Kordić and Čerkez* Appeal Judgement, paras. 384, 385).

[1921] *Šešelj* Appeal Judgement, para. 49; *Prlić et al.* Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.

[1922] *Šešelj* Appeal Judgement, paras. 62, 101, 126; *Prlić et al.* Appeal Judgement, paras. 187, 329, 453, 628, 771; *Nyiramasuhuko et al.* Appeal Judgement, paras. 105, 1308.

[1923] *Prlić et al.* Appeal Judgement, paras. 187, 2937, 3039; *Nyiramasuhuko et al.* Appeal Judgement, para. 1308.

[1924] The Appeals Chamber observes that the Prosecution principally faults the Trial Chamber for the brevity of its analysis and reliance on limited cross-references to other sections of the Trial Judgement without elaborating on prior evidence or findings contained in the Trial Judgement that it argues were critical to assessing whether conditions sought the physical destruction of Bosnian Muslims and Bosnian Croats. *See* Prosecution Appeal Brief, paras. 54, 55. For the reasons stated above, the Appeals Chamber is not persuaded by this argument.

paragraph 2583 of the Trial Judgement that the Trial Chamber would "limit its assessment" to acts that had not been established under Article 4(2)(b) of the ICTY Statute. However, the obvious interpretation of this statement is that the Trial Chamber would not include conduct falling within the ambit of Article 4(2)(b) of the ICTY Statute *as a basis for conviction* under Article 4(2)(c) of the ICTY Statute as well.[1925] While the Prosecution argues that the Trial Chamber was required to "identify 'all the legal implications of the evidence presented'",[1926] the approach adopted by the Trial Chamber is consistent with binding jurisprudence on the issue.[1927]

704. The Prosecution also fails to demonstrate that the Trial Chamber failed to sufficiently consider the particular vulnerability of the detainees and how killings and/or conduct resulting in serious bodily and mental harm had an exacerbating effect on the remaining detainees, eliminating any doubt that their conditions of life were deliberately calculated to lead to their destruction. Notably, the Trial Chamber's approach to assessing evidence that could support the elements of genocide charged in relation to the Count 1 Municipalities reflected a holistic approach to the record.[1928] The Appeals Chamber is not persuaded that the Trial Chamber ignored the evidence or findings the Prosecution points to and considers that the Trial Chamber appropriately examined the circumstances of the detainees as well as the conditions and conduct that fell outside the ambit of Articles 4(2)(a) and 4(2)(b) of the ICTY Statute[1929] and determined that it was not satisfied that such conduct was deliberately inflicted to bring about the destruction of the Bosnian Muslims and Bosnian Croats.[1930]

705. In light of the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution does not show that the Trial Chamber failed to provide a reasoned opinion or erroneously compartmentalized its assessment when evaluating the elements under Article 4(2)(c) of the ICTY Statute.

[1925] *See* Trial Judgement, para. 2583, *referring to Brđanin* Trial Judgement, para. 905.
[1926] Prosecution Appeal Brief, para. 58.
[1927] *Cf. Tolimir* Appeal Judgement, para. 228 ("Notably, killings, which are explicitly mentioned as a separate genocidal act under Article 4(2)(a) of the [ICTY] Statute, may not be considered as a method of inflicting upon the protected group conditions of life calculated to bring about its destruction under Article 4(2)(c) of the [ICTY] Statute."). Indeed, the Appeals Chamber observes that, when the same set of facts establish the offence of deliberately imposing conditions of life calculated to bring about a group's destruction under Article 4(2)(c) of the ICTY Statute but result in killing or serious bodily or mental harm as required by Articles 4(2)(a) and 4(2)(b) of the ICTY Statute, then the latter two articles are the appropriate basis for liability. *Cf. Brđanin* Trial Judgement, n. 2255.
[1928] *See, e.g.*, Trial Judgement, paras. 2592, 2616-2622, 2626. *See also, e.g.*, Trial Judgement, paras. 2482, 2483, 2486-2518, 2522-2538 (recalling and assessing factual findings underpinning criminal conduct in detention facilities in relation to persecution as a crime against humanity).
[1929] Trial Judgement, paras. 2584, 2585.
[1930] Trial Judgement, para. 2587.

2. Error in Concluding that the Elements of Article 4(2)(c) of the ICTY Statute were not Established

706. The Prosecution argues that the Trial Chamber erred in fact when determining that the elements required under Article 4(2)(c) of the ICTY Statute had not been established with respect to certain detention facilities in the Count 1 Municipalities.[1931] The Prosecution stresses that genocide under Article 4(2)(c) of the ICTY Statute may be established based on the deliberate imposition of conditions that have the objective probability of leading to a group's destruction, such as:

> subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[1932]

It submits that the totality of the evidence and findings in relation to the detention facilities charged under Scheduled Detention Facilities C.20.2, C.10.1, and C.25.3, are emblematic of the genocidal conditions, and compel the conclusion that the elements of Article 4(2)(c) of the ICTY Statute were established.[1933] The Prosecution further points to other evidence and findings to demonstrate the lack of proper food and water, insufficient sanitation conditions, severe over-crowding, inadequate shelter, lack of medical care and supplies, and forced labor in certain detention facilities, that it claims also compel the same conclusion.[1934]

707. Karadžić, focusing on the relatively high survival rate of detainees and submitting that most detainees who died at detention facilities died as a consequence of killings or beatings rather than detention conditions,[1935] disputes that the evidence and findings demonstrate as the only reasonable conclusion that conditions calculated to bring about the physical destruction of the relevant groups were deliberately imposed in relation to the relevant detention facilities in the Count 1 Municipalities.[1936]

708. The Prosecution replies that Karadžić ignores findings and evidence demonstrating the severity of detention conditions and inaccurately minimizes the number of victims subjected to

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[1931] Prosecution Appeal Brief, paras. 51, 70, n. 196.
[1932] Prosecution Appeal Brief, para. 73, *quoting Tolimir* Appeal Judgement, para. 225. The Prosecution emphasizes that immediate physical destruction is not required under Article 4(2)(c) of the ICTY Statute and that the sufficiency requirement may be satisfied where the conduct is directed at a collection of the "group members". Prosecution Appeal Brief, paras. 71, 72. *See also* Prosecution Reply Brief, paras. 17-19.
[1933] Prosecution Appeal Brief, paras. 74, 76 and references cited therein.
[1934] Prosecution Appeal Brief, paras. 75, 76 and references cited therein.
[1935] Karadžić Response Brief, paras. 78, 80, 82, 84, 86, 94.
[1936] Karadžić Response Brief, paras. 77-94. Karadžić further argues that the elements of Article 4(2)(c) of the ICTY Statute cannot be satisfied by targeting members of the group rather than the group as a whole. *See* Karadžić Response Brief, paras. 66-76.

them.[1937] It further argues that the fact that many detainees died from beatings and killings supports rather than contradicts the inference that detention conditions were aimed at their destruction.[1938]

709. The Appeals Chamber observes that the Prosecution does not challenge the Trial Chamber's articulation of the relevant legal principles or suggest that the Trial Judgement, when read as a whole, omits consideration of relevant evidence. Rather, the Prosecution posits an alternative interpretation that the record eliminates any doubt that the only reasonable conclusion is that the elements of Article 4(2)(c) of the ICTY Statute were satisfied with respect to certain detention facilities within the Count 1 Municipalities. The Appeals Chamber does not agree. The Trial Judgement reflects the Trial Chamber's extensive assessment of both the discriminatory and the destructive conditions in which the relevant detention facilities were operated.[1939] While the Prosecution argues that the Trial Chamber ignored these factors, the Appeals Chamber observes that the Trial Chamber found that the conditions demonstrated discriminatory intent and were sufficient to establish persecution, in part, on the basis of cruel and inhumane treatment.[1940] However, the persecutory and severe mistreatment demonstrated by the evidence and reflected in the Trial Chamber's findings did not compel it to find, as the only reasonable inference, the existence of the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Bosnian Muslim and Bosnian Croat groups as such. In this regard, and as discussed in greater detail below, the Trial Chamber, when considering the *mens rea* for genocide with respect to the Count 1 Municipalities, reasonably considered the number of Bosnian Muslims and Bosnian Croats who survived and found that it was not satisfied that the Prosecution had established the requisite genocidal intent with respect to other conduct falling within Articles 4(2)(a) and 4(2)(b) of the ICTY Statute.[1941] Such a conclusion would apply with equal force in relation to conduct falling within Article 4(2)(c) of the ICTY Statute, and the Prosecution has not demonstrated that this is in error.

710. Based on the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution has not demonstrated that the Trial Chamber erred in its assessment of the record in not finding the elements of Article 4(2)(c) of the ICTY Statute proven beyond reasonable doubt.

[1937] Prosecution Reply Brief, paras. 17, 20, 22, 24-27. The Prosecution also replies that Karadžić misinterprets Article 4(2)(c) of the ICTY Statute in suggesting that it requires the infliction of destructive conditions on a group as a whole rather than on members of a group. *See* Prosecution Reply Brief, paras. 17-19.
[1938] Prosecution Reply Brief, para. 22.
[1939] As noted previously, the Appeals Chamber observes that the Trial Chamber considered, *inter alia*: (i) severe overcrowding; (ii) stifling heat paired with lack of ventilation; (iii) inadequate or non-existent medical care; (iv) insufficient access to food and water; (v) poor hygienic conditions; (vi) forced labour in dangerous conditions; and (vii) lasting physical and psychological damage on detainees. *See, e.g.*, Trial Judgement, paras. 2584, 2585 and references cited therein.
[1940] *See, e.g.*, Trial Judgement, paras. 2507-2514, 2518.
[1941] *See infra* Section IV.C.1(b).

3. Conclusion

711. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 2 of the Prosecution's appeal.

C. Alleged Errors in Failing to Find Genocidal Intent (Ground 3)

712. The Trial Chamber was not satisfied beyond reasonable doubt that acts under Article 4(2) of the ICTY Statute in relation to the Overarching JCE were committed with genocidal intent.[1942] Specifically, it was not convinced that the only reasonable inference to be drawn from the evidence was that the named members of the Overarching JCE, including Karadžić, other Bosnian Serbs not named as alleged members, or physical perpetrators "possessed such intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities".[1943] Karadžić was found not guilty of genocide in relation to Count 1 of the Indictment.[1944]

713. The Prosecution submits that the Trial Chamber erred in law and in fact when it failed to find that Karadžić and other members of the Overarching JCE possessed genocidal intent as charged under Count 1.[1945] The Prosecution argues that the Trial Chamber erred in assessing the pattern of crimes[1946] as well as the specific statements and conduct of Karadžić and other members of the Overarching JCE.[1947] The Prosecution requests that the Appeals Chamber find that Karadžić and other members of the Overarching JCE possessed genocidal intent and convict Karadžić of genocide under Count 1.[1948]

1. Alleged Errors Regarding the Pattern of Crimes

714. The Trial Chamber reviewed the pattern of crimes committed in each of the Count 1 Municipalities and found that the evidence did not establish, as the only reasonable inference, the existence of the intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in these municipalities.[1949] Rather, it considered that another reasonable inference was the intent to "ensure the removal" of the targeted groups from the Count 1 Municipalities.[1950]

715. In particular, in paragraph 2624 of the Trial Judgement, the Trial Chamber found that:

> The total number of Bosnian Muslims and Bosnian Croats displaced – especially when examined in light of the portion of the groups of Bosnian Muslims and Bosnian Croats allegedly targeted for destruction in the Count 1 Municipalities through the commission of the acts under Article 4(2) of the [ICTY] Statute identified above as well as the fact that Serb Forces exercised control over these territories – does not satisfy the Chamber that the only reasonable inference is that there existed an intent to destroy the Bosnian Muslim and/or the Bosnian Croat groups in the Count 1

[1942] Trial Judgement, para. 2626. *See also* Trial Judgement, paras. 2588-2625.
[1943] Trial Judgement, para. 2626. *See also* Trial Judgement, paras. 2571, 2588-2625.
[1944] Trial Judgement, paras. 2626, 6071.
[1945] Prosecution Notice of Appeal, paras. 16-23; Prosecution Appeal Brief, paras. 6, 78-147; T. 24 April 2018 pp. 281, 286.
[1946] Prosecution Appeal Brief, paras. 6, 78-83, 85, 87-139; T. 24 April 2018 pp. 281, 286.
[1947] Prosecution Appeal Brief, paras. 84, 85, 126, 140-146.
[1948] Prosecution Appeal Brief, paras. 6, 82, 83, 86, 88, 94, 102, 103, 114, 124-126, 139, 146, 147.
[1949] Trial Judgement, paras. 2624-2626. *See also* Trial Judgement, paras. 2589, 2614-2623.
[1950] Trial Judgement, para. 2624.

> Municipalities as such. Rather, the Chamber considers that a reasonable inference to be drawn from the pattern described above is that the intent behind those crimes was to ensure the removal of members of the Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities.[1951]

716. The Prosecution submits that the Trial Chamber committed legal and factual errors in its assessment of the pattern of crimes. Specifically, it contends that the Trial Chamber: (i) erroneously concluded that the objective of permanent removal precluded a finding of genocidal intent;[1952] (ii) applied an erroneous legal standard for genocidal intent;[1953] and (iii) erred in failing to assess genocidal intent with respect to Prijedor Municipality specifically.[1954] The Appeals Chamber will address these arguments in turn.

(a) Objective of Permanent Removal and Genocidal Intent

717. The Prosecution submits that, in finding that permanent removal was the "intent behind" crimes committed in the Count 1 Municipalities against Bosnian Muslims and Bosnian Croats, the Trial Chamber erroneously presumed that such a conclusion was inconsistent with a finding of genocidal intent.[1955] The Prosecution argues that the Trial Chamber failed to consider that the objective of permanent removal can be accomplished through genocide and, thereby, did not sufficiently assess whether Karadžić and the Overarching JCE members possessed genocidal intent and used acts of genocide to achieve the joint criminal enterprise's objective of permanent removal.[1956] The Prosecution further argues that, read in context, the Trial Chamber's analysis, and use of the phrase "intent behind" the crimes at paragraph 2624 of the Trial Judgement, conflate the removal objective of the Overarching JCE with the intent for the underlying acts of genocide that were used to carry out the removal operation.[1957]

718. Karadžić responds that the Trial Chamber: (i) never found that the objective of permanent removal precluded genocidal intent and acknowledged that genocidal intent was charged as a means of achieving permanent removal; (ii) did not conflate the Overarching JCE's objective of permanent

[1951] Trial Judgement, para. 2624.
[1952] Prosecution Appeal Brief, paras. 6, 78-81, 85, 94-102.
[1953] Prosecution Appeal Brief, paras. 6, 80, 82, 83, 85, 103-125. *See also* T. 24 April 2018 pp. 286-290.
[1954] Prosecution Appeal Brief, paras. 85, 87-93, 127-139. *See also* T. 24 April 2018 pp. 290-293.
[1955] Prosecution Appeal Brief, paras. 6, 78, 81, 85, 94, 95, 98-102; T. 24 April 2018 pp. 293, 294.
[1956] Prosecution Appeal Brief, paras. 85, 94, 102. The Prosecution argues that it repeatedly submitted before the Trial Chamber that the Overarching JCE's objective of permanent removal was achieved through acts of genocide. *See* Prosecution Appeal Brief, paras. 95, 97. It also argues that the Trial Chamber erroneously made a theoretical distinction between "redistribution" and "physical destruction" of the targeted population. *See* Prosecution Appeal Brief, para. 100; Prosecution Reply Brief, para. 37. *See also* T. 24 April 2018 p. 293.
[1957] Prosecution Appeal Brief, paras. 94, 96, 98, 99, *referring to* Trial Judgement, paras. 2623-2625, 3447, 3463. *See also* Prosecution Reply Brief, paras. 35-37, 39; T. 24 April 2018 pp. 293, 294.

removal with genocidal intent; and (iii) correctly found that the evidence presented did not establish genocidal intent in respect of the Count 1 Municipalities.[1958]

719. Turning to the contention that the Trial Chamber presumed the intent for permanent removal to be inconsistent with genocidal intent, the Appeals Chamber observes that the Prosecution fails to provide any citation to support this proposition and the Appeals Chamber does not find it in the Trial Judgement. Rather, the Trial Judgement reflects that, while the record established beyond reasonable doubt a shared intent for the removal of Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities,[1959] the record did not support, as the only reasonable inference, the finding of genocidal intent with respect to the crimes committed in the Count 1 Municipalities.[1960]

720. Likewise, there is no merit to the submission that the Trial Chamber failed to consider that the objective of permanent removal can be achieved through acts of genocide, thereby failing to sufficiently consider the existence of genocidal intent. The Trial Chamber expressly noted the Prosecution's position that genocide was one of the "means" used to permanently remove Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities.[1961] It also recalled the Prosecution's contention that the "alleged persecutory campaign included or escalated to include conduct that manifested an intent to destroy, in part, the national, ethnical and/or religious groups of Bosnian Muslims and/or Bosnian Croats as such".[1962] Furthermore, the Trial Chamber examined the conduct of Karadžić, members and non-members of the Overarching JCE, and physical perpetrators to discern whether genocidal intent could be inferred in relation to crimes committed within the Count 1 Municipalities.[1963] The Trial Chamber also considered various crimes that demonstrated "a clear pattern of widespread intimidation, violence, [and] killings [...] targeted at the Bosnian Muslims and Bosnian Croats".[1964] It expressly acknowledged that certain Bosnian Muslims and Bosnian Croats were targeted through the commission of acts that would fall under Article 4(2) of the ICTY Statute.[1965]

721. While the Trial Chamber's analysis in paragraph 2624 of the Trial Judgement, to which the Prosecution points in its submission, does not expressly reiterate each of these considerations, the Appeals Chamber recalls that a trial chamber need not spell out every step of its analysis or

[1958] Karadžić Response Brief, paras. 116-133, *referring to* Trial Judgement, paras. 592, 2596, 2605, 2624, 2625.
[1959] *See, e.g.*, Trial Judgement, paras. 2625, 2898.
[1960] *See, e.g.*, Trial Judgement, paras. 2624-2626.
[1961] Trial Judgement, para. 592.
[1962] Trial Judgement, para. 2571, *referring to* Indictment, paras. 36, 38, Prosecution Final Trial Brief, para. 570.
[1963] Trial Judgement, paras. 2595-2613.
[1964] Trial Judgement, para. 2623. *See also* Trial Judgement, paras. 2614-2622.
[1965] Trial Judgement, para. 2624.

unnecessarily repeat considerations reflected elsewhere in the trial judgement.[1966] Viewed in this context, the Prosecution's contention ignores the Trial Chamber's extensive assessment of evidence, which the Prosecution argues would suggest that the objective of permanent removal could be achieved through acts of genocide.

722. The Prosecution's argument that the Trial Chamber erroneously conflated the Overarching JCE's objective of permanent removal with its evaluation of genocidal intent is also unpersuasive. The Prosecution's position fails to sufficiently take into account that the Trial Chamber observed that the *mens rea* for genocide is distinguished from motive and that the existence of motive does not exclude the possession of genocidal intent.[1967] Moreover, the Prosecution's argument that the Trial Chamber's use of the phrase "intent behind"[1968] conflates the notions of "motive" and "intent"[1969] discounts the plain meaning of the phrase as well as the context and purpose for which it was used – to express that the *mens rea* of genocide had not been established.[1970] Likewise, the Appeals Chamber is not persuaded by the Prosecution's argument that parallels in the language used by the Trial Chamber when assessing the *mens rea* for genocide and the objective of the Overarching JCE demonstrate that it conflated the two concepts.[1971] The findings in the Trial Judgement reflect that the Trial Chamber distinguished its analysis concerning the *mens rea* for genocide from the "objectives" of the Bosnian Serb leadership.[1972]

723. In light of the foregoing, the Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution fails to demonstrate that the Trial Chamber erroneously concluded that the objective of permanent removal precluded a finding of genocidal intent.

(b) Alleged Incorrect Legal Standard for Genocidal Intent

724. The Prosecution submits that the Trial Chamber erroneously applied a "narrow" definition of genocidal intent, as it focused only on evidence resulting in immediate physical destruction and ignored conduct that targets the long-term existence of the groups and that supports an inference of genocidal intent.[1973] Specifically, it challenges the Trial Chamber's comparison between the larger number of Bosnian Muslims and Bosnian Croats displaced from the Count 1 Municipalities against

[1966] *Stakić* Appeal Judgement, para. 47.
[1967] Trial Judgement, para. 554.
[1968] Trial Judgement, para. 2624.
[1969] *See* Prosecution Appeal Brief, para. 99.
[1970] *See* Trial Judgement, para. 2624.
[1971] *See* Prosecution Appeal Brief, para. 99, *comparing* Trial Judgement, paras. 2624, 2625 *with* Trial Judgement, paras. 3447, 3463.
[1972] Trial Judgement, para. 2625, nn. 8802, 8803, *referring to* Trial Judgement, Section IV.A.3.a.i, para. 2898.
[1973] Prosecution Appeal Brief, paras. 6, 80, 82, 83, 85, 103, 114-125. *See also* Prosecution Appeal Brief, paras. 104-113; Prosecution Reply Brief, para. 41; T. 24 April 2018 pp. 286, 287, 290.

the fewer number of genocidal acts committed against them.[1974] According to the Prosecution, this approach led the Trial Chamber to ignore that large-scale displacements committed alongside the relatively fewer acts of genocide: (i) support (rather than negate) a finding of genocidal intent; and (ii) augment the destructive impact of the underlying acts of genocide.[1975]

725. The Prosecution further contends that the Trial Chamber's "simplistic numerical" approach led it to ignore several other factors demonstrating the existence of genocidal intent, including: (i) the violent and traumatic circumstances in which displacements were effected; (ii) the unlawful and destructive conditions in which displaced persons were detained; and (iii) the destruction of cultural and religious property that accompanied the attacks.[1976] It further submits that the Trial Chamber failed to account for the destructive impact the displacements had on the long-term ability of the targeted Bosnian Muslims and Bosnian Croats to survive as "separate and distinct" entities.[1977]

726. Karadžić responds that the Trial Chamber did not limit its focus to immediate physical destruction and submits that the Trial Chamber considered other culpable acts such as forcible displacement, conditions of detention, destruction of religious and cultural property, sexual violence, and the targeting of leaders when concluding that the record did not support a finding of genocidal intent.[1978]

727. The Appeals Chamber observes that the Prosecution's arguments principally take issue with paragraph 2624 of the Trial Judgement, as quoted above. The Appeals Chamber recalls that the intent to destroy a group as such is circumscribed by the "area of the perpetrators' activity and

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[1974] Prosecution Appeal Brief, paras. 115, 116, *referring to* Trial Judgement, paras. 2624, 2625. *See also* Prosecution Reply Brief, paras. 45-48; T. 24 April 2018 pp. 286, 287.
[1975] Prosecution Appeal Brief, paras. 115, 117, 118.
[1976] Prosecution Appeal Brief, paras. 117-121. *See also* Prosecution Reply Brief, para. 54. The Prosecution contends that the scale of killings or genocidal acts is a relevant factor in inferring genocidal intent, however, a "narrow" focus on this factor to the exclusion of others is an error. T. 24 April 2018 p. 287.
[1977] Prosecution Appeal Brief, paras. 80, 85, 114, 117, 122-124; Prosecution Reply Brief, paras. 46, 48, 49. The Prosecution emphasizes that the intent to physically and biologically destroy a targeted group does not require intent to destroy every member of the group or part, rather the intent to destroy the continued physical existence of group members as a community. In this respect, conduct that inflicts no physical harm on group members can contribute to the physical destruction of the community where surviving group members can no longer function as members of or reconstitute themselves as a community. *See* Prosecution Reply Brief, para. 41; T. 24 April 2018 pp. 286-290. The Prosecution argues that the manner in which Serb forces effected the mass expulsion of Bosnian Muslims and Bosnian Croats from the Count 1 Municipalities exemplifies that it was used as a means to ensure the physical destruction of the community, thereby reflecting genocidal intent. *See* Prosecution Appeal Brief, para. 128. *See also* T. 24 April 2014 pp. 290-293. It contends that the Trial Chamber, however, divided victims into two categories – direct victims of genocidal acts versus victims of forcible displacements – and only focused on immediate victims who were, for example, killed or faced sexual violence. *See* Prosecution Appeal Brief, paras. 122, 123. The Prosecution argues that this misguided approach to genocidal intent affected the Trial Chamber's assessment of the statements and conduct of Karadžić and other members of the joint criminal enterprise. *See* Prosecution Appeal Brief, para. 125. This contention is evaluated below. *See infra* Section IV.C.2.
[1978] Karadžić Response Brief, paras. 134, 135, 151-160.

control" and the "extent of [the perpetrators'] reach".[1979] Absent direct evidence of genocidal intent, the "scale of the atrocities committed" is one of several factors relevant to determining genocidal intent[1980] and the fact that more members of a targeted group could have been, for example, killed, but were not, may indicate a lack of the *dolus specialis* required to prove such intent.[1981]

728. Against this background, the Appeals Chamber is not persuaded that the Trial Chamber placed undue emphasis on evidence reflecting immediate physical destruction when assessing genocidal intent with respect to the pattern of crimes in the Count 1 Municipalities. The Trial Chamber recalled that conduct not constituting acts of genocide may be considered when assessing genocidal intent.[1982] Furthermore, when assessing the *mens rea* for genocide, the Trial Chamber extensively detailed criminal conduct committed against Bosnian Muslims and Bosnian Croats that resulted in both immediate physical destruction as well as the remaining conduct which the Prosecution argues would have impacted the long-term survival of the targeted groups.[1983] The Appeals Chamber finds that the Trial Chamber acted within the bounds of the law and its discretion when contrasting the number of Bosnian Muslims and Bosnian Croats displaced versus those who were victims of conduct falling within Article 4(2) of the ICTY Statute in assessing whether genocidal intent had been established.[1984]

729. Furthermore, the Appeals Chamber notes that the paragraphs preceding the conclusion in paragraph 2624 of the Trial Judgement reflect the Trial Chamber's extensive consideration of the violent circumstances in which displacements occurred, the unlawful and destructive conditions in which displaced persons were detained, and the destruction of cultural and religious property that accompanied the attacks that resulted in displacements.[1985] It further considered acts of sexual violence, targeted killings, and other conduct that could have an impact on the long-term survival of the Bosnian Muslims and Bosnian Croats as such.[1986] In this context, the Appeals Chamber finds that the Prosecution simply offers an alternative interpretation of the record without demonstrating

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[1979] *See Krstić* Appeal Judgement, para. 13.
[1980] *See Tolimir* Appeal Judgement, para. 246; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Judgement, 11 July 2013, para. 80.
[1981] *See Stakić* Appeal Judgement, para. 42.
[1982] *See* Trial Judgement, para. 553 ("The Genocide Convention and customary international law prohibit only the physical and biological destruction of a group, not attacks on cultural or religious property or symbols of the group. However, while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group. Forcible transfer alone would not suffice to demonstrate the intent to 'destroy' a group but it is a relevant consideration as part of the Chamber's overall factual assessment.") (internal references omitted).
[1983] *See* Trial Judgement, paras. 2614-2622. The Appeals Chamber finds unpersuasive the Prosecution's arguments that the Trial Chamber failed to sufficiently account for findings made previously in the Trial Judgement.
[1984] *Cf. Stakić* Appeal Judgement, paras. 41, 42.
[1985] *See* Trial Judgement, paras. 2616-2622 and references cited therein.
[1986] *See* Trial Judgement, paras. 2616-2622 and references cited therein.

that, under the circumstances, the Trial Chamber was compelled to find, as the only reasonable inference, the existence of genocidal intent.

730. In light of the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses the Prosecution's arguments that the Trial Chamber applied an incorrect definition of genocidal intent and erred in concluding that genocidal intent had not been established based on the crimes committed in the Count 1 Municipalities.

(c) Alleged Errors Concerning Genocidal Intent in Relation to Prijedor Municipality

731. The Prosecution submits that, after finding that genocidal intent was not established for all of the Count 1 Municipalities on a cumulative basis, the Trial Chamber, in light of the Prosecution submissions throughout the proceedings, erred by not determining whether genocidal intent was established with respect to crimes committed in Prijedor Municipality individually.[1987] Alternatively, the Prosecution argues that, if the Trial Judgement is read as "containing an implicit negative conclusion regarding genocidal intent in individual Count 1 Municipalities", the Trial Chamber erred by failing to provide a reasoned opinion.[1988] The Prosecution further submits that the Trial Chamber erred in its analysis of the relevant evidence and findings in concluding that genocidal intent had not been established.[1989]

732. Karadžić responds that the Prosecution's case at trial was that the crimes committed in all of the Count 1 Municipalities on a cumulative basis – not Prijedor Municipality individually – amounted to genocide.[1990] He further submits that the Trial Chamber fully considered evidence relevant to the assessment of genocidal intent in relation to Prijedor Municipality and that evaluating the record with respect to this municipality individually would not have resulted in a

[1987] Prosecution Appeal Brief, paras. 85, 87-92, 129-139. *See also* Prosecution Reply Brief, paras. 28, 33.
[1988] Prosecution Appeal Brief, paras. 85, 93. *See also* Prosecution Reply Brief, para. 31. The Prosecution argues in passing that the Trial Chamber also failed in its obligation to provide a reasoned opinion in not reaching genocidal intent conclusions for each of the other Count 1 Municipalities in addition to Prijedor. *See* Prosecution Appeal Brief, para. 93; Prosecution Reply Brief, para. 31.
[1989] Prosecution Appeal Brief, paras. 129-139. *See also* Prosecution Reply Brief, para. 58. The Appeals Chamber observes that the Prosecution also argues that the conduct in the other Count 1 Municipalities further supports a finding of genocidal intent. *See* Prosecution Appeal Brief, para. 129, nn. 474, 476, 485, 492, 493, 503, 505, 508, 509, 512, 513, 515, 518-520, 526, 527. However, it contends that the events in Prijedor Municipality reflect the clearest example of genocidal intent particularly in light of three unique factors: (i) the vast scale of genocidal acts in relation to the detention of over 30,000 Muslims and Croats across Omarska, Keraterm, and Trnopolje camps; (ii) the rape, abuse, mistreatment, and deplorable detention conditions subjected to women, children, and the elderly in Trnopolje causing terrible fear and mental trauma; and (iii) the targeting of prominent group members of the Prijedor Muslim community who were singled out for execution, torture, and abuse. T. 24 April 2018 pp. 290-293, 295, 296, *referring to* Trial Judgement, paras. 1587, 1596, 1740, 1744, 1749, 1753, 1766, 1793, 1830, 1831, 1851.
[1990] Karadžić Response Brief, paras. 98-101, 104, 106, 111. In this respect, Karadžić suggests that the Trial Chamber recalled and assessed the Prosecution's submissions as they were presented with respect to Prijedor Municipality. Karadžić Response Brief, paras. 98, 99. Karadžić further contends that there is no authority for the proposition that a trial chamber is required to isolate all of the different municipalities in the indictment and make a "genocidal evaluation indictment by indictment". T. 24 April 2018 p. 301.

different outcome.[1991] Karadžić concludes that the Trial Chamber did not fail to provide a reasoned opinion.[1992]

733. The Appeals Chamber finds no error in the Trial Chamber's assessment of genocidal intent on the basis of all Count 1 Municipalities without providing a separate conclusion for Prijedor Municipality.[1993] The phrasing employed in the Indictment[1994] as well as the Prosecution's pre-trial[1995] and closing submissions[1996] did not require the Trial Chamber to articulate a separate *mens rea* finding for Prijedor Municipality. The Trial Chamber assessed the events in Prijedor Municipality in the same manner in which the Prosecution emphasized its importance – as a "core example" of the genocidal nature of crimes committed throughout the Count 1 Municipalities.[1997] As noted above, the Trial Chamber concluded that genocidal intent had not been established in respect of the Count 1 Municipalities. Consequently, the Prosecution's arguments regarding the failure to adjudicate and to provide a reasoned opinion are dismissed.[1998]

734. Turning to the Prosecution's contention that the Trial Chamber erred in assessing genocidal intent in relation to Prijedor Municipality,[1999] the Appeals Chamber observes that the Trial

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[1991] Karadžić Response Brief, paras. 98, 100-102, 107-115.
[1992] Karadžić Response Brief, para. 114.
[1993] The Prosecution's references to the *Stanišić and Simatović* Appeal Judgement for a basis of arguing that the Trial Chamber was compelled to make *mens rea* findings on genocide for Prijedor Municipality specifically are unpersuasive. In the *Stanišić and Simatović* Appeal Judgement, the Appeals Chamber of the ICTY faulted the Trial Chamber for not making requisite findings on elements of responsibility with respect to the relevant joint criminal enterprise, which were crucial to assessing the defendants' *mens rea* with respect to that mode of liability. *Stanišić and Simatović* Appeal Judgement, paras. 86-88. In the present case, the Trial Chamber made the findings on all the elements of responsibility with respect to the Overarching JCE and did not omit consideration of the relevant elements of genocide. *See*, *e.g.*, Trial Judgement, paras. 2571-2626 (genocide), 2627-3525 (Overarching JCE).
[1994] *See* Indictment, paras. 36-40.
[1995] *See* Prosecution Pre-Trial Brief, para. 27.
[1996] Prosecution Final Trial Brief, paras. 573, 587, 588.
[1997] *Compare* Trial Judgement, para. 2589 ("For the Prosecution, the pattern of crimes in the Count 1 Municipalities, taking Prijedor as the core example, demonstrates the intent to destroy the very existence of the Bosnian Croat and Bosnian Muslim communities in the Count 1 Municipalities and to prevent their ability to reconstitute themselves.") (internal references omitted) *with* Prosecution Final Trial Brief, paras. 583 ("While the same general pattern of crimes occurred in all of the municipalities charged in Count 1, it is instructive to focus on one to illustrate how far removed from 'mere' forcible transfer this was and how clearly the underlying crimes reflect Karadžić's intent to destroy the group in part. In Prijedor, […]."), 591 ("Applying the substantiality factors to just one of the Count 1 specified municipalities, the numeric size of the Bosnian Muslim population in Prijedor in 1991 was nearly 25 percent larger that the Bosnian Muslim population in Srebrenica at the time of the 1995 genocide […]."); T. 29 September 2014 pp. 47567 (Mr. Tieger: "I outline the story of some of the masses of victims of the overarching JCE, particularly Dr. Sadikovic, but whole communities, distinct and separate parts of the Bosnian Muslim and Bosnian Croat community, were also victims; for example, Prijedor"), 47579 (Mr. Tieger: "Let me just return to Prijedor, focus on that by way of example […].").
[1998] For the reasons articulated above, the Appeals Chamber further dismisses the Prosecution's contention that the Trial Chamber failed to provide a reasoned opinion in not making specific genocidal intent findings with respect to each of the Count 1 Municipalities other than Prijedor.
[1999] The Appeals Chamber is mindful that the Prosecution's arguments are raised under Sub-Ground 3(D) of its appeal brief wherein it contends that Karadžić and the other joint criminal enterprise members possessed genocidal intent based on the pattern of crimes committed and in view of the statements and conduct of the joint criminal enterprise members. *See* Prosecution Appeal Brief, paras. 126-146. The Appeals Chamber has considered the arguments holistically notwithstanding the organization of its analysis.

Chamber, *inter alia*, considered: (i) the establishment of Serb institutions in 1991 and 1992; (ii) the prevalence of propaganda against Bosnian Muslims and Bosnian Croats; (iii) the takeover by Serb forces on 30 April 1992 and its immediate aftermath of events against non-Serbs; (iv) the attack and destruction of predominantly Muslim villages; (v) the killings and detention of Bosnian Muslims and Bosnian Croats, where detainees were subjected to frequent and severe beatings, rape, sexual violence, or death; (vi) the destruction of mosques and Catholic churches by Serb forces; (vii) the expulsion of non-Serbs from the municipalities; and (viii) that, by 1995, the population of Prijedor Municipality was approximately 92 percent Bosnian Serb, five percent Bosnian Muslim, and one percent Bosnian Croat.[2000] The Trial Chamber assessed these findings along with the similar pattern of crimes arising from the various other Count 1 Municipalities and concluded that it was not satisfied that there was genocidal intent to destroy parts of the Bosnian Muslim and/or Bosnian Croat groups in these municipalities.[2001]

735. The Appeals Chamber notes that the majority of the Prosecution's submissions under this ground of appeal rely upon the Trial Chamber's factual findings regarding atrocities committed against Bosnian Muslims and Bosnian Croats in Prijedor Municipality. The Prosecution does not challenge the Trial Chamber's assessment of evidence underlying these factual conclusions, but rather presents an alternative interpretation of the record. The Appeals Chamber is not persuaded that the Trial Chamber ignored the relevant evidence or the impact of its findings or that it was compelled to find, as the only reasonable conclusion, that genocidal intent existed with respect to the underlying crimes committed in Prijedor Municipality.[2002]

736. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses the Prosecution's submissions that the Trial Chamber erred in its assessment of genocidal intent with respect to Prijedor Municipality.

(d) Conclusion

737. The Appeals Chamber finds, Judge de Prada dissenting, that the Prosecution has failed to demonstrate any error in the Trial Chamber's assessment of the pattern of crimes in relation to the Count 1 Municipalities.

[2000] Trial Judgement, para. 2620, *referring to* Trial Judgement, paras. 1578-1582, 1592, 1593, 1596-1603, 1618, 1619, 1621, 1628, 1631, 1637, 1638, 1647, 1657, 1666, 1669, 1677, 1681, 1682, 1684, 1692, 1700-1703, 1715, 1717, 1735, 1738, 1747, 1774, 1778, 1781, 1803, 1815, 1832, 1847, 1861, 1871, 1877, 1885, 1896, 1897, 1902, 1913. Elsewhere in the Trial Judgement, the Trial Chamber noted that in 1991, 43.9 percent of the population in Prijedor were Bosnian Muslims, 42.3 percent were Bosnian Serbs, and 5.6 percent were Bosnian Croats. *See* Trial Judgement, para. 1574.

[2001] Trial Judgement, paras. 2624, 2625.

[2002] This same analysis applies with equal force to the Prosecution's contentions that the conduct in other Count 1 Municipalities demonstrates genocidal intent in view of the holistic consideration of the circumstances prevalent in the municipalities aside from Prijedor. *See, e.g.*, Trial Judgement, paras. 2616-2619, 2621, 2622.

2. Alleged Errors in Assessing Conduct and Statements

738. The Trial Chamber assessed the statements and conduct of Karadžić and other members of the Overarching JCE and determined that it was not satisfied that this evidence, even when considered in the context of the pattern of crimes, allowed it to conclude that the only reasonable inference was that these individuals had the intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities as such.[2003]

739. The Prosecution submits that the Trial Chamber's "narrow" conception of genocidal intent affected its assessment of statements made by Karadžić and other joint criminal enterprise members.[2004] The Prosecution further challenges the Trial Chamber's assessment of: (i) Karadžić's "constant references" to historical grievances and genocide against Serbs in World War II[2005] and his statements that "repeatedly foreshadowed" the destruction of the Bosnian Muslim and Bosnian Croat groups;[2006] (ii) statements made by Overarching JCE members such as Mladić, Šešelj, and Plavšić that echoed Karadžić's sentiments and reflected shared genocidal intent;[2007] and (iii) statements made by Mladić and Plavšić in Prijedor and Karadžić's promotion of Simo Drljača, who oversaw camps and commanded those responsible for genocidal acts in the municipality.[2008] According to the Prosecution, the Trial Chamber failed to assess the statements' "true destructive impact", which affirms the inference of a shared genocidal intent among the members of the Overarching JCE.[2009]

740. Karadžić responds that the Trial Chamber properly considered the conduct and statements of Karadžić and other members of the Overarching JCE, and was well within its discretion to find that genocidal intent was not established.[2010] He further responds that these statements were assessed in

[2003] Trial Judgement, para. 2605. *See also* Trial Judgement, paras. 2595-2604, 2634-2903.
[2004] Prosecution Appeal Brief, para. 125. The Prosecution contends that the Trial Chamber considered this evidence in the context of the pattern of crimes, and found that statements about disappearance, elimination, annihilation, or "possible extinction" of Bosnian Muslims "did not support a conclusion" that joint criminal enterprise members possessed the intent to "physically destroy" these groups. *See* Prosecution Appeal Brief, para. 125, *referring to, inter alia*, Trial Judgement, paras. 2599, 2601, 2605. It submits, however, that a "holistic consideration" of the statements and conduct of joint criminal enterprise members responsible for the pattern of crimes, viewed against the proper legal framework, leads to the only reasonable conclusion that Karadžić and other joint criminal enterprise members possessed and shared genocidal intent. *See* Prosecution Appeal Brief, paras. 125, 126, 140-146.
[2005] Prosecution Appeal Brief, para. 141.
[2006] Prosecution Appeal Brief, para. 142. *See also* Prosecution Reply Brief, para. 66.
[2007] Prosecution Appeal Brief, para. 143.
[2008] Prosecution Appeal Brief, para. 144. *See also* Prosecution Reply Brief, para. 68.
[2009] Prosecution Appeal Brief paras. 145, 146; T. 24 April 2018 pp. 308-310. The Prosecution submits that, in addition to these statements, Karadžić used his "unparalleled" power and authority over the perpetrators to encourage the commission of crimes by deflecting outside scrutiny, continuing to incite ethnic hatred, deliberately failing to curb the rampant criminality until international exposure, as well as rewarding and promoting Prijedor police officials who he knew had been involved in crimes. *See* T. 24 April 2018 pp. 309, 310.
[2010] Karadžić Response Brief, paras. 190-200.

other ICTY cases, all of which found no genocidal intent with respect to crimes committed in the Count 1 Municipalities.[2011]

741. The Appeals Chamber has rejected, Judge de Prada dissenting, the Prosecution's contention that the Trial Chamber applied a "narrow" conception of genocidal intent in its assessment of the pattern of crimes.[2012] Consequently, it also rejects the contention that, on this basis, the Trial Chamber applied an erroneous interpretation of the law when assessing the statements and conduct of Karadžić and other members of the Overarching JCE.

742. Turning to the specific challenges, the Appeals Chamber observes that the Trial Chamber explicitly considered statements and conduct addressed in the Prosecution's submissions. In this regard, the Trial Chamber noted that Karadžić and the Bosnian Serb leadership repeatedly denigrated Bosnian Muslims and Bosnian Croats and portrayed them as historic enemies, all of which exacerbated ethnic tensions in Bosnia and Herzegovina.[2013] In the Trial Chamber's view, these statements had the effect of "furthering the objective of ethnic separation", rather than revealing an intent to "physically destroy" a part of the Bosnian Muslim and/or Bosnian Croat groups.[2014] The Trial Chamber equally considered highly inflammatory public speeches by Karadžić calling for the "disappearance", "annihilation", "vanish[ing]", "elimination", and "extinction" of Bosnian Muslims.[2015] Having assessed these statements "in the full context in which they were delivered and not in isolation",[2016] the Trial Chamber found that they were delivered "mainly as a warning that Bosnian Muslims should not pursue a path to independence" and "that if they did do so there would be war which would lead to severe bloodshed".[2017] The Trial Chamber stated that it was not satisfied that these statements demonstrated that Karadžić intended to physically destroy a part of the Bosnian Muslim and/or the Bosnian Croat groups as such.[2018]

[2011] Karadžić Response Brief, paras. 192-194. *See also* T. 24 April 2018 pp. 301-305.
[2012] *See supra* Section IV.C.1(b).
[2013] Trial Judgement, para. 2596.
[2014] Trial Judgement, para. 2598.
[2015] Trial Judgement, para. 2599. The statements expressly considered by the Trial Chamber included Karadžić's speeches in October 1991 to the Assembly of the Socialist Republic of Bosnia and Herzegovina and in July 1992 to the Bosnian Serb Assembly. *See* Trial Judgement, paras. 2600, 2601, *referring to* Trial Judgement, para. 2675 (where Karadžić spoke about a "highway of hell" and issued threats of war if the Bosnian Serb interests were ignored and the Bosnian Muslims pursued independence for Bosnia and Herzegovina), Exhibit D92, p. 86 (where Karadžić stated that the conflict had been roused to eliminate Bosnian Muslims, and went on to say that "we have to save the Serb people in their ethnic and also historical territories", that in "the state that we are building, we have to ensure that [Bosnian Muslims and Bosnian Croats] have all the rights we have, under the condition that they are not hostile and that they leave the weapons").
[2016] Trial Judgement, para. 2599, *referring to* Trial Judgement, paras. 2675, 2766, 2789, 2810, 2864, 2870, 3272, 3273.
[2017] Trial Judgement, para. 2599.
[2018] Trial Judgement, paras. 2599-2601. The Appeals Chamber notes the Prosecution's submissions that, in private telephone conversations in late 1991, Karadžić warned that Bosnian Muslims would, *inter alia*, "disappear from the face of the earth" and "be annihilated" if they persisted in pursuing independence. *See* Prosecution Appeal Brief, para. 142, nn. 546-549. While the Trial Chamber's assessment of genocidal intent in paragraphs 2599 and 2600 of the Trial

743. In the same vein, the Trial Chamber evaluated statements made by Šešelj, Mladić, and Plavšić, including those that the Prosecution has cited.[2019] It considered that, despite the highly inflammatory language, given the context in which the statements were made, the evidence did not lead to the conclusion that the only reasonable inference was the intent to physically destroy, but rather to separate and move Bosnian Muslims and/or Bosnian Croats out of Bosnian Serb claimed territory.[2020]

744. The Appeals Chamber notes that the Trial Chamber, when assessing genocidal intent, did not discuss statements made by Mladić and Plavšić in Prijedor.[2021] Nevertheless, recalling the presumption that the Trial Chamber has evaluated all the evidence presented to it,[2022] and reading the Trial Judgement as a whole,[2023] the Appeals Chamber observes that this evidence was addressed elsewhere in the Trial Judgement.[2024] Finally, regarding the promotion of Drljača, who established the Omarska camp in Prijedor, the Trial Chamber also did not discuss this evidence in its assessment of genocidal intent. However, this evidence was considered elsewhere in the Trial Judgement, where the Trial Chamber found that Karadžić knowingly rewarded or promoted subordinates who had committed crimes, thus demonstrating his indifference to criminal activity directed at non-Serbs during the conflict "as long as the core objectives of the Bosnian Serbs were fulfilled".[2025] The Appeals Chamber is therefore not convinced that the Trial Chamber ignored this evidence or that it was compelled to conclude that genocidal intent was the only reasonable inference based on the conduct of Karadžić and the other members of the Overarching JCE as well as the pattern of crimes committed in Prijedor Municipality.

745. Aside from arguing that the statements and conduct demonstrate the "true destructive impact of the pattern of crimes on the targeted communities" and affirm Karadžić's genocidal intent,[2026] the Prosecution fails to demonstrate how the Trial Chamber's assessment was erroneous or unreasonable. Evidence demonstrating ethnic bias, however reprehensible, does not necessarily

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Judgement did not explicitly discuss this evidence, the Trial Judgement reflects that it was considered by the Trial Chamber in reaching its conclusions with respect to genocidal intent. *See* Trial Judgement, paras. 2595, 2677, 2678, 2680.

[2019] *See* Prosecution Appeal Brief, para. 143, nn. 550-557 *and* Trial Judgement, paras. 2602-2604, 2657, 2662-2664, 2669, 2706, 2727, 2771, 2798, 2832, 3329.

[2020] Trial Judgement, paras. 2602, 2603.

[2021] *See* Prosecution Appeal Brief, para. 144, *referring to* Exhibit P1360.

[2022] *See, e.g., Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Nyiramasuhuko et al.* Appeal Judgement, para. 163; *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75; *Kvočka et al.* Appeal Judgement, para. 23.

[2023] *Šešelj* Appeal Judgement, para. 62; *Prlić et al.* Appeal Judgement, paras. 329, 453. *Cf. Nyiramasuhuko et al.* Appeal Judgement, paras. 643, 1523, 1927, 2106, 2901.

[2024] *See* Trial Judgement, nn. 200, 9024, 9334.

[2025] Trial Judgement, paras. 3432, 3433.

[2026] Prosecution Appeal Brief, paras. 125, 140, 145.

prove genocidal intent.[2027] Utterances that fall short of expressly calling for a group's physical destruction might constitute evidence of genocidal intent but a perpetrator's statements must be understood and assessed in their proper context.[2028] The Trial Judgement reflects the Trial Chamber's adherence to this approach. In light of the above, the Appeals Chamber, Judge de Prada dissenting, cannot conclude that the statements and conduct to which the Prosecution refers required a reasonable trier of fact to infer as the only reasonable inference that the conduct and statements of Karadžić and other Overarching JCE members reflected an intent to destroy the Bosnian Muslim and the Bosnian Croat groups as such in the Count 1 Municipalities.

3. Conclusion

746. Based on the foregoing, the Appeals Chamber, Judge de Prada dissenting, dismisses Ground 3 of the Prosecution's appeal.

[2027] *See Stakić* Appeal Judgement, para. 52.
[2028] *Stakić* Appeal Judgement, para. 52.

V. SENTENCING APPEALS

A. Introduction

747. The Trial Chamber sentenced Karadžić to a single sentence of 40 years' imprisonment for his convictions for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war.[2029] In determining the sentence, the Trial Chamber considered the gravity of Karadžić's offences, aggravating and mitigating circumstances, sentences in related cases at the ICTY, general practice of sentences in the former Yugoslavia, as well as credit for the time that Karadžić had already spent in detention.[2030]

748. Pursuant to Article 24 of the ICTY Statute and Rule 101(B) of the ICTY Rules, trial chambers must take into account the following factors in sentencing: (i) the gravity of the offence or totality of the culpable conduct; (ii) the individual circumstances of the convicted person; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; and (iv) aggravating and mitigating circumstances.[2031]

749. The Appeals Chamber recalls that appeals against the sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[2032] Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime.[2033] 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.[2034] It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence.[2035] To show that the trial chamber committed a discernible error in exercising its discretion, an appellant must demonstrate

[2029] Trial Judgement, paras. 6070-6072.
[2030] *See* Trial Judgement, paras. 6045-6070.
[2031] *Prlić et al.* Appeal Judgement, para. 3203; *Stanišić and Župljanin* Appeal Judgement, para. 1099; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1960. *See also Šešelj* Appeal Judgement, para. 179.
[2032] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961; *Kupreškić et al.* Appeal Judgement, para. 408.
[2033] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1961; *Ngirabatware* Appeal Judgement, para. 255.
[2034] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961; *Ngirabatware* Appeal Judgement, para. 255.
[2035] *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.

that the trial chamber gave weight to extraneous or irrelevant 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 that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion.[2036]

750. Both Karadžić[2037] and the Prosecution[2038] have appealed against the 40-year sentence imposed by the Trial Chamber. The Appeals Chamber will address their appeals as well as the impact of its findings on Karadžić's sentence.

B. Karadžić's Sentencing Appeal (Grounds 47-50)

751. Karadžić submits that the Trial Chamber erred in declining to find several mitigating circumstances.[2039] Specifically, he argues that the Trial Chamber erroneously found his motive to enter into an agreement with an American official, Richard Holbrooke ("Holbrooke Agreement"), irrelevant and therefore failed to consider that his prosecution before the ICTY was a breach of this agreement and consequently a violation of his rights.[2040] Karadžić further submits that the Trial Chamber erred in finding that the Prosecution's disclosure violations did not constitute a mitigating circumstance, and that the violations did not prejudice him, particularly because the violations prompted the Trial Chamber to order 14 weeks of trial suspension which unduly delayed his proceedings.[2041] Finally, Karadžić submits that the Trial Chamber failed to find his lack of preparation for war, difficulties in exercising command, and good conduct during the war as mitigating circumstances.[2042]

752. The Prosecution responds that Karadžić's self-serving motive to resign from public life is incompatible with mitigation and that he fails to substantiate that any right was violated by the

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[2036] *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1962; *Ngirabatware* Appeal Judgement, para. 255.
[2037] *See* Karadžić Notice of Appeal, pp. 15, 16; Karadžić Appeal Brief, paras. 846-856; Karadžić Reply Brief, paras. 256, 257.
[2038] *See* Prosecution Notice of Appeal, paras. 24, 25; Prosecution Appeal Brief, paras. 7, 148-180; Prosecution Reply Brief, paras. 69-75.
[2039] *See* Karadžić Notice of Appeal, pp. 15, 16; Karadžić Appeal Brief, paras. 846-856; Karadžić Reply Brief, paras. 256, 257.
[2040] Karadžić Appeal Brief, paras. 846, 848. In reply, Karadžić points to domestic jurisprudence to support his contention that a right was violated in the breach of an agreement not to prosecute. Karadžić Reply Brief, para. 257, n. 507, *referring to Santobello v. New York*, 404 U.S. 257, 262 (1971).
[2041] Karadžić Appeal Brief, paras. 849, 850. In reply, Karadžić submits that the delay, resulting from the Prosecution's disclosure violations, was in no way his fault. Karadžić Reply Brief, para. 257. While recognizing the delay as relatively short, he submits that the Trial Chamber failed to recognize it as a mitigating circumstance. Karadžić Reply Brief, para. 257.
[2042] Karadžić Appeal Brief, paras. 851, 853-855. *See also* Karadžić Reply Brief, para. 256. Karadžić argues that these factors have been recognized as mitigating circumstances in other cases. Karadžić Appeal Brief, para. 855, nn. 1168, 1169.

purported breach of the alleged non-prosecution element of the Holbrooke Agreement.[2043] It further submits that Karadžić does not show any abuse of discretion when the Trial Chamber rejected arguments that Karadžić suffered prejudice from the Prosecution's disclosure violations or that the trial was unduly delayed.[2044] As for Karadžić's contentions about his lack of preparation for war, difficulties in exercising command, and good conduct during the war, the Prosecution responds that the Trial Chamber considered relevant evidence in support and appropriately concluded that these factors were not mitigating in light of the extreme gravity of Karadžić's crimes, the central role he played in their commission, and his authority over Bosnian Serb forces as well as Bosnian Serb political and governmental organs.[2045]

753. The Appeals Chamber recalls that a trial chamber is required to consider any mitigating circumstance when determining the appropriate sentence, but it enjoys considerable discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to the factors identified.[2046] The existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.[2047]

754. Turning to Karadžić's submissions regarding the purported violation of the non-prosecution agreement, the Appeals Chamber observes that the Trial Chamber considered the Holbrooke Agreement[2048] and Karadžić's reliance on it for two purposes: (i) to demonstrate his good character and conduct after the conflict; and (ii) to receive a remedy for the violation of his rights resulting from his prosecution at the ICTY in alleged breach of this agreement.[2049] The Trial Chamber concluded that Karadžić's decision to step down from public office in July 1996 had a "positive influence on the establishment of peace and stability" in Bosnia and Herzegovina and the region and found this to be a mitigating factor.[2050] The Trial Chamber also examined evidence that Karadžić verbally agreed to step down from public office in order to not be prosecuted by the

[2043] Prosecution Response Brief, para. 494.
[2044] Prosecution Response Brief, paras. 495, 496. The Prosecution further submits that a remedy for supposed prejudice resulting from disclosure violations should not automatically result in a reduction of sentence, particularly in view of the extreme gravity of Karadžić's crimes and individual circumstances. Prosecution Response Brief, para. 497.
[2045] Prosecution Response Brief, para. 498.
[2046] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 1130; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265.
[2047] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265 and references cited therein.
[2048] Trial Judgement, paras. 6053-6057.
[2049] Trial Judgement, para. 6053, n. 20648, *referring to* Karadžić Final Trial Brief, paras. 3379-3406. *See* Karadžić Final Trial Brief, paras. 3400-3406.
[2050] Trial Judgement, para. 6057.

ICTY[2051] but considered his reasons for resigning irrelevant to determining mitigating factors in sentencing.[2052]

755. The Appeals Chamber finds no error in this approach. The Appeals Chamber recalls that the ICTY Appeals Chamber issued a decision on 12 October 2009 finding that, even if the Holbrooke Agreement provided that Karadžić would not be prosecuted before the ICTY, "it would not limit the jurisdiction of the [ICTY], it would not otherwise be binding on the [ICTY] and it would not trigger the doctrine of abuse of process".[2053] The Appeals Chamber of the ICTY considered that a fundamental aim of international criminal tribunals is to end impunity by ensuring that serious violations of international humanitarian law are prosecuted and punished.[2054] Consequently, it held that individuals accused of such crimes "can have no legitimate expectation of immunity from prosecution" and that Karadžić's "expectations of impunity do not constitute an exception to this rule".[2055] Accordingly, the Trial Chamber correctly did not take into account any purported non-prosecution agreement when assessing the mitigating factors. The Appeals Chamber finds that Karadžić does not demonstrate any error on the part of the Trial Chamber in this respect.

756. As to Karadžić's contention that the Trial Chamber failed to consider the Prosecution's disclosure violations in mitigation, the Trial Chamber found that the number of such violations did not constitute a mitigating circumstance and that the Prosecution's disclosure practices had no bearing on the appropriate sentence.[2056] The Trial Chamber further recalled that Karadžić did not suffer any prejudice from the disclosure violations and that it had taken measures to protect his fair trial rights.[2057]

757. The Appeals Chamber recalls that it has previously dismissed Karadžić's appeal concerning the Trial Chamber's findings in relation to disclosure violations and prejudice, including alleged undue delay resulting from the Prosecution's disclosure practices.[2058] In particular, the Appeals

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[2051] *See* Trial Judgement, para. 6056.
[2052] Trial Judgement, para. 6057.
[2053] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009 ("Decision of 12 October 2009"), para. 54.
[2054] Decision of 12 October 2009, para. 52.
[2055] Decision of 12 October 2009, para. 52.
[2056] Trial Judgement, para. 6063.
[2057] Trial Judgement, para. 6063.
[2058] *See supra* Section III.A.4(b). The Appeals Chamber also notes that Karadžić relies on ICTR jurisprudence to argue that all violations, regardless of the degree of prejudice, require an appropriate remedy. *See* Karadžić Appeal Brief, para. 849, n. 1156, *referring to Rwamakuba* Decision of 13 September 2007, para. 24, *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000 (originally filed in French, English translation filed on 6 July 2001), para. 125. The Appeals Chamber is of the view that Karadžić misconstrues the jurisprudence. The nature and form of an effective remedy should be proportional to the gravity of the harm that is suffered. Furthermore, in situations where a violation has not materially prejudiced an accused, recognition of the violation may suffice as an effective remedy. *See Nyiramasuhuko et al.* Appeal Judgement, para. 42. In any event, the Appeals Chamber notes that the Trial Chamber found no prejudice in relation to the Prosecution's disclosure violations, and in view of the remedies

Chamber has found that the Trial Chamber's orders to suspend proceedings in view of the Prosecution's disclosure practices did not result in undue delay as such suspensions expressly sought to strike a balance between Karadžić's rights to be tried without undue delay and to have adequate time and facilities to prepare his defence.[2059] In light of the foregoing and mindful of the broad discretion trial chambers enjoy in determining what constitutes a mitigating circumstance, the Appeals Chamber finds that Karadžić demonstrates no error in the Trial Chamber's refusal to consider the Prosecution's disclosure violations in mitigation.

758. As to the Trial Chamber's alleged failure to consider Karadžić's lack of preparation and control during the war, the Appeals Chamber observes that the Trial Chamber explicitly noted his submissions but concluded that it did not consider his alleged lack of training and preparation for war to be mitigating in light of its findings on his authority over Bosnian Serb forces and relevant political and governmental organs.[2060] Karadžić's contention that he was a "psychiatrist and poet, with no military training"[2061] ignores the Trial Chamber's extensive findings of his authority over Bosnian Serb forces[2062] and his central involvement in four joint criminal enterprises.[2063] Given the broad discretion trial chambers enjoy in determining what constitutes a mitigating circumstance, Karadžić does not demonstrate that the Trial Chamber erred in not giving weight to his contentions of lack of preparation and control during the war in mitigation of his sentence.

759. As to Karadžić's submissions relating to his good conduct during the war, the Appeals Chamber recalls that this may be a relevant factor in sentencing,[2064] but that good character or conduct of a convicted person often carries little weight in the determination of the sentence.[2065] The Appeals Chamber observes that the Trial Chamber noted Karadžić's submission on this point, recalled the relevant jurisprudence, and found that, given the gravity of his crimes and his central involvement in them, it did not "consider his conduct during the war to be mitigating in any way".[2066] The Appeals Chamber also recalls the Trial Chamber's findings that Karadžić's participation was integral to crimes committed in furtherance of four joint criminal enterprises, as well as a finding, in one instance, that his "contribution was so instrumental that, without his

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provided by the Trial Chamber to pre-empt the occurrence of any such prejudice, the cases Karadžić refers to are distinguishable from the circumstances of his case.

[2059] *See supra* Section III.A.4(b).

[2060] Trial Judgement, paras. 6053, 6064.

[2061] Karadžić Appeal Brief, para. 855; Karadžić Final Trial Brief, para. 3417.

[2062] *See, e.g.*, Trial Judgement, paras. 3157, 3160, 3167, 3168, 3177, 4891, 5848, 5850.

[2063] *See, e.g.*, Trial Judgement, paras. 3505, 3524, 4891, 4937-4939, 5831, 5849, 5992, 5993, 5996-6010, 6046-6050.

[2064] *See, e.g.*, *Šainović et al.* Appeal Judgement, para. 1821; *Ntabakuze* Appeal Judgement, para. 296; *Krajišnik* Appeal Judgement, para. 816.

[2065] *See Ntabakuze* Appeal Judgement, para. 296 and references cited therein.

[2066] Trial Judgement, paras. 6036, 6053, 6064.

support, the SRK's attacks on civilians could not have in fact occurred".[2067] In light of the above, Karadžić has failed to demonstrate that the Trial Chamber erred in not giving weight to his submission of good conduct during the war in mitigation of his sentence.

760. Based on the foregoing, the Appeals Chamber dismisses Grounds 47 to 50 of Karadžić's appeal in their entirety.

C. Prosecution's Sentencing Appeal (Ground 4)

761. The Prosecution submits that the Trial Chamber abused its discretion by imposing a sentence of 40 years' imprisonment and seeks to have Karadžić's sentence increased to life imprisonment.[2068] It argues that the 40-year sentence does not reflect the Trial Chamber's own findings and analysis on the gravity of Karadžić's crimes and his responsibility for the largest and gravest set of crimes ever attributed to a single person at the ICTY.[2069] The Prosecution contends that, *inter alia*, the Trial Chamber failed to acknowledge the Prosecution's recommendation of a life sentence[2070] and that sentencing practice in comparable and "related cases" demonstrates that the Trial Chamber committed a discernible error in imposing a 40-year sentence.[2071] The Prosecution further submits that the Trial Chamber erred in its assessment of aggravating[2072] and mitigating factors.[2073]

762. Karadžić responds that the Trial Chamber was under no compulsion to impose a mandatory life sentence,[2074] and that comparing sentences of other cases is of limited assistance.[2075] Karadžić

[2067] *See* Trial Judgement, para. 4891. *See also, e.g.*, Trial Judgement, paras. 3505, 3524, 4937-4939, 5831, 5849, 5992, 5993, 5996-6010, 6046-6050.
[2068] *See* Prosecution Notice of Appeal, paras. 24, 25; Prosecution Appeal Brief, paras. 7, 148-180; Prosecution Reply Brief, paras. 69-75. *See also* T. 24 April 2018 p. 295.
[2069] *See* Prosecution Appeal Brief, paras. 7, 148-151, 153, 155-172. *See also* T. 24 April 2018 p. 295. The Prosecution submits that the Trial Chamber failed to give sufficient weight to its own findings regarding the extreme gravity of Karadžić's crimes and his "essential" or "instrumental" role in any one of the three main joint criminal enterprises, of which he was found to have been a member. *See* Prosecution Appeal Brief, paras. 7, 149, 155, 158, 159, 168. *See also* T. 24 April 2018 p. 295.
[2070] Prosecution Appeal Brief, paras. 169, 171.
[2071] Prosecution Appeal Brief, paras. 149, 164-166, 172; Prosecution Reply Brief, para. 71.
[2072] *See* Prosecution Appeal Brief, paras. 152, 173-175.
[2073] *See* Prosecution Appeal Brief, paras. 7, 152, 159, 176-179. *See also* T. 24 April 2018 pp. 310, 311. The Prosecution argues that the Trial Chamber erred in crediting Karadžić's decision to resign in 1996 from public office as a mitigating circumstance and in failing to consider his reasons for doing so. *See* Prosecution Appeal Brief, para. 178. *See also* T. 24 April 2018 pp. 310, 311. In this regard, the Prosecution contends that Karadžić's self-serving motive to gain immunity from criminal prosecution does not show good character or an intention to make amends for wrongful conduct. *See* Prosecution Appeal Brief, paras. 178, 179. *See also* Prosecution Reply Brief, para. 75.
[2074] Karadžić Response Brief, para. 210.
[2075] Karadžić Response Brief, paras. 215, 216. *See also* Karadžić Response Brief, paras. 217, 218.

further submits that the Prosecution fails to demonstrate an error in the Trial Chamber's assessment of aggravating and mitigating factors.[2076]

763. After setting out the jurisprudence on sentencing[2077] and considering the relevant sentencing factors,[2078] the Trial Chamber concluded that a 40-year sentence was warranted, "in particular given the scope and scale of the serious crimes for which [Karadžić] was found responsible and his central involvement in the commission of these crimes".[2079]

764. In assessing the gravity of Karadžić's offences, the Trial Chamber considered them to be "among the most egregious of crimes in international criminal law [including] extermination as a crime against humanity and genocide".[2080] The Trial Chamber recalled its findings that, between October 1991 and 30 November 1995, Karadžić participated in the Overarching JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina.[2081] For crimes committed in relation to the Overarching JCE, the Trial Chamber convicted Karadžić of persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity (under the first form of joint criminal enterprise), as well as of persecution, extermination, and murder as crimes against humanity and murder as a violation of the laws or customs of war (under the third form of joint criminal enterprise).[2082] The Trial Chamber also recalled that, between April 1992 and October 1995, Karadžić participated in the Sarajevo JCE to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling.[2083] In relation to this joint criminal enterprise, Karadžić was convicted of murder as a crime against humanity, as well as of murder, terror, and unlawful attacks on civilians as violations of the laws or customs of war (under the first form of

[2076] *See* Karadžić Response Brief, paras. 221-229. With respect to mitigating factors, Karadžić responds that there is no dispute with the Trial Chamber's finding that his resignation in 1996 had a positive influence on the establishment of peace and stability in Bosnia and Herzegovina and the region. In his view, the establishment of peace and security, being one of the broader goals of international criminal justice, should be encouraged, and it was appropriate to attribute weight to his resignation as a mitigating factor. *See* Karadžić Response Brief, paras. 227-229; T. 24 April 2018 p. 300.
[2077] *See* Trial Judgement, paras. 6025-6044.
[2078] *See* Trial Judgement, paras. 6045-6069.
[2079] Trial Judgement, para. 6070.
[2080] Trial Judgement, paras. 6046-6050.
[2081] Trial Judgement, para. 6047. *See also* Trial Judgement, paras. 3447, 3462, 3463, 3464, 3505, 3511, 3512, 3524, 5996, 6002-6007.
[2082] Trial Judgement, paras. 3521, 3524, 5996, 6002-6007, 6022, 6047. The Trial Chamber noted that the crimes of extermination and murder as crimes against humanity are impermissibly cumulative, and therefore only entered convictions for extermination as a crime against humanity for specific "overlapping" incidents related to the Overarching JCE. *See* Trial Judgement, paras. 6023, 6024, n. 20574. The Appeals Chamber recalls that it, Judge Joensen dissenting, has granted, in part, Ground 31 of Karadžić's appeal, regarding certain crimes committed in connection with the Overarching JCE. *See supra* paras. 474, 475. The Appeals Chamber will consider the impact of this in a later section. *See infra* Section V.D.
[2083] Trial Judgement, para. 6048. *See also* Trial Judgement, paras. 4644, 4647-4649, 4676, 4678, 4707, 4708, 4891, 4892, 4932, 4936-4939, 5997.

joint criminal enterprise).[2084] The Trial Chamber further recalled that, in 1995, Karadžić participated in the Srebrenica JCE to eliminate Bosnian Muslims in Srebrenica,[2085] and was convicted of genocide, persecution, extermination, and other inhumane acts (forcible transfer) as crimes against humanity, as well as of murder as a violation of the laws or customs of war (under the first form of joint criminal enterprise).[2086] In relation to this joint criminal enterprise, the Trial Chamber also convicted Karadžić as a superior of persecution and extermination as crimes against humanity, as well as of murder as a violation of the laws or customs of war.[2087] Finally, the Trial Chamber recalled its finding that, between 25 May and June 1995, Karadžić participated in the Hostages JCE with the purpose of taking UN Personnel hostage to compel NATO to abstain from conducting air strikes against Bosnian Serb targets.[2088] In relation to this joint criminal enterprise, the Trial Chamber convicted Karadžić of the crime of taking hostages as a violation of the laws or customs of war (under the first form of joint criminal enterprise).[2089]

765. In assessing the degree and form of Karadžić's participation, the Trial Chamber explicitly noted Karadžić's "central role" and contribution to the joint criminal enterprises, specifically noting that: (i) in the Overarching JCE, as the *Republika Srpska* President and Supreme Commander of its army, Karadžić was "at the apex of power and played an integral role" by promoting ethnic separation and hatred, establishing institutions to carry out objectives of the common plan, and creating a climate of impunity; (ii) in the Sarajevo JCE, Karadžić's contribution was "so instrumental that without his support the SRK attacks on civilians could not have in fact occurred"; and (iii) that in the Srebrenica JCE, Karadžić, as the "sole person" in *Republika Srpska* with the power to prevent Bosnian Serb forces from moving Bosnian Muslim males to Zvornik to be killed, ordered their transfer, and therefore "agreed to and enabled the implementation of a systematic, organized, and large scale murder operation".[2090]

[2084] Trial Judgement, paras. 4939, 5997, 6004, 6005, 6008, 6009.
[2085] Trial Judgement, para. 6049. *See also* Trial Judgement, paras. 5724, 5731, 5736, 5737, 5739-5745, 5810, 5811, 5814, 5821, 5822, 5831, 5849, 5998.
[2086] Trial Judgement, para. 6049. *See* Trial Judgement, paras. 5849, 5998, 6001-6005, 6007. With respect to the Srebrenica JCE, the Trial Chamber noted that murder and extermination as crimes against humanity are "impermissibly cumulative" and did not enter convictions for murder as a crime against humanity as these incidents were "subsumed" under extermination as a crime against humanity. *See* Trial Judgement, paras. 6023, 6024, n. 20574. *See also* Trial Judgement, paras. 5607-5621. The Appeals Chamber recalls that it, Judge Joensen dissenting, has granted, in part, Ground 31 of Karadžić's appeal, regarding certain crimes committed in connection with the Srebrenica JCE. *See supra* paras. 474, 475.
[2087] Trial Judgement, paras. 5837, 5848, 5850, 5998, 6002-6005. With respect to the Srebrenica JCE, the Trial Chamber noted that murder and extermination as crimes against humanity are impermissibly cumulative and did not enter convictions for murder as a crime against humanity as these incidents were subsumed under extermination as a crime against humanity. *See* Trial Judgement, paras. 5607-5621, 6022-6024, n. 20574.
[2088] Trial Judgement, para. 6050. *See also* Trial Judgement, paras. 5962, 5973, 5992, 5993, 5999.
[2089] Trial Judgement, paras. 5993, 6010.
[2090] Trial Judgement, paras. 6046-6049.

766. The Appeals Chamber understands that the Prosecution does not challenge the Trial Chamber's factual determinations regarding the gravity of crimes, but rather contends that the sentence it imposed on Karadžić was "manifestly inadequate" and unreasonable given the "unprecedented gravity" of his crimes.[2091] Taking into account the Trial Chamber's conclusions reflecting the magnitude of Karadžić's crimes, the Appeals Chamber is in agreement with the Prosecution's position. While fully cognizant of the Trial Chamber's discretion in sentencing, the Appeals Chamber considers that the 40-year sentence inadequately reflects the extraordinary gravity of Karadžić's crimes as well as his central and instrumental participation in four joint criminal enterprises, which spanned more than four years and covered a large number of municipalities in Bosnia and Herzegovina.

767. The incongruence between the gravity of Karadžić's crimes and his 40-year sentence is apparent when Karadžić's crimes and punishment are compared to the life sentences imposed on Tolimir, Beara, Popović, and Galić for their responsibility in only a fraction of Karadžić's crimes. The Appeals Chamber notes that the Trial Chamber did not explicitly consider these cases in its determination of Karadžić's sentence.[2092] The Appeals Chamber recalls that trial chambers are under no obligation to expressly compare the case of one accused to that of another.[2093] Moreover, it is settled jurisprudence that any given case may contain a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual.[2094] However, a "disparity between sentences rendered in similar cases may be considered 'capricious or excessive', hence warranting the intervention of the Appeals Chamber, 'if it is out of *reasonable* proportion with a line of sentences passed in similar circumstances for the same offences'".[2095]

768. The Appeals Chamber notes that Tolimir, the Assistant Commander and Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the VRS and direct subordinate of Mladić, was convicted of genocide, conspiracy to commit genocide, extermination, persecution, and other inhumane acts (forcible transfer) as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in joint criminal enterprises to forcibly remove and

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[2091] *See* Prosecution Appeal Brief, paras. 7, 148-172, 180; Prosecution Reply Brief, paras. 69-72. *See also* T. 24 April 2018 p. 295.
[2092] The Appeals Chamber notes that the Trial Chamber only explicitly considered the sentences imposed on Biljana Plavšić (11 years) and Momčilo Krajišnik (20 years) that were argued by the Defence at trial. *See* Trial Judgement, paras. 6066, 6067.
[2093] *See Prlić et al.* Appeal Judgement, para. 3340; *Kupreškić et al.* Appeal Judgement, para. 443.
[2094] *See, e.g., Prlić et al.* Appeal Judgement, para. 3341; *Nyiramasuhuko et al.* Appeal Judgement, para. 3400; *Ntabakuze* Appeal Judgement, para. 298. A trial chamber's primary responsibility is to tailor the penalty to fit the individual circumstances of the accused. *See, e.g., Prlić et al.* Appeal Judgement, para. 3341; *Nyiramasuhuko et al.* Appeal Judgement, paras. 3400, 3453, 3512; *Popović et al.* Appeal Judgement, para. 2093; *Ntabakuze* Appeal Judgement, para. 298.
[2095] *See Prlić et al.* Appeal Judgement, para. 3340; *Đorđević* Appeal Judgement, para. 949 and references cited therein.

murder Bosnian Muslims in Srebrenica and Žepa in 1995.[2096] The Trial Chamber of the ICTY sentenced Tolimir to life imprisonment.[2097] On appeal, despite the partial reversal of his convictions, the Appeals Chamber of the ICTY affirmed his remaining convictions, including genocide, and upheld Tolimir's sentence of life imprisonment.[2098]

769. Tolimir's subordinate,[2099] Beara, the Chief of the VRS Main Staff's Administration for Security, was convicted of genocide, extermination and persecution as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in the joint criminal enterprise to murder able-bodied Bosnian Muslim men from Srebrenica in July 1995.[2100] The Trial Chamber of the ICTY considered Beara as the "driving force behind the murder enterprise and a central figure in the organisation and execution of the genocide" in Srebrenica, and found that "the only appropriate sentence for him [was] life imprisonment".[2101] On appeal, despite partially reversing his convictions with respect to the killing of six Bosnian Muslims near Trnovo, the Appeals Chamber of the ICTY affirmed the remainder of Beara's convictions, including genocide, and upheld his sentence of life imprisonment.[2102]

770. Beara's subordinate,[2103] Popović, the Chief of Security of the VRS Drina Corps, was also convicted of genocide, extermination and persecution as crimes against humanity, as well as of murder as a violation of the laws or customs of war for his participation in the joint criminal enterprise to murder able-bodied Bosnian Muslim men from Srebrenica in July 1995.[2104] The Trial Chamber of the ICTY, considering that Popović played a key role in the organization and execution of the genocide in Srebrenica and that he participated "vigorously in almost every step of the murder operation", found that the "only appropriate sentence" was life imprisonment.[2105] The

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[2096] *See Tolimir* Trial Judgement, paras. 1, 2, 82, 83, 1040, 1071, 1093-1095, 1128, 1129, 1144, 1154, 1216, 1224, 1225, 1227, 1239. *See also Tolimir* Appeal Judgement, paras. 2, 5, 649.
[2097] *See Tolimir* Trial Judgement, para. 1242.
[2098] *See Tolimir* Appeal Judgement, paras. 634, 648, 649. According to the Appeals Chamber of the ICTY, "[i]n light of these genocide convictions alone, the Appeals Chamber considers that Tolimir's responsibility does not warrant a revision of his sentence". *Tolimir* Appeal Judgement, para. 648.
[2099] *See Popović et al.* Trial Judgement, paras. 1090, 1202. *See also Tolimir* Appeal Judgement, para. 648; *Tolimir* Trial Judgement, para. 1127.
[2100] *See Popović et al.* Trial Judgement, paras. 1072, 1202-1206, 1302, 2105, p. 833. *See also Popović et al.* Appeal Judgement, paras. 3, 4, 2117.
[2101] *See Popović et al.* Trial Judgement, paras. 1314, 2164, p. 833; *Popović et al.* Appeal Judgement, paras. 1967, 1972. *See also Popović et al.* Trial Judgement, paras. 2148-2152 (discussing the gravity of the crimes committed in Srebrenica in July 1995).
[2102] *See Popović et al.* Appeal Judgement, paras. 2111, 2117. The Appeals Chamber of the ICTY also granted the Prosecution's appeal and entered a conviction for conspiracy to commit genocide, which was not entered by the Trial Chamber of the ICTY on the basis of the principle of cumulative convictions. *See Popović et al.* Appeal Judgement, paras. 555, 557, 2111, 2117; *Popović et al.* Trial Judgement, p. 833.
[2103] *See Popović et al.* Trial Judgement, paras. 1090, 1205.
[2104] *See Popović et al.* Trial Judgement, paras. 1072, 1090, 1168, p. 832. *See also Popović et al.* Appeal Judgement, paras. 3, 4.
[2105] *See Popović et al.* Trial Judgement, para. 2157, p. 832.

Appeals Chamber of the ICTY partially reversed Popović's convictions with respect to the killing of six Bosnian Muslims near Trnovo, but affirmed the remainder of his convictions, including genocide, and upheld his sentence of life imprisonment.[2106]

771. Galić, the *de jure* SRK Commander, whose superiors were Mladić and Karadžić, was found guilty of acts of violence, the primary purpose of which was to spread terror among the civilian population, a violation of the laws or customs of war, as well as of murder and other inhumane acts as crimes against humanity for having "directly participated" in the commission of crimes by ordering the campaign of sniping and shelling civilians in Sarajevo between 10 September 1992 and 10 August 1994.[2107] The Trial Chamber of the ICTY sentenced Galić to 20 years' imprisonment.[2108] The Appeals Chamber of the ICTY upheld all of Galić's convictions but quashed his sentence of 20 years and imposed a sentence of life imprisonment.[2109] In doing so, the Appeals Chamber of the ICTY considered that the Trial Chamber of the ICTY abused its discretion as the 20-year sentence fell outside the range of available sentences and "underestimated the gravity of Galić's criminal conduct".[2110]

772. In the present case, the Appeals Chamber observes the Trial Chamber's findings that Galić was a named member of the Sarajevo JCE,[2111] and that Tolimir,[2112] Beara,[2113] and Popović[2114] either supported or were named members of the Srebrenica JCE. Additionally, as noted above, these individuals were high-ranking members of the VRS or the SRK, which were under Karadžić's "authority" as the President of *Republika Srpska* and Supreme Commander of its forces.[2115] The fact that Tolimir, Beara, Popović, and Galić were each sentenced to life imprisonment for participating in only one of the four joint criminal enterprises involved in this case, and the fact that

[2106] *See Popović et al.* Appeal Judgement, paras. 2110, 2117. The Appeals Chamber of the ICTY also granted the Prosecution's appeal and entered a conviction for conspiracy to commit genocide, which was not entered by the Trial Chamber of the ICTY on the basis of the principle of cumulative convictions. *See Popović et al.* Appeal Judgement, paras. 546, 557, 2110, 2117. *See also Popović et al.* Trial Judgement, p. 832.
[2107] *See Galić* Trial Judgement, paras. 3, 606, 750-752, 769. *See also Galić* Appeal Judgement, paras. 2-4, 454.
[2108] *See Galić* Trial Judgement, para. 769.
[2109] *See Galić* Appeal Judgement, p. 185.
[2110] *See Galić* Appeal Judgement, paras. 454-456.
[2111] *See* Trial Judgement, paras. 4680, 4707, 4708, 4892, 4932, 5997.
[2112] In finding that the common plan to eliminate Bosnian Muslims in Srebrenica was formed and executed in conditions designed to ensure its secrecy to the greatest extent possible, the Trial Chamber considered "Tolimir's proposal to remove the detainees from locations where they could be sighted". *See* Trial Judgement, para. 5734. The Trial Chamber also considered that Karadžić was constantly kept abreast of developments on the ground, and this was achieved particularly through briefings by high-ranking officers, including Tolimir, who was already on the ground near Srebrenica. *See* Trial Judgement, para. 5801.
[2113] The Trial Chamber found that Beara was a member of the Srebrenica JCE. *See* Trial Judgement, paras. 5737, 5830, 5998.
[2114] The Trial Chamber found that Popović was a member of the Srebrenica JCE. *See* Trial Judgement, paras. 5733, 5737, 5830, 5998.
[2115] *See, e.g.*, Trial Judgement, paras. 4885, 4891, 4938, 5821, 6047, 6052.

they were subordinated to Karadžić, further demonstrates that the 40-year sentence imposed on Karadžić was inadequate.

773. Given the above, the Appeals Chamber considers that the sentence of 40 years imposed on Karadžić by the Trial Chamber underestimates the extraordinary gravity of Karadžić's responsibility and his integral participation in "the most egregious of crimes" that were committed throughout the entire period of the conflict in Bosnia and Herzegovina and were noted for their "sheer scale" and "systematic cruelty".[2116] In the circumstances of this case, the sentence the Trial Chamber imposed was so unreasonable and plainly unjust that the Appeals Chamber can only infer that the Trial Chamber failed to properly exercise its discretion.

774. The Appeals Chamber finds, Judges de Prada and Rosa dissenting, that the Trial Chamber committed a discernible error and abused its discretion in imposing a sentence of only 40 years of imprisonment. The Appeals Chamber, Judges de Prada and Rosa dissenting, therefore grants Ground 4 of the Prosecution's appeal.[2117] The impact of this finding is addressed below.

D. Impact of the Appeals Chamber's Findings on Sentence

775. The Appeals Chamber recalls that it has granted, in part, Judges Joensen and de Prada dissenting, Ground 31 of Karadžić's appeal and has accordingly reversed his convictions related to the Overarching JCE to the extent that they are based on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1.[2118] Notwithstanding, the Appeals Chamber has dismissed all other aspects of Karadžić's appeal and has affirmed his remaining convictions for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war, in relation to his participation in the Overarching JCE, the Sarajevo JCE, the Srebrenica JCE, and the Hostages JCE.[2119] The Appeals Chamber further recalls that it has granted, Judges de Prada and Rosa dissenting, Ground 4 of the Prosecution's appeal.[2120]

776. The Appeals Chamber considers that the overturned convictions, related to Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1, are *de minimis* in nature compared to the extraordinary gravity of the crimes for which Karadžić remains convicted. In light

[2116] *See* Trial Judgement, para. 6046.
[2117] In light of the foregoing, the Appeals Chamber finds it unnecessary to address the remainder of the Prosecution's sentencing submissions.
[2118] *See supra* paras. 460, 462, 464, 467, 470, 473-475.
[2119] *See supra* paras. 30, 42, 64, 108, 133, 153, 166, 186, 192, 202, 214, 224, 241, 268, 282, 292, 299, 307, 316, 324, 344, 357, 421, 437, 445, 475, 509, 521, 555, 587, 623, 633, 644, 661.

of Karadžić's position at the apex of power in *Republika Srpska* and its military, his instrumental and integral participation in the four joint criminal enterprises, the scale and systematic cruelty of the crimes committed, the large number of victims, the continued impact of these crimes on victims who have survived, as well as the relevant mitigating and aggravating factors, the Appeals Chamber, Judges de Prada and Rosa dissenting, finds that the only appropriate sentence in the circumstances of this case is imprisonment for the remainder of Karadžić's life.

[2120] *See supra* para. 774.

VI. DISPOSITION

777. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 23 and 24 April 2018;

SITTING in open session;

GRANTS, Judges Joensen and de Prada dissenting, Karadžić's Thirty-First Ground of Appeal, in part, and **REVERSES**, Judges Joensen and de Prada dissenting, Karadžić's convictions to the extent that they rely on Scheduled Incidents C.27.5, B.20.4, B.13.1 in part, C.22.5 in part, and E.11.1;

DISMISSES Karadžić's appeal in all other respects;

AFFIRMS Karadžić's remaining convictions, pursuant to Article 1 of the Statute and Articles 7(1) and 7(3) of the ICTY Statute, for genocide, persecution, extermination, murder, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as for murder, terror, unlawful attacks on civilians, and hostage-taking as violations of the laws or customs of war, in relation to his participation in the Overarching JCE, the Sarajevo JCE, the Srebrenica JCE, and the Hostages JCE;

GRANTS, Judges de Prada and Rosa dissenting, the Prosecution's Fourth Ground of Appeal;

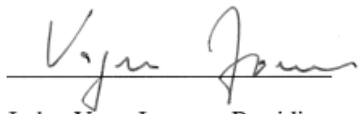
DISMISSES, Judge de Prada dissenting, the Prosecution's appeal in all other respects;

SETS ASIDE, Judges de Prada and Rosa dissenting, the sentence of 40 years of imprisonment and **IMPOSES**, Judges de Prada and Rosa dissenting, a sentence of life imprisonment, subject to credit being given under Rules 125(C) and 131 of the Rules for the period Karadžić has already spent in detention since his arrest on 21 July 2008;

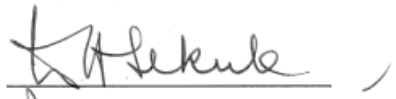
RULES that this Judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules;

ORDERS that, in accordance with Rules 127(C) and 131 of the Rules, Karadžić shall remain in the custody of the Mechanism pending the finalization of the arrangements for his transfer to the State where his sentence will be served.

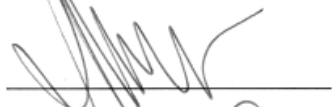
Done in English and French, the English text being authoritative.



Judge Vagn Joensen, Presiding



Judge William H. Sekule



Judge José Ricardo de Prada Solaesa

Judge Graciela Susana Gatti Santana

Judge Ivo Nelson de Caires Batista Rosa

Judge Vagn Joensen appends partially dissenting and separate concurring opinions.

Judge José Ricardo de Prada Solaesa appends a partially dissenting opinion.

Done this 20th day of March 2019 at The Hague, the Netherlands.

[Seal of the Mechanism]

VII. PARTIALLY DISSENTING AND SEPARATE CONCURRING OPINIONS OF JUDGE JOENSEN

778. I respectfully disagree with the Majority's conclusion concerning Ground 31 of Karadžić's appeal. Moreover, I attach to this Judgement a separate opinion setting out my position with regard to the finding in relation to one of the evidentiary elements in Ground 40 of Karadžić's appeal.

A. Partially Dissenting Opinion on Ground 31

779. In this Judgement, the Majority finds that the Trial Chamber impermissibly relied solely or in a decisive manner on untested Rule 92 *bis* or *quater* evidence in entering convictions related to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1.[2121] The Majority therefore granted Ground 31 of Karadžić's appeal, in part, and reversed his convictions to the extent that they relied on these Scheduled Incidents.[2122] While I agree with the Majority that the untested evidence has been significant in relation to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1,[2123] for the reasons set forth below, I respectfully disagree with the conclusion of the Majority concerning Ground 31 of Karadžić's appeal.

780. At the outset, I recall that a trial chamber need not spell out every step of its analysis or unnecessarily repeat considerations reflected elsewhere in the trial judgement, and that trial judgements must be read as a whole when evaluating the findings contained in them.[2124] The Appeals Chamber itself explicitly relied on this principle in the Appeal Judgement regarding other grounds of appeal.[2125] The Appeals Chamber also confirmed the presumption that a trial chamber has evaluated all of the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence and, in certain instances, did so in the context of evidence "not expressly discussed in the Trial Judgement".[2126] In particular, when providing its analysis of Grounds 2 and 3 of the appeal of the Prosecution, the Appeals Chamber correctly viewed it as sufficient if evidence was considered elsewhere in the Trial Judgement, relying on the

[2121] *See* Appeal Judgement, paras. 460-462, 464, 467, 470, 473-475.
[2122] *See* Appeal Judgement, paras. 475, 775, 777.
[2123] *See* Appeal Judgement, paras. 460-473.
[2124] *See* Appeal Judgement, paras. 563, 702, 721, 744, nn. 1842, 1872, *referring to, inter alia*, *Šešelj* Appeal Judgement, para. 62; *Prlić et al.* Appeal Judgement, paras. 329, 453; *Stakić* Appeal Judgement, para. 47.
[2125] *See* Appeal Judgement, paras. 363, 563, 702.
[2126] *See* Appeal Judgement, paras. 396, 533, 541, 562, 563, 702, 744, *referring to, inter alia*, *Šešelj* Appeal Judgement, para. 101; *Prlić et al.* Appeal Judgement, para. 187; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Nyiramasuhuko et al.* Appeal Judgement, paras. 163, 1308; *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75; *Kvočka et al.* Appeal Judgement, para. 23.

aforementioned principle that trial judgements must be read as a whole.[2127] I respectfully contend that there is no reason to deviate from these principles in relation to Ground 31 of Karadžić's appeal.

781. Considering the above, it is my view that, although the Trial Chamber did not explicitly state in its individual analysis on the relevant Scheduled Incidents that it relied upon other evidence or findings as corroborative of the untested evidence, this approach does not necessarily mean that the Trial Chamber considered the evidence concerning particular Scheduled Incidents in isolation. More specifically, when read as a whole, it is evident that the Trial Chamber did not rely solely or decisively on untested evidence in convicting Karadžić on the basis of the Scheduled Incidents in question. Instead, the Trial Chamber referred to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1 cumulatively with other Scheduled Incidents when considering whether the elements of the relevant crimes had been established.[2128] For instance, with respect to Karadžić's conviction for persecution as a crime against humanity, the Trial Chamber relied on Scheduled Incidents C.27.5 and C.22.5 cumulatively with other Scheduled Incidents when describing the crimes and the conditions of detention to which the Bosnian Muslim and Bosnian Croat detainees were subjected.[2129] As to Karadžić's convictions for murder as a crime against humanity and as a

[2127] *See* Appeal Judgement, paras. 702 ("Such reading of the Trial Judgement departs from the well-established principles that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence. 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. Viewed in this light, the Prosecution's extensive references in its appeal brief to findings made and evidence referred to elsewhere in the Trial Judgement undermine its position that the Trial Chamber disregarded relevant evidence or findings in concluding that the elements required under Article 4(2)(c) of the ICTY Statute had not been established in respect of the Count 1 Municipalities. Therefore, this contention is dismissed."), 744 ("The Appeals Chamber notes that the Trial Chamber, when assessing genocidal intent, did not discuss statements made by Mladić and Plavšić in Prijedor. Nevertheless, recalling the presumption that the Trial Chamber has evaluated all the evidence presented to it, and reading the Trial Judgement as a whole, the Appeals Chamber observes that this evidence was addressed elsewhere in the Trial Judgement. […] The Appeals Chamber is therefore not convinced that the Trial Chamber ignored this evidence."). The Appeal Judgement further reflects instances where the Appeals Chamber made findings based on the "totality of the evidence". *See* Appeal Judgement, paras. 396, 551, 577.

[2128] Trial Judgement, paras. 2448, 2451, 2454, 2486, 2491, 2493, 2507, 2514, 2522, 2542, 5609, 5610, 5615.

[2129] The Trial Chamber referred to Scheduled Incident C.27.5 along with other Scheduled Incidents in support of its findings that some detainees were cut and stabbed. *See* Trial Judgement, para. 2486, *referring to* Scheduled Incidents C.1.2, C.6.1, C.6.2, C.10.1, C.20.2, C.20.4, C.21.2, C.25.1, C.27.1, C.27.4, C.27.5. The Trial Chamber relied on Scheduled Incidents C.27.5 and C.22.5 when it found that: (i) detainees were punched, kicked, and beaten often severely with whatever device could be found, including chains, batons, bats, clubs, rifle butts, machine guns, heavy wooden sticks, iron tubes, steel rods, wooden planks, poles, thick plastic pipes, cables, rubber hoses, stakes, chair legs, and brass knuckles (Trial Judgement, para. 2491, *referring to* Scheduled Incidents C.2.1, C.6.1, C.6.2, C.7.2, C.10.1, C.11.2, C.15.1, C.15.2, C.20.2, C.20.3, C.21.3, C.25.1-C.25.3, C.26.1, C.26.3, C.27.2, C.27.4-C.27.7); and (ii) detainees were also subject to verbal and mental abuse, intimidation, and threats, including threats that they would be killed (Trial Judgement, para. 2493, *referring to* Scheduled Incidents C.4.1, C.6.1, C.6.2, C.7.2, C.10.1, C.10.2, C.10.5-C.15.2, C.15.3, C.19.2, C.20.1, C.20.2, C.20.4, C.21.1, C.21.3, C.25.2, C.25.3, C.26.3, C.27.1, C.27.4-C.27.6). The Trial Chamber referred to Scheduled Incident C.22.5 along with other Scheduled Incidents in support of its findings that: (i) conditions of detention were characterised by insufficient or restricted access to water (Trial Judgement, para. 2507, *referring to* Scheduled Incidents C.1.2, C.4.1, C.11.1, C.17.1, C.18.1, C.20.2, C.20.4, C.20.5, C.22.1, C.22.2, C.22.5, C.21.3, C.25.3); (ii) a large number of Bosnian Muslim and Bosnian Croat civilians were detained by members of Serb Forces and Bosnian Serb Political and Governmental Organs in detention facilities in Sanski Most (Trial Judgement,

violation of the laws or customs of war, the Trial Chamber relied on Scheduled Incidents B.20.4 and B.13.1 alongside other Scheduled Incidents *vis-à-vis* its findings concerning the intent of the perpetrators[2130] and the status of the victims.[2131] Moreover, the Trial Chamber referred to Scheduled Incident E.11.1 together with other similar events in its legal findings on murder and extermination as crimes against humanity and murder as a violation of the laws or customs of war, when describing the circumstances of the killings of Bosnian Muslim males.[2132]

782. Viewed in this context, it is clear that the Trial Chamber's assessment of the evidence and its legal conclusions did not follow from evaluation of the evidence underpinning the findings in relation to Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1 in isolation. In my view, considering the Trial Judgement as a whole, as the Appeals Chamber has done in relation to other Grounds of appeal, the record offers sufficient corroboration, based on a pattern of similar conduct, in relation to these events.[2133] In addition, I respectfully consider that the Majority read the relevant

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para. 2522, *referring to* Scheduled Incidents C.22.1-C.22.5); and (iii) Bosnian Muslims had their money, identification documents, jewellery, and valuables taken away from them on arrival at detention facilities (Trial Judgement, para. 2542, *referring to* Scheduled Incidents C.1.2, C.6.1, C.7.2, C.10.1, C.15.2, C15.3, C.20.2, C.20.5, C.21.1, C.22.5, C.25.2, C.25.3, C.26.3, C.27.2, C.27.6).

[2130] The Trial Chamber referred to Scheduled Incident B.20.4 in finding that in the detention facilities the victims were shot by Serb Forces during their detention. *See* Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.2.1, B.4.1, B.5.1, B.10.1, B.12.1, B.15.1, B.15.4, B.15.5, B.16.2, B.18.1, B.18.3, B.20.1, B.20.2, B.20.3, B.20.4. The Trial Chamber referred to Scheduled Incident B.13.1 in finding that the victims died as a result of severe beatings by Serb Forces during their detention. *See* Trial Judgement, para. 2451, *referring to* Scheduled Incidents B.1.4, B.2.1, B.4.1, B.8.1, B.12.1, B.12.1, B.13.1, B.15.2, B.15.5, B.18.1.

[2131] The Trial Chamber referred to Scheduled Incidents B.13.1 and B.20.4 in finding that the victims "were killed after being detained by Serb Forces in scheduled detention facilities". Trial Judgement, para. 2454, *referring to* Scheduled Incidents A.10.8, B.1.1-B.1.4, B.2.1, B.4.1, B.5.1, B.8.1, B.10.1, B.12.1, B.12.2, B.13.1, B.15.1-B.15.6, B.16.1, B.16.2, B.18.1-B.18.3, B.20.1-B.20.4.

[2132] *See* Trial Judgement, paras. 5609 (*referring to* Scheduled Incidents E.1.1, E.3.1, E.4.1, E.5.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.1, E.9.2, E.10.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3), 5610 (*referring to* Scheduled Incidents E.4.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3), 5615 (*referring to* Scheduled Incidents E.1.1, E.3.1, E.4.1, E.5.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.1, E.9.2, E.10.1, E.11.1, E.12.1, E.13.1, E.14.1, E.14.2, E.15.1, E.15.3.).

[2133] For instance, the Trial Chamber found in Scheduled Incidents C.27.5 and C.22.5 that Bosnian Serb Forces mistreated Bosnian Muslims and Bosnian Croats detained in detention centres, subjecting them to threats, severe beatings, and stabbing them. Trial Judgement, paras. 1329-1333, 2019-2024. The Trial Chamber's findings of other Scheduled Incidents reveal that, in similar circumstances, Bosnian Muslim and Bosnian Croat detainees held in detention centres across the Overarching JCE Municipalities were subjected to comparable mistreatment and harsh conditions by Bosnian Serb forces, which stabbed or beat them. *See* Trial Judgement, paras. 2486-2492, 3443-3445. *See also* Trial Judgement, paras. 769-780 (Scheduled Incident C.6.2), 889-903 (Scheduled Incident C.10.1), 998-1001 (Scheduled Incident C.21.2), 1009-1021 (Scheduled Incident C.21.3), 1160-1167 (Scheduled Incident C.25.1). Moreover, in relation to Scheduled Incidents B.20.4 and B.13.1, the Trial Chamber found that, in detention centres, detainees were shot during their detention or died as a result of severe beatings by Serb Forces, respectively. *See* Trial Judgement, paras. 1347-1349, 2153-2155. These findings are corroborated by evidence underpinning the findings reached in relation to other Scheduled Incidents concerning the Overarching JCE Municipalities, where detainees in other detention centres, including civilians and combatants *hors de combat*, were found to have been shot by Serb Forces or died as a result of the beatings. *See* Trial Judgement, paras. 2446-2448, 2451, 3443-3445. *See also* Trial Judgement, paras. 658-661 (Scheduled Incident B.2.1), 769-780 (Scheduled Incident B.4.1), 812-823 (Scheduled Incident B.5.1), 1168-1170 (Scheduled Incident B.18.3), 1202-1207 (Scheduled Incident B.18.1) 1523-1529 (Scheduled Incident B.10.1), 1757-1768 (Scheduled Incident B.15.2), 1779-1781 (Scheduled Incident B.15.4), 1806-1815 (Scheduled Incident B.15.1), 1824-1829 (Scheduled Incident B.15.5). As to Scheduled Incident E.11.1, the Trial Chamber found that, following the fall of Srebrenica, members of the Bosnian Serb Forces shot and killed two Bosnian Muslim men near the town of Snagovo on 14 July 1995. Trial Judgement, paras. 5477-5481. The Trial Chamber's

evidence, that the Trial Chamber relied upon, in a selective manner, and I cannot agree that the witness's account that two persons were murdered is not corroborated by the forensics confirming the death of one of these persons.[2134]

783. For the foregoing reasons, I do not agree with the Majority's conclusion that it has been demonstrated that Karadžić's convictions on the basis of Scheduled Incidents C.27.5, B.20.4, B.13.1, C.22.5, and E.11.1, or any of the other Scheduled Incidents identified in this ground of appeal, rely solely or decisively on untested evidence.

B. Separate Concurring Opinion on Ground 40

784. Based on a thorough analysis of a large number of evidentiary elements, the Trial Judgement found beyond reasonable doubt that Karadžić agreed to the expansion of the purpose of the Srebrenica JCE to include the killing of able-bodied Muslim boys and men of Srebrenica, and that, through his acts and omissions, he significantly contributed to the expanded purpose.[2135] The Appeals Chamber has found no errors in these findings.[2136]

785. The Appeals Chamber determined that the Trial Chamber committed no error in concluding that the only reasonable inference from the totality of the evidence was that Karadžić had ordered the detainees to be transferred to Zvornik.[2137] While otherwise agreeing with the analysis on this matter, I would like to set out my views with regard to the finding in relation to one of its evidentiary elements, namely the intercepted phone call between Karadžić and Deronjić on 13 July 1995 at around 8:10 p.m.[2138]

786. The transcript of the intercepted phone call shows that Karadžić, using coded words for detainees and Bratunac, instructed Deronjić that the detainees who were being held in Bratunac be moved "somewhere else".[2139] The Trial Chamber found that, during the intercepted call, Karadžić "conveyed to Deronjić the direction that the detainees should be transferred to Zvornik".[2140] The

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findings of other Scheduled Incidents show that in similar circumstances, Muslim men were shot by Bosnian Serb forces, in the area around Srebrenica and during the same time period. *See* Trial Judgement, paras. 5609, 5610, 5615, 5744. *See also* Trial Judgement, paras. 5146-5154 (Scheduled Incident E.5.1), 5223-5239 (Scheduled Incident E.3.1), 5287-5291 (Scheduled Incident E.4.1), 5482-5490 (Scheduled Incident E.12.1).

[2134] The Trial Chamber based its findings regarding Scheduled Incident B.13.1 on the witness statement of Mirsad Smajš (Trial Judgement, paras. 2153-2155, *referring to* Exhibit P43, pp. 2, 3). As the forensic evidence regarding Scheduled Incident B.13.1 supports the death of Zlatan Salčinović (Trial Judgement, para. 2154, *referring to* Exhibit P4853, p. 89), the witness statement of Mirsad Smajš, describing a single and consistent process and not two different incidents, is corroborated.

[2135] Trial Judgement, paras. 5814, 5830, 5831, 5849, 5850, 5851, 5998.

[2136] Appeal Judgement, paras. 573, 586, 587, 598, 600, 601, 609, 612, 613, 619-623.

[2137] Appeal Judgement, para. 600.

[2138] Trial Judgement, paras. 5710, 5772, 5805, 5811, 5814, 5829, 5830. *See also* Appeal Judgement, para. 600.

[2139] Trial Judgement, para. 5772, *referring to*, *inter alia*, Exhibit P6692.

[2140] Trial Judgement, para. 5773.

Trial Chamber based this finding on Prosecution Witness Momir Nikolić's evidence that he heard Deronjić say at a subsequent meeting with Beara and others that Karadžić had instructed him that all detainees should be transferred to Zvornik.[2141]

787. I find that a reasonable trier of fact could not exclude as an alternative reasonable inference of the evidence that Deronjić, at the meeting with Beara, had invoked Karadžić's authority to promote his own preference for Zvornik as the most suitable execution site and that Karadžić approved this transfer at a subsequent stage, for instance, during his meeting with Deronjić the following morning.[2142]

788. This alternative inference is in accordance with the Trial Chamber's conclusion that "[t]he Chamber is thus satisfied that the Accused's order to move [...] Bosnian Muslim males of Srebrenica enabled their transfer to Zvornik, where they were ultimately killed."[2143]

789. The said modification, in my opinion, does not affect the Appeals Chamber's conclusion that the Trial Chamber did not err in finding that Karadžić had agreed and significantly contributed to the Srebrenica JCE.

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

Done this 20th day of March 2019,
At The Hague,
The Netherlands

Judge Vagn Joensen

[Seal of the Mechanism]

[2141] Trial Judgement, para. 5712.
[2142] Trial Judgement, paras. 5807, 5808.
[2143] Trial Judgement, para. 5818.

VIII. PARTIALLY DISSENTING OPINION OF JUDGE DE PRADA

790. I respectfully disagree with the Majority's conclusion concerning Grounds 1, 2, 3, and 4 of the Prosecution's appeal. Moreover, I attach to this Judgement a separate dissenting opinion setting out my position in this regard. In my opinion, the Appeals Chamber should have granted Grounds 1, 2, and 3 and dismissed Ground 4 of the Prosecution's appeal.

A. Dissenting Opinion on Grounds 1, 2, and 3 of the Prosecution's Appeal

1. Common Aspects on General Evidentiary Principles

791. Regarding the "General Evidentiary Principles" contained in paragraphs 8 to 10 of the Trial Judgement and specifically the evidentiary assessment and the standard of proof applicable, I would like to make the following considerations.

792. In first instance, taking as premise that one of the principal functions and basic principles of any criminal trial is to find out the truth about a crime or crimes, always within a framework of strict procedural safeguards, it is of paramount importance to examine the different mechanisms that establish the rules of evidence and procedure that would be appropriate to ascertain a "judicial truth" as the overriding aim of the criminal justice system.[2144] Among them, we can find the following: the rules of admission or exclusion of evidence, the standard of proof, the benefit of the doubt, the presumption of innocence, the burden of proof, etc.

793. Concerning the standard of proof for the trier of facts, the lack of a single universal standard of proof common to all legal systems and jurisdictions, has to be addressed. We typically distinguish between the standard applicable to common law and civil law systems. In the first case, there is traditionally the standard of "Beyond Reasonable Doubt" ("BRD"), which permeated with different names (*e.g. in dubio pro reo*) and nuances in a great part of the civil law systems, in their pursuit for the highest objective standard of proof to substitute the subjectivism inherent to moral certainty.

794. Nevertheless, the BRD standard does not satisfy all desired expectations of clarity, determination, and objectivity. It generates many interpretative doubts even regarding basic terms that constitute the core of the concept's descriptive definition.[2145]

[2144] We should take into consideration that truth gains a special relevance in criminal proceedings related to transitional contexts, as it is the present case, in which the victims' rights to truth, justice reparation, and non-repetition prevail.
[2145] *See* T. Mulrine, *Reasonable Doubt: How in the World Is It Defined?*, American University International Law Review (1997), at 12(1); L. Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology (Cambridge

795. In this respect, it is of paramount relevance to carefully differentiate the use of BRD by juries from that of professional judges, of whom legal knowledge and professional practice is expected and who should implicitly have, at least in theory, better, more sophisticated, systematic, and complete skills of evidence analysis.[2146]

796. The legal obligation of professional judges to provide a reasoned opinion acts as a complementary guarantee in this matter. This also implies, apart from making public his general line of reasoning, the possibility of a vertical control of his opinions (evidentiary findings) on appeal.

797. Neither the ICTY Statute, the Statute of the Mechanism, nor the Rules of Procedure and Evidence of both tribunals establish with clarity what is the standard of proof applicable for a trier of facts, limiting themselves to establish general principles that should serve all judges as a guideline. In contrast to the ICC Statute,[2147] the only reference contained in the ICTY Statute is that of Articles 19 and 21(3), which provide that "the accused shall be presumed innocent until proven guilty according to the provisions of the Statute". Rules 89(B) of the ICTY Rules and 105(B) of the Rules of the Mechanism establish that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". Only Rule 87(A) of the ICTY Rules and Rule 104(A) of the Rules of the Mechanism contain a reference to the standard of proof of BRD: "A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt".

798. Notwithstanding, the relevance of BRD as the standard of proof applicable to trier of facts is well established in the jurisprudence of both the ICTR and the ICTY.

799. Of special relevance are the characteristics and high professional requirements that according to the Statutes of the ICTY, ICTR, and Mechanism judges must comply and taken into account in the composition of trial and appeal chambers. [2148]

University Press, 2006); L. Laudan, *Por qué un estándar de prueba subjetivo y ambiguo no es un estándar*, DOXA, Cuadernos de Filosofía del Derecho 28 (2005); J. Igartua Salaverría, *Prolongaciones a partir de Laudan*, DOXA, Cuadernos de Filosofía del Derrecho 28 (2005); M. Taruffo, *Tres observaciones sobre "Por qué un estándar de prueba subjetivo y ambiguo no es un estándar", de Larry Laudan*, DOXA, Cuadernos de Filosofía del Derecho 28 (2005).

[2146] Michelle Taruffo, La rueba de los Hechos (Editorial Trotta, 2002).

[2147] ICC Statute, Article 66 (Presumption of innocence) ("1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2. The onus is on the Prosecutor to prove the guilt of the accused. 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.").

[2148] Article 9 (Qualification of Judges) of the Statute of the Mechanism provides:

800. In addition, Article 23(2) of ICTY Statute and Article 21(2) of the Statute of the Mechanism impose the requirement upon Judges to provide a written reasoned opinion of their judgements.[2149] This is also required under Rules 98 *ter*(C)(5) and 117(B) of the ICTY Rules and Rules 122(C) and 144(B) of the Rules of the Mechanism.

801. This implies the legal obligation for trial and appeals chambers to express in writing their legal grounds as well as factual arguments and especially those related to the evidentiary assessment on which they base their Judgements.

802. For this reason, according to my opinion, there is no doubt on the design of the accused's guarantees contained in both Statutes: the accused enjoys the benefit of the presumption of innocence at all time during the process, the burden of proof lies on the Prosecution, only legally valid evidence is admissible, and BRD is the standard of proof applicable for trier of facts.

803. This model, however, is characterized by the fact that the BRD standard has to be applied by professional judges, and although this does not modify its general meaning, judges have to comply with a high level of specialization and sophistication in their evidentiary assessment as well as keep record of the reasoning of their decision in the Judgement.

804. In addition to these general considerations, there are several important evidentiary issues which occur in practice regarding the BRD application to concrete cases.

805. The BRD standard is not exactly equivalent to the non-existence of an alternate inference that could be accepted as reasonable, but rather that the outcome of the evidentiary analysis that has been reached is beyond a reasonable doubt.

806. This implies that the opinion of a professional judge cannot be circumscribed to a mere fragmented, superficial, or limited evidentiary assessment; nor can he, in order to establish his criterion, simply conform to a mere observation of the existence of a mere inference or alternative hypothesis that could be reasonable in abstract. In my opinion, his analysis should cover, and thus should be expressed in the reasons, if this possible (and reasonable) alternative inference has the

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1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.

2. In the composition of the Trial and Appeals Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

[2149] P.A. Ibañez, *Sobre prueba y motivación*, Revista de la Asociación de Ciencias Penales, 25 (2008), at pp. 20-40.

real power to generate in the judge a reasonable doubt in a manner that he would not be able to express a judgement of certainty in his reasoning.

807. Thus, according to my view, the test of on the assessment of evidence conducted by the Trial Chamber and expressed in paragraph 10 of the Trial Judgement[2150] does not seem useful:

> When the Prosecution relied upon proof of a certain fact such as, for example, the state of mind of an Accused by inference, the Chamber considered whether that inference was the only reasonable inference that could have been made based on that evidence. Where that inference was not the only reasonable inference, it found that the Prosecution had not proved its case.

808. In my opinion, this represents a simplistic analysis of evidence that does not satisfy the reasonableness standard corresponding to professional judges, who have the obligation to justify why a concrete possible alternative inference can cause a reasonable doubt. A court decision would only be legitimate when the alternative inference is recognised as a veritable reasonable doubt, being this one: well-reasoned, responding to an evident reasonableness standard, and allowing the mechanisms for its control. On the other hand, control (procedural and extra-procedural) would only be possible if the reasoning is published, thus being impossible to exert any control of any non-written reasoning (that remains in the minds of the judge).

809. The criteria established in paragraph 10 of the Trial Judgement is the standard of proof applied by the Trial and Appeals Chambers regarding the mental state of Karadžić. Therefore, in my opinion, the Trial and Appeals Chambers erred when they found evidence insufficient to demonstrate, with respect to other proven acts of persecution charged in Count 3 of the Indictment, as well as to the crimes of murder and extermination as charged in Counts 4, 5, and 6 of the Indictment or "Excluded Crimes", that these crimes were included in the common plan or intended by Karadžić.

2. Ground 1 of the Prosecution's Appeal

810. In this Judgement, the Majority has found that the Trial Chamber did not commit any error in finding that the Excluded Crimes were not part of the common criminal purpose of the Overarching JCE. The Majority has also found unnecessary to consider the Prosecution's argument that the erroneous conclusion on the scope of the common purpose led to a flawed genocidal intent analysis, dismissing Ground 1 of the Prosecution's appeal.

811. In my opinion, the Trial Chamber erred when it found insufficient evidence to demonstrate that the Excluded Crimes were included in the common plan or intended by Karadžić.[2151]

[2150] Trial Judgement, para. 10, *referring to Vasiljević* Appeal Judgement, para. 120.

812. The Trial Chamber found insufficient evidence to demonstrate that this is the only reasonable inference and that another reasonable available inference that could be drawn from the evidence was that, while Karadžić did not intend for these other crimes to be committed, he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.[2152]

813. In my view, this argumentation of the evidence assessment is clearly insufficient as it does not satisfy the required reasonableness standard. Paragraphs 3466, 3512, and 3521 of the Trial Judgement on which the Trial Chamber based its reasoning and which the Majority[2153] adopts in this Judgement, do not contain any explanation that justifies a true reasonable doubt. Apparently, they limited themselves to affirm the existence of an alternative inference, which is not the same as a reasonable doubt, but, in my opinion, they did not sufficiently analyse if this alternative inference is truly contradictory or incompatible[2154] with the inference that appears as the most likely finding - principal hypothesis or conclusion- resulting from a holistic evidentiary analysis, or if it can be undermined by other concurrent alternative inferences that support the principal conclusion. An alternative inference can either generate a true reasonable doubt or not depending on the circumstances and the strength of the principal conclusion, given the force of all existing relevant evidence.

814. The possibility of establishing with less evidential effort an alternative inference that would allow to establish the criminal liability under the third form of joint criminal enterprise ("JCE III"), does not allow us to renounce or verify if after a complete and thoughtful evidence analysis we can establish a principal inference, that could also be of the first form of joint criminal enterprise ("JCE I), and would resist any reasonable doubt. The precise determination of the criminal liability is critical in the reasoning standard. It allows to complete the necessary legal analysis to ascertain the fulfillment of the elements and requirements of the applicable crimes. In the present case, concerning two separate mental elements of the crime of genocide (Count 1 of the Indictment), the Excluded Crimes gain a singular relevance.

815. Following the legal categories established in the jurisprudence after the *Tadić* Appeal Judgement regarding the interpretation of Article 7(1) of the ICTY Statute, the matter is centered in whether a first scenario occurs which involves a conspiracy where all members – Karadžić included

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[2151] On the ambiguous meaning of the concept of intent as an element of *mens rea* and on the existence of a common initial plan and its evolution and successive adaptation as the most plausible logical proposal, *see infra* paras. 835, 836.
[2152] Trial Judgement, para. 3466.
[2153] Appeal Judgement, para. 669. *See supra* n. 2147.
[2154] The Prosecution contends that this alternative inference is consistent with shared intent and the Trial Chamber erred by concluding that it foreclosed the possibility that Karadžić shared the intent for the Excluded Crimes.

– carry the intent to commit the crimes, although the criminal action is only executed by one or more members of the conspiracy; or if instead a second scenario takes place where the participant – Karadžić – is committed to the goals of a joint criminal enterprise and becomes liable for the foreseeable criminal acts of other participants even if the criminal acts in question were not part of the agreement.

816. The problem arises precisely in particularly complex situations in which it is difficult to identify conditions, in addition to the difficulties derived from the evidence analysis. I refer, beyond the common purpose, explicit and easily identifiable, to other less public aspects of which it is accompanied, upon which an agreement also exists. We can differentiate among these purposes, those which are perfectly foreseeable, being the necessary consequences of the means used, as well as those which are purely foreseeable. On the other hand, it has to be taken into account that an initial common purpose can be modified, and an escalation in the use of violence and thus in its consequences can take place, conducing to the renewal of the agreement on the new situation of existing violence.[2155] It is also of great importance the distinction between top, mid, and low-level perpetrators as well as between principal and secondary forms of participation.

817. Since this is not the place to give a solution to all the possible situations that may arise, I will limit my arguments to some factual legal explanations for my reasons to consider that the exclusion of these crimes from the common purpose, or at least from their consideration, as part of liability under JCE I, was incorrect. In first instance, I would like to point out some of the Trial Chamber's findings that I consider especially relevant in the analysis of the situation:

> (i) The position of Karadžić, at the apex of Bosnian Serb civilian and military power. Karadžić through his position played an essential role in four interconnected joint criminal enterprises involving crimes committed throughout Bosnia and Herzegovina ("BiH") over the entire conflict.[2156]

[2155] *Krajišnik* Trial Judgement, para. 1118 ("The Chamber finds that, whereas in the early stages of the Bosnian-Serb campaign the common objective of the JCE was discriminatory deportation and forced transfer, soon thereafter it became clear to the members of the JCE, including the Accused, that the implementation of the common objective involved, as a matter of fact, the commission of an expanded set of crimes. These crimes came to redefine the criminal means of the JCE's common objective during the course of the indictment period. In accordance with the reasoning set out earlier in this section, acceptance of this greater range of criminal means, coupled with persistence in implementation, signalled an intention to pursue the common objective through those new means. As this is an evidentiary matter, the Chamber's conclusion does not exclude the possibility that the 'original' crimes of the common objective were not limited to deportation and forced transfer. To speak of an increase in criminal means is only to say that the evidence confirms that at the given point in time indicated by the evidence the accepted means were what they were.").

[2156] *See, e.g.*, Trial Judgement, paras. 2, 3447, 3462-3464, 3493 ("The Chamber found that during the time period relevant to the Indictment, the Accused was the highest authority in the VRS chain of command. Prior to its establishment, the Accused had *de jure* authority over the [Territorial Defence] and took steps to create a hierarchical

(ii) In the latter half of 1991, before the outbreak of the conflict, Karadžić, in several conversations and public speeches threatened Muslims with the very types of crimes that the Trial Chamber excluded from the common purpose.[2157]

(iii) Karadžić and the Bosnian Serb leadership's objective was to create an ethnically pure Bosnian Serb state as well as contiguous Serb areas and they were prepared to use force and violence against non-Serbs to achieve their permanent removal objective and knew that violence would be necessary to achieve it.[2158] The Trial Chamber also found that the Karadžić and the Bosnian Serb leadership were aware and put on notice that the objective of ethnic separation would result in violence given the extent to which the population in BiH was intermixed and yet still proceeded to pursue this objective.[2159]

(iv) Karadžić, following up on his threats, formulated and promoted a policy of ethnic separation[2160] and "not only did the [he] formulate and promote these policies, the [Trial] Chamber [found] that he was adamant that he would not allow anything to stop the Bosnian Serbs from achieving their objectives".[2161]

(v) Karadžić developed an ideology "loaded with Serb nationalism" and "the importance of creating an ethnically homogeneous Serb state",[2162] "promot[ing] the idea that the Bosnian Serbs could not live together with the Bosnian Muslims and Bosnian Croats and formed the foundation for the separation of the three people and the creation of a Serb state",[2163] creating an amplified narrative of the historic grievances for the Serb people,[2164] generating "fear and hatred of Bosnian Muslims and Bosnian Croats", and "exacerbating ethnic

command and control structure, which included some municipal Crisis Staffs over which he had authority. According to the Bosnian Serb Constitution and the Law on the Army, as Supreme Commander, the Accused had the authority to, *inter alia*: (i) appoint, promote, and dismiss VRS officers in accordance with the law; (ii) appoint and dismiss presidents, judges, and assistant judges of military courts and military prosecutors; (iii) issue regulations prescribing internal order and relations in the military service; and (iv) issue regulations on military training and discipline. The Chamber also found that the Accused had de jure authority over the MUP, which he exercised in fact. The Chamber finds that in light of his position of authority over the VRS, [Territorial Defence], Crisis Staffs, and MUP […]."), 3505, 3511, 3512, 3524, 3840, 4809, 4891, 4937-4939, 5849, 5850, 5992, 5993, 5996-5999, 6001-6010, 6022, 6046, 6071, 6502.

[2157] *See*, *e.g.*, Trial Judgement, paras. 2675- 2680, 2707, 2708, 2710-2712, 2716.

[2158] Trial Judgement, paras. 2599 ("The record shows that the Bosnian Serbs were prepared to use force and violence against Bosnian Muslims and Bosnian Croats in order to achieve their objectives and assert their historic territorial claims."), 2846 ("The Chamber also finds that the Accused and Bosnian Serb leadership were aware and put on notice that the objective of ethnic separation would result in violence given the extent to which the population in BiH was intermixed and yet still proceeded to pursue this objective.").

[2159] Trial Judgement, para. 2846.

[2160] Trial Judgement, paras. 2841, 3476.

[2161] Trial Judgement, para. 3467.

[2162] Trial Judgement, para. 3475.

[2163] Trial Judgement, para. 3485.

[2164] Trial Judgement, paras. 2596, 2598, 2599.

divisions and tensions in BiH".[2165] The Trial Chamber found that these speeches and statements went beyond mere rhetoric and formed a core element in the policies and plans developed by the Karadžić and the Bosnian Serb leadership.[2166] In another paragraph, the Trial Chamber emphasized: "While the Accused publicly claimed that he had no influence over the issue of war, it was clear that he envisaged that in a war, there would be bloodshed and all the communities would flee towards their 'fully homogeneous' areas. In contrast to public statements where the Accused foreshadowed what could happen, [...] the Accused was not simply foreshadowing what he thought could happen, he was outlining the pattern which was actually put into practice.".[2167]

(vi) In implementing the common purpose, Serb forces expelled a vast number of Bosnian Muslims and Bosnian Croats through a systematic and organised pattern of crimes involving the Excluded Crimes of murder, cruel treatment, sexual violence and wanton destruction,[2168] throughout the Overarching JCE Municipalities.[2169] The purpose was not only the permanent removal of Bosnian Muslims and Bosnian Croats to create an ethnically pure Bosnian Serb state. Other purposes were established, such as, the discrimination against Bosnian Muslims and Bosnian Croats on the basis of their identity.[2170]

(vii) Karadžić "played the most important role" in preparing the structure used for the implementation of the common purpose.[2171]

(viii) The same Excluded Crimes formed part of the *actus reus* of the JCE I Crimes[2172] of forcible transfer and deportation. The Trial Chamber established that the Bosnian Muslims and Bosnian Croats in the Overarching JCE Municipalities were forcibly displaced. For this

[2165] Trial Judgement, paras. 2590, 2660, 2661.
[2166] Trial Judgement, para. 3487.
[2167] Trial Judgement, para. 2846.
[2168] Trial Judgement, paras. 622, 624, 1250-1258, 1269, 1298-1301, 1307, 1311, 1315, 1318-1320, 1324-1328, 1332-1333, 1335-1338, 1341-1346, 1349, 1351-1353.
[2169] *See* Trial Judgement, paras. 670-672, 728-732, 738-749, 784, 785, 1039, 1128-1151, 1219, 1456-1462, 1464-1466, 1912, 2039, 2469, 2470, 2478, nn. 2166, 8335, 8339.
[2170] Trial Judgement, para. 3465 ("With respect to these underlying acts of persecution, the Chamber also finds that the Accused and the Overarching JCE members shared the specific intent to discriminate against the Bosnian Muslims and Bosnian Croats on the basis of their identity.").
[2171] *See, e.g.*, Trial Judgement, paras. 2895, 3437 ("the Accused issued the Variant A/B Instructions in December 1991 to ensure preparations at the municipal level for the establishment of an ethnically homogeneous separate state. The Chamber found above that these instructions were central in terms of furthering the objectives of the Accused and the Bosnian Serb leadership from December 1991 onwards. The Chamber found that the structures and organs created pursuant to the Variant A/B Instructions—first and foremost the Crisis Staffs—played a central role in preparing for, and carrying out, the Bosnian Serb take-overs in the Municipalities and in maintaining Bosnian Serb authority and power after the take-overs were completed."), 3439, 3475, 3483.
[2172] According to the Trial Chamber, the scope of the Overarching JCE includes the crimes of deportation, inhumane acts (forcible transfer), persecution (forcible transfer and deportation), and persecution through the underlying acts of

purpose, it took into account the surrounding circumstances in the Overarching JCE Municipalities "and found that the Bosnian Muslims and Bosnian Croats were displaced as a result of physical force, threat of force, or coercion. Others fled out of fear. This fear was caused by ongoing violence and various crimes committed against non-Serbs including *inter alia*, killings, cruel and inhumane treatment, unlawful detention, rape and other acts of sexual violence, discriminatory measures, and wanton destruction of villages, houses and cultural monuments."[2173] The Excluded Crimes were not random, unplanned or isolated. Rather, they formed part of a "systematic and organised pattern of crimes" committed in the Overarching JCE Municipalities.[2174]

(ix) Karadžić was perfectly aware from the first moment as he was promptly, repeatedly and well informed, that Serb forces were using Excluded Crimes to implement the common purpose.[2175]

(x) Notwithstanding, Karadžić did not use his immense authority to put a stop to these crimes,[2176] and instead, he encouraged them by pursuing a policy of non-punishment for

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unlawful detention and the imposition and maintenance of restrictive and discriminatory measures ("JCE I Crimes"). *See* Trial Judgement, para. 3466.

[2173] Trial Judgement, para. 2468.

[2174] Trial Judgement, para. 3445.

[2175] Trial Judgement, paras. 3515 ("Based on the nature of the common plan and the manner in which it was carried out, the Chamber considers that it was foreseeable to the Accused that Serb Forces might commit violent and property-related crimes against non-Serbs during and after the take-overs in the Municipalities and the campaign to forcibly remove non-Serbs."), 3516 ("The Chamber considers that in light of his knowledge of crimes committed in the Municipalities, the Accused was aware of the environment of extreme fear in which non-Serbs were forced to leave and of other acts of violence committed by Serb Forces against non-Serbs during the campaign of forcible displacement."), 3363 ("Based on the evidence set forth above, the Chamber finds that the Accused was promptly and well informed of the forced displacement of non-Serb civilians from the Municipalities by Serb Forces from as early as April 1992. He continued to learn of such displacements throughout the conflict. In addition, he learned of other types of criminal activity committed against the non-Serb population by Serb Forces, including killings, rapes, and property related offences, from the beginning of April 1992 onwards.").

[2176] Trial Judgement, para. 3410 ("The Chamber considers that while the Accused and his subordinates issued orders during the conflict regarding respect for international humanitarian law, the rampant criminal acts being committed against non-Serbs in the Municipalities continued. The Accused continued to learn about the commission of serious crimes committed by Serb Forces against non-Serbs throughout the conflict and yet he continued to issue the same type of generic orders. He made no efforts to ensure that these orders were implemented on the ground so as to generate a positive effect on the prevention of crime. The Chamber therefore finds that these orders are not reflective of genuine efforts to prevent such crimes."), 3501("The Chamber considers that the Accused's failure to exercise his authority to adequately prevent or punish crimes committed against non-Serbs signalled to Serb Forces and Bosnian Serb Political and Governmental Organs that criminal acts committed against non-Serbs were tolerated throughout the period of the Overarching JCE. In light of this, his failure to take adequate steps to prevent and punish criminal activity committed against non-Serbs in the Municipalities had the effect of encouraging and facilitating the JCE I Crimes. The Chamber further finds that the Accused's failure to prevent and punish crimes committed by Serb Forces against non-Serbs and his tolerance for such crimes demonstrate a failure on his part to take adequate steps to ensure that Serb Forces and Bosnian Serb Political and Governmental Organs would act to protect Bosnian Muslims and Bosnian Croats residing in areas under their control.").

JCE I Crimes and Excluded Crimes[2177] alike and rewarded perpetrators.[2178] Furthermore, he publicly denied the serious situation.[2179]

(xi) Karadžić continued to pursue the common purpose for over three years without altering his policies.[2180]

818. The above findings bring to light a scenario of extreme violence, among them the Excluded Crimes, against Bosnian Muslim and Bosnian Croat victims, in a general policy of permanent removal of these populations in order to obtain the ethnic homogeneity of certain territories under Bosnian Serb control. This took place over a long period of time, during which Karadžić was promptly informed of these crimes. However, despite his position as the highest political and military authority, not only did he omitted to exert his authority to prevent or avoid the Excluded Crimes, he even concealed and encouraged them by pursuing a policy of non-punishment and rewarding the perpetrators.

819. From an evidentiary assessment point of view, it seems reasonable to conclude, for being a quite wide inference, that it is not proven beyond a reasonable doubt that the Excluded Crimes were deliberately planned in the initial common purpose that Karadžić shared with other members of the Overarching JCE and who decided or planned (intended) those crimes, as members of the initial intent. However, it does not seem reasonable at all, and is even incongruent with the obtained findings, to establish as an alternative inference an inference in which the only participation generating criminal liability that can be ascribed to Karadžić is that he did not care enough to stop pursuing the common plan to forcibly remove the non-Serb population from the Overarching JCE Municipalities.

820. This analysis does not take into consideration certain facts of extraordinary relevance that were previously expressed and consequently legally assessed. This is not a situation of mere

[2177] Trial Judgement, para, 3415 ("In relation to crimes committed by Bosnian Serbs against non-Serbs, authorities either failed to investigate or actively prevented investigations or prosecutions.").
[2178] Trial Judgement, paras. 3428, 3432.
[2179] Trial Judgement, paras. 3503 ("The Chamber found the many different ways in which the Accused, having been informed of crimes in the Municipalities, provided misleading information to representatives of international organisations, the public, and to the media in relation to these crimes. He covered up, for instance, the severity of the conditions in detention facilities, and he deflated criticism expressed by internationals in relation to claims of 'ethnic cleansing' by claiming that non-Serbs were leaving 'out of fear'. The Chamber found a clear disjuncture between the manner in which the Accused defended the actions of the Bosnian Serbs in international settings and press conferences and the reality on the ground, of which he was fully aware. In statements and speeches, the Accused created a narrative for an international audience in which the Bosnian Serbs would not be blamed for the movement of the non-Serb population."), 3356 ("On 2 April 1993, the Accused was present at the Bosnian Serb Assembly when it was reported that Foča was completely under Bosnian Serb control. At the same session, he acknowledged that 'we could not swear that there are no crimes' and that Serbs who committed crimes should be tried. However, the Accused claimed that he had only heard of 18 allegations of rape, but the propaganda had turned this into 18,000 cases of rape."), 3378, 3379.
[2180] Trial Judgement, para. 3487.

passivity before the Excluded Crimes, as merely foreseeable events. The findings of the Trial Chamber show other conclusions: the Excluded Crimes were not committed in a single isolated occasion, but during a determined lapse of time, in a framework of gradual escalation of violence until it became systematic and generalized, and as part of a wide plan that comported other crimes of extraordinary violence and similar characteristics carried out as means to the consecution of the end of ethnic cleansing of the territories under Bosnian Serb control. Karadžić and other members of the joint criminal enterprise had, from the beginning, knowledge of all of this. Despite Karadžić's position at the apex of power, knowing that these crimes were being committed, he instead encouraged them, publicly denied them, and rewarded the perpetrators.

821. It does not seem reasonable to affirm the existence of a sole agreement regarding a common purpose and that it remained unchanged over time, that it absolutely closed and excluded the perpetration of certain crimes as a means to achieve the implementation of the established plan. The most plausible hypothesis is that during the development of the events, different decisions were taken before new and changing situations occur, motivated by the development of war and the results of the implementation of the initial plan, adapting to the common purpose in connection with the means to be used.[2181]

822. On the other hand, we should recall the position of Karadžić, at the highest level of the structure – understood in an organizational way and as means to the implementation of the ethnic cleansing policies – and with all the power to approve or reject any act of his subordinates and all the information at his disposal. We are not in a scenario of mere passivity and voluntary assumption of a foreseeable risk of excesses in the execution of the common purpose; but in a complex form of criminal engagement, although not physical or direct, but through the control of the persons and involving events within the context of an executive structure; a situation that exceeds mere secondary criminal participation and reaches the essential contribution threshold of co-perpetration.

823. All this would imply that the most appropriate solution would be to consider that this is a case of liability under JCE I,[2182] and not JCE III.

824. In any case, from a factual point of view (and not of liability), it allows us to establish, as an alternative inference to that adopted by the Trial Chamber, stronger and more consistent with the rest of the evidence, that Karadžić was aware of and consented to the perpetration by his

[2181] *See supra* n. 2155.
[2182] I share the argument of the Trial Chamber in the *Stakić* case stating: "The Trial Chamber notes with special reference to the *mens rea* of joint criminal enterprise, that Article 7(1) lists modes of liability only. These cannot change or replace elements of crimes defined in the Statute. In particular, the *mens rea* elements required for an offence listed

subordinates of the Excluded Crimes, which *actus reus* in occasions extended over the course of several months.

3. Ground 2 of the Prosecution's Appeal

825. I can neither agree with the solution adopted by the majority of the Appeals Chamber regarding Ground 2 of the Prosecution's Appeal. In my opinion, a defect lies in the legal reasoning derived from the mixture or incorrect separation of factual and legal aspects in the moment of undertaking the analysis of the factual assumptions of the case, prior to the application of the legal norm. This analysis should take place in two different stages. First, regarding facts; second, regarding the applicable law.

826. With respect to the first stage, Article 4(2)(c) of the ICTY Statute clearly contains a factual description:

> deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

This describes an action from a naturalistic point of view. The form to determine or establish if this action or human conduct actually took place has to be undertaken according to the existing evidence. It is not a legal concept as such and therefore cannot to be subject to legal approximations but rather to rules and standards of evidentiary assessment exclusively.

827. The second stage, corresponds to the legal assessment, this means, which law is applicable to the factual description previously established. At this stage, the first thing that has to be cleared out is whether sections (a), (b), (c), (d), and (e) of Article 4(2) of the ICTY Statute constitute different criminal subtypes or correspond to a plural description of different modalities of the offence commission. From my point of view, each section does not constitute a different crime, rather, different forms or conduct of the *actus reus* of the crime of genocide, that can be represented in a sole form, concurrent or combined. I consider that, there is no legal reason to consider that a concrete event or fact cannot be from a legal point of view included in one or more sections of Article 4(2) of the ICTY Statute, thus being the only possible limitation of ontological nature in case we face two events physically incompatible. This limitation does not take place in the present case in which the same authorities who imposed deplorable conditions in the detention facilities in the Count 1 Municipalities were simultaneously killing, raping, and abusing detainees, as a factual reality.

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in the Statute cannot be altered." *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 437.

828. On the other hand, in my view, the evidentiary assessment contained in paragraph 2587 of the Trial Judgement is not adjusted to the minimum reasonableness standard. The detailed description of the terrible conditions in which Bosnian Muslims and Bosnian Croats were held,[2183] and which are summarised in paragraphs 2584[2184] and 2585[2185] of the Trial Judgement, should be taken into account together with the findings that establish that the same authorities who imposed deplorable conditions in the detention facilities in the Count 1 Municipalities were simultaneously killing, raping, and abusing detainees or enabling these other genocidal acts in the very same facilities. These findings all together reveal an objective situation of extreme gravity which could only lead to a sole reasonable conclusion: there were conditions of life calculated to bring about physical destruction in whole or in part and they were deliberately inflicted.

829. For all the above mentioned, my dissenting opinion is that thousands of Bosnian Muslims and Bosnian Croats, whom the Trial Chamber categorised as merely displaced, were in fact subjected to conditions of life aimed at their physical destruction.

4. Ground 3 of the Prosecution's Appeal

830. I can neither share the position of the Majority regarding the Prosecution's ground of appeal on Count 1 Municipalities, confirming the lack of genocidal intent already noted by the Trial Chamber regarding the acts under Article 4(2) of the ICTY Statute. In my opinion, the legal arguments provided regarding the *mens rea* for the crime of genocide are not correct, neither is the evidentiary assessment undertaken as it does not correspond with the required reasonableness standard.

831. Regarding the genocidal *mens rea*, the Trial Chamber stated in paragraph 549 of the Trial Judgement:

> The *mens rea* required for the crime of genocide –"intent to destroy, in whole or in part, a national, ethnical, racial or religious group" as defined in Article 4 of the Statute– has been referred to variously as, for instance, special intent, specific intent, *dolus specialis*, particular intent and genocidal intent. Genocide requires not only proof of intent to commit the alleged acts of genocide, but also proof of the specific intent to destroy the protected group, in whole or in part.

[2183] *See* Trial Judgement, Section IV.A.1, paras. 2507-2509.
[2184] Trial Judgement, para. 2584 ("In all of the Count 1 Municipalities, the Chamber found that Bosnian Muslim and Bosnian Croat detainees were held in terrible conditions. For the purpose of Article 4(2)(c), the Chamber recalls its findings that the detainees faced severe over-crowding in the detention facilities. This combined with stifling heat and lack of ventilation led to unbearable conditions for the detainees and some died. In these detention facilities, medical care was non-existent or inadequate, at best. Access to water and food was insufficient, which led to severe weight loss, malnutrition, and at times, starvation. Hygienic conditions were poor and the lack of access to washing facilities led to dysentery, lice, and skin diseases spreading throughout the facilities.").
[2185] Trial Judgement, para. 2585 ("Further, in Foča, Ključ, and Vlasenica, the Chamber found that a number of Bosnian Muslim and Bosnian Croat detainees were forced to perform labour at the frontline. They were put in dangerous situations, were afraid for their lives and of being beaten if they refused to work.").

> Therefore, when genocide is charged through the framework of JCE I, the accused needs to share genocidal intent with other members of the JCE.

832. Further, when the Trial Chamber referred to the proof of the *mens rea* of genocide, it reiterated this position and established as evidentiary standard the following:

> The chamber will examine below whether it can be satisfied beyond reasonable doubt that there was intent to destroy a part of the Bosnian Muslim and/or Bosnian Croat groups, namely the Bosnian Muslims and Bosnian Croats in the Count 1 Municipalities.[2186]

833. Under these premises, the Trial Chamber assessed evidence of genocidal intent: (i) of Karadžić and named alleged Overarching JCE members; (ii) of Bosnian Serbs not names as alleged members of the Overarching JCE; (iii) of the physical perpetrators; and (v) through the pattern of crimes. Lastly, in paragraph 2626 of the Trial Judgement, the Trial Chamber concluded:

> Having reviewed all of the evidence on record, for the purpose of Count 1, the Chamber is not satisfied beyond reasonable doubt that the acts under Article 4(2) identified above as Count 1 Municipalities were committed with genocidal intent. Further, it is not convinced that the only reasonable inference to be drawn from the evidence is that named members of the alleged Overarching JCE, or physical perpetrators possessed such intent to destroy the Bosnian Muslim and/or Bosnian Croat groups in the Count 1 Municipalities as such.

834. In my opinion, the Trial Chamber did not express an opinion sustained by true arguments but rather by mere subjective appreciations, referred to a purpose-based understanding of the concept of intent, a psychological fact that characterizes with especial intensity the crime of genocide. Psychological facts are practically impossible to be proven by direct evidence and can only be supported by indirect evidence, by means of inferences. This is the reason why they should be accompanied with a minimum reasonableness standard to justify the decision and render it in some way verifiable.

835. The legal definition of genocide establishes the *mens rea* requisite of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". The first question at stake is to determine the meaning of this element or requirement of "intent to destroy, in whole or in part, a national ethnical, racial or religious group" in the definition of the "Crime of Genocide" contained in Article 4(2) of the ICTY Statute and Article 2 of the UN Genocide Convention of 1948. Is it a specific "intent" or (direct) purpose – purpose-based concept – that operates as *dolus specialis* of the person committing genocide, which is the position sustained by the Trial Chamber and the majority of the Appeals Chamber, and the position traditionally maintained in the jurisprudence of both the ICTY and ICTR? Or if, on the contrary, it operates as an assignable end to the diverse acts –means – in which the commission of the crime of genocide can be unfolded according to the definition contained in Article 4(2) of the ICTY Statute, without a specific *mens rea* other than the

[2186] Trial Judgement, para. 1594.

ordinary, even with the possibility of *dolus eventualis*, as a cognitive element of *mens rea* – knowledge-based concept – regarding the end of genocidal acts, aimed to destroy in whole or in part, a national, ethnical or religious group.

836. Scholars have highlighted the conceptual ambiguity and the practical problems inherent to the concept of "intent", especially regarding the crime of genocide, proposing alternative approaches to those adopted by the jurisprudence of international tribunals.[2187] Nothing in the ICTY or ICTR Statutes or the Genocide Convention explicitly provides for a distinct genocidal intent standard. The origins and drafting of the Genocide Convention show the ambiguity of the treaty's intent provision.[2188]

837. In my opinion, a definition of the crime of genocide – which intends the protection of human groups – almost completely articulated on the basis of the intention or particular purpose of the person committing the act, in the sense that it should be specific and exclusively focused on the intent to destroy the group as such, makes no sense. Rather, it should have more objective bases, addressing: (i) the "genocidal acts", the core of which should conform with the most characteristic defining elements of genocide, namely, as means to intend the end of, "to destroy, in whole or in part", a group; and (ii) the effective contribution of the perpetrator to the collective destruction of a protected group.

838. I do not intend to dwell on the reasons, of criminal politics among others, that according to my view could have influenced the development of an extraordinarily narrow concept of genocide, filling it with impossible requirements that make the concept almost inapplicable, losing all its sense and legal value for the correct protection of criminal attacks against human groups, thus gaining a mere symbolic character. There is nothing to gain in the spread conception of genocide as the crime amongst crimes. In my opinion, when addressing the gravest crimes against human rights, we cannot establish graduations but apply the law differentiating distinct situations, qualitatively different. The concept of the crime of genocide makes sense when understood as extreme criminal acts of discrimination against human groups, which can go as far as their physical destruction, but also includes all acts tending to this finality.

[2187] A. K. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, Columbia Law Review (1999), at pp. 2259-2294; O. Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, Leiden Journal of International Law, 14(2) (2001), at pp. 399-408; H. Vest, *A Structure-Based Concept of Genocidal Intent*, Journal of International Criminal Justice, 5(4) (2007), at pp. 781-797; C. Kress, *The Darfur Report and Genocidal Intent*, Journal of International Criminal Justice 3(3) (2005), at pp. 562-578; K. Ambos, *What Does 'Intent to Destroy' in Genocide Mean?*, International Review of the Red Cross, 91(876) (2009), at pp. 833-858; A. Gil Gil, *Derecho penal internacional*, Madrid: Editorial Tecnos: Madrid (1999), at pp. 231-258.

[2188] A. K. Greenawalt, *Rethinking Genocidal Intent: the Case for a Knowledge-Based Interpretation*, Columbia Law Review (1999), at pp. 2270-2279.

839. In my view, both perspectives – purpose-based and knowledge-based– make sense and can be reconciled in their application to the present case. I have already mentioned important aspects regarding the general framework of the case, in which a context of extraordinary violence takes places and extraordinary criminal means of special gravity were used with the intention of obtaining a concrete result of ethnic cleansing for the consecution of an ethnically pure territory. These collective actions took place inside a war structure, with both military and paramilitary intervention, and where Karadžić held a special position at the apex of this structure as a political and military leader. I have tried to explain – with the purpose of evaluating his criminal liability both in psychological and material terms – the relationship between Karadžić and the events, that in my opinion resulted from the Trial Chamber findings, drawing specific conclusions that enhance the real control of the Karadžić over the events.

840. In the presence of certain situations of extreme complexity, with many elements and unmanageable shades from an evidentiary point of view, the dilemmas regarding the "intent to destroy" are of practical evidentiary order rather than legal. There are many possible situations and they do not admit a unitary solution. The questions to answer are the following: what is the required standard to consider the intent "to destroy in whole or in part" as proved, when is there enough evidence regarding the perpetration of the genocidal acts constitutive of the *actus reus*, and which acts are objectively attributable to the accused when he did not perpetrate them directly? What are the elements that have to be taken into account in this assessment? Is the BRD criterion useful when applied to a concept of intent exclusively purpose-based? How do judges have to understand the BRD criterion in these scenarios? Is it possible to objectify intent through some kind of indicators[2189] serving as guides to assess genocide scenarios?

841. To give an answer to the above questions –that the Trial Chamber did not ask– is not an easy task. From my point of view, the Trial Chamber limited itself to a formal approach to the evidentiary problems which is unsatisfactory. It did not make a deep analysis of the characteristic

[2189] According the Office of the UN Special Adviser on the Prevention of Genocide, among the issues that have to be analysed and taken into account to establish genocidal intent are: Statements amounting to hate speech by those involved in a genocidal campaign; In a large-scale armed conflict, widespread and systematic nature of acts; intensity and scale of acts and invariability of killing methods used against the same protected group; types of weapons employed (in particular weapons prohibited under international law) and the extent of bodily injury caused; In a non-conflict situation, widespread and/or systematic discriminatory and targeted practices culminating in gross violations of human rights of protected groups, such as extrajudicial killings, torture and displacement; The specific means used to achieve "ethnic cleansing" which may underscore that the perpetration of the acts is designed to reach the foundations of the group or what is considered as such by the perpetrator group; The nature of the atrocities, *e.g.*, dismemberment of those already killed that reveal a level of dehumanization of the group or euphoria at having total control over another human being, or the systematic rape of women which may be intended to transmit a new ethnic identity to the child or to cause humiliation and terror in order to fragment the group; The destruction of or attacks on cultural and religious property and symbols of the targeted group that may be designed to annihilate the historic presence of the group or groups; Targeted elimination of community leaders and/or men and/or women of a particular age group (the "future generation" or a military-age group); Other practices designed to complete the exclusion of targeted group from social/political life.

elements and peculiarities related to the present case. Many of the alluded indicators used as evidence of an intent "to destroy in whole or in part" exist in the present case and appear as proven in the findings of the Trial Judgement, particularly in paragraphs 2595 to 2624 and 2634 to 2903. Paragraphs 2634 to 2903 of the Trial Judgement deserve a special mention in their reference to "Evidence of genocidal intent through the pattern of crimes".

842. However, these findings are not sufficiently considered by the Trial Chamber, giving arguments that in my opinion do not meet the due reasonableness standard.[2190] It is paradigmatic that paragraph 2624 of the Trial Judgement establishes the evidentiary test on the basis of a purely quantitative criterion, which I cannot share.

843. In my view, another result could have been achieved from a correct assessment of the ensemble of the evidence together with more objective and pragmatic criteria regarding the requirements of intent "to destroy in whole or in part". For example, taking into account the presence of the alluded genocidal indicators and the certainty of knowledge on the part of the accused that his acts or omissions were contributing to the collective destruction of a group.

B. Dissenting Opinion on Ground 4 of the Prosecution's Appeal

844. I also express my respectful disagreement with the Appeals Chamber's finding that the Trial Chamber committed a discernible error and abused its discretion in imposing a sentence of only 40 years of imprisonment, therefore granting Ground 4 of the Prosecution's appeal and imposing a sentence of life imprisonment.

845. The Prosecution submits that the 40-year sentence does not reflect the Trial Chamber's own findings and analysis on the gravity of Karadžić's crimes and his responsibility for the largest and gravest set of crimes ever attributed to a single person at the ICTY.

846. In my opinion, the sentence should have remained as 40 years of imprisonment, a penalty which reflects in a sufficient measure the extreme gravity of the events, for the following reasons.

847. A penalty cannot rely on the principles of retribution and deterrence at the expense of other important sentencing factors, including: rehabilitation, reintegration into society, proportionality, and consistency.

848. A penalty, in any form or duration, cannot lose its humanity. This is what sets the difference between a legally civilised response and tribal vengeance. A sentence of 40 years of imprisonment

[2190] *See* Trial Judgement, paras. 2599-2606, 2610, 2612-2614, 2624.

is a penalty of a very large duration if compared with the extension of the human life and represents the absolute limit of what should be considered as acceptable confinement.

849. If we trespass a certain threshold, the quantity of the penalty ceases from being representative of the moral or legal gravity of a crime and gains a new significance. Neither can we talk of proportionality when the gravity of the crimes committed is of a very large scale and magnitude that no one can imagine a correlative penalty.

850. Life imprisonment or imprisonment for the remainder of the convicted person's life, without any possible redemption, makes the penalty acquire different qualitative characteristics to a mere deprivation of liberty, transforming it metaphysically. It deprives, in a definitive way, a human being from a right consubstantial with human nature, making life lose any sense and thus equating it with a death sentence. Life imprisonment only makes sense as a substitute of death penalty, a penalty that is fortunately proscribed from the rank of possible penalties that can be imposed on a subject.

851. Losing the freedom horizon undermines the humanity of penalties in any sense and reduces it to the realm of inhuman and degrading. The European Court of Human Rights ("ECtHR")[2191] has ruled on this matter on multiple occasions, considering life imprisonment sentences (for the remainder of the convicted person's life) in breach of Article 3 of the ECHR.

[2191] *Vinter and Others v. the United Kingdom* [GC], ECtHR, Nos. 66069/09, 130/10 and 3896/10, Judgment, 9 July 2013, paras. 119-122 ("[…] [I]n the context of a life sentence, Article 3 [of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment] must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. However, the [European] Court [of Human Rights] would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing […], it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, […] the comparative and international law materials before [the Court] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter [...] It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention. […] Furthermore, […] [a] whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."). *See Öcalan v. Turkey (no. 2)*, ECtHR, Nos. 24069/03, 197/04, 6201/06 and 10464/07, Judgment, 18 March 2014 (The Court held that there had been a violation of Article 3 of the Convention as regards the applicant's sentence to life imprisonment without any possibility of conditional release, finding that, in the absence of any review mechanism, the life prison sentence imposed on the applicant constituted an irreducible sentence that amounted to inhuman treatment). *See also Matiošaitis and Others v. Lithuania*, ECtHR, Nos. 22662/13, 51059/13, 58823/13, 59692/13, 59700/13, 60115/13, 69425/13 and 72824/13, Judgment, 23 May 2017; *T.P. and A.T. v. Hungary*, ECtHR, Nos. 37871/14 and 73986/14, Judgment, 4 October 2016; *Murray v. the Netherlands*, ECtHR, No. 10511/10, Judgment, 26 April 2016; *László Magyar v. Hungary*, ECtHR, No. 73593/10, Judgment, 20 May 2014.

852. Lastly, although it has been widely established in the ICTY jurisprudence, I have serious doubts on the fulfillment of the principle of *nulla poena sine lege* of the prison penalty for the remainder of the convicted person's life and thus, if it would be a possible penalty. Article 24 of the ICTY Statute clearly establishes that "[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment" and the provision contained in Rule 101 (B) of the ICTY Rules on imprisonment for the remainder of the convicted person's life, would be in my opinion an *ultra vires* ("beyond the powers") disposition since we are facing a penalty that exceeds qualitatively from the mere penalty of imprisonment, which is of a limited time, and without its provision in the "national law provision". We should remember that Article 38 of Socialist Federal Republic of Yugoslavia Criminal Code explicitly excluded life imprisonment even as a substitute to death penalty. On the other hand, the ICTY Rules do not contain any provision establishing the possibility of its revision after a certain time, something that is not sufficiently guaranteed if it is not determined in each Judgement.[2192] This situation is quite different from the explicit provision of life imprisonment and the possibility, as set by the ICC Statute, of conditional release (Articles 77 and 110 (3)-(5) of the ICC Statute).

853. For the foregoing reasons, I do not agree with the Majority's conclusion concerning Grounds 1, 2, 3, and 4 of the Prosecution's appeal.

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

Done this 20th day of March 2019,
At The Hague,
The Netherlands

Judge José Ricardo de Prada Solaesa

[Seal of the Mechanism]

[2192] *Stakić* Trial Judgement, paras. 437, 890, Disposition.

IX. ANNEX A – PROCEDURAL HISTORY

854. The main aspects of the appeal proceedings are summarized below.

A. Composition of the Appeals Chamber

855. On 20 April 2016, the President of the Mechanism ordered that the Bench in the present case be composed of Judge Theodor Meron (Presiding), Judge William H. Sekule, Judge Vagn Joensen, Judge José Ricardo de Prada Solaesa, and Judge Graciela Susana Gatti Santana.[2193] On 21 April 2016, the Judge Meron assigned himself as the Pre-Appeal Judge in this case.[2194] On 27 September 2018, Judge Meron withdrew from this case[2195] and, in his capacity as President of the Mechanism, assigned Judge Ivo Nelson de Caires Batista Rosa to replace him on the Bench in this case.[2196]

B. Karadžić's and the Prosecution's Appeals

856. Following the Pre-Appeal Judge's decisions granting Karadžić and the Prosecution an extension of 90 days to file their notices of appeal,[2197] Karadžić and the Prosecution filed their respective notices of appeal on 22 July 2016.[2198]

857. On 9 August 2016, the Pre-Appeal Judge granted Karadžić and the Prosecution an extension of 60 days for filing their appeal briefs and an extension of 45 days for filing their response briefs.[2199] On 8 September 2016, the Pre-Appeal Judge granted Karadžić's motion for an extension of the word limit for his appeal brief and authorized him to file a brief not exceeding 75,000 words, granting the Prosecution an equivalent extension of the word limit for its response brief.[2200] On 15 September 2016, the Pre-Appeal Judge denied the Prosecution's motion for a further extension of time for the parties to file their respective response briefs.[2201]

[2193] Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016, p. 2.
[2194] Order Assigning a Pre-Appeal Judge, 21 April 2016, p. 1.
[2195] Decision, 27 September 2018, p. 3.
[2196] Order Replacing a Judge in a Case Before the Appeals Chamber, 27 September 2018, p. 1.
[2197] Decision on Motion for Extension of Time to File Notice of Appeal, 21 April 2016, p. 2; Decision on a Motion for a Further Extension of Time to File a Notice of Appeal, 15 June 2016, pp. 3, 4.
[2198] Radovan Karad[ž]i[ć]'s Notice of Appeal, 22 July 2016 (public with confidential annex); Prosecution's Notice of Appeal, 22 July 2016.
[2199] Decision on a Joint Motion for Extension of Time to File Appeal and Response Briefs, 9 August 2016, pp. 2, 3.
[2200] Decision on a Motion for an Extension of a Word Limit, 8 September 2016, p. 3.
[2201] Decision on the Prosecution's Motion for an Extension of Time to File the Response Briefs, 15 September 2016, pp. 1, 2.

858. Karadžić and the Prosecution filed their appeal briefs on 5 December 2016.[2202]

859. On 9 January 2017, the Appeals Chamber granted an additional extension of 15 days for filing the parties' response briefs.[2203] Karadžić and the Prosecution filed their response briefs on 15 March 2017.[2204]

860. On 21 March 2017, the Pre-Appeal Judge granted, in part, Karadžić's motion for an extension of time and word limit, authorizing him to file a brief not exceeding 22,500 words and allowing the parties a seven day extension to file their reply briefs.[2205] On 6 April 2017, Karadžić and the Prosecution filed their briefs in reply.[2206]

C. Decisions Pursuant to Rule 142 of the Rules

861. Karadžić filed motions requesting the admission of additional evidence on appeal on 24 April 2017 and 7 May 2018, respectively.[2207] On 2 March 2018, the Appeals Chamber denied Karadžić's first motion for admission of additional evidence on appeal.[2208] On 18 July 2018, the Appeals Chamber denied Karadžić's second motion for admission of additional evidence on appeal.[2209]

D. Status Conferences

862. In accordance with Rule 69 of the Rules, Status Conferences were held on 15 November 2016,[2210] 6 March 2017,[2211] 23 June 2017,[2212] 10 October 2017,[2213] 30 January 2018,[2214] 25 April 2018,[2215] 15 August 2018,[2216] and 11 December 2018.[2217]

[2202] Radovan Karad[ž]i[ć]'s Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 23 December 2016); Prosecution Appeal Brief, 5 December 2016 (confidential ; public redacted version filed on 11 January 2017).
[2203] Decision on the Renewed Prosecution Motion for an Extension of Time to File the Response Briefs, 9 January 2017, p. 3.
[2204] Radovan Karad[ž]i[ć]'s Response Brief, 15 March 2017 (confidential; public redacted version filed on 15 March 2017); Prosecution Response Brief, 15 March 2017 (confidential; revised public redacted version filed on 16 May 2017).
[2205] Decision on a Motion for Extension of Time and Word Limit for Reply Brief, 21 March 2017.
[2206] Radovan Karad[ž]i[ć]'s Reply Brief, 6 April 2017 (confidential; public redacted version filed on 19 April 2017); Prosecution Reply Brief, 6 April 2017 (confidential; public redacted version filed on 16 May 2017).
[2207] Motion to Admit Additional Evidence, 24 April 2017; Second Motion to Admit Additional Evidence, 7 May 2018.
[2208] Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018, paras. 1, 19.
[2209] Decision on Second Motion to Admit Additional Evidence on Appeal, 18 July 2018, pp. 2, 5. The Appeals Chamber denied Karadžić's request to reconsider each of these decisions on 13 February 2019. Decision on a Motion for Reconsideration, 13 February 2019, p. 6.
[2210] T. 15 November 2016 pp. 1-15.
[2211] T. 6 March 2017 pp. 16-31.
[2212] T. 23 June 2017 pp. 32-47.
[2213] T. 10 October 2017 pp. 48-66.
[2214] T. 30 January 2018 pp. 67-83.
[2215] T. 25 April 2018 pp. 317-322.

E. Hearing of the Appeals

863. The Appeals Chamber heard the parties' oral arguments at the appeal hearing held in The Hague, The Netherlands on 23 and 24 April 2018.[2218]

[2216] T. 15 August 2018 pp. 323-330.
[2217] T. 11 December 2018 pp. 331-339.
[2218] T. 23 April 2018 pp. 84-236; T. 24 April 2018 pp. 237-316.

X. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Mechanism

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Prosecutor v. Radovan Karadžić, Case No. MICT-13-55-A, Decision on a Motion to Admit Additional Evidence on Appeal, 2 March 2018.

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MUNYARUGARAMA, Phénéas

Phénéas Munyarugarama v. Prosecutor, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012").

NGIRABATWARE, Augustin

Prosecutor v. Augustin Ngirabatware, Case No. MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017.

Augustin Ngirabatware v. Prosecutor, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgement").

Augustin Ngirabatware v. Prosecutor, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014 ("*Ngirabatware* Decision of 15 April 2014").

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Prosecutor v. Naser Orić, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ("*Orić* Decision of 17 February 2016").

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Prosecutor v. Vojislav Šešelj, Case No. MICT-16-99-A, Judgement, 11 April 2018 ("*Šešelj* Appeal Judgement").

Prosecutor v. Vojislav Šešelj, Case No. MICT-16-99-A, Decision on Assignment of Standby Counsel for the Appeal Hearing, 11 October 2017.

2. ICTR

BAGILISHEMA, Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement (Reasons), 3 July 2002 (originally filed in French, English translation filed on 16 June 2003) ("*Bagilishema* Appeal Judgement").

BAGOSORA, Théoneste, *et al.*

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Appeal Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

Théoneste Bagosora, Aloys Ntabakuze, and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010 ("*Bagosora et al.* Decision of 29 October 2010").

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006.

BIZIMUNGU, Augustin

Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("*Bizimungu* Appeal Judgement").

BIZIMUNGU, Casimir, *et al.*

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-AR73.6, Order Lifting the Confidentiality of the Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador to Rwanda Issued on 16 July 2007, 19 April 2010.

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009.

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The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-AR73.6, Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador Robert Flaten, signed on 16 July 2007, filed on 17 July 2007 ("*Bizimungu et al.* Decision of 17 July 2007").

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-AR73, Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 ("*Bizimungu et al.* Decision of 16 November 2005").

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Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement").

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Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010 ("*Kanyarukiga* Decision of 23 March 2010").

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Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor, Case No. ICTR-98-44-A, Judgement, 29 September 2014 ("*Karemera and Ngirumpatse* Appeal Judgement").

Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera v. The Prosecutor, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al.* Decision of 29 May 2009").

The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning His Right to be Present at Trial, 5 October 2007 ("*Karemera et al.* Decision of 5 October 2007").

The Prosecutor v. Édouard Karemera, Matthieu 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 ("*Karemera et al.* Decision of 16 June 2006").

The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera, Case No. ICTR-98-44-AR73.6, Decision on Joseph Nzirorera's Interlocutory Appeal, 28 April 2006.

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Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007 ("*Nahimana et al.* Decision of 5 March 2007").

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D. Defined Terms and Abbreviations

ABiH

Army of the Republic of Bosnia and Herzegovina (*Armija Bosne i Hercegovine*)

Additional Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Appeals Chamber

Appeals Chamber of the Mechanism

ARK

Autonomous Region of Krajina (*Autonomna Regija Krajina*)

Assembly

Assembly of the Serbian People of Bosnia-Herzegovina (*later* National Assembly of *Republika Srpska*)

Bosnian Serb Political and Governmental Organs

Political and governmental organs as defined in paragraph 12 of the Indictment, namely: "members of SDS and Bosnian Serb government bodies at the republic, regional, municipal, and local levels, including Crisis Staffs, War Presidencies, and War Commissions"

Common Article 3

Common Article 3 of the Geneva Conventions of 1949

Count 1 Municipalities

Municipalities referred to in paragraph 38 of the Indictment, namely: Bratunac, Foča, Ključ, Prijedor, Sanski Most, Vlasenica, and Zvornik

DB

State Security Service of *Republika Srpska*

Defence

Defence Team of Radovan Karadžić

Directive 7

The Directive for Further Operations No. 7 issued by Radovan Karadžić on 8 March 1995

DutchBat

Dutch Battalion of UNPROFOR

ECCC

Extraordinary Chambers in the Courts of Cambodia

ECHR

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

Eight Witnesses

Eight witnesses whose prior statements and/or testimony had been admitted into evidence as part of the Rule 92 *bis* Material and who were subject of Karadžić's request to issue subpoenas compelling them to submit to interviews with the Defence which was denied by the Trial Chamber on 21 March 2011

First Amended Indictment

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Amended Indictment, 24 May 2000

Five Rule 70 Witnesses

Prosecution Witnesses KDZ182, KDZ185, KDZ196, KDZ304, and KDZ450 who on 15 April 2010 were granted leave to testify under certain conditions, including the use of pseudonyms as well as image and voice distortion

Hostages JCE

Joint criminal enterprise that existed between 25 May and 18 June 1995 with the common purpose of taking UN Personnel hostage in order to compel NATO to abstain from conducting air strikes against Bosnian Serb targets

ICC

International Criminal Court

ICCPR

International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976

ICRC

International Committee of the Red Cross

ICRC Commentary on Additional Protocol I

International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949

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

ICTR Rules

ICTR Rules of Procedure and Evidence

ICTR Statute

Statute of the ICTR

ICTY or Tribunal

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

ICTY Directive on the Assignment of Counsel

ICTY Directive on the Assignment of Defence Counsel, Revision 11, 11 July 2006, No. 1/94, (IT/73/REV. 11)

Prosecution Final Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Prosecution's Submission on Final Trial Brief, 29 August 2014 (confidential with confidential appendices)

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ICTY Rules

ICTY Rules of Procedure and Evidence

ICTY Statute

Statute of the ICTY

Indictment

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009

JCE

Joint criminal enterprise

JNA

Yugoslav People's Army (*Jugoslavenska Narodna Armija*)

Karadžić

Mr. Radovan Karadžić

Karadžić Appeal Brief

Radovan Karad[ž]i[ć]'s Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 23 December 2016)

Karadžić Final Trial Brief

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Defence Final Trial Brief, 29 August 2014 (confidential; public redacted version filed on 24 September 2014)

Karadžić Notice of Appeal

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Karadžić Reply Brief

Radovan Karad[ž]i[ć]'s Reply Brief, 6 April 2017 (confidential; public redacted version filed on 19 April 2017)

Karadžić Response Brief

Radovan Karad[ž]i[ć]'s Response Brief, 15 March 2017 (confidential; public redacted version filed on 15 March 2017)

Mechanism

International Residual Mechanism for Criminal Tribunals

Municipalities 92 *bis* Statements

Unsigned statements of eight prospective Defence witnesses who initially appeared on Karadžić's witness list and whose evidence concerned the Municipalities component of his case and who are the subject of motions filed by Karadžić which was denied by the Trial Chamber on 18 March 2014

MUP

Ministry of Internal Affairs (*Ministarstvo Unutrašnjih Poslova*) of *Republika Srpska*

n. (nn.)

footnote (footnotes)

NATO

North Atlantic Treaty Organization

Order Appointing Deronjić as Civilian Commissioner

Order issued by Karadžić on 11 July 1995 appointing Miroslav Deronjić as civilian commissioner for Srebrenica

Order on Approval of Humanitarian Convoys

Order issued by Karadžić on 11 July 1995 that approval of humanitarian convoys will be given exclusively by the State Committee following prior consultations with Karadžić

Order to Form an SJB in Srebrenica

Order issued by Karadžić on 11 July 1995 to the *Republika Srpska* Ministry of Internal Affairs to form a Public Security Station in "Serb Srebrenica"

Overarching JCE

Joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in municipalities throughout Bosnia and Herzegovina between October 1991 and November 1995

Overarching JCE Municipalities

Bosnia and Herzegovina municipalities of Bijeljina, Bratunac, Brčko, Foča, Rogatica, Višegrad, Sokolac, Vlasenica, Zvornik, Banja Luka, Bosanski Novi, Ključ, Prijedor, Sanski Most, Hadžići, Ilidža, Novi Grad, Novo Sarajevo, Pale, and Vogošća

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Prosecution

Office of the Prosecutor of the ICTY or the Mechanism

Prosecution Appeal Brief

Prosecution Appeal Brief, 5 December 2016 (confidential; public redacted version filed on 11 January 2017)

Prosecution Notice of Appeal

Prosecution's Notice of Appeal, 22 July 2016

Prosecution Reply Brief

Prosecution Reply Brief, 6 April 2017 (confidential; public redacted version filed on 16 May 2017)

Prosecution Response Brief

Prosecution Response Brief, 15 March 2017 (confidential; public redacted version filed on 16 May 2017)

Registry

Office of the Registrar of the ICTY or the Mechanism

***Republika Srpska* or RS**

Serbian Republic of Bosnia and Herzegovina from 12 August 1992

Rome Statute

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3, entered into force 1 July 2002

RP.

Registry Pagination

Rule 92 *bis* and *quater* Evidence or Rule 92 *bis* Evidence and Rule 92 *quater* Evidence

Evidence admitted pursuant to Rule 92 *bis* and/or Rule 92 *quater* of the ICTY Rules

Rules

Rules of Procedure and Evidence of the Mechanism

Sarajevo 92 *bis* Statements

Four witness statements under Rule 92 *bis* of the ICTY Rules related to the Sarajevo component of the case of which Karadžić sought admission on 1 October 2013

Sarajevo JCE

Joint criminal enterprise with the primary purpose of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling conducted by the SRK between late May 1992 and October 1995

SCSL

Special Court for Sierra Leone

SDC

Supreme Defence Council *(Vrhovni Savet Odbrane)*

SDS

Serbian Democratic Party (*Srpska Demokratska Stranka*) in Bosnia and Herzegovina

Security Council Resolution 1966

UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010

SerBiH

Serbian Republic of Bosnia and Herzegovina, renamed *Republika Srpska* on 12 August 1992

SJB

Public Security Station (local level) (*Stanica Javne Bezbjednosti*)

Srebrenica JCE

Joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica in 1995

SRK

Sarajevo-Romanija Corps of the VRS *(Sarajevo Romanija Korpus)*

State Committee

State Committee for Co-Operation with the UN and international humanitarian organisations in charge of the approval of humanitarian convoys

Statute

Statute of the Mechanism

Strategic Goals

A list of six goals presented by Karadžić and adopted by the Bosnian Serb Assembly during its 16th session, the Strategic Goals which included: (i) separation from the other two national communities and the separation of states; (ii) creation of the corridor between Semberija and Krajina; (iii) creation of the corridor in the Drina Valley; (iv) creation of a border on the Una and Nereveta Rivers; (v) division of the city of Sarajevo into Serbian and Muslim parts; and (vi) access of SerBiH to the sea

STL

Special Tribunal for Lebanon

T.

Transcript from hearings at trial or appeal in the present case, all references are to the official English transcript, unless otherwise indicated

Trial Chamber

Trial Chamber of the ICTY seized of the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T

Trial Judgement

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Judgement, 24 March 2016 (confidential; public redacted version filed on 24 March 2016)

UN

United Nations

UNHCR

United Nations High Commissioner for Refugees

UNICEF

United Nations Children's Fund

UNMO

United Nations Military Observers

UN Personnel

United Nations Protection Force and United Nations Military Observers

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, U.N. Doc. A/Res/67/187, 28 March 2013

UNPROFOR

United Nations Protection Force

Variant A/B Instructions

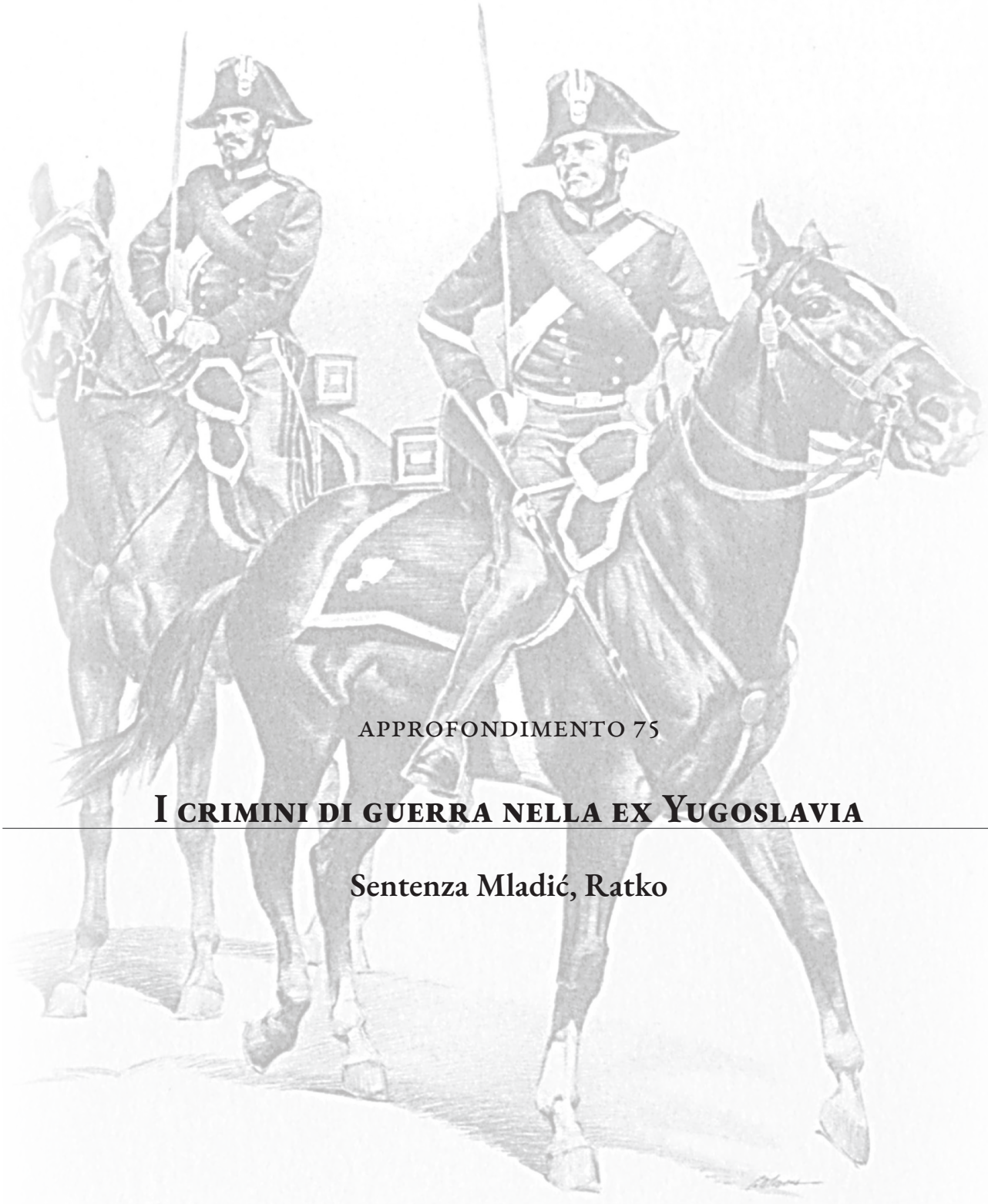
Document issued by the Main Board of the SDS on 19 December 1991 entitled "Instructions for the Organization and Operation of Organs of the Serbian People in Bosnia and Herzegovina in Emergency Conditions"

VRS

Army of *Republika Srpska* (*Vojska Republike Srpske*)

Žepinić Interview

Witness Vitomir Žepinić's interview with the Prosecution in September 1996



APPROFONDIMENTO 75

I crimini di guerra nella ex Yugoslavia

Sentenza Mladić, Ratko

Fonte: ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/MICT-13-55-A/JUD283R0000522215.pdf

Tribunale internazionale per la ex Jugoslavia. Ergastolo, 8 giugno 2021

Ratko Mladić (il boia di Srebrenica) è stato accusato davanti al Tribunale penale internazionale per l'ex Jugoslavia di due capi d'accusa di genocidio, cinque capi d'accusa di crimini contro l'umanità e quattro capi d'accusa di violazioni delle leggi o delle consuetudini di guerra commesse dalle forze serbe durante il conflitto armato in Bosnia-Erzegovina dal 1992 al 1995.
Mladić è stato accusato di essere individualmente responsabile penalmente di tali reati attraverso, *tra l'altro,* la sua partecipazione a diverse imprese criminali congiunte collegate. Il presunto obiettivo del primo, Overarching JCE era la rimozione permanente dei musulmani bosniaci e dei croati bosniaci dai territori rivendicati dai serbo-bosniaci in Bosnia-Erzegovina attraverso i crimini accusati nell'atto d'accusa.
Mladić è stato inoltre accusato di essere superiore ai sensi dell'articolo 7, paragrafo 3, dello Statuto del meccanismo per aver saputo, *tra l'altro*, o aver avuto motivo di sapere che i crimini stavano per essere commessi o erano stati commessi da forze sotto il suo effettivo controllo e non aver impedito i crimini o punito gli autori.

MICT-13-56-A 12105
A12105-A11737
08 June 2021 SF

UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-56-A
Date: 8 June 2021
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Prisca Matimba Nyambe, Presiding**
Judge Aminatta Lois Runeni N'gum
Judge Seymour Panton
Judge Elizabeth Ibanda-Nahamya
Judge Mustapha El Baaj

Registrar: **Mr. Abubacarr Tambadou**

Judgement of: **8 June 2021**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC REDACTED

JUDGEMENT

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy

Counsel for Mr. Ratko Mladić:

Mr. Branko Lukić
Mr. Dragan Ivetić

CONTENTS

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seized of appeals by Mr. Ratko Mladić ("Mladić") and the Office of the Prosecutor of the Mechanism ("Prosecution") against the Judgement in the case of *Prosecutor v. Ratko Mladić*, rendered on 22 November 2017 ("Trial Judgement") by Trial Chamber I 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 ("Trial Chamber" and "ICTY", respectively).

I. INTRODUCTION

A. Background

2. Mladić was born on 12 March 1942 in Božanovići, Kalinovik Municipality.[1] From 27 September 1965 until 10 May 1992, he was a member of the Yugoslav People's Army ("JNA") and held various positions in military posts throughout the former Yugoslavia.[2] On 12 May 1992, the Bosnian Serb Assembly appointed Mladić as Commander of the Main Staff of the Army of *Republika Srpska* ("VRS").[3] He remained in command of the VRS Main Staff until at least 8 November 1996.[4]

3. Mladić was indicted on 24 July and 16 November 1995 and, following several amendments, the operative indictment against him was filed on 16 December 2011.[5] The Prosecution charged Mladić with individual criminal responsibility pursuant to Articles 7(1) and 7(3) of the Statute of the ICTY ("ICTY Statute") on 11 counts of genocide, crimes against humanity, and violations of the laws or customs of war under Articles 3, 4, and 5 of the ICTY Statute.[6] The crimes covered by the Indictment were allegedly committed between 12 May 1992 and 30 November 1995 on the territory of Bosnia and Herzegovina.[7]

4. The Trial Chamber acquitted Mladić of genocide under Count 1 of the Indictment[8] and convicted him pursuant to Article 7(1) of the ICTY Statute of genocide, crimes against humanity

[1] Trial Judgement, para. 272.
[2] Trial Judgement, paras. 272-274.
[3] Trial Judgement, paras. 275, 276. Prior to 12 August 1992, *Republika Srpska* was known as the Serbian Republic of Bosnia and Herzegovina. *See* Trial Judgement, p. 13.
[4] Trial Judgement, paras. 275, 276.
[5] Trial Judgement, paras. 1, 5229-5234, *referring to*, *inter alia*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, Annex A ("Indictment").
[6] Indictment, paras. 4-86. *See also* Trial Judgement, paras. 2-10.
[7] *See* Indictment, paras. 8, 13, 14, 18, 19, 23, 24, 28, 35-86, Schedules A-G. *See also* Trial Judgement, para. 2.
[8] Trial Judgement, para. 5214.

(persecution, extermination, murder, deportation, and inhumane acts), and violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and taking of hostages).[9] The Trial Chamber found him responsible for committing these crimes through a "leading and grave role" in four joint criminal enterprises.[10]

5. The Trial Chamber found that, from 12 May 1992 until 30 November 1995, Mladić participated in a joint criminal enterprise with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and deportation ("Overarching JCE"),[11] and convicted him of these crimes.[12]

6. The Trial Chamber further found that, between 12 May 1992 and November 1995, Mladić participated in a joint criminal enterprise with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling ("Sarajevo JCE"),[13] and convicted him of the crimes of terror, unlawful attacks on civilians, and murder.[14]

7. The Trial Chamber also found that, from the days immediately preceding 11 July 1995 to at least October 1995, Mladić participated in a joint criminal enterprise with the objective of eliminating the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men ("Srebrenica JCE"),[15] and convicted him of the crimes of genocide, as well as persecution, inhumane acts (forcible transfer), murder, and extermination.[16]

8. Further, the Trial Chamber found that, from approximately 25 May 1995 to approximately 24 June 1995, Mladić participated in a joint criminal enterprise with the objective of capturing

[9] Trial Judgement, para. 5214. *See also* Trial Judgement, paras. 3065, 3116, 3183, 3206, 3212, 3226, 3286, 3312, 3324, 3359, 3380, 3387, 3405, 3418, 3431, 3555, 4232, 4612, 4688, 4740, 4893, 4921, 4987, 5098, 5128, 5130, 5131, 5141, 5156, 5163, 5168, 5188-5192. Where the Trial Chamber found Mladić guilty of murder and extermination as crimes against humanity based on the same incidents, it only entered convictions for extermination, in line with the law on cumulative convictions. *See* Trial Judgement, para. 5179. *See also* Trial Judgement, paras. 5168-5178.
[10] Trial Judgement, para. 5165. *See also* Trial Judgement, paras. 4232, 4612, 4688, 4740, 4892, 4893, 4921, 4987, 5096-5098, 5128, 5130, 5131, 5141, 5156, 5163, 5188-5193.
[11] Trial Judgement, paras. 4232, 4610, 4612, 4688, 5189. The Trial Chamber determined that the Overarching JCE existed between 1991 and 30 November 1995. *See* Trial Judgement, paras. 4232, 4610.
[12] Trial Judgement, para. 5214. *See also* Trial Judgement, para. 5189.
[13] Trial Judgement, paras. 4740, 4892, 4893, 4921, 5190.
[14] Trial Judgement, paras. 4893, 4921, 5190, 5214.
[15] Trial Judgement, paras. 4987, 4988, 5096-5098, 5128, 5130, 5131. The Trial Chamber determined that in the days immediately preceding 11 July 1995, the objective of the Srebrenica JCE involved the commission of the crimes of persecution and inhumane acts (forcible transfer), but that by the early morning of 12 July 1995, the crimes of genocide, extermination, and murder became part of the means to achieve that objective. *See* Trial Judgement, paras. 4987, 5096, 5108.
[16] Trial Judgement, paras. 5098, 5128, 5130, 5131, 5191, 5214.

United Nations ("UN") personnel deployed in Bosnia and Herzegovina and detaining them in strategic military locations to prevent the North Atlantic Treaty Organization ("NATO") from launching further military air strikes on Bosnian Serb military targets ("Hostage-Taking JCE"),[17] and convicted him of the crime of taking of hostages as a violation of the laws or customs of war.[18]

9. The Trial Chamber sentenced Mladić to life imprisonment.[19]

B. The Appeals

10. Mladić presents nine grounds of appeal challenging his convictions and sentence.[20] Mladić requests that the Appeals Chamber reverse all erroneous findings of the Trial Chamber, quash his convictions, and acquit him.[21] In the alternative, Mladić seeks a retrial,[22] or a reduction in his sentence.[23] The Prosecution responds that Mladić's appeal should be dismissed in its entirety.[24]

11. The Prosecution presents two grounds of appeal challenging certain findings or conclusions of the Trial Chamber pertaining to the Overarching JCE and its acquittal of genocide under Count 1 of the Indictment.[25] The Prosecution requests that the Appeals Chamber correct the Trial Chamber's errors[26] and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first category of joint criminal enterprise, or alternatively, the third category of joint criminal enterprise, or as a superior under Article 7(3) of the ICTY Statute.[27] Mladić responds that the Prosecution's appeal should be dismissed in its entirety.[28]

12. The Appeals Chamber heard oral submissions regarding these appeals on 25 and 26 August 2020.[29]

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[17] Trial Judgement, paras. 5141, 5142, 5156, 5163, 5192.
[18] Trial Judgement, paras. 5192, 5214.
[19] Trial Judgement, para. 5215.
[20] *See* Mladić Notice of Appeal, paras. 5, 7, 12-91; Mladić Appeal Brief, paras. 10-19, 41-958. In his notice of appeal, Mladić raised nine grounds of appeal comprising a total of 40 subgrounds. In his appellant's brief, Mladić withdrew five subgrounds, did not address one subground (Ground 5(J)), and subsumed eight subgrounds into other subgrounds, leaving nine grounds of appeal with a total of 26 subgrounds to be addressed by the Appeals Chamber. *See* Mladić Appeal Brief, paras. 61, 565-569, 644, 678-680, 760, 761, 876.
[21] Mladić Notice of Appeal, para. 10, p. 32; Mladić Appeal Brief, paras. 20, 22, 60, 114, 185, 210, 224, 237, 269, 293, 316, 334, 335, 338, 349, 351, 372, 375, 397, 400, 442, 445, 458, 465, 496, 527, 541, 554, 563, 564, 583, 600, 641, 643, 665, 694, 697, 710, 713, 734, 759, 875, 884, 930, 958, 959, 960.
[22] Mladić Notice of Appeal, para. 10, p. 32; Mladić Appeal Brief, paras. 21, 885, 916, 959.
[23] Mladić Notice of Appeal, para. 11, p. 32; Mladić Appeal Brief, paras. 22, 60, 677, 780, 920, 926, 930, 931, 958, 960.
[24] Prosecution Response Brief, para. 4.
[25] Prosecution Notice of Appeal, paras. 3-9; Prosecution Appeal Brief, paras. 1-3, 5-50.
[26] Prosecution Appeal Brief, paras. 1, 4, 17, 43.
[27] Prosecution Appeal Brief, paras. 1, 4, 18, 44, 47-50.
[28] *See* Mladić Response Brief, paras. 9-343.
[29] T. 25 August 2020 pp. 1-110; T. 26 August 2020 pp. 1-109.

II. STANDARDS OF APPELLATE REVIEW

13. The Mechanism was established pursuant to UN Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY.[30] The Statute and the Rules of Procedure and Evidence of the Mechanism ("Rules") reflect normative continuity with the Statutes and the Rules of Procedure and Evidence of the ICTR and the ICTY ("ICTR Rules" and "ICTY Rules", respectively).[31] The Appeals Chamber considers that it is bound to interpret the Statute and the Rules in a manner consistent with the jurisprudence of the ICTR and the ICTY.[32] Likewise, where the Statute of the ICTR ("ICTR Statute") and the ICTR Rules or the ICTY Statute and its Rules are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.[33]

14. While not bound by the jurisprudence of the ICTR or the ICTY, the Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTR and the ICTY Appeals Chambers and depart from them only for cogent reasons in the interest of justice, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[34] It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure.[35]

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[30] UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), paras. 1, 4, Annex 1, Statute of the Mechanism ("Statute"), Preamble, Article 1. *See also* Security Council Resolution 1966, Annex 2, Article 2(2); *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6.

[31] *See, e.g.*, *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6. *See also Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case Nos. IT-08-91-A & MICT-13-55, Decision on Karadžić's Motion for Access to Prosecution's Sixth Protective Measures Motion, 28 June 2016, p. 2; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012"), para. 5.

[32] *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[33] *Karadžić* Appeal Judgement, para. 12; *Šešelj* Appeal Judgement, para. 11; *Ngirabatware* Appeal Judgement, para. 6; *Munyarugarama* Decision of 5 October 2012, para. 6.

[34] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *Cf. Munyarugarama* Decision of 5 October 2012, para. 5 (noting the "normative continuity" between the Rules and the Statute and the ICTY Rules and ICTY Statute and that the "parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice").

[35] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968; *Bizimungu* Appeal Judgement, para. 370.

15. Article 23(2) of the Statute stipulates that the Appeals Chamber may affirm, reverse, or revise decisions taken by a trial chamber. An appeal is not a trial *de novo*.[36] The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.[37] These criteria are set forth in Article 23 of the Statute and are well established in jurisprudence.[38]

16. 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.[39] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[40] 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.[41] 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.[42]

17. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[43] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[44] 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

[36] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12. *See also Stanišić and Župljanin* Appeal Judgement, para. 17.
[37] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[38] *Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[39] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[40] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19.
[41] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19; *Nyiramasuhuko et al.* Appeal Judgement, para. 30.
[42] *Karadžić* Appeal Judgement, para. 15; *Šešelj* Appeal Judgement, para. 13; *Ngirabatware* Appeal Judgement, para. 8. *See also, e.g., Prlić et al.* Appeal Judgement, para. 19.
[43] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.
[44] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14; *Ngirabatware* Appeal Judgement, para. 9. *See also, e.g., Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.

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.[45]

18. When considering alleged errors of fact, 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.[46] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[47] 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 caused a miscarriage of justice.[48] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[49]

19. The same standard of reasonableness and the same deference to factual findings of the trial chamber apply when the Prosecution appeals against an acquittal.[50] 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.[51] Nevertheless, considering that, at trial, it is the Prosecution that bears the burden 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 than for a defence appeal against conviction.[52] Whereas a convicted person must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt,[53] the Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated.[54]

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[45] *Karadžić* Appeal Judgement, para. 16; *Šešelj* Appeal Judgement, para. 14. *See also Prlić et al.* Appeal Judgement, para. 20; *Nyiramasuhuko et al.* Appeal Judgement, para. 31.
[46] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[47] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 21.
[48] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 21; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[49] *Karadžić* Appeal Judgement, para. 17; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 22; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[50] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[51] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 15; *Ngirabatware* Appeal Judgement, para. 10. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[52] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[53] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.
[54] *Karadžić* Appeal Judgement, para. 18; *Šešelj* Appeal Judgement, para. 16. *See also*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 23; *Nyiramasuhuko et al.* Appeal Judgement, para. 32.

20. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting an intervention of the Appeals Chamber.[55] 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.[56]

21. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[57] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[58] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[59]

[55] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 25; *Nyiramasuhuko et al*. Appeal Judgement, para. 34.
[56] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. *See also*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 25; *Nyiramasuhuko et al*. Appeal Judgement, para. 34.
[57] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 24; *Nyiramasuhuko et al*. Appeal Judgement, para. 35.
[58] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 24; *Nyiramasuhuko et al*. Appeal Judgement, para. 35.
[59] *Karadžić* Appeal Judgement, para. 20; *Šešelj* Appeal Judgement, para. 18; *Ngirabatware* Appeal Judgement, para. 12. *See also*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 24; *Nyiramasuhuko et al*. Appeal Judgement, para. 35.

III. THE APPEAL OF RATKO MLADIĆ

A. Alleged Violations of Fair Trial Rights

1. Alleged Errors Concerning the Indictment (Ground 1)

22. In addressing challenges to the form of the second amended indictment, the Trial Chamber, in a decision issued on 13 October 2011, observed that Mladić was not charged with personally committing any of the acts in this indictment and that the charges against him covered a vast amount of territory and spanned more than three years.[60] On this basis, the Trial Chamber rejected Mladić's contention that this indictment omitted material facts by failing to plead with sufficient specificity the identity of victims, dates, locations, and perpetrators in relation to several underlying crimes.[61]

23. In its decision issued on 2 December 2011, the Trial Chamber noted the Prosecution's submission that the third amended indictment contained "196 scheduled crimes" and the Prosecution's proposal, pursuant to Rule 73 *bis* (D) of the ICTY Rules, to limit "its presentation of evidence to a selection of 106 crimes" ("Scheduled Incidents").[62] The Trial Chamber, "[i]n the interests of a fair and expeditious trial, [...] fixe[d] the number of crime sites or incidents of the charges in respect of which evidence may be presented by the Prosecution" in accordance with the Prosecution's proposal.[63]

24. Consequently, the Trial Chamber, in its Decision of 2 December 2011, ordered that the Prosecution could not present evidence on crimes other than those it proposed to retain, unless it: (i) considered such evidence necessary to establish an element of any of the counts of the Third Amended Indictment; and (ii) provided prior notice of such evidence "which it has proposed to remove" from this indictment and explained its specific relevance to the Prosecution's case in its filings pursuant to Rule 65 *ter* of the ICTY Rules ("Rule 65 *ter* filings").[64]

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[60] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision on Defence Preliminary Motion Objecting to the Form of the Second Amended Indictment, 13 October 2011 ("Decision of 13 October 2011"), para. 7, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Prosecution's Second Amended Indictment, 1 June 2011 ("Second Amended Indictment").
[61] Decision of 13 October 2011, paras. 8-10, 13, 14, 16.
[62] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision Pursuant to Rule 73 *bis* (D), 2 December 2011 ("Decision of 2 December 2011"), paras. 2-4, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Third Amended Indictment, 20 October 2011 ("Third Amended Indictment").
[63] Decision of 2 December 2011, para. 14. *See also* Decision of 2 December 2011, para. 15 ("For the foregoing reasons, pursuant to Rule 73 *bis* (D) of the [ICTY] Rules, the [Trial] Chamber ADOPTS the Prosecution's proposals in respect of the reduction of its case and the selection of crimes for each of the charges").
[64] Decision of 2 December 2011, para. 15.

25. The Prosecution filed the operative Indictment on 16 December 2011, attaching Schedules A to G, which enumerated the 106 Scheduled Incidents.[65] Like the Second Amended Indictment that the Trial Chamber found was not defective in light of Mladić's prior notice challenges,[66] the Indictment charged Mladić with 11 counts concerning events spanning over three years,[67] across numerous municipalities in Bosnia and Herzegovina,[68] and with the victims of the alleged crimes numbering in the thousands.[69] In this respect, Mladić's responsibility was principally charged based on his membership in four separate joint criminal enterprises, pursuant to Article 7(1) of the ICTY Statute,[70] and based on his superior liability for crimes committed by Bosnian Serb forces, pursuant to Article 7(3) of the ICTY Statute.[71]

26. On 25 October 2016, after the conclusion of the Defence case, Mladić filed a motion alleging defects in the form of the Indictment.[72] The Trial Chamber dismissed the motion as untimely.[73] In rejecting Mladić's subsequent request to reconsider this decision or certify it for appeal, the Trial Chamber rejected Mladić's argument that the Indictment was limited to the Scheduled Incidents.[74] The Trial Chamber stated that its Decision of 2 December 2011 "fixed the number of *scheduled* incidents but did not affect other incidents within the scope of the Indictment, which remained part of the Indictment as charged".[75]

27. In the Trial Judgement, the Trial Chamber addressed Mladić's contention raised in his final trial brief that the crimes underpinning all counts of the Indictment were confined to the Scheduled Incidents.[76] The Trial Chamber reiterated that the Decision of 2 December 2011 did not limit the scope of the Prosecution's case to the Scheduled Incidents and that other incidents within the scope

[65] *See supra* para. 3.
[66] Decision of 13 October 2011, para. 16. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Defense Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011.
[67] Indictment, paras. 5, 8, 14, 19, 36, 43-46, 49, 51, 52, 56, 57, 59, 61, 62, 64, 65, 68-74, 76, 78, 84, 85.
[68] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedule of Incidents, 16 December 2011, para. 3; Indictment, paras. 37, 41, 47, 61, 62, 67, 76, 85; Schedules A-G.
[69] Indictment, paras. 39, 46, 55, 59, 64, 65, 71, 72, 78, 80, 81, 85; Schedules A-G.
[70] Indictment, paras. 5-30.
[71] Indictment, paras. 30-34, pp. 18, 21, 27, 30, 33, 35, 37.
[72] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion Alleging Defects in the Form of the Indictment, 25 October 2016. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Alleging Defects in the Form of the Indictment, 30 November 2016 ("Decision of 30 November 2016"), para. 1.
[73] Decision of 30 November 2016, paras. 10-13. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration of or, in the Alternative, Certification to Appeal the Decision on Defence Motion Alleging Defects in the Form of the Indictment, 24 February 2017 ("Decision of 24 February 2017"), para. 12.
[74] Decision of 24 February 2017, paras. 11, 14.
[75] Decision of 24 February 2017, para. 11. *See also* Decision of 2 December 2011, paras. 12, 14, 15.
[76] Trial Judgement, paras. 5265-5270, *referring to*, *inter alia*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Corrigendum to Annex A to Notice of Filing Under Objection and with Reservation of Rights, Filed 25 October 2016, 2 November 2016, Annex A (confidential; public redacted version filed on 8 March 2018) ("Mladić Final Trial Brief"). *See also Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Notice of Filing of Public Redacted Final Trial Brief, 8 March 2018.

of the Indictment remained part of the Indictment as charged.[77] The Trial Chamber recalled that the key consideration was whether the relevant material facts were pleaded with sufficiency under the applicable law[78] and noted that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident.[79]

28. On appeal, Mladić contends that the Trial Chamber erred by considering incidents not enumerated in Schedules A to G of the Indictment and/or unscheduled incidents that were not otherwise identified by the Prosecution through its Rule 65 *ter* filings as part of its case against him ("Unnamed Unscheduled Incidents") and relying on them to prove the elements of the crimes whereas he was not put on notice of such incidents, materially impairing his ability to prepare his defence.[80] He submits that the Trial Chamber fixed the number of "crime sites or incidents of the charges" in the Decision of 2 December 2011 to the Scheduled Incidents and to those that the Prosecution identified as unscheduled incidents, which it intended to rely on in its Rule 65 *ter* filings, and which would have provided him with adequate notice.[81] Mladić requests that the Appeals Chamber reverse the findings on the crimes based on the Unnamed Unscheduled Incidents and the convictions entered on Counts 3, 5, 9, and 10 of the Indictment in whole or in part, and reduce his sentence accordingly.[82]

29. The Prosecution responds that the Indictment is not defective as it pleaded the material facts with sufficient specificity.[83] It argues that the Decision of 2 December 2011 struck out a number of scheduled incidents without affecting the scope of its case as it pertained to Mladić's criminal

[77] Trial Judgement, para. 5267.
[78] Trial Judgement, para. 5269.
[79] Trial Judgement, para. 5270.
[80] Mladić Notice of Appeal, paras. 13, 14; Mladić Appeal Brief, paras. 41, 43, 46-59. Mladić further argues that the Trial Chamber erred by *proprio motu* considering the Unnamed Unscheduled Incidents as part of the Prosecution's case and relying upon them as forming part of the Indictment in order to prove the elements of the crimes. *See* Mladić Notice of Appeal, para. 13; Mladić Appeal Brief, paras. 41, 50, 59; T. 25 August 2020 pp. 21, 22, 27; T. 26 August 2020 p. 60.
[81] Mladić Appeal Brief, paras. 46, 47, 49, *referring to* Decision of 2 December 2011; T. 25 August 2020 pp. 21, 23.
[82] Mladić Appeal Brief, para. 60; T. 25 August 2020 p. 28. Mladić contends that he did not waive his right to raise this error on appeal as he only became aware of the Unnamed Unscheduled Incidents when the Trial Judgement was rendered. Mladić Appeal Brief, para. 43; T. 25 August 2020 p. 23. Mladić withdrew his appeal in relation to the following incidents: Srebrenica incident (v) of 18 July 1995, sniping incident (o) of 10 December 1994, and shelling incidents (i) and (k) on Geteova Street of 22 and 28 June 1995. *See* T. 25 August 2020 pp. 22, 23; T. 26 August 2020 pp. 25, 59 (confirming that the Prosecution "is correct that orally those [incidents] have been withdrawn from the Appeals Chamber's consideration").
[83] Prosecution Response Brief, paras. 6-13; T. 26 August 2020 p. 23. In particular, the Prosecution submits that: (i) the Indictment's inclusive language shows that Schedules A to G are not meant to be exhaustive; (ii) the charges include Unnamed Unscheduled Incidents as a number of crimes were pleaded without reference to Schedules A to G or the Scheduled Incidents; (iii) the Trial Chamber expressed consistent views on the Indictment's scope; and (iv) the record demonstrates that Mladić was aware that the Unnamed Unscheduled Incidents formed part of the charges against him. *See* Prosecution Response Brief, paras. 7-13. The Prosecution further submits that he was also put on notice through other pleadings and that any vagueness in the Indictment was cured by this additional information. *See* Prosecution Response Brief, paras 14-18; T. 26 August pp. 24-27.

liability for events not set forth in Schedules A to G of the Indictment.[84] The Prosecution submits that the Decision of 2 December 2011 did not address Unnamed Unscheduled Incidents and that the Trial Chamber rejected Mladić's misreading of this decision and reaffirmed that Unnamed Unscheduled Incidents were within the Indictment's scope.[85] In any event, the Prosecution contends, "Mladić cannot pretend to be surprised that his convictions included [Unnamed] [U]nscheduled [I]ncidents" as he fully defended against them.[86]

30. Mladić replies that the Decision of 2 December 2011 provides guidance on the proper approach to notice.[87] He argues that the Prosecution fails to establish that he received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts in support of his criminal liability based on the various post-Indictment submissions identified by the Prosecution.[88] He further contends that defects in the Indictment were not cured in view of his "general defences" at trial or cross-examination aimed at undermining evidence admitted to prove the legal elements of crimes.[89]

31. The Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber erred in considering the Unnamed Unscheduled Incidents in determining his liability for the crimes charged in the Indictment. In the Decision of 2 December 2011, the Trial Chamber reduced the number of "scheduled incidents" pleaded in support of the counts in the Indictment and instructed the Prosecution to give notice in its Rule 65 *ter* filings "if it intends to present evidence *on the crimes it has proposed to remove from the* [Third Amended] Indictment".[90] The Appeals Chamber observes that it is clear that this decision pertained only to scheduled incidents and that the instruction to the

[84] Prosecution Response Brief, paras. 8-10.
[85] Prosecution Response Brief, paras. 9, 11; T. 26 August 2020 pp. 27, 30, 31.
[86] Prosecution Prosecution Response Brief, paras. 19-23; T. 26 August 2020 pp. 31, 32. The Prosecution further submits that Mladić's challenge to the Indictment is untimely and the burden to show prejudice is on him. *See* Prosecution Response Brief, para. 21; T. 26 August 2020 pp. 27-29, 32. It also submits, in the alternative, that any reversal of the Trial Chamber's findings related to the Unnamed Unscheduled Incidents would not impact Mladić's convictions or sentence as they amount to a fraction of the events for which he was convicted. Prosecution Response Brief, para. 24; T. 26 August 2020 p. 24.
[87] Mladić Reply Brief, para. 10. Mladić further contends that the Prosecution fails to address his submission that it failed to direct the Trial Chamber to enter convictions on the Unnamed Unscheduled Incidents and that the Trial Chamber did so *proprio motu*. Mladić Reply Brief, para. 8.
[88] Mladić Reply Brief, paras. 11, 12, 14; T. 26 August 2020 p. 60. Specifically, Mladić argues that the Prosecution fails to establish that he received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts by: (i) giving notice that a witness would provide evidence related to the Scheduled Incidents; (ii) mentioning Unnamed Unscheduled Incidents in a witness summary or motion or leading evidence of them; and (iii) relying on Unnamed Unscheduled Incidents as adjudicated facts to establish the legal elements of a crime. Mladić Reply Brief, paras. 11, 12, 14; T. 25 August 2020, pp. 22, 23.
[89] Mladić Reply, para. 14; T. 25 August 2020 pp. 24, 27. Mladić argues that the use of inclusive language in the Indictment should not serve to include any accusation made before the Trial Chamber without proper notice and that the Prosecution must identify what case and for which incidents it seeks a conviction. *See* T. 25 August 2020 pp. 22-24; T. 26 August 2020 p. 59. As to prejudice, Mladić submits that "[u]pholding any findings on an erroneous legal basis is unfair and harmful". *See* T. 26 August 2020 pp. 61, 62.

Prosecution on giving notice specifically related to the scheduled incidents which the Trial Chamber approved be struck from the Third Amended Indictment. As the Trial Chamber stated in the Decision of 24 February 2017 and reaffirmed in the Trial Judgement, the Decision of 2 December 2011 did not limit the scope of the Prosecution's case to the 106 Scheduled Incidents; other incidents within the scope of the Indictment remained part of the Indictment as charged.[91]

32. From the time of Mladić's earliest challenge that the Second Amended Indictment was defective because it omitted material facts, the Trial Chamber emphasized that Mladić was not charged with personally committing any of the acts in the Indictment and that the charges against him covered a vast amount of territory and spanned more than three years.[92] In this context, the Trial Chamber rejected Mladić's contention that the Second Amended Indictment omitted material facts by failing to plead with sufficient specificity the identity of victims, dates, locations, and perpetrators.[93] Additionally, even when ordering the Prosecution to provide further specificity with respect to known victims, the Trial Chamber emphasized that the Prosecution was not required to set forth this information specifically in a schedule to this indictment.[94]

33. Furthermore, the Trial Chamber observed that a number of allegations in support of the counts in the Indictment, which was filed after Mladić's challenges to the form of the Indictment were rejected and after the Trial Chamber reduced the number of scheduled incidents, are not linked with any of the 106 Scheduled Incidents.[95] The Appeals Chamber considers that this is consistent with a plain reading of the Indictment, which in no way limits Mladić's criminal liability to the 106 Scheduled Incidents enumerated in Schedules A to G of the Indictment.[96] The Trial Chamber also observed that where the Indictment relied on information in Schedules A to G of the Indictment, it made clear that the 106 Scheduled Incidents listed therein are non-exhaustive or "illustrative"

[90] Decision of 2 December 2011, p. 5 (emphasis added).
[91] Decision of 24 February 2017, para. 11; Trial Judgement, para. 5267.
[92] Decision of 13 October 2011, para. 7.
[93] Decision of 13 October 2011, paras. 8-10, 13, 14, 16.
[94] Decision of 13 October 2011, para. 8 ("The Defence argues that in the *Popović* case, the Prosecution was required to provide identification of known victims of alleged crimes by way of annexes to the Indictments. In the view of the [Trial] Chamber, the fact that the *Popović* Trial Chamber ordered the Prosecution to do so does not stand for the principle that an indictment must have the names of victims attached to it as an Annex or a Schedule. In fact, the Tribunal's jurisprudence has not imposed any formal requirements as to how the relevant notification of information concerning the identity of victims should be made, and the approach to this issue varies from case to case.") (internal citations omitted).
[95] Trial Judgement, para. 5270.
[96] *See*, *e.g.*, Indictment, paras. 46(b), 59(e), (f), (h), (i), (k), 67-74, 82-86.

examples of criminal conduct in support of the counts.[97] This too is evident from a plain reading of the Indictment.[98]

34. Based on the foregoing, Mladić fails to demonstrate that the Trial Chamber limited the scope of his criminal conduct to the 106 Scheduled Incidents enumerated in Schedules A to G of the Indictment. Rather, the Trial Chamber's decisions as well as a plain reading of the Indictment reflect that the Scheduled Incidents were not a comprehensive list of all the underlying criminal conduct that may be relied upon in support of a particular count charged in the Indictment.

35. The Appeals Chamber also observes that Mladić, largely in his reply brief, contests the Prosecution's arguments that the Indictment sufficiently pleaded material facts related to the Unnamed Unscheduled Incidents or that post-Indictment submissions and the nature of his defence demonstrate that any defects in the Indictment were cured in relation to such incidents.[99] However, Mladić does not demonstrate error in the Trial Chamber's conclusion that, in light of his pre-trial notice challenges, the Indictment was not defective in view of the nature and scope of the case against him or show error in its conclusion in the Trial Judgement that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident whether enumerated by schedule or not.

36. The Appeals Chamber recalls that a trial chamber can only convict an accused of crimes that are charged in the indictment.[100] 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 and enable him or her to prepare a meaningful defence.[101] An indictment need not have the degree of specificity of the evidence underpinning it; the degree of specificity required depends on the nature and scale of the alleged criminal conduct, including the proximity of the accused to the relevant events.[102] As noted above, the charges against Mladić did not implicate him as a physical perpetrator, concerned a vast amount of territory of Bosnia and Herzegovina, and spanned over three years.[103] Relevant jurisprudence dictates that, while an indictment is required to

[97] Trial Judgement, para. 5270. The Trial Chamber pointed to language in the Indictment such as "including", "illustrative examples", "as well as", and "including but not limited to" as clarifying that the crimes enumerated in Schedules A to G were not exhaustive in nature. *See* Trial Judgement, para. 5270.
[98] *See*, *e.g.*, Indictment, paras. 39(a)-(c), 46(a), 59(a)-(d), (g), (i), 62, 64, 81.
[99] Mladić Reply Brief, paras. 11, 12, 14.
[100] *Karadžić* Appeal Judgement, para. 441; *Ngirabatware* Appeal Judgement, para. 116; *Mugenzi and Mugiraneza* Appeal Judgement, para. 117; *Ntawukulilyayo*. Appeal Judgement, para. 189.
[101] *Karadžić* Appeal Judgement, para. 441; *Ngirabatware* Appeal Judgement, paras. 32, 115; *Ndindiliyimana et al.* Appeal Judgement, para. 171; *Šainović et al*. Appeal Judgement, paras. 213, 225, 262.
[102] *Karadžić* Appeal Judgement, para. 441, *citing Ngirabatware* Appeal Judgement, para. 32; *Šainović et al.* Appeal Judgement, paras. 225, 233; *Kvočka et al.* Appeal Judgement, para. 65; *Rutaganda* Appeal Judgement, para. 302.
[103] Decision of 13 October 2011, para. 7.

plead material facts through which the Prosecution seeks to establish an accused's criminal liability, as the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.[104] Indeed, in cases concerning extensive and continuous criminality, specificity with respect to the timing, victims, and location of "representative" incidents of criminality may satisfy the obligation of providing sufficient notice of the nature of the case the accused is required to meet in order to effectively prepare his defence.[105]

37. The burden falls on Mladić to develop arguments to demonstrate an error[106] and, having not even sought to show that the Trial Chamber erred in finding that the Indictment detailed sufficient material facts, such as references to victims, dates, and locations, for each incident whether enumerated by schedule or not, the Appeals Chamber declines to reassess these findings on its own. With respect to Mladić's contention that the Trial Chamber erred by convicting him *proprio motu*, the Appeals Chamber recalls that trial chambers are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record.[107] Having not demonstrated error in the Trial Chamber's conclusions that the Indictment was not defective for each incident whether enumerated by schedule or not, Mladić does not demonstrate error in this respect either.

38. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 1 of Mladić's appeal.

[104] *Kvočka et al*. Appeal Judgement, para. 65.
[105] *Cf. Galić* Appeal Judgement, paras. 3, 222, 223, nn. 636, 637 (noting that in a case charging an accused with conducting a campaign of shelling and sniping for nearly two years, the Prosecution was bound to provide details about some of the sniping and shelling incidents in the indictment but was under no obligation to list all the specific incidents in order to satisfy its obligation in pleading material facts so as to provide the accused notice of the nature of the case he had to meet).
[106] *See supra* Section II.
[107] *See Nyiramasuhuko et al*. Appeal Judgement, para. 115.

2. Alleged Errors Concerning Adjudicated Facts (Ground 2)

(a) Alleged Error in the Use of Adjudicated Facts (Ground 2.A)

39. Mladić submits that the Trial Chamber erred in law and/or in fact by relying on adjudicated facts in convicting him, and requests that the Appeals Chamber reverse the findings which were affected by the Trial Chamber's error.[108] In particular, he contends that the Trial Chamber erred in: (i) taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates;[109] or, in the alternative, (ii) applying a heightened standard of the burden to produce rebuttal evidence.[110] The Appeals Chamber will address these contentions in turn. Mladić also submits, *inter alia*, that the Trial Chamber: (i) erroneously relied on the "partial consistency" of evidence with adjudicated facts; (ii) relied extensively on adjudicated facts from cases which the Judges of the Trial Chamber had previously presided over, in which there were references to his role and guilt, thereby resulting in a perception of bias; (iii) failed to provide reasons for rejecting evidence in rebuttal of adjudicated facts; and (iv) repeatedly failed to state in the Trial Judgement which adjudicated facts it was taking judicial notice of and/or which it relied on in making findings of fact.[111] The Appeals Chamber notes, however, that Mladić does not develop these submissions in his appellant's brief, and accordingly considers that he has abandoned them. The Appeals Chamber will therefore only address Mladić's allegations of error to the extent that they have been raised in his notice of appeal and sufficiently developed in his appellant's brief.

(i) Alleged Error in Taking Judicial Notice of Facts Relating to the Conduct of Subordinates

40. The Trial Chamber took judicial notice of approximately 2,000 adjudicated facts pursuant to Rule 94(B) of the ICTY Rules.[112] Mladić challenged the taking of judicial notice of adjudicated

[108] *See* Mladić Notice of Appeal, paras. 21-25; Mladić Appeal Brief, paras. 62-114; T. 25 August 2020 pp. 28-30, 32-40. *See also* Mladić Reply Brief, paras. 15-32; T. 26 August 2020 pp. 62-65.
[109] *See* Mladić Notice of Appeal, para. 21; Mladić Appeal Brief, paras. 62-95; T. 25 August 2020 pp. 28-30, 32-35. *See also* Mladić Reply Brief, paras. 16-19; T. 26 August 2020 pp. 62, 63.
[110] *See* Mladić Notice of Appeal, para. 22; Mladić Appeal Brief, paras. 96-113; T. 25 August 2020 pp. 35-40. *See also* Mladić Reply Brief, paras.20-32; T. 26 August 2020 pp. 63-65.
[111] *See* Mladić Notice of Appeal, paras. 22-27.
[112] *See* Trial Judgement, paras. 16, 5262, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012 ("First Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 March 2012 ("Second Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012 ("Third Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning the Rebuttal Evidence Procedure, 2 May 2012 ("Fourth Decision on Adjudicated Facts"), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on *Proprio Motu* Taking Judicial Notice of Two Adjudicated Facts, 5 June 2012.

facts, including adjudicated facts relating to the acts or conduct of his alleged subordinates.[113] The ICTY Appeals Chamber in this case reviewed the Trial Chamber's approach and found that it was consistent with the applicable jurisprudence.[114] Relying primarily on a decision in the *Karemera et al*. case, the ICTY Appeals Chamber, on 12 November 2013, held that it is within a trial chamber's discretion to take judicial notice of "facts relating to the existence of a joint criminal enterprise, the conduct of its members other than an accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be criminally responsible".[115]

41. Mladić submits that the Trial Chamber erred in relying on a decision of the ICTR Appeals Chamber in the *Karemera et al*. case when it took judicial notice of adjudicated facts relating to the acts or conduct of his proximate subordinates.[116] He argues that the ICTR Appeals Chamber in the *Karemera et al*. Decision of 16 June 2006 did not consider whether judicial notice could be taken of such facts.[117] Mladić contends that a decision of the ICTY Appeals Chamber in the *Galić* case recognizes the inherent unfairness of admitting written evidence relating to the acts or conduct of proximate subordinates, particularly in cases involving charges of command responsibility, and submits that the *Karemera et al*. Decision of 16 June 2006 should be reviewed in light of this decision in the *Galić* case to determine whether judicial notice of such facts may be taken.[118] He argues that the Trial Chamber's application of the law, although upheld on appeal in this case,[119] occasioned a miscarriage of justice as it relied on judicially noticed facts relating to the acts or conduct of his proximate subordinates to establish his criminal responsibility, thereby creating a rebuttable presumption of his guilt for their crimes.[120] Mladić contends that there are divergent approaches in the jurisprudence and compelling reasons to revisit the *Karemera et al.* Decision of

[113] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Defense Interlocutory Appeal Brief Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 July 2012 ("Defence Interlocutory Appeal Brief of 4 July 2012"), para. 26.
[114] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.1, Decision on Ratko Mladić's Appeal Against the Trial Chamber's Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 November 2013 ("Appeal Decision on Adjudicated Facts"), para. 85. *See also* Appeal Decision on Adjudicated Facts, paras. 82-84, 86, 87.
[115] Appeal Decision on Adjudicated Facts, para. 85, *referring to*, *inter alia*, *The Prosecutor v. Édouard Karemera et al*., Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 ("*Karemera et al*. Decision of 16 June 2006"), paras. 52, 53. *See also* Appeal Decision on Adjudicated Facts, paras. 81, 83.
[116] *See* Mladić Appeal Brief, paras. 62-94, *referring to Karemera et al*. Decision of 16 June 2006; T. 25 August 2020 pp. 28-30, 32-35.
[117] Mladić Appeal Brief, para. 76; T. 25 August 2020 p. 30. *See also* Mladić Appeal Brief, paras. 80-88; T. 25 August 2020 pp. 29, 30, 32-34; T. 26 August 2020 p. 63, *referring to*, *inter alia*, Trial Judgement, para. 2210 (Incident of 23 July 1995), *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 ("*D. Milošević* Decision of 26 June 2007"), para. 16.
[118] *See* Mladić Appeal Brief, paras. 64, 65, 68, 69, 72-75, 80, 93, 94, *referring to Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Decision of 7 June 2002"); T. 25 August 2020 pp. 28, 29. *See also* Mladić Reply Brief, paras. 17, 18.
[119] Mladić Appeal Brief, paras. 66, 67, 90, *referring to* Appeal Decision on Adjudicated Facts.
[120] *See* Mladić Appeal Brief, paras. 62-65, 89, 91, 92. *See also* T. 25 August 2020 pp. 32-35.

16 June 2006, namely to provide guidance on the exercise of discretion when taking judicial notice of facts relating to the accused's proximate subordinates and to determine whether such judicially noticed facts can be relied upon in a sole or decisive manner, and requests the Appeals Chamber to review the relevant findings of the Trial Chamber accordingly.[121]

42. The Prosecution responds that Mladić fails to show any cogent reason to reverse well-established jurisprudence on taking judicial notice of adjudicated facts or any abuse of the Trial Chamber's discretion.[122] The Prosecution argues that Mladić misconstrues the ICTY Appeals Chamber's approach in the *Galić* Decision of 7 June 2002, which did not preclude admission of written evidence relating to the acts and conduct of immediately proximate subordinates,[123] and that he raised similar arguments at trial which were rejected on appeal in this case.[124]

43. In reply, Mladić maintains that the Prosecution mischaracterizes his submissions and misunderstands the relevant law.[125]

44. The Appeals Chamber finds that, by challenging on appeal the Trial Chamber's decision to take judicial notice of adjudicated facts relating to the acts or conduct of his alleged subordinates, Mladić is in effect seeking a reconsideration of the Appeal Decision on Adjudicated Facts. The impugned decision was based on an approach which the ICTY Appeals Chamber in this case confirmed as consistent with applicable jurisprudence. The Appeals Chamber recalls that it ordinarily treats prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions in order to prevent parties from endlessly relitigating the same issues and to allow certain issues to be finally resolved before proceedings continue on other issues.[126] The only exception to this principle is that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a

[121] *See* Mladić Appeal Brief, paras. 65, 68, 69, 81-84, 93-95; Mladić Reply Brief, para. 16; T. 25 August 2020 pp. 28-30, 33-35; T. 26 August 2020 pp. 62, 63.
[122] Prosecution Response Brief, paras. 25-31; T. 26 August 2020 pp. 32-35. The Prosecution highlights that the Appeals Chamber in the *Karadžić* case recently found that the ICTY trial chamber in that case did not commit an error by taking judicial notice of the existence of crimes committed by Karadžić's subordinates. T. 26 August 2020 p. 34. The Prosecution further submits that Mladić fails to demonstrate that the Trial Chamber used any adjudicated fact regarding acts of his proximate subordinates to make findings on his contributions or *mens rea* relevant to the joint criminal enterprises. T. 26 August 2020 p. 35.
[123] Prosecution Response Brief, paras. 27, 28, 30.
[124] Prosecution Response Brief, para. 31.
[125] Mladić Reply Brief, paras. 15-19. *See also* T. 26 August 2020 pp. 62, 63.
[126] *See, e.g., Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Public Redacted Version of the "Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release" Filed on 22 May 2018, 8 June 2018 ("Decision of 22 May 2018"), p. 2; *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Prosecutor v. Mladen Naletilić, aka "Tuta", and Vinko Martinović, aka "Štela"*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005 ("*Naletilić and Martinović* Decision of 7 July 2005"), para. 20; *Kajelijeli* Appeal Judgement, para. 202.

clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[127]

45. In examining whether there is a clear error of reasoning in the Appeal Decision on Adjudicated Facts, the Appeals Chamber considers Mladić's argument that the *Karemera et al.* Decision of 16 June 2006 overlooked the relevance of the *Galić* Decision of 7 June 2002 when considering whether to take judicial notice of adjudicated facts relating to the acts or conduct of proximate subordinates.[128] The Appeals Chamber observes that the *Galić* Decision of 7 June 2002 does not preclude admission of written evidence in lieu of oral testimony relating to the acts and conduct of proximate subordinates.[129] Rather, it only precludes the admission of such evidence pertaining to the acts and conduct or mental state of the accused.[130] In that decision, the ICTY Appeals Chamber expressly noted that the ICTY rule on the admission of written statements in lieu of oral testimony did not exclude the admission of such statements going to the acts and conduct of others for which the accused is charged with responsibility.[131] Even with respect to admission of written evidence that is "so pivotal to the prosecution case, and where the person whose acts and conduct […] is so proximate to the accused", the *Galić* Decision of 7 June 2002 recognizes that this is a matter within the discretion of the trial chamber, observing that, in such circumstances, the trial chamber "may decide that it would not be fair to the accused" to permit its admission.[132]

46. A review of the *Karemera et al.* Decision of 16 June 2006 shows that the ICTR Appeals Chamber explicitly considered as applicable in the context of judicial notice of adjudicated facts the ICTY Appeals Chamber's analysis in the *Galić* Decision of 7 June 2002.[133] In particular, the *Karemera et al.* Decision of 16 June 2006 recalled the distinction drawn therein between "'(a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others'",[134] to emphasize that only adjudicated facts going to the latter warrant complete exclusion from judicial notice.[135] With respect to all other adjudicated facts relating to the accused's criminal responsibility, the ICTR Appeals Chamber adopted a cautious approach by declaring that "it is for the [t]rial

[127] *See, e.g.*, Decision of 22 May 2018, p. 2, n. 16; *Nyiramasuhuko et al.* Appeal Judgement, para. 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 203.
[128] *See* Mladić Appeal Brief, paras. 64, 65, 69, 76, 80, 82, 85, 86, 94; T. 25 August 2020 pp. 28-30.
[129] *See Galić* Decision of 7 June 2002, paras. 9, 13-16.
[130] *See Galić* Decision of 7 June 2002, paras. 9-11.
[131] *Galić* Decision of 7 June 2002, para. 10.
[132] *Galić* Decision of 7 June 2002, para. 13.
[133] *See Karemera et al.* Decision of 16 June 2006, para. 52.
[134] *Karemera et al.* Decision of 16 June 2006, para. 52, *quoting Galić* Decision of 7 June 2002, para. 9.
[135] *See Karemera et al.* Decision of 16 June 2006, paras. 50-53.

[c]hambers, *in the careful exercise of their discretion*, to assess each particular fact in order to determine whether taking judicial notice of it – and thus shifting the burden of producing evidence rebutting it to the accused – is consistent with the accused's rights under the circumstances of the case".[136] Upon review of both decisions, the Appeals Chamber considers that the *Karemera et al.* Decision of 16 June 2006 evinces a consistent approach with the *Galić* Decision of 7 June 2002. The Appeals Chamber further considers that Mladić's position fails to recognize that adjudicated facts within the meaning of Rule 94(B) of the ICTR and ICTY Rules are presumptions and are not equivalent to the untested evidence at issue in the *Galić* Decision of 7 June 2002, and that this decision is therefore inapposite when considering what restrictions should be placed on a trial chamber when relying on adjudicated facts under Rule 94(B) of the ICTY Rules.[137] In particular, adjudicated facts under Rule 94(B) of the ICTY Rules are rebuttable presumptions that can only be accepted where, *inter alia*, they have been tested and established in another trial proceeding whereas the reliability and credibility requirements for admission of untested evidence pursuant to Rules 89(C) and 92 *bis* of the ICTY Rules are far less onerous.[138]

47. Moreover, this Appeals Chamber has recently held that a trial chamber may rely on adjudicated facts judicially noticed under Rule 94(B) of the ICTY Rules to establish the underlying crime base when making findings in support of convictions so long as such adjudicated facts do not concern the acts, conduct, or mental state of the accused.[139] In so doing, the Appeals Chamber reaffirmed the position taken in the Appeal Decision on Adjudicated Facts that adjudicated facts may relate to, *inter alia*, the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible, which necessarily include alleged subordinates.[140] In view of the above, Mladić fails to demonstrate that the ICTY Appeals Chamber in the Appeal Decision on Adjudicated Facts erred in relying on the *Karemera et al.* Decision of 16 June 2006 or that it committed any other error.

48. As to whether it is necessary to reconsider the Appeal Decision on Adjudicated Facts to prevent an injustice, the Appeals Chamber notes that, although Mladić contends that "[j]udicial notice of facts […] [relating to the acts or conduct of his immediate subordinates] *contributed* to the Trial Chamber's findings that the Appellant significantly contributed to the [joint criminal enterprises] through his command and control of Serb forces",[141] under this ground of appeal he

[136] *Karemera et al.* Decision of 16 June 2006, para. 52 (emphasis added).
[137] *See Karadžić* Appeal Judgement, para. 452, n. 1189.
[138] *See Karadžić* Appeal Judgement, n. 1189 (citations omitted).
[139] *Karadžić* Appeal Judgement, paras. 452, 453.
[140] *See Karadžić* Appeal Judgement, para. 452; Appeal Decision on Adjudicated Facts, para. 85.
[141] Mladić Appeal Brief, para. 91 (emphasis added). *See also* Mladić Appeal Brief, para. 62.

does not specifically point to any findings in which the Trial Chamber relied on adjudicated facts of this nature in a sole or decisive manner to establish his criminal responsibility.[142] On the contrary, a review of the Trial Judgement shows that the Trial Chamber duly considered the adjudicated facts in connection with other evidence during its deliberations.[143] Mladić therefore fails to demonstrate that the Trial Chamber's application of the relevant law, endorsed in the Appeal Decision on Adjudicated Facts, occasioned a miscarriage of justice.

49. The Appeals Chamber finds, Judge Nyambe dissenting, that having failed to demonstrate the existence of a clear error of reasoning in the Appeal Decision on Adjudicated Facts, or that reconsideration thereof is necessary to prevent an injustice, Mladić fails to demonstrate that the Trial Chamber erred in taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.

(ii) Alleged Error in Heightening the Standard of the Burden to Produce Rebuttal Evidence

50. In articulating its approach to evidence presented in rebuttal to adjudicated facts, the Trial Chamber specified, in part, as follows:

> The Trial Chamber analysed the evidence and considered, as an initial step, whether evidence contradicted the Adjudicated Facts. The Trial Chamber required evidence to be unambiguous in its meaning in order to be termed as 'contradicting the Adjudicated Facts'. For example, evidence suggesting mere possibilities was deemed not to reach that threshold. In other words, merely pointing at the possibility of alternative scenarios was in itself not sufficient ground to reopen the evidentiary debate. A contradiction can exist in either presenting evidence on a specific alternative scenario, as opposed to a mere suggestion of one or more possible alternative scenarios, or in the unambiguous demonstration that the scenario as found in the Adjudicated Fact must reasonably be excluded as true. […] The Trial Chamber was mindful that evidence contradicting adjudicated facts does not automatically rebut the adjudicated fact. The presumption of accuracy of the adjudicated fact is only rebutted by 'reliable and credible' contradictory evidence.[144]

[142] *Cf. Tolimir* Appeal Judgement, para. 36. With respect to Mladić's submission that, in relation to the Incident of 23 July 1995, the Trial Chamber relied solely on adjudicated facts concerning the identity of the perpetrator which "went to the core of [the] case on his responsibility", (*see* T. 25 August 2020 pp. 32, 33; T. 26 August 2020 p. 63, *referring to* Trial Judgement, para. 2210, n. 9385, Adjudicated Fact 2871), the Appeals Chamber observes that the Trial Chamber already considered and rejected Mladić's argument that the Prosecution had not "led any substantial evidence other than adjudicated facts" in relation to this incident (*see* Trial Judgement, para. 2211) and Mladić demonstrates no error in this regard. In any event, the Trial Chamber noted that where it took judicial notice of adjudicated facts relating to this incident, it received documentary evidence which was consistent with the adjudicated facts (*see* Trial Judgement, para. 2209). Mladić's arguments are therefore dismissed.

[143] *See*, *e.g.*, Trial Judgement, paras. 16, 17, 33, 41, 51, 68, 71, 91, 108, 165, 187, 221, 298, 314, 349, 361, 378, 459, 479, 520, 577, 581, 590, 633, 657, 669, 675, 686, 709, 713, 727, 739, 760, 776, 785, 792, 800, 821, 833, 840, 854, 862, 870, 895, 920, 947, 976, 986, 1017, 1042, 1054, 1152, 1176, 1182, 1238, 1271, 1327, 1330, 1384, 1411, 1422, 1431, 1477, 1553, 1615, 1617, 1623, 1627, 1639, 1681, 1689, 1744, 1752, 1758, 1774, 1803, 1813, 1816, 1823, 1850, 1892, 1915, 1923, 1931, 1938, 1944, 1954, 1960, 1965, 1970, 1995, 1997, 2001, 2012, 2042, 2058, 2098, 2107, 2115, 2120, 2178, 2184, 2187, 2194, 2209, 2319, 2388, 2479, 2572, 2677, 2685, 2709, 2724, 2733, 2767, 2777, 2792, 2827, 2883, 2895, 2989, 3580, 3678, 3785, 3904, 3919, 4694. *See also* Trial Judgement, paras. 5276, 5277.

[144] Trial Judgement, paras. 5273, 5274 (internal citations omitted).

51. Mladić submits that the Trial Chamber erred in heightening the standard of the burden to produce credible and reliable evidence in rebuttal of adjudicated facts by introducing an additional requirement that such evidence be "unambiguous", and thereby shifting the burden of persuasion onto him by requiring him to disprove the judicially noticed facts beyond reasonable doubt.[145] According to Mladić, as a result of this error, the Trial Chamber relied on adjudicated facts which would have otherwise been rebutted to establish his criminal responsibility, thereby occasioning a miscarriage of justice.[146] Mladić requests the Appeals Chamber to articulate the correct legal standard, review the relevant findings of the Trial Chamber accordingly, and reverse those findings and convictions affected by the error.[147]

52. The Prosecution responds that Mladić fails to show that the Trial Chamber introduced an additional requirement or applied an incorrect legal standard to rebuttal evidence for adjudicated facts.[148] According to the Prosecution, the Trial Chamber correctly explained when evidence could be considered to clearly contradict an adjudicated fact, without requiring Mladić to disprove it beyond reasonable doubt.[149] The Prosecution adds that the incidents that Mladić lists as having been affected by the Trial Chamber's alleged error are inapposite.[150]

53. In reply, Mladić maintains that, had the correct standard been applied, his evidence would have been sufficient to reopen the evidentiary debate and rebut the adjudicated facts in question.[151]

54. The Appeals Chamber recalls that adjudicated facts of which judicial notice is taken are admitted with a presumption of accuracy that may be rebutted by the opposing party through the presentation of evidence at trial.[152] The ICTR Appeals Chamber in the *Karemera et al.* case has clarified that "the effect [of judicially noticing an adjudicated fact] is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into

[145] Mladić Appeal Brief, paras. 96-105, *referring to*, *inter alia*, Trial Judgement, para. 5273; T. 25 August 2020 pp. 35-40. *See also* Mladić Appeal Brief, para. 110.
[146] Mladić Appeal Brief, paras. 106-113; T. 25 August 2020 pp. 38-40. Mladić contends that, even when the accuracy of an adjudicated fact was challenged through evidence presented by the Prosecution, the Trial Chamber often disregarded such evidence as insufficiently reliable to rebut the adjudicated fact or relied on the adjudicated fact exclusively. *See* Mladić Appeal Brief, para. 110; T. 25 August 2020 p. 39. *See also* Mladić Reply Brief, paras. 31, 32, 34.
[147] Mladić Appeal Brief, para. 114; T. 25 August 2020 p. 40.
[148] *See* Prosecution Response Brief, paras. 32-41; T. 26 August 2020 pp. 33, 36, 37.
[149] *See* Prosecution Response Brief, paras. 32-35. *See also* T. 26 August 2020 pp. 36, 37.
[150] *See* Prosecution Response Brief, paras. 36-41.
[151] *See* Mladić Reply Brief, paras. 20-32, 34.
[152] *See Karadžić* Appeal Judgement, para. 452. *See also* Appeal Decision on Adjudicated Facts, para. 24. *See also Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.17, Decision on Joseph Nzirorera's Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, 29 May 2009 ("*Karemera et al.* Decision of 29 May 2009"), para. 13 and references cited therein.

question by introducing reliable and credible evidence to the contrary".[153] In this respect, Mladić contends that "[t]he need for rebuttal evidence to be 'credible and reliable' […] must be read in light of the general standard for the admissibility of evidence",[154] which is "relatively low",[155] and "was never intended to be applied in conjunction with an additional requirement that the evidence be 'unambiguous'".[156] He argues that the Trial Chamber's error in heightening the standard resulted in his evidence being deemed "insufficient to enliven the rebuttal procedure or to rebut the accuracy of the adjudicated fact".[157]

55. In the Appeals Chamber's view, Mladić confuses the standard for the admissibility of evidence with the final evaluation thereof. A reading of the Trial Judgement shows that the Trial Chamber's criterion of unambiguity was not related to the reliability or credibility of evidence, but rather to its contrary nature.[158] In accordance with the standard elucidated by the ICTR Appeals Chamber in the *Karemera et al*. case, in order for evidence presented in rebuttal of an adjudicated fact to be admissible, and thereby bringing the presumption of its accuracy into dispute, such evidence must be contrary to the adjudicated fact and bear sufficient indicia of *prima facie* reliability and credibility.[159] The Appeals Chamber stresses, however, that "adjudicated facts that are judicially noticed […] remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial".[160] As such, the final evaluation of the probative value of rebuttal evidence, which includes a final assessment of its reliability and credibility, as well as the extent to which it is consistent with or contradicts adjudicated facts, "will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it".[161]

56. In light of the above, and considering that, once judicially noticed, an adjudicated fact is presumed to be true, the Appeals Chamber finds no dissonance in the Trial Chamber's requirement

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[153] *Karemera et al*. Decision of 16 June 2006, para. 42. *See also Karadžić* Appeal Judgement, para. 452; *Karemera et al*. Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17; *Karemera et al*. Decision of 16 June 2006, para. 49.
[154] Mladić Appeal Brief, para. 103; T. 25 August 2020 p. 36. *See also* Mladić Appeal Brief, para. 98.
[155] Mladić Appeal Brief, para. 103, *quoting Karemera et al*. Decision of 29 May 2009, para. 15 ("the threshold for admission of this type of rebuttal evidence is relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia"); T. 25 August 2020 p. 36.
[156] Mladić Appeal Brief, para. 104; T. 25 August 2020 pp. 37, 38.
[157] Mladić Appeal Brief, para. 106; T. 25 August 2020 pp. 39, 40. *See also* Mladić Appeal Brief, para. 112; Mladić Reply Brief, para. 27.
[158] *See* Trial Judgement, para. 5273 ("The Trial Chamber required evidence to be unambiguous in its meaning in order to be termed as 'contradicting the Adjudicated Facts'.").
[159] *See Karemera et al*. Decision of 29 May 2009, paras. 13-15. *See also D. Milošević* Decision of 26 June 2007, paras. 16, 17; *Karemera et al*. Decision of 16 June 2006, paras. 42, 49.
[160] *Karemera et al*. Decision of 29 May 2009, para. 21. *See also Karadžić* Appeal Judgement, para. 452.
[161] *Karemera et al*. Decision of 29 May 2009, para. 15. *See also Karadžić* Appeal Judgement, para. 128.

that evidence produced in rebuttal thereof should be "unambiguous in its meaning" – namely that it must either point to "a specific alternative scenario" or "unambiguous[ly] demonstrat[e] that the scenario as found in the Adjudicated Fact must reasonably be excluded as true"[162] – in order to successfully contradict it. Thus, read in context, the Trial Chamber gave guidance as to the type of evidence that amounted to rebuttal evidence in relation to adjudicated facts and did not shift the burden of proof or persuasion, which remained squarely on the Prosecution to prove its case beyond reasonable doubt.[163] Mladić points to no instance in which the Trial Chamber denied the admission of evidence produced in rebuttal of adjudicated facts for failing to be unambiguous, or for any other reason. Rather, a review of the Trial Judgement shows that the Trial Chamber duly considered, *inter alia*, whether the evidence in rebuttal was sufficiently contrary, as well as reliable and credible, to rebut the presumption of accuracy of an adjudicated fact before determining whether it could safely rely on that fact, in whole or in part, in its findings.[164] The fact that, in most instances, the Trial Chamber found that the rebuttal evidence which was admitted did not contradict the adjudicated facts, in the context of all evidence on the record, does not demonstrate error on the part of the Trial Chamber.

57. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred by applying a heightened standard of the burden to produce rebuttal evidence or shifting the burden of persuasion onto him. The Appeals Chamber therefore dismisses the remainder of Mladić's arguments in relation to his request for review of the relevant findings of the Trial Chamber and reversal of those findings and convictions affected by the alleged error.

58. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 2.A of Mladić's appeal.

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[162] Trial Judgement, para. 5273.

[163] *See* Trial Judgement, para. 5272 ("Taking notice of an adjudicated fact does not shift the ultimate burden of persuasion, which remains with the Prosecution."). *See also Karadžić* Appeal Judgement, para. 219; *Karemera et al.* Decision of 16 June 2006, para. 49.

[164] *See, e.g.*, Trial Judgement, paras. 351, 353, 362, 447, 448, 603, 608, 682, 750, 771, 787, 829, 887, 905, 915, 969, 1050, 1064, 1076, 1089, 1092, 1101, 1113, 1124, 1149, 1156, 1159, 1263, 1264, 1318, 1319, 1378, 1486-1488, 1515, 1589, 1599, 1604, 1611, 1623, 1635, 1639, 1662, 1664, 1668, 1720, 1739, 1767, 1771, 1787-1792, 1912, 1919, 1920, 1929, 1934, 1942, 1950-1952, 1957, 1963, 1968, 1973, 2008, 2010, 2035, 2039, 2042, 2047, 2048, 2051, 2054, 2055, 2085, 2086, 2095, 2096, 2144-2148, 2182, 4734, nn. 4284, 4560, 5424, 5425, 7565. *See also* Trial Judgement, paras. 5273-5277.

(b) Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D)

59. As part of Ground 2 of his appeal, Mladić submits that the Trial Chamber systematically erred in law and in fact throughout the Trial Judgement by: (i) applying an incorrect standard of proof, thereby alleviating the Prosecution's burden to prove his guilt beyond reasonable doubt (Ground 2.B);[165] (ii) failing to address clearly relevant exculpatory evidence in its reasoning, thereby indicating that it either failed to consider such evidence or gave insufficient weight thereto (Ground 2.C);[166] and (iii) relying on untested evidence in a sole or decisive manner (Ground 2.D).[167] In these respects, Mladić contends that the Trial Chamber's errors and their impact, which he elaborates more specifically in Grounds 3 through 7 of his appellant's brief, individually or cumulatively, invalidate the findings on which his convictions rest.[168]

60. The Prosecution addresses Grounds 2.B, 2.C, and 2.D of Mladić's appeal in response to the relevant grounds where he sets forth his substantive arguments.[169]

61. To the extent that Mladić develops his arguments in relation to Grounds 2.B, 2.C, and 2.D of his appeal, the Appeals Chamber will evaluate these grounds in connection with the submissions made in their support.

[165] *See* Mladić Notice of Appeal, paras. 26, 27; Mladić Appeal Brief, paras. 115-125.
[166] *See* Mladić Notice of Appeal, paras. 28-30; Mladić Appeal Brief, paras. 127-140. *See also* Mladić Reply Brief, paras. 33, 34.
[167] *See* Mladić Notice of Appeal, paras. 31, 32; Mladić Appeal Brief, paras. 142, 145-150.
[168] *See* Mladić Appeal Brief, paras. 115, 116, 118-129, 136-144, 148-151.
[169] Prosecution Response Brief, para. 42, n. 226.

3. Alleged Errors in Failing to Ensure Equality of Arms (Ground 8.A)

62. Mladić submits that the Trial Chamber violated his right to a fair trial by failing to ensure equality of arms.[170] He specifically argues that the Trial Chamber: (i) abused its discretion by refusing to extend the deadline for the presentation of witnesses to allow two Defence witnesses to testify;[171] and (ii) erred by closing the Defence case when evidentiary matters were pending.[172] The Appeals Chamber will address these arguments in turn.

63. Before doing so, the Appeals Chamber recalls that the principle of equality of arms provides that each party must have a reasonable opportunity to defend its interests under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.[173] Pursuant to Rule 85 of the ICTY Rules, each party is entitled to call witnesses and present evidence, and according to Rule 87(A) of the ICTY Rules, the hearing shall be closed when "both parties have completed their presentation of the case". The Appeals Chamber further recalls that matters related to the management of trial proceedings fall within the discretion of the trial chamber,[174] and that "every court possesses the inherent power to control the proceedings *during* the course of the trial".[175] This is reflected in Rule 73 *ter* of the ICTY Rules, which states that the trial chamber has the authority to determine the time allocated to the presentation of the defence case and the number of witnesses the defence may call.[176] Rule 54 of the ICTY Rules further provides that a trial chamber may issue orders as may be necessary for the conduct of the trial. In order to successfully challenge a discretionary decision, a

[170] *See* Mladić Notice of Appeal, paras. 77, 78, 84, 85, p. 27; Mladić Appeal Brief, paras. 781-809, 876, 908.
[171] *See* Mladić Appeal Brief, paras. 781, 792-802, 806; T. 25 August 2020 pp. 85, 86.
[172] *See* Mladić Appeal Brief, paras. 782, 789-791, 803-805, 807.
[173] *See Karadžić* Appeal Judgement, para. 201; *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents, 4 September 2008, para. 29. *See also Kalimanzira* Appeal Judgement, para. 34; *Nahimana et al*. Appeal Judgement, para. 173.
[174] *See*, *e.g*., *Karadžić* Appeal Judgement, paras. 72, 330; *Prlić et al*. Appeal Judgement, paras. 26, 119; *Šainović et al*. Appeal Judgement, para. 29; *Lukić and Lukić* Appeal Judgement, para. 17; *Prosecutor v. Ante Gotovina et al*., Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010 ("*Gotovina et al*. Decision of 1 July 2010"), para. 5; *Prosecutor v. Vujadin Popović et al*., Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008 ("*Popović et al*. Decision of 24 September 2008"), para. 3.
[175] *See Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012 ("*Ngirabatware* Decision of 20 February 2012"), para. 13; *Prosecutor v. Jadranko Prlić et al*., Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010 ("*Prlić et al*. Decision of 1 July 2010"), para. 31.
[176] *See* Rule 73 *ter* (C) and (E) of the ICTY Rules. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013 ("*Karadžić* Decision of 29 January 2013"), para. 9; *Prlić et al*. Decision of 1 July 2010, para. 31. The Appeals Chamber also recalls that the Trial Chamber's authority to limit the number of witnesses is always subject to the general requirement that the rights of the accused, pursuant to Article 21 of the ICTY Statute, be respected. Indeed, a trial chamber is required to ensure that the number of witnesses for the defence case is sufficient to allow the accused a fair opportunity to present his or her case. *See Prlić et al*. Decision of 1 July 2010, para. 31.

party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[177] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[178]

(a) Variation of the Deadline for the Presentation of Defence Witnesses

64. On 19 May 2014, Mladić filed a witness list that included [REDACTED].[179] Mladić amended his witness list on 25 March 2015 [REDACTED].[180] On 18 January 2016, Mladić filed motions requesting that the Trial Chamber admit documentary evidence related to, among others, [REDACTED].[181] On 26 April 2016, the Trial Chamber set the week of 30 May 2016 as the deadline for the calling of the remaining three Defence witnesses on the list of witnesses to be called to testify, which did not include [REDACTED].[182] The Trial Chamber denied Mladić's requests to admit documentary evidence related to [REDACTED] on 23 and 30 May 2016, respectively.[183] Subsequently, on 13 July 2016, Mladić requested a variation of the deadline for the presentation of Defence witnesses and notified his provisional intent to call [REDACTED] as *viva voce* witnesses.[184] The Trial Chamber denied these requests on 15 August 2016, finding, *inter alia*, that Mladić had not shown that the anticipated testimonies of [REDACTED] were of such

[177] *See Karadžić* Appeal Judgement, paras. 72, 330; *Nyiramasuhuko et al*. Appeal Judgement, para. 68; *Ndahimana* Appeal Judgement, para. 14; *Lukić and Lukić* Appeal Judgement, para. 17.
[178] *See, e.g., Karadžić* Appeal Judgement, para. 85; *Prlić et al*. Appeal Judgement, para. 26; *Ndahimana* Appeal Judgement, para. 14; Appeal Decision on Adjudicated Facts, para. 9; *Lukić and Lukić* Appeal Judgement, para. 17.
[179] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Supplemental Submission of Preliminary Witness and Exhibit Lists Under Rule 65 *ter* (G), 19 May 2014 (confidential), Annex A, Registry Pagination ("RP"). 78906, 78905, 78834, 78833.
[180] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion to Amend 65 *ter* List to Add Witnesses not Previously on the List and Notice of Intent to Not Adduce Evidence of Certain Witnesses and Modify the Mode of Others, 25 March 2015 (confidential), para. 4, Annex A, Registry Pagination ("RP") 87883, Annex B, RP. 87881.
[181] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Second Motion to Admit Documents from the Bar – Srebrenica, 18 January 2016 (confidential), RP. 95519, 95507; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Fifth Motion to Admit Documents from the Bar – Enemy Actions, 18 January 2016, RP. 95703.
[182] T. 26 April 2016 p. 43703. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 15 August 2016 (confidential) ("Decision of 15 August 2016"), paras. 1, 14, n. 44.
[183] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Second Motion to Admit Documents from the Bar Table, 23 May 2016, paras. 19, 20, p. 9; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Fifth Motion for the Admission of Documents from the Bar Table, 30 May 2016, para. 22, p. 15. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence's Motion for Partial Reconsideration or Certification to Appeal the Decision on Defence's Second Bar Table Motion, 7 July 2016, paras. 11, 12.
[184] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Request to Vary the Time for Witnesses Following the Denial 3 Bar Table Exhibits and, if Granted, Defence Notification of Intent to Call [REDACTED] *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]"), paras. 2, 20; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Pending the Outcome of the Certification to Appeal 65*ter* #1D07014, Defence Advance Motion to Notify of the Intent to Request a Variation of Time for Witnesses and, if Granted, to Call [REDACTED], *Viva Voce*, 13 July 2016 (confidential) ("Request of 13 July 2016 Concerning [REDACTED]"), paras. 2, 17.

significance as to weigh in favour of granting the requested variance.[185] On 22 August 2016, Mladić sought reconsideration of or, alternatively, certification to appeal the Decision of 15 August 2016,[186] which the Trial Chamber denied on 26 October 2016.[187]

65. Mladić submits that the Trial Chamber abused its discretion by refusing to extend the deadline for the presentation of Defence witnesses to allow [REDACTED] to testify.[188] He argues that, in determining whether there was "good cause" to extend the deadline, the Trial Chamber failed to consider or gave "insufficient weight" to the relevance, context, and potential impact of the testimonies of [REDACTED][189] and [REDACTED],[190] as well as the interests of justice.[191] According to Mladić, the Trial Chamber's error prejudiced his ability to present his defence case,[192] and invalidates findings made on Srebrenica and Sarajevo in the Trial Judgement to the extent identified in his arguments on appeal.[193]

66. The Prosecution responds that Mladić fails to show any abuse of discretion in the Trial Chamber's decision not to grant additional time to allow [REDACTED] to testify.[194] According to the Prosecution, the Trial Chamber's denial of Mladić's "last-minute request" to vary the deadline for the presentation of witnesses was a "proper and reasonable exercise of its discretion",[195] especially given the "questionable relevance and negligible probative value of [REDACTED]

[185] Decision of 15 August 2016, paras. 16, 17, 19.
[186] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 22 August 2016 (confidential) ("Reconsideration Motion of 22 August 2016"), pp. 2, 18.
[187] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration of or, Alternatively, Certification to Appeal the Decision on Defence Requests to Vary the Deadline for Presenting Witnesses, 26 October 2016 (confidential) ("Decision of 26 October 2016"), p. 8.
[188] *See* Mladić Appeal Brief, paras. 781, 792-802; T. 25 August 2020 pp. 85, 86.
[189] Mladić contends that [REDACTED] evidence was directly relevant to the Trial Chamber's assessment of the cause of death of victims in Srebrenica and their military status, and that without this the Defence was left to rely on "piecemeal evidence". Mladić specifically argues that [REDACTED]. *See* Mladić Appeal Brief, paras. 797-799. *See also* Mladić Reply Brief, para. 109; T. 25 August 2020 pp. 85, 86.
[190] Mladić argues that the Trial Chamber rejected the Defence submissions that certain sniping and shelling incidents in Sarajevo were caused by the Army of the Republic of Bosnia and Herzegovina ("ABiH"), and that [REDACTED]. Mladić Appeal Brief, paras. 800-802. *See also* Mladić Reply Brief, para. 111.
[191] Mladić Appeal Brief, paras. 792, 795. *See also* Mladić Appeal Brief, paras. 793, 794.
[192] Mladić Appeal Brief, paras. 795, 808. *See also* Mladić Appeal Brief, paras. 793, 794, 799, 802.
[193] Mladić Appeal Brief, para. 806. Mladić submits that the Trial Chamber's alleged error invalidates the findings made on Srebrenica and Sarajevo "to the extent identified above". Having reviewed his submissions, the Appeals Chamber understands that Mladić refers to paragraphs 796 to 802 of his appellant's brief, where he describes the alleged impact that [REDACTED] evidence would have had on the Trial Chamber's findings concerning the cause of death of the Srebrenica victims and their military or civilian status ([REDACTED]), as well as the origin of fire and perpetrators of sniping and shelling on Sarajevo ([REDACTED]).
[194] *See* Prosecution Response Brief, paras. 328-335; T. 26 August 2020 pp. 39, 40.
[195] Prosecution Response Brief, para. 329.

evidence".[196] The Prosecution additionally submits that Mladić's arguments misrepresent the record and are repetitive of submissions that failed at trial.[197]

67. Mladić replies that, contrary to the Prosecution's response, he demonstrates on appeal that the Trial Chamber abused its discretion.[198]

68. The Appeals Chamber recalls that, according to Rule 73 *ter* (F) of the ICTY Rules, a trial chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. Contextual factors of the case, including the potential importance of a witness's evidence, may be relevant considerations in determining whether to grant additional time for a party to present evidence.[199] When requesting additional time at trial, Mladić argued that hearing the testimonies of [REDACTED] would be in the interests of justice because their evidence was relevant and probative, and that any delay occasioned by hearing their testimonies would be minimal.[200] Mladić specified that [REDACTED],[201] and that [REDACTED].[202]

69. The Appeals Chamber observes that, in the Decision of 15 August 2016, the Trial Chamber considered Mladić's submissions concerning the interests of justice, particularly the "significance" of [REDACTED] evidence.[203] The Trial Chamber noted Mladić's submissions that [REDACTED].[204] The Trial Chamber considered this submission and observed that [REDACTED].[205] The Trial Chamber further noted Mladić's submissions that [REDACTED].[206] The Trial Chamber reasoned that, while relevant, [REDACTED].[207] The Trial Chamber also dismissed Mladić's assertion that [REDACTED].[208] Having concluded that the anticipated

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[196] Prosecution Response Brief, paras. 325, 331-334. The Prosecution further argues that Mladić fails to demonstrate how the evidence from [REDACTED] would have affected the verdict in the Trial Judgement. *See* Prosecution Response Brief, paras. 332, 335. *See also* T. 26 August 2020 pp. 39, 40.
[197] Prosecution Response Brief, paras. 324, 333, 334.
[198] *See* Mladić Reply Brief, paras. 109-111, p. 32.
[199] *Cf. Karadžić* Decision of 29 January 2013, paras. 20, 22; *Haradinaj et al.* Appeal Judgement, paras. 38-40, 43, 49; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendants Appeal Against "*Décision Portant Attribution du Temps à la Défense pour la Présentation des Moyens à Décharge*", 1 July 2008, paras. 20, 21, 25, 27.
[200] Request of 13 July 2016 Concerning [REDACTED], paras. 18, 19; Request of 13 July 2016 Concerning [REDACTED], para. 15.
[201] Request of 13 July 2016 Concerning [REDACTED], para. 18. *See also* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 3, 15, 16.
[202] Request of 13 July 2016 Concerning [REDACTED], paras. 15, 16. *See also* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 3, 13.
[203] *See* Decision of 15 August 2016, paras. 4, 5, 7, 8, 16.
[204] *See* Decision of 15 August 2016, para. 4, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 15, 16, 18.
[205] *See* Decision of 15 August 2016, para. 16, n. 45. *See also* Decision of 15 August 2016, para. 4.
[206] *See* Decision of 15 August 2016, para. 7, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 13-16.
[207] *See* Decision of 15 August 2016, para. 16, n. 46.
[208] *See* Decision of 15 August 2016, para. 16.

testimonies of [REDACTED] were not of such significance as to weigh in favour of varying the deadline for the presentation of the case, the Trial Chamber found that it was not in the interests of justice to do so.[209] The Appeals Chamber notes that the Trial Chamber reiterated its position in the Decision of 26 October 2016 when it denied requests for reconsideration of and certification to appeal the Decision of 15 August 2016.[210]

70. Bearing in mind the Trial Chamber's broad discretion in the management of trial proceedings before it, the Appeals Chamber is not persuaded, given the Trial Chamber's findings on the limited significance of [REDACTED] evidence, that its refusal to grant Mladić additional time amounted to an abuse of discretion. Notably, Mladić has not substantiated his assertions that the Trial Chamber failed to contextualize or give sufficient weight to the relevance of [REDACTED] testimonies, or that it failed to adequately consider the interests of justice.[211] The Appeals Chamber finds that the Trial Chamber duly considered these issues in the Decision of 15 August 2016,[212] and subsequently in the Decision of 26 October 2016.[213] On appeal, Mladić repeats arguments which failed at trial[214] without demonstrating any discernible error. The Appeals Chamber, Judge Nyambe dissenting, accordingly dismisses Mladić's submissions in this regard.

(b) Closure of the Defence Case

71. On 16 August 2016, the Trial Chamber enquired whether the Defence had rested its case.[215] The Defence submitted that it had not, given its pending motion to reconsider two decisions concerning a Prosecution witness and its intention to file a request for certification to appeal the Decision of 15 August 2016.[216] The Trial Chamber considered that "[c]ertification or reconsideration motions do not have a suspensive effect" on the closure of a case and accordingly

[209] Decision of 15 August 2016, para. 17. The Appeals Chamber further observes that Mladić's submissions on appeal ignore the Trial Chamber's considerations concerning the Defence's delay in informing the Trial Chamber and the Prosecution about adding [REDACTED] as witnesses. *See* Decision of 15 August 2016, para. 14, n. 44. In this regard, the Trial Chamber underlined the Defence's discretion in managing its own case as well as the consequences of seeking to tender evidence in late stages of the proceedings. *See* Decision of 15 August 2016, para. 15.
[210] *See* Decision of 26 October 2016, paras. 11, 12, 16.
[211] *See* Mladić Appeal Brief, paras. 792, 795.
[212] *See* Decision of 15 August 2016, paras. 4, 5, 7, 8, 10, 16-18.
[213] *See* Decision of 26 October 2016, paras. 4, 6, 11, 12.
[214] *Compare* Mladić Appeal Brief, paras. 792-795, 797-799, 802 *with* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 2, 15-19 *and* Request of 13 July 2016 Concerning [REDACTED], paras. 1, 2, 13, 15, 16 *and* Reconsideration Motion of 22 August 2016, paras. 2, 3, 6, 18, 19, 23 *and* Decision of 26 October 2016, paras. 4, 6, 11, 12.
[215] T. 16 August 2016 pp. 44313, 44314.
[216] T. 16 August 2016 pp. 44314-44319. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion Requesting to Strike Amor Mašović Charts Due to Clear Error and New Particular Circumstances or, Alternatively, that this Trial Chamber Require the Testimony of Amor Mašović or Exercise its Power Under Rule 98 to Call Amor Mašović to Clarify the Reliabil[i]ty of His Expansive Forensic Assertions, 9 August 2016 (public with confidential and public annexes) ("Motion of 9 August 2016"), paras. 9, 28-31, 40-44.

closed the Defence case on the basis that there were no remaining evidentiary issues.[217] On 18 August 2016, Mladić filed a notice of objection to the closing of the Defence case, arguing, *inter alia*, that the Trial Chamber's decision lacked proper reasoning.[218] The Trial Chamber dismissed the objection on 23 August 2016,[219] and, as discussed above, on 26 October 2016, it denied Mladić's requests for reconsideration of or certification to appeal the Decision of 15 August 2016.[220]

72. Mladić submits that the Trial Chamber erred in closing the Defence case while evidentiary matters were pending.[221] According to Mladić, during the exchange with the Trial Chamber on 16 August 2016, the Defence had notified the Trial Chamber of its intention to seek reconsideration of the Decision of 15 August 2016.[222] Mladić argues that the Trial Chamber erred in law by concluding that a motion for reconsideration of a decision on an evidentiary matter did not constitute a pending evidentiary matter.[223]

73. The Prosecution responds that Mladić fails to demonstrate prejudice from the Trial Chamber's decision to close the Defence case.[224] In this regard, it submits that the Trial Chamber's decision to deny reconsideration or certification to appeal the Decision of 15 August 2016 was unrelated to the closure of the Defence case.[225] According to the Prosecution, Mladić also wrongly submits that he put the Trial Chamber on notice that he would seek reconsideration of the Decision of 15 August 2016.[226]

74. Mladić replies that the Prosecution incorrectly claims that he did not notify the Trial Chamber of his intention to seek reconsideration of the Decision of 15 August 2016.[227]

75. The Appeals Chamber observes that, when the Trial Chamber closed the Defence case on 16 August 2016, the only pending motion for reconsideration concerned a Prosecution witness

[217] T. 16 August 2016 pp. 44317, 44319.
[218] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Notice of Objection to the Chamber's Closing of its Case, 18 August 2016, paras. 1, 8-11.
[219] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 23 August 2016, paras. 7, 8.
[220] Decision of 26 October 2016, p. 8.
[221] *See* Mladić Appeal Brief, paras. 782, 803-805, 807.
[222] Mladić Appeal Brief, paras. 789, 804.
[223] Mladić Appeal Brief, paras. 803, 805. According to Mladić, a motion for reconsideration would have required the Trial Chamber to review its previous evidentiary decision on the basis that it was erroneous or caused an injustice, or on the basis of a new fact or argument not originally considered. *See* Mladić Appeal Brief, para. 805.
[224] Prosecution Response Brief, para. 336. *See also* T. 26 August 2020 pp. 39, 40.
[225] The Prosecution submits that the Decision of 26 October 2016 reiterated that the nature of [REDACTED] evidence did not weigh in favour of varying the deadline for the presentation of Defence evidence. *See* Prosecution Response Brief, para. 336, *referring to* Decision of 26 October 2016, paras. 10-16.
[226] Prosecution Response Brief, n. 1324.
[227] Mladić Reply Brief, para. 112.

rather than the presentation of Defence evidence, and that the Defence had at that time only declared its intention to challenge the Decision of 15 August 2016.[228] Mladić adduces no authority on appeal to substantiate his assertion that the Trial Chamber was precluded from closing the Defence case following the Defence's statement that it would seek reconsideration or certification to appeal the Decision of 15 August 2016. Given the Trial Chamber's broad discretion in managing trial proceedings,[229] as well as its inherent power to control proceedings during the course of the trial,[230] the Appeals Chamber considers that, in the circumstances at the time, the Trial Chamber acted within the limits of its discretion. Mladić's submissions merely reflect his disagreement with the Trial Chamber's decision to close the Defence case and fail to demonstrate any discernible error amounting to an abuse of discretion.

76. The Appeals Chamber further considers that, beyond asserting that the Trial Chamber failed to guarantee equality of arms between the parties, and that he was not given a fair opportunity to present his case, Mladić does not substantiate his claims.[231] Mladić's submissions regarding equality of arms are therefore dismissed.

77. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.A of Mladić's appeal.

4. Alleged Errors in Conducting the Trial to the Detriment of Mladić's Health and in Assessing the Impact of Mladić's Medical Conditions on His Behaviour at Trial (Ground 8.B)

78. Mladić submits that the Trial Chamber conducted trial proceedings to the detriment of his health and failed to assess the impact of his medical conditions on his behaviour at trial.[232] He specifically contends that the Trial Chamber: (i) abused its discretion in denying his request for a four-day per week trial schedule and by imposing a five-day per week trial schedule for nine months;[233] and (ii) erroneously relied on communication protected by lawyer-client privilege to establish his *mens rea* for the Overarching JCE.[234] Mladić requests that, as a result of the errors, the Appeals Chamber reverse his convictions on all counts, order a retrial, or remit the case in part.[235] Specific to the contention of error related to lawyer-client privilege, Mladić further requests that the

[228] *See* Motion of 9 August 2016, para. 48; T. 16 August 2016 pp. 44314-44319.
[229] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 72, 330; *Lukić and Lukić* Appeal Judgement, para. 17; *Gotovina et al.* Decision of 1 July 2010, para. 5; *Popović et al*. Decision of 24 September 2008, para. 3.
[230] *See, e.g.*, *Ngirabatware* Decision of 20 February 2012, para. 13; *Prlić et al*. Decision of 1 July 2010, para. 31.
[231] *See* Mladić Appeal Brief, paras. 783, 808, 908.
[232] *See* Mladić Notice of Appeal, paras. 79-83; Mladić Appeal Brief, paras. 810-875, 904-907.
[233] *See* Mladić Appeal Brief, paras. 810, 830-840, 904-906.
[234] *See* Mladić Appeal Brief, paras. 842-875, 907. *See also* Mladić Notice of Appeal, para. 81.
[235] Mladić Appeal Brief, paras. 915, 916.

Appeals Chamber articulate the correct legal standard, review the Trial Chamber's factual findings, and reverse findings on all counts, to the extent of the identified error.[236] The Appeals Chamber will address these arguments in turn. The Appeals Chamber notes that, in his notice of appeal, Mladić raises allegations concerning his fitness to stand trial.[237] However, Mladić does not develop this argument in his appellant's brief, and his reply brief clarifies that he is not appealing this issue.[238] Consequently, the Appeals Chamber finds that Mladić has abandoned this argument and will not consider it further.[239]

(a) Alleged Errors Regarding the Trial Schedule

79. On 15 January 2013, during the Prosecution case, Mladić filed a motion to reduce the five-day per week trial schedule due to health concerns, and annexed a medical report recommending, *inter alia*, two sets of four-hour hearing days followed by a day of rest per week.[240] Finding the medical report unpersuasive, the Trial Chamber denied Mladić's motion on 13 March 2013.[241] On 16 April 2013, Mladić again requested a reduction of the trial schedule on the basis of his health concerns,[242] which the Trial Chamber denied on 12 July 2013.[243] The ICTY Appeals Chamber, on 22 October 2013, reversed the Decision of 12 July 2013, ordered the Trial Chamber to adopt a four-day per week sitting schedule for the remainder of the Prosecution case, and directed the Trial Chamber to reassess the matter of the sitting schedule at the beginning of the Defence case.[244]

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[236] Mladić Appeal Brief, para. 875.
[237] *See* Mladić Notice of Appeal, paras. 80, 82.
[238] *See* Mladić Reply Brief, para. 113.
[239] *See, e.g.*, *Karadžić* Appeal Judgement, n. 19; *Karemera and Ngirumpatse* Appeal Judgement, nn. 28, 29.
[240] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 15 January 2013 (confidential), p. 8, Annex C, RP. 50952. *See also Prosecutor v. Ratko Mladić*, IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 ("Decision of 22 October 2013"), para. 3.
[241] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Seeking Adjustment of Modalities of Trial, 13 March 2013, paras. 12, 14. *See also* Decision of 22 October 2013, para. 3.
[242] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Second Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 16 April 2013 (confidential), para. 27. *See also* Decision of 22 October 2013, para. 5.
[243] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 12 July 2013 ("Decision of 12 July 2013"), paras. 18, 19. *See also* Trial Judgement, para. 5248; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motions for Reconsideration and Certification to Appeal the Decision on Defence Motion Seeking Adjustment of the Trial Schedule, 22 August 2013, para. 8 (granting certification to appeal the Trial Chamber's Decision of 12 July 2013).
[244] Decision of 22 October 2013, paras. 16, 17. *See also* Trial Judgement, para. 5248.

80. On 15 November 2013, the Trial Chamber ordered the Registry to examine Mladić's health prior to the commencement of the Defence case.[245] The Registry filed medical reports on 24 January 2014.[246] Based on these reports, on 14 March 2014, the Trial Chamber ordered a five-day per week trial schedule for the Defence case, subject to continued monitoring of Mladić's health and "regular appraisals" of the schedule in light of changes, if any, to his health.[247] Following the Registry's filing of additional medical reports on 9 and 24 July 2014, respectively,[248] the Trial Chamber adopted a four-day per week trial schedule on 25 August 2014, with Fridays provisionally designated as the non-sitting days.[249]

81. Mladić submits that, despite medical recommendations for a four-day per week schedule, the Trial Chamber conducted trial proceedings with a five-day per week schedule for nine months – five during the Prosecution case and four during the Defence case.[250] He argues that the five-day per week schedule resulted in chronic fatigue and a deterioration of his health which made it impossible for him to effectively participate in the proceedings and exercise his rights.[251] Mladić specifically challenges the Decision of 14 March 2014, in which, he alleges, the Trial Chamber erroneously reinstated the five-day per week schedule during the Defence case, from 19 May 2014 until August 2014.[252] According to Mladić, the Trial Chamber infringed his right to effective participation in his defence, harmed his health, disregarded medical recommendations, and continued to conduct proceedings with a five-day per week trial schedule for nine months.[253] In his view, the Trial Chamber's enforcement of a five-day per week schedule was prejudicial and occasioned a miscarriage of justice.[254]

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[245] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Order for Medical Examination of the Accused Pursuant to Rule 74 *bis*, 15 November 2013 ("Order of 15 November 2013"), paras. 5, 9. *See also* Trial Judgement, para. 5248.
[246] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Reports, 24 January 2014 (confidential) ("Submission of 24 January 2014").
[247] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Trial Sitting Schedule, 14 March 2014 (confidential; filed publicly on 28 March 2014) ("Decision of 14 March 2014"), paras. 20, 22.
[248] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 9 July 2014 (confidential), Annex A [REDACTED] ("Medical Report of 28 June 2014"); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar's Submission of Medical Report, 24 July 2014 (confidential), Annex B [REDACTED] ("Medical Report of 7 July 2014").
[249] T. 25 August 2014 p. 24701. On 17 September 2014, the Trial Chamber issued written reasons for the reduced schedule. *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Reasons for Decision on the Future Trial Sitting Schedule, 17 September 2014 ("Reasoning of 17 September 2014"), paras. 10-17, 19.
[250] *See* Mladić Appeal Brief, paras. 830-839, 905, 906. Specifically, Mladić contends that the Trial Chamber enforced the five-day per week schedule between 1 June and October 2013 during the Prosecution case, and that the four-day schedule was only implemented after appellate intervention on 22 October 2013. Mladić Appeal Brief, paras. 825, 836, *referring to* Decision of 22 October 2013. *See also* Mladić Appeal Brief, paras. 818-824.
[251] Mladić Appeal Brief, paras. 831, 833-835, 837-840, 906.
[252] Mladić Appeal Brief, paras. 826, 827, 829, 830, 837, *referring to* Decision of 14 March 2014, Reasoning of 17 September 2014.
[253] Mladić Appeal Brief, paras. 831, 839, 840, 906.
[254] Mladić Appeal Brief, paras. 810, 840, 906.

82. The Prosecution responds that, contrary to Mladić's suggestion, he actively participated in his defence when the five-day per week schedule was imposed during the Prosecution and the Defence cases, thus undermining his claim.[255] It further contends that Mladić fails to demonstrate how the Trial Chamber abused its discretion in the Decision of 14 March 2014, in which it ordered the five-day per week schedule during the Defence case,[256] given that it relied upon the reports of two doctors stating that reducing the sitting schedule to four days per week would lengthen the trial to the detriment of Mladić's health.[257] The Prosecution further contends that, in any event, Mladić fails to demonstrate any concrete impact on his fair trial rights as the Decision of 14 March 2014 only resulted in a five-day per week trial schedule "for a total of just six weeks over a three-month period".[258]

83. Mladić replies that the Prosecution's response demonstrates that the Trial Chamber was aware of the detrimental impact of the existing trial schedule and failed to adapt the proceedings accordingly.[259] He reiterates that the Trial Chamber abused its discretion in the Decision of 14 March 2014 by denying his request to change the schedule and by disregarding medical evidence recommending adapting the court proceedings to safeguard his health.[260]

84. The Appeals Chamber recalls that decisions concerning the scheduling of trials and their modalities are discretionary decisions of the trial chamber to which the Appeals Chamber accords deference.[261] The trial chamber's discretion, however, must be exercised in accordance with Articles 20(1) and 21 of the ICTY Statute, which require trial chambers to ensure that trials are fair and conducted with full respect for the rights of the accused.[262]

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[255] Prosecution Response Brief, paras. 344, 345.
[256] Prosecution Response Brief, paras. 338, 346, 347.
[257] Prosecution Response Brief, paras. 338, 346, 347.
[258] Prosecution Response Brief, paras. 338, 348. According to the Prosecution, Mladić fails to show that these six weeks rendered his 239-week-long trial unfair, deprived him of any rights, or diminished his effective participation in the trial. *See* Prosecution Response Brief, para. 348.
[259] Mladić Reply Brief, para. 114.
[260] Mladić Reply Brief, para. 116. *See also* Mladić Reply Brief, para. 115.
[261] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal Against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution Re-Opening, 22 May 2015, para. 6; Decision of 22 October 2013, para. 11. In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party. *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al*. Appeal Judgement, para. 431, n. 1018 and references cited therein.
[262] *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 26, 72; *Ndahimana* Appeal Judgement, para. 14; Decision of 22 October 2013, para. 12; *Galić* Appeal Judgement, para. 18. Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the violation caused prejudice that amounts to an error of law invalidating the judgement. *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 26, 72; *Nyiramasuhuko et al*. Appeal Judgement, para. 346; *Šainović et al*. Appeal Judgement, para. 29 and references cited therein.

85. With respect to the trial schedule during the Prosecution case, notably from 1 June to October 2013,[263] the Appeals Chamber recalls that the matter was addressed by the ICTY Appeals Chamber in the Decision of 22 October 2013.[264] The ICTY Appeals Chamber concluded that the Trial Chamber failed to attribute sufficient weight to relevant medical reports, abused its discretion in rejecting Mladić's request for a modified schedule, and therefore committed a discernible error.[265] The ICTY Appeals Chamber ordered the Trial Chamber to, *inter alia*, adopt a four-day per week schedule for the remainder of the Prosecution case.[266]

86. As to the trial schedule during the Defence case, the Appeals Chamber observes that, in the Decision of 22 October 2013, the ICTY Appeals Chamber directed the Trial Chamber to "reassess the matter at the beginning of the Defence case".[267] Complying with this direction, the Trial Chamber, on 15 November 2013, ordered the Registry to facilitate further examinations of Mladić's health.[268] The Registry submitted medical reports regarding Mladić's health on 24 January 2014.[269] Following this, the Trial Chamber reinstated the five-day per week schedule on 14 March 2014.[270] In doing so, the Trial Chamber considered, *inter alia*, that: (i) two expert medical reports by [REDACTED], attached to the Registry's Submission of 24 January 2014, concluded that "delaying or protracting the course of the trial would be disadvantageous to [] Mladić's health";[271] (ii) other medical reports filed by the Registry and the UN Detention Unit medical staff showed a preference for a four-day per week schedule due to [REDACTED] or in order to keep Mladić's condition "as good as possible";[272] and (iii) the expert reports of the [REDACTED] should be given more weight, as their opinions fall squarely within their fields of expertise.[273] Based on these considerations, the Trial Chamber found that delaying or protracting the course of the trial would be disadvantageous to Mladić's health given that the likelihood of any further delay would increase [REDACTED] due to the existence of serious risk factors – such as [REDACTED] – as well as his increasing age.[274]

[263] *See* Mladić Appeal Brief, paras. 833-836.
[264] *See* Decision of 22 October 2013, paras. 12-17.
[265] Decision of 22 October 2013, para. 16.
[266] Decision of 22 October 2013, para. 17.
[267] Decision of 22 October 2013, para. 17.
[268] Order of 15 November 2013, paras. 5, 9.
[269] Submission of 24 January 2014, Annexes B, D-F.
[270] Decision of 14 March 2014, para. 22.
[271] Decision of 14 March 2014, para. 15. [REDACTED] *See* Submission of 24 January 2014, Annexes D-F, RP. 76203, 76191, 76188.
[272] Decision of 14 March 2014, paras. 17, 18.
[273] Decision of 14 March 2014, para. 18.
[274] Decision of 14 March 2014, para. 19.

The Trial Chamber also ordered that the same [REDACTED] continue to examine Mladić's health on an ongoing basis at least every four months.[275]

87. The Appeals Chamber notes that, on 13 June 2014, the Defence requested the Trial Chamber to permanently adopt a four-day per week trial schedule with Wednesdays designated as the day of rest.[276] On 9 and 24 July 2014, the Registry filed the Medical Report of 28 June 2014 and the Medical Report of 7 July 2014, respectively.[277] The Medical Report of 28 June 2014, prepared by the [REDACTED], stated, *inter alia*, that: [REDACTED].[278] The Medical Report of 7 July 2014, prepared by the [REDACTED], stated, *inter alia*, that: [REDACTED].[279] [REDACTED].[280] Having considered these medical reports and particularly the recommendation in the Medical Report of 7 July 2014, the Trial Chamber adopted a four-day per week schedule on 25 August 2014, with Fridays as provisional non-sitting days.[281]

88. The Appeals Chamber notes that there is no indication that, during trial proceedings, Mladić sought to appeal or to have the Trial Chamber reconsider the Decision of 14 March 2014, which he now challenges on appeal. In this respect, 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 its right to raise the issue on appeal.[282] While Mladić did not challenge the Decision of 14 March 2014 at trial, the Appeals Chamber observes that he repeatedly raised concern with the five-day per week sitting schedule after this decision.[283] In these circumstances, the Appeals Chamber exercises its discretion to examine Mladić's appeal submissions in respect of the Decision of 14 March 2014.

89. Noting the above, the Appeals Chamber is not convinced by Mladić's submissions that the Trial Chamber abused its discretion in the Decision of 14 March 2014, which reinstated the five-day per week schedule between 19 May and 25 August 2014.[284] Rather, the Trial Chamber reassessed the matter of the schedule, in compliance with the ICTY Appeals Chamber's decision,[285]

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[275] Decision of 14 March 2014, paras. 20, 22.
[276] T. 13 June 2014 pp. 22668-22670, 22674, 22675. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Renewed Submissions in Relation to the Future Trial Sitting Schedule, 7 August 2014 (confidential) ("Defence Sitting Schedule Submissions of 7 August 2014"), para. 4.
[277] *See* Medical Report of 28 June 2014; Medical Report of 7 July 2014.
[278] Medical Report of 28 June 2014, RP. 80024, 80023.
[279] Medical Report of 7 July 2014, RP. 80339.
[280] Medical Report of 7 July 2014, RP. 80339.
[281] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-19.
[282] *See, e.g., Karadžić* Appeal Judgement, paras. 25, 312.
[283] *See* T. 12 June 2014 p. 22629; T. 13 June 2014 pp. 22668-22670, 22674, 22675; Defence Sitting Schedule Submissions of 7 August 2014.
[284] *See* Mladić Appeal Brief, para. 830; Decision of 14 March 2014, paras. 20, 22.
[285] *See* Order of 15 November 2013, para. 5; Decision of 14 March 2014, para. 6.

and based its findings on expert medical reports that advised against delaying trial proceedings, which would have resulted from a reduced schedule.[286] The Trial Chamber further ordered regular medical examinations to be performed, and that the examinations "be timed to coincide, where possible, with the hearings for the Defence case, if any, so that [] Mladić is assessed during a period in which the impact of the hearings on his health could be properly gauged".[287] Thereafter, following the filing of two additional expert medical reports on 9 and 24 July 2014, respectively, the Trial Chamber duly noted a clear preference for the four-day per week schedule to reduce the stress on Mladić's health.[288] The Trial Chamber therefore adjusted the schedule to four days a week for the remainder of the trial.[289] The foregoing demonstrates that, during the Defence case, the Trial Chamber was cognizant of and attempted to balance its duty under Article 20(1) of the ICTY Statute to ensure a fair and expeditious trial with Mladić's rights and well-being. The Appeals Chamber notes Mladić's additional submission that the Trial Chamber erred in ignoring medical recommendations to have Wednesdays as rest days rather than Fridays.[290] The Appeals Chamber notes that the Trial Chamber explicitly considered this matter but was unable to identify a medical basis for Wednesdays as rest days in the medical reports. The Trial Chamber also deemed it preferable to sit on consecutive days to avoid interruptions in the presentation of evidence and to allow Mladić longer uninterrupted rest.[291] In the Appeals Chamber's view, Mladić fails to substantiate any error on the part of the Trial Chamber in this respect. As Mladić fails to demonstrate that the Trial Chamber committed a discernible error with respect to the trial schedule during the Defence case, his contention that the Trial Chamber abused its discretion in the Decision of 14 March 2014 is therefore dismissed.

90. The Appeals Chamber is further not convinced by Mladić's arguments about the effect of the combined five-day per week schedule during the Prosecution and Defence cases on his ability to participate in the proceedings and exercise his rights.[292] Recalling that the burden rests on Mladić to demonstrate the errors or violations he alleges, the Appeals Chamber is not persuaded that the five-day per week schedule during limited periods of his trial impeded his ability to effectively

[286] *See* Decision of 14 March 2014, paras. 18, 19.
[287] *See* Decision of 14 March 2014, paras. 20, 22.
[288] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-17, 19.
[289] *See* T. 25 August 2014 p. 24701; Reasoning of 17 September 2014, paras. 10-17, 19.
[290] *See* Mladić Appeal Brief, paras. 836, 839.
[291] *See* Reasoning of 17 September 2014, para. 17.
[292] *See*, *e.g.*, Mladić Appeal Brief, paras. 831, 833, 835, 838-840. The Appeals Chamber notes that a five-day per week sitting schedule was implemented during 19 weeks of the trial. *See* http://www.icty.org/case/mladic/4#trans (accessed on 8 June 2021) (between June and 22 October 2013 – the impugned five months during the Prosecution case – 13 out of the 20 weeks followed the five-day sitting schedule; during the Defence case, between 19 May and 25 August 2014, six out of the 14 weeks followed the five-day sitting schedule). Mladić's argument, that the Trial Chamber conducted

participate in his defence or caused harm to his health in violation of any of the rights enshrined in the ICTY Statute that would require appellate intervention at this stage of the proceedings. In this regard, Mladić simply raises arguments that were remedied by the ICTY Appeals Chamber or considered by the Trial Chamber without demonstrating any error.[293] The Appeals Chamber further notes instances during the relevant periods where Mladić actively participated in his trial.[294] His contention that the Trial Chamber infringed his fair trial rights in this respect is therefore without merit and is rejected.

91. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Mladić's submissions regarding the schedule during the trial proceedings.

(b) Alleged Errors Regarding the Use of Privileged Communication

92. On 18 February 2013, the Prosecution informed the Trial Chamber that Mladić had allegedly uttered some "terribly offensive" statements during recess ("Alleged Utterances"), which had been overheard by members of the Prosecution's staff.[295] At that time, the Prosecution expressed its intention to investigate the matter and its position that the Alleged Utterances could constitute "evidence of *mens rea* and knowledge of the crimes".[296] On 18 March 2013, the Prosecution sought to admit an investigator's report that included statements from two Prosecution staff, Maria Karall and Dora Sokola, who attested to having overheard the Alleged Utterances.[297] On 4 June 2013, the Trial Chamber rejected the Motion of 18 March 2013 on the basis that the Alleged Utterances "have the potential to be *prima facie* relevant to [Mladić's] knowledge of the alleged detention and mistreatment of Muslim women and girls" and would need to be tendered as *viva voce* evidence or pursuant to Rule 92 *ter* of the ICTY Rules.[298] On 22 August 2013, the Trial Chamber granted the Prosecution's request to add Karall and Sokola to its witness list.[299]

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proceedings with a five-day sitting schedule for "nine months", is therefore a misrepresentation of the record. *See* Mladić Appeal Brief, paras. 810, 840, 906.

[293] *See* Mladić Appeal Brief, paras. 831-838.

[294] *See, e.g.*, T. 5 September 2013 p. 16313; T. 26 June 2014 p. 23098.

[295] T. 18 February 2013 pp. 8830, 8831.

[296] T. 18 February 2013 pp. 8830, 8831.

[297] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (confidential), paras. 1, 15.

[298] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Prosecution's Motion for Admission of the Utterances of the Accused, 4 June 2013 ("Decision of 4 June 2013"), paras. 5, 7.

[299] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Prosecution's Motion for Leave to Amend its Rule 65 *ter* Witness List, 22 August 2013 ("Decision of 22 August 2013"), paras. 7-9, 11. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List, 20 June 2013, paras. 1, 10.

93. Prior to Karall's testimony on 12 September 2013, the Defence made two objections, arguing that the Alleged Utterances were subject to lawyer-client privilege and that Karall had a conflict of interest as a member of the Prosecution's staff.[300] The Trial Chamber denied both objections on the basis that: (i) the Defence's privilege argument "ignores that by speaking very loudly, [...] the communication cannot be considered to be confidential any further, and the accused has been warned about that, or at least it has been brought to his attention"; and (ii) there was no conflict of interest as Karall was "witness of fact" and "not here to establish any *mens rea* or things of the kind".[301]

94. During their testimonies, Karall and Sokola each stated that the Prosecution had tasked them with listening to Mladić's statements and that they overheard the Alleged Utterances in the courtroom during recess on 18 February 2013.[302] In noting evidence tendered as to Mladić's *mens rea* with respect to the Overarching JCE in the Trial Judgement, the Trial Chamber referred to the evidence of Karall and Sokola[303] as reflecting that, [REDACTED]:

[REDACTED][304]

95. Mladić submits that the Trial Chamber erred by admitting and relying on the evidence of Karall and Sokola regarding the Alleged Utterances to establish his *mens rea*, despite its statement to the contrary, occasioning a miscarriage of justice.[305] Mladić argues in this respect that the Trial Chamber: (i) failed to consider Rule 97 of the ICTY Rules to determine whether the Alleged Utterances had been voluntarily disclosed;[306] (ii) disregarded the circumstances in which Karall and Sokola "overheard" the Alleged Utterances and failed to provide a reasoned opinion on how, in the circumstances, the disclosure could have been voluntary;[307] and (iii) erred by failing to consider "idiosyncrasies" in Mladić's speech stemming from his health conditions when determining whether he had voluntarily disclosed the Alleged Utterances or to provide a reasoned opinion on this point.[308]

[300] T. 12 September 2013 pp. 16585, 16586.
[301] T. 12 September 2013 pp. 16589, 16590. On 21 October 2013, the Trial Chamber rejected a Defence request for certification to appeal the Oral Decision of 12 September 2013. *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Request for Certification to Appeal Oral Decision of 12 September 2013, 21 October 2013 ("Decision of 21 October 2013"), para. 9.
[302] T. 12 September 2013 pp. 16593, 16594, 16595 (private session), 16597-16599, 16601, 16602, 16604; T. 21 October 2013 pp. 18165-18183.
[303] Trial Judgement, paras. 4614, 4643, 5352 (confidential), n. 16380.
[304] Trial Judgement, para. 5352 (confidential).
[305] *See* Mladić Appeal Brief, paras. 842-875, 907. *See also* Mladić Reply Brief, para. 123.
[306] Mladić Appeal Brief, paras. 842, 851, 856-859, 866-868.
[307] *See* Mladić Appeal Brief, paras. 842, 853-858, 860-865, 874, 907. *See also* Mladić Reply Brief, paras. 118-121.
[308] Mladić Appeal Brief, paras. 821, 856, 869-871. *See also* Mladić Reply Brief, para. 122.

96. The Prosecution responds that Mladić fails to demonstrate an error in the Trial Chamber's decision to admit and rely on evidence of the Alleged Utterances, which were relevant, admissible, and not private.[309] The Prosecution submits, *inter alia*, that: (i) Rule 97 of the ICTY Rules does not apply as the Alleged Utterances were not made in a private and confidential space but "within easy earshot of Prosecution staff members who were openly and visibly sitting in the same courtroom";[310] (ii) the Trial Chamber was aware of the circumstances under which the Alleged Utterances were heard by Karall and Sokola;[311] (iii) Mladić fails to demonstrate how the Trial Chamber erred in giving little weight to the impact of his health problems;[312] and (iv) the Trial Chamber properly relied on the Alleged Utterances to establish his *mens rea* for the Overarching JCE.[313]

97. Mladić replies that the Prosecution provides no legal basis for the contention that Rule 97 of the ICTY Rules does not apply in public spaces or that the volume of the utterances absolves or negates the significance of the Prosecution's conduct – instructions to its staff to listen to all his communication – which negates the voluntariness of the disclosure.[314] He further submits that the Trial Chamber ruled that he had waived privilege before hearing the testimonies of Karall and Sokola.[315] According to Mladić, the Prosecution has also failed to undermine his submissions that the Trial Chamber did not to consider the impact of his medical conditions on the volume of his speech or that it explicitly stated that the witnesses would not be relied upon to establish his *mens rea*.[316]

98. The Appeals Chamber recalls that, pursuant to Rule 97 of the ICTY Rules, all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. This privilege is vital to the defence of an accused or appellant by

[309] Prosecution Response Brief, paras. 350-362. The Prosecution further argues that even if the Trial Chamber had excluded the Alleged Utterances, it would find Mladić guilty of crimes related to the Overarching JCE on the basis of other conclusive evidence of his criminal intent. *See* Prosecution Response Brief, paras. 351, 363.
[310] *See* Prosecution Response Brief, paras. 350, 352, 353, 358.
[311] Prosecution Response Brief, paras. 354-357.
[312] Prosecution Response Brief, para. 361.
[313] Prosecution Response Brief, para. 362.
[314] Mladić Reply Brief, paras. 117, 118, 120, 121.
[315] Mladić Reply Brief, para. 119.
[316] Mladić Reply Brief, paras. 122, 123.

allowing for open communication between counsel and client that is necessary for effective legal assistance as guaranteed under Article 21(4)(d) of the ICTY Statute.[317]

99. As a preliminary consideration, the Appeals Chamber notes that Mladić does not appear to dispute the fact that he made the Alleged Utterances or that he spoke them loudly in the courtroom.[318] With respect to the submission that the Trial Chamber failed to refer to Rule 97 of the ICTY Rules and address the issue of privilege,[319] the Appeals Chamber observes that the Trial Chamber took express note that Mladić objected to the admission of the Alleged Utterances on the basis that they violated his right to privileged communications with his counsel.[320] In this context, Mladić does not demonstrate that the Trial Chamber failed to address the matter as one of lawyer-client privilege within the meaning of Rule 97 of the ICTY Rules. As for Mladić's claim that the Trial Chamber erroneously found that privilege had been waived without holding an evidentiary hearing on this issue, the Appeals Chamber observes that Mladić did not seek an evidentiary hearing on the matter and that, on appeal, he makes no attempt to establish that such a hearing was required.[321] In light of the above, Mladić's submissions that the Trial Chamber failed to address the issue of lawyer-client privilege or erred by not holding an evidentiary hearing on this matter are dismissed.

100. The Appeals Chamber is also not convinced by Mladić's contention that the Trial Chamber disregarded the circumstances in which Karall and Sokola "overheard" the Alleged Utterances.[322]

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[317] *See Prosecutor v. Vujadin Popović et al.*, Case No. IT 05-88-A, Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege, 16 July 2012 (public redacted version) ("*Popović et al*. Decision of 16 July 2012"), para. 7.

[318] *See*, *e.g.*, Mladić Appeal Brief, paras. 866, 867, 870, 871.

[319] *See* Mladić Appeal Brief, paras. 856, 857.

[320] *See* Decision of 22 August 2013, para. 4; T. 12 September 2013 pp. 16587-16589; Decision of 21 October 2013, para. 7. The Appeals Chamber also recalls that, while trial chambers usually state the law they intend to apply, this is not a formal requirement. *See Šešelj* Appeal Judgement, paras. 57, 160.

[321] *See* T. 12 September 2013 pp. 16585-16589. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response to Prosecution Motion for Admission into Evidence the Utterances of the Accused, 2 April 2013 (confidential); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response to Prosecution Motion to Amend its Rule 65 *ter* Witness List, 4 July 2013. The Appeals Chamber moreover notes that, prior to Karall's testimony, the Trial Chamber gave the Defence the opportunity to argue why Mladić did not waive privilege despite indications that he shouted the Alleged Utterances in the presence of others. *See* T. 12 September 2013 pp. 16587, 16588 (Judge Orie to Defence Counsel: "What is the legal authority that if you shout audible for everyone but not in the presence of the Bench, that [] then suddenly that other rules would apply? And that you would not have given up your privilege if you shout […] or yell in the presence of other persons than the Bench? Is there any legal authority for that? Or could you analyse the waiver of privilege in such a way that it does only apply during court sessions and not if you do it anywhere else?"). The Trial Chamber found the Defence arguments in this regard unpersuasive. To this effect, in the Decision of 21 October 2013, the Trial Chamber considered that the Defence "appeared unable to address the issue of a potential lawyer-client privilege with a sufficient level of legal analysis for the [Trial] Chamber to properly understand the outline of the issue at stake". *See* Decision of 21 October 2013, para. 7.

[322] *See* Mladić Appeal Brief, paras. 856, 860-863, 874. The Appeals Chamber further finds Mladić's submission, suggesting that the Prosecution had clandestinely tasked Karall and Sokola to listen indiscriminately to conversations between Mladić and counsel, to be a misrepresentation of the facts. *See* Mladić Appeal Brief, paras. 861, 862. The Appeals Chamber notes that the Prosecution had, previous to Karall and Sokola hearing the Alleged Utterances, openly

Contrary to his submission, the record shows that the Trial Chamber was aware of and considered the relevant circumstances.[323] In addition, Mladić's argument that the Trial Chamber failed to provide a reasoned opinion in this regard[324] overlooks Judge Orie's statement, in the Oral Decision of 12 September 2013, that the Defence objection to Karall's testimony "about the waiver of privileged communication […] ignores that by speaking very loudly, that communication cannot be considered to be confidential any further, and the accused has been warned about that".[325] In view of the foregoing, Mladić does not demonstrate that the Trial Chamber failed to sufficiently consider that he had not waived privilege with respect to the Alleged Utterances.

101. The Appeals Chamber turns to address Mladić's contention that the Trial Chamber failed to consider that his health condition leads to "loud, curt and rigid" speech and that the Trial Chamber placed undue weight on the volume of his speech to justify its finding of voluntary disclosure.[326] The Appeals Chamber recalls that, in a decision related to the Alleged Utterances, the Trial Chamber explicitly considered and rejected as unsubstantiated the Defence's attempt to link Mladić's health condition with his propensity to speak loudly.[327] The Appeals Chamber further recalls that the Trial Chamber warned Mladić on 23 August 2012 that loud and audible statements would be considered a waiver of lawyer-client privilege.[328] The Trial Chamber recalled the Warning of 23 August 2012 when rejecting Defence claims of privilege related to the Alleged Utterances.[329] The record also reveals that, following the Warning of 23 August 2012, Mladić controlled the volume of his speech when addressing his counsel on numerous occasions.[330]

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stated its intention to "use any inculpatory statements shouted" by Mladić in court, and Mladić had also been warned by the Trial Chamber that loud and audible statements "shouted across a courtroom" are considered a waiver of his lawyer-client privilege. *See* T. 23 August 2012 p. 1481 ("Warning of 23 August 2012").

[323] In rendering the Oral Decision of 12 September 2013, the Trial Chamber considered Defence Counsel's argument that Karall had a conflict of interest as she was a staff member of the Prosecution and that she was in the courtroom on 18 February 2013, listening to Mladić's communication with his counsel outside the official part of the trial. *See* T. 12 September 2013 pp. 16585, 16586, 16589. During the hearing where Karall and Sokola testified, the Trial Chamber also heard evidence that both were tasked to listen to Mladić's outbursts and about circumstances in which they heard the Alleged Utterances. *See*, *e.g.*, T. 12 September 2013 pp. 16593, 16594, 16595 (private session), 16596; T. 21 October 2013 pp. 18165-18173.

[324] *See* Mladić Appeal Brief, para. 865.

[325] T. 12 September 2013 p. 16589.

[326] *See* Mladić Appeal Brief, paras. 856, 869-871. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision Concerning Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie, 22 January 2014, Annex B, para. 18 (where Judge Orie stated that over the course of the Prosecution's case, Mladić was "perfectly able to control the volume of his speech").

[327] *See* Decision of 21 October 2013, para. 7.

[328] *See* Warning of 23 August 2012.

[329] *See* T. 12 September 2013 p. 16589.

[330] *See*, *e.g.*, T. 28 August 2012 p. 1825 (where Judge Orie reminded Mladić and counsel to confer with the microphone switched off and in lower voices and this instruction was followed); T. 30 August 2012 pp. 1939, 1940 (where Defence counsel asked to confer with Mladić and Judge Orie granted the request and reminded them to "please take care that he speaks softly", this was followed and Judge Orie indicated that "[t]he Chamber appreciates the way it was done […] that Mr. Mladić indicates he wants to consult with counsel and that the level of the volume of your voices was such that […] it's in line with what we expect you to […] do"); T. 31 August 2012 p. 2051 (where Defence counsel asked to

Considering the foregoing, the Appeals Chamber finds no merit in Mladić's arguments that the Trial Chamber failed to take into account his health conditions or placed undue weight on the volume of his speech in rejecting claims of privilege with respect to the Alleged Utterances.

102. Mladić contends that as a consequence of the alleged errors discussed above, the Trial Chamber admitted the Alleged Utterances and erroneously relied on them to establish his *mens rea*, despite stating in its oral ruling on 12 September 2013 that it would not use Karall's evidence to this effect.[331] The Appeals Chamber recalls that, on 12 September 2013, when rejecting the Defence's objection to Karall's testimony, the Trial Chamber stated that Karall was tasked to recount the events of 18 February 2013 surrounding the Alleged Utterances and "not here to establish any *mens rea* or things of that kind".[332] In the Appeals Chamber's view, the Trial Chamber was simply highlighting that Karall was a witness of fact, tasked to testify about "what she saw, heard or experienced" on 18 February 2013.[333] This statement in no way contradicts the Trial Chamber's ultimate determination to summarize testimony of the Alleged Utterances when noting evidence that was tendered as to Mladić's *mens rea* with respect to the Overarching JCE. Moreover, the Appeals Chamber observes that the Trial Chamber expressed, on more than one occasion, the possibility that the Alleged Utterances could be evidence going to Mladić's acts and conduct as charged in the Indictment. For example, in the Decision of 4 June 2013, the Trial Chamber stated that Karall's and Sokola's evidence regarding the Alleged Utterances must be led *viva voce* or through Rule 92 *ter* of the ICTY Rules because "they concern the Accused's acts and conduct as charged in the Indictment".[334] The Trial Chamber made a similar statement when granting the Prosecution request to add Karall and Sokola to its witness list.[335]

103. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber notes the extensive evidence relied upon by the Trial Chamber in determining Mladić's *mens rea* in relation to the Overarching JCE.[336] In the midst of this body of evidence, the Appeals Chamber observes that, aside from summarizing Karall's and Sokola's testimonies, no express statement in the Trial Judgement indicates that the Trial Chamber relied on the Alleged Utterances in finding Mladić's

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confer with Mladić and appeared to do so in a low voice); T. 16 May 2013 p. 11194 (Judge Orie asked Defence counsel to consult with Mladić and this was done without incident or admonition from the Trial Chamber); T. 12 September 2013 pp. 16601, 16643, 16653 (where Defence counsel consulted with Mladić on several occasions without incident).

[331] *See* Mladić Appeal Brief, paras. 872-874. Arguments related to Mladić's *mens rea* for the Overarching JCE are addressed elsewhere in this Judgement. *See infra* Section III.B.2(b).

[332] *See* T. 12 September 2013 pp. 16589, 16590.

[333] *See* T. 12 September 2013 pp. 16589, 16590.

[334] *See* Decision of 4 June 2013, para. 5.

[335] *See* Decision of 22 August 2013, para. 7.

[336] *See* Trial Judgement, paras. 4613-4688, 5352.

mens rea for the Overarching JCE.[337] Given the *de minimis* relevance and probative value of this evidence in relation to the other evidence relied upon by the Trial Chamber concerning the Overarching JCE, Mladić fails to demonstrate how any error committed by the Trial Chamber's reliance on the Alleged Utterances would have impacted findings in the Trial Judgement.

104. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error warranting appellate intervention in relation to the Alleged Utterances.

(c) Conclusion

105. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.B of Mladić's appeal.

5. Alleged Errors in Permitting and Failing to Remedy Disclosure Violations (Ground 8.D)

106. Mladić submits that the Trial Chamber failed to provide an adequate remedy for the Prosecution's disclosure violations, putting him at an unfair disadvantage and hampering his ability to prepare his defence.[338] Specifically, he challenges the Trial Chamber's refusal to grant sufficient additional time to the Defence before the start of the trial to review materials that the Prosecution had: (i) belatedly disclosed; and (ii) provided through Electronic Disclosure Suite ("EDS") procedures without metadata.[339] The Appeals Chamber will address these arguments in turn.

107. Before doing so, the Appeals Chamber recalls that Article 21(4)(b) of the ICTY Statute provides that the accused shall have adequate time and facilities for the preparation of his defence. Nevertheless, trial chambers have considerable discretion in relation to the management of the proceedings before them.[340] Decisions concerning disclosure violations as well as related remedies concern the general conduct of trial proceedings and therefore fall within the discretion of the trial chamber.[341] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that

[337] *See* Trial Judgement, paras. 4614, 4685-4688, 5352.
[338] *See* Mladić Notice of Appeal, para. 86, p. 30; Mladić Appeal Brief, paras. 877-880, 908; Mladić Reply Brief, para. 125.
[339] Mladić Appeal Brief, paras. 879, 880. *See also* Mladić Reply Brief, para. 125.
[340] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 72, 330; *Prlić et al.* Appeal Judgement, para. 26; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14.
[341] *See, e.g.*, *Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al.* Appeal Judgement, para. 431; *Ndindiliyimana et al.* Appeal Judgement, para. 22; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

party.[342] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[343]

(a) Alleged Errors Related to Belatedly Disclosed Materials

108. The presentation of Prosecution evidence was originally set to commence on 29 May 2012.[344] On 25 April 2012, the Prosecution provided notice that, due to an upload error, a substantial part of materials supposedly disclosed on 11 November 2011, notably the fifth batch ("Batch 5"), had not been disclosed.[345] On 11 May 2012, the Prosecution informed the Defence that portions of batch 4-c of a 3 October 2011 disclosure ("Batch 4-c") had, for technical reasons, also not been disclosed.[346] On 14 May 2012, Mladić filed a motion requesting, *inter alia*, the adjournment of the commencement of the trial for six months.[347] Noting "the Prosecution's significant disclosure errors", on 17 May 2012, the Trial Chamber suspended the start of the presentation of evidence.[348] In a decision issued on 24 May 2012, the Trial Chamber assessed the impact of the Prosecution's disclosure violations regarding Batch 4-c and Batch 5[349] and found that the appropriate remedy was a limited postponement of the presentation of the Prosecution's

[342] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 85; *Nyiramasuhuko et al*. Appeal Judgement, para. 431 and references cited therein.
[343] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 85; *Prlić et al*. Appeal Judgement, para. 26; *Ndahimana* Appeal Judgement, para. 14; Appeal Decision on Adjudicated Facts, para. 9; *Lukić and Lukić* Appeal Judgement, para. 17.
[344] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Scheduling Order, 15 February 2012 (public with confidential annex), p. 7.
[345] *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012 (confidential) ("Eighth Prosecution Pre-Trial Report"), para. 6, Annex A, RP. 39041; T. 2 May 2012 pp. 404-410 (closed session).
[346] *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution's Submission of Informal Correspondence, 16 May 2012, Annex A, RP. 40193; T. 16 May 2012 p. 400. *See also* Eighth Prosecution Pre-Trial Report, Annex A, RP. 39041.
[347] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Urgent Defence Motion to Adjourn and Continue Trial or in the Alternative Bar the Prosecution from Presenting Any Witnesses or Exhibits That Were Untimely Disclosed, 14 May 2012, para. 4, p. 9. The Appeals Chamber notes that Mladić had previously filed several motions notifying the Trial Chamber of the Prosecution's disclosure violations and requesting a postponement of the start of trial. *See*, *e.g.*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Notice Pursuant to Chamber Direction of 29 March 2012, and Urgent Motion to Compel, 10 April 2012 (confidential), p. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Defense Response to the Prosecution "Corrigendum" Seeking Addition of Documents to the Rule 65 *ter* Exhibit List, 12 April 2012, paras. 3, 7-10, p. 4; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Report on Disclosure and Motion to Continue Trial, 1 May 2012 (confidential), paras. 3-9, Annexes A, B. *See also* T. 29 March 2012 pp. 243-253. These requests for adjournments were denied by the Trial Chamber on 3 May 2012. *See Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Decision on Two Defence Requests for Adjournment of the Start of Trial, 3 May 2012, paras. 1, 3.
[348] T. 17 May 2012 p. 524.
[349] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Urgent Defence Motion of 14 May 2012 and Reasons for Decision on Two Defence Requests for Adjournment of the Start of Trial of 3 May 2012, 24 May 2012 ("Decision of 24 May 2012"), paras. 20-26.

evidence until 25 June 2012.[350] When Mladić requested a further remedy for disclosure violations, the Trial Chamber again postponed the start of trial and instructed the Prosecution to first schedule witnesses least impacted by any disclosure failures.[351] The first Prosecution witness did not testify until 9 July 2012.[352]

109. Mladić submits that he did not have a reasonable opportunity to review the belatedly disclosed material, notably documents in Batch 4-c and Batch 5, before the commencement of trial.[353] In this regard, he contends that the limited adjournment provided by the Trial Chamber was insufficient to cure the cumulative effect of the Prosecution's disclosure failings.[354] He also challenges the Trial Chamber's consideration that preparing a defence is not exclusively done during the pre-trial stage.[355]

110. The Prosecution responds that Mladić fails to show that the Trial Chamber abused its discretion or that he suffered prejudice as the Trial Chamber granted him a substantial adjournment at the start of the proceedings and adopted other measures to ensure adequate preparation time.[356]

111. Mladić replies that the Prosecution incorrectly claims that he has failed to identify any unfairness and unreasonableness in the Trial Chamber's determinations.[357]

112. The Appeals Chamber recalls that suspensions due to extensive disclosure in the midst of proceedings are precisely the remedy that may be necessary to ensure an accused's right to a fair trial.[358] In granting limited postponements of the start of trial from 29 May 2012 until the testimony of the first Prosecution witness on 9 July 2012, the Trial Chamber considered that the Prosecution's disclosure violations had an impact on the Defence's preparations for trial and that additional searches and reviews may have been required.[359] It noted, however, that the impact of the disclosure

[350] Decision of 24 May 2012, paras. 26, 27.
[351] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration, 22 June 2012 ("Decision of 22 June 2012"), p. 2; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012 ("Decision of 29 June 2012"), para. 25. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion to Reconsider Decision of 24 May 2012, 31 May 2012, p. 13; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Supplement to Motion to Reconsider Decision of 24 May 2012, 5 June 2012, para. 16.
[352] T. 9 July 2012 pp. 525, 537. *See also* Decision of 22 June 2012, p. 2; Decision of 29 June 2012, para. 25.
[353] Mladić Appeal Brief, paras. 879, 880.
[354] Mladić Reply Brief, para. 125. *See also* Mladić Appeal Brief, para. 879.
[355] Mladić argues that the Trial Chamber's consideration "fundamentally ignores the importance of establishing a case theory and determining a case strategy in light of the evidence served". Mladić Appeal Brief, para. 880.
[356] *See* Prosecution Response Brief, paras. 325, 364-367.
[357] Mladić Reply Brief, para. 125.
[358] *Karadžić* Appeal Judgement, para. 90.
[359] *See* Decision of 24 May 2012, paras. 2, 25-27; Decision of 29 June 2012, paras. 23-25.

violations was limited.[360] The Trial Chamber further considered that: (i) the Prosecution had facilitated Defence preparations beyond its disclosure obligations; (ii) the preparation for a defence is not exclusively done during the pre-trial stage; and (iii) where warranted, the Defence may request another remedy.[361] Mladić's appeal submissions do not substantiate that the Trial Chamber's foregoing considerations and findings were incorrect, unfair, or unreasonable. In particular, the Appeals Chamber considers Mladić's submission challenging the Trial Chamber's statement that "preparing a Defence is not exclusively done during the pre-trial phase"[362] to be without merit. Mladić ignores that, following the impugned statement, the Trial Chamber considered that "Defence team members will continue to support counsel in the weeks and months following the start of the trial, including with the analysis of evidentiary material the Prosecution will present in relation to specific witnesses".[363] The Trial Chamber's position is consistent with jurisprudence stating that preparation time during the trial phase is a factor in determining whether a defence team has been given sufficient overall time to prepare its case.[364] The Appeals Chamber considers, Judge Nyambe dissenting, that, other than disagreeing with the Trial Chamber's determination to grant a limited postponement to the start of trial and presentation of Prosecution evidence, Mladić fails to demonstrate how the Trial Chamber abused its discretion or hampered his ability to prepare his defence.

(b) Alleged Errors Related to Disclosures Through EDS

113. On 9 February 2012, Mladić filed a motion in which he, *inter alia*: (i) argued that documents disclosed by the Prosecution through EDS lacked metadata; and (ii) requested an order to the Prosecution to re-disclose all previously disclosed material with metadata, and that the trial date be vacated "until a more workable date can be established after the [Prosecution] cures its deficient disclosure".[365] On 26 June 2012, the Trial Chamber denied these requests.[366] Mladić

[360] In relation to Batch 5, the Trial Chamber considered that material related to the first Prosecution witnesses was already disclosed in April 2012 and that affected documents were largely available on the ICTY's public website. *See* Decision of 24 May 2012, para. 22. In relation to Batch 4-c, the Trial Chamber considered that the missing documents were disclosed in May 2012, documents relating to the first Prosecution witnesses were released in e-court between April and May 2012, the disclosure failure related mainly to documents in English while the same documents in Bosnian/Croatian/Serbian had been disclosed to the Defence, and many of the documents that had not been disclosed were photographs or maps. It found that the impact of the belated disclosure was therefore limited. *See* Decision of 24 May 2012, para. 23.
[361] *See* Decision of 24 May 2012, para. 25; Decision of 29 June 2012, paras. 23, 24. *See also* Prosecution Response Brief, para. 365.
[362] *See* Mladić Appeal Brief, para. 880.
[363] Decision of 24 May 2012, para. 25. *See also* Decision of 29 June 2012, para. 23.
[364] *See Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.5, Decision on Radovan Karadžić's Appeal of the Decision on Commencement of Trial, 13 October 2009, para. 24.
[365] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Amended Defense Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations, 9 February 2012 (public

appealed this decision on 21 August 2012,[367] and the ICTY Appeals Chamber denied his appeal on 28 November 2013.[368]

114. Mladić submits that the Trial Chamber erroneously refused to grant him additional time to process documents the Prosecution provided to him through EDS without metadata.[369]

115. The Prosecution responds that the ICTY Appeals Chamber already addressed this matter in an interlocutory appeal decision and that Mladić's submissions amount to a request for reconsideration without satisfying the requirements for reconsideration and that he does not demonstrate unfairness.[370]

116. The Appeals Chamber observes that the ICTY Appeals Chamber already considered and rejected Mladić's argument that the Trial Chamber erred in not granting him additional time because of the lack of metadata.[371] Specifically, in its Decision of 28 November 2013, the ICTY Appeals Chamber considered that the Trial Chamber had addressed the difficulties caused by the missing metadata, and found that the unresolved metadata issue "amounted only to an 'inconvenience'" for the Defence rather than a significant burden, and that, therefore, no additional time was warranted.[372] According to the ICTY Appeals Chamber, the Trial Chamber's denial of additional time to process documents without metadata was not unreasonable.[373] Given that the ICTY Appeals Chamber already ruled on this matter, Mladić's submissions on appeal amount to a request for reconsideration.

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with confidential annexes), paras. 9-11, p. 5. *See also*, *e.g.*, T. 23 February 2012 pp. 200-202; T. 29 March 2012 pp. 263-266.

[366] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 26 June 2012 ("Decision of 26 June 2012"), para. 14. The Trial Chamber specifically determined that: (i) Mladić had not shown that the Prosecution was not in compliance with its disclosure obligations; (ii) there was no need to order his requested relief in the interests of justice; and (iii) the Prosecution should continue to assist the Defence in accessing and searching the EDS. *See* Decision of 26 June 2012, paras. 10-13.

[367] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Defense Interlocutory Appeal Brief Against the Trial Chamber Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 21 August 2012, paras. 1, 21-37 (wherein Mladić argued that the Trial Chamber erred in not ordering that metadata be included with all materials disclosed through the EDS, and in not granting him additional time). *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 3 July 2012; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 13 August 2012.

[368] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, 28 November 2013 ("Decision of 28 November 2013"), paras. 45, 46.

[369] Mladić Appeal Brief, para. 879.

[370] *See* Prosecution Response Brief, paras. 325, 368, 369.

[371] Decision of 28 November 2013, paras. 39-46.

[372] Decision of 28 November 2013, paras. 41, 42.

[373] Decision of 28 November 2013, paras. 43, 44.

117. The Appeals Chamber recalls that it ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions.[374] The only exception to this principle is that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[375] The Appeals Chamber observes that Mladić fails to present any argument to demonstrate a clear error of reasoning in the ICTY Appeals Chamber's decision or show that reconsideration of the Decision of 28 November 2013 is necessary to prevent an injustice. Consequently, the Appeals Chamber declines to reconsider the Decision of 28 November 2013.

118. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber committed a discernible error in not granting him further time to review materials that the Prosecution had belatedly disclosed or provided through EDS procedures without metadata. Similarly, he does not show that the Trial Chamber's refusal to do so put him at a disadvantage *vis-à-vis* the Prosecution.

(c) Conclusion

119. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 8.D of Mladić's appeal.

[374] *See*, *e.g.*, Decision of 22 May 2018, nn. 15, 16; *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 202.
[375] *See*, *e.g.*, *Nyiramasuhuko et al*. Appeal Judgement, paras. 56, 127; *Naletilić and Martinović* Decision of 7 July 2005, para. 20; *Kajelijeli* Appeal Judgement, para. 203.

B. Alleged Errors Related to the Overarching JCE (Ground 3)

120. The Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[376] It concluded that members of the Overarching JCE included Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Nikola Koljević, Bogdan Subotić, Momčilo Mandić, Mićo Stanišić, and Mladić.[377] The Trial Chamber found that members of the Overarching JCE used units from the VRS and the Ministry of Interior of *Republika Srpska* ("MUP"), as well as paramilitary formations, regional and municipal authorities, and territorial defence units subordinated to or working closely with the VRS and the MUP, as "tools to commit the crimes in the Municipalities" in furtherance of the joint criminal enterprise.[378]

121. The Trial Chamber further found that Mladić, as Commander of the VRS Main Staff from 12 May 1992 until at least 8 November 1996,[379] significantly contributed to the Overarching JCE through his acts and omissions.[380] The Trial Chamber also found that Mladić knew crimes were committed against non-Serbs in the Municipalities, and that, through his statements and conduct, by 12 May 1992 at the latest, he shared the intent to achieve the common objective of the Overarching JCE.[381]

122. Mladić submits that the Trial Chamber erred in finding: (i) the existence of and his membership in the Overarching JCE; and (ii) that he significantly contributed to and shared the intent to further the Overarching JCE.[382] The Appeals Chamber will address these contentions in turn.

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[376] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231. The Trial Chamber found that crimes related to the Overarching JCE were committed in the following municipalities: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, and Vlasenica ("Municipalities"). *See* Trial Judgement, paras. 4218, 4225, 4227, 4229-4231. *See also* Trial Judgement, pp. 176-948.
[377] *See*, *e.g.*, Trial Judgement, paras. 4238, 4610, 4612, 4688, 5188, 5189. *See also*, *e.g.*, Trial Judgement, paras. 3578-3742, 3784-3827.
[378] *See*, *e.g.*, Trial Judgement, paras. 4225-4231, 4239. *See also*, *e.g.*, Trial Judgement, paras. 108-271, 3784-3985.
[379] Trial Judgement, paras. 275, 276, 4383.
[380] *See*, *e.g.*, Trial Judgement, paras. 4611, 4612, 4685. *See also* Trial Judgement, paras. 4241-4610.
[381] Trial Judgement, paras. 4685, 4686, 4688.
[382] *See* Mladić Notice of Appeal, paras. 33-38; Mladić Appeal Brief, paras. 13, 152-335; Mladić Reply Brief, paras. 38-66. *See also* T. 25 August 2020 pp. 41-59; T. 26 August 200 pp. 57-59.

1. Alleged Errors Regarding the Overarching JCE and Mladić's Membership (Ground 3.A)

123. As recalled above, the Trial Chamber concluded that between 1991 and 30 November 1995, the Overarching JCE existed with the common objective to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory[383] and that, by 12 May 1992, Mladić significantly contributed to and shared the intent of the joint criminal enterprise.[384]

124. Mladić submits that the Trial Chamber erred in finding the existence of and his membership in the Overarching JCE by: (i) improperly relying on adjudicated facts to establish the underlying crime base;[385] (ii) according insufficient weight to exculpatory evidence in relation to his participation;[386] and (iii) expanding the scope of the joint criminal enterprise as well as making inconsistent or erroneous findings with respect to his relationship with the Bosnian Serb leadership and his role in the VRS.[387] He contends that, as a consequence of the Trial Chamber's errors, the Appeals Chamber should overturn his convictions in relation to the Overarching JCE, or, in the alternative, reverse findings to the extent of any errors.[388] The Appeals Chamber will consider these arguments in turn.

(a) Reliance on Adjudicated Facts to Establish the Underlying Crimes of the Overarching JCE

125. Mladić submits that, in finding that the Overarching JCE existed, the Trial Chamber erred in its method of using adjudicated facts by: (i) relying solely on adjudicated facts that went to the acts and conduct of his proximate subordinates; and (ii) relying on adjudicated facts that were only corroborated by evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules ("Rule 92 *bis* evidence").[389] He argues that these errors led to a "defective evidentiary approach" in making findings on the crime base for the Overarching JCE.[390] To illustrate the Trial Chamber's erroneous approach, Mladić refers specifically to Scheduled Incidents B.10.2 and B.16.2,[391] and generally to 13 other scheduled incidents of the Indictment and five chapters of the Trial Judgement.[392] Mladić

[383] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[384] *See, e.g.*, Trial Judgement, paras. 4611, 4612, 4685-4688, 5188, 5189.
[385] *See* Mladić Appeal Brief, paras. 118, 156, 158-185, 207. *See also* T. 25 August 2020 p. 46.
[386] *See* Mladić Appeal Brief, paras. 186, 194-202, 208; Mladić Reply Brief, paras. 41, 42.
[387] *See* Mladić Appeal Brief, paras. 203-206.
[388] Mladić Appeal Brief, paras. 184, 185, 209, 210.
[389] Mladić Appeal Brief, paras. 158, 159, 180.
[390] Mladić Appeal Brief, paras. 118, 160, 182.
[391] Mladić Appeal Brief, paras. 161-179.
[392] Mladić Appeal Brief, paras. 160, 182.

submits that, as a result of the Trial Chamber's errors, findings in the Trial Judgement with respect to the existence of the Overarching JCE are invalidated.[393]

126. The Appeals Chamber will address Mladić's contentions of error in turn. Before doing so, the Appeals Chamber recalls that adjudicated facts, within the meaning of Rule 94(B) of the ICTY Rules, are presumptions which, as such, do not require corroboration.[394] Adjudicated facts may relate to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts related to the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible.[395] In this context, trial chambers, after having reviewed the record as a whole, may rely on adjudicated facts to establish the underlying crime base when making findings in support of convictions.[396]

(i) Scheduled Incident B.16.2

127. With respect to Scheduled Incident B.16.2, the Trial Chamber found that:

> [O]n the evening of 30 September 1992, Serb MUP officers from the [Public Security Station ("SJB")] Vlasenica arrived at Sušica camp and, on the order of Mane Đurić [("Đurić")], removed 140 [to] 150 non-Serb detainees in four trips. Serbs wearing military uniforms were also present when the last group of detainees was removed by the MUP officers. The MUP officers killed all the detainees. Considering that Sušica camp comprised only Bosnian-Muslim detainees, the Trial Chamber finds that those killed were Bosnian Muslims.[397]

In making its findings on this event, the Trial Chamber considered Adjudicated Facts 1266 to 1268 as well as the evidence of Witnesses RM-066 and Ewa Tabeau.[398] It further determined that this incident constituted murder as charged under Counts 5 and 6 of the Indictment.[399]

128. Mladić notes that to reach its findings on Scheduled Incident B.16.2, the Trial Chamber relied on Adjudicated Facts 1266 to 1268 and Prosecution evidence.[400] He argues that the Prosecution evidence was insufficient on its own to establish that MUP officers caused the deaths in Scheduled Incident B.16.2.[401] Mladić further contends that he was unable to challenge Adjudicated Facts 1266 to 1268 through cross-examination because the Prosecution's evidence did not

[393] Mladić Appeal Brief, para. 183, *referring to* Trial Judgement, paras. 4216, 4232. *See also* Mladić Appeal Brief, para. 118.
[394] *See Karadžić* Appeal Judgement, para. 452, n. 1189 and references cited therein.
[395] *Karadžić* Appeal Judgement, para. 452, n. 1193; Appeal Decision on Adjudicated Facts, para. 85; *Karemera et al.* Decision of 16 June 2006, paras. 52, 53.
[396] *Karadžić* Appeal Judgement, para. 452, n. 1194 and references cited therein.
[397] Trial Judgement, para. 1773. *See also* Trial Judgement, paras. 3051 (Schedule B (r)), 4190. According to the Trial Chamber, Đurić was Head of SJB Vlasenica as of 20 May 1992. *See, e.g.*, Trial Judgement, paras. 51, 520.
[398] Trial Judgement, paras. 1771-1773.
[399] Trial Judgement, paras. 3051 (Schedule B (r)), 3065.
[400] Mladić Appeal Brief, para. 164.
[401] Mladić Appeal Brief, paras. 164, 165.

corroborate the facts that proved the elements of the crime.[402] Accordingly, Mladić submits that the Trial Chamber erred by relying exclusively on "unchallengeable" adjudicated facts to make its findings with respect to Scheduled Incident B.16.2.[403] Mladić also refers to his submissions in Ground 2 of his appeal that the standard imposed to rebut adjudicated facts is impermissibly high.[404]

129. The Prosecution responds that the Trial Chamber properly considered the adjudicated facts to establish the crime base of the Overarching JCE and that Mladić demonstrates no error in relation to Scheduled Incident B.16.2.[405] It argues that nothing prevented Mladić from bringing countervailing evidence against the adjudicated facts, and [REDACTED].[406]

130. The Appeals Chamber notes that, in reaching its findings on Scheduled Incident B.16.2, the Trial Chamber considered that: (i) according to Adjudicated Fact 1266, on 30 September 1992, a public burial of more than 20 Serb soldiers killed in an ambush by the ABiH was held in Vlasenica town;[407] (ii) according to Adjudicated Fact 1267, during the night, three MUP officers arrived at the Sušica camp with a bus and the MUP officers removed all 140 to 150 inmates in four loads and killed them;[408] and (iii) according to Adjudicated Fact 1268, the massacre was reported to the Vlasenica Crisis Staff members, who took no action except to order the dismantling of the camp and the concealment of its traces.[409]

131. Pursuant to the evidence of primarily Witness RM-066, the Trial Chamber further noted, *inter alia*, that: (i) after concerns about the safety of detainees of Sušica camp were raised with Đurić following the funeral in Vlasenica on 30 September 1992 and it was recommended to him that the detainees be transferred elsewhere until "things calmed down", Đurić "promised to send vehicles to have the detainees transferred";[410] (ii) the same evening, MUP officers from the SJB Vlasenica – including a man nicknamed "Chetnik", a man called Garić, and Pedrag Bastah – came

[402] Mladić Appeal Brief, para. 167.
[403] Mladić Appeal Brief, paras. 165, 168.
[404] *See* Mladić Appeal Brief, paras. 118, 167, 169.
[405] Prosecution Response Brief, paras. 46, 49, 50.
[406] Prosecution Response Brief, paras. 49, 50. [REDACTED]. Prosecution Response Brief, para. 50, nn. 245, 246, *referring to* Mladić Final Trial Brief, paras. 1669, 1671-1674 (confidential).
[407] Trial Judgement, para. 1772, n. 7431. *See also* First Decision on Adjudicated Facts, para. 51(1); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011 ("Prosecution Motion on Adjudicated Facts"), Annex A, pp. 473, 474.
[408] Trial Judgement, para. 1772, nn. 7433, 7435. *See also* First Decision on Adjudicated Facts, para. 51(1); Prosecution Motion on Adjudicated Facts, Annex A, p. 474.
[409] Trial Judgement, para. 1772, n. 7440. *See also* First Decision on Adjudicated Facts, para. 51(1); Prosecution Motion on Adjudicated Facts, Annex A, p. 474.
[410] Trial Judgement, para. 1772, n. 7432, *referring to* Exhibit P182 (confidential), para. 126.

to Sušica camp with an order from Đurić to remove the detainees as soon as possible;[411] (iii) the last group of detainees, consisting mostly of local Muslims from Vlasenica, was loaded onto a small bus that also carried a number of Serbs wearing military and police uniforms, and the bus was escorted by a police car carrying Chetnik, Bastah, and Garić;[412] (iv) after the police officers removed the last group of detainees, a group of soldiers arrived at Sušica camp demanding to know where the Muslims were;[413] and (v) the massacre was reported to the Vlasenica Crisis Staff members, who took no action except to order the dismantling of the camp and the concealment of its traces.[414]

132. Recalling the statement of the law above,[415] the Appeals Chamber considers that it was within the Trial Chamber's discretion to rely on Adjudicated Facts 1267 and 1268 to make findings concerning the removal and killing of Bosnian Muslim detainees by MUP officers and Mladić fails to show any error in this respect. In addition to the adjudicated facts, the Trial Chamber admitted a statement and heard testimony from Witness RM-066, who stated that [REDACTED].[416] The Appeals Chamber further observes that the Trial Chamber considered Witness Tabeau's evidence as well as documentary and forensic evidence regarding missing persons from Vlasenica Municipality.[417] On this basis, Mladić's submission – that the Prosecution evidence the Trial Chamber relied on is insufficient to create a link between the deaths of 140 to 150 detainees and the perpetrators of the killings – is without merit.

133. The Appeals Chamber also rejects Mladić's argument that, since the Prosecution evidence did not corroborate the adjudicated facts, he was prevented from challenging them through cross-examination.[418] In this respect, the Appeals Chamber notes that [REDACTED].[419]

134. The Appeals Chamber has rejected Mladić's submission that the burden imposed to rebut adjudicated facts is impermissibly high or that the Trial Chamber shifted the burden of proof by taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.[420] The Appeals Chamber recalls that taking judicial notice of an adjudicated fact serves only to relieve the Prosecution of its initial burden to produce evidence on the point, and the defence may then put

[411] Trial Judgement, para. 1772, n. 7434, *referring to* Exhibit P182 (confidential), para. 128, T. 18 September 2012 pp. 2528, 2529 (closed session).
[412] Trial Judgement, para. 1772, nn. 7436-7438, *referring to* Exhibits P182 (confidential), paras. 132, 134, P197.
[413] Trial Judgement, para. 1772, n. 7439, *referring to* Exhibit P182 (confidential), para. 133.
[414] Trial Judgement, para. 1772, n. 7441, *referring to* Exhibit P182 (confidential), paras. 135, 136, T. 17 September 2012 pp. 2430, 2431, 2456 (closed session). *See also* Trial Judgement, para. 4191.
[415] *See supra* para. 126.
[416] *See* Exhibit P182 (confidential), paras. 120, 128-136; T. 17 September 2012 pp. 2428-2432, 2455-2457 (closed session); T. 18 September 2012 pp. 2528, 2529 (closed session).
[417] *See* Trial Judgement, para. 1771, n. 7430.
[418] *See* Mladić Appeal Brief, paras. 166, 167, 181.
[419] *See* T. 17 September 2012 pp. 2455-2457 (closed session); T. 18 September 2012 pp. 2528, 2529 (closed session).

the point into question by introducing reliable and credible evidence to the contrary.[421] Nothing prevented Mladić from bringing evidence to refute Adjudicated Facts 1266 to 1268. Moreover, at trial, Mladić did not appear to dispute the facts pertaining to Scheduled Incident B.16.2 or Witness RM-066's evidence in this regard. Rather, relying on Witness RM-066's evidence, Mladić argued that the killing of 140 to 150 detainees was perpetrated by Serb police, who were not under the effective control of the VRS or under his authority, and could not be attributed to him given the lack of *actus reus* or *mens rea*.[422]

135. In light of the foregoing, Mladić fails to demonstrate that the Trial Chamber erred by relying exclusively on "unchallengeable" adjudicated facts to make findings on Scheduled Incident B.16.2.

(ii) Scheduled Incident B.10.2

136. In relation to Scheduled Incident B.10.2, the Trial Chamber found that:

> [O]n 14 June 1992, at least 52 detainees from the oil cisterns near the Rajlovac barracks were forced onto a bus, driven by a Serb named Žuti, who was Jovan Tintor's driver. There were two persons stationed on the bus as guards, and the Trial Chamber understands from Elvir Jahić's evidence, describing them as members of the "Serb army-police forces", that they were members of the VRS military police. The bus was escorted by four vehicles. Žuti stopped the bus near the village of Sokolina, near Srednje, and he and the two military policemen exited the bus. Immediately after, they attacked the bus with automatic weapons, hand grenades, and "zoljas", and the detainees who tried to escape were shot and killed. After the shooting, some detainees were still alive. A few minutes later, one of the vehicles that had escorted the bus, approached. The driver stepped out, entered the bus, and started firing at the bodies and survivors with an automatic rifle. He threw two hand grenades and left. In all, at least 47 of the detainees were killed, 38 of whom were found in a mass grave. Of them, 26 were found in civilian clothes. Based on the evidence of Witness RM-145 […], the Trial Chamber finds that all 52 detainees were Bosnian Muslims.[423]

In making this finding, the Trial Chamber considered Adjudicated Fact 1229, as well as the evidence of Witnesses Elvir Jahić, RM-145, and Tabeau.[424] It further determined that this incident constituted murder as charged under Counts 5 and 6 of the Indictment.[425]

137. Mladić notes that to reach the finding in respect of Scheduled Incident B.10.2, that at least 47 of the 52 detainees were killed by members of the VRS, the Trial Chamber relied on Adjudicated Fact 1229 which "established part of the elemental requirements".[426] Mladić submits

[420] *See supra* Section III.A.2(a)(ii); Mladić Appeal Brief, paras. 118, 167, 169.
[421] *See Karemera et al.* Decision of 16 June 2006, paras. 42, 49; *Karemera et al.* Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17.
[422] *See* Mladić Final Trial Brief, paras. 61, 122, 123, 125, 130, 1669, 1671-1674, nn. 179, 180, 182, 183, 186, 187, 193, 205-207.
[423] Trial Judgement, para. 974. *See also* Trial Judgement, para. 3051 (Schedule B (i)).
[424] Trial Judgement, paras. 969-974.
[425] Trial Judgement, paras. 3051 (Schedule B (i)), 3065.
[426] Mladić Appeal Brief, para. 171.

that, in respect of this scheduled incident, the Trial Chamber also received the evidence of Witnesses Jahić and RM-145, which he could not challenge because it was admitted pursuant to Rule 92 *bis* of the ICTY Rules.[427] He also reiterates that the burden to rebut adjudicated facts is "impermissibly high".[428] Accordingly, Mladić submits that the Trial Chamber erred by relying on "unchallengeable" adjudicated facts to establish the elements of the crime.[429]

138. The Prosecution responds that the Trial Chamber properly considered the adjudicated facts and Rule 92 *bis* evidence to establish the crime base of the Overarching JCE and that Mladić demonstrates no error in relation to Scheduled Incident B.10.2.[430] The Prosecution submits that it was within the Trial Chamber's discretion to take judicial notice of adjudicated facts that relate to the acts and conduct of an accused's subordinates, proximate or otherwise, and to rely on adjudicated facts alone or in combination with Rule 92 *bis* evidence in making crime-based incident findings.[431] The Prosecution further argues that, in any event, Mladić falsely asserts that he could not challenge or cross-examine evidence supporting Adjudicated Fact 1229, as he cross-examined Witness RM-145, whose evidence was entered through Rule 92 *ter* of the ICTY Rules, on events pertinent to the relevant adjudicated fact.[432]

139. With respect to Mladić's submission that Adjudicated Fact 1229 was "unchallengeable" as he was not able to cross-examine the Rule 92 *bis* evidence led in support of it, the Appeals Chamber, recalling the law on the use of adjudicated facts, considers that it was within the Trial Chamber's discretion to rely on Adjudicated Fact 1229 to find that at least 47 detainees from oil cisterns near Rajlovac barracks in Sokolina were killed by members of the VRS police and Mladić fails to show any error in this respect. The Appeals Chamber further considers that Mladić's argument fails to recognize that adjudicated facts admitted under Rule 94(B) of the ICTY Rules are not the equivalent of untested evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules.[433] Furthermore, the Appeals Chamber presumes that this argument is in reference to the evidence of

[427] Mladić Appeal Brief, paras. 171, 172. In this regard, Mladić contends that the Trial Chamber abused its discretion by relying solely on untested written Rule 92 *bis* evidence to corroborate Adjudicated Fact 1229 and to establish the conduct of his proximate subordinates. *See* Mladić Appeal Brief, paras. 174-180, *referring to*, *inter alia*, *Galić* Decision of 7 June 2002, paras. 14-16.
[428] Mladić Appeal Brief, paras. 170, 172, 173, 181.
[429] Mladić Appeal Brief, para. 173.
[430] Prosecution Response Brief, paras. 46, 51, 52.
[431] Prosecution Response Brief, paras. 47, 48, 52. The Prosecution asserts that, in any event, the perpetrators at issue were not Mladić's proximate subordinates. Prosecution Response Brief, para. 47.
[432] Prosecution Response Brief, para. 52.
[433] *See Karadžić* Appeal Judgement, para. 452, n. 1189 and references cited therein. Taking judicial notice of adjudicated facts does not render such facts "unchallengeable" and a trial chamber may reasonably rely on adjudicated facts as proof of facts related to, *inter alia*, the conduct of physical perpetrators of crimes for which an accused is alleged to be responsible. *See Karadžić* Appeal Judgement, para. 452, n. 1193; Appeal Decision on Adjudicated Facts, para. 85; *Karemera et al*. Decision of 16 June 2006, paras. 52, 53.

Witness Jahić, whose statement was admitted pursuant to Rule 92 *bis* of the ICTY Rules.[434] However, this submission ignores the fact that Mladić cross-examined Witness RM-145, who also gave supporting evidence about the attack on 14 June 1992 and whose evidence the Trial Chamber considered when making its findings.[435] Additionally, a review of the Mladić Final Trial Brief reflects that Mladić did not dispute the occurrence of the events of 14 June 1992 or the credibility of Witness RM-145's evidence.[436] Rather, Mladić simply argued at trial that the physical perpetrators of this event were not under the VRS's or his command and control.[437]

140. Furthermore, the Appeals Chamber recalls that it has rejected Mladić's submissions that the burden imposed to rebut adjudicated facts is impermissibly high and that the Trial Chamber shifted the burden of proof by taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates.[438] The Appeals Chamber reiterates that taking judicial notice of an adjudicated fact serves only to relieve the Prosecution of its initial burden of production, and the defence may introduce reliable and credible evidence to the contrary.[439] As with Scheduled Incident B.16.2, nothing prevented Mladić from bringing evidence to refute Adjudicated Fact 1229 with respect to Scheduled Incident B.10.2. There is no indication that he presented such evidence.

141. Given the foregoing, Mladić fails to demonstrate that the Trial Chamber erred by relying on an "unchallengeable" adjudicated fact in making findings on Scheduled Incident B.10.2.

(iii) Other Scheduled Incidents

142. Mladić submits that, similar to Scheduled Incidents B.10.2 and B.16.2, the Trial Chamber also took a "defective evidentiary approach" in relation to 13 other scheduled incidents and five chapters of the Trial Judgement.[440] According to Mladić, these comprise Scheduled Incidents A.4.4, A.6.4, A.6.6, A.6.7, A.7.2, A.7.4, A.7.5, B.1.1, B.1.2, B.10.1, B.13.3, B.13.4, and C.6.1, as well as Chapters 4.2.4, 4.3.6, 4.5.5, 4.5.6, and 4.8.7 of the Trial Judgement.[441] He contends that this approach occurred systematically in establishing the crime base for the Overarching JCE.[442]

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[434] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution's Twenty-Eighth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 2 December 2013, p. 8.
[435] T. 26 September 2012 pp. 3068, 3080-3087.
[436] Mladić Final Trial Brief, paras. 1372-1377.
[437] Mladić Final Trial Brief, paras. 1372, 1377.
[438] *See supra* Section III.A.2(a); Mladić Appeal Brief, paras. 118, 167, 169.
[439] *See Karemera et al.* Decision of 16 June 2006, paras. 42, 49; *Karemera et al.* Decision of 29 May 2009, paras. 13, 14; *D. Milošević* Decision of 26 June 2007, paras. 16, 17.
[440] Mladić Appeal Brief, paras. 160, 182.
[441] Mladić Appeal Brief, para. 160.
[442] Mladić Appeal Brief, para. 182.

143. The Prosecution responds that Mladić's challenge to these 13 other incidents, amounting to a single sentence in his appellant's brief, fails to identify any error and should be summarily dismissed.[443]

144. The Appeals Chamber observes that, in this respect, Mladić merely enumerates scheduled incidents of the Indictment and chapters of the Trial Judgement without making any attempt to substantiate his allegation of a "defective evidentiary approach".[444] Consequently, Mladić fails to satisfy his burden on appeal[445] and his submissions in this regard are dismissed.

(iv) Conclusion

145. In light of the foregoing considerations, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić has failed to demonstrate that the Trial Chamber committed any error in its method of relying on adjudicated facts when making findings on the underlying crimes of the Overarching JCE.

(b) Assessment of Exculpatory Evidence of Mladić's Membership in the Overarching JCE

146. Mladić submits that the Trial Chamber erred in finding that he was a member of the Overarching JCE by disregarding or giving insufficient weight to direct and exculpatory evidence that he acted in opposition to the common criminal objective of the joint criminal enterprise.[446] He points to evidence of his "positive attitude and behaviour" towards Bosnian Muslim and Bosnian Croat civilians,[447] including: (i) evidence of his care for non-Serb civilians during the conflict,[448] as well as evidence that they remained in their municipalities during the conflict[449] and were given a choice to leave or remain in their villages;[450] (ii) evidence that he reported concerns to Karadžić and the Minister of the Interior about the commission of crimes by "MUP forces" against non-Serbs, and that he called for affirmative action to be taken;[451] and (iii) excerpts from his military notebooks containing direct evidence of constraints he experienced in the Municipalities and the

[443] Prosecution Response Brief, para. 48.
[444] Mladić Appeal Brief, para. 160, nn. 229-238, 240, 241, 243-248.
[445] *See supra* Section II.
[446] *See* Mladić Appeal Brief, paras. 136, 186, 197-202, 208. *See also* Mladić Reply Brief, para. 42.
[447] Mladić Appeal Brief, para. 198.
[448] Mladić Appeal Brief, paras. 198, 200, nn. 280, 289, 290.
[449] Mladić Appeal Brief, paras. 198, 199, nn. 281, 282, 284, 285.
[450] Mladić Appeal Brief, para. 200, nn. 287, 288, 291.
[451] Mladić Appeal Brief, para. 199, n. 286.

protection he intended to provide to non-Serbs.[452] The Appeals Chamber will consider these arguments in turn.

(i) Evidence of Care for Non-Serb Civilians

147. Mladić submits that the Trial Chamber failed to give sufficient or any weight to evidence of his positive attitude and behaviour toward Bosnian Muslim and Bosnian Croat civilians through his "concerted efforts to take care of civilians" and the measures employed to provide security for Bosnian Muslim villagers during the conflict.[453] In support, he points to minutes of a Pale Municipal Assembly meeting,[454] as well as the evidence of Witnesses Branko Basara,[455] Safet Gagula,[456] RM-802,[457] and Sveto Veselinović.[458]

148. Mladić further submits that the Trial Chamber did not include in its reasoning the evidence of Witnesses Slavko Mijanović,[459] Mile Ujić,[460] and Elvedin Pašić[461] – stating that non-Serbs remained in their municipalities during the conflict.[462] He also contends that the Trial Chamber erroneously found Witness Vinko Nikolić's evidence, that over 8,000 Bosnian Muslims and Bosnian Croats continued to live in Sanski Most Municipality, unreliable and did not give sufficient weight to the witness's clarification during cross-examination that over 4,400 Bosnian Muslims remained.[463] Mladić argues that the Trial Chamber also failed to provide analysis of the probative value of evidence from Witness RM-009 that Bosnian Muslims "left their villages freely",[464] and from Witness Dragiša Masal that Mladić made concerted efforts to give civilians the choice of remaining or leaving municipalities, and to allow unarmed individuals to farm the land and receive

[452] Mladić Appeal Brief, para. 202.
[453] Mladić Appeal Brief, paras. 198, 200.
[454] Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, para. 1014, Exhibit P3972.
[455] Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, paras. 1619, 1692, Exhibit D1031, para. 48.
[456] Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, para. 1753, Exhibit P2525, p. 5.
[457] Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64.
[458] Mladić Appeal Brief, para. 200, n. 290, *referring to* Exhibit D770, paras. 16, 17.
[459] Mladić Appeal Brief, para. 198, n. 281, *referring to*, *inter alia*, Exhibit D799.
[460] Mladić Appeal Brief, para. 198, n. 281, *referring to*, *inter alia*, Exhibit D691.
[461] Mladić Appeal Brief, para. 198, n. 281, *referring to*, *inter alia*, T. 9 July 2012 pp. 555, 556. *See also* Mladić Appeal Brief, para. 198, nn. 282, 283, *referring to*, *inter alia*, Trial Judgement, paras. 948, 952, 960.
[462] Mladić Appeal Brief, para. 198.
[463] Mladić Appeal Brief, para. 199, nn. 284, 285, *referring to* Exhibit D892, T. 5 February 2015 pp. 31279, 31280, Trial Judgement, paras. 1716, 1720.
[464] Mladić Appeal Brief, para. 200, n. 288, *referring to* Exhibit P843 (under seal), para. 61. *See also* Mladić Appeal Brief, para. 200, n. 287, *referring to* Exhibit P854, p. 5.

humanitarian aid.[465] According to Mladić, the Trial Chamber did not take this evidence into account when making its findings.[466]

149. The Prosecution responds that Mladić did not act to protect non-Serbs, that he repeats arguments that failed at trial without showing any error, and that the Trial Chamber expressly considered the evidence that he points to in his appellant's brief.[467] Regarding the alleged voluntary departure of non-Serbs, the Prosecution responds that Mladić ignores the Trial Chamber's express rejection of this argument at trial, and that those who requested to leave never returned out of fear or because their homes were torched.[468] The Prosecution further submits that the Trial Chamber reasonably concluded that Witness Vinko Nikolić's evidence was not sufficiently reliable to rebut the adjudicated fact that almost all Bosnian Muslims had left Sanski Most by the end of 1992 because the witness admitted that his estimates were without basis.[469] According to the Prosecution, Mladić's mere assertions that the Trial Chamber failed to give sufficient weight to pieces of supposedly "exculpatory evidence" warrant summary dismissal.[470]

150. Mladić replies that the Prosecution does not directly engage with his submissions and fails to undermine his arguments that the Trial Chamber failed to afford certain evidence sufficient weight.[471]

151. Regarding Mladić's claim that he made concerted efforts to take care of non-Serb civilians,[472] the Appeals Chamber observes that the Trial Chamber expressly considered evidence to which Mladić refers on appeal. In particular, the Trial Chamber noted: (i) the relevant Pale Municipal Assembly meeting minutes that the Pale SJB were to guarantee the safety of non-Serb civilians;[473] (ii) Witness Basara's evidence that members of his brigade in the VRS protected civilians in Muslim villages in Sanski Most Municipality;[474] (iii) Witness Gagula's statement that, while Serb representatives in Knežina, Sokolac Municipality indicated that they would protect Muslim civilians, many Muslims left the village in the second half of May 1992 and significantly

[465] Mladić Appeal Brief, para. 200, n. 291, *referring to* Exhibit D942, para. 15.
[466] Mladić Appeal Brief, para. 200, n. 292, *referring to* Trial Judgement, paras. 960, 1720.
[467] *See* Prosecution Response Brief, paras. 54-58. *See also* T. 25 August 2020 pp. 96, 97.
[468] Prosecution Response Brief, para. 60.
[469] Prosecution Response Brief, para. 58, n. 282, *referring to*, *inter alia*, Trial Judgement, para. 1720.
[470] Prosecution Response Brief, paras. 53, 54. *See also* T. 25 August 2020 pp. 96, 97.
[471] *See* Mladić Reply Brief, paras. 40-42.
[472] *See* Mladić Appeal Brief, paras. 198, 200.
[473] Trial Judgement, paras. 1007, 1014, *referring to* Exhibit P3972. *See also* Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, para. 1014, Exhibit P3972.
[474] Trial Judgement, paras. 1617, 1619, 1692, *referring to*, *inter alia*, Exhibit D1031, paras. 36-38, 48, 49, T. 21 April 2015 pp. 34494-34496, T. 22 April 2015 p. 34562. *See also* Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, paras. 1619, 1692, Exhibit D1031, para. 48.

toward the end of June 1992;[475] (iv) Witness RM-802's evidence that Bosnian Serb political authorities made preparations to take care of the Muslim civilian population by lining up buses to transport the women, children, and the elderly out of Večići, Kotor Varoš Municipality;[476] and (v) Witness Veselinović's evidence regarding the treatment of refugees and Bosnian Muslims in Rogatica Municipality.[477]

152. The Trial Chamber nevertheless found that regarding: (i) Pale Municipality, between late June and early July 1992, over 2,000 Bosnian Muslim and Bosnian Croats involuntarily left in convoys escorted by the Pale SJB;[478] (ii) Sanski Most Municipality, Witness Basara's evidence was not credible and unpersuasive in light of a "large amount of reliable evidence" showing that the VRS was involved in transfers and evacuations, and that it carried out attacks and shelling campaigns to "mop up" predominantly Muslim villages and hamlets;[479] (iii) Sokolac Municipality, Bosnian Muslims in, *inter alia*, Knežina fled their homes from 12 May 1992 onwards due to perceived threats of violence and the lack of protection from municipal authorities;[480] (iv) Kotor Varoš Municipality, between June and November 1992, large parts of the non-Serb population were involuntarily moved out, including in Večići, in convoys by, *inter alia*, members of the VRS, MUP, and Kotor Varoš Crisis Staff;[481] and (v) Rogatica Municipality, thousands of Muslims involuntarily left starting in May 1992 as a result of fear generated by threats and violence, and that the perpetrators of these displacements were members of the VRS.[482]

153. The Appeals Chamber further observes that the excerpt of Witness Veselinović's evidence, to which Mladić points, concerned efforts taken by Serb municipal authorities to protect exclusively

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[475] Trial Judgement, para. 1753, *referring to* Exhibit P2525, pp. 2, 3, 5. *See* Mladić Appeal Brief, para. 198, n. 280, *referring to*, *inter alia*, Trial Judgement, para. 1753, Exhibit P2525, p. 5.
[476] *See* Trial Judgement, paras. 948, 958, *referring to*, *inter alia*, Exhibit P439 (under seal), paras. 58-60, 64, T. 5 November 2012 p. 4532 (private session), T. 6 November 2012 pp. 4615-4622 (private session), 4627 (private session). *See also* Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64. The Trial Chamber considered that, according to Witness RM-802's evidence, of the 120,000 non-Serbs who walked past a VRS command post, "some were physically forced to leave", "others registered to leave because conditions were unbearable for them to stay", "some were forcibly removed from their houses", and others "were pressured into leaving by hearing only Serb songs on the radio, having only Serb stamps on documents, and managers being dismissed and sent to do cleaning jobs". *See* Trial Judgement, para. 959, *referring to* Exhibit P439 (under seal), para. 32.
[477] Trial Judgement, para. 1560, n. 6605, *referring to* Exhibit D770, para. 16. *See also* Mladić Appeal Brief, para. 200, n. 290, *referring to* Exhibit D770, paras. 16, 17. The Appeals Chamber notes that paragraph 17 of Exhibit D770 concerns the role of the Serb Democratic Party during the war rather than assistance to refugees.
[478] Trial Judgement, para. 1016. *See also* Trial Judgement, paras. 1004-1015.
[479] Trial Judgement, paras. 1625, 1723, n. 7288. *See also*, *e.g.*, Trial Judgement, paras. 1691-1717.
[480] Trial Judgement, para. 1754. *See also* Trial Judgement, paras. 1752, 1753.
[481] Trial Judgement, paras. 959, 960, 3122(g), 3147. *See also*, *e.g.*, Trial Judgement, paras. 948-959. The Appeals Chamber considers that Mladić's selective use of Exhibit P439 ignores aspects substantiating the Trial Chamber's finding that non-Serb civilians in Kotor Varoš Municipality were expelled by Serb forces. *See* Mladić Appeal Brief, para. 200, n. 289, *referring to* Exhibit P439 (under seal), para. 64. As noted above, Exhibit P439, Witness RM-802's statement, provided that non-Serbs were physically forced or felt pressured to leave due to the unbearable conditions. *See* Trial Judgement, para. 959, *referring to* Exhibit P439 (under seal), para. 32.

Serb refugees,[483] rather than non-Serbs. Having reviewed the foregoing evidence cited by Mladić, the Appeals Chamber notes that none relates to his personal actions or demonstrates his efforts to provide care or security for Bosnian Muslim and Bosnian Croat civilians. The Appeals Chamber therefore finds that Mladić's cursory submissions fail to substantiate his claim that the Trial Chamber erred by giving insufficient weight to evidence of his care for non-Serb civilians.

154. The Appeals Chamber now turns to Mladić's arguments that the Trial Chamber did not include in its reasoning evidence that non-Serbs remained in their municipalities during the conflict and that he made concerted efforts to give civilians the choice to remain or leave.[484] Mladić submits that the Trial Chamber failed to include Exhibit D799, Witness Mijanović's statement, in its analysis on findings related to Ilidža Municipality.[485] A review of the Trial Judgement indicates that the Trial Chamber expressly referred to Exhibit D799 and summarized Witness Mijanović's evidence that, *inter alia*, the Serb authorities in Ilidža Municipality did not expel non-Serbs.[486] The Trial Chamber found that, aside from one specific incident,[487] it did not receive any evidence "indicating that residents [in Ilidža] were forcibly displaced".[488] In view of this finding, the Appeals Chamber considers that there was no need for the Trial Chamber to discuss Exhibit D799 further and Mladić does not show any error in this respect.

155. Regarding the Trial Chamber's alleged failure to discuss in its reasoning Exhibit D691, Witness Ujić's statement that non-Serbs remained in Rogatica Municipality during the conflict,[489] the Appeals Chamber observes that the paragraphs of the Trial Judgement that Mladić challenges in this respect do not concern Rogatica, but other municipalities, namely Ilidža and Kotor Varoš.[490] Mladić identifies no reason why the Trial Chamber should have considered this evidence when addressing crimes in other municipalities and fails to demonstrate any error in this respect. The

[482] *See*, *e.g.*, Trial Judgement, paras. 1554-1585, 3122(k), 3151, 3183.
[483] A review of the relevant portions of Exhibit D770 reveals, *inter alia*, that: (i) in May 1992, due to growing insecurity in Rogatica Municipality and shooting in the streets, both Serbs and Muslims left town and moved into suburbs and further away; and (ii) Serb municipal authorities organized the transport of Serb families to Serbia to keep them safe, received Serb refugees arriving from other areas, and accommodated the refugees in abandoned Muslim and Serb homes in a controlled and organized manner. *See* Exhibit D770, paras. 15, 16.
[484] Mladić Appeal Brief, paras. 198-200.
[485] *See* Mladić Appeal Brief, para. 198, nn. 281-283, *referring to*, *inter alia*, Exhibit D799, para. 6, Trial Judgement, paras. 746, 748.
[486] Trial Judgement, para. 746, *referring to*, *inter alia*, Exhibit D799, para. 6.
[487] The Trial Chamber ultimately found, based on the evidence of Witness RM-104, that one Bosnian Muslim family left Ilidža Municipality to Sarajevo after a member of the "White Eagles" threatened the family members' lives if they were to refuse to comply with the ultimatum to leave the municipality or to take up arms and become loyal to the Serb authorities. The Trial Chamber found that this one incident in Ilidža Municipality constituted forcible transfer as charged in Count 8 of the Indictment. *See* Trial Judgement, paras. 747-749, 3122(d), 3144, 3183.
[488] Trial Judgement, para. 748.
[489] *See* Mladić Appeal Brief, para. 198, nn. 281, 283, *referring to*, *inter alia*, Exhibit D691, para. 35.
[490] *See* Mladić Appeal Brief, para. 198, n. 283, *referring to* Trial Judgement, paras. 748 (Ilidža Municipality), 960 (Kotor Varoš Municipality).

Appeals Chamber notes that, in any event, the Trial Chamber expressly referred to Witness Ujić's evidence, including Exhibit D691, in relation to events in Rogatica Municipality.[491]

156. The Appeals Chamber is also not convinced by Mladić's submission that the Trial Chamber erred by not including in its analysis Witness Pašić's testimony that non-Serbs remained in the Kotor Varoš Municipality during the conflict.[492] The Appeals Chamber observes that the Trial Chamber explicitly considered relevant portions of Witness Pašić's testimony regarding the flight of 50 to 70 Bosnian Muslims from the village of Hrvaćani in mid-1992 and the fate of those who remained.[493] The Trial Chamber found, based on the totality of evidence, that between June and November 1992, large parts of the non-Serb population in Kotor Varoš Municipality were forcibly displaced by, *inter alios*, members of the VRS, MUP, and Kotor Varoš Crisis Staff.[494] In doing so, the Trial Chamber explicitly recalled Witness Pašić's testimony that a "group of 50 to 70 Muslims" encountered Serb soldiers, who told the group "there was nothing left for them in Hrvaćani and that they should go to Turkey".[495] Mladić simply isolates portions of Witness Pašić's testimony that support his position and ignores the rest of the witness's evidence and the Trial Chamber's findings regarding events in Kotor Varoš Municipality. His arguments therefore fail to establish any error in the Trial Chamber's assessment of Witness Pašić's evidence or in its finding that non-Serbs involuntarily left the municipality.

157. As to Mladić's contention regarding Witness Vinko Nikolić, the Appeals Chamber is not convinced that the Trial Chamber gave insufficient weight to the witness's "clarification" made during cross-examination.[496] In summarizing the evidence concerning Sanski Most Municipality, the Trial Chamber stated that Witness Vinko Nikolić estimated that more than 8,000 Muslims and Croats continued to live in the municipality during the war.[497] During the witness's cross-examination, this number was challenged by the Prosecution, who stated that by February 1995, the

[491] *See*, *e.g.*, Trial Judgement, para. 1555, *referring to* Exhibit D691, para. 35, T. 16 October 2014 pp. 26895, 26896.
[492] *See* Mladić Appeal Brief, para. 198, nn. 281-283, *referring to*, *inter alia*, T. 9 July 2012 pp. 555, 556, Trial Judgement, paras. 948, 952, 960.
[493] The Trial Chamber noted that, according to Witness Pašić: (i) six Bosnian Muslim families remained in Hrvaćani when his family fled in mid-1992; (ii) after leaving Hrvaćani, the witness and his family, along with 50 to 70 people, mainly civilians, returned to Hrvaćani en route to another location and encountered Serb soldiers who called them "*balijas*", and who told the group that there was nothing left for them in Hrvaćani and that they should go to Turkey; and (iii) in their passage through Hrvaćani, "the village was destroyed, houses had been stripped, animals killed, and the elderly who had remained were either shot or burnt". *See* Trial Judgement, para. 952, *referring to* T. 9 July 2012 pp. 550, 551, 553, 555, 556. *See also* Trial Judgement, para. 949.
[494] Trial Judgement, paras. 960, 3122(g), 3147, 3183. *See also* Trial Judgement, paras. 947-959.
[495] Trial Judgement, para. 960.
[496] *See* Mladić Appeal Brief, para. 199, n. 285, *referring to* T. 5 February 2015 pp. 31279, 31280, Trial Judgement, paras. 1716, 1720.
[497] Trial Judgement, para. 1716, n. 7270, *referring to* Exhibit D892, para. 12, T. 5 February 2015 pp. 31279, 31280.

Banja Luka State Security Service estimated around 4,400 non-Serbs remaining in Sanski Most.[498] When asked to clarify his estimate of 8,000, Witness Vinko Nikolić stated that the number included "Muslims and Croats", that it was a "[f]ree estimate", and that he "spontaneously came up with that number".[499] The Appeals Chamber notes that, contrary to Mladić's submission,[500] at no point during the cross-examination did the witness "clarify" his estimate. The Trial Chamber explicitly considered that the witness's estimate of 8,000 had no basis, and that the witness could not justify this figure in light of evidence indicating a "significantly lower" number.[501] It therefore considered the witness's evidence insufficiently reliable.[502] In the view of the Appeals Chamber, Mladić fails to show any error in the Trial Chamber's assessment of Witness Vinko Nikolić's evidence.

158. Turning to Mladić's contention that the Trial Chamber gave insufficient weight to evidence that Bosnian Muslims left their villages freely and submitted requests to return, the Appeals Chamber notes that he relies on Exhibit P843, a statement from Witness RM-009, and Exhibit P854, a December 1992 report from the Kotor Varoš Light Brigade.[503] In Exhibit P843, Witness RM-009 stated that in mid-1992 at least 50 buses full of Bosnian Muslims and Bosnian Croats left Kotor Varoš Municipality.[504] The witness specified that "[t]hey were leaving freely, in the sense that they were not forced in the buses, but the main reason for this was because they were afraid of what would happen to them if they stayed. The non-Serb population was under pressure and I would say that they were persecuted."[505] The witness also noted that thousands of non-Serbs left "[b]ecause of the crimes that were committed against them by either the special unit or the military personnel".[506] The Appeals Chamber notes that the Trial Chamber duly considered this evidence,[507] as well as Exhibit P854, indicating that many Bosnian Muslims were submitting requests to return to their villages.[508] The Trial Chamber considered, however, that according to Witness RM-009's testimony, such requests would have been submitted to and approved by the local war presidency,

[498] T. 5 February 2015 p. 31279.
[499] T. 5 February 2015 pp. 31279, 31280.
[500] *See* Mladić Appeal Brief, para. 199.
[501] Trial Judgement, para. 1720. *See also* Trial Judgement, para. 1716, *referring to*, *inter alia*, T. 5 February 2015 pp. 31279, 31280.
[502] Trial Judgement, para. 1720.
[503] *See* Mladić Appeal Brief, para. 200, nn. 287, 288, *referring to* Exhibits P843 (under seal), para. 61, P854, p. 5.
[504] *See* Exhibit P843 (under seal), para. 61. *See also* Trial Judgement, para. 953.
[505] Exhibit P843 (under seal), para. 61. *See also* Trial Judgement, para. 955.
[506] Exhibit P843 (under seal), para. 61. The witness also stated that non-Serbs did not have the right of free movement within the municipality, all were fired from their positions, they did not have access to any medical assistance, some of them were put under work obligations without any financial compensation, they were not allowed into shops and could not go to the mosque or the Catholic church to pray. *See* Exhibit P843 (under seal), para. 61; Trial Judgement, para. 955.
[507] *See* Trial Judgement, paras. 953, 955, nn. 3923, 3940, 3941, *referring to*, *inter alia*, Exhibit P843, paras. 61, 62.
[508] *See* Trial Judgement, para. 955, n. 3943, *referring to* Exhibit P854, p. 5.

"but these people never returned".[509] The Appeals Chamber further observes that, in relation to Kotor Varoš specifically, the Trial Chamber rejected the Defence arguments that people voluntarily made the decision to leave.[510] Recalling its findings that Bosnian Muslims and Bosnian Croats in Kotor Varoš faced, *inter alia*, restrictions on their freedom of movement, limited access to medical care, dismissals from employment, killings, unlawful detention, as well as cruel and inhumane treatment, the Trial Chamber found that non-Serb civilians who left the municipality "did not have a genuine choice but to leave".[511] The Appeals Chamber considers that Mladić relies on an isolated excerpt of Witness RM-009's evidence and ignores the entirety of the evidence, demonstrating that non-Serbs left Kotor Varoš Municipality involuntarily.[512] Mladić therefore does not demonstrate any error in the Trial Chamber's assessment of evidence in this regard.

159. The Appeals Chamber finally turns to Mladić's submission that the Trial Chamber disregarded Exhibit D942, Witness Masal's evidence that Mladić made concerted efforts to give civilians the choice to leave or remain and that he allowed unarmed individuals to farm the land and receive humanitarian aid.[513] The Appeals Chamber observes that the paragraphs of the Trial Judgement Mladić challenges in this respect relate to Kotor Varoš and Sanski Most Municipalities, neither of which is mentioned in the excerpt of Exhibit D942 on which Mladić relies.[514] Mladić makes no argument as to why the Trial Chamber should have considered the evidence he points to when assessing crimes in Kotor Varoš and Sanski Most Municipalities. Mladić therefore fails to identify any error in this respect.

160. Given that Mladić does not demonstrate an error with respect to any of the pieces of evidence to which he points on appeal, the Appeals Chamber dismisses his contention that the Trial Chamber, in assessing his membership in the Overarching JCE, erred in failing to address or give sufficient weight to evidence of his efforts to provide care to non-Serbs or evidence that they remained or voluntarily left their villages during the conflict.

(ii) Evidence that Mladić Reported Concerns to Karadžić and the Minister of the Interior

161. In alleging that the Trial Chamber gave insufficient weight to his actions protecting the non-Serb population who remained in the Municipalities, Mladić refers to Exhibits D1503 and

[509] Trial Judgement, para. 955, n. 3944, *referring to* T. 4 February 2013 pp. 8030, 8031 (closed session).
[510] *See* Trial Judgement, para. 3147.
[511] Trial Judgement, para. 3147. *See also* Trial Judgement, paras. 955, 960.
[512] *See* Exhibit P843 (under seal), para. 61.
[513] *See* Mladić Appeal Brief, para. 200, nn. 291, 292, *referring to*, *inter alia*, Exhibit D942, para. 15.
[514] *See* Mladić Appeal Brief, para. 200, n. 292, *referring to* Trial Judgement, paras. 960 (Kotor Varoš), 1720 (Sanski Most).

P3095 to demonstrate that he reported concerns to Karadžić, the President of *Republika Srpska*, and the Minister of the Interior about the commission of crimes by MUP forces against the non-Serb population and that he called for "affirmative action" to be taken.[515]

162. The Prosecution responds that Mladić exaggerates the exculpatory value of his reports to Karadžić and the Minister of the Interior about crimes committed against non-Serbs.[516] The Prosecution submits that Mladić's reports were about Željko Ražnatović ("Arkan") and his paramilitary unit, which were not found to be part of the Overarching JCE.[517] Additionally, the Prosecution contends that these reports requested action to be taken against Arkan's paramilitary unit only towards the end of the conflict and that they reveal Mladić being "predominantly concerned about [the] abuse of VRS members and looting of army materiel".[518]

163. Mladić replies that the Prosecution does not directly engage with his submissions and fails to undermine his arguments that the Trial Chamber failed to afford certain evidence sufficient weight.[519]

164. The Appeals Chamber notes that Exhibit D1503 is a letter from Mladić to Karadžić, dated 20 October 1995, reporting on the activities of Arkan's paramilitary unit.[520] The Appeals Chamber observes that Mladić's reference to "MUP forces" in relation to Arkan or his paramilitary unit is a misinterpretation of the Trial Judgement. While Mladić argued at trial that Arkan's paramilitary unit was subordinated to the MUP, the Trial Chamber did not make any finding on this matter in light of its findings that there was insufficient evidence to show that Arkan participated in the realization of the Overarching JCE.[521] In the letter, Mladić stated that the "general behaviour and individual acts" of Arkan's paramilitary unit have complicated the situation in the field and "spread fear among the population".[522] He further presented 12 "verified reports" of "extremely inhumane, unscrupulous and ruthless conduct" of Arkan's paramilitary unit towards "the population and VRS members",[523] such as: (i) threatening, arresting, physically abusing, maltreating, beating, using firearms to inflict wounds, and humiliating officers and privates;[524] (ii) seizing military equipment,

[515] Mladić Appeal Brief, paras. 198, 199, n. 286. *See also* Mladić Reply Brief, paras. 40-42.
[516] Prosecution Response Brief, para. 59.
[517] Prosecution Response Brief, para. 59.
[518] Prosecution Response Brief, para. 59.
[519] Mladić Reply Brief, paras. 40-42.
[520] Exhibit D1503, pp. 1, 2.
[521] *See* Trial Judgement, paras. 4238, 4396, n. 15357. *See also* Trial Judgement, para. 4401.
[522] Exhibit D1503, para. 1.
[523] Exhibit D1503, para. 2.
[524] Exhibit D1503, paras. 2, 7.

weapons, documents of VRS officers, and expensive cars from the VRS without authorization;[525] (iii) looting and wantonly destroying abandoned houses;[526] and (iv) murdering 11 non-Serbs in Sanski Most and one member of the VRS near Novi Grad.[527] In the letter, Mladić stated that he had issued orders to remove paramilitary formations that had refused to submit to the VRS, and that he expected Karadžić to prohibit such conduct.[528]

165. The Appeals Chamber observes that, referring to Exhibit D1503, the Trial Chamber discussed the evidence that Mladić had informed Karadžić about crimes committed by Arkan's paramilitary unit, including the murder of 11 non-Serbs in Sanski Most, and that Mladić had expected Karadžić to prohibit the continued presence of this group.[529] While the Trial Chamber did not expressly refer to Exhibit P3095 in the Trial Judgement, such an omission is not erroneous. In this regard, Exhibit P3095 is a letter, dated 24 September 1995, from Mladić to the President and the Minister of the Interior of *Republika Srpska*, complaining that Arkan's paramilitary unit was not under VRS command, was abusing VRS officers and looting VRS material, was causing armed clashes, and was upsetting the population at large by "liquidat[ing] a certain number of loyal Muslim citizens, including family members of some VRS servicemen".[530] In this letter, Mladić also requested that, *inter alia*, Karadžić revoke power given to Arkan and that the MUP take measures against Arkan.[531] Exhibits P3095 and D1503 are therefore similar in nature – both are from autumn 1995, reveal Mladić's strong disapproval of criminal acts committed by Arkan's paramilitary unit, and address Karadžić, stating that action should be taken to prohibit the paramilitary group's operation.[532]

166. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber did consider evidence that Mladić reported concerns to Karadžić and the Minister of the Interior about the commission of crimes against the non-Serb population, and that he called for action to be taken. In assessing his contribution to the Overarching JCE, the Trial Chamber also considered evidence that Mladić noted crimes committed by paramilitary groups and that he ordered their disarmament.[533] Mladić therefore fails to demonstrate that the Trial Chamber disregarded evidence

[525] Exhibit D1503, paras. 3-5.
[526] Exhibit D1503, para. 5.
[527] Exhibit D1503, para. 6.
[528] Exhibit D1503, p. 2.
[529] Trial Judgement, para. 3853.
[530] Exhibit P3095, pp. 1, 2.
[531] Exhibit P3095, pp. 2, 3.
[532] *See* Exhibits D1503, P3095.
[533] *See* Trial Judgement, paras. 4419, 4522.

or gave insufficient weight to his actions protecting the non-Serb population who remained in the Municipalities when determining his participation in the Overarching JCE.

(iii) Evidence from Mladić's Notebook Entries of Constraints During the War and Assistance Provided to Non-Serbs

167. Mladić submits that the Trial Chamber erred by not giving sufficient weight to his military notebook entries that contain direct evidence of the constraints he faced during the war[534] as well as the protection he intended to provide Bosnian Muslims and Bosnian Croats.[535] He states that the Trial Chamber relied on his notebooks "only four times" in its analysis of crimes that occurred in the Municipalities.[536]

168. The Prosecution responds that Mladić fails to demonstrate any error in the Trial Chamber's analysis of his notebook entries or substantiate how his purported intention to protect non-Serbs could impact the findings in the Trial Judgement regarding his contributions to the Overarching JCE.[537]

169. Regarding the alleged constraints he faced, Mladić points to his notebook entries (Exhibits P353 and P356),[538] indicating, *inter alia*, that the VRS had issues with morale and discipline in the army as well as control over paramilitary formations,[539] with the lack of cooperation between civilian and military structures,[540] and with the provision of ammunition and military equipment.[541] The Appeals Chamber notes that the Trial Chamber considered Exhibits P353 and P356 with respect to issues regarding the declining morale in the army,[542] discipline in paramilitary formations,[543] the shortage of ammunition,[544] as well as the provision and financing of soldiers to the VRS.[545] Beyond these specific exhibits, the Trial Chamber considered other evidence

[534] Mladić Appeal Brief, para. 202, n. 293, *referring to* Exhibits P353, pp. 163, 179, 180, 192, 260, 299, P356, pp. 179, 180. *See also* Mladić Reply Brief, paras. 40-42.
[535] Mladić Appeal Brief, para. 202, n. 294, *referring to* Exhibits P353, p. 330, P356, p. 218, D1514, D187. *See also* Mladić Reply Brief, paras. 40-42.
[536] Mladić Appeal Brief, para. 202, n. 295, *referring to* Trial Judgement, paras. 381, 715, 1774, 1786.
[537] *See* Prosecution Response Brief, paras. 61-63. *See also* T. 25 August 2020 pp. 96, 97.
[538] Mladić Appeal Brief, para. 202, n. 293, *referring to* Exhibits P353, pp. 163, 179, 180, 192, 260, 299, P356, pp. 179, 180.
[539] *See* Exhibits P353, pp. 192, 260, 299, P356, pp. 179, 180.
[540] *See* Exhibits P353, p. 299, P356, p. 180.
[541] *See* Exhibit P353, p. 163. A review of pages 179 and 180 of Exhibit P353 to which Mladić refers shows no relevance to the alleged constraints he faced during the war. The Appeals Chamber therefore dismisses any contention of error in this regard without further consideration.
[542] *See, e.g.*, Trial Judgement, para. 4658.
[543] *See, e.g.*, Trial Judgement, para. 3877.
[544] *See, e.g.*, Trial Judgement, paras. 4422, 4423, 4798.
[545] *See, e.g.*, Trial Judgement, paras. 4443-4445. *See also* Trial Judgement, paras. 4446-4448.

concerning the lack of discipline in the VRS,[546] the "imperfect functioning of [the] military and civilian justice branches",[547] as well as plundering and "war profiteering" by members of the VRS as well as paramilitary units.[548] Mladić ignores the Trial Chamber's rejection of Defence arguments regarding the lack of loyalty and obedience to the VRS command. The Trial Chamber found that "occasional indiscipline in the VRS did not undermine Mladić's overall ability to exercise command and control over his subordinates".[549] The Appeals Chamber therefore concludes that the Trial Chamber did consider evidence of the constraints Mladić faced during the war and further finds that, given its broad discretion in evidence assessment,[550] Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to such evidence.

170. With respect to the "protection he intended" to provide to non-Serbs, Mladić refers to his notebook entries (Exhibits P353 and P356) as well as two orders he issued in 1992 and 1994, respectively (Exhibits D1514 and D187).[551] A review of the excerpt of Exhibit P353 to which Mladić points indicates that, in a conversation between Mladić and Colonel Petar Salapura in mid-July 1992, it was raised that the "people of Podžeplje (Muslims) [we]re asking to be given flour supplies".[552] The following text appears immediately after: "Decision:→ provide the basic foodstuffs, flour and oil".[553] While the Trial Chamber did not explicitly refer to this aspect of Exhibit P353, the Appeals Chamber observes that the Trial Chamber considered extensive evidence about the delivery and restriction of humanitarian aid in the territory of *Republika Srpska* between

[546] *See* Trial Judgement, paras. 4425, 4527, 4528, nn. 15777, 16090, 16094, *referring to* Exhibits P358 (Mladić's notebook, dated 2 April to 24 October 1993), P5059 (an order from the VRS Main Staff regarding discipline in commands, units, and institutions, dated 11 August 1994), P5064 (an order from Mladić regarding military discipline in the VRS, dated 13 March 1995).
[547] *See*, *e.g.*, Trial Judgement, para. 4522.
[548] *See* Trial Judgement, para. 4522, nn. 16072-16075, *referring to* Exhibit P1966 (a VRS Main Staff report from Mladić dated September 1992). *See also*, *e.g.*, Trial Judgement, paras. 3831, 3834, 3838, 3839, 3842, 3844, 3847, 3853-3855. Observing that the relationship between paramilitary formations and the VRS or the MUP differed from group to group, the Trial Chamber found that some operated outside the command of the VRS while others cooperated and coordinated with the VRS while committing crimes in municipalities such as Prijedor, Sanski Most, and Trnovo. *See* Trial Judgement, para. 4419. The Trial Chamber nevertheless found that, since it did not receive evidence indicating that Mladić directed, monitored, or authorized the VRS's cooperation and coordination with paramilitary formations, it did not consider this allegation further. *See* Trial Judgement, para. 4419.
[549] *See* Trial Judgement, para. 4392. *See also*, *e.g.*, Trial Judgement, paras. 4296-4380, 4383-4391.
[550] *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 403, 530; *Šainović et al*. Appeal Judgement, para. 490.
[551] Mladić Appeal Brief, para. 202, n. 294, *referring to* Exhibits P353, p. 330, P356, p. 218, D1514, D187. With respect to Exhibit P356, a review of the excerpt to which Mladić refers shows no relevance to the alleged protection he intended to provide to non-Serbs. *See* Mladić Appeal Brief, para. 202, n. 294, *referring to*, *inter alia*, Exhibit P356, p. 218. The Appeals Chamber, in any event, observes that page 219 of Exhibit P356 contains language to the effect of "[p]rotection in the population/especially in the towns". However, without further submissions from Mladić in relation to this statement, it is unclear how this could demonstrate an error in the Trial Judgement. Given the vague references and obvious deficiencies in Mladić's submissions in this regard, the Appeals Chamber dismisses any contention of error on this basis without further consideration.
[552] Exhibit P353, p. 330.
[553] Exhibit P353, p. 330.

1992 and 1995.[554] This includes evidence that Mladić allowed the provision of aid to civilian populations of the "opposing side".[555] Based on evidence in the record, the Trial Chamber found that, while Mladić initially showed willingness to allow the passage of humanitarian aid through *Republika Srpska* in 1992 and 1993, his orders and conduct became "increasingly obstructive" in 1994 and 1995.[556] It subsequently considered his restrictions on humanitarian aid from 10 April 1994 onwards to be a factor in determining that he significantly contributed to the Overarching JCE.[557] Mladić fails to demonstrate any error in the Trial Chamber's assessment of the evidence in this regard.

171. The Appeals Chamber now turns to allegations of error with respect to Exhibits D1514 and D187. The Appeals Chamber observes that Exhibit D1514 is an order issued by Mladić on 28 November 1992 to the Commander of the VRS Drina Corps, Rogatica Brigade.[558] According to this exhibit, "unknown persons [had] disturbed [the] Muslim population in S. Burati and Vrhbarje" and Mladić ordered the Commander of the Rogatica Brigade to, *inter alia*: (i) immediately take measures to protect the Muslim population in these villages from possible violence, because they expressed loyalty to *Republika Srpska*; and (ii) explain to soldiers and units that "any violence against the people of these villages will be politically harmful for [*Republika Srpska*], its army and the Serbian people in general".[559] The Appeals Chamber notes that the Trial Chamber discussed this exhibit at paragraph 4524 of the Trial Judgement.[560] Mladić's submission that the Trial Chamber failed to consider this evidence is therefore without merit.

172. Exhibit D187 is an order that Mladić issued on 16 April 1994 regarding the treatment of civilians and prisoners of war in Goražde.[561] This exhibit reflects Mladić's statement that:

> [v]ia global media the Muslim propaganda keeps launching disinformation that the members of the VRS started a total annihilation of [the] Muslim population in order to compromise [*Republika Srpska*] and force the UN Security Council to make resolutions which are unfavourable to the Serbs.[562]

On this basis, Mladić ordered, *inter alia*, that: (i) "cruel treatments are severely forbidden, as well as abuse and physical destruction of civil[ian] population, prisoners of war and members of the international organizations"; (ii) all members of the VRS are duty-bound to protect the civilian

[554] *See*, *e.g.*, Trial Judgement, paras. 4548-4600.
[555] *See*, *e.g.*, Trial Judgement, paras. 4552, 4554-4556.
[556] *See* Trial Judgement, paras. 4602-4608.
[557] *See* Trial Judgement, paras. 4611, 4612.
[558] Exhibit D1514, pp. 1, 2.
[559] Exhibit D1514, p. 1.
[560] *See* Trial Judgement, para. 4524, nn. 16080, 16081.
[561] Exhibit D187, pp. 1, 2.
[562] Exhibit D187, p. 1.

population in Goražde by transferring them to more adequate locations; (iii) all prisoners of war "are to be treated in compliance with the international law of war"; and (iv) all members of international organizations are to be sheltered on the territory of *Republika Srpska*.[563] While this exhibit is not explicitly referenced in the Trial Judgement, the Appeals Chamber notes that the Trial Chamber considered evidence of a similar nature, namely evidence concerning the protection of civilians and prisoners of war as well as courteous treatment of foreigners.[564] Given that the Trial Chamber is presumed to have considered all evidence and is not obligated to refer to every piece of evidence on the record,[565] and observing that the Trial Chamber considered evidence of a similar nature, the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to such evidence.

173. The Appeals Chamber observes that, in assessing his significant contribution to the Overarching JCE, the Trial Chamber considered arguments and evidence that Mladić disseminated orders and instructions to subordinates to, *inter alia*: (i) follow the laws and regulations of the VRS, *Republika Srpska*, international humanitarian law, customary laws of war, and other international laws; and (ii) protect the civilian population.[566] The Trial Chamber concluded, however, that despite such orders, the Bosnian Serb military and civilian justice system failed to investigate crimes and arrest or punish perpetrators – members of the VRS or Serb forces – who committed crimes against non-Serbs.[567] Regarding the treatment of prisoners of war, the Trial Chamber considered evidence that Mladić deliberately misled the international community on the conditions in camps, and "attempted to conceal the crimes committed therein by portraying the camp[] conditions in a more favourable light".[568] Given the Trial Chamber's findings and assessment of evidence on the record, Mladić fails to demonstrate that the Trial Chamber erred by not considering or giving sufficient weight to evidence concerning the "protection he intended" to provide to non-Serbs when determining his participation in the Overarching JCE.

[563] Exhibit D187, p. 1.
[564] *See, e.g.*, Trial Judgement, paras. 4518-4520, 4524, 4525.
[565] *See, e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864, n. 2527.
[566] *See, e.g.*, Trial Judgement, paras. 4515, 4517-4528, 4545. *See also* Trial Judgement, para. 4687.
[567] Trial Judgement, para. 4545. *See also* Trial Judgement, paras. 4529-4543.
[568] *See, e.g.*, Trial Judgement, paras. 4510-4512, 4546. *See also* Trial Judgement, paras. 4502-4509, 4687.

(iv) Conclusion

174. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred in its assessment of the evidence to which he points and purports to be exculpatory relating to his membership in the Overarching JCE.

(c) Alleged Errors Regarding the Scope of and Mladić's Participation in the Overarching JCE

175. Mladić submits that the Trial Chamber expanded the Overarching JCE to include the entirety of 1991 and included the actions and speeches of politicians from a period during which he was absent, undermining the conclusion that he was part of the common plan of the Overarching JCE.[569] He also contends that the Trial Chamber was "inconsistent" in its interpretation of his interactions with other members of the Overarching JCE – finding that he had "influence" over and "was subject" to the political leadership.[570] Mladić finally argues that the Trial Chamber gave undue weight to his role in establishing the VRS and that he directed military operations in furtherance of the war effort and in compliance with duties delegated to him by Karadžić.[571]

176. The Prosecution responds that Mladić's submissions show no error in the Trial Chamber's analysis of his participation in the Overarching JCE or inconsistency in his influential capacity with respect to the political leadership.[572] According to the Prosecution, the Trial Chamber reasonably found that Mladić contributed to the Overarching JCE through his command and control of the VRS.[573]

177. Turning to Mladić's contention that the Trial Chamber expanded the scope of the Overarching JCE to include 1991, which included actions and speeches from a period during which he was absent, the Appeals Chamber recalls that joint criminal enterprise liability requires: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to, or involves, the

[569] Mladić Appeal Brief, para. 203; T. 25 August 2020 pp. 41, 43-46. Mladić contends that the Trial Chamber never cited evidence that he was aware of the content of these meetings, conversations, as well as speeches and statements from politicians. *See* Mladić Appeal Brief, para. 203.
[570] Mladić Appeal Brief, para. 204; T. 25 August 2020 pp. 55-56.
[571] Mladić Appeal Brief, para. 206; T. 25 August 2020 pp. 57, 58.
[572] Prosecution Response Brief, paras. 64, 65. *See also* T. 25 August 2020 pp. 89-97. The Prosecution submits that Mladić conflates the date that the Overarching JCE came into existence and the date he was found to be a member, and that, therefore, arguments about his lack of involvement in 1991 are irrelevant. *See* Prosecution Response Brief, para. 64; T. 25 August 2020 p. 93.
[573] Prosecution Response Brief, paras. 66, 67. *See also* T. 25 August 2020 pp. 91, 92, 95-97. The Prosecution further asserts that Mladić does not challenge the Trial Chamber's conclusion that he contributed to the Overarching JCE by, *inter alia*, establishing and maintaining the VRS. T. 25 August 2020 p. 98.

commission of a crime; and (iii) the participation of the accused in the common purpose.[574] In this case, prior to its assessment of whether Mladić was part of the Overarching JCE, the Trial Chamber found that the Overarching JCE existed from 1991 until 30 November 1995[575] and that the plurality of persons included members of the Bosnian Serb leadership.[576] The Trial Chamber found that Mladić only contributed and shared the intent to achieve the common objective of the Overarching JCE by 12 May 1992 at the latest.[577] The Trial Chamber's assessment of the existence of the Overarching JCE was therefore independent of its assessment of Mladić's participation. Mladić fails to show that, to determine whether the Overarching JCE existed in 1991, the Trial Chamber erroneously expanded the scope of the joint criminal enterprise or erroneously considered the conduct and speeches of the Bosnian Serb leadership prior to Mladić's participation.[578]

178. The Appeals Chamber is also not convinced that the Trial Chamber erred in its interpretation of Mladić's interactions with other members of the Overarching JCE.[579] Having reviewed the impugned paragraphs in the Trial Judgement, the Appeals Chamber observes that they contain a *summary* of the evidence and findings on, *inter alia*, Mladić's control and authority over the VRS[580] as well as his participation in Bosnian Serb Assembly meetings and relationship with the Bosnian Serb political leadership.[581] In particular, the Trial Chamber recalled evidence and considered arguments that Mladić was not a member of the Supreme Command of the VRS ("Supreme Command")[582] and did not have voting rights within the Bosnian Serb Assembly, but that he was invited to attend meetings between 1992 and 1995 to brief the Supreme Command on the military situation.[583] The Trial Chamber also found that he actively participated in policy discussions in the Bosnian Serb Assembly,[584] often suggested to Bosnian Serb politicians what position they should take during peace negotiations,[585] and addressed policy issues in detail "with the purpose of influencing" the Bosnian Serb political leadership in its decision-making.[586] The

[574] *See*, *e.g.*, *Stanišić and Simatović* Appeal Judgement, para. 77; *Brđanin* Appeal Judgement, paras. 364; 430; *Stakić* Appeal Judgement, para. 64; *Tadić* Appeal Judgement, para. 227. *See also Nizeyimana* Appeal Judgement, para. 325; *Gotovina and Markač* Appeal Judgement, para. 89.
[575] *See*, *e.g.*, Trial Judgement, paras. 4232, 4610.
[576] *See* Trial Judgement, paras. 4238, 4610, 4612 (these members included Karadžić, Krajišnik, Plavšić, Koljević, Subotić, Mandić, and Stanišić).
[577] *See*, *e.g.*, Trial Judgement, paras. 4611, 4685, 4686, 4688.
[578] *See*, *e.g.*, Trial Judgement, paras. 4218-4221.
[579] *See* Mladić Appeal Brief, para. 204, *referring to* Trial Judgement, paras. 4374-4395, 4466, 4472-4474.
[580] *See* Trial Judgement, paras. 4374-4395.
[581] *See* Trial Judgement, paras. 4466, 4472-4474.
[582] The Trial Chamber found that the Supreme Command was created on 30 November 1992 and that the Commander of the VRS Main Staff, Mladić, was not its member and could attend meetings on invitation only. Trial Judgement, paras. 31, 4476.
[583] Trial Judgement, paras. 4476, 4478.
[584] Trial Judgement, paras. 4477, 4478.
[585] Trial Judgement, para. 4477.
[586] Trial Judgement, para. 4478.

Appeals Chamber considers that, contrary to Mladić's submissions, the Trial Chamber did not make "inconsistent interpretations" of his interactions with the members of the Overarching JCE, but rather clearly found that Mladić actively participated in high-level political discussions with the purpose of influencing political decisions. His contentions in this regard are therefore without merit and fail to identify any error.

179. As to Mladić's submission that the Trial Chamber gave undue weight to his role as Commander of the VRS and that he directed military operations in furtherance of the war effort and in compliance with duties delegated to him by Karadžić, the Appeals Chamber recalls that in order to hold an accused responsible pursuant to joint criminal enterprise liability, it must be established that he or she performed acts that in some way were directed to the furthering of the common plan or purpose of the joint criminal enterprise.[587] These acts need not be criminal *per se* but they may take the form of assistance in, or contribution to, the execution of the common objective or purpose.[588] Moreover, the fact that the participation of the accused amounted to no more than his or her "routine duties" will not exculpate the accused.[589]

180. The Appeals Chamber notes the Trial Chamber's conclusion that between 12 May 1992 and 30 November 1995, members of the VRS committed crimes in furtherance of the Overarching JCE in the Municipalities.[590] In finding that Mladić participated in the Overarching JCE, the Trial Chamber concluded that he, *inter alia*: (i) was the Commander of the VRS Main Staff; (ii) issued orders regarding the establishment and operations of the VRS; (iii) had knowledge of crimes being committed against non-Serbs in the Municipalities by his subordinates; (iv) deliberately misled the media and international community about crimes committed on the ground; (v) had the authority but did not take appropriate or further steps to investigate or punish perpetrators of crimes; (vi)

[587] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Šainović et al.* Appeal Judgement, para. 1177; *Krajišnik* Appeal Judgement, paras. 695, 696.
[588] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1615, 1653; *Šainović et al.* Appeal Judgement, para. 985; *Krajišnik* Appeal Judgement, paras. 215, 695.
[589] *Popović et al.* Appeal Judgement, para. 1615.
[590] *See*, *e.g.*, Trial Judgement, paras. 4224, 4225. The Trial Chamber found that crimes were committed by the VRS in the following municipalities: (i) Banja Luka (*see*, *e.g.*, Trial Judgement, paras. 374, 454-456, 469-472, 487-494, 502); (ii) Bijeljina (*see*, *e.g.*, Trial Judgement, paras. 505, 510, 511, 513, 516, 551-555, 559-567, 582-587); (iii) Foča (*see*, *e.g.*, Trial Judgement, paras. 603-629, 631-655, 657-667, 669-673, 675-684, 686-690, 696, 697, 702, 704, 706-723); (iv) Kalinovik (*see*, *e.g.*, Trial Judgement, paras. 750-752, 760-774, 776-780, 782-784, 790, 791); (v) Ključ (*see*, *e.g.*, Trial Judgement, paras. 800-832, 840-851, 854-859, 883, 884); (vi) Kotor Varoš (*see*, *e.g.*, Trial Judgement, paras. 887-892, 894-902, 905-918, 920-928, 931-934, 937-943, 947-960); (vii) Novi Grad (*see*, *e.g.*, Trial Judgement, paras. 969-974); (viii) Prijedor (*see*, *e.g.*, Trial Judgement, paras. 1017-1040, 1050-1062, 1064-1074, 1076-1087, 1089-1100, 1101-1121 1142, 1159-1170, 1236, 1238-1269, 1271-1325, 1330-1380, 1384-1401, 1403, 1407, 1408, 1411-1413, 1417, 1419, 1420, 1430-1449); (ix) Rogatica (*see*, *e.g.*, Trial Judgement, paras. 1456-1462, 1464-1471, 1490-1506, 1511-1529, 1532, 1533, 1536-1550, 1553-1585); (x) Sanski Most (*see*, *e.g.*, Trial Judgement, paras. 1589-1602, 1604-1625, 1627-1637, 1649, 1650, 1663, 1677-1679, 1681-1686, 1689-1735); (xi) Sokolac (*see*, *e.g.*, Trial Judgement, paras. 1739-1742, 1744-1746, 1752-1756); and (xii) Vlasenica (*see*, *e.g.*, Trial Judgement, paras. 1758, 1760, 1763, 1766, 1774-1795, 1803-1815, 1841-1846).

placed severe restrictions on the delivery of humanitarian aid; and (vii) repeatedly used derogatory terms to refer to Bosnian Muslims and Bosnian Croats as well as introduced and controlled a centralized system of spreading propaganda related to Bosnian Muslims and Bosnian Croats.[591] Given the Trial Chamber's findings on Mladić's acts and conduct furthering the Overarching JCE and in line with the jurisprudence that performing routine duties will not exculpate the accused,[592] the Appeals Chamber considers it inconsequential that Mladić, as Commander of the VRS Main Staff, was acting in accordance with his obligations as delegated to him by Karadžić.[593] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić therefore fails to show that the Trial Chamber committed any error in this regard.

(d) Conclusion

181. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 3.A of Mladić's appeal.

2. Alleged Errors Regarding Significant Contribution and *Mens Rea* (Ground 3.B)

182. As recalled above, the Trial Chamber found that Mladić significantly contributed to achieving the objective of the Overarching JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[594] The Trial Chamber further found that Mladić shared the intent to achieve the common objective of the Overarching JCE through the commission of the above-noted crimes, and that he held this intent by 12 May 1992 at the latest.[595]

183. Mladić submits that the Trial Chamber erred in finding that he significantly contributed to and intended to participate in the Overarching JCE.[596] He requests that the Appeals Chamber reverse his convictions based on the first form of joint criminal enterprise, or that it reverse them to the extent of any error identified.[597] The Appeals Chamber will address his contentions in turn.

[591] *See*, *e.g.*, Trial Judgement, paras. 4383-4390, 4498-4500, 4510-4512, 4544-4546, 4601-4608, 4611, 4612, 4623, 4630-4650, 4666-4675, 4685-4688.
[592] *Popović et al*. Appeal Judgement, para. 1615.
[593] *See* Mladić Appeal Brief, para. 206.
[594] Trial Judgement, para. 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4611, 4615, 4685, 5189.
[595] Trial Judgement, para. 4688. *See also*, *e.g.*, Trial Judgement, paras. 4613-4687.
[596] *See* Mladić Notice of Appeal, paras. 36-38; Mladić Appeal Brief, paras. 211-335. *See also* Mladić Appeal Brief, para. 136.
[597] Mladić Appeal Brief, paras. 224, 237, 335.

(a) Significant Contribution

184. The Trial Chamber found, in Chapters 9.3.2 through 9.3.12 of the Trial Judgement, that Mladić's acts and omissions during the existence of the Overarching JCE were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were, and that, therefore, Mladić significantly contributed to achieving the objective of the Overarching JCE.[598] This conclusion rested on findings that Mladić: (i) between May 1992 and at least October 1995, issued orders regarding the establishment and organization of VRS organs and corps, including assignments and promotions;[599] (ii) from May 1992 until 1995, held daily briefings and occasional meetings with VRS Main Staff officers and corps commanders, regularly visited and inspected VRS units, and issued orders and directives to VRS units and other groups;[600] (iii) tasked brigade commanders of the VRS First Krajina Corps to cooperate with the MUP;[601] (iv) from May 1992 to October 1995, was in direct contact with members of the leadership in Serbia and members of the Yugoslav Army ("VJ") General Staff to ensure the military needs of the VRS were met;[602] (v) addressed the Bosnian Serb Assembly during several of its sessions on issues surrounding the development of policies of the Bosnian Serb political leadership, and often suggested to Bosnian Serb politicians what position they should take during peace negotiations in order to achieve the strategic objectives as initially defined;[603] (vi) between September 1992 and at least March 1995, introduced and maintained a controlled and centralized system of spreading propaganda related to Bosnian Croats and Bosnian Muslims;[604] (vii) made deliberately misleading statements to members of the media and international community in relation to crimes committed on the ground;[605] (viii) did not take appropriate or further steps to investigate or punish perpetrators of crimes;[606] and (ix) placed severe restrictions on the delivery of humanitarian aid from 10 April 1994 onwards.[607]

185. Mladić submits that the Trial Chamber erred in finding that he significantly contributed to the Overarching JCE.[608] Specifically, he challenges the Trial Chamber's findings that: (i) he had command and control over members of the MUP;[609] (ii) he had command and control over VRS

[598] Trial Judgement, paras. 4611, 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4610, 4615, 4685, 5189.
[599] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4242-4291.
[600] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4293-4394, 4396-4404.
[601] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 3817, 4408, 4409, 4414.
[602] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4420-4456.
[603] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4458-4478.
[604] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4480-4500.
[605] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4502-4512.
[606] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4514-4546.
[607] Trial Judgement, para. 4611. *See also* Trial Judgement, paras. 4548-4608.
[608] *See* Mladić Appeal Brief, paras. 211-267; Mladić Reply Brief, para. 47.
[609] *See* Mladić Appeal Brief, paras. 218-223; T. 25 August 2020 pp. 54, 55.

forces;[610] and (iii) he failed to adequately investigate and/or punish crimes.[611] Mladić submits that, as a consequence of errors in the Trial Judgement, the Trial Chamber's findings on his guilt under the first form of joint criminal enterprise are invalidated as, *inter alia*, the element of *actus reus* cannot be considered to have been proven beyond a reasonable doubt.[612]

186. The Appeals Chamber recalls that for an accused to be found criminally liable on the basis of joint criminal enterprise liability, a trial chamber must be satisfied that the accused acted in furtherance of the common purpose of a joint criminal enterprise in the sense that he significantly contributed to the commission of the crimes involved in the common purpose.[613] An accused's contribution need not be necessary or substantial,[614] it need not involve the commission of a crime,[615] and the law does not foresee specific types of conduct which *per se* could not be considered a contribution to a joint criminal enterprise.[616]

(i) Command and Control Over Members of the MUP

187. The Trial Chamber found that the MUP cooperated closely with the VRS and that, when MUP units were participating in combat operations, from at least 12 May 1992 to 26 September 1995, they were re-subordinated to the command of the VRS while still being under the direct command of MUP officials.[617] It also found that MUP members were involved in a large number of crimes, including murder, unlawful detention, cruel or inhumane treatment, and persecution, committed in 12 municipalities, and that they were either under the operational supervision of the VRS or under the supervision of the MUP.[618] In relation to his significant contribution to the Overarching JCE via control of the MUP, the Trial Chamber considered that Mladić, *inter alia*, issued orders and directives to VRS units as well as "other groups", and tasked brigade commanders of the VRS First Krajina Corps to cooperate with the MUP.[619]

[610] *See* Mladić Appeal Brief, paras. 227-236.
[611] *See* Mladić Appeal Brief, paras. 238, 244-267.
[612] Mladić Appeal Brief, paras. 212, 268.
[613] *See, e.g., Stanišić and Župljanin* Appeal Judgement, paras. 110, 136; *Popović et al.* Appeal Judgement, para. 1378; *Šainović et al.* Appeal Judgement, para. 987; *Krajišnik* Appeal Judgement, paras. 215, 695.
[614] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 136; *Popović et al.* Appeal Judgement, para. 1378; *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430.
[615] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1378, 1615; *Krajišnik* Appeal Judgement, paras. 215, 695.
[616] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696.
[617] Trial Judgement, paras. 3819, 3824, 3826, 4227. *See also* Trial Judgement, paras. 3793-3818.
[618] Trial Judgement, paras. 3819, 4227, 4239, 4610. The Trial Chamber listed the following as locations where the MUP was involved in crimes: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Pale, Prijedor, Rogatica, Sanski Most, and Vlasenica. *See, e.g.*, Trial Judgement, paras. 3819, 4227.
[619] Trial Judgement, paras. 4611, 4612.

188. Mladić submits that the Trial Chamber relied on adjudicated facts to establish that he had command and control over MUP forces, thereby failing to give sufficient weight to evidence that he lacked *de jure* or *de facto* control over such forces, and conflating coordinated action with re-subordination.[620] In his view, this evidence was sufficient to "enliven the evidentiary debate and rebut the adjudicated facts" relied upon by the Trial Chamber.[621] According to Mladić, effective command and control of the MUP was a "critical component" to the Trial Chamber's consideration of his contribution.[622] He argues that, based on a proper weighing of evidence at trial, no reasonable trier of fact could have concluded that he exercised effective command and control of the MUP to establish a significant contribution to the Overarching JCE.[623]

189. The Prosecution responds that Mladić's arguments are grounded in a misreading of the Trial Judgement.[624] It submits that, in relation to Mladić's contribution to the Overarching JCE, the Trial Chamber's finding concerning the MUP is expressly limited to the MUP forces under the command of the VRS First Krajina Corps at Manjača camp.[625] In addition, the Prosecution submits that Mladić refers to irrelevant evidence, and fails to show any impact of his arguments on the Trial Chamber's conclusion that he significantly contributed to furthering the common purpose.[626] The Prosecution further argues that Mladić's submissions have no bearing on his liability for crimes committed by any MUP forces not re-subordinated to the VRS, as crimes of perpetrators who were subordinated to another member of the Overarching JCE are attributable to him.[627]

190. The Appeals Chamber observes that Mladić challenges the Trial Chamber's reliance on adjudicated facts at paragraph 3794 of the Trial Judgement.[628] The Appeals Chamber notes that, in the impugned paragraph, the Trial Chamber relied on: (i) Adjudicated Fact 1354 to state that, in accordance with the law in effect in the *Republika Srpska*, MUP units could be re-subordinated to the VRS for various purposes, including reinforcement during combat activities;[629] (ii) Adjudicated Fact 1355 to state that, when re-subordinated, MUP forces followed orders from the VRS, and that

[620] Mladić Appeal Brief, paras. 218, 221, *referring to*, *inter alia*, Trial Judgement, para. 3794. *See also* T. 25 August 2020 pp. 54, 55. Mladić argues that, contrary to the Trial Chamber's findings, MUP forces were not re-subordinated to the VRS, but remained under the command of MUP officials. *See* Mladić Appeal Brief, para. 221. To the extent that Mladić makes similar arguments in Ground 5.B of his appeal regarding the Srebrenica JCE, the Appeals Chamber will evaluate them in connection with submissions made in support of that ground of appeal. *See infra* Section III.D.2(b).
[621] Mladić Appeal Brief, paras. 218, 221, *referring to*, *inter alia*, T. 10 December 2013 pp. 20615-20617, T. 23 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session), Exhibit P5248, p. 2. *See also* T. 25 August 2020 p. 55.
[622] Mladić Appeal Brief, para. 222.
[623] Mladić Appeal Brief, paras. 221, 223; T. 25 August 2020 pp. 54, 55. *See also* Mladić Reply Brief, para. 47.
[624] Prosecution Response Brief, paras. 70, 71. *See also* T. 25 August 2020 pp. 98, 99.
[625] Prosecution Response Brief, para. 71, n. 324; T. 25 August 2020 p. 99.
[626] Prosecution Response Brief, paras. 72, 73.
[627] Prosecution Response Brief, para. 73; T. 25 August 2020 p. 99.
[628] *See* Mladić Appeal Brief, para. 221, n. 324, *referring to* Trial Judgement, para. 3794; T. 25 August 2020 pp. 54, 55.

the VRS and MUP unit commanders coordinated their work in carrying out the tasks assigned by the VRS;[630] and (iii) Adjudicated Fact 1356 to state that MUP forces were engaged in combat operations for a specific time to carry out a precisely described task and, during their re-subordination, MUP forces retained their formation and could not be disintegrated or separated.[631]

191. The Appeals Chamber notes that paragraph 3794 of the Trial Judgement does not address Mladić's role or contribution. Rather, this paragraph is contained in Chapter 9.2.7 of the Trial Judgement, which discusses the role of the MUP, and is part of the Trial Chamber's analysis regarding the scope of the Overarching JCE as a whole (Chapter 9.2).[632] The Trial Chamber further specified, at the conclusion of Chapter 9.2.7 and Chapter 9.2 generally, that it would only address Mladić's membership in the Overarching JCE and his role with regard to the MUP in Chapter 9.3 of the Trial Judgement.[633]

192. As to Mladić's contribution to the Overarching JCE through his command and control of other Serb forces subordinated to the VRS,[634] the Trial Chamber addressed the MUP in paragraph 4404 of the Trial Judgement and recalled only findings related to Manjača camp in Banja Luka Municipality.[635] According to the Trial Chamber, the VRS First Krajina Corps was in charge of Manjača camp, and the MUP members who committed crimes were operating under the command of the VRS First Krajina Corps.[636] Given that Mladić, as Commander of the VRS Main Staff, issued orders to the VRS First Krajina Corps, the Trial Chamber found that Mladić "commanded and controlled the Manjača camp command, including the subordinated MUP units".[637] In the same paragraph, the Trial Chamber also recalled its finding that, on 3 August 1992, Mladić issued orders to, *inter alios*, the Manjača camp command, units of the VRS First Krajina Corps, and the Prijedor Security Services Centre ("CSB"), an organ of the MUP,[638] to allow reporters and a team of the International Committee of the Red Cross ("ICRC") to visit various detention camps, including Manjača.[639] Finally, when summarizing Mladić's actions relevant to his significant contribution to

[629] *See* Trial Judgement, para. 3794, n. 14173, *referring to* Adjudicated Fact 1354.
[630] *See* Trial Judgement, para. 3794, nn. 14174, 14175, *referring to* Adjudicated Fact 1355.
[631] *See* Trial Judgement, para. 3794, nn. 14176, 14177, *referring to* Adjudicated Fact 1356.
[632] *See* Trial Judgement, paras. 3573-4240.
[633] *See*, *e.g.*, Trial Judgement, paras. 3828, 4238.
[634] Trial Judgement, paras. 4396-4405.
[635] *See* Trial Judgement, para. 4404. *See also*, *e.g.*, Trial Judgement, paras. 361-374, 378-456.
[636] Trial Judgement, para. 4404, *referring to* Trial Judgement, Chapters 4.1.2 and 8.9.2. *See also*, *e.g.*, Trial Judgement, paras. 374, 454, 455.
[637] Trial Judgement, para. 4404, *referring to* Trial Judgement, Chapter 9.3.3. *See also* Trial Judgement, paras. 4383, 4388.
[638] *See*, *e.g.*, Trial Judgement, paras. 322, 323, 325, 328, 339, 341, 342, 3823.
[639] Trial Judgement, para. 4404. *See also*, *e.g.*, Trial Judgement, paras. 1209, 4001, 4002.

the Overarching JCE, the Trial Chamber considered, *inter alia*, that Mladić "controlled VRS units and issued orders to other groups".[640] The Appeals Chamber therefore considers that, contrary to Mladić's submission, the Trial Chamber did not find that he significantly contributed to the Overarching JCE through a general command and control over the MUP. Rather, in determining Mladić's contribution to the Overarching JCE, the Trial Chamber limited its findings of his command and control of the MUP to Manjača camp and to the orders he issued to the Prijedor CSB.[641] These findings, summarized in paragraph 4404 of the Trial Judgement, are based on extensive evidence – including witness testimonies, exhibits, and adjudicated facts – addressed in other sections of the Trial Judgement.[642] Mladić does not challenge these findings, nor does he demonstrate that the Trial Chamber erred by relying on adjudicated facts to find that he had command and control over the MUP forces at Manjača camp or that he issued orders to the Prijedor CSB.

193. Given that the adjudicated facts Mladić seeks to challenge at paragraph 3794 of the Trial Judgement pertain to the general subordination of the MUP to the VRS and not to his specific conduct or contribution to the Overarching JCE, the Appeals Chamber considers that the evidence he points to on appeal, which he presented at trial to rebut these adjudicated facts, is inapposite.[643] Any error in the assessment of this evidence would have no impact on the Trial Chamber's conclusions regarding Mladić's control of Manjača camp or his orders to the Prijedor CSB. At this juncture, the Appeals Chamber further recalls that members of a joint criminal enterprise may be held responsible for crimes carried out by principal perpetrators, provided that the crimes can be imputed to at least one member of the joint criminal enterprise and that the latter – when using the

[640] Trial Judgement, paras. 4611, 4612.
[641] *See* Trial Judgement, paras. 4404, 4405.
[642] *See*, *e.g.*, Trial Judgement, paras. 349-456, 1209, 4001-4004.
[643] The Appeals Chamber observes that, in any event, Mladić refers to the testimonies of Witnesses Reynaud Theunens, Velimir Kevac, and Mitar Kovač, as well as Exhibit P5248, which he asserts prove that coordinated action of MUP forces with the VRS did not involve re-subordination and that command and control remained with the MUP. *See* Mladić Appeal Brief, para. 221, nn. 325, 327, *referring to* T. 10 December 2013 pp. 20615-20617, T. 23 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session), Exhibit P5248, p. 2. A review of Witness Theunens's evidence reveals that it concerns the witness being questioned on re-subordination and coordinated action on a theoretical level, without drawing any connection to events on the ground. *See* T. 10 December 2013 pp. 20615-20617. As to Witness Kevac's testimony, the Trial Chamber considered it at paragraph 3796 of the Trial Judgement and this evidence contains a statement from the witness that, in a coordinated action between the army and the police, an army unit does not necessarily have command authority over a police unit. *See* T. 23 January 2015 pp. 30544, 30545. *See also* Trial Judgement, paras. 3785, 3796. [REDACTED] *See* T. 25 November 2015 p. 41921 (private session). The Appeals Chamber is of the view that these statements do not point to specific instances on the ground and do not contradict the Trial Chamber's finding that, at times, the VRS and the MUP acted in coordination, while at other times, the MUP was subordinated to the VRS. *See* Trial Judgement, paras. 3819, 4227, 4239, 4610. The Appeals Chamber is also of the view that this evidence has no bearing on findings concerning Manjača camp or orders made on 3 August 1992 to the Prijedor CSB. Finally, Exhibit P5248 concerns a VRS Main Staff report containing no information relevant to the issues at hand. Mladić's contention that the Trial Chamber conflated coordination and subordination with respect to the MUP is discussed below in the section addressing Ground 5.B of his appeal. *See infra* Section III.D.2(b).

principal perpetrators – acted in accordance with the common objective.[644] The Appeals Chamber notes the Trial Chamber's findings that MUP units were used as tools to commit the crimes in the Municipalities in furtherance of the common purpose of the Overarching JCE,[645] that Stanišić, as Minister of the Interior, was a member of the Overarching JCE,[646] and that Stanišić had overall command and control over MUP forces.[647] The Appeals Chamber observes that Mladić has not challenged these findings regarding Stanišić and the MUP in relation to the Overarching JCE. Consequently, even if Mladić were to establish that the Trial Chamber erred in regard to his command and control over the MUP, such an error would not impact his liability through his membership in the Overarching JCE.

194. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred in relation to his significant contribution to the Overarching JCE via command and control of MUP forces.

(ii) Command and Control over VRS Soldiers

195. In relation to the Overarching JCE, the Trial Chamber considered that many of the principal perpetrators of crimes in the Municipalities were VRS members, who were under the operational command of one of the corps and ultimately of the VRS Main Staff.[648] It concluded that Mladić significantly contributed to achieving the objective of the Overarching JCE by, *inter alia*, issuing orders regarding the establishment and organization of the VRS and its organs, being closely involved in VRS activities, as evidenced by regular briefings, meetings, and inspections, and commanding and controlling VRS units.[649]

196. The Trial Chamber found, *inter alia*, that Mladić: (i) from 12 May 1992 until at least 8 November 1996, was Commander of the VRS Main Staff; (ii) between May 1992 and April 1995, issued orders and directives to the VRS regarding its establishment, organization, military operations, and combat strategies; (iii) from May 1992 until 1995, was personally kept informed of

[644] *See Stanišić and Župljanin* Appeal Judgement, para. 119; *Šainović et al.* Appeal Judgement, para. 1256; *Krajišnik* Appeal Judgement, para. 225; *Martić* Appeal Judgement, para. 168; *Brđanin* Appeal Judgement, para. 413.
[645] *See, e.g.*, Trial Judgement, para. 4239.
[646] *See, e.g.*, Trial Judgement, paras. 4238, 4610.
[647] *See, e.g.*, Trial Judgement, paras. 341, 342, 3824, 3825, 4227.
[648] Trial Judgement, paras. 4239, 4610, 4612. *See also, e.g.*, Trial Judgement, paras. 374, 455, 456, 513, 517, 564, 566, 607, 626, 627, 629, 632, 654, 655, 664-667, 672, 673, 684, 690, 702, 720, 752, 772-774, 778-780, 784, 791, 820, 832, 834, 851, 857, 858, 892, 902, 916-918, 927, 928, 933, 934, 943, 960, 974, 1036-1038, 1040, 1053, 1061, 1062, 1072, 1082-1087, 1100, 1112, 1121, 1142, 1168, 1169, 1180, 1233-1236, 1265-1269, 1322-1325, 1369, 1371-1373, 1375-1378, 1396-1401, 1403, 1406-1408, 1417, 1419, 1420, 1448, 1449, 1462, 1471, 1503-1506, 1512, 1527, 1529, 1536, 1547, 1548, 1580-1585, 1602, 1610, 1616, 1637, 1663, 1679, 1686, 1721, 1723, 1725, 1726, 1728, 1731, 1733, 1735, 1742, 1746, 1754-1756, 1766, 1795, 1806-1808, 1812, 1815, 1844-1846.
[649] Trial Judgement, paras. 4611, 4612. *See also* Trial Judgement, paras. 4242-4291, 4293-4394.

developments on the battlefield through daily reports from corps commanders, and held daily briefings and occasional evening meetings with VRS Main Staff officers and corps commanders; (iv) between May 1992 and May 1995, regularly visited and inspected VRS units or ordered VRS Main Staff officers to conduct such inspections in order to be informed on the units' state of combat readiness and to assist on specific tasks; and (v) from May 1992 to July 1995, issued several orders to various VRS units with detailed instructions regarding combat strategies, military operations, deployment of units, authorization of offensive operations, use of weapons and ammunition, and ceasefire agreements.[650] The Trial Chamber also found that the VRS had a well-functioning communication system, which allowed Mladić to effectively and quickly communicate with his subordinates.[651] In addition, it concluded that Mladić was respected as a leader by his subordinates and possessed a "very high level of command and control over [them]".[652] The Trial Chamber explicitly rejected Defence arguments regarding Mladić's limited influence as well as the lack of subordinate loyalty and obedience to the VRS command, and noted that occasional indiscipline in the VRS did not undermine his overall ability to exercise command and control.[653]

197. Mladić submits that the Trial Chamber failed to give sufficient weight to evidence that the lack of professional or trained subordinates significantly affected his ability to command and control VRS soldiers.[654] He specifies that the Trial Chamber erred by failing to adequately consider: (i) the wider repercussions of the lack of professional subordinates on his ability to instruct subordinates and to ensure that military combat operations were carried out within VRS rules and procedures;[655] and (ii) his efforts to deal with the lack of professional subordinates, namely through visits to VRS commands and units by him and other VRS Main Staff personnel[656] as well as through a meeting with VJ representatives to acquire more trained personnel.[657] Mladić submits as an example that the Trial Chamber failed to include relevant evidence in its assessment of an 8 July 1993 meeting, such as references in his notebook about problems in the VRS and the MUP.[658]

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[650] Trial Judgement, paras. 4383-4389. *See also* Trial Judgement, paras. 246-276, 4242-4291, 4293-4382, 4611.
[651] Trial Judgement, para. 4387. *See also*, *e.g.*, Trial Judgement, paras. 114-120, 152, 159, 160, 164, 181, 186, 193, 199, 200, 203, 205, 213, 214, 218, 263, 4296-4310, 4375, 4380, 4383.
[652] Trial Judgement, paras. 4390, 4391. *See also*, *e.g.*, Trial Judgement, paras. 4375-4380.
[653] Trial Judgement, para. 4392. *See also*, *e.g.*, Trial Judgement, paras. 151, 237.
[654] Mladić Appeal Brief, para. 227. *See also* Mladić Appeal Brief paras. 228-236.
[655] Mladić Appeal Brief, para. 231. Mladić asserts that inadequately trained subordinates led to "organisational disunity" and affected combat operations. Mladić Appeal Brief, para. 231, n. 340, *referring to* Mladić Final Trial Brief, paras. 653, 654, Exhibits P5241, pp. 2-5, 8-10, 12, 14, 15, D566, p. 2, D686, paras. 36, 38, 39, D939, p. 9, P356, p. 180, P346, pp. 140, 141, P338, pp. 21, 22, 73, D559, paras. 31, 32, T. 13 November 2012 p. 5033 (closed session), T. 16 November 2015 pp. 41371, 41372.
[656] Mladić Appeal Brief, para. 232, nn. 341, 342, *referring to* Mladić Final Trial Brief, para. 662, Exhibits P3029, pp. 563, 564, P347, p. 56, Trial Judgement, paras. 4311-4321.
[657] Mladić Appeal Brief, para. 233.
[658] Mladić Appeal Brief, para. 234, nn. 344-347, *referring to*, *inter alia*, Exhibits P358, p. 238, P4583, p. 39, Trial Judgement, paras. 4425, 4440.

Mladić argues that no reasonable trier of fact could have concluded that he exercised effective command and control over VRS subordinates to support a finding that he significantly contributed to the Overarching JCE.[659]

198. The Prosecution responds that the Trial Chamber's conclusions were reasonable and grounded in findings as well as detailed analysis of evidence on the functioning VRS command structures and Mladić's exercise of command and control over them.[660] According to the Prosecution, the Trial Chamber considered evidence of VRS indiscipline and found that occasional lack of discipline did not undermine Mladić's overall ability to exercise command and control over the VRS.[661] In addition, the Prosecution submits that Mladić's generic argument that he lacked professional subordinates does not demonstrate that he lacked effective command and control over VRS subordinates.[662]

199. With regard to Mladić's contention that the Trial Chamber failed to sufficiently consider how the lack of professional or trained subordinates affected his command and control of the VRS, the Appeals Chamber observes that he makes reference to Exhibits P5241, D566, D686, P338, D559, D939, P356, and P346 as well as the testimonies of Witnesses Kovač and RM-511.[663] A review of the Trial Judgement reveals that, in addressing arguments regarding command and control issues in the VRS, the Trial Chamber explicitly considered Exhibits P5241,[664] D566,[665] D686,[666] P338,[667] and D559.[668] The Trial Chamber, however, did not explicitly refer to Exhibits

[659] Mladić Appeal Brief, para. 236. *See also* Mladić Reply Brief, para. 47.
[660] Prosecution Response Brief, para. 74. *See also* T. 25 August 2020 pp. 97, 100.
[661] Prosecution Response Brief, para. 75; T. 25 August 2020 p. 100.
[662] Prosecution Response Brief, paras. 76-78. *See also* T. 25 August 2020 p. 100.
[663] Mladić Appeal Brief, para. 231, n. 340, *referring to*, *inter alia*, Exhibits P5241, pp. 2-5, 8-10, 12, 14, 15, D566, p. 2, D686, paras. 36, 38, 39, P338, pp. 21, 22, 73, D559, paras. 31, 32, D939, p. 9, P356, p. 180, P346, pp. 140, 141, T. 13 November 2012 p. 5033 (closed session), T. 16 November 2015 pp. 41371, 41372.
[664] *See*, *e.g.*, Trial Judgement, paras. 210, 4313, n. 15539 (where the Trial Chamber considered that, on 5 March 1993, Mladić sent an assessment report of the VRS Drina Corps units' state of combat readiness to the Drina Corps command and recommended that it study the report, draw up a plan to eliminate shortcomings, and incorporate the designated assignments into its working plan).
[665] *See*, *e.g.*, Trial Judgement, paras. 233, 237, nn. 894, 897-899 (where the Trial Chamber considered that the VRS Sarajevo Romanija Corps ("SRK") brigades had very few professional officers, were understaffed, only rarely provided training, and faced disciplinary problems, all of which led to problems of indiscipline, disobedience, and inefficient command and control).
[666] *See*, *e.g.*, Trial Judgement, paras. 221, 224, 230, nn. 820, 845, 882-884, 886 (where the Trial Chamber considered, *inter alia*, that 15 to 20 per cent of the SRK were professional soldiers, that there was a lack of discipline in the SRK due to fatigue and the lack of soldiers, and that there was a lack of training).
[667] *See*, *e.g.*, Trial Judgement, paras. 4322, 4473, nn. 15559-15562, 15932 (where the Trial Chamber considered the VRS Main Staff analysis of the combat readiness and activities of the VRS in 1992, and noted, *inter alia*, that the VRS had been under a single command and control structure in 1992, despite being initially composed of a large number of different armies and paramilitary formations, and that the VRS Main Staff was performing the function of the Staff of the VRS Supreme Command and at the same time the function of the superior command for operational and some joint tactical formations).

D939, P356, P346, nor to Witness RM-511's testimony from 13 November 2012 and Witness Kovač's testimony from 16 November 2015 in relation to issues of command and control of the VRS. Notwithstanding, the Appeals Chamber recalls that a trial chamber is not obliged to refer to every piece of evidence on the trial record,[669] and it is to be presumed to have evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[670] In this regard, the Appeals Chamber notes that the portions of Exhibits D939, P356, and P346, as well as the testimonies of Witnesses RM-511 and Kovač, to which Mladić refers, discuss the lack of professional soldiers and the poor level of training in various VRS units.[671] This evidence is similar to extensive evidence the Trial Chamber expressly noted and considered in the Trial Judgement that certain VRS units were untrained or unprofessional.[672] After reviewing such evidence, the Trial Chamber rejected Mladić's claim that VRS units lacked discipline, which included issues such as untrained and unprofessional soldiers.[673] For example, with regard to the VRS First Krajina Corps, the Trial Chamber concluded that, even if there were instances of lack of discipline or organization, any such problems did not affect the VRS First Krajina Corps's overall ability to meaningfully control its subordinate units,[674] and that the chain of command and reporting system "fully functioned between the VRS Main Staff, the VRS

[668] *See*, *e.g.*, Trial Judgement, paras. 221, 233, 236, nn. 818, 894, 899, 921, 922 (where the Trial Chamber considered that the SRK brigades had very few professional officers, faced disciplinary problems, and did not have specially organized sniper units).
[669] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, para. 864. *See also* Trial Judgement, para. 16 (stating that "[d]ue to the vast quantity of evidence, it was not possible to reference and discuss every piece of evidence in the [Trial] Judgment, even though the Trial Chamber considered all evidence carefully.").
[670] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 396; *Prlić et al.* Appeal Judgement, para. 187; *Kvočka et al.* Appeal Judgement, para. 23. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Đorđević* Appeal Judgement, n. 2527.
[671] *See* Exhibits D939, p. 9, P356, p. 180, P346, pp. 140, 141; T. 13 November 2012 p. 5033 (closed session); T. 16 November 2015 pp. 41371, 41372.
[672] *See*, *e.g.*, Trial Judgement, paras. 108 (where the Trial Chamber considered arguments that the VRS First Krajina Corps units "lacked discipline" and were "untrained and unprofessional"), 144 (where the Trial Chamber considered evidence that the 30th Division of the VRS First Krajina Corps was comprised of soldiers who lacked military rank), 151 (where the Trial Chamber considered and assessed evidence that several brigades of the VRS First Krajina Corps lacked professional personnel and discipline), 187 (where the Trial Chamber considered Defence argument that the Drina Corps squads lacked qualified officers at all command levels and lacked organizational unity), 196 (where the Trial Chamber considered evidence that the Bratunac Brigade of the Drina Corps lacked, *inter alia*, suitably trained officers at all levels), 221 (where the Trial Chamber considered Defence arguments that the SRK lacked appropriately qualified soldiers, officers, and commanders; that orders were not always followed; and that the SRK could not exercise effective command and control), 230 (where the Trial Chamber considered evidence that 15 to 20 per cent of the SRK were professional soldiers, and that there was a lack of discipline and training), 233 (where the Trial Chamber summarized various witness evidence that the SRK brigades had very few professional officers, only rarely provided training, were understaffed, and faced disciplinary problems), 237-239 (where the Trial Chamber considered and assessed evidence about the lack of command and control in the SRK brigades), 800 (where the Trial Chamber considered argument that a battalion of the 17th Light Infantry Brigade of the Second Krajina Corps operating in Ključ Municipality was untrained and ill-disciplined).
[673] Trial Judgement, paras. 151, 152, 237. *See also* Trial Judgement, para. 4392.
[674] Trial Judgement, para. 151.

First Krajina Corps, and its subordinate units".[675] With regard to the SRK,[676] the Trial Chamber addressed evidence that there were many unprofessional men in its brigades, but found that such evidence did not contradict the Trial Chamber's consideration that the SRK was under normal military command, with subordinates being disciplined and following orders.[677] The Trial Chamber also considered extensive evidence suggesting that the lack of professional commanding officers and staff in various SRK brigades affected the quality of command and control and led to problems with indiscipline, disobedience, and inefficient command and control.[678] It found, however, that this evidence was limited to specific incidents or moments in time and therefore found that it did not contradict Adjudicated Facts 1808 and 1864, which state that the SRK generally functioned under normal command and control and that subordinates were very disciplined and followed orders.[679] In light of the foregoing, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber failed to sufficiently consider how the lack of professional or trained subordinates affected his command and control of the VRS.

200. With regard to the argument that the Trial Chamber failed to adequately consider that Mladić and other VRS Main Staff personnel visited commands and units "as a strategy to deal with the lack of professional subordinates", Mladić references Exhibits P3029 and P347 as well as paragraph 662 of the Mladić Final Trial Brief.[680] The Appeals Chamber observes that the Trial Chamber referenced the paragraph of the Mladić Final Trial Brief to which Mladić points on appeal when summarizing his submissions and recalls that a trial chamber has the discretion to select which legal arguments to address.[681] The Appeals Chamber further notes that the Trial Chamber considered Exhibit P3029 to the effect that Mladić and VRS Main Staff inspection teams regularly visited VRS commands, units, and their combat positions, and that this was essential for Mladić to familiarize himself with the situation on the ground, including the implementation of his orders and the activities of his forces, and to exercise authority over his subordinate forces.[682] While the Trial Chamber did not expressly refer to Exhibit P347 in relation to Mladić's inspection of VRS units in

[675] Trial Judgement, para. 152.
[676] Outside of the Sarajevo JCE, the Trial Chamber found that certain SRK units, notably the Rogatica Brigade, committed crimes in relation to the Overarching JCE. *See*, *e.g.*, Trial Judgement, paras. 239, 1462, 1471, 1504, 1512, 1547, 3051 (Schedule B (p), Schedule C (d)), 3287(i), 3325(i), 3360(f), 3381(b), 3388(f), n. 927.
[677] Trial Judgement, para. 237.
[678] Trial Judgement, para. 237.
[679] Trial Judgement, para. 237.
[680] *See* Mladić Appeal Brief, para. 232, n. 341, *referring to* Exhibits P3029, pp. 563, 564, P347, p. 56, Mladić Final Trial Brief, para. 662.
[681] *See* Trial Judgement, para. 4293, n. 15467; *Prlić et al.* Appeal Judgement, para. 989; *Stanišić and Župljanin* Appeal Judgement, para. 101; *Kvočka et al.* Appeal Judgement, para. 23.
[682] *See* Trial Judgement, para. 4378, nn. 15690, 15691, 15693, *referring to*, *inter alia*, Exhibit P3029.

the Trial Judgement,[683] this exhibit is similar to extensive evidence that the Trial Chamber considered in relation to Mladić or other members of the VRS Main Staff visiting units, between 1992 and 1995, for the purposes of inspection.[684] The Trial Chamber considered that, in many of these inspections, Mladić or members of the VRS Main Staff assessed whether units were combat ready,[685] which included issues such as the lack of well-trained or professional officers and soldiers.[686]

201. The Appeals Chamber is also not persuaded by Mladić's submission that, with respect to the 8 July 1993 meeting, the Trial Chamber failed to note several weaknesses he referenced in his notebook, Exhibit P358, such as declining discipline within the VRS and the dismantling of the MUP.[687] The Appeals Chamber observes that the Trial Chamber not only considered this exhibit in the Trial Judgement, but expressly summarized evidence that "Mladić noted that there were several weaknesses, such as that discipline was getting worse within the VRS and that the MUP had been dismantled".[688]

202. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić's submissions reflect mere disagreement with the Trial Chamber's assessment of the evidence with respect to his command and control of the VRS. Mladić does not show any error in the Trial Chamber's findings that he was respected as a leader, possessed a "very high level of command and control over his subordinates", and that occasional indiscipline did not undermine his overall ability to exercise command and control.[689] Accordingly, his submissions do not demonstrate error in the Trial Chamber's finding that he significantly contributed to the Overarching JCE through his command and control of the VRS.

(iii) Knowledge, Investigation, and Punishment of Crimes

203. The Trial Chamber found that, as the Commander of the VRS Main Staff, Mladić was under a duty to take adequate steps to prevent, investigate, and/or punish crimes by members of the VRS

[683] The Appeals Chamber observes that Exhibit P347 is Mladić's notebook and the portion to which he refers simply lists visiting VRS units among a series of tasks. *See* Exhibit P347, p. 56.
[684] *See* Trial Judgement, paras. 4311-4321.
[685] *See*, *e.g.*, Trial Judgement, paras. 4313, 4314, 4316, 4318. *See also* Trial Judgement, paras. 4322-4324. The Appeals Chamber notes that the Trial Chamber also considered evidence of a large-scale inspection of VRS commands and units that Mladić ordered to be carried out between 16 June 1994 and 2 July 1994. The purpose of this inspection was to obtain information on, *inter alia*, the situation in commands and units, and the levels and readiness of VRS units. *See* Trial Judgement, para. 4316.
[686] *See*, *e.g.*, Exhibits P5241, pp. 3, 5, 6, 8, 9; P338, pp. 10, 44, 79, 134. *See also* Trial Judgement, paras. 4313, 4322, nn. 15539, 15559-15562, *referring to* Exhibits P5241, P338.
[687] *See* Mladić Appeal Brief, para. 234, *referring to*, *inter alia*, Exhibit P358, p. 238 (where Mladić referred to a meeting with Karadžić, Slobodan Milošević, Jovica Stanišić, and Života Panić).
[688] Trial Judgement, para. 4425.

and other Serb forces under his effective control.[690] It considered that, while he issued orders to comply with the laws and regulations of the *Republika Srpska* and the VRS, the Geneva Conventions,[691] customary laws of war, and other international laws,[692] he did not take appropriate or further steps to investigate or punish perpetrators of crimes.[693] On the contrary, the Trial Chamber found that Mladić facilitated the commission of crimes by providing misleading information to representatives of the international community, non-governmental organizations, the media, and the public about crimes against Bosnian Muslims and Bosnian Croats and about the role that Serb forces had played in those crimes.[694] The Trial Chamber concluded that Mladić's misleading statements regarding crimes committed on the ground and inadequate steps to investigate and/or prosecute these crimes constituted part of his significant contribution to achieving the objective of the Overarching JCE.[695]

204. Mladić submits that the Trial Chamber erred by failing to give sufficient weight to and adequately consider certain evidence when finding that he significantly contributed to the Overarching JCE by not taking appropriate steps to investigate and/or punish perpetrators of crimes.[696] Specifically, he argues that the Trial Chamber: (i) erred by not giving sufficient weight to evidence that he could not have known certain crimes had been committed as they were not reported to him;[697] (ii) failed to give sufficient weight to evidence that he ordered investigations and punishment for crimes committed;[698] (iii) failed to give a reasoned opinion on exculpatory evidence listed in Chapter 9.3.10 of the Trial Judgement that he ordered investigations to be carried out and directed subordinates to comply with applicable laws;[699] (iv) erroneously qualified his alleged failure to punish crimes as a significant contribution based on "an absence of evidence";[700] and (v)

[689] Trial Judgement, paras. 4390-4392.
[690] Trial Judgement, para. 4544. *See also* Trial Judgement, paras. 4529-4543.
[691] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31 ("Geneva Convention I"); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85 ("Geneva Convention II"); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 ("Geneva Convention III"); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 ("Geneva Convention IV") (collectively, "Geneva Conventions").
[692] Trial Judgement, para. 4545. *See also* Trial Judgement, paras. 4517-4528.
[693] Trial Judgement, paras. 4546, 4611. *See also* Trial Judgement, paras. 4529-4545.
[694] *See* Trial Judgement, paras. 4510-4512, 4546. *See also* Trial Judgement, paras. 4502-4509
[695] Trial Judgement, paras. 4611, 4612. *See also* Trial Judgement, paras. 4502-4512, 4514-4546.
[696] *See* Mladić Appeal Brief, paras. 238, 244-267.
[697] *See* Mladić Appeal Brief, paras. 244-248.
[698] *See* Mladić Appeal Brief, paras. 249-253.
[699] *See* Mladić Appeal Brief, paras. 254-257, 259.
[700] Mladić Appeal Brief, paras. 244, 258.

gave insufficient weight to institutional issues of the military justice system in a state of crisis[701] and to its independence.[702]

205. The Prosecution responds that the Trial Chamber properly considered the totality of the evidence, including measures Mladić took to investigate and punish crimes, and reasonably concluded that the measures were inadequate.[703] It contends that Mladić's arguments misrepresent the Trial Judgement and the evidence, are irrelevant or consist of mere assertions, and thus should be summarily dismissed.[704] The Prosecution also submits that it is immaterial that Mladić may not have been informed about certain crimes and that his submissions do not support this claim.[705] Furthermore, the Prosecution argues that the Trial Chamber properly found that Mladić failed to take appropriate measures to investigate and punish crimes, and that the examples he provides do not concern him personally.[706] According to the Prosecution, the Trial Chamber provided a reasoned opinion on the "supposed 'exculpatory evidence'" listed in Chapter 9.3.10 of the Trial Judgement[707] and, contrary to Mladić's submissions, the military justice system was functioning for the duration of the war.[708] Regarding Mladić's submission about the independence of the military justice system, the Prosecution responds, *inter alia*, that the Trial Chamber found that, in many instances, decisions to release suspects were made after the VRS exerted pressure to drop cases or release perpetrators of crimes.[709] The Prosecution argues that, even if the Trial Chamber erred in finding that Mladić's failure to investigate or punish crimes significantly contributed to the Overarching JCE, such an error would have no impact on his convictions as this was only one of numerous contributions in relation to this joint criminal enterprise.[710]

206. Mladić replies that the Prosecution has erroneously asserted that evidence of his subordinates ordering prosecutions is irrelevant because this does not involve him personally.[711] He argues that the Prosecution also errs in stating that the Trial Chamber did not find that the military justice system suffered from institutional issues that inhibited its functioning.[712] He further submits that the Prosecution incorrectly claims that he ignored relevant findings and that it also incorrectly

[701] Mladić Appeal Brief, paras. 244, 261-263.
[702] Mladić Appeal Brief, paras. 244, 264.
[703] Prosecution Response Brief, paras. 79-81, 84.
[704] Prosecution Response Brief, para. 80. *See also* T. 25 August 2020 p. 101.
[705] Prosecution Response Brief, paras. 82, 83. In this regard, the Prosecution argues that the Trial Chamber never found that Mladić was informed of every criminal incident in the Municipalities. *See* Prosecution Response Brief, para. 82; T. 25 August 2020 p. 101.
[706] *See* Prosecution Response Brief, paras. 84-86, 89, 94; T. 25 August 2020 p. 101.
[707] Prosecution Response Brief, paras. 87, 88.
[708] *See* Prosecution Response Brief, paras. 91-93.
[709] Prosecution Response Brief, para. 94. *See also* Prosecution Response Brief, para. 95.
[710] Prosecution Response Brief, para. 96. *See also* T. 25 August 2020 p. 98.
[711] Mladić Reply Brief, para. 43.

submits that two isolated incidents of the VRS exerting pressure on military courts to drop cases or release perpetrators are "findings about what actually happened".[713]

a. Evidence that Mladić Lacked Knowledge of Crimes

207. The Trial Chamber found that Mladić knew that the crimes of persecution, murder, extermination, deportation, and inhumane acts (forcible transfer) were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, including in detention facilities.[714] This finding was based on evidence the Trial Chamber reviewed and its determinations on: (i) Mladić's position as Commander of the VRS Main Staff; (ii) receipt of detailed reports by the VRS Main Staff; (iii) Mladić's personal receipt of regular updates; (iv) his involvement in the VRS units' activities; and (v) the fact that the commission of crimes was widely acknowledged, reported on by international media outlets, and commented on by the UN.[715]

208. Mladić submits that the Trial Chamber failed to give sufficient weight to evidence that he could not have known that certain crimes were committed by VRS soldiers against Bosnian Muslims and Bosnian Croats.[716] To support this argument, Mladić points to four instances – relating to incidents in Manjača camp, murders in Zecovi, the VRS First Krajina Corps's false reporting on the number of "Green Berets" killed in Kozarac, and the same unit's false reporting on an incident in Grabovica – where he was misinformed or not informed about certain crimes.[717] In addition, in oral submissions replying to the Prosecution, the Defence raised a new argument that Mladić could not have known about the killings in Keraterm camp (Prijedor Municipality) as the camp was operated by the MUP.[718] The Appeals Chamber considers this argument open for summary dismissal as oral arguments are strictly limited to briefs filed on appeal, unless otherwise authorized.[719] In any event, the Appeals Chamber observes that Mladić's oral submissions are repetitive of those already considered by the Trial Chamber and that they do not undermine the Trial Chamber's finding, based on evidence, that the VRS participated in killings at Keraterm camp referenced at paragraph 1121 of the Trial Judgement.[720]

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[712] Mladić Reply Brief, para. 45.
[713] Mladić Reply Brief, para. 46, n. 81. *See also* Prosecution Response Brief, para. 95, *referring to* Trial Judgement, paras. 4143, 4189, 4196.
[714] Trial Judgement, paras. 4546, 4685.
[715] Trial Judgement, para. 4685. *See also* Trial Judgement paras. 262, 263, 268, 4383-4390, 4623, 4630-4643.
[716] Mladić Appeal Brief, paras. 244-246.
[717] Mladić Appeal Brief, paras. 246-248.
[718] *See* T. 26 August 2020 pp. 57, 58, *referring to* T. 25 August 2020 p. 95, Trial Judgement, para. 1121.
[719] *See* Decision on Defence Submissions, 14 August 2020, p. 4; Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020, para. 18; *Haradinaj et al*. Appeal Judgement, para. 19.
[720] *See* Trial Judgement, paras. 1113-1121.

209. Regarding Manjača camp (Banja Luka Municipality), Mladić submits that a report, dated 8 July 1992, from the operational team of the camp to the VRS First Krajina Corps Command, stated that a prisoner, Husein Delalović, had died of natural causes on 6 July 1992, while Witness RM-709 testified that Delalović had been shot.[721] The Appeals Chamber observes that the Trial Chamber discussed Delalović's death and considered that, according to Witness RM-709, six to seven guards took Delalović away and shot him, while the report of 8 July 1992 stated that Delalović died of natural causes.[722] The Trial Chamber could not, however, determine Delalović's ethnicity and ultimately did not include his killing among the crimes for which Mladić was held liable under Scheduled Incident B.1.4.[723] Given that Delalović's killing does not underpin Mladić's conviction and that any error would have little or no impact on findings in the Trial Judgement, the Appeals Chamber dismisses Mladić's arguments in this regard.[724]

210. As to killings in the village of Zecovi, Prijedor Municipality, Mladić submits that "no one was informed of the crime", and the incident only became known after the perpetrators were arrested and indicted in 2014.[725] The Appeals Chamber observes that the Trial Chamber considered evidence of killings in the Brdo area, comprising the villages of, *inter alia*, Zecovi and Čarakovo.[726] The Trial Chamber found that, although evidence suggested that the number of victims in the Brdo

[721] Mladić Appeal Brief, para. 246.
[722] Trial Judgement, para. 369. *See also* Trial Judgement, para. 374.
[723] Trial Judgement, para. 375. *See also* Trial Judgement, paras. 3051 (Schedule B.1.4), 4116-4123 (where the Trial Chamber, in addressing punishment of perpetrators, recalled earlier findings from Schedule B.1.4 that guards at Manjača camp murdered two Bosnian Muslim detainees, not including Delalović).
[724] The Appeals Chamber recalls that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not be considered on the merits. *See supra* para. 20. *See also*, *e.g.*, *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11. Mladić also refers to exhibits to support his claim that reports he received from Manjača camp did not provide any information about the commission of crimes by the VRS. Mladić Appeal Brief, para. 246, n. 364, *referring to* Exhibits P92, P215 (under seal), P218 (under seal), P219 (under seal), P220 (under seal), P221 (under seal), P222 (under seal), P225 (under seal), P226 (under seal), P227 (under seal), P228, P229 (under seal), P231 (under seal), P233 (under seal), P234 (under seal), P235 (under seal), P237 (under seal), P241 (under seal), D1536, D1827, D2030, D2071. A review of these exhibits reveals that, contrary to Mladić's contention, they explicitly indicate that crimes were committed at or during the prisoners' transportation to Manjača camp. *See* Exhibits P220 (under seal), p. 1 (during transportation from Sanski Most, prisoners of war were "not being treated in line with the Geneva [C]onventions: they [were] maltreated, beaten, and humiliated to the extreme", and 24 prisoners died due to thirst and lack of oxygen) (*see also* Exhibit P227, p. 1 (under seal)), P222 (under seal), pp. 1, 2 (prisoners were beaten, kicked, maltreated, and killed by military police; "Military Police in 'Manjača' camp […] think they can do whatever they want with the prisoners"), P229 (under seal), pp. 1, 2 ("two prisoners who are in isolation today […] have been beaten and […] there is a fresh human blood on the walls of the cell"; "military policemen, together with the Security commander, Staff Sergeant MESAR, just don't understand that prisoners are humans and that they are protected by international regulations while in the camp"; the team leader of the ICRC stated that "they established infliction of multiple injuries to the prisoners created by beating (bruises)"; "it is a fact that the soldiers – policemen are sometimes taking [o]ut prisoners whom they 'don't like' or who they 'like less' by their own will and that they beat them as they please"), P233 (under seal), p. 1 ("eight prisoners died during transportation from 'Omarska' to 'Manjača', three of which have most probably been killed because they bore visible traces of violence"; "behaviour of people who participated in securing transportation of the prisoners [was] very incorrect, inhuman and bullying").
[725] Mladić Appeal Brief, para. 246, *referring to* Mladić Final Trial Brief, para. 940.
[726] *See* Trial Judgement, paras. 1064-1075.

area was much higher, the evidence could establish beyond reasonable doubt only the killing of 21 victims in the village of Čarakovo and on or around Žeger Bridge.[727] A review of the Trial Judgement reveals that the deaths in Zecovi thus did not form part of the crime base supporting Mladić's conviction.[728] The Appeals Chamber accordingly dismisses Mladić's arguments with respect to killings in Zecovi in this regard.

211. With respect to the killing of the "Green Berets", Mladić points to Witness Osman Selak's testimony that during a high-level meeting General Momir Talić ordered that a report to the VRS Main Staff be changed to indicate that only 80 to 100 Green Berets had been killed in Kozarac, whereas the real number was 800.[729] Mladić relies on this to argue that he was never put on notice of the real number of deaths or their nature.[730] The Appeals Chamber observes that the Trial Chamber explicitly discussed Witness Selak's testimony that a meeting occurred on 27 May 1992, that Dragan Marčetić informed those present of 800 people being killed after an attack on Kozarac, Prijedor Municipality, and that Talić ordered that, in reporting to the VRS Main Staff, the number of people killed should be 80.[731] The Trial Chamber further noted that the VRS First Krajina Corps subsequently reported to the VRS Main Staff on 27 May 1992, *inter alia*, that "80 to 100 'Green Berets' were killed".[732] The Appeals Chamber therefore accepts Mladić's submission that he was not informed of the real number of deaths arising from this incident. Nevertheless, the Appeals Chamber notes that Mladić acknowledges that the VRS Main Staff was informed that 80 to 100 Green Berets were killed. The Appeals Chamber therefore considers that this example does not support Mladić's contention that he could not have known that certain crimes were committed.

212. Mladić asserts that, on 4 November 1992, the VRS First Krajina Corps falsely reported killings in Grabovica School in Kotor Varoš Municipality as deaths during combat operations.[733] The Appeals Chamber observes that the Trial Chamber found that the VRS First Krajina Corps tried to conceal the murder of approximately 150 unarmed Bosnian Muslim men at and around Grabovica School from the VRS Main Staff through false reports on 4 and 5 November 1992.[734] Based on the foregoing, the Appeals Chamber accepts Mladić's submission regarding the false

[727] Trial Judgement, paras. 1065, 1066, 1072, 1073.
[728] *See* Trial Judgement, para. 3051, p. 1602 (Scheduled Incident A.6.5).
[729] Mladić Appeal Brief, para. 247, *referring to* Trial Judgement, para. 1024. The Trial Chamber found that Talić was Commander of the VRS First Krajina Corps. *See, e.g.*, Trial Judgement, paras. 57, 97, 109, 147.
[730] Mladić Appeal Brief, para. 247.
[731] *See* Trial Judgement, para. 1024, *referring to* T. 25 September 2012 pp. 2988, 2989, Exhibit P253, pp. 1, 2.
[732] Trial Judgement, para. 1024, *referring to* Exhibit P247. The Trial Chamber found that, as a result of the VRS attack on Kozarac from 24 to 27 May 1992, more than 800 inhabitants were killed and that this constituted murder as charged under Counts 5 and 6 of the Indictment. *See* Trial Judgement, paras. 1037, 3051 (Scheduled Incident A.6.1), 3053, 3060, 3065.
[733] Mladić Appeal Brief, para. 248, *referring to* Trial Judgement, para. 4040.

reporting on this incident in Grabovica School. However, despite the false reporting, the Appeals Chamber notes that one of the reports from the VRS First Krajina Corps to the VRS Main Staff stated, as the Trial Chamber observed, that "a *brutal massacre* of the captured members of the Green Berets started because of the wounding of four and the killing of one soldier of the Kotor Varoš Light Infantry Brigade and the burning of wounded soldiers on Gola Planina (Jajce)".[735] As such, the Appeals Chamber considers that the VRS Main Staff was informed of a potential crime, raising the obligation to investigate. The Appeals Chamber therefore finds that this example does not support Mladić's contention that he could not have known that certain crimes were committed.

213. In view of the foregoing, the Appeals Chamber considers that Mladić does not demonstrate that the Trial Chamber erred by failing to give sufficient weight to evidence that he could not have known certain crimes were committed by his subordinates.

b. Evidence that Mladić Took Measures to Investigate and/or Punish Crimes

214. As noted above, the Trial Chamber found, in assessing his significant contribution to the Overarching JCE, that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes.[736]

215. Mladić argues that the Trial Chamber gave insufficient weight to evidence of instances where he learned about crimes committed by VRS subordinates, and where he or his subordinates ordered their investigation and prosecution.[737] To support his submission, Mladić refers to evidence that: (i) according to Basara, a brigade commander in the VRS First Krajina Corps, soldiers who executed a group of Bosnian Muslim men in Kenjari were "handed over for further proceedings";[738] (ii) Mladić launched an investigation after learning that the Commander of the Igman Infantry Brigade failed to report crimes to his superiors;[739] (iii) Basara prevented killings of detainees by ordering them to be taken to a Sanski Most police station;[740] (iv) Stanislav Galić ordered the arrest of VRS soldiers who had killed detainees;[741] and (v) Mladić took measures to improve the

[734] *See* Trial Judgement, paras. 4038, 4040, *referring to*, *inter alia*, Exhibits P441, P442, P3745.
[735] *See* Trial Judgement, para. 4038 (emphasis added), *referring to*, *inter alia*, Adjudicated Fact 807; Exhibit P441.
[736] Trial Judgement, paras. 4546, 4611.
[737] Mladić Appeal Brief, para. 249.
[738] Mladić Appeal Brief, para. 250.
[739] Mladić Appeal Brief, para. 251.
[740] Mladić Appeal Brief, para. 252.
[741] Mladić Appeal Brief, para. 252.

conditions in Manjača camp, and "took affirmative action" to punish perpetrators of certain killings in Manjača.[742]

216. Regarding the incident in Kenjari, Sanski Most Municipality, Mladić refers to Basara's evidence that four soldiers executed 17 Muslim men, and that when Lieutenant Ranko Brajić learned about this crime, the four soldiers were arrested and handed over for proceedings.[743] The Appeals Chamber observes that the Trial Chamber explicitly considered this aspect of Basara's evidence about the killings and that Brajić had the perpetrators arrested and "handed over for further proceedings".[744] The Trial Chamber further noted that, according to Basara, he did not know what happened next with the arrested persons.[745] The Trial Chamber addressed this incident when considering the punishment or non-punishment of crimes, stating that it did not receive evidence allowing it to conclude that the four soldiers were not investigated or prosecuted following their arrest, and thus did not consider this incident further.[746] In light of the above, the Appeals Chamber finds that Mladić does not demonstrate an error in the Trial Chamber's assessment of this evidence.

217. Mladić submits that Velimir Dunjić, Commander of the Igman Infantry Brigade, failed to report crimes of his detachment to his superiors, and when Mladić heard about this misconduct, he immediately initiated an investigation.[747] According to Mladić, this resulted in Dunjić's summary dismissal and the arrest and prosecution of anyone suspected to have engaged in criminal activity.[748] The Trial Chamber did not explicitly address this matter in the Trial Judgement. The Appeals Chamber notes that the evidence raised in the Mladić Final Trial Brief does not support the contention that Mladić launched an investigation or that anyone suspected to have engaged in criminal activity was arrested and prosecuted. Rather, the evidence appears to indicate that Dunjić was dismissed by Marčetić, Galić, and/or on the proposal of Colonel Ljuban Kosovac.[749] The evidence reveals that Dunjić's dismissal appears to have been related to disagreements with, *inter alios*, Galić,[750] and his lack of professional discipline rather than his failure to report crimes to his

[742] Mladić Appeal Brief, para. 253.
[743] Mladić Appeal Brief, para. 250, *referring to* Trial Judgement, paras. 1614, 4180. According to the Trial Chamber, Basara was Commander of the 6th Krajina Brigade from 29 October 1991 to mid-December 1992, and Brajić commanded battalions within this brigade. *See*, *e.g.*, Trial Judgement, paras. 108, 133, 1614.
[744] Trial Judgement, para. 1614, *referring to*, *inter alia*, Exhibit D1031, paras. 39, 46.
[745] Trial Judgement, paras. 1614, 4180, *referring to*, *inter alia*, Exhibit D1031, para. 46.
[746] Trial Judgement, paras. 4180, 4181.
[747] Mladić Appeal Brief, para. 251, *referring to* Mladić Final Trial Brief, para. 1305.
[748] Mladić Appeal Brief, para. 251, *referring to* Mladić Final Trial Brief, para. 1305.
[749] *See*, *e.g.*, T. 28 August 2014 pp. 24955, 24971; Exhibit P6705, p. 3. The Appeals Chamber notes that Marčetić was the Deputy Commander of the SRK in 1993. *See*, *e.g.* Trial Judgement, paras. 4718, 4853.
[750] According to Dunjić, he was removed from his role as a consequence of a physical confrontation with Galić, his corps commander. *See* T. 28 August 2014 pp. 24956, 24957, 24968.

supervisors.[751] This submission therefore does not demonstrate that the Trial Chamber gave insufficient weight to evidence that Mladić took measures to investigate or punish perpetrators of crimes.

218. Regarding Basara's prevention of deaths in Sanski Most, Mladić refers to paragraph 1202 of the Mladić Final Trial Brief, which points to evidence provided by Witness RM-706.[752] This evidence relates to the killing of at least 28 Bosnian Muslim men on or about 31 May 1992 between the hamlet of Begići and Vrhpolje Bridge in Sanski Most Municipality, and how Basara prevented the killing of 20 others whom he sent to a police station.[753] The Appeals Chamber considers that this example does not relate to investigations or prosecutions and, as such, does not support Mladić's contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes committed by the VRS. Moreover, this example also ignores the Trial Chamber's findings related to crimes committed by members of the VRS under Basara's command.[754]

219. Mladić avers that, on 1 June 1992, Galić ordered the arrest of VRS soldiers who had killed detainees at Velagići School (Ključ Municipality), and refers to paragraph 1273 of the Mladić Final Trial Brief, which cites the evidence of Witness Rajko Kalabić.[755] The Trial Chamber discussed Witness Kalabić's testimony about this incident and, in particular, Galić's reaction – ordering the arrest of the suspected perpetrators when he heard about the killings.[756] The Trial Chamber noted evidence that an investigating judge was subsequently sent to the school and several VRS soldiers were arrested in connection with the killings.[757] However, after being held briefly, these soldiers were released without being tried for their participation in the killings.[758] In considering whether the perpetrators of killings at Velagići School were punished, the Trial Chamber found that, following "a blackmail operation" by members of the Ključ Brigade, the investigating judge ordered the release of the arrested soldiers with the consent of the President of the Supreme Military Court and officers of the VRS Main Staff.[759] The Trial Chamber observed that "[n]o further steps were taken

[751] *See* Exhibit P6705, pp. 2, 3.
[752] Mladić Appeal Brief, para. 252, *referring to* Mladić Final Trial Brief, para. 1202.
[753] *See* Mladić Final Trial Brief, paras. 1195-1202; Trial Judgement, paras. 1589-1602.
[754] *See*, *e.g.*, Trial Judgement, paras. 3497-3502, 3513.
[755] Mladić Appeal Brief, para. 252, n. 378, *referring to* Mladić Final Trial Brief, para. 1273. Based on evidence and findings in the Trial Judgement, in June 1992, Colonel Galić was Commander of the 30th Division, which operated under the VRS First Krajina Corps. *See* Trial Judgement, paras. 145, 148, 150.
[756] Trial Judgement, para. 827, n. 3423, *referring to*, *inter alia*, T. 19 January 2015 pp. 30205, 30206.
[757] Trial Judgement, para. 827, n. 3424, *referring to* Adjudicated Fact 774.
[758] Trial Judgement, para. 827, n. 3427, *referring to* Adjudicated Fact 774.
[759] Trial Judgement, para. 4143. *See also* Trial Judgement, paras. 4135-4142.

to investigate, prosecute, or punish the perpetrators until 1996".[760] This submission therefore does not demonstrate that the Trial Chamber gave insufficient weight to evidence that Mladić took measures to investigate or punish perpetrators of crimes.

220. Mladić submits that, when advised of killings in Manjača camp, he took "affirmative action" to punish the VRS perpetrators, resulting in their suspension and criminal reports being filed.[761] To support his submissions, he refers to paragraphs 366 and 367 of the Trial Judgement.[762] These paragraphs of the Trial Judgement make no mention of any actions taken by Mladić and Mladić does not explain how they support his contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes.[763] Additionally, Mladić ignores the Trial Chamber's findings that perpetrators of killings at Manjača camp were not punished or prosecuted until years after the war.[764]

221. In light of the foregoing, the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber erred by giving insufficient weight to evidence of instances where he learned about crimes committed by VRS subordinates and he or his subordinates ordered their investigation or prosecution.

c. Failure to Give Sufficient Weight to Exculpatory Evidence

222. In finding that Mladić failed to take appropriate or further steps to investigate or punish perpetrators, the Trial Chamber considered, *inter alia*, evidence of his command over the VRS as well as orders he issued to initiate investigations and to comply with domestic and international laws.[765]

[760] Trial Judgement, para. 4143.
[761] Mladić Appeal Brief, para. 253.
[762] Mladić Appeal Brief, para. 253, *referring to* Trial Judgement, paras. 366, 367.
[763] Mladić further submits that he ordered the improvement of conditions in Manjača camp. *See* Mladić Appeal Brief, para. 253, *referring to*, *inter alia*, Exhibit P2881, p. 1. The Appeals Chamber notes that the Trial Chamber expressly referred to Exhibit P2881, an order from Mladić dated 12 August 1992, and summarized Mladić's orders to improve conditions in the camp. *See* Trial Judgement, para. 395. In the Appeals Chamber's view, not only does Mladić fail to demonstrate that the Trial Chamber failed to give sufficient weight to this evidence, he also ignores findings in the Trial Judgement that the VRS First Krajina Corps, the VRS Main Staff, and the Bosnian Serb leadership made efforts to conceal the unlawful detention and cruel and inhumane treatment of detainees at Manjača camp. *See*, *e.g.*, Trial Judgement, paras. 3989-4018. The Appeals Chamber further observes that Mladić's orders, issued on 12 August 1992, came after killings had occurred at the camp and after intense international scrutiny. *See*, *e.g.*, Trial Judgement, paras. 3994, 3996-4000. In any event, Mladić's claim that he ordered the improvement of conditions at the camp does not relate to investigations or prosecutions and, as such, does not support his contention that the Trial Chamber gave insufficient weight to evidence that he or his subordinates ordered investigation and prosecution of crimes committed by the VRS.
[764] *See*, *e.g.*, Trial Judgement, paras. 4116-4123.
[765] Trial Judgement, paras. 4544-4546.

223. Mladić notes that the Trial Chamber found in Chapter 9.3.10 of the Trial Judgement that he ordered investigations on several occasions and issued orders directing subordinates to comply with laws and regulations.[766] He submits that the Trial Chamber nevertheless concluded, based on its findings in Chapter 9.2.12 of the Trial Judgement, that he significantly contributed to furthering the common criminal objective by failing to take adequate steps to prevent or investigate crimes and/or arrest or punish the perpetrators.[767] He argues that the Trial Chamber failed to provide a reasoned opinion by omitting to analyze exculpatory evidence set out in Chapter 9.3.10 of the Trial Judgement, thus indicating that it failed to accord sufficient weight to such evidence.[768]

224. In Chapter 9.2.12 of the Trial Judgement, the Trial Chamber considered evidence concerning the response of the Bosnian Serb military and civilian justice system to crimes committed by members of the VRS and other Serb forces.[769] It found that, between 12 May 1992 and 30 November 1995, the Bosnian Serb military and civilian justice system failed on many occasions to investigate crimes committed by members of the Serb forces in the Municipalities, file criminal reports, and detain, arrest, or punish perpetrators of these crimes.[770] In Chapter 9.3.10, the Trial Chamber considered whether Mladić personally failed to take steps to prevent or investigate crimes committed in the Municipalities and arrest or punish the perpetrators.[771] Recalling its findings in Chapter 9.2.12, conclusions on Mladić's command and control of the VRS and certain Serb forces, as well as determinations that he knew that crimes were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, the Trial Chamber ultimately found in Chapter 9.3.10 that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes.[772] In coming to this conclusion, the Trial Chamber, at paragraph 4545 of the Trial Judgement, explicitly considered what Mladić regards as "exculpatory evidence",[773] namely that he issued orders to comply with laws and regulations, and initiated investigations.[774] There is accordingly no merit in Mladić's argument that the Trial Chamber omitted to analyze "exculpatory evidence" set out in Chapter 9.3.10 of the Trial Judgement and erroneously based its findings on his joint criminal enterprise liability solely on evidence in Chapter 9.2.12.[775] Mladić therefore does not demonstrate that the Trial Chamber erred by failing to give a reasoned opinion or failing to accord sufficient weight to evidence addressed in Chapter 9.3.10.

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[766] Mladić Appeal Brief, para. 256.
[767] Mladić Appeal Brief, paras. 255, 257.
[768] Mladić Appeal Brief, para. 254. *See also* Mladić Appeal Brief, para. 259.
[769] Trial Judgement, paras. 4094-4197.
[770] Trial Judgement, paras. 4114, 4195, 4545. *See also* Trial Judgement, paras. 4095-4113, 4116-4194.
[771] Trial Judgement, paras. 4514-4547.
[772] Trial Judgement, paras. 4544-4546.
[773] *See* Mladić Appeal Brief, paras. 254, 256.

d. Error in Finding Significant Contribution on the Basis of Lack of Evidence

225. In finding that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes, the Trial Chamber stated that it "did not receive evidence" to conclude that he ordered any substantial or meaningful investigations, or whether he followed up on the few investigations he may have ordered.[776]

226. Mladić argues that the Trial Chamber found, "due to an absence of evidence", that he failed to order the investigation and prosecution of crimes committed by Bosnian Serbs against Bosnian Muslims or Bosnian Croats.[777] According to Mladić, "[t]hese omissions" formed part of the basis for the Trial Chamber's findings that he significantly contributed to furthering the objective of the Overarching JCE.[778] In his view, proof that crimes occurred and went unpunished is not sufficient to establish the requirements of significant contribution or to sustain a conviction.[779] Relying on the *Kordić and Čerkez* Appeal Judgement, Mladić submits that the Trial Chamber's finding is a "grossly unfair outcome" as he was convicted "despite a lack of evidence on an essential element of the crime".[780] Mladić also references an appeal judgement of the International Criminal Court ("ICC") to argue that "measures taken by a commander cannot be faulted merely because of shortfalls in their execution".[781]

227. For the reasons that follow, the Appeals Chamber is not convinced that the Trial Chamber erred by making findings on Mladić's significant contribution to the Overarching JCE based on an "absence of evidence" – namely the lack of evidence that perpetrators were investigated or punished for their crimes.[782] First, the Trial Chamber's conclusion that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes is based on its assessment of extensive evidence and several key considerations.[783] In this regard, the Trial Chamber considered that Mladić: (i) as Commander of the VRS Main Staff, exercised effective command and control over the VRS and re-subordinated Serb forces, and thus had a duty to take adequate

[774] *See* Trial Judgement, paras. 4517-4528, 4535, 4537.
[775] *See* Mladić Appeal Brief, paras. 254-257.
[776] Trial Judgement, para. 4546.
[777] Mladić Appeal Brief, para. 258.
[778] Mladić Appeal Brief, para. 258.
[779] Mladić Appeal Brief, para. 244.
[780] Mladić Appeal Brief, para. 258, *referring to*, *inter alia*, *Kordić and Čerkez* Appeal Judgement, para. 19.
[781] Mladić Appeal Brief, para. 258, *referring to*, *inter alia*, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute", 8 June 2018 ("*Bemba* Appeal Judgement"), para. 180.
[782] *See* Mladić Appeal Brief, paras. 244, 258-260.
[783] *See* Trial Judgement, para. 4546.

steps to prevent, investigate, and/or punish crimes by subordinates under his command;[784] (ii) possessed the authority to order investigations within the military justice system, but did so primarily for breaches of military discipline and crimes committed against the VRS;[785] (iii) knew crimes were being committed by his subordinates against non-Serbs in the Municipalities;[786] and (iv) "deliberately misled" the international community and non-governmental organizations about conditions in detention facilities and "attempted to conceal the crimes committed therein" by portraying camp conditions in a more favourable light.[787] The Trial Chamber further considered that, despite a functioning military justice system, it did not receive evidence that Bosnian Serbs were prosecuted for war crimes between 12 May 1992 and 30 November 1995.[788] To the contrary, it found, based on a review of extensive evidence in the Municipalities, that: (i) the Bosnian Serb military and civilian justice system failed on many occasions to investigate, arrest, or punish perpetrators who were members of the VRS and other Serb forces; (ii) on multiple occasions where crimes were committed by members of the VRS against non-Serbs, criminal reports were not filed, investigations were not initiated by military prosecutors or investigating judges, suspects were not arrested or detained, and perpetrators were unlawfully released from detention to return to their units; and (iii) in many instances, decisions to release suspects were made after VRS officers exerted pressure on the military courts to drop cases or release perpetrators of crimes and, once released, these individuals were rarely remanded in custody.[789] Given these extensive considerations, the Appeals Chamber finds that it was reasonable for the Trial Chamber to conclude that Mladić failed to take appropriate or further steps to investigate or punish perpetrators.[790]

228. Second, the Appeals Chamber recalls that for an accused to be found criminally liable on the basis of joint criminal enterprise liability, it is sufficient that he acted in furtherance of the common purpose of a joint criminal enterprise in the sense that he significantly contributed to the commission of the crimes involved in the common purpose.[791] Beyond that, the law does not foresee specific types of conduct which *per se* could not be considered a contribution to a joint

[784] Trial Judgement, paras. 4544, 4546. *See also* Trial Judgement, paras. 246-276, 4242-4291, 4293-4394.
[785] Trial Judgement, para. 4545. *See, e.g.*, Trial Judgement, paras. 4529-4533, 4536, 4539-4543. The Trial Chamber considered evidence that Mladić on two specific occasions ordered investigations for crimes committed against non-Serbs or UN personnel. *See* Trial Judgement, paras. 4535, 4537, 4546, 4635. However, there is no further evidence considered by the Trial Chamber that prosecutions resulted from these investigations he ordered. *See, e.g.*, Trial Judgement, paras. 4545, 4546.
[786] *See, e.g.*, Trial Judgement, paras. 4546, 4630-4642, 4685.
[787] Trial Judgement, paras. 4502-4512, 4546. *See also* Trial Judgement, paras. 3986-4093.
[788] Trial Judgement, para. 4545.
[789] Trial Judgement, paras. 4094-4196, 4545.
[790] Trial Judgement, para. 4546.
[791] *See, e.g.*, *Stanišić and Župljanin* Appeal Judgement, paras. 110, 136; *Popović et al.* Appeal Judgement, para. 1378; *Šainović et al*. Appeal Judgement, paras. 987, 1177; *Krajišnik* Appeal Judgement, paras. 215, 695.

criminal enterprise.[792] Within these legal confines, the question of whether a failure to act could be taken into account to establish that the accused significantly contributed to a joint criminal enterprise is a question of fact to be determined on a case-by-case basis.[793] It is also recalled that the relevant failures to act or acts carried out in furtherance of a joint criminal enterprise need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all.[794] That is, an accused's contribution to a joint criminal enterprise need not be in and of itself criminal, as long as the accused performs (or fails to perform) acts that in some way contribute significantly to the furtherance of the common purpose.[795]

229. In the present case, the Trial Chamber considered that, as the Commander of the VRS Main Staff, Mladić was under a duty to take adequate steps to prevent, investigate, and/or punish crimes committed by members of the VRS and other Serb forces under his effective control.[796] On that basis, it considered that his failure to take such steps constituted part of his contribution to the Overarching JCE.[797] The Appeals Chamber observes that, in the jurisprudence of the ICTY, a failure to take effective and genuine measures to discipline, prevent, and/or punish crimes committed by subordinates, despite having knowledge thereof, has been taken into account in assessing, *inter alia*, an accused's *mens rea* and contribution to a joint criminal enterprise where the accused had some power and influence or authority over the perpetrators sufficient to prevent or punish the abuses but failed to exercise such power.[798] Therefore, the Trial Chamber's consideration of Mladić's failure to take adequate steps was consistent with the applicable jurisprudence.

230. Third, the Appeals Chamber finds that Mladić's references to the *Kordić and Čerkez* Appeal Judgement and the *Bemba* Appeal Judgement[799] do not support his submissions. The paragraph to which he cites in the *Kordić and Čerkez* Appeal Judgement recites the law on the standards of appellate review and defines an error causing a miscarriage of justice as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential

[792] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696.
[793] *See Stanišić and Župljanin* Appeal Judgement, para. 110. *See also, e.g., Šainović et al.* Appeal Judgement, paras. 1233, 1242.
[794] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1615, 1653; *Krajišnik* Appeal Judgement, paras. 215, 695.
[795] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al.* Appeal Judgement, paras. 1615, 1653; *Šainović et al.* Appeal Judgement, para. 985; *Krajišnik* Appeal Judgement, paras. 215, 695.
[796] Trial Judgement, para. 4544.
[797] Trial Judgement, paras. 4546, 4611, 4612.
[798] *Cf. Stanišić and Župljanin* Appeal Judgement, para. 111; *Šainović et al.* Appeal Judgement, paras. 1233, 1242; *Krajišnik* Appeal Judgement, para. 216(e).
[799] *See* Mladić Appeal Brief, para. 258.

element of the crime".[800] As discussed above, the Appeals Chamber considers that Mladić was not convicted based on an absence of evidence on an essential element of a crime. Rather, the Trial Chamber's conclusion that he failed to order investigations and prosecutions is based on an extensive assessment of evidence of his powers and role as Commander of the VRS Main Staff as well as his conduct.[801]

231. With regard to Mladić's reference to the *Bemba* Appeal Judgement from the ICC, the Appeals Chamber notes that Mladić relies on it to argue that "measures taken by a commander cannot be faulted merely because of shortfalls in their execution".[802] The Appeals Chamber recalls that it is not bound by the findings of other courts – domestic, international, or hybrid – and that, even though it may consider such jurisprudence, it may nonetheless come to a different conclusion on a matter than that reached by another judicial body.[803] Furthermore, the Appeals Chamber considers that the circumstances of that case are distinguishable from those in the present case. The accused in the *Bemba* case took measures in reaction to allegations of crimes such as establishing investigative commissions and missions, which ultimately had limited impact.[804] In the present case, the Trial Chamber found that, despite possessing authority to order investigations for war crimes and crimes against humanity, Mladić primarily ordered investigations and punishment for breaches of military discipline and crimes against the VRS.[805] The Trial Chamber further stated that it did not receive evidence on whether Mladić followed up on the "few investigations" he may have ordered regarding war crimes and crimes against humanity.[806]

232. In light of the foregoing, the Appeals Chamber dismisses Mladić's submissions that the Trial Chamber erred in finding that he failed to order investigations or prosecutions of crimes committed by his subordinates based on an "absence of evidence".

e. Limitations on Mladić and an Independent Military Justice System

233. The Trial Chamber found that the military courts in *Republika Srpska* were fully operational by the early autumn of 1992 and had jurisdiction over the crime of armed rebellion, crimes against the state, crimes against humanity, and violations of the Geneva Conventions.[807] According to the

[800] *See Kordić and Čerkez* Appeal Judgement, para. 19.
[801] *See, e.g.*, Trial Judgement, paras. 4544-4546.
[802] *See* Mladić Appeal Brief, para. 258, n. 391, *referring to Bemba* Appeal Judgement, para. 180.
[803] *See, e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83.
[804] *See, e.g.*, *Bemba* Appeal Judgement, paras. 171-182.
[805] *See* Trial Judgement, paras. 4545, 4546.
[806] *See* Trial Judgement, paras. 4545, 4546.
[807] Trial Judgement, para. 4111. *See also* Trial Judgement, paras. 4099, 4101, 4103, 4105, 4107.

Trial Chamber, the jurisdiction of these courts also extended to crimes committed by police officers and paramilitaries subordinated to military units.[808] The Trial Chamber further found that proceedings before the military courts continued throughout the war, despite problems such as shortages of staff and materials, and difficulties locating suspects and witnesses.[809] The Trial Chamber observed that the military courts focused on crimes committed against the VRS[810] and noted that it did not receive any evidence of Bosnian Serbs being prosecuted for war crimes against non-Serbs during this period.[811] The Trial Chamber found that, between 12 May 1992 and 30 November 1995, the Bosnian Serb military and civilian justice system failed on many occasions to investigate crimes committed by members of the VRS and other Serb forces, and to arrest and/or punish perpetrators.[812]

234. Mladić submits that the Trial Chamber "failed to appreciate the limitations" he faced while the military justice system was in a "state of crisis" and the realities that he was unable to submit matters for investigation and prosecution in the conflict situation.[813] He argues that by failing to consider the "restrictive realities of applying justice in conditions of conflict", the Trial Chamber imposed a standard upon him that was impossible to meet.[814] Mladić further submits that the Trial Chamber erred by "simply juxtapos[ing him] with the structure of the military justice system" and that it failed to "provide an appropriate nexus" between him and the decisions made by independent prosecutors or judges.[815] In his view, the independence of the military justice system meant that decisions about prosecutions did not involve him.[816]

[808] Trial Judgement, para. 4111. *See also* Trial Judgement, para. 4101.
[809] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4103, 4105-4107, 4109, 4110.
[810] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4106, 4107, 4110.
[811] Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4104 (where the Trial Chamber considered evidence that the atmosphere in 1995 was such that it was not realistic for anyone to file a criminal complaint against a high-ranking VRS officer or for a prosecutor to initiate an investigation against the security organ of the VRS Main Staff as doing so would have risked the safety and lives of his or her family), 4106 (where the Trial Chamber considered evidence that no VRS soldier was prosecuted for killing non-Serbs in Sanski Most where the 6th Krajina Brigade of the VRS First Krajina Corp was based, and that, according to Witness Slobodan Radulj, the Banja Luka Military Prosecutor had received instructions not to bring charges of war crimes for crimes committed by VRS soldiers against non-Serbs), 4107 (where the Trial Chamber considered evidence that, after the Bijeljina Military Court began functioning in August 1992, the justice system was not prosecuting Serbs for committing crimes against non-Serbs, with the exception of a few cases wherein the sentences were not carried out, and that, according to Witness RM-513, there were no prosecutions by the military court of VRS soldiers for crimes committed against non-Serb civilian populations).
[812] Trial Judgement, paras. 4195, 4545. *See also* Trial Judgement, paras. 4106, 4107, 4110, 4123, 4128, 4134, 4143, 4148, 4152, 4165, 4178, 4189, 4194.
[813] Mladić Appeal Brief, paras. 261, 262. *See also* Mladić Reply Brief, para. 45.
[814] Mladić Appeal Brief, para. 263.
[815] Mladić Appeal Brief, para. 264.
[816] Mladić Appeal Brief, para. 244.

235. In support of his argument that the Trial Chamber failed to "appreciate the limitations" he faced, Mladić refers to, *inter alia*, his final trial brief,[817] which discusses the difficulties faced by military courts during the conflict.[818] The Appeals Chamber notes that these submissions do not address difficulties he personally faced. The rest of his argument on appeal in this regard also does not identify any evidence that the Trial Chamber ought to have addressed. In any event, the Appeals Chamber observes that the Trial Chamber explicitly considered difficulties faced by the military courts during the war and found that they reported problems such as shortages of staff and materials and difficulties locating suspects and witnesses.[819] It nevertheless concluded that proceedings before the military courts continued throughout the war.[820] Additionally, Mladić ignores the Trial Chamber's findings that he possessed the authority to order investigations within the military justice system and that he did so on numerous occasions, but primarily with respect to crimes committed against the VRS or breaches of military discipline.[821] The Appeals Chamber therefore finds that Mladić does not demonstrate that the Trial Chamber erred in failing to appreciate the limitations he faced in raising issues for investigation and prosecution during the war.

236. The Appeals Chamber is also not persuaded by Mladić's submission that the Trial Chamber erred by "simply juxtapos[ing]" him with the military justice system in finding that he did not take appropriate steps to investigate or punish perpetrators of crimes.[822] As previously noted, on the

[817] Mladić Appeal Brief, para. 261, n. 392, *referring to*, *inter alia*, Mladić Final Trial Brief, paras. 732, 733. Mladić also refers to Exhibit P360. *See* Mladić Appeal Brief, para. 261, n. 392, *referring to*, *inter alia*, Exhibit P360, p. 296. The Appeals Chamber notes, however, that the page number indicated in the appellant's brief, page 296, does not exist in Exhibit P360. The Appeals Chamber further notes that Mladić relies on the *Bemba* Appeal Judgement as well as the *Popović et al*. Appeal Judgement to support his submission. *See* Mladić Appeal Brief, paras. 261, 263. With regard to his reliance on the *Bemba* Appeal Judgement, the Appeals Chamber recalls that it is not bound by jurisprudence from other courts. *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83. Furthermore, Mladić's references to the *Bemba* Appeal Judgement do not support his argument as that case concerned different factual circumstances – namely, the Appeals Chamber of the ICC found that the Trial Chamber of the ICC had failed to properly appreciate, *inter alia*, that the accused faced limitations in investigating and prosecuting crimes as a "remote commander sending troops to a foreign country". *See* Mladić Appeal Brief, paras. 261-263, nn. 392, 399, 400, *referring to*, *inter alia*, *Bemba* Appeal Judgement, paras. 138, 144-146, 166-171, 173, 189. *See also Bemba* Appeal Judgement, paras. 171-173, 189. The Appeals Chamber also finds Mladić's references to the *Popović et al*. Appeal Judgement, relating to superior responsibility under Article 7(3) of the ICTY Statute, to be distinguishable from Mladić's case, which involves joint criminal enterprise liability under Article 7(1) of the ICTY Statute. *See* Mladić Appeal Brief, paras. 261, 263, nn. 392, 400, *referring to*, *inter alia*, *Popović et al*. Appeal Judgement, para. 1931.

[818] *See* Mladić Final Trial Brief, paras. 732, 733, *referring to* Exhibits P3560, P1092 (under seal), D1026.

[819] *See* Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4106, 4108.

[820] *See* Trial Judgement, para. 4114. *See also* Trial Judgement, paras. 4099, 4101, 4103-4111.

[821] Trial Judgement, para. 4545. *See*, *e.g.*, Trial Judgement, paras. 4529-4533, 4535-4540, 4542, 4543.

[822] *See* Mladić Appeal Brief, para. 264. In this regard, Mladić ignores the Trial Chamber's findings that, while the military judicial system of *Republika Srpska* was formally autonomous and independent, "in many instances, decisions to release suspects were made after VRS officers […] exerted pressure on the military courts to drop cases or release perpetrators of crimes". Trial Judgement, para. 4196. The Appeals Chamber further notes the Trial Chamber's consideration of Witness RM-513's evidence that a military prosecutor "obstructed the work of the Bijeljina military court and put pressure on his subordinates to drop cases involving Bosnian-Serb perpetrators and Bosnian-Muslim victims". *See* Trial Judgement, para. 4132, *referring to* Exhibit P1054 (under seal), paras. 58, 62. The Trial Chamber considered the evidence of Witness RM-016, who stated that the Banja Luka military court released perpetrators of a

basis of extensive evidence, the Trial Chamber concluded that, in practice, on multiple occasions in which crimes had been committed against non-Serbs by members of the VRS or other Serb forces, criminal reports were not filed, investigations were not initiated by military prosecutors or investigating judges, suspects were not arrested or detained, and perpetrators were unlawfully released.[823] Given these findings as well as conclusions that Mladić possessed the authority to order investigations in the military justice system[824] but failed to order any substantial or meaningful investigations into war crimes and crimes against humanity,[825] the Trial Chamber's findings are based on evidence it considered rather than juxtaposing Mladić's conduct with decisions of an allegedly independent military justice system.

(iv) Conclusion

237. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred in finding that he significantly contributed to the common criminal purpose of the Overarching JCE.

(b) *Mens Rea*

238. In assessing Mladić's *mens rea* with respect to the Overarching JCE, the Trial Chamber found that he knew that the crimes of persecution, murder, extermination, deportation, and inhumane acts (forcible transfer) were committed against Bosnian Muslims and Bosnian Croats in the Municipalities, including in detention facilities.[826] It also found that Mladić's statements and

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massacre at Velagići School under the pressure of the Ključ Brigade and with the approval of the VRS Main Staff. *See* Trial Judgement, paras. 828, 4139, 4141, *referring to* Exhibit P2375 (under seal). The Trial Chamber also considered evidence that the atmosphere in 1995 was such that, although it was possible for an individual to file a criminal complaint against high-ranking VRS officers, it was not realistic as those who did would have risked the safety and lives of family members, and that, while it was also possible for a prosecutor to initiate investigations against the security organ of the VRS Main Staff, no prosecutor would have done so for the same reason. *See* Trial Judgement, para. 4104, *referring to* Exhibit P3351, pp. 10856, 10861, 10862.

[823] *See* Trial Judgement, paras. 4195, 4545. *See also*, *e.g.*, Trial Judgement, paras. 4106 (where the Trial Chamber considered evidence showing that: "no VRS soldier was prosecuted for killing non-Serbs in Sanski Most, where the 6th Krajina Brigade was based", "cases concerning non-Serb victims were delayed"; "[p]riority […] was given to cases concerning the evasion of military service by Serbs"); 4107 (where the Trial Chamber considered evidence from Witness RM-513 that "after the Bijeljina Military Court began functioning in August 1992, the justice system, including the court, prosecutors, and police, was not prosecuting Serbs for committing crimes against non-Serbs, with the exception of a few cases, even though it was common knowledge that Serbs were killing non-Serbs in 1992" while "in cases where the victims were Bosnian Serbs, perpetrators were punished according to the law" as "[p]ressure from families influenced the courts"); 4110 (where the Trial Chamber considered evidence that criminal proceedings in the military justice system "were primarily initiated and completed with the aim of assisting the armed struggle and thus contributing to the creation of the new Serbian state").

[824] Trial Judgement, paras. 4544, 4545. *See also* Trial Judgement, paras. 4383-4394, 4529-4543.

[825] Trial Judgement, paras. 4545, 4546.

[826] Trial Judgement, para. 4685. *See also* Trial Judgement, paras. 4623, 4630-4643, 5352 (confidential). In finding that Mladić knew of crimes being committed against non-Serbs in the Municipalities, the Trial Chamber relied on the following considerations: (i) his position as Commander of the VRS Main Staff (*see*, *e.g.*, Trial Judgement, paras. 4374-4394, 4544, 4611, 4612, 4623, 4685); (ii) the VRS Main Staff's receipt of detailed reports (*see*, *e.g.*, Trial Judgement,

conduct demonstrated his intent for the crimes to be committed on discriminatory grounds.[827] In reaching this finding, the Trial Chamber considered Mladić's: (i) repeated use of derogatory terms to refer to Bosnian Muslims and Bosnian Croats;[828] (ii) recalling of historical crimes that were allegedly committed against Bosnian Serbs and his references to the threat of "genocide" against the Bosnian Serbs;[829] (iii) statements indicating an intention not to respect the laws of war in Croatia in 1991 and later references to repeating the destruction inflicted during that conflict;[830] and (iv) expressions of commitment to an ethnically homogeneous *Republika Srpska*, even in territories that previously had a large percentage of non-Serb inhabitants.[831] The Trial Chamber further considered that Mladić's orders to respect the Geneva Conventions, his statements to personnel of the UN Protection Force ("UNPROFOR"), and his involvement in peace negotiations were not indicative of his true state of mind.[832] The Trial Chamber concluded that Mladić shared the intent to achieve the common objective of the Overarching JCE through the commission of crimes and that he held this intent by 12 May 1992 at the latest.[833]

239. Mladić submits that the Trial Chamber erred in determining that he possessed and shared the intent to achieve the common objective of the Overarching JCE.[834] Specifically, he argues that the Trial Chamber erred by: (i) applying a "defective method" in determining his *mens rea*;[835] (ii) preferring circumstantial evidence and disregarding or failing to give sufficient weight to clearly relevant direct evidence that contradicts findings in the Trial Judgement of his *mens rea*;[836] and (iii) relying on isolated parts of his speeches at two Bosnian Serb Assembly sessions.[837] Mladić argues that as a consequence of these errors, the Trial Chamber's findings on his *mens rea* are invalid and do not support his liability, and requests that the Appeals Chamber reverse his convictions in

paras. 4297-4299, 4383-4385, 4387, 4631, 4638, 4685); (iii) Mladić's personal receipt of regular updates (*see*, *e.g.*, Trial Judgement, paras. 4296-4310, 4385, 4685); (iv) his involvement in VRS units' activities (*see*, *e.g.*, Trial Judgement, paras. 4293-4394, 4611, 4612, 4615, 4685); and (v) the fact that the commission of crimes was widely acknowledged (*see*, *e.g.*, Trial Judgement, paras. 4632, 4633, 4685).

[827] Trial Judgement, para. 4686.

[828] Trial Judgement, para. 4686. *See also*, *e.g.*, Trial Judgement, paras. 4332, 4342, 4460, 4461, 4483, 4499, 4644, 4645, 4647, 4650, 4667-4669.

[829] Trial Judgement, para. 4686. *See also*, *e.g.*, Trial Judgement, paras. 4483, 4486, 4499, 4647-4650, 4667.

[830] Trial Judgement, para. 4686. *See also*, *e.g.*, Trial Judgement, paras. 4617-4619, 4670, 4671.

[831] Trial Judgement, para. 4686. *See also*, *e.g.*, Trial Judgement, paras. 4620, 4629.

[832] Trial Judgement, para. 4687. *See also*, *e.g.*, Trial Judgement, paras. 4503, 4511, 4517-4528, 4545, 4676-4684.

[833] Trial Judgement, para. 4688.

[834] *See* Mladić Notice of Appeal, para. 36; Mladić Appeal Brief, paras. 13, 270-334; Mladić Reply Brief, paras. 48-66.

[835] *See* Mladić Appeal Brief, paras. 270, 281-292; Mladić Reply Brief, paras. 49-63; T. 25 August 2020 pp. 46-52. *See also* T. 26 August 2020 pp. 58, 59.

[836] *See* Mladić Appeal Brief, paras. 294, 299-313; Mladić Reply Brief, paras. 64-66; T. 25 August 2020 pp. 46, 47, 59.

[837] *See* Mladić Appeal Brief, paras. 317, 320-330; T. 25 August 2020 pp. 58, 59.

relation to the Overarching JCE, or, in the alternative, reverse the Trial Chamber's findings to the extent of any errors.[838] The Appeals Chamber will address these submissions in turn.

(i) Alleged Error in Conflating *Mens Rea* and *Actus Reus*

240. Mladić submits that the Trial Chamber employed a "defective method" when determining his *mens rea* that resulted in its erroneous finding that he shared the intent to further the common objective of the Overarching JCE.[839] He contends that the Trial Chamber erred in two respects.[840] First, Mladić argues that the Trial Chamber erroneously made inferences of his *mens rea* in its *actus reus* analysis.[841] To support this argument, he relies on the *Milutinović et al*. Trial Judgement[842] and points to parts of the Trial Judgement that address his significant contribution but contain matters that "should have only been considered in the context of [his] *mens rea*".[843] Second, Mladić submits that the Trial Chamber erred in using its finding on his *mens rea* "to substantiate its *actus reus* findings".[844] In this regard, he refers to parts of the Trial Judgement and relies on the *Stanišić and Simatović* Appeal Judgement to argue that the *mens rea* can only be considered after the *actus reus* has been established.[845] Mladić submits that the "collective consequence of these errors" was that, when the Trial Chamber determined his *mens rea*, "it had already drawn a relevant inference from the evidence".[846] In his view, the evidence analyzed in the *mens rea* section was "indelibly tainted so that it could only lead to the conclusion of guilt".[847]

241. The Prosecution responds that Mladić identifies no error in the Trial Chamber's assessment of his *mens rea*,[848] as he does not point to any instance where the Trial Chamber in fact made inferences on his *mens rea* in its *actus reus* analysis, or that it used findings on his *mens rea* to

[838] *See* Mladić Appeal Brief, paras. 291-293, 314-316, 331-335.
[839] *See* Mladić Appeal Brief, paras. 270, 281-292; T. 25 August 2020 pp. 46-52. *See also* T. 26 August 2020 pp. 58, 59.
[840] *See* Mladić Appeal Brief, paras. 281-290; T. 25 August 2020 pp. 46-52.
[841] *See* Mladić Appeal Brief, paras. 281-285; T. 25 August 2020 pp. 50-52.
[842] Mladić Appeal Brief, paras. 276, 277, 284. *See also* Mladić Reply Brief, paras. 52-54. The Appeals Chamber notes that Mladić erroneously refers to the *Milutinović et al.* Trial Judgement, which concerned Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić, as the "*Šainović* Trial Judgement". In its analysis, the Appeals Chamber will refer to the correct name for this trial judgement.
[843] Mladić Appeal Brief, paras. 282-285, *referring to*, *inter alia*, Trial Judgement, paras. 4459, 4460, 4465, 4468, 4486, 4471-4473, 4477, 4478, 4627, 4629, 4686. *See also* Mladić Reply Brief, paras. 55-57.
[844] *See* Mladić Appeal Brief, paras. 286-290; T. 25 August 2020 pp. 47-50.
[845] Mladić Appeal Brief, para. 286; T. 25 August 2020 pp. 48-50. *See also* Mladić Appeal Brief, para. 273; Mladić Reply Brief, paras. 51, 56.
[846] Mladić Appeal Brief, para. 291; T. 25 August 2020 pp. 50, 51.
[847] Mladić Appeal Brief, para. 291; Mladić Reply Brief, para. 55; T. 25 August 2020 p. 51.
[848] Prosecution Response Brief, paras. 98, 100; T. 25 August 2020 p. 103.

substantiate its *actus reus* findings.[849] In addition, the Prosecution submits that Mladić misconstrues the law, misrepresents the Trial Judgement, and disregards relevant findings.[850]

242. In relation to his first contention that the Trial Chamber erred by assessing his *mens rea* in its significant contribution analysis,[851] Mladić submits that, according to the *Milutinović et al*. Trial Judgement, where the same evidence is used to determine the *actus reus* and the *mens rea*, the "*actus reus* elements" are "very limited, physical, and two-dimensional contributions of the individual", whereas the *mens rea* analysis uses the same evidence as a basis to infer "the three-dimensional aspects" of behaviour, such as the individual's influence, knowledge, and intent behind his words.[852]

243. After reviewing the relevant portions of the *Milutinović et al*. Trial Judgement, the Appeals Chamber observes that the ICTY trial chamber in that case was assessing whether the accused's participation in a meeting met either the significant contribution or the *mens rea* element relevant to his participation in a joint criminal enterprise.[853] In the Appeals Chamber's view, contrary to Mladić's submissions, at no point did the ICTY trial chamber in the *Milutinović et al*. case establish a distinction between "two-dimensional" *actus reus* elements and "three-dimensional" *mens rea* aspects. In any event, the Appeals Chamber recalls that a trial chamber's determinations are not binding on other trial chambers or on the Appeals Chamber.[854] Of even greater significance, there is no legal requirement that a trial chamber's analysis as to an accused's *mens rea* and *actus reus* be done separately and Mladić fails to substantiate that this was required of the Trial Chamber when assessing the *mens rea* and *actus reus* elements pertaining to the Overarching JCE. To the contrary, trial chambers are free to organize their judgements as they see fit so long as they fulfil their obligation to provide a reasoned opinion.[855]

244. As illustrations of the first alleged error, Mladić refers to paragraphs 4459, 4460, 4471, 4472, 4473, 4477, and 4478 of the Trial Judgement.[856] The Appeals Chamber notes that these paragraphs are part of Chapter 9.3.7 of the Trial Judgement where the Trial Chamber addressed

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[849] Prosecution Response Brief, paras. 100-103; T. 25 August 2020 pp. 102, 103.
[850] Prosecution Response Brief, para. 98. *See also* T. 25 August 2020 pp. 102, 103.
[851] The Appeals Chamber understands that Mladić's arguments and references to the "*actus reus*" in this portion of the appeal concern his significant contribution, as the Trial Judgement paragraphs referenced in his appellant's brief deal with significant contribution rather than other elements of the *actus reus* of joint criminal enterprise. *See* Mladić Appeal Brief, nn. 419-424, 426, 428, 429, 431, 432.
[852] Mladić Appeal Brief, paras. 276, 277, *referring to Milutinović et al*. Trial Judgement, Vol. 3, paras. 142, 275, 276.
[853] *See Milutinović et al*. Trial Judgement, Vol. 3, paras. 275, 276.
[854] *See Karemera and Ngirumpatse* Appeal Judgement, para. 52; *Lukić and Lukić* Appeal Judgement, para. 260.
[855] *See* Article 23 of the ICTY Statute; Rule 98 *ter* (C) of the ICTY Rules.
[856] Mladić Appeal Brief, paras. 282-284, nn. 419-424.

Mladić's participation in the development of Bosnian Serb governmental policies.[857] The Appeals Chamber further observes that paragraphs 4459, 4460, 4471, 4472, and 4473 of the Trial Judgement contain summaries of evidence rather than analysis of such evidence or inferences drawn from it.[858] As such, the Appeals Chamber considers that these references do not support Mladić's contention that the Trial Chamber was making *mens rea* inferences in its *actus reus* analysis.[859] In paragraphs 4477 and 4478 of the Trial Judgement, the Trial Chamber considered Mladić's arguments that he, *inter alia*, "did not have a tendency to get involved in political matters" and "did not have voting rights within the Bosnian Serb Assembly".[860] It found, however, that he, *inter alia*: (i) attended and actively participated in policy discussions during Bosnian Serb Assembly sessions and meetings with members of the Bosnian Serb government; (ii) discussed these policies at several meetings with high-level political figures and representatives of the international community, and expressed his commitment to the strategic objectives; and (iii) often suggested to Bosnian Serb politicians what position they should take during peace negotiations in order to achieve the strategic objectives as initially defined.[861] It is clear that the findings reflect that the Trial Chamber was addressing Mladić's conduct in the context of a significant contribution assessment rather than his intent. Mladić's contention that the Trial Chamber made inferences on his *mens rea* in its analysis of his significant contribution is therefore incorrect. The Appeals Chamber further notes that Mladić also appears to challenge paragraphs 4465, 4468, 4486, 4627, 4629, and 4686 of the Trial Judgement in that the Trial Chamber was making inferences on his *mens rea* in sections related to his significant contribution.[862] The Appeals Chamber considers that paragraphs 4465, 4468, and 4486 of the Trial Judgement merely contain references to evidence reviewed in Chapter 9.3.13 and brief summaries of that evidence, rather than analysis, while paragraphs 4627 and 4629 contain summaries of evidence, rather than analysis. Therefore, similar to paragraphs 4459, 4460, 4471, 4472, and 4473 of the Trial Judgement discussed above, the Appeals Chamber considers that the Trial Chamber, in summarizing the evidence, was not "making inferences" and thus rejects Mladić's arguments in this regard. Finally, considering that paragraph 4686 of the Trial Judgement is the conclusion of Chapter

[857] *See* Trial Judgement, paras. 4458-4478.
[858] *See* Trial Judgement, paras. 4459 (where the Trial Chamber summarized the evidence of Witness Robert Donia that, *inter alia*, Mladić did not have a right to vote or make proposals at assembly sessions but served as an influential voice and was able to make suggestions, advocate policies, and engage in discussions about such policies), 4460 (where the Trial Chamber summarized the minutes of a Bosnian Serb Assembly session on 12 May 1992, including Mladić's statements), 4471 (where the Trial Chamber summarized the minutes of a Bosnian Serb Assembly session on 15 and 16 April 1995, including Mladić's statements), 4472 (where the Trial Chamber summarized the evidence of Witnesses Michael Rose, Husein Aly Abdel-Razek, and Anthony Banbury on Mladić's authority in relation to Karadžić and others), 4473 (where the Trial Chamber summarized the evidence of Witnesses Rupert Smith and John Wilson on the relationship between military and political structures, and between Mladić and Karadžić).
[859] *See* Mladić Appeal Brief, para. 281.
[860] Trial Judgement, paras. 4477, 4478.
[861] Trial Judgement, paras. 4477, 4478.
[862] *See* Mladić Appeal Brief, para. 285, n. 426.

9.3.13 wherein the Trial Chamber analyzed Mladić's *mens rea*, the Appeals Chamber considers it appropriate for Mladić's intent to be assessed at this point in the judgement. His contention that the Trial Chamber made inferences concerning his *mens rea* in its significant contribution analysis, with respect to paragraphs 4465, 4468, 4486, 4627, 4629, and 4686 of the Trial Judgement, is therefore also dismissed.

245. The Appeals Chamber now turns to Mladić's second alleged error concerning the Trial Chamber's reliance on its *mens rea* findings to substantiate elements of his significant contribution.[863] In support, Mladić references the *Stanišić and Simatović* Appeal Judgement to argue that "the *actus reus* determination must be established first, before considerations of *mens rea* are determined".[864] The Appeals Chamber observes that the ICTY Appeals Chamber in the *Stanišić and Simatović* case considered whether the trial chamber in that case had erred by concluding that the joint criminal enterprise *mens rea* of both accused had not been established, prior to making any findings on the existence of a common criminal purpose that was shared by a plurality of persons.[865] The ICTY Appeals Chamber, by majority, concluded that, in the circumstances of that case, the trial chamber should have determined the existence and scope of a common purpose, and whether the accused's acts contributed to that purpose, before determining whether the accused shared the intent to further that purpose.[866]

246. The Appeals Chamber considers that the circumstances in the *Stanišić and Simatović* case – where the trial chamber had failed to make any findings or to analyze any evidence on the existence of a common criminal purpose[867] – are different from the current case. In the present case, the Trial Chamber established the existence of the Overarching JCE and its membership,[868] assessed Mladić's contribution,[869] and addressed his *mens rea*.[870]

247. The Appeals Chamber is further of the view that the Trial Chamber did not, as Mladić alleges, use its finding of his *mens rea* to substantiate its finding of his significant contribution.[871] Having reviewed Mladić's references to the Trial Judgement, the Appeals Chamber considers that

[863] *See* Mladić Appeal Brief, paras. 286-290. *See also* T. 25 August 2020 pp. 47-50.
[864] *See* Mladić Appeal Brief, paras. 273, 286, nn. 412, 427, *referring to Stanišić and Simatović* Appeal Judgement, paras. 82, 87; T. 25 August 2020 pp. 48, 50.
[865] *See Stanišić and Simatović* Appeal Judgement, paras. 79-90.
[866] *Stanišić and Simatović* Appeal Judgement, para. 88. *See also Stanišić and Simatović* Appeal Judgement, paras. 81, 82.
[867] *See Stanišić and Simatović* Appeal Judgement, para. 89.
[868] *See* Trial Judgement, paras. 3573-4240.
[869] *See* Trial Judgement, paras. 4241-4612.
[870] *See* Trial Judgement, paras. 4613-4688.
[871] *See* Mladić Appeal Brief, paras. 286-290, *referring to* Trial Judgement, paras. 4298, 4386, 4465, 4477, 4486, 4546, 4611, 4612, 4628. *See also* T. 25 August 2020 pp. 47-50.

these references show nothing more than the Trial Chamber cross-referencing between different sections in the Trial Judgement. Within its extensive assessment of evidence on Mladić's significant contribution, the Trial Chamber at times referred to its summary of evidence or findings of fact in the *mens rea* section.[872] The Appeals Chamber observes that the Trial Chamber used this practice of cross-referencing throughout the Trial Judgement instead of re-summarizing its findings of fact or summaries of evidence.[873] The Appeals Chamber recalls that trial chambers need not unnecessarily repeat considerations reflected elsewhere in the trial judgement.[874] Furthermore, nothing prevents a trial chamber from relying on the same evidence when making findings as to an accused's *actus reus* and *mens rea*. Accordingly, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber used its finding of *mens rea* to substantiate its finding of his significant contribution or committed any error in this respect.

248. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić has failed to demonstrate that the Trial Chamber erred by conflating or otherwise applying a defective method in assessing the *mens rea* and significant contribution elements in relation to the Overarching JCE.

(ii) Alleged Error in Assessment of Evidence

249. Mladić submits that, in assessing his *mens rea*, the Trial Chamber erred by disregarding or failing to give sufficient weight to clearly relevant direct evidence and preferring circumstantial evidence.[875] He submits that the circumstantial evidence the Trial Chamber relied on was "of lower probative value" than other "stronger, more direct, and conflicting evidence".[876] To this effect, Mladić challenges the Trial Chamber's reliance on the following circumstantial evidence to

[872] Mladić alleges that the Trial Chamber erred in paragraphs 4298, 4386, 4465, and 4546 of the Trial Judgement. *See* Mladić Appeal Brief, paras. 287, 289, 290, nn. 428, 432, 433. The Appeals Chamber observes that, in paragraph 4465 of the Trial Judgement, while assessing Mladić's participation in the development of Bosnian Serb governmental policies, the Trial Chamber cross-referenced evidence reviewed in Chapter 9.3.13 (*mens rea*) that Mladić demonstrated his opposition to the Vance-Owen plan. *See* Trial Judgement, paras. 4465, 4628. In paragraph 4298 of the Trial Judgement, when discussing Mladić's command and control of the VRS, the Trial Chamber cross-referenced the evidence of Witness RM-802, which it considered in Chapter 9.3.13 (*mens rea*), that daily reports were sent and that Mladić was a "hands-on" commander. *See* Trial Judgement, paras. 4298, 4631. In paragraph 4386 of the Trial Judgement, the Trial Chamber made findings relevant to Mladić's visits to and inspections of VRS units but did not refer to any evidence or assessment in the *mens rea* section of the Trial Judgement. *See* Trial Judgement, para. 4386. In paragraph 4546 of the Trial Judgement, the Trial Chamber found that Mladić did not take appropriate or further steps to investigate or punish perpetrators of crimes, referring to, *inter alia*, its findings in Chapter 9.3.13 (*mens rea*) that Mladić knew that crimes were committed. *See* Trial Judgement, paras. 4546, 4623, 4630-4643, 5352 (confidential).

[873] *See*, *e.g.*, Trial Judgement, paras. 3051, 3068, 3122, 3133, 3210, 3217-3220, 3222, 3224-3226, 3230, 3241, 3267, 3287, 3325, 3360, 3381, 3388, 3406, 3419, 3556, 3577, 3665, 3676, 3690, 3691, 3704, 3708, 3722, 4614, 4615, 4623, 4624, 4630, 4631, 4635-4639, 4644, 4646, 4685.

[874] *See Karadžić* Appeal Judgement, para. 721; *Stakić* Appeal Judgement, para. 47.

[875] *See* Mladić Appeal Brief, paras. 294, 299-313; T. 25 August 2020 pp. 46, 47, 59.

[876] Mladić Appeal Brief, para. 299.

establish his *mens rea* for the Overarching JCE: (i) statements he made when posted in Knin with the 9th Corps of the JNA which were used to infer that he had the intent to disrespect the laws of war in Croatia; and (ii) his "passive presence" at two meetings in Pale Municipality ("Pale Meetings").[877] Mladić further argues that the Trial Chamber disregarded and omitted to provide reasoning in its analysis of the following direct and probative evidence: (i) his "anti-paramilitary" orders and conduct, which Mladić argues directly contradict his intent to further the Overarching JCE; (ii) the "genuine warnings in his orders for VRS soldiers to respect the Geneva Conventions"; and (iii) his "direct orders" to observe ceasefire agreements.[878] In his view, had appropriate weight been given to direct evidence, no reasonable trier of fact could have concluded that his *mens rea* in relation to the Overarching JCE was established beyond reasonable doubt.[879]

250. The Prosecution responds that Mladić's arguments are grounded in misconceptions, and his examples demonstrate no error or disregard of evidence.[880] Regarding circumstantial evidence, it submits that Mladić's submissions misrepresent the Trial Judgement and the evidence,[881] and wrongly imply that direct evidence has inherently greater value than circumstantial evidence.[882] According to the Prosecution, Mladić also repeatedly mislabels evidence as either direct or circumstantial and addresses only a fraction of the vast amount of evidence underlying the Trial Chamber's *mens rea* assessment.[883] The Prosecution further responds that Mladić fails to demonstrate that the Trial Chamber disregarded direct evidence, as he misrepresents the law and the Trial Judgement, inflates the probative value of evidence on which he relies, and ignores relevant findings.[884]

251. Mladić replies that the Prosecution has mischaracterized his submissions, as he does not assert that direct evidence is inherently more probative than circumstantial evidence.[885] He clarifies

[877] Mladić Appeal Brief, paras. 303-307. *See also* T. 25 August 2020 p. 43.
[878] Mladić Appeal Brief, paras. 308-313; T. 25 August 2020 pp. 52-54, 59.
[879] Mladić Appeal Brief, paras. 314, 315. *See also* T. 25 August 2020 p. 59.
[880] *See* Prosecution Response Brief, paras. 98, 104-115; T. 25 August 2020 pp. 103-106.
[881] *See* Prosecution Response Brief, paras. 105, 107-109; T. 25 August 2020 pp. 105, 106.
[882] Prosecution Response Brief, paras. 104, 106; T. 25 August 2020 pp. 103-105.
[883] Prosecution Response Brief, paras. 104, 108, 109. *See also* T. 25 August 2020 p. 105. In response to Mladić's specific examples of where the Trial Chamber erred in relation to circumstantial evidence, the Prosecution submits, *inter alia*, that: (i) he misrepresents the Trial Chamber's findings regarding statements made in Croatia in 1991; and (ii) the evidence of his attendance at both meetings does not simply demonstrate his tacit agreement but rather reflects his explicit agreement with the common purpose of the Overarching JCE. *See* Prosecution Response Brief, paras. 107, 108.
[884] Prosecution Response Brief, paras. 98, 110-115. In response to Mladić's specific examples where the Trial Chamber ignored direct evidence, the Prosecution submits, *inter alia*, that: (i) the Trial Chamber considered his orders regarding paramilitary groups and that Mladić "simply cherry-picks his preferred evidence and ignores the rest"; (ii) Mladić misrepresents findings in the Trial Judgement regarding his orders to follow the Geneva Conventions; and (iii) the Trial Chamber explicitly discussed his orders to observe ceasefire agreements and Mladić fails to explain how these orders constitute direct evidence. *See* Prosecution Response Brief, paras. 113-115; T. 25 August 2020 pp. 105, 106.
[885] Mladić Reply Brief, paras. 64, 65.

that the Trial Chamber relied primarily on circumstantial evidence and did not provide the requisite level of analysis of direct and highly probative evidence in opposition.[886] According to Mladić, this lack of "due consideration resulted in direct evidence being given insufficient weight in the Trial Chamber's considerations".[887]

252. The Appeals Chamber recalls that a trial chamber may rely on direct or circumstantial evidence in reaching its findings.[888] A trial chamber may draw inferences to establish a fact on which a conviction relies based on circumstantial evidence as long as it is the only reasonable conclusion that could be drawn from the evidence presented.[889] The Appeals Chamber further recalls that the requisite *mens rea* for a conviction under the first form of joint criminal enterprise can be inferred from circumstantial evidence, such as a person's knowledge of the common plan or the crimes it involves, combined with his or her continuous participation in the joint criminal enterprise, if this is the only reasonable inference available on the evidence.[890]

253. The Appeals Chamber first turns to Mladić's submissions challenging the Trial Chamber's use of specific circumstantial evidence. Mladić avers that the Trial Chamber relied on statements he made when he was posted in Croatia to infer his intention to disrespect the laws of war in Croatia and "to repeat similar destruction" in the conflict in Bosnia.[891] According to Mladić, statements made prior to his membership in this joint criminal enterprise should not be relied upon to establish his *mens rea*.[892] Mladić further surmises that this was the reason why the Trial Chamber expanded the Overarching JCE from "'at least October 1991' to '1991'".[893] To support his submissions, Mladić refers to paragraph 4686 of the Trial Judgement.[894]

254. The Appeals Chamber observes that, at paragraph 4686 of the Trial Judgement, the Trial Chamber listed, among several other factors, Mladić's "statements indicating an intention not to respect the laws of war in Croatia in 1991, and his later references to repeating the destruction

[886] Mladić Reply Brief, para. 65.
[887] Mladić Reply Brief, para. 65. Mladić further replies that the Prosecution has failed to undermine his submission that statements he made prior to his membership in the Overarching JCE should not have been included as a factor in determining his *mens rea*. *See* Mladić Reply Brief, para. 66.
[888] *See*, *e.g.*, *Prlić et al*. Appeal Judgement, para. 1709; *Stanišić and Župljanin* Appeal Judgement, para. 172; *Popović et al*. Appeal Judgement, para. 971.
[889] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 599; *Šešelj* Appeal Judgement, paras. 63, 118; *Prlić et al*. Appeal Judgement, para. 1709; *Nyiramasuhuko et al*. Appeal Judgement, paras. 650, 1509; *Karemera and Ngirumpatse* Appeal Judgement, paras. 146, 535.
[890] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 672; *Prlić et al*. Appeal Judgement, para. 1800; *Stanišić and Simatović* Appeal Judgement, para. 81; *Popović et al*. Appeal Judgement, paras. 1369, 1652; *Đorđević* Appeal Judgement, para. 512.
[891] Mladić Appeal Brief, para. 304, n. 445, *referring to* Trial Judgement, para. 4686. *See also* T. 25 August 2020 p. 43.
[892] *See* Mladić Reply Brief, para. 66. *See also* T. 25 August 2020 pp. 43-45.
[893] Mladić Appeal Brief, para. 304, nn. 446, 447, *referring to* Trial Judgement, paras. 3556, 4232, 4610.
[894] *See* Mladić Appeal Brief, para. 304, n. 445.

inflicted during this conflict", when it found that he possessed discriminatory intent.[895] The Appeals Chamber notes that the Trial Chamber's reference to statements Mladić made in Croatia appears to be based on evidence set out in paragraphs 4617 to 4619 of the Trial Judgement. In these paragraphs, the Trial Chamber reviewed, *inter alia*, an audio recording and video transcripts of Mladić himself making threats to the effect that "if his demands were not met, he would cause destruction of a level […] not yet seen before" in Croatian towns.[896] The Trial Chamber further considered statements of a similar nature from 23 May 1992, during the conflict in Bosnia and Herzegovina, wherein Mladić was recorded to have threatened reprisal attacks if his demands were not met, to have stated that "he would 'order the shelling of entire Bihać […] and it will burn too'", and to have warned that "[t]he whole of Bosnia will burn if I start to 'speak'".[897] The Trial Chamber also noted evidence that, in August 1992, Mladić warned UNPROFOR that "he would use heavy artillery weapons if [Croatian and Bosnian] forces did not cease combat activities in Central Bosnia" and that "he would most likely aim the heavy artillery weapons at densely populated areas".[898] Given evidence of Mladić's express threats to destroy Croatian and Bosnian towns and target civilians, Mladić does not demonstrate that the Trial Chamber erred in considering "his statements indicating an intention not to respect the laws of war in Croatia in 1991, and his later references to repeating the destruction" among several other factors when assessing his *mens rea*.[899] Specifically, while the Trial Chamber found that Mladić held the intent to contribute to the Overarching JCE by "12 May 1992 at the latest",[900] it was not unreasonable for the Trial Chamber to consider his conduct from 1991.[901]

255. The Appeals Chamber is also not convinced by Mladić's submission that the Trial Chamber expanded the Overarching JCE from "'at least October 1991' to '1991'".[902] A review of the Trial Judgement reveals no indication that the Trial Chamber relied on his statements in Croatia in 1991 to expand the temporal scope of the Overarching JCE. As set out at the end of Chapter 9.2 of the Trial Judgement, which assessed the existence of the Overarching JCE, the Trial Chamber expressly noted that it had yet to determine Mladić's membership and participation in the joint

[895] *See* Trial Judgement, para. 4686.
[896] *See* Trial Judgement, paras. 4617-4619, *referring to*, *inter alia*, Exhibits P7639, pp. 1, 2, P7640, p. 1, P1959, pp. 3, 5, 8.
[897] *See* Trial Judgement, para. 4670, *referring to* Exhibit P2750, pp. 3-6.
[898] *See* Trial Judgement, para. 4671, *referring to* Exhibit P2244 (under seal), p. 1.
[899] *See* Trial Judgement, para. 4686.
[900] Trial Judgement, para. 4688. *See also*, *e.g.*, Trial Judgement, paras. 3708, 4222, 4378, 4383, 4477, 4623-4650, 4666-4687. The Trial Chamber found that Mladić was appointed Commander of the VRS Main Staff on 12 May 1992. *See*, *e.g.*, Trial Judgement, paras. 275, 276, 4623.
[901] *See supra* para. 252. *Cf. Nahimana et al.* Appeal Judgement, paras. 560, 561.
[902] *See* Mladić Appeal Brief, para. 304, nn. 446, 447, *referring to* Trial Judgement, paras. 3556, 4232, 4610.

criminal enterprise and would only do so in the subsequent chapter of the judgement.[903] Mladić's arguments in this regard are based on a misreading of the Trial Judgement and do not demonstrate an error.

256. As to his "passive presence" at the two Pale Meetings, Mladić argues that the relevant evidence does not indicate his mental state but rather infers "tacit agreement based solely on his physical presence".[904] He further states that, "[o]f all evidence available to the Trial Chamber, a third person's observation was included in [its] factual basis as the most probative".[905] The Appeals Chamber observes that the Trial Chamber summarized the evidence of Witness Miroslav Deronjić regarding a meeting in Pale on 10 or 11 May 1992.[906] The Trial Chamber noted that, according to Deronjić, Mladić and Karadžić were present at the meeting, and that when Deronjić reported that Glogova had been partially destroyed and that Bosnian Muslims had been evacuated by force, "all present in the room greeted his report with applause".[907] The Trial Chamber also summarized the evidence of Witness Abdel-Razek to the effect that, during a Christmas celebration in Pale on 7 January 1993, Karadžić stated that Muslims would be transferred out of Serb territory as the Serbs and Muslims could not live together anymore.[908] The Trial Chamber further summarized Witness Abdel-Razek's evidence that "Mladić, General Gvero, Krajišnik, and Plavšić all agreed" and that "Krajišnik said that ethnic cleansing was necessary".[909]

257. The Appeals Chamber further notes that the Trial Chamber relied upon a vast amount of evidence concerning Mladić's statements, conduct, and knowledge of crimes to determine his *mens rea* in relation to the Overarching JCE.[910] It explicitly concluded that Mladić shared the intent to achieve the common objective of the Overarching JCE and that this conclusion was based on, *inter alia*, Mladić's repeated use of derogatory terms to refer to Bosnian Muslims and Bosnian Croats,

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[903] *See* Trial Judgement, para. 4238. *See also*, *e.g.*, Trial Judgement, paras. 3828, 4197.
[904] *See* Mladić Appeal Brief, paras. 305-307, *referring to* Trial Judgement, paras. 4621, 4626. The Appeals Chamber observes that the first of the Pale Meetings challenged by Mladić took place on 10 or 11 May 1992, thus occurring before 12 May 1992, the date on which the Trial Chamber found that his shared intention to further the Overarching JCE began. *See* Trial Judgement, paras. 4621, 4688. Nevertheless, given the Trial Chamber's finding that Mladić held the intent to contribute to the Overarching JCE by 12 May 1992 "at the latest" and that this meeting took place immediately before the specified date, the Appeals Chamber will address Mladić's submissions in this regard.
[905] Mladić Appeal Brief, para. 307.
[906] *See* Trial Judgement, para. 4621, *referring to* Chapter 9.2.2. *See also* Trial Judgement, para. 3663, *referring to* Exhibit P3566, para. 106.
[907] Trial Judgement, paras. 3663, 4621, *referring to* Exhibit P3566, para. 106.
[908] Trial Judgement, para. 4626, *referring to* Chapter 9.2.5. *See also* Trial Judgement, para. 3725, *referring to* Exhibit P293, para. 33. Abdel-Razek was the UNPROFOR Sector Sarajevo Commander from 21 August 1992 to 20 February 1993. *See* Trial Judgement, para. 3710.
[909] Trial Judgement, paras. 3725, 4626, *referring to* Exhibit P293, para. 33 (where, according to Abdel-Razek, "[a]ttending and agreeing with Karadžić's words were the Serb military leaders, Generals Mladić and Gvero, Mr. Krajišnik and Ms. Plavšić" and "[t]his view expressed by Mr. Karadžić was shared by other Bosnian Serb leaders").
[910] *See* Trial Judgement, paras. 4613-4688, 5352 (confidential).

his recalling of historical crimes allegedly committed against Bosnian Serbs, his expressions of commitment to an ethnically homogeneous *Republika Srpska*, and his provision of misinformation while knowing about the commission of crimes in the Municipalities.[911] In view of this body of evidence, as well as the Trial Chamber's analysis of such evidence, Mladić provides no support for his claim that the Trial Chamber, outside of summarizing Witnesses Deronjić's and Abdel-Razek's evidence, relied on his presence or participation in these two Pale Meetings "as the most probative" to establish his *mens rea*.[912] Accordingly, the Appeals Chamber finds that Mladić does not demonstrate that the Trial Chamber erred in referring to evidence of his participation in the two Pale Meetings in the context of assessing his *mens rea*.

258. The Appeals Chamber now turns to Mladić's allegations that the Trial Chamber erred in disregarding direct and probative evidence demonstrating that he did not share the intent to further the common criminal purpose of the Overarching JCE.[913] Mladić contends that the Trial Chamber failed to give sufficient weight to, and excluded from its *mens rea* analysis, evidence of his orders and conduct demonstrating his "anti-paramilitary position", which is in contrast to the intent he supposedly shared with other members of the Overarching JCE that the paramilitaries commit crimes to further the joint criminal enterprise.[914] To support his argument, Mladić cites what he asserts is extensive evidence of his orders in relation to paramilitary groups[915] and meetings recorded in his military notebooks in line with his approach.[916] A review of Chapter 9.3.13 of the Trial Judgement reveals that the Trial Chamber did not consider Mladić's orders to disband, arrest, or eliminate paramilitary formations when addressing his *mens rea* pertinent to the Overarching JCE.[917] Recalling that the Trial Judgement is to be considered as a whole,[918] the Appeals Chamber observes that the Trial Chamber reviewed this evidence when assessing Mladić's significant contribution and noted that several orders were attempts to bring paramilitary units under the VRS's unified command.[919] Contrary to his alleged "anti-paramilitary position", the Trial Chamber found

[911] *See* Trial Judgement, paras. 4685-4688.
[912] *See* Mladić Appeal Brief, para. 307. *See also* Trial Judgement, paras. 4614, 4621, 4626, 4685-4688.
[913] *See* Mladić Appeal Brief, paras. 308-313; T. 25 August 2020 pp. 46, 47, 59.
[914] Mladić Appeal Brief, paras. 309, 310; T. 25 August 2020 pp. 52-54.
[915] Mladić Appeal Brief, para. 309, n. 451, *referring to*, *inter alia*, Exhibits P356, P7390, P5113, P5112, P2873, P4038, P5133, P1966, P7208, P5151, P5119, P5248, D99, D891, D921, D792, D1996. *See also* T. 25 August 2020 pp. 52-54.
[916] Mladić Appeal Brief, para. 309, n. 452, *referring to* Exhibits P352, P353, P354, P356, P360.
[917] *See* Trial Judgement, paras. 4613-4688.
[918] *See*, *e.g.*, *Karadžić* Appeal Judgement, paras. 563, 702; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[919] The Trial Chamber considered evidence that, on 28 July 1992, Mladić ordered the disarmament of all paramilitary formations, groups, and individuals in the territory of *Republika Srpska* by 15 August 1992 in order to put all armed formations and individuals under the unified command of the VRS. *See* Trial Judgement, paras. 3840, 4419, *referring to* Exhibit P5112, pp. 2-4. The Trial Chamber noted that, according to the order, those who carried out misdeeds or crimes as well as paramilitary formations that refused to be placed under the unified command of the VRS in

that some units operated under VRS command when crimes were committed in the Municipalities.[920] In this regard, the Trial Chamber found that, from at least late June 1992, Mladić commanded and controlled Pero Elez's paramilitary unit, which committed crimes in Kalinovik and Foča Municipalities.[921] It also found that from 3 June 1992 onwards, Mladić commanded and controlled the paramilitary unit under "Ljubiša Savić, a.k.a Mauzer", which committed crimes in Bijeljina Municipality.[922] Therefore, the Appeals Chamber finds that Mladić fails to establish that the Trial Chamber erred in not considering his "anti-paramilitary position" in assessing his *mens rea* for the Overarching JCE. The Appeals Chamber further notes that, of the evidence he references, only a few items are orders from Mladić, or otherwise stemming from Mladić, to disarm paramilitary formations that did not submit to VRS command.[923]

259. Mladić further asserts that the Trial Chamber failed to give sufficient weight to the "genuine warnings in his orders for VRS soldiers to respect the Geneva Conventions" and omitted to provide any reasoning on why this "direct evidence" of his intent did not form part of an evidentiary basis to arrive at another reasonable inference.[924] The Appeals Chamber observes that the Trial Chamber considered extensive evidence of his orders to follow the Geneva Conventions and expressly addressed this evidence in its analysis of his *mens rea* in relation to the Overarching JCE.[925]

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cooperation with the MUP were to be disarmed, arrested, and charged with crimes. *See* Trial Judgement, para. 3840, *referring to* Exhibit P5112, p. 3. The Trial Chamber also summarized evidence of Mladić's further orders, issued on 17 August 1992 and 22 May 1993, regarding the disarmament, elimination, or liquidation of paramilitary formations that refused to submit to VRS command. *See* Trial Judgement, paras. 3847, 3852, *referring to* Exhibits P5116, p. 1, D1499, pp. 1-3.

[920] *See* Trial Judgement, paras. 4228, 4419. *See also* Trial Judgement, paras. 3829-3916.

[921] *See*, *e*, *g*., Trial Judgement, paras. 175, 176, 185, 620, 627, 629, 644, 655, 658, 660, 664, 667, 751, 752, 766, 767, 773, 774, 791, 3051 Schedule B(e)(f), 3287(c)(e), 3388(b), 3460, 3461, 3514, 3515, 3890-3894, 3897, 4228, 4239, 4399, 4402, 4641.

[922] *See*, *e.g*., Trial Judgement, paras. 167, 171, 172, 579, 592, 601, 3122(b), 3154, 3388(a), 3874-3879, 3965, 4228, 4239, 4398, 4403.

[923] *See* Exhibits P5112 (order dated 30 July 1992 and signed by Mladić to bring paramilitary formations under the control of the VRS or to disarm by 15 August 1992); P5113 (order dated 30 July 1992 from the VRS First Krajina Corps Command to subordinate units to bring paramilitary formations under VRS control or to disarm by 15 August 1992 with similar language to Mladić's order from 30 July 1992); P1966, p. 8 (report dated September 1992 from Mladić stating that all self-organizing units should be deployed in VRS units or prosecuted); P5151, pp. 1, 3, 5 (document dated 14 September 1992 from the VRS First Krajina Corps Command summarizing discussions at a military roundtable from 13 September 1992 that was chaired by the VRS Main Staff and Mladić and stating that the use of common military uniforms and insignia was considered as a way to ban paramilitary formations that deviate from the regulations on uniforms); P5119, p. 1 (document dated 19 February 1993 from the VRS Main Staff to all subordinate units to place military units under VRS command or to disband); D99, p. 1 (directive dated 22 July 1992 from Mladić noting that special assistance be given to internal units tasked with discovering, exposing, or breaking up paramilitary units); D792, p. 4 (a report dated 20 August 1992 from the VRS First Krajina Corps Command that by an order of the VRS Main Staff major activities lay ahead to abolish all paramilitary formations so as to establish firm military control and discipline). Other exhibits referenced by Mladić, including his notebooks, only discuss problems with paramilitary formations or actions taken by individuals other than Mladić personally. *See* Exhibits P352, pp. 48, 207, 331, 338; P353, pp. 59, 164, 308; P354, pp. 48, 133; P356, pp. 178, 180, 234; P7390, p. 2; P2873, p. 3; P4038, p. 1; P5133; P7208, p. 3; D891, para. 5; D921, paras. 26, 27; D1996, pp. 1, 2. As to Exhibit P360, the Appeals Chamber has reviewed the page referenced in the Mladić Appeal Brief (p. 150) and observes no discussion on paramilitary units.

[924] Mladić Appeal Brief, para. 311; T. 25 August 2020 p. 59.

[925] *See*, *e.g*., Trial Judgement, paras. 4363, 4515, 4517, 4518, 4520, 4526, 4545, 4555, 4687.

According to the Trial Chamber, evidence of, *inter alia*, his orders to respect the Geneva Conventions "[was] not indicative of his true state of mind" as it was contradicted by "what happened on the ground", his provision of misinformation, and "his other contemporaneous statements".[926] In the Appeals Chamber's view, the Trial Chamber's reasoned assessment, based on the totality of evidence, demonstrates its careful consideration and ultimate rejection of the "genuine" nature of Mladić's orders. Mladić's appeal submissions merely reflect his disagreement with the Trial Chamber's assessment of his orders to respect the Geneva Conventions without demonstrating any error.

260. In a similar vein, the Appeals Chamber is not convinced by Mladić's contention that the Trial Chamber failed to give sufficient weight, if any, to his orders to observe ceasefire agreements.[927] He argues that the Trial Chamber only made findings on this evidence in relation to his *actus reus* and "failed to see its direct evidentiary representation of [his] *mens rea*".[928] The Appeals Chamber notes that the Trial Chamber considered evidence of Mladić's orders to observe ceasefire agreements in various parts of the Trial Judgement, including the section discussing his intent to further the common purpose of the Overarching JCE.[929] As part of its reasoning on his *mens rea* for the Overarching JCE, the Trial Chamber considered that Mladić "appeared on various occasions to pursue peaceful solutions to the conflict, and made statements […] indicating his desire to further the peace process", but that "these actions and statements, sometimes providing misinformation, [were] inconsistent with [his] other conduct and [were] directly contradicted by his other contemporaneous statements".[930] Similar to its assessment of his orders to respect the Geneva Conventions, the Trial Chamber found that Mladić's "involvement in peace negotiations [was] not indicative of his true state of mind".[931] The Appeals Chamber considers that Mladić merely disagrees with the Trial Chamber's findings without demonstrating that the Trial Chamber failed to consider, accord sufficient weight to, or provide a reasoned opinion on his orders to observe ceasefire agreements.

261. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's assessment of direct and circumstantial evidence in relation to his intent to achieve the common objective of the Overarching JCE.

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[926] *See* Trial Judgement, para. 4687.
[927] *See* Mladić Appeal Brief, para. 312. According to Mladić, this evidence indicates that he ordered his soldiers to abide by international humanitarian law rather than further the common criminal purpose of the Overarching JCE. *See* Mladić Appeal Brief, para. 313.
[928] Mladić Appeal Brief, para. 312.
[929] *See, e.g.*, Trial Judgement, paras. 4325-4328, 4340, 4388, 4677.
[930] Trial Judgement, para. 4687. *See also* Trial Judgement, paras. 4502-4512, 4546, 4646, 4676-4684.
[931] Trial Judgement, para. 4687.

(iii) Alleged Error in Selectively Relying on Parts of Assembly Speeches

262. The Trial Chamber found that, on 12 May 1992, at the 16th Session of the Bosnian Serb Assembly ("16th Assembly Session"), Karadžić presented six strategic objectives, which most prominently included the demarcation of a Serbian state separate from any Croatian and Muslim state and involved the separation of people along ethnic lines.[932] The Trial Chamber further found that, during the same session, the assembly adopted the six strategic objectives and Mladić, among others present, clarified his understanding of the objectives.[933] Regarding the 24th Session of the Bosnian Serb Assembly ("24th Assembly Session"), held on 8 January 1993, the Trial Chamber considered evidence that the assembly "adopted a unanimous conclusion that Muslims should be taken out of 'Serbism' forever, and that the Muslims, as a nation, were a 'sect' of Turkish provenance; a communist, artificial creation which the Serbs did not accept".[934]

263. Mladić submits that the Trial Chamber erred by relying on "selective" parts of his speeches at the 16th and 24th Assembly Sessions when it assessed his *mens rea* pertinent to the Overarching JCE.[935] With respect to the 16th Assembly Session, he argues that the Trial Chamber gave insufficient weight to statements he made opposing the common criminal objective of the Overarching JCE, and that it "methodically isolated phrases or passages and ascribed a sinister meaning to them".[936] In this regard, Mladić contends that the Trial Chamber referred to his warnings "against genocidal actions" but "confuse[d]" his reference to protecting people with fighting forces in the trenches.[937] Mladić contends that the Trial Chamber also failed to provide a reasoned opinion for preferring certain parts of his statement over others.[938] In his view, the Trial Chamber failed to "properly assess" whether the inference that he only sought military success, as opposed to permanent removal of civilians, was a reasonable alternative conclusion.[939]

264. Mladić further submits that the same error is repeated in relation to the 24th Assembly Session, whereby the Trial Chamber gave no weight to his statements calming other members of the

[932] Trial Judgement, para. 3708. *See also* Trial Judgement, paras. 3694-3702, 3706, 4222, 4460, 4625, *referring to*, *inter alia*, Exhibit P431.
[933] Trial Judgement, paras. 3703-3706, 3708, 4222, 4460, 4461, 4625, *referring to*, *inter alia*, Exhibit P431, pp. 31-35, 39, 41.
[934] Trial Judgement, para. 4627, *referring to*, *inter alia*, Exhibit P6921, pp. 14, 15 (while the Trial Judgement references pages 96 and 97 of recorded minutes of the 24th Assembly Session, the Appeals Chamber notes that these correspond to pages 14 and 15 of Exhibit P6921).
[935] *See* Mladić Appeal Brief, paras. 317, 320-333.
[936] Mladić Appeal Brief, paras. 321-326. *See also* T. 25 August 2020 pp. 58, 59.
[937] Mladić Appeal Brief, para. 322. Mladić argues that, given a contextual reading, his statement describes military combat. *See* Mladić Appeal Brief, paras. 322, 323.
[938] Mladić Appeal Brief, para. 321.
[939] Mladić Appeal Brief, paras. 321, 323, 325-327, n. 476, *referring to*, *inter alia*, Exhibits D1514, D187, D540, P3483, P794, P358, D962, P5040, D1982 (under seal). *See also* T. 25 August 2020 pp. 58, 59.

assembly and defending UNPROFOR.[940] He contends that, rather than using his own statements, the Trial Chamber chose to use the statements of others to infer his intent.[941] According to Mladić, another reasonable inference exists,[942] namely that he "sought only legitimate military success (not permanent removal of civilians)".[943] He argues that, had the evidence been viewed in its totality, no reasonable trier of fact could have established that he shared the *mens rea* to achieve the objective of the Overarching JCE.[944]

265. The Prosecution responds that Mladić's arguments are based on the erroneous premise that a few fragments of isolated evidence may show error in the conclusions of the Trial Chamber that are based on a "holistic assessment of thousands of pieces of evidence".[945] The Prosecution submits that Mladić makes misleading and unsubstantiated assertions about the evidence without demonstrating any unreasonableness in the Trial Chamber's approach,[946] and that he makes no attempt to show an impact on findings in the Trial Judgement.[947] According to the Prosecution, the Trial Chamber considered Mladić's claim that he sought only legitimate military success but reasonably rejected this on the basis of an overwhelming body of contrary evidence.[948]

266. In relation to Mladić's statements at the 16th Assembly Session, the Appeals Chamber is not convinced by the submission that the Trial Chamber gave insufficient weight to "statements made by [Mladić] in opposition of the supposed aim of the common criminal objective of the O[verarching] JCE".[949] The Appeals Chamber observes that the Trial Chamber considered Mladić's alleged warning "against genocidal actions" and other sections of his speech that appeared contrary to the Bosnian Serb Assembly position.[950] The Trial Chamber also explicitly considered Mladić's claim that he only sought legitimate military success.[951]

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[940] Mladić Appeal Brief, para. 328.
[941] Mladić Appeal Brief, para. 329.
[942] Mladić Appeal Brief, para. 330.
[943] Mladić Appeal Brief, para. 321.
[944] Mladić Appeal Brief, paras. 332, 333.
[945] Prosecution Response Brief, para. 116.
[946] Prosecution Response Brief, paras. 98, 117. According to the Prosecution, the Trial Chamber made no error in relation to, *inter alia*, speeches made at the 16th and 24th Assembly Sessions. *See* Prosecution Response Brief, paras. 119-124.
[947] Prosecution Response Brief, para. 118.
[948] Prosecution Response Brief, para. 117.
[949] *See* Mladić Appeal Brief, para. 321. *See also* Mladić Appeal Brief, 322-326. T. 25 August 2020 pp. 58, 59.
[950] *See*, *e.g.*, Trial Judgement, paras. 3704, 3705, 4460. *See also* Mladić Appeal Brief, paras. 322, 324-326; T. 25 August 2020 pp. 58, 59. For instance, the Trial Chamber considered his statements that, *inter alia*:

> 'There we cannot cleanse nor can we have a sieve to sift so that only Serbs would stay, or that the Serbs would fall through and the rest leave. Well that is, that will not, I do not know how Mr Krajišnik and Mr Karadžić would explain this to the world. People, that would be genocide. We have to call upon any man who has bowed his forehead to the ground to embrace these areas and

267. However, the Appeals Chamber notes that the Trial Chamber also considered the following statements that Mladić made at the 16th Assembly Session, including:

> '*Ustašas*, I know what kind of people *Ustašas* are. However, we must now see and assess […] who our allies and our enemies are, and which enemy would be easier to handle. On the basis of this we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches.'[952]
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> According to Mladić, the 'thing' that they were doing 'need[ed] to be guarded as [their] deepest secret'. Serb representatives in the media and at political talks and negotiations would have to present the goals in a way that would sound appealing to those who they wanted to win over and the 'Serbian people' would need to know how to read between the lines.[953]
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> Mladić also noted that the enemy, a 'common enemy, regardless whether it is the Muslim hordes or Croatian hordes' had attacked 'with all its might from all directions'. He further said that '[w]hat is important now is either to throw both of them out employing political and other moves, or to organize ourselves and throw out one by force of arms, and we will be able to deal somehow with the other'.[954]

268. In assessing his *mens rea*, the Trial Chamber recalled specific portions of Mladić's statement to the effect that Bosnian Serb leaders needed to guard their "deepest secret", that their objectives needed to be presented in a way that appealed to the Serbian people, and that what Krajišnik and Karadžić wanted would amount to genocide.[955] The Trial Chamber also recalled his statement that "we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches".[956] The Appeals Chamber observes that Mladić's statements, together with his conduct, underpin the Trial Chamber's finding that he possessed the intent for crimes to be committed against Bosnian Muslims and Bosnian Croats on discriminatory grounds,[957]

> the territory of the state we plan to make. He to [*sic*] has his place with us and next to us.' Trial Judgement, para. 3704, n. 13905, *referring to* Exhibit P431, p. 35.
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> 'Fear, might, prays to no God, and God cares not for might. But that does not mean that Muslims have to be expelled or drowned […] both Serbs and Muslims, all must take care of one another […] [b]ut there are ways in which we can neutralise them.' Trial Judgement, para. 3705, n. 13906, *referring to* Exhibit P431, pp. 1, 35.
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> '[F]or any man born in the area of the Serbian Republic of Bosnia and Herzegovina or whose roots reach back to here, there is only the first path, the path I see as the path of honour, glory and survival. However, I do not refer only to Serbs here.' Trial Judgement, para. 4460, n. 15880, *referring to* Exhibit P431, pp. 31, 32, 34.

951 *See* Trial Judgement, para. 4613, n. 16367, *referring to* Mladić Final Trial Brief, para. 115.
952 Trial Judgement, para. 4460, n. 15886, *referring to* Exhibit P431, p. 33.
953 Trial Judgement, paras. 3704, 3708, 4460, *referring to, inter alia*, Exhibit P431, p. 34.
954 Trial Judgement, para. 4461, n. 15888, *referring to* Exhibit P431, p. 41.
955 Trial Judgement, para. 4625.
956 Trial Judgement, para. 4625.
957 *See* Trial Judgement, para. 4686.

and ultimately its finding that he shared the intent to achieve the common objective of the Overarching JCE.[958]

269. Given the foregoing, the Appeals Chamber is of the view that, contrary to Mladić's submissions, the Trial Chamber did not isolate portions of his statements at the 16th Assembly Session, ascribe a "sinister meaning" to them, or otherwise confuse his references.[959] Rather, as set out above, the Trial Chamber took a balanced account of Mladić's statements in their context and considered them within the totality of evidence of all his statements and conduct pertinent to the Overarching JCE.[960] Mladić therefore fails to demonstrate that the Trial Chamber gave insufficient weight to or failed to refer to sections of his speech that were allegedly in opposition to the common criminal objective of the Overarching JCE. Given the extensive consideration of his statements at the 16th Assembly Session in the Trial Judgement,[961] the Appeals Chamber also rejects Mladić's submission that the Trial Chamber erred by failing to provide a reasoned opinion on why the sections of the assembly transcript that it quoted were allegedly "more important" than others.[962]

270. As to the 24th Assembly Session, Mladić refers to his interventions, contending that the Trial Chamber did not give them sufficient weight.[963] In this regard, Mladić specifically points to: (i) his attempt to calm assembly members and to ask them to not "appear too heated and frightening" in order to "not create more damage to ourselves than necessary";[964] and (ii) his defence of UNPROFOR by stating: "I ask you not to develop such climate towards the UNPROFOR, there are those who work well".[965] The Appeals Chamber observes that the Trial Chamber considered evidence relating to the 24th Assembly Session but did not, in the Trial Judgement, expressly summarize or refer to the statements Mladić points to in his submission.[966] Having reviewed the minutes of the 24th Assembly Session, the Appeals Chamber observes that Mladić appeared to urge assembly members to not "appear too heated and frightening" in relation to combat operations and that "35 aeroplanes took off of the Kennedy plane carrier thirty minutes ago and are flying in an unidentified direction".[967] He further made the statement to not antagonize UNPROFOR in response to an incident where the Vice-President of Bosnia and Herzegovina, travelling in an UNPROFOR vehicle, was killed by a Bosnian Serb soldier when the car was

[958] *See* Trial Judgement, para. 4688.
[959] *See* Mladić Appeal Brief, paras. 321-323.
[960] *See* Trial Judgement, paras. 4685-4688. *See also* Trial Judgement, paras. 4614-4684.
[961] *See* Trial Judgement, paras. 3704, 3705, 3708, 4460, 4461, 4625.
[962] *See* Mladić Appeal Brief, para. 321.
[963] *See* Mladić Appeal Brief, para. 328.
[964] *See* Mladić Appeal Brief, para. 328, n. 480, *referring to* Exhibit P6921, pp. 11, 12.
[965] *See* Mladić Appeal Brief, para. 328, n. 481, *referring to* Exhibit P6921, p. 12.
[966] *See* Trial Judgement, para. 4627.
[967] *See* Exhibit P6921, p. 11.

stopped and searched.[968] Mladić further stated that "I don't know how we are going to return to the Conference in Geneva" because of this incident and that "we must have a very, very sober head" to not "let some individual drive us to disaster".[969] The Appeals Chamber considers that, read in context, these statements reflect self-interest in protecting the image of the Bosnian Serb Assembly rather than protecting non-Serbs or UNPROFOR. Mladić therefore fails to demonstrate that the Trial Chamber erred by not expressly referring to these statements or that these statements would undermine findings in the Trial Judgement regarding his *mens rea*.

271. Mladić further contends that, in relation to the 24th Assembly Session, the Trial Chamber relied on statements of others to infer his intent.[970] Having reviewed the pertinent portions of the Trial Judgement as well as evidence relating to the 24th Assembly Session, the Appeals Chamber considers that the Trial Chamber accurately summarized events at the session to the effect that Mladić was present,[971] and that the assembly unanimously adopted the conclusion that Muslims were a "sect" of Turkish provenance and an artificial creation which the Serbs did not accept.[972] However, the Appeals Chamber notes that there is no indication in the Trial Judgement that the Trial Chamber relied on these statements to infer his intent. Therefore, Mladić fails to demonstrate any error in this respect.

272. The Appeals Chamber now turns to Mladić's submission that another reasonable inference – his legitimate military goals – was available on the basis of his statements at the 16th and 24th Assembly Sessions[973] as well as his orders on the protection of civilians and on ceasefires.[974] The Appeals Chamber recalls that the standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.[975] It is further recalled that a trial chamber does not have to discuss every possible hypothesis or inference it may have considered, as long as it is satisfied that the inference it retained was the only reasonable one.[976]

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[968] *See* Exhibit P6921, p. 12.
[969] *See* Exhibit P6921, p. 12.
[970] *See* Mladić Appeal Brief, para. 329, *referring to* Trial Judgement, para. 4627.
[971] *See* Trial Judgement, para. 4627; Exhibit P6921, p. 11.
[972] *See* Trial Judgement, para. 4627; Exhibit P6921, pp. 14, 15.
[973] *See* Mladić Appeal Brief, paras. 321, 323, 325-327, 330, 332. *See also* T. 25 August 2020 pp. 58, 59.
[974] Mladić distinguishes the exhibits he refers to as those concerning protection of civilians (*see* Mladić Appeal Brief, para. 325, n. 476, *referring to*, *inter alia*, Exhibits D1514, D187, D540, P3483, P794, P358) and those concerning "warnings in combat" or ceasefires (*see* Mladić Appeal Brief, para. 325, n. 476, *referring to*, *inter alia*, Exhibits D962, P5040, D1982 (under seal)). *See also* T. 25 August 2020 p. 59.
[975] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 220.
[976] *See Prlić et al.* Appeal Judgement, para. 967. *See also Karadžić* Appeal Judgement, para. 599; *Mrkšić and Šljivančanin* Appeal Judgement, para. 220.

273. The Appeals Chamber observes that the Trial Chamber considered Mladić's claim that he only sought legitimate military success rather than permanent removal of Bosnian Muslim and Bosnian Croat civilians.[977] As set out above, the Trial Chamber considered Mladić's interventions at the 16th Assembly Session in a balanced manner,[978] and found that the totality of all his statements and conduct demonstrated that he possessed the requisite *mens rea*.[979] Furthermore, the Trial Chamber discussed Mladić's orders to respect the Geneva Conventions and to protect civilians,[980] as well as to respect ceasefires.[981] As noted above, it found that these orders "were not indicative of his true state of mind", as they were inconsistent with his other conduct, and directly contradicted by his other contemporaneous statements.[982] In this regard, the Trial Chamber found that Mladić, *inter alia*, repeatedly used derogatory terms to refer to Bosnian Muslims and Bosnian Croats, made references to historical crimes committed against Bosnian Serbs, and made statements indicating an intention to not respect the laws of war in Croatia in 1991, and it also considered his later references to repeating the destruction inflicted during this conflict.[983] In light of the foregoing evidence and the Trial Chamber's assessment, the Appeals Chamber finds, Judge Nyambe dissenting, that the alternative inference Mladić proposes is not reasonable. Mladić's submissions amount to a disagreement with the Trial Chamber's assessment of evidence and ultimate finding on his *mens rea* without demonstrating any error in its conclusions.

(iv) Conclusion

274. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić demonstrates no error in the Trial Chamber's finding that he shared the intent to achieve the common objective of the Overarching JCE.

(c) Conclusion

275. Consequently, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 3.B of Mladić's appeal.

[977] *See* Trial Judgement, para. 4613, *referring to* Mladić Final Trial Brief, para. 115.
[978] *See* Trial Judgement, paras. 3704, 3705, 3708, 4460, 4461, 4625.
[979] *See* Trial Judgement, paras. 4686, 4688.
[980] *See, e.g.*, Trial Judgement, paras. 4517-4520, 4524-4526, 4687.
[981] *See, e.g.*, Trial Judgement, paras. 4325-4328, 4340, 4388, 4677, 4687.
[982] Trial Judgement, para. 4687.
[983] *See* Trial Judgement, paras. 4617-4619, 4647-4650, 4666-4675, 4686.

C. Alleged Errors Related to the Sarajevo JCE (Ground 4)

276. The Trial Chamber found that the Sarajevo JCE existed between 12 May 1992 and November 1995, with the objective of spreading terror among the civilian population of Sarajevo through a campaign of sniping and shelling, including through the commission of murder, terror, and unlawful attacks against civilians.[984] It found that members of this joint criminal enterprise included Radovan Karadžić, Stanislav Galić, Dragomir Milošević, Momčilo Krajišnik, Biljana Plavšić, Nikola Koljević, and Mladić.[985] The Trial Chamber determined that Mladić shared the intent to further, and significantly contributed to achieving, the Sarajevo JCE's common purpose.[986] The Trial Chamber concluded that several sniping and shelling incidents in Sarajevo, except in relation to non-civilian victims, constituted murder, terror, and/or unlawful attacks against civilians,[987] and held Mladić guilty of these crimes through his participation in the Sarajevo JCE.[988]

277. Mladić submits that the Trial Chamber committed several errors of law and fact in finding the existence of, and that he participated in, the Sarajevo JCE, and requests that the Appeals Chamber reverse his convictions for the crimes of murder, terror, and unlawful attacks against civilians in Sarajevo.[989]

1. Alleged Errors Related to the Crime of Terror and Mladić's *Mens Rea* (Ground 4.A)

278. Mladić submits that the Trial Chamber erred in holding him responsible for spreading terror among the civilian population through a campaign of sniping and shelling and in finding that he intended to further the Sarajevo JCE.[990] In particular, he argues that the Trial Chamber erred in: (i) exercising jurisdiction over the crime of terror;[991] (ii) failing to find that Sarajevo was a "defended city";[992] (iii) finding the existence of the Sarajevo JCE and that Mladić shared the intent to further the joint criminal enterprise;[993] and (iv) the assessment of specific intent for the crime of terror.[994] The Appeals Chamber will address these contentions in turn.

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[984] Trial Judgement, paras. 4740, 4892.
[985] Trial Judgement, paras. 4740, 4892, 4893, 4921.
[986] Trial Judgement, paras. 4893, 4921.
[987] Trial Judgement, paras. 3065, 3202, 3206, 3212.
[988] Trial Judgement, paras. 4893, 4921, 5190, 5214.
[989] *See* Mladić Notice of Appeal, paras. 39-50; Mladić Appeal Brief, paras. 336-569. *See also* Mladić Reply Brief, paras. 67-77.
[990] *See* Mladić Appeal Brief, paras. 336-458.
[991] *See* Mladić Appeal Brief, paras. 336-372; T. 25 August 2020 pp. 60-64.
[992] *See* Mladić Appeal Brief, paras. 373-397.
[993] *See* Mladić Appeal Brief, paras. 398-442.
[994] *See* Mladić Appeal Brief, paras. 443-458.

(a) Alleged Errors in the Exercise of Jurisdiction over the Crime of Terror

279. The Trial Chamber determined that it had jurisdiction over acts of violence the primary purpose of which was to spread terror among the civilian population as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute ("crime of terror"), as charged under Count 9 of the Indictment.[995] In making this determination, the Trial Chamber recalled that the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases had confirmed that the ICTY had jurisdiction over the crime of terror and found nothing in Mladić's submissions that would lead it to deviate from the established jurisprudence.[996]

280. Mladić submits that the Trial Chamber erred in exercising jurisdiction over the crime of terror and convicting him of this crime, and requests that the Appeals Chamber reverse his conviction under Count 9 of the Indictment.[997] In particular, he argues that the Trial Chamber failed to give sufficient weight to his submissions that there exist cogent reasons to depart from the jurisprudence which holds that the ICTY had jurisdiction over the crime of terror, asserting that the prohibition of spreading terror among the civilian population did not extend to its penalization under customary international law during the period of his Indictment due to insufficient evidence of settled, extensive, or uniform state practice.[998] Mladić further argues that the Trial Chamber was prohibited from exercising jurisdiction over the crime of terror because it was not defined with sufficient specificity to be foreseeable at the time of the Indictment, therefore infringing the principle of *nullum crimen sine lege*.[999]

281. The Prosecution responds that the ICTY had jurisdiction over the crime of terror because it formed part of customary international law at the relevant time and that Mladić fails to show any

[995] Trial Judgement, paras. 3011, 3184, 3185.
[996] Trial Judgement, para. 3185, *referring to Galić* Appeal Judgement, paras. 87-90, *D. Milošević* Appeal Judgement, para. 30.
[997] *See* Mladić Appeal Brief, paras. 336-372; T. 25 August 2020 pp. 60-64. *See also* T. 26 August 2020 pp. 66-68. The Appeals Chamber notes that Mladić does not raise the allegation that the Trial Chamber erred in exercising jurisdiction over the crime of terror in his notice of appeal, thus failing to meet the requirements of Rule 133 of the Rules. However, considering that the Prosecution does not object to Mladić's failure and responds to his arguments, and in light of the importance of the issues raised, the Appeals Chamber chooses to exercise its discretion to consider Mladić's arguments in order to ensure the fairness of the proceedings. *Cf. Bikindi* Appeal Judgement, para. 96; *Simba* Appeal Judgement, para. 12.
[998] *See* Mladić Appeal Brief, paras. 336, 337, 341-347; T. 25 August 2020 pp. 60-64, *referring to*, *inter alia*, *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, *D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision of 2 October 1995"), para. 94. *See also* Mladić Reply Brief, paras. 67-69; T. 26 August 2020 pp. 66, 67. Mladić does not dispute that a prohibition of spreading terror among the civilian population existed under customary international law at the time of his Indictment. *See* Mladić Appeal Brief, para. 341; T. 25 August 2020 p. 60.
[999] *See* Mladić Appeal Brief, paras. 350, 352-371; T. 25 August 2020 p. 64. *See also* Mladić Reply Brief, paras. 70, 71.

cogent reasons to depart from established ICTY jurisprudence in this respect.[1000] The Prosecution further asserts that: (i) at the time of Mladić's crimes, several states on four continents had criminalized terror, and the widespread ratification by 1992 of Additional Protocols I and II to the Geneva Conventions of 1949 ("Additional Protocols") further demonstrates the customary international law status of the crime of terror;[1001] (ii) the principle of *nullum crimen sine lege* does not demand that crimes under customary international law be measured by the standards of specificity required for statutory provisions;[1002] and (iii) the crime of terror was defined with sufficient specificity and was foreseeable to Mladić, particularly since laws of the former Yugoslavia had criminalized terror.[1003]

282. Mladić replies that the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases did not consider the absence of a widespread or representative criminalization of terror, and that, in penalizing terror, the former Yugoslavia did not adopt the language of the Additional Protocols or attempt to define the concept of terror after ratifying the Additional Protocols.[1004]

283. The Appeals Chamber recalls that the ICTY Trial Chamber in the *Galić* case determined, by majority, that the ICTY had subject-matter jurisdiction over the crime of terror under Article 3 of the ICTY Statute.[1005] The ICTY Appeals Chamber in the same case confirmed, by majority, the ICTY's jurisdiction over the crime of terror, clarifying that customary international law imposed individual criminal responsibility for violations of the prohibition of terror against the civilian population at the time of the commission of the crimes for which Galić was convicted.[1006] The ICTY Appeals Chamber in the *D. Milošević* case, by majority, subsequently reaffirmed the ICTY's jurisdiction over the crime of terror.[1007] In light of this jurisprudence, the Appeals Chamber

[1000] Prosecution Response Brief, paras. 128, 131-133; T. 25 August 2020 pp. 106-109. According to the Prosecution, Mladić simply complains that there was insufficient state practice but he ignores that the *Galić* Appeals Chamber did not rely on national laws. *See* T. 25 August 2020 p. 107.
[1001] Prosecution Response Brief, paras. 134-136. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 ("Additional Protcol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609 ("Additional Protocol II").
[1002] Prosecution Response Brief, para. 137.
[1003] Prosecution Response Brief, paras. 137-139; T. 25 August 2020 pp. 108, 109.
[1004] Mladić Reply Brief, paras. 67-71. *See also* T. 26 August 2020 p. 68.
[1005] *Galić* Trial Judgement, para. 138. *See Galić* Trial Judgement, paras. 63-138. *See also Galić* Trial Judgement, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, paras. 108-113.
[1006] *Galić* Appeal Judgement, para. 98. *See Galić* Appeal Judgement, paras. 86-98. *See also Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 2, 4-22, 24.
[1007] *D. Milošević* Appeal Judgement, para. 30. *See also D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 1-13. The Appeals Chamber notes that the ICTY Appeals Chamber in the *Prlić et al.* case, by majority, upheld convictions for the crime of terror. *See Prlić et al.* Appeal Judgement, paras. 424, 562-564, 1774-1789, 2017-2026, 2400-2402, 2406, 2800-2802; *Prlić et al.* Trial Judgement, Volume 3, paras. 1689-1692. *See also Prlić et al.* Appeal Judgement, Partially Dissenting, Dissenting Opinions and Declaration of Judge Liu Daqun, paras. 8-10

considers that the matter of the ICTY's jurisdiction over the crime of terror was settled by the ICTY Appeals Chamber and was therefore binding on the Trial Chamber in the present case.[1008] As it was not open to the Trial Chamber to depart from the existing jurisprudence in this respect, the Appeals Chamber rejects Mladić's contention that the Trial Chamber erred in failing to give sufficient weight to his submissions that there exist cogent reasons to do so.

284. As to whether there exist cogent reasons for the Appeals Chamber to depart from the jurisprudence in this regard, the standards of appellate review require Mladić to demonstrate that the decision to exercise jurisdiction over the crime of terror was made on the basis of a wrong legal principle or was "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[1009] In this respect, Mladić relies chiefly on the dissenting views of Judges Schomburg and Liu in the *Galić* and *D. Milošević* Appeal Judgements, respectively, to argue that the state practice referred to by the majority in the *Galić* Appeal Judgement was not sufficiently extensive, uniform, or representative to give rise to individual criminal responsibility for spreading terror among the civilian population under customary international law at the relevant time.[1010]

285. A review of the *Galić* Appeal Judgement reveals that the judges of the majority applied the same legal principles as Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case in reaching their conclusions, namely that: (i) the ICTY has jurisdiction to prosecute a violation of a rule of international humanitarian law under Article 3 of the ICTY Statute when four conditions are fulfilled, including when "the violation of the rule must entail, under customary international law, the individual criminal responsibility of the person breaching the rule" ("Fourth Condition");[1011] and (ii) the fulfilment of the Fourth Condition may be inferred from, *inter alia*, state practice indicating an intention to criminalize the violation.[1012]

(wherein Judge Liu reiterated his position that the ICTY does not have jurisdiction over the crime of terror and that such convictions should therefore have been vacated because the crime did not exist under customary international law at the relevant time). In addition, despite opposition to the ICTY's jurisdiction over the crime of terror by Karadžić at trial, the ICTY Trial Chamber in the *Karadžić* case reiterated that Article 3 of the ICTY Statute covers the crime of terror, and entered a conviction for it, which was upheld on appeal. *See Karadžić* Appeal Judgement, para. 777; *Karadžić* Trial Judgement, paras. 458, 6008, 6022, 6071; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Karadžić Pre-Trial Brief, 29 June 2009, paras. 24, 25.

[1008] *See Aleksovski* Appeal Judgement, para. 113. *See also Gotovina et al*. Decision of 1 July 2010, para. 24.

[1009] *See supra* para. 14 and references cited therein.

[1010] *See* Mladić Appeal Brief, paras. 341-347; T. 25 August 2020 pp. 61-63; T. 26 August 2020 pp. 66, 67.

[1011] *Galić* Appeal Judgement, para. 91; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 5; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, para. 2. *See also Tadić* Decision of 2 October 1995, para. 94.

[1012] *Galić* Appeal Judgement, para. 92; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 7; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6, 10. *See also Tadić* Decision of 2 October 1995, para. 128.

286. In concluding that the Fourth Condition was fulfilled, the judges of the majority in the *Galić* case considered, *inter alia*, that: (i) references to terror as a war crime could be found in national and multinational documents as early as 1919 and 1945;[1013] (ii) numerous states, including the former Yugoslavia, had criminalized terrorizing civilians as a method of warfare or in a time of war;[1014] and (iii) a court in Croatia had entered a conviction under, *inter alia*, Article 51 of Additional Protocol I and Article 13 of Additional Protocol II for acts of terror against civilians which occurred between March 1991 and January 1993.[1015] Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case, by contrast, expressed doubt as to whether the evidence referred to by the majority in the *Galić* case was sufficiently extensive and uniform to establish customary international law.[1016]

287. In the Appeals Chamber's view, Judge Schomburg in the *Galić* case and Judge Liu in the *D. Milošević* case applied the same legal principles as the majority in the *Galić* case in determining the sufficiency of the evidence of state practice before them and merely disagreed on the result.[1017] Bearing in mind that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence, both of which are reasonable",[1018] the Appeals Chamber finds that Mladić fails to demonstrate that the finding by the ICTY Appeals Chamber that the ICTY had jurisdiction over the crime of terror was made on the basis of a wrong legal principle or was wrongly decided. In the absence of cogent reasons to depart from the controlling jurisprudence, the Appeals Chamber finds no error in the Trial Chamber's determination that the ICTY had jurisdiction over the crime of terror in the present case.

288. As to Mladić's contention that the definition of the crime of terror nonetheless violated the principle of *nullum crimen sine lege* for lack of specificity and foreseeability,[1019] the Appeals Chamber notes that the Trial Chamber set out the elements of the crime in accordance with the ICTY Appeals Chamber's definition in the *Galić* Appeal Judgement, as clarified in the *D. Milošević* Appeal Judgement.[1020] In particular, the Trial Chamber stated that the crime of terror requires proof of, *inter alia*, acts or threats of violence committed with the primary purpose of spreading terror

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[1013] *See Galić* Appeal Judgement, para. 93 and references cited therein.
[1014] *See Galić* Appeal Judgement, paras. 94-96 and references cited therein.
[1015] *See Galić* Appeal Judgement, para. 97 and references cited therein.
[1016] *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6-8; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 8-10.
[1017] *See D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, paras. 6-8; *Galić* Appeal Judgement, paras. 94, 95; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7-11.
[1018] *See Ntawukulilyayo* Appeal Judgement, para. 15 and references cited therein.
[1019] *See* Mladić Appeal Brief, paras. 350, 352-371; T. 25 August 2020 p. 64.
[1020] *See* Trial Judgement, paras. 3186-3188.

among the civilian population and directed against the civilian population or individual civilians not taking direct part in hostilities causing the victims to suffer grave consequences.[1021]

289. Relying on Judge Shahabuddeen's separate opinion in the *Galić* Appeal Judgement stating that "there is neither the required *opinio juris* nor state practice to support the view that customary international law knows of a comprehensive definition [of terror]",[1022] Mladić argues that the ICTY was not in a position to define the elements of the crime.[1023] He further contends that the definition adopted by the ICTY, particularly the requirement that victims suffer "grave consequences" from the acts or threats of violence, did not provide a clear gravity threshold and was improperly determined through a jurisdictional analysis which was developed after the Indictment period.[1024]

290. The Appeals Chamber recalls that the principle of *nullum crimen sine lege* requires that a person may only be found guilty of a crime in respect of acts which constituted a violation of a norm which existed at the time of their commission.[1025] Moreover, the criminal liability in question must have been sufficiently foreseeable and the law providing for such liability must have been sufficiently accessible at the relevant time.[1026] This principle does not, however, prevent a court from interpreting and clarifying the elements of a particular crime, nor does it preclude the progressive development of the law by the court.[1027]

291. The Appeals Chamber notes that Judge Shahabuddeen specified in his separate opinion in the *Galić* Appeal Judgement that: (i) he agreed with the view that terror as charged is a crime known to customary international law;[1028] (ii) the ICTY could recognize that customary international law does know of a core or predominant meaning of "terror" for which there was individual criminal responsibility at the material times;[1029] and (iii) he was satisfied that a serious violation of the laws or customs of war within the meaning of Article 3 of the ICTY Statute,

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[1021] *See* Trial Judgement, para. 3186.
[1022] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 3.
[1023] *See* Mladić Appeal Brief, paras. 354-358.
[1024] *See* Mladić Appeal Brief, paras. 359-370, *referring to*, *inter alia*, *Tadić* Decision of 2 October 1995, para. 94.
[1025] *See Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Milutinović et al.* Decision of 21 May 2003"), para. 37; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Aleksovski* Contempt Appeal Judgement"), para. 38; *Čelebići* Appeal Judgement, para. 576; *Aleksovski* Appeal Judgement, para. 126. *See also Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 ("*Hadžihasanović et al.* Decision of 16 July 2003"), para. 51.
[1026] *Milutinović et al.* Decision of 21 May 2003, paras. 37, 38. In the case of an international tribunal such as the ICTY, accessibility does not exclude reliance being placed on a law which is based on custom. *Hadžihasanović et al.* Decision of 16 July 2003, para. 34.
[1027] *Milutinović et al.* Decision of 21 May 2003, para. 38; *Čelebići* Appeal Judgement, paras. 173, 576; *Aleksovski* Appeal Judgement, paras. 126, 127.
[1028] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 3.
[1029] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 4.

namely, by resorting to the core of terror, gives rise to such responsibility, which existed at the time of the alleged acts of the appellant.[1030] In the view of the Appeals Chamber, the ICTY Appeals Chamber in the *Galić* and *D. Milošević* cases merely clarified the elements of the crime of terror, which existed in customary international law, for the purposes of Article 3 of the ICTY Statute.[1031] The Appeals Chamber considers that this is consistent with the principle of *nullum crimen sine lege*, as recalled above. Consequently, Mladić fails to show any error in the Trial Chamber's application of the elements of the crime of terror as clarified by the ICTY Appeals Chamber.[1032]

292. As to foreseeability, the Appeals Chamber recalls that the accused must be able to appreciate that his conduct was criminal in the sense generally understood, without reference to any specific provision.[1033] Although the ICTY did not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction, it had recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the Indictment was prohibited and punishable.[1034]

293. To this end, it is worth noting that the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY" and "Criminal Code of the SFRY", respectively) in force at the time of the Indictment period provided that "[w]hoever, in violation of the rules of international law effective at the time of war, armed conflict, or occupation, orders that the civilian population be subject to […] application of measures of intimidation and terror […] shall be punished by imprisonment for not less than five years or by the death penalty".[1035] In addition, the military manual of the SFRY applicable at the time provided, *inter alia*, that: (i) "serious violations of the laws of war [are considered] as criminal offences";[1036] (ii) "[w]ar crimes and other serious violations of the laws of war include […] the application of measures of intimidation and terror [against a civilian population]";[1037] (iii) "[a]ttacking civilians for the purpose of terrorising them is especially prohibited";[1038] and (iv) "[p]ersons who commit a war crime, or any other grave violation of the laws of war, […] may also answer before an international court, if such a court has been

[1030] *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 5.
[1031] *See D. Milošević* Appeal Judgement, paras. 31-37; *Galić* Appeal Judgement, paras. 100-104.
[1032] Trial Judgement, paras. 3186-3188.
[1033] *Hadžihasanović et al.* Decision of 16 July 2003, para. 34.
[1034] *Milutinović et al.* Decision of 21 May 2003, paras. 40, 41.
[1035] *See* Article 142 of the Criminal Code of the SFRY, adopted on 28 September 1976, entered into force on 1 July 1977, and repealed by the Criminal Code of the Republic of Serbia on 1 January 2006. *See also Galić* Appeal Judgement, nn. 302, 303.
[1036] *See* Article 18 of the Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, adopted on 13 April 1988 ("SFRY Military Manual"). *See also Galić* Appeal Judgement, n. 304.
[1037] *See* Article 33(2) of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.

established".[1039] Against this background, the Appeals Chamber considers that Mladić does not demonstrate that the crime of terror was not reasonably foreseeable to him at the time of the events charged in the Indictment.

294. Furthermore, in the Appeals Chamber's view, the specification that, for the purposes of Article 3 of the ICTY Statute, the crime of terror also requires that victims suffered "grave consequences",[1040] in no way detracts from the conclusion that Mladić could reasonably have known that the commission of acts or threats of violence the primary purpose of which is to spread terror among the civilian population was prohibited and punishable.[1041] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić consequently fails to demonstrate that the Trial Chamber erred in exercising jurisdiction over the crime of terror due to lack of specificity and foreseeability in its definition.

(b) Alleged Error in Failing to Find that Sarajevo was a "Defended City"

295. In finding the existence of the Sarajevo JCE, the Trial Chamber considered, *inter alia*, that, about two days after the policy regarding Sarajevo was outlined at the 16th Assembly Session, the SRK commenced its heavy shelling of Sarajevo, which, together with regular and frequent sniping, continued throughout the Indictment period.[1042] The Trial Chamber found that the objective of the joint criminal enterprise involved the commission of, *inter alia*, the crime of terror, and that "the infliction of terror among the civilian population was used to gain strategic military advantages and done out of ethnical vengeance".[1043] In making these determinations, the Trial Chamber rejected Mladić's arguments that Sarajevo was a valid military target that could not be seen as an "undefended city" pursuant to Article 3(c) of the ICTY Statute.[1044]

296. Mladić submits that, in convicting him of the crime of terror, the Trial Chamber erred by misconstruing and failing to give sufficient weight to his submissions regarding Sarajevo as a "defended city" pursuant to Article 3(c) of the ICTY Statute.[1045] In particular, he argues that the

[1038] *See* Article 67 of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.
[1039] *See* Article 20 of the SFRY Military Manual. *See also Galić* Appeal Judgement, n. 304.
[1040] *See* Trial Judgement, para. 3186. *See also D. Milošević* Appeal Judgement, paras. 32, 33.
[1041] Mladić's contention that the definition of the crime of terror adopted by the ICTY provided an unclear gravity threshold creating "two distinct sets of victims" (*see* Mladić Appeal Brief, paras. 365, 366) also does not demonstrate an error. The "grave consequences" requirement to which Mladić points in this respect is jurisdictional, meaning that the crime of terror victim group remains the same: "the civilian population or individual civilians not taking direct part in hostilities", but that the ICTY could only exercise its jurisdiction over the crime where the grave consequences requirement is met. *See* Trial Judgement, para. 3186. *See also D. Milošević* Appeal Judgement, paras. 31-33.
[1042] Trial Judgement, para. 4740. *See also* Trial Judgement, paras. 1855-1913, 1915-2215, 4734-4739.
[1043] Trial Judgement, para. 4740. *See also* Trial Judgement, paras. 3201, 3202.
[1044] Trial Judgement, paras. 4693, 4733.
[1045] *See* Mladić Appeal Brief, paras. 373-388. *See also* Mladić Appeal Brief, paras. 425, 467, 487.

Trial Chamber "erred by failing to consider Sarajevo as a defended city which constituted a legitimate military objective".[1046] Mladić contends that, had the Trial Chamber understood and considered his submissions in this respect, it could not have concluded that terror was the primary purpose of the campaign in Sarajevo and that he possessed the requisite *mens rea* for this crime.[1047] Accordingly, Mladić requests that the Appeals Chamber reverse his conviction under Count 9 of the Indictment.[1048]

297. The Prosecution responds that Sarajevo as a whole was not a legitimate military target and that the Trial Chamber rightly rejected Mladić's argument about Sarajevo as a "defended city".[1049] It contends that, regardless of the presence of legitimate military targets within Sarajevo, or of the military advantage offered by holding the city, a distinction must be made between civilian and military objectives.[1050] The Prosecution also contends that Mladić was not charged with attacking undefended locales, but with terrorizing, unlawfully attacking, and murdering civilians as violations of the laws or customs of war pursuant to Article 3 of the ICTY Statute.[1051]

298. Mladić replies that he does not contend that Sarajevo in its entirety constituted a valid military target but rather, that Sarajevo, as a defended city, constituted a valid military objective.[1052] Mladić further asserts that he does not contend that categorizing a city as "defended" allows a party to avoid their obligations of distinction, but maintains that the Trial Chamber's conclusion that his primary objective in Sarajevo was to spread terror among the civilian population was not the only reasonable inference available on the evidence.[1053]

299. The Appeals Chamber recalls that Article 3 of the ICTY Statute sets out a non-exhaustive list of punishable violations of the laws or customs of war, including, *inter alia*, under Article 3(c), the "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings" ("crime of attacking undefended locales").[1054] The crime of attacking undefended locales is thus one of the violations of the laws or customs of war within the jurisdiction of the ICTY pursuant to Article 3 of the ICTY Statute, which include, for instance, the crimes of murder, terror, unlawfully attacking civilians, or hostage-taking.[1055] Mladić asserts that "the reference to Article 3

[1046] Mladić Appeal Brief, para. 380.
[1047] *See* Mladić Appeal Brief, paras. 374, 377-395.
[1048] Mladić Appeal Brief, paras. 375, 396, 397.
[1049] *See* Prosecution Response Brief, paras. 140-143.
[1050] Prosecution Response Brief, paras. 140-142.
[1051] Prosecution Response Brief, para. 142.
[1052] Mladić Reply Brief, para. 72.
[1053] Mladić Reply Brief, para. 72.
[1054] Article 3(c) of the ICTY Statute.
[1055] *Cf. Kupreškić et al.* Trial Judgement, paras. 698, 742.

in the [I]ndictment should be understood to *include* a reference to Art[icle] 3(c)".[1056] However, nothing in the Indictment, Prosecution Pre-Trial Brief,[1057] or trial record suggests that Mladić was charged with the crime of attacking undefended locales. Mladić therefore does not demonstrate that the Trial Chamber erred by failing to give sufficient weight to his submissions and consider Sarajevo as a "defended city" pursuant to Article 3(c) of the ICTY Statute.

300. Moreover, Mladić conflates the question of whether Sarajevo was a "defended city" with whether it contained legitimate military objectives.[1058] In this respect, the Appeals Chamber recalls that the principle of distinction requires parties to a conflict to distinguish at all times between the civilian population and combatants, or civilian and military objectives, such that only military objectives may be lawfully attacked and the prohibition on targeting civilians is absolute.[1059] As such, Mladić's general assertion that the strategic military importance, nature, and location of Sarajevo rendered the city and its contents broadly subject to legitimate attack falls to be rejected.[1060]

301. The Appeals Chamber is also not persuaded by Mladić's suggestion that, if the Trial Chamber had recognized Sarajevo's strategic military importance, it could not have concluded that the campaign in Sarajevo was primarily aimed at spreading terror as opposed to gaining military advantage.[1061] The Appeals Chamber observes that the Trial Chamber explicitly recognized that the infliction of terror among the civilian population, as the primary purpose of the sniping and shelling incidents in Sarajevo, was used to gain a strategic military advantage.[1062] In this respect, the Trial Chamber considered evidence showing, *inter alia*, that: (i) many civilians were targeted while carrying out daily activities of a civilian nature or when present at sites that were known as locations where civilians gathered;[1063] (ii) several of the sniping and shelling attacks were carried out during cease-fires or quiet periods, and civilians were more prone to being targeted when

[1056] Mladić Appeal Brief, para. 378.
[1057] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Prosecution Pre-Trial Brief, 24 February 2012.
[1058] Article 59 of Additional Protocol I, which prohibits parties to a conflict to attack, by any means whatsoever, non-defended localities, defines the concept of a non-defended locality as an "inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse [p]arty". Article 52 of Additional Protocol I, by contrast, prohibits attacks against civilian objects and provides that attacks shall be strictly limited to military objectives, which it defines as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".
[1059] *See Karadžić* Appeal Judgement, paras. 486-488; *D. Milošević* Appeal Judgement, paras. 53, 54; *Galić* Appeal Judgement, para. 190; *Blaškić* Appeal Judgement, para. 109.
[1060] *See* Mladić Appeal Brief, paras. 379-386. *See also D. Milošević* Appeal Judgement, para. 54.
[1061] *See* Mladić Appeal Brief, paras. 380, 388.
[1062] *See* Trial Judgement, paras. 3201, 4740.
[1063] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.1, F.3, F.5, F.11, F.12, F.13, F.15, F.16, G.6, G.7, and Unscheduled Sniping Incidents of 31 March 1993, 24 July 1993, 5 August 1993, 9 November 1993, 24 October 1994, 10 December 1994.

circumstances suggested that the shooting or shelling had stopped and it was safe for civilians to continue their daily activities;[1064] (iii) numerous civilians were targeted while they were at home or in neighbourhoods where there was no military activity or military personnel and equipment present in the immediate vicinity;[1065] (iv) the period of sniping and shelling continued, largely unabated, over almost four years;[1066] and (v) civilians in Sarajevo lived in extreme and constant fear of being hit by sniper or artillery fire.[1067]

302. In view of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that no reasonable trier of fact could, in principle, have concluded that terror was the primary purpose of the shelling and sniping campaign in Sarajevo. To the extent that Mladić alleges specific errors in the Trial Chamber's assessment of evidence in this respect, the Appeals Chamber will evaluate such allegations in connection with the supporting submissions.

(c) Alleged Errors Relating to the Existence of a Sarajevo JCE and Mladić's Intent

303. In finding the existence of the Sarajevo JCE and that Mladić shared the common criminal purpose and intended to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the Trial Chamber considered, *inter alia*, that the policy of the Bosnian Serb leadership with regard to Sarajevo was outlined at the 16th Assembly Session, and that Mladić personally directed the SRK to shell Sarajevo and cut its utilities to force inhabitants outside.[1068] The Trial Chamber also noted that some of the evidence received may indicate that the Bosnian Serb leadership was genuinely concerned with the well-being of civilians.[1069] In this respect, the Trial Chamber pointed to statements of assurance by Bosnian Serb officials to international organizations,[1070] including Mladić's assurances that Sarajevo was "under no threat from the VRS",[1071] as well as certain orders prohibiting firing at civilians without approval.[1072] The Trial Chamber concluded, however, that these could not serve as a reliable basis for determining the Bosnian Serb leadership's true state of mind in light of the totality of the evidence.[1073] The Trial Chamber considered, *inter alia*, that Mladić's statements at the 16th Assembly Session, as well as

[1064] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.11, F.13, F.15, G.6.
[1065] *See* Trial Judgement, para. 3201, *referring to* Scheduled Incidents F.1, F.4, F.5, F.11, F.12, F.15, F.16, G.6, G.7, G.10, and Incidents of 27 June 1993, 26 September 1993, 11 January 1994.
[1066] *See* Trial Judgement, paras. 3201, 4740.
[1067] *See* Trial Judgement, paras. 1888-1890, 3201.
[1068] *See* Trial Judgement, paras. 4740, 4921.
[1069] Trial Judgement, para. 4737.
[1070] Trial Judgement, para. 4736.
[1071] Trial Judgement, paras. 4736, 4919.
[1072] Trial Judgement, paras. 4737-4739.
[1073] Trial Judgement, paras. 4736-4739, 4919, 4920.

the language of the orders, evinced a lack of genuine concern for the well-being of civilians and the rule of law.[1074]

304. Mladić submits that the Trial Chamber erred in interpreting his statements at the 16th Assembly Session predominantly through the lens of its findings on the Sarajevo crime base[1075] and in disregarding evidence of orders prohibiting the targeting of civilians.[1076] He argues that, as a consequence of these errors, alone or in combination, the Trial Chamber erred in concluding that there was no other inference available on the evidence consistent with his innocence, and thereby erroneously inferred the existence of the Sarajevo JCE and his intention to act in furtherance thereof.[1077] Mladić accordingly requests the Appeals Chamber to reverse his convictions for the crimes of murder, terror, and unlawful attacks on civilians under Counts 5, 9, and 10 of the Indictment, respectively, or, in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.[1078]

305. The Prosecution responds that the Trial Chamber reasonably interpreted Mladić's statements at the 16th Assembly Session[1079] and appropriately discounted Mladić's orders not to fire at civilians.[1080] The Prosecution further submits that the Trial Chamber's findings on the existence and Mladić's shared intent of the common criminal purpose do not hinge on his statements at the 16th Assembly Session as the Trial Chamber relied on a wide range of evidence in reaching its conclusions.[1081]

[1074] Trial Judgement, paras. 4737, 4739. *See also* Trial Judgement, para. 4823.
[1075] *See* Mladić Appeal Brief, paras. 398, 409-420, *referring to* Trial Judgement, paras. 4740, 4897, 4919-4921.
[1076] *See* Mladić Appeal Brief, paras. 398, 429-437, *referring to* Trial Judgement, paras. 4737, 4739, 4919.
[1077] *See* Mladić Appeal Brief, paras. 398, 399, 415-421, 437-439. *See also* Mladić Reply Brief, paras. 73, 74. As part of this sub-ground of appeal, Mladić also asserts that the Trial Chamber erred by relying on evidence of crimes which were not proven beyond reasonable doubt and supports this assertion by referring to submissions made elsewhere in his appellant's brief. *See* Mladić Appeal Brief, paras. 422-428. *See also* Mladić Reply Brief, paras. 75, 76. In particular, he contends that, because Sarajevo was a "defended city", evidence that Sarajevo was bombarded does not, *per se*, prove the commission of a crime. *See* Mladić Appeal Brief, para. 425, *referring to* Mladić Appeal Brief, paras. 373-397. The Appeals Chamber recalls that it has dismissed Mladić's alleged errors in relation to Sarajevo as a "defended city" (*see supra* Section III.C.1(b)), and accordingly, hereby dismisses his allegation of error in this respect. Mladić also contends that the Trial Chamber erroneously drew upon the evidence of Witness RM-511 pursuant to Scheduled Incident G.1 to infer the existence of the Sarajevo JCE and his intent. *See* Mladić Appeal Brief, paras. 422, 423, 426, *referring to* Mladić Appeal Brief, paras. 464-496. The Appeals Chamber recalls that it has already dismissed Mladić's alleged errors in relation to Scheduled Incident G.1 (*see infra* Section III.C.2(a)).
[1078] *See* Mladić Appeal Brief, paras. 400, 421, 440-442.
[1079] *See* Prosecution Response Brief, paras. 146-156.
[1080] *See* Prosecution Response Brief, paras. 165-168.
[1081] *See* Prosecution Response Brief, paras. 157-161. In particular, the Prosecution argues that the Trial Chamber based its common criminal purpose conclusions on international witnesses, insider witnesses, and documentary evidence, and took into account, *inter alia*, the difficult living conditions caused by constant shelling and sniping over a four-year period. *See* Prosecution Response Brief, para. 158. The Prosecution further argues that the Trial Chamber's conclusion on Mladić's shared intent was based on evidence of, *inter alia*, Mladić personally directing the SRK to shell Sarajevo and cut its utilities to force inhabitants outside as well as his contemporaneous statements. *See* Prosecution Response Brief, paras. 159, 160.

306. The Appeals Chamber recalls that explicit manifestations of criminal intent are often rare and that the requisite intent may therefore be inferred from relevant facts and circumstances,[1082] such as, *inter alia*, the accused's words and/or actions, as well as the general context in which they occurred.[1083] Mladić, by contrast, argues that the Trial Chamber should have viewed the statements made at the 16th Assembly Session "independent of the crime base", and refers to an analysis by the ICTY Appeals Chamber in the *Gotovina and Markač* case to support his argument.[1084] In the Appeals Chamber's view, however, Mladić misconstrues the ruling of the ICTY Appeals Chamber in the *Gotovina and Markač* case. In that case, after having overturned the Trial Chamber's findings as to the criminal nature of the context in which certain statements were made, the ICTY Appeals Chamber found that the existence of a joint criminal enterprise could no longer be inferred from those statements.[1085] This does not stand for the proposition that a trial chamber should examine evidence related to intent "independent of the crime base". As recalled above, intent is generally inferred from relevant facts and circumstances which include the accused's conduct and the context in which it took place.

307. Moreover, having carefully reviewed the Trial Judgement, as well as the minutes of the 16th Assembly Session, the Appeals Chamber finds nothing to suggest that the Trial Chamber erred in its assessment of Mladić's specific statements.[1086] The Trial Chamber determined that his statements at the 16th Assembly Session evinced a desire to mislead the public about the truth of the Bosnian Serb leadership's actions in Sarajevo.[1087] Mladić, however, submits that "the warnings that '[t]he thing we are doing needs to be guarded as our deepest secret' and '[o]ur people must know how to read between the lines' could be understood as a warning not to divulge legitimate military strategies needlessly".[1088] The Appeals Chamber considers that Mladić merely proposes alternative interpretations without demonstrating the unreasonableness of the Trial Chamber's interpretation of his statements at the 16th Assembly Session.[1089]

[1082] *See, e.g., Rutaganda* Appeal Judgement, paras. 525, 528; *Kayishema and Ruzindana* Appeal Judgement, paras. 159, 198. *See also Munyakazi* Appeal Judgement, para. 142.
[1083] *See, e.g., Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 31; *Jelisić* Appeal Judgement, para. 47. *See also Šainović et al.* Appeal Judgement, paras. 580, 1016; *Nyiramasuhuko et al.* Appeal Judgement, paras. 1029, 1030; *D. Milošević* Appeal Judgement, para. 37; *Krstić* Appeal Judgement, para. 33.
[1084] Mladić Appeal Brief, paras. 413-417, *referring to Gotovina and Markač* Appeal Judgement, paras. 81, 82, 87, 91, 93.
[1085] *See Gotovina and Markač* Appeal Judgement, paras. 77-98.
[1086] *Compare* Trial Judgement, paras. 3704, 4736, 4739, 4897 *with* Exhibit P431, pp. 34-36, 38, 39.
[1087] *See* Trial Judgement, para. 4736, *referring to* Exhibit P431.
[1088] Mladić Appeal Brief, para. 418 (internal citations omitted).
[1089] *See also supra* paras. 269, 273.

308. With respect to Mladić's contention that the Trial Chamber erred by failing to give weight to orders prohibiting the targeting of civilians,[1090] the Appeals Chamber notes that the Trial Chamber explicitly considered and discussed such orders,[1091] but concluded that they evinced a concern with insubordination or wasting of ammunition,[1092] and provided "mere lip-service" to support assurances to the international community and/or give the appearance of a leadership obeying the law.[1093] Mladić takes issue with this assessment, contending that such orders constituted direct evidence of his intent and therefore should have weighed against a finding that he intended to further the Sarajevo JCE.[1094] The Appeals Chamber notes, however, that, in assessing the probative value of orders prohibiting the targeting of civilians, the Trial Chamber did not only consider the language of such orders, but also, *inter alia*, that: (i) such orders were not adhered to and the leadership did not take measures to enforce them;[1095] (ii) the testimonial evidence concerning the existence of standing orders not to target civilians in Sarajevo was given by former members of the SRK who may have had an interest in protecting themselves;[1096] and (iii) Mladić stated at the 16th Assembly Session that Serbian people would need to know how to "read between the lines".[1097] Mladić shows no error in the Trial Chamber's approach.

309. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate error in the Trial Chamber's overall assessment of his intent to commit murder, terror, and unlawful attacks on civilians in relation to the Sarajevo JCE, especially given the totality of the factors relied upon by the Trial Chamber in this respect.[1098]

[1090] *See* Mladić Appeal Brief, paras. 429-437.
[1091] *See* Trial Judgement, paras. 4737-4739, *referring to*, *inter alia*, Exhibits P812, P4424, D66, D726, D2022, D2039, D2045, D2081. *See also* Trial Judgement, paras. 4704, 4714, 4715, 4717, 4718, 4720-4722, 4738.
[1092] Trial Judgement, para. 4737.
[1093] Trial Judgement, para. 4739.
[1094] Mladić Appeal Brief, paras. 429, 433-437.
[1095] *See* Trial Judgement, paras. 4739, 4919. *See also* Trial Judgement, paras. 4718, 4835.
[1096] *See* Trial Judgement, para. 4738. *See also* Trial Judgement, paras. 4714-4732.
[1097] *See* Trial Judgement, para. 4739.
[1098] In particular, in making this finding, the Trial Chamber considered that Mladić:

> (i) […] personally direct[ed] the 28 May 1992 shelling of Sarajevo, select[ed] targets, and direct[ed] fire away from Serb-populated areas; (ii) […] formulat[ed] and issu[ed] directives and command[ed] the SRK; (iii) […] propos[ed] in the spring of 1995 that Sarajevo be bombarded with explicit disregard for the safety of civilians; and (iv) […] ordered the SRK Command to cut utilities supplying Sarajevo on 6 September 1995, thereby forcing the inhabitants of Sarajevo to go outside and be exposed to sniping and shelling […].

Trial Judgement, para. 4921.

(d) Alleged Errors in the Assessment of Specific Intent for the Crime of Terror

310. In finding that the sniping and shelling incidents in Sarajevo constituted the crime of terror,[1099] the Trial Chamber determined, *inter alia*, that: (i) the perpetrators wilfully made civilians not taking direct part in hostilities the object of their sniping and shelling; (ii) the perpetrators intended to spread terror among the civilian population of Sarajevo; and (iii) the infliction of terror was the primary purpose of the sniping and shelling incidents.[1100]

311. Mladić submits that the Trial Chamber erred in applying the same "standard of proof", and relying on the same set of circumstantial factors, to determine the perpetrators' wilful intent to target civilians as it did to determine their specific intent to spread terror, which requires a "higher standard of proof".[1101] He contends that, in the absence of "more precise indicia", no reasonable trier of fact could have concluded "with any certainty" that terror was the primary purpose of the perpetrators of the alleged crimes.[1102] Mladić submits that, as a result of the Trial Chamber's error, he was wrongly held liable for the crime of terror pursuant to a joint criminal enterprise, and accordingly requests the Appeals Chamber to reverse his conviction under Count 9 of the Indictment.[1103]

312. The Prosecution responds that, for Mladić to be held liable as a member of the Sarajevo JCE, the physical perpetrators used as tools by the joint criminal enterprise members need not possess the intent for the crimes,[1104] and that, in any event, the Trial Chamber reasonably concluded that the SRK perpetrators of the sniping and shelling campaign specifically intended to spread terror among Sarajevo's civilian population.[1105]

313. The Appeals Chamber recalls that the *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population.[1106] Such intent may be inferred from the circumstances of the acts or threats of violence, such as, *inter alia*, their nature, manner, timing, and duration.[1107] Nothing precludes a

[1099] Trial Judgement, para. 3202. As a sole exception, the Trial Chamber excluded the Unscheduled Sniping Incident of 9 November 1994 from constituting the crime of terror on the basis that it could not determine beyond a reasonable doubt that the sniping was directed at civilians. *See* Trial Judgement, paras. 3190, 3199, 3200, 3202.
[1100] Trial Judgement, paras. 3200, 3201. *See also* Trial Judgement, paras. 3184-3199, 4740, 4921.
[1101] *See* Mladić Appeal Brief, paras. 443, 446-456. *See also* Mladić Reply Brief, para. 77.
[1102] Mladić Appeal Brief, para. 455.
[1103] Mladić Appeal Brief, paras. 444, 445, 457, 458.
[1104] Prosecution Response Brief, para. 169 and references cited therein.
[1105] Prosecution Response Brief, paras. 170-174.
[1106] *D. Milošević* Appeal Judgement, para. 37, *referring to Galić* Appeal Judgement, para. 104.
[1107] *D. Milošević* Appeal Judgement, para. 37; *Galić* Appeal Judgement, para. 104.

reasonable trier of fact from relying on the same set of circumstances to infer that perpetrators willfully made civilians the object of acts or threats of violence, and, at the same time, that such acts or threats of violence were committed with the primary purpose of spreading terror among the civilian population. Mladić's argument that the Trial Chamber erred in so doing because a finding of specific intent requires a "higher standard of proof"[1108] is accordingly ill-founded.

314. Moreover, in determining that spreading terror was the primary purpose of the sniping and shelling attacks in Sarajevo, the Trial Chamber considered the nature, manner, timing, location, and duration of the attacks, as well as: (i) that many civilians were targeted when carrying out daily activities such as while at the market, standing in line for food, or collecting water or firewood, and while in or around their homes or in parks and hospitals, or when travelling by tram; (ii) that children were also targeted while in school or playing or walking outside their house or on the street; (iii) that civilians were more prone to being targeted when circumstances suggested that the shooting or shelling had stopped and it was safe for them to continue their daily activities; (iv) the challenging living conditions they were subjected to; and (v) the constant and extreme fear they experienced of being hit by sniper or artillery fire.[1109] In this respect, Mladić recalls his submissions that Sarajevo was a legitimate military target,[1110] which the Appeals Chamber has dismissed above.[1111] He further argues that the existence of fear is not an element of the crime of terror, nor does its existence alone substantiate the conclusion that terror was intended,[1112] and that the origin of such fear cannot conclusively be attributed to the SRK in light of evidence of the ABiH sniping and attacking civilians in Sarajevo.[1113]

315. The Appeals Chamber recalls that terror could be defined as "extreme fear",[1114] and that such fear was merely one of several factors from which the Trial Chamber inferred specific intent in this case.[1115] The Appeals Chamber further observes that the Trial Chamber duly considered evidence of the ABiH's involvement in the events in Sarajevo[1116] and considers that such evidence does not detract from the Trial Chamber's findings regarding the SRK's perpetration of sniping and

[1108] *See* Mladić Appeal Brief, para. 448.
[1109] *See* Trial Judgement, para. 3201. *See also supra* para. 301.
[1110] *See* Mladić Appeal Brief, para. 452.
[1111] *See supra* Section III.C.1(b).
[1112] Mladić Appeal Brief, para. 453.
[1113] *See* Mladić Appeal Brief, para. 454, *referring to* Mladić Appeal Brief, para. 548.
[1114] *See Galić* Appeal Judgement, n. 320.
[1115] *See* Trial Judgement, para. 3201.
[1116] *See, e.g.*, Trial Judgement, paras. 1853, 1856, 1861, 1877, 1878, 1887, 1912, 1913, 1917, 1919, 1923, 1932, 1933, 1944, 1948, 1949, 1962, 1965-1969, 1971-1973, 2024, 2033, 2035, 2047, 2066-2068, 2087, 2093, 2100, 2101, 2106, 2117, 2144, 2156, 2162, 2164, 2169, 2181, 2183.

shelling attacks against civilians in Sarajevo and the relevant intent pertinent to such conduct.[1117] Consequently, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show any error in the Trial Chamber's assessment of the SRK perpetrators' specific intent to spread terror among the civilian population in Sarajevo.

(e) Conclusion

316. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 4.A of Mladić's appeal.

2. Alleged Errors Related to the Crimes of Murder and Unlawful Attacks on Civilians and that Spreading Terror was the Primary Purpose of the Sarajevo JCE (Ground 4.B)

317. The Trial Chamber concluded that several sniping and shelling incidents in Sarajevo, except in relation to non-civilian victims, constituted the crimes of murder, terror and/or unlawful attacks on civilians,[1118] and held Mladić responsible for these crimes through his participation in the Sarajevo JCE.[1119]

318. Mladić submits that the Trial Chamber erred in law and in fact in its assessment of the majority of the incidents that it considered to form part of the Sarajevo JCE crime base,[1120] and that the cumulative effect of these errors impacts the Trial Chamber's findings on the existence of the Sarajevo JCE.[1121] He requests the Appeals Chamber to reverse the Trial Chamber's findings on the affected incidents, "remove" the specified incidents from consideration under Counts 5, 9, and 10 of the Indictment, and reconsider the existence of the Sarajevo JCE and his alleged intent to further its common purpose.[1122] In particular, he argues that the Trial Chamber erred in: (i) failing to consider evidence of legitimate military activity;[1123] (ii) relying on adjudicated facts;[1124] (iii) failing to provide a reasoned opinion;[1125] and (iv) inferring the responsibility of the SRK.[1126] The Appeals Chamber will address these contentions in turn.

[1117] *See also infra* Section III.C.2(d).
[1118] Trial Judgement, paras. 3065, 3202, 3206, 3212.
[1119] Trial Judgement, paras. 4740, 4893, 4921, 5214.
[1120] *See* Mladić Notice of Appeal, paras. 40-48; Mladić Appeal Brief, paras. 460-464, 466-495, 497-526, 528, 530-540, 542, 543, 545-553. *See also* Mladić Reply Brief, paras. 78-85.
[1121] *See* Mladić Appeal Brief, paras. 555-562.
[1122] *See* Mladić Appeal Brief, paras. 465, 496, 527, 529, 541, 544, 554, 563, 564.
[1123] *See* Mladić Appeal Brief, paras. 460(a), 464, 466-495.
[1124] *See* Mladić Appeal Brief, paras. 460(b), 497-526.
[1125] *See* Mladić Appeal Brief, paras. 530-540. *See also* Mladić Appeal Brief, para. 460(c).
[1126] *See* Mladić Appeal Brief, paras. 542-553. *See also* Mladić Appeal Brief, para. 460(d).

(a) Alleged Errors in Failing to Consider Evidence of Legitimate Military Activity

319. The Trial Chamber found that, in relation to Scheduled Incident G.1, following an order from Mladić, from 5 p.m. on 28 May 1992 until early the next morning, members of the SRK fired artillery, rockets, and mortars against Sarajevo, injuring Witnesses RM-115 and Fadila Tarčin and causing extensive damage to buildings.[1127] The Trial Chamber determined that Mladić personally directed the attack on Sarajevo, including selecting targets such as the Presidency, the town hall, police headquarters, and the children's embassy and directing the fire away from Serb-populated areas.[1128]

320. Mladić submits that the Trial Chamber erred in finding that Scheduled Incident G.1 satisfied the elements of the crimes of terror and unlawful attacks on civilians.[1129] In particular, he argues that no reasonable trier of fact could have concluded beyond reasonable doubt, on the basis of the hearsay and circumstantial evidence of Witnesses Tarčin and John Wilson, that the SRK was responsible for the shelling attacks which injured Witnesses Tarčin and RM-115 and/or caused other grave consequences.[1130] He further argues that the Trial Chamber misconstrued the evidence of Witness RM-511 and relied on the hearsay evidence of Witness Wilson to erroneously conclude that the attacks were wilfully directed at civilians or civilian targets, in contrast with an assessment of the ICTY Appeals Chamber in the *Gotovina and Markač* case under similar circumstances.[1131]

321. The Prosecution responds that the Trial Chamber reasonably found that Scheduled Incident G.1 formed part of the crimes of terror and unlawful attacks on civilians, and that Mladić fails to show any error in the Trial Chamber's conclusions.[1132] It contends that the Trial Chamber did not base its conclusion regarding the SRK's responsibility solely on the evidence of Witnesses Tarčin and Wilson, but also on a wealth of other circumstantial evidence.[1133] The Prosecution further contends that the Trial Chamber correctly interpreted Witness RM-511's evidence, which was

[1127] Trial Judgement, paras. 2022, 3191(a), 4758. *See also* Indictment, Schedule G.1.
[1128] Trial Judgement, paras. 2022, 4758.
[1129] *See* Mladić Appeal Brief, paras. 464, 466-495.
[1130] *See* Mladić Appeal Brief, paras. 469-475.
[1131] *See* Mladić Appeal Brief, paras. 476-493; Mladić Reply Brief, paras. 78, 79, *referring to*, *inter alia*, *Gotovina and Markač* Appeal Judgement, paras. 62, 63, 65, 70-73, 77, 78, 81. In support of his arguments, Mladić also recalls his submissions regarding Sarajevo as a "defended city" (*see* Mladić Appeal Brief, paras. 467, 473, 487), which the Appeals Chamber has dismissed above. *See supra* Section III.C.1(b). In addition, Mladić contends that "targets of opportunity operated extensively in and around Sarajevo throughout the indictment period", and argues that "[t]he Trial Chamber did not exclude the possibility that shells were fired at these targets of opportunity during the bombardment". Mladić Appeal Brief, para. 489. The Appeals Chamber notes, however, that Mladić does not develop this argument any further, and a review of the evidence to which he points in support of his argument (*see* Mladić Appeal Brief, n. 610) shows that it does not relate to the scope of Scheduled Incident G.1 and/or does not refer to such "targets of opportunity". The Appeals Chamber accordingly dismisses Mladić's argument in this respect.
[1132] *See* Prosecution Response Brief, paras. 176-197.
[1133] *See* Prosecution Response Brief, paras. 180-184.

among several other factors leading the Trial Chamber to reasonably conclude that Mladić and SRK members wilfully directed Scheduled Incident G.1 against civilians, and asserts that Mladić's comparison of his case with the *Gotovina and Markač* case is inapposite.[1134]

322. The Appeals Chamber notes that, in reversing the conclusion of the ICTY Trial Chamber that certain artillery attacks were unlawful, the ICTY Appeals Chamber in the *Gotovina and Markač* case considered, *inter alia*, that there was no evidence that an explicit order was given to commence the unlawful attacks.[1135] By contrast, the Trial Chamber in the present case received evidence of Mladić explicitly ordering the attack on Sarajevo and selecting civilian targets.[1136] The Appeals Chamber therefore considers the *Gotovina and Markač* case to be distinguishable from the circumstances of the present case.

323. The Appeals Chamber recalls that trial chambers have the discretion to rely on hearsay evidence[1137] and may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that could be drawn from the evidence presented.[1138] Mladić's implication that the Trial Chamber could not reasonably rely on hearsay and/or circumstantial evidence to reach its conclusions is accordingly ill-founded. Moreover, the Appeals Chamber notes that the Trial Chamber's findings in relation to Scheduled Incident G.1 were not only based on the evidence of Witnesses Tarčin, Wilson, and RM-511, but also on the testimonies of Witnesses RM-115, Milan Mandivolić, Bakir Nakaš, Nedžib Đozo, as well as documentary evidence.[1139]

324. In particular, in concluding that during Scheduled Incident G.1 shells were fired by the SRK and aimed at civilian targets, the Trial Chamber considered evidence, *inter alia*, that: (i) Witness RM-115 was seriously injured in the night of 28 May 1992 by shrapnel while at a civilian hospital;[1140] (ii) Witness Tarčin was injured in the night of 28 May 1992 by shrapnel while hiding in the cellar of her house in the neighbourhood of Širokača, and learned of the model and calibre of the shell which caused her injuries and the origin of its fire from men in Širokača who had previously served with the JNA;[1141] (iii) the Stari Grad police station logbook recorded that, on 27 and 28 May 1992, VRS artillery shelled neighbourhoods within the vicinity of Širokača;[1142] (iv)

[1134] *See* Prosecution Response Brief, paras. 187-197.
[1135] *Gotovina and Markač* Appeal Judgement, paras. 81-83.
[1136] *See* Trial Judgement, paras. 2020, 2021.
[1137] *See, e.g., Karadžić* Appeal Judgement, para. 598 and references cited therein.
[1138] *See, e.g., Šešelj* Appeal Judgement, para. 63 and references cited therein.
[1139] *See* Trial Judgement, paras. 2016-2022.
[1140] Trial Judgement, paras. 2017, 2018, 2022.
[1141] Trial Judgement, paras. 2019, 2022.
[1142] Trial Judgement, para. 2019, n. 8590, *referring to* Exhibit P549, p. 72.

Mladić was the Commander of the VRS Main Staff,[1143] which comprised the SRK and other corps;[1144] (v) on 29 May 1992, Witness Wilson heard an audiotape of Mladić ordering the attack on Sarajevo, selecting civilian targets while directing fire away from Serb-populated areas and determining the calibre of fire to be used at his direct command only;[1145] and (vi) on 30 May 1992, Mladić admitted his responsibility for the attack on Sarajevo to Witness Wilson.[1146]

325. The Trial Chamber also recalled the evidence of Witness RM-511,[1147] who, according to the Trial Chamber, "testified that Mladić ordered the shelling of Velešići and Pofalići, two neighbourhoods in Sarajevo, and that the civilians in these neighbourhoods be harassed throughout the night so that they could not rest".[1148] In this regard, Mladić submits that "[W]itness RM-511 did not state that the Appellant had directed the bombardment of Sarajevo to harass civilians throughout the night".[1149] A review of the transcript of Witness RM-511's testimony shows that the witness was made to listen to an audiotape of Mladić ordering his subordinates to "[s]hoot at Velešići, and also at Pofalići, there is not much Serb population there […] [a]nd apply artillery reconnaissance, so that they cannot sleep that we roll out their minds".[1150] The witness explained that the expression "roll out their minds" meant "[t]o harass them throughout the night, so that they cannot rest"[1151] and confirmed that Mladić, [REDACTED].[1152] In the Appeals Chamber's view, the Trial Chamber could reasonably have concluded on the basis of such evidence that the shelling of Velešići and Pofalići was wilfully directed at harassing civilians. Mladić therefore fails to demonstrate an error in the Trial Chamber's assessment of Witness RM-511's evidence.

326. Having reviewed the evidence underlying the Trial Chamber's conclusions regarding Scheduled Incident G.1, the Appeals Chamber considers that Mladić shows no error in the Trial Chamber's approach or findings. The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber erred in considering Scheduled Incident G.1 as part of the crimes of terror and unlawful attacks on civilians as well as in its determination of the existence of the Sarajevo JCE and his alleged intent to further its common purpose.

[1143] Trial Judgement, para. 2022. *See also* Trial Judgement, para. 275.
[1144] Trial Judgement, para. 105.
[1145] Trial Judgement, paras. 2020, 2022, nn. 8602-8604.
[1146] Trial Judgement, para. 2021.
[1147] Trial Judgement, para. 2021.
[1148] Trial Judgement, para. 4700, *referring to* T. 13 November 2012 pp. 5049-5054 (closed session).
[1149] Mladić Appeal Brief, para. 477.
[1150] T. 13 November 2012 p. 5050 (closed session).
[1151] T. 13 November 2012 p. 5050 (closed session). Witness RM-511 did not specify, however, whether the purpose of ordering artillery fire into Velešići and Pofalići was to harass the civilian population. *See* T. 13 November 2012 pp. 5050, 5051 (closed session).
[1152] T. 13 November 2012 pp. 5051, 5052 (closed session).

(b) Alleged Errors in Relying on Adjudicated Facts

327. The Trial Chamber found that, in relation to Scheduled Incident F.11, on 8 October 1994 during a series of shootings, an SRK member killed one person, hit two trams and seriously wounded 11 other people.[1153] It further found that, in relation to Scheduled Incident G.8, on 5 February 1994, members of the SRK fired a mortar shell from Mrkovići which hit Markale Market, killing 68 people and injuring over 140 others.[1154]

328. Mladić submits that the Trial Chamber erred by relying on adjudicated facts to reach essential findings, particularly with respect to the SRK's responsibility, in relation to several alleged sniping and shelling incidents underpinning his convictions for the crimes of murder, terror, and/or unlawful attacks on civilians in Sarajevo.[1155] In particular, he contends that the Trial Chamber erred in: (i) failing to find that Adjudicated Fact 2303 was rebutted and then relying on it to conclude that the shots in Scheduled Incident F.11 were fired by a member of the SRK;[1156] and (ii) relying on adjudicated facts to conclude that the shell in Scheduled Incident G.8 originated from SRK territory after acknowledging that the Prosecution's own evidence could not support such a finding.[1157]

329. The Prosecution responds that the Trial Chamber properly relied on adjudicated facts in relation to the events in Sarajevo and that Mladić fails to show any error in the Trial Chamber's approach.[1158]

330. The Appeals Chamber recalls that "adjudicated facts that are judicially noticed […] remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial".[1159] As such, the final evaluation of the probative value of rebuttal evidence, which includes a final assessment of its reliability and credibility, as well as the extent to which it is consistent with or contradicts adjudicated facts, "will

[1153] Trial Judgement, paras. 1953, 3051 (Schedule F and other sniping incidents (b)). *See also* Indictment, Schedule F.11.
[1154] Trial Judgement, paras. 2097, 3051 (Schedule G and other shelling incidents (d)). *See also* Indictment, Schedule G.8.
[1155] *See* Mladić Appeal Brief, paras. 497-526. *See also* Mladić Reply Brief, paras. 80-82. Mladić submits that the Trial Chamber's error in this respect invalidates its findings for Scheduled Incidents F.5, F.11, F.12, F.13, F.15, F.16, G.4, G.7, G.8, and G.18 as well as Unscheduled Sniping Incidents of 24 October 1994, 22 November 1994, and 10 December 1994. Mladić Appeal Brief, para. 526.
[1156] *See* Mladić Appeal Brief, paras. 502-507.
[1157] *See* Mladić Appeal Brief, paras. 512-525.
[1158] *See* Prosecution Response Brief, paras. 198-205. The Prosecution also contends that Mladić's allegations on other incidents are unsupported since he only develops his submissions on Scheduled Incidents F.11 and G.8. Prosecution Response Brief, para. 199.
[1159] *Karemera et al*. Decision of 29 May 2009, para. 21.

only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it".[1160] The Appeals Chamber also recalls that, in order for it to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[1161] The Appeals Chamber notes, however, that Mladić only develops and supports his arguments with precise references to relevant adjudicated facts and/or paragraphs in the Trial Judgement in relation to Scheduled Incidents F.11 and G.8.[1162] The Appeals Chamber will therefore only consider Mladić's arguments in relation to Scheduled Incidents F.11 and G.8, and summarily dismisses his submissions under this sub-ground of appeal in relation to Scheduled Incidents F.5, F.12, F.13, F.15, F.16, G.4, G.7, and G.18 as well as Unscheduled Sniping Incidents of 24 October 1994, 22 November 1994, and 10 December 1994.

331. The Appeals Chamber notes that, in reaching its conclusions in relation to Scheduled Incident F.11, the Trial Chamber considered a number of adjudicated facts, including Adjudicated Fact 2303 according to which the shots in question were fired by an SRK member.[1163] With respect to the origin of the fire, Mladić contends that he presented rebuttal evidence offering a reasonable alternative, which should thus have been considered sufficient to rebut the adjudicated facts and re-open the evidentiary debate.[1164] A review of the Trial Judgement shows, however, that the Trial Chamber duly noted that, "[i]n relation to the origin of the fire, […] the Adjudicated Facts and some of the evidence differ".[1165] The Trial Chamber also thoroughly examined whether such evidence was sufficiently reliable to rebut the presumption of the accuracy of the adjudicated facts before determining that it could safely rely on them in its findings.[1166] In this instance, Mladić does not demonstrate that it was inappropriate for the Trial Chamber to rely on adjudicated facts notwithstanding his presentation of evidence that he argued was inconsistent with them.[1167] He also does not show that the Trial Chamber misapplied the burden of proof when evaluating his evidence presented to rebut the adjudicated facts.

[1160] *Karemera et al*. Decision of 29 May 2009, para. 15. *See also Karadžić* Appeal Judgement, para. 452.
[1161] *See supra* para. 21.
[1162] *See* Mladić Appeal Brief, paras. 503, 513, 521.
[1163] *See* Trial Judgement, paras. 1944, 1945, 1949-1952, *referring to* Adjudicated Facts 2297, 2299, 2300, 2302-2304.
[1164] Mladić Appeal Brief, para. 505. Mladić also recalls his submissions that judicially noticed facts should not be relied upon to establish the acts or conduct of an accused's proximate subordinates. Mladić Appeal Brief, para. 507. The Appeals Chamber has already dismissed Mladić's submissions in this respect. *See supra* Section III.A.2(a)(i).
[1165] Trial Judgement, para. 1949.
[1166] *See* Trial Judgement, paras. 1950-1953.
[1167] *Cf. Nizeyimana* Appeal Judgement, para. 54 (recalling that the mere presentation of alibi evidence does not necessarily raise the reasonable possibility that it is true and that it is within the discretion of the trial chamber to assess it).

332. As to its findings in relation to Scheduled Incident G.8, the Trial Chamber similarly considered a number of adjudicated facts – including Adjudicated Facts 2519 and 2525 according to which the mortar shell was fired from SRK-controlled territory.[1168] Mladić points to the Trial Chamber's finding that evidence of investigations that were inconclusive as to the origin of fire did not contradict the adjudicated facts establishing the matter,[1169] and contends that the Trial Chamber impermissibly entered "into the arena of the parties" and "saved the Prosecution case" by relying on adjudicated facts instead of the Prosecution evidence.[1170] He argues that the fact that the Prosecution evidence was inconclusive as to the origin of fire should have been considered sufficient to rebut the adjudicated facts on this point.[1171]

333. The Appeals Chamber recalls that judicially noticed facts are presumed to be accurate, and therefore do not have to be proven again at trial, but may be challenged subject to that presumption.[1172] As such, the Prosecution was not required to adduce evidence supporting the origin of fire as stated in the adjudicated facts,[1173] even if, according to Mladić, the Prosecution intended to do so.[1174] Moreover, the Appeals Chamber notes that the Trial Chamber duly considered evidence disputing that the SRK fired the shell in Scheduled Incident G.8.[1175] The Trial Chamber also thoroughly examined whether such evidence was sufficiently reliable to rebut the presumption of the accuracy of the adjudicated facts before determining that it could safely rely on them in its findings.[1176] Mladić does not demonstrate that it was inappropriate for the Trial Chamber to rely on adjudicated facts notwithstanding that the record included relevant Prosecution evidence that the Trial Chamber did not rely upon.

334. The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's reliance on adjudicated facts in its assessment of Scheduled Incidents F.11 and G.8.

(c) Alleged Error in Failing to Provide a Reasoned Opinion

335. The Trial Chamber found that, in relation to Scheduled Incident G.6, on 22 January 1994, three mortars were fired by a member or members of the SRK hitting a neighbourhood area where

[1168] *See* Trial Judgement, paras. 2058, 2061-2063, *referring to*, *inter alia*, Adjudicated Facts 2482, 2499, 2504, 2513, 2515, 2517, 2519, 2520, 2522-2525, 2528.
[1169] Mladić Appeal Brief, paras. 513, 521, *referring to* Trial Judgement, para. 2084.
[1170] *See* Mladić Appeal Brief, paras. 520-525.
[1171] *See* Mladić Appeal Brief, paras. 512-525, *referring to*, *inter alia*, Trial Judgement, para. 2084.
[1172] *See*, *e.g.*, *Karadžić* Appeal Judgement, para. 452 and references cited therein.
[1173] *See Tolimir* Appeal Judgement, para. 25.
[1174] Mladić Appeal Brief, para. 516.
[1175] *See* Trial Judgement, paras. 2087-2094.

children were playing, killing six children and severely wounding six other civilians, five of whom were children.[1177] It further found that, in relation to Scheduled Incident G.7, on 4 February 1994, three mortar shells were fired by an SRK member on a residential neighbourhood of Dobrinja, killing at least eight civilians and wounding at least eighteen persons who were queuing for humanitarian aid.[1178]

336. Mladić submits that the Trial Chamber erred by failing to provide a reasoned opinion in finding that the perpetrators of the attacks in Scheduled Incidents G.6 and G.7 wilfully intended to target civilians.[1179] In particular, he contends that the Trial Chamber elaborated on a number of specific incidents in reaching its conclusion that the perpetrators wilfully targeted civilians, but that Scheduled Incidents G.6 and G.7 were not included in this analysis.[1180] Mladić further argues that circumstantial evidence such as Adjudicated Fact 2434, on which the Trial Chamber relied to conclude that the attack in Scheduled Incident G.6 was not directed at a legitimate military objective, cannot, by itself, demonstrate the wilful intent of the perpetrator to attack a civilian target.[1181]

337. The Prosecution recalls its submissions that the SRK perpetrators' intent is not required to be proven in order to hold Mladić liable as a member of the Sarajevo JCE, and responds that, in any event, the Trial Chamber's conclusion on the SRK perpetrators' wilful intent for Scheduled Incidents G.6 and G.7 with regard to murder, terror, and unlawful attacks on civilians was reasoned and reasonable.[1182]

338. The Appeals Chamber recalls that the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats may be inferred from the circumstances of the acts or threats of violence, such as, *inter alia*, their nature, manner, timing, and duration.[1183] Mladić's submission that the Trial Chamber erred in relying exclusively on circumstantial evidence such as Adjudicated Fact 2434, according to which an ABiH military unit

[1176] *See* Trial Judgement, paras. 2095-2097.
[1177] Trial Judgement, paras. 2050, 3051 (Schedule G and other shelling incidents (b)). *See also* Indictment, Schedule G.6.
[1178] Trial Judgement, paras. 2057, 3051 (Schedule G and other shelling incidents (c)). *See also* Indictment, Schedule G.7.
[1179] *See* Mladić Appeal Brief, paras. 528-540. *See also* Mladić Reply Brief, paras. 83, 84.
[1180] Mladić Appeal Brief, para. 532.
[1181] *See* Mladić Appeal Brief, paras. 533, 534, 536-538.
[1182] *See* Prosecution Response Brief, paras. 206-211.
[1183] *See supra* para. 313.

was not the intended target of the attack in Scheduled Incident G.6,[1184] to infer the wilful intent to attack civilians is accordingly ill-founded.

339. The Appeals Chamber further recalls that a trial chamber is not required to articulate every step of its reasoning and that a trial judgement must be read as a whole.[1185] In the present case, a reading of the Trial Judgement shows that the Trial Chamber clearly considered Scheduled Incidents G.6 and G.7 among those incidents for which it inferred the intent to target civilians beyond reasonable doubt,[1186] and in respect of which it explicitly "considered a number of factors in determining whether civilians or the civilian population were targeted."[1187] Such factors included, *inter alia*, that the victims were civilians, that they were in residential areas when targeted, and that there were no military targets in their vicinity.[1188]

340. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber failed to provide a reasoned opinion in finding that perpetrators of the attacks in Scheduled Incidents G.6 and G.7 wilfully intended to target civilians.

(d) Alleged Errors in Inferring SRK Responsibility from Circumstantial Evidence

341. The Trial Chamber found that, in relation to Scheduled Incident F.5, on 2 November 1993, a member of the SRK targeted, shot, and injured a Bosnian Muslim civilian in her leg.[1189] It determined that the shot was fired by a member of the SRK on the basis that it originated from SRK-held territory.[1190] The Trial Chamber similarly determined that the SRK was responsible for a number of other incidents on the basis that the fire in those incidents originated from SRK-held territory.[1191]

342. Mladić submits that the Trial Chamber erred in inferring the SRK's responsibility for alleged incidents such as Scheduled Incident F.5 on the sole basis that the fire originated from SRK-held territory.[1192] He contends that the Trial Chamber failed to consider exculpatory evidence such as that the ABiH were, at times, tasked to snipe civilians in Sarajevo to make it appear as

[1184] *See* Mladić Appeal Brief, para. 533; Trial Judgement, para. 2043, n. 2434.
[1185] *See, e.g.*, *Karadžić* Appeal Judgement, paras. 563, 702 and references cited therein.
[1186] *See* Trial Judgement, paras. 3057, 3200, 3211.
[1187] Trial Judgement, para. 3196.
[1188] *See* Trial Judgement, para. 3199. *See also* Trial Judgement, para. 3201, *referring to*, *inter alia*, Scheduled Incidents G.6 and G.7.
[1189] Trial Judgement, paras. 1937, 3190(c). *See also* Indictment, Schedule F.5.
[1190] Trial Judgement, para. 1937.
[1191] *See, e.g.*, Trial Judgement, paras. 1922, 1943, 1980, 1982, 1984, 1986, 1988, 1992, 1994, 1996, 1998, 2151, 2177.
[1192] *See* Mladić Appeal Brief, paras. 542-552, *referring to*, *inter alia*, Trial Judgement, para. 1937.

though the SRK were responsible,[1193] and argues that the Trial Chamber's errors in this regard affected a number of other incidents.[1194]

343. The Prosecution responds that the Trial Chamber reasonably found the SRK to be responsible when fire originated from SRK-held territory since this was the only inference available on the evidence.[1195] It also contends that the Trial Chamber did address the possibility that the ABiH fired from SRK-held territory.[1196]

344. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that would be drawn from the evidence presented.[1197] As such, the Trial Chamber's inference that the SRK must have been responsible for fire that originated from SRK-held territory is not *per se* unreasonable, unless the relevant evidence would suggest otherwise. In this respect, the Appeals Chamber notes that Mladić does not support his argument that the ABiH could also have been responsible for firing at civilians from SRK-held territory with references to any evidence underlying any of the specific incidents he contends were affected by the Trial Chamber's alleged error.[1198]

345. Moreover, a review of the Trial Judgement shows that the Trial Chamber explicitly considered and analyzed exculpatory evidence disputing the origin of fire, including evidence of possible ABiH involvement, in respect of certain incidents.[1199] With respect to Scheduled Incident F.5, for example, the Trial Chamber considered the evidence of Witness Mile Poparić, who testified that there was a line of sight from ABiH-held territory to the impact site and that the shot could not

[1193] Mladić Appeal Brief, para. 548.
[1194] Mladić Appeal Brief, para. 553, *referring to* Scheduled Incidents F.2, F.9, G.18, Unscheduled Sniping Incidents of 31 March 1993, 25 June 1993, 27 June 1993, 24 July 1993, 5 August 1993, 26 September 1993, 2 November 1993, 9 November 1993, 11 January 1994, and Unscheduled Shelling Incidents of 6 and 7 September 1994. With respect to Mladić's reference to "Scheduled Incident[] F.2", the Appeals Chamber notes that Schedule F.2 was stricken from the Indictment and therefore not evaluated by the Trial Chamber (*see* Indictment, Schedule F; Trial Judgement, pp. 985-989), and accordingly understands Mladić to be referring to the Trial Chamber's analysis of Schedule F.1. *See* Trial Judgement, para. 1922.
[1195] *See* Prosecution Response Brief, paras. 212-216.
[1196] *See* Prosecution Response Brief, paras. 214-216. The Prosecution also contends that Mladić did not challenge the finding that the fire came from SRK-held territory. Prosecution Response Brief, para. 215. Mladić replies that this does not relieve the Prosecution of its burden to prove its case beyond reasonable doubt. *See* Mladić Reply Brief, para. 85.
[1197] *See, e.g.*, *Šešelj* Appeal Judgement, para. 63 and references cited therein.
[1198] Mladić merely points to the evidence of Witness Edin Garaplija that the Sevé unit of the ABiH shot a French soldier in such a way as to make it appear that the Serbs were responsible for it, and to a newspaper article which significantly predates all of the incidents that Mladić contests. *See* Mladić Appeal Brief, para. 548, *referring to* T. 31 March 2015 p. 33909, Exhibit D1425.
[1199] *See, e.g.*, Trial Judgement, paras. 1917-1921 (Scheduled Incident F.1), 1932-1936 (Scheduled Incident F.5), 1940-1942 (Scheduled Incident F.9), 2121-2139, 2144-2149 (Scheduled Incident G.18).

have come from Serb-held positions.[1200] The Trial Chamber concluded that such evidence was not sufficiently reliable to rebut Adjudicated Facts 2263 and 2266 establishing that the shot was fired from SRK-held territory, and that any remaining contradictory evidence related to marginal aspects of the incident and did not affect the outcome of its finding.[1201] The Trial Chamber further noted that the only evidence to support the Defence's argument that "ABiH units sn[uck] into SRK-held territory and fired from there into the city" was hearsay evidence, which the Trial Chamber determined to be "very vague and insufficiently probative to affect the Trial Chamber's finding in this regard".[1202] In determining SRK responsibility with respect to several other incidents, the Trial Chamber "refer[red] to its considerations […] as set out in its factual finding on Scheduled Incident F.5".[1203] Mladić demonstrates no error in the Trial Chamber's approach. The Appeals Chamber, Judge Nyambe dissenting, accordingly dismisses Mladić's arguments in this respect.

(e) Conclusion

346. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 4.B of Mladić's appeal.[1204]

[1200] Trial Judgement, paras. 1932-1934.
[1201] *See* Trial Judgement, paras. 1933-1937.
[1202] Trial Judgement, n. 8220.
[1203] *See, e.g.*, Trial Judgement, nn. 8411, 8428, 8438, 8452, 8472, 8483, 8500, 9313.
[1204] In view of the Appeals Chamber's conclusions that Mladić failed to demonstrate any error in Ground 4.B of his appeal, Mladić's submissions related to the cumulative effect of these alleged errors are dismissed. *See* Mladić Appeal Brief, paras. 555-564.

D. Alleged Errors Related to the Srebrenica JCE (Ground 5)

347. The Trial Chamber found that, between the days immediately preceding 11 July 1995 and at least October 1995, the Srebrenica JCE existed with the primary purpose of eliminating Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men.[1205] The Trial Chamber concluded that the objective of the Srebrenica JCE involved the commission of the crimes of persecution and inhumane acts (forcible transfer) "in the days immediately preceding 11 July 1995".[1206] By the morning of 12 July 1995, and "prior to the first crime being committed", the crimes of genocide, extermination, and murder became part of the means to achieve the objective.[1207] According to the Trial Chamber, members of the Srebrenica JCE included Radovan Karadžić, Radislav Krstić, Vujadin Popović, Zdravko Tolimir, Ljubomir Borovčanin, Svetozar Kosorić, Radivoje Miletić, Radoslav Janković, Ljubiša Beara, Milenko Živanović, Vinko Pandurević, Vidoje Blagojević, and Mladić.[1208]

348. The Trial Chamber found that Mladić contributed significantly to the Srebrenica JCE[1209] and that he shared the intent to achieve its common objective.[1210] As a member of the Srebrenica JCE, the Trial Chamber found him guilty of the crimes of genocide, persecution, inhumane acts (forcible transfer), murder, and extermination.[1211]

349. Mladić submits that the Trial Chamber committed errors of law and fact in finding he participated in, significantly contributed to, and shared the intent for the Srebrenica JCE, and requests that the Appeals Chamber reverse his convictions for the crimes of genocide as well as murder, extermination, persecution, and inhumane acts (forcible transfer) as crimes against humanity.[1212]

1. Alleged Errors Related to the Common Plan for Forcible Transfer, Genocide, Extermination, and Murder (Ground 5.A)

350. Mladić submits that the Trial Chamber erred in its assessment of the evidence in relation to the Srebrenica JCE and in finding that he was part of a common criminal plan to: (i) forcibly

[1205] Trial Judgement, paras. 4987, 5096.
[1206] Trial Judgement, paras. 4987, 5096.
[1207] Trial Judgement, paras. 4987, 5096.
[1208] Trial Judgement, paras. 4988, 5096, 5098, 5131.
[1209] Trial Judgement, paras. 5097, 5098.
[1210] Trial Judgement, paras. 5128, 5130, 5131.
[1211] Trial Judgement, paras. 5098, 5128, 5130, 5191, 5214.
[1212] *See* Mladić Notice of Appeal, paras. 51-66; Mladić Appeal Brief, paras. 570-694; Mladić Reply Brief, paras. 86-99; T. 25 August 2020 pp. 64-74, 78-85; T. 26 August 2020 pp. 44-57. According to Mladić, the Trial Chamber erred by convicting him of crimes in Srebrenica by way of a legal fiction. *See* T. 25 August 2020 pp. 74, 78, 82.

transfer individuals; and (ii) commit genocide, extermination, and murder.[1213] The Appeals Chamber will address these arguments in turn.

(a) Alleged Errors Concerning the Common Plan for Forcible Removal

351. The Trial Chamber found that the VRS began attacking the Srebrenica enclave on 6 July 1995,[1214] and, as a result, thousands of Bosnian Muslims fled to Potočari seeking protection within the UNPROFOR compound.[1215] The Trial Chamber held that the displacement of the Bosnian Muslim civilians gathered in Potočari was organized by the VRS and the MUP and took place, for the first convoy only, under the supervision and escort of UNPROFOR.[1216] In considering the displacements, the Trial Chamber recalled: (i) the circumstances surrounding the movement of population from Srebrenica to Potočari, including the orders by the VRS 10th Sabotage Detachment to Srebrenica Town inhabitants to leave, the shells fired by the VRS at the UNPROFOR Bravo compound in Srebrenica, and the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, where the population sought refuge, namely the shots and shells fired around the compound, the dire living conditions, and the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women, children, and the elderly onto the buses while some were hit by members of the MUP, and that the VRS escorted the buses towards Bosnian Muslim controlled territory.[1217] Based on the above, the Trial Chamber concluded that the approximately 25,000 Bosnian Muslims, mostly women, children, and the elderly who left Potočari to go to Bosnian Muslim controlled territory, did not have a genuine choice but to leave.[1218]

352. With respect to Mladić's role in the transfers, the Trial Chamber found that Mladić gave several orders in relation to the displacement of the Bosnian Muslim civilians from Srebrenica, including the transportation of Bosnian Muslim civilians out of Potočari.[1219] In particular, the Trial Chamber found that Mladić and other VRS officers, a representative of the Serb civilian leadership in Srebrenica, UNPROFOR members, and "representatives" of the Bosnian Muslim population "agreed" on 12 July 1995 that the evacuation of the Bosnian Muslim civilians would be organized

[1213] *See* Mladić Notice of Appeal, paras. 54-56; Mladić Appeal Brief, paras. 570, 575-600; Mladić Reply Brief, paras. 86-92; T. 25 August 2020 pp. 64-71, 73, 74, 79-82; T. 26 August 2020 pp. 44-51. *See also* T. 26 August 2020 pp. 51-57.
[1214] Trial Judgement, paras. 2443, 2968.
[1215] Trial Judgement, paras. 2446, 2968.
[1216] Trial Judgement, para. 3159.
[1217] Trial Judgement, para. 3159.
[1218] Trial Judgement, para. 3159.
[1219] Trial Judgement, paras. 5052, 5067, 5097.

by the VRS and Bosnian Serb police forces, and would take place under the supervision and escort of UNPROFOR.[1220]

353. Mladić submits that the Trial Chamber erred in inferring that he was part of a joint criminal enterprise to eliminate the Bosnian Muslims of Srebrenica through their forcible transfer given that the totality of the evidence allowed for another reasonable inference – namely that he was acting in coordination with high-level Dutch Battalion ("DutchBat")/UNPROFOR officials to evacuate civilians for humanitarian reasons.[1221] He asserts that there was ample evidence that the evacuations were necessary and observes that the Trial Chamber credited evidence that he had given civilians a choice to leave.[1222] In this context, he argues that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations.[1223] Mladić requests that the Appeals Chamber reverse the Trial Chamber's findings of forcible transfer under the first form of joint criminal enterprise or, alternatively, reverse the findings to the extent of the errors identified.[1224]

354. The Prosecution responds that Mladić disagrees with the Trial Chamber's evidentiary assessment without demonstrating error.[1225] It argues that the Trial Chamber considered and rejected Mladić's argument that the evidence suggested that the civilian population was evacuated for humanitarian reasons.[1226]

355. Mladić replies that the Prosecution has taken the Trial Chamber's findings out of context and did not respond to the errors he identified.[1227]

356. The Appeals Chamber observes that Mladić seeks to demonstrate under this ground of appeal that the evacuations were not unlawful. The Appeals Chamber recalls that forcible transfer entails the displacement of persons from the area in which they are lawfully present, without grounds permitted under international law.[1228] The requirement that the displacement be forced is

[1220] Trial Judgement, paras. 2972, 2982.
[1221] *See* Mladić Appeal Brief, paras. 575, 580-582; T. 25 August 2020 pp. 65-71; T. 26 August 2020 pp. 45, 47-51. Mladić further submits that the Trial Chamber did not abide by ICTY jurisprudence to the effect that the forced character of the displacement is determined by the absence of a genuine choice by the victim in his or her displacement. T. 25 August 2020 pp. 70, 71.
[1222] Mladić Appeal Brief, paras. 578, 579; T. 25 August 2020 pp. 65, 67-70; T. 26 August 2020 pp. 47-51.
[1223] *See* Mladić Appeal Brief, paras. 577-581; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47-51. Mladić argues that the Trial Chamber relied on selective evidence to conclude that his conduct in arranging buses contributed to the common criminal objective. Mladić Appeal Brief, para. 576; T. 25 August 2020, pp. 65, 69.
[1224] Mladić Appeal Brief, para. 583.
[1225] Prosecution Response Brief, paras. 218, 221; T. 26 August 2020 pp. 3, 7-14.
[1226] Prosecution Response Brief, paras. 222, 223; T. 26 August 2020 pp. 7-14.
[1227] Mladić Reply Brief, paras. 87, 88.
[1228] *See Šešelj* Appeal Judgement, para. 150, nn. 538, 541 and references cited therein; *Krajišnik* Appeal Judgement, para. 308.

not limited to physical force but can be met through the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive environment. It is the absence of genuine choice that makes the displacement unlawful. While fear of violence, use of force, or other such circumstances may create an environment where there is no choice but to leave, the determination as to whether a transferred person had a genuine choice is one to be made in the context of a particular case being considered.[1229] Displacement may be permitted by international law in certain limited circumstances,[1230] provided it is temporary in nature[1231] and conducted humanely.[1232] Notably, however, displacement is not permissible where the humanitarian crisis that caused the displacement is the result of the accused's own unlawful activity.[1233] In addition, the participation of a non-governmental organization in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful.[1234]

357. The Appeals Chamber observes that the Trial Chamber considered whether the displacement of the Bosnian Muslim civilians gathered in Potočari on 12 and 13 July 1995 was undertaken pursuant to an evacuation permitted by international law and found that this was not the case.[1235] Mladić contends that the Trial Chamber failed to give sufficient weight to evidence that the transfers were necessary for humanitarian reasons and that he "worked in coordination with" UNPROFOR to evacuate the civilians.[1236] The Appeals Chamber observes that, when addressing the attacks on Srebrenica, the displacement of the Bosnian Muslim civilians, and Mladić's role in the Srebrenica JCE, the Trial Chamber considered the evidence to which Mladić points on appeal.[1237] The Appeals Chamber also observes that the Trial Chamber correctly recalled that "the displacement of persons carried out pursuant to an agreement among political or military leaders or under the auspices of an organization does not necessarily make it voluntary".[1238] While Mladić seeks to emphasize cooperation with international organizations with respect to the relocations of civilians from Srebrenica, he ignores the Trial Chamber's finding that DutchBat soldiers

[1229] *See Stanišić and Župljanin* Appeal Judgement, para. 918 and references cited therein (internal citations omitted).
[1230] *See Krajišnik* Appeal Judgement, para. 308; *Stakić* Appeal Judgement, para. 284.
[1231] *See Blagojević and Jokić* Trial Judgement, para. 597, *referring to* Article 49(2) of Geneva Convention IV.
[1232] *See Blagojević and Jokić* Trial Judgement, para. 599, *referring to* Article 49(3) of Geneva Convention IV, Article 17(1) of Additional Protocol II.
[1233] *Stakić* Appeal Judgement, para. 287.
[1234] *Simić* Appeal Judgement, para. 180; *Stakić* Appeal Judgement, para. 286.
[1235] Trial Judgement, paras. 3159, 3164. *See also* Trial Judgement, para. 3120.
[1236] Mladić Appeal Brief, para. 578; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47-51.
[1237] *See* Mladić Appeal Brief, paras. 577-579. *See, e.g.*, Trial Judgement, paras. 2388, 2389, 2391, 2393-2396, 2398, 2416, 2419, 2421, 2422, 2424, 2427, 2433, 2437, 2438, 2457, 2461, 2463-2467, 2470, 2473, 2479, 2480, 2492, 2493, 2497, 2500, 2509, 2515, 2516, 2518, 2522-2524, 2526, 2529, 2531, 2535, 2537, 2538, 2546-2548, 2552, 2553, 2572, 2587, 2617, 2618, 4926, 4949, 4992, 4995, 4998, 5003, 5071, 5074, 5087, 5117.
[1238] Trial Judgement, para. 3159.

accompanied only the first convoys on 12 July 1995 but were then stopped by the VRS and that VRS soldiers stole DutchBat jeeps as well as weapons and equipment, rendering further DutchBat escorts impossible.[1239] Mladić does not contest these conclusions.

358. Moreover, Mladić fails to undermine the core findings relied upon by the Trial Chamber to determine that the displacements from Srebrenica were not lawful. Significantly, the Trial Chamber recalled that it was the conduct of the VRS that precipitated the humanitarian crises that preceded the displacements as well as the violent nature in which the VRS effected the displacements.[1240] The Trial Chamber concluded that, in such circumstances, the civilians who left Srebrenica in July 1995 "did not have a genuine choice but to leave".[1241] Furthermore, in assessing displacements cumulatively, which included those related to Srebrenica in July 1995, the Trial Chamber found that the transfers were "not carried out for the security of the persons involved, but rather to transfer them out of certain municipalities" and that no steps were taken to secure the return of those displaced.[1242] On this basis, the Trial Chamber concluded that there "were no circumstances that justified the displacement […] as recognized by international law".[1243]

359. In view of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred with respect to the Srebrenica JCE in finding that the removal of Bosnian Muslim women, young children, and some elderly men from Srebrenica was forcible.

(b) Alleged Errors Concerning the Common Plan to Commit Genocide, Extermination, and Murder

360. The Trial Chamber found that, by the morning of 12 July 1995, the objective of the Srebrenica JCE developed to involve the commission of the crimes of genocide, extermination, and murder.[1244] In reaching this finding, the Trial Chamber specifically considered its findings that Momir Nikolić, Kosorić, and Popović discussed the "killings on the morning of 12 July 1995" as

[1239] Trial Judgement, para. 2984.
[1240] Trial Judgement, para. 3159. *See also* Trial Judgement, paras. 2443-2454, 2556, 2257, 2973-2981, 3164, 5052.
[1241] Trial Judgement, para. 3159. *See also* Trial Judgement, para. 4981. Mladić erroneously submits that the Trial Chamber found that he had given civilians a choice to leave or remain and that evidence of statements made by him supports the inference that he was acting to evacuate the civilians for humanitarian reasons. *See* Mladić Appeal Brief, para. 579, *referring to* Trial Judgement, para. 2472. The Trial Chamber did not accept that Mladić had given civilians such a choice and found that Mladić's statements were "deliberately misleading". *See* Trial Judgement, paras. 4965, 5082, 5083. Mladić fails to demonstrate any error in this assessment.
[1242] Trial Judgement, para. 3164.
[1243] Trial Judgement, para. 3164.
[1244] Trial Judgement, paras. 4987, 5096.

well as findings that Tolimir first ordered that Batković camp be prepared for a large number of detainees and thereafter conveyed that this plan had been given up.[1245]

361. As it concerns Mladić's involvement in the Srebrenica JCE, the Trial Chamber found, *inter alia*, that between at least 11 July and 11 October 1995, Mladić issued several orders to VRS forces, including the Drina Corps, concerning the operation in and around Srebrenica, provided misleading information about the crimes, and failed to take adequate steps to investigate and/or punish the perpetrators.[1246] The Trial Chamber held that Mladić significantly contributed to achieving the objective of the Srebrenica JCE.[1247]

362. The Trial Chamber further determined that Mladić shared the intent to achieve the common objective of the Srebrenica JCE, including genocidal intent, based on his statements and conduct throughout the take-over of the Srebrenica enclave, including: (i) his command and control over VRS and MUP units operating in and around Srebrenica in July 1995; (ii) his role in the Hotel Fontana meetings on 11 and 12 July 1995, including statements that the Bosnian Muslims could either "live or vanish", "survive or disappear", and that only the people who could secure the surrender of weapons would save the Bosnian Muslims from "destruction"; (iii) his presence in a meeting at the Bratunac Command Centre on 13 July 1995 with VRS and MUP officers during which the task of killing 8,000 Muslim males near Konjević Polje was discussed; (iv) his presence during the gathering and separation of Bosnian Muslims in Potočari on 12 and 13 July 1995; (v) his denial of the crimes committed in Srebrenica; and (vi) the measures he took to provide misleading information and prevent the media from knowing what was happening in Srebrenica.[1248]

363. Mladić contends that the Trial Chamber gave insufficient weight to the lack of direct, indirect, or corroborative evidence that a meeting occurred between 11 and 12 July 1995 wherein the criminal objective to commit genocide, extermination, and murder was discussed or agreed upon.[1249] He submits that the Trial Chamber: (i) erroneously relied on hearsay evidence from Witness Momir Nikolić to indirectly conclude that such a meeting occurred;[1250] (ii) failed to take

[1245] Trial Judgement, para. 4987.
[1246] Trial Judgement, paras. 5052, 5066, 5067, 5097.
[1247] Trial Judgement, para. 5098.
[1248] Trial Judgement, paras. 5128, 5130.
[1249] Mladić Appeal Brief, paras. 584, 587, 593; T. 25 August 2020 pp. 78-82.
[1250] Mladić Appeal Brief, paras. 585, 587, 589; T. 25 August 2020 pp. 79-82. Mladić argues that the Trial Chamber erred by relying on Witness Momir Nikolić's evidence because: (i) his evidence of a meeting occurring between 11 and 12 July 1995 did not establish a link with Mladić; and (ii) it failed to account for the evidence of Witness Bruce Bursik, a Prosecution investigator, and its own determination that Witness Momir Nikolić lacked credibility. *See* Mladić Appeal Brief, paras. 585, 587-589, 593, 594; T. 25 August 2020 pp. 79-82. He further argues that the Trial Chamber erred in relying on Exhibit D1228, an unsworn out of court statement of Witness Momir Nikolić as summarized by Witness Bursik, for the truth of its contents to establish the occurrence of this meeting: (i) without having admitted it pursuant to

into account that the evidence demonstrated that Mladić would not have had the opportunity to attend such a meeting;[1251] and (iii) failed to sufficiently account for Prosecution and Defence evidence that the only known meeting including Mladić and his subordinates that occurred at that time involved no discussion of killings or any criminal objective.[1252]

364. Mladić further submits that the Trial Chamber inferred his participation in the common criminal enterprise based on his statements at the Hotel Fontana meetings and command and control over the VRS and the MUP but erred by: (i) giving insufficient weight to the military context in which the statements at the Hotel Fontana meetings were made;[1253] and (ii) placing undue weight on his position and role in the military without sufficiently accounting for the absence of evidence "showing direct orders".[1254]

365. Mladić argues that, in light of the above, another reasonable inference was available and, therefore, the *actus reus* for the Srebrenica JCE supporting his convictions for genocide, extermination, and murder is not established beyond reasonable doubt.[1255] He requests that the Appeals Chamber reverse these convictions or, alternatively, reverse the findings to the extent of the errors identified.[1256]

366. The Prosecution responds that it was not its case at trial, and that the Trial Chamber never found, that there was a specific meeting on the night of 11 to 12 July 1995,[1257] but rather that the plan "must have been discussed and decided upon sometime between the evening of 11 July […] and 10:00 hours on 12 July".[1258] Accordingly, the Prosecution argues that Mladić's challenge to such a non-existent finding should be summarily dismissed.[1259] It further submits that the Trial Chamber specifically considered the argument that there was no evidence of a meeting where

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Rule 92 *bis* or *quater* of the ICTY Rules; (ii) because the statement had not been recorded as required under Rule 43 of the ICTY Rules; and (iii) because the Prosecution did not rely on it in its closing submissions to support the position that a meeting involving Mladić occurred between 11 and 12 July 1995 and concerned a common criminal plan for genocide or extermination. *See* Mladić Appeal Brief, paras. 590-592; T. 25 August 2020 pp. 79, 80.

[1251] Mladić Appeal Brief, para. 593.

[1252] *See* Mladić Appeal Brief, paras. 584, 585, 587, 592-594, *referring to*, *inter alia*, Trial Judgement, paras. 4932, 4934, 4936, 4937; T. 25 August 2020 pp. 79, 80.

[1253] Mladić Appeal Brief, para. 595; T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.

[1254] Mladić Appeal Brief, para. 596; T. 25 August 2020 pp. 74, 78, 79. *See also* T. 26 August 2020 pp. 51-57. Mladić's arguments regarding the Trial Chamber's alleged errors in relation to his alibi are addressed elsewhere in the Judgement. *See infra* Section III.D.2(a). *See also* T. 25 August 2020 pp. 71, 80, 81, 84; T. 26 August 2020 pp. 44, 56 (where Mladić seeks to distance himself from the crimes in Srebrenica by arguing that the killings were committed by rogue members of the VRS, separate from the normal chain of command).

[1255] Mladić Appeal Brief, paras. 584, 597-599. *See also* T. 25 August 2020 pp. 72, 73, 80-82, 84; T. 26 August 2020 pp. 44, 56, 57.

[1256] Mladić Appeal Brief, para. 600.

[1257] Prosecution Response Brief, paras. 226, 227; T. 26 August 2020 pp. 15, 16.

[1258] Prosecution Response Brief, para. 227, *quoting* Prosecution Final Trial Brief, para. 1175; T. 26 August 2020 pp. 16, 17.

crimes were discussed and that Mladić fails to demonstrate how the Trial Chamber gave insufficient weight to that argument.[1260] The Prosecution argues that the Trial Chamber was entitled to rely upon the evidence as it did and that Mladić identifies no error.[1261] The Prosecution further contends that Mladić's submissions that the Trial Chamber placed undue weight on his position and role in the military and gave insufficient weight to a lack of direct orders are unsupported.[1262]

367. Mladić replies that the Prosecution fails to engage with or undermine the legal or factual bases of his submissions.[1263] He contends that the Prosecution submissions misrepresent his arguments and that the Prosecution incorrectly relies on inapplicable evidence.[1264]

368. The Appeals Chamber observes that, contrary to Mladić's submissions, the Trial Chamber made no finding that a meeting attended by Mladić and his subordinates occurred between 11 and 12 July 1995 wherein the common criminal plan to commit genocide, extermination, and murder was discussed or formulated. In this respect, Mladić simply points to evidence summarized by the Trial Chamber or arguments made by the Prosecution rather than any finding made by the Trial Chamber.[1265] Consequently, Mladić's arguments that the Trial Chamber erroneously relied on Witness Momir Nikolić's hearsay evidence to reach such a conclusion as well as his contentions that the evidence on the record would not have permitted Mladić to attend such a meeting are without merit and are dismissed. In light of this conclusion, the Appeals Chamber further dismisses as moot Mladić's arguments that the Trial Chamber erred by relying on Witness Momir Nikolić's evidence because: (i) his evidence of a meeting occurring between 11 and 12 July 1995 did not establish a link with Mladić; (ii) it failed to account for Witness Bursik's evidence and its own determination that Witness Momir Nikolić lacked credibility; and (iii) it relied upon Exhibit D1228 for the truth of its contents to establish the occurrence of this meeting contrary to Rules 43, 92 *bis*

[1259] Prosecution Response Brief, para. 226.
[1260] Prosecution Response Brief, para. 229.
[1261] *See* Prosecution Response Brief, paras. 227-234. T. 26 August 2020 pp. 15-20. The Prosecution submits that Mladić identifies no error in relying upon Witness Momir Nikolić's evidence because the Trial Chamber assessed Witness Momir Nikolić's evidence in light of Witness Bursik's testimony, including that Witness Momir Nikolić "did not tell everything in its entirety". *See* Prosecution Response Brief, para. 233, *referring to* Trial Judgement, para. 5304; T. 26 August 2020 pp. 19, 20. The Prosecution further argues that, in relation to Exhibit D1228, the Trial Chamber committed no error because: (i) Mladić tendered Exhibit D1228 pursuant to Rule 89(C) of the ICTY Rules and without limitation or conditions under Rules 92 *bis* or *quater* of the ICTY Rules, and; (ii) Mladić relied upon the exhibit for the truth of its contents at trial and on appeal and, therefore, cannot criticise the Trial Chamber for also doing so. *See* Prosecution Response Brief, paras. 231, 232; T. 26 August 2020 p. 20. The Prosecution further argues that Mladić does not refer to any factual findings based on Exhibit D1228. *See* Prosecution Response Brief, para. 234; T. 26 August 2020 p. 20.
[1262] Prosecution Response Brief, para. 235. *See also* T. 26 August 2020 pp. 14-23.
[1263] Mladić Reply Brief, paras. 86, 92; T. 26 August 2020 p. 44. *See also* T. 26 August 2020 pp. 46, 47.
[1264] *See* Mladić Reply Brief, paras. 89-91.
[1265] *See* Mladić Appeal Brief, paras. 586-589; T. 26 August 2020 pp. 46, 47, *referring to*, *inter alia*, Prosecution Response Brief, paras. 226, 229, Prosecution Final Trial Brief, paras. 1063, 1105.

or 92 *quater* of the ICTY Rules and because the Prosecution did not rely on it in its closing submissions for this purpose.[1266]

369. Furthermore, Mladić does not show that the Trial Chamber failed to sufficiently account for evidence of his participation in a meeting in which no discussion of killings or any criminal act took place. Mladić's arguments are premised on the Trial Chamber's summaries of evidence of a meeting at the Bratunac Brigade headquarters on 11 or 12 July 1995,[1267] which the Trial Chamber clearly considered and made findings on.[1268] Mladić has not shown that the Trial Chamber disregarded this evidence or that it is inconsistent with its conclusion that the crimes of genocide, extermination, and murder became part of the means to achieve the elimination of Bosnian Muslims in Srebrenica by the early morning of 12 July 1995, prior to the first crime being committed.[1269] Notably, in reaching this conclusion, the Trial Chamber specifically considered its findings that: (i) the VRS intended to empty the enclave; (ii) the crimes of persecution and inhumane acts (forcible transfer) were committed following the attack, noting that the crimes of genocide, extermination, and murder became part of the means to achieve the objective by early 12 July 1995; (iii) Momir Nikolić, Kosorić, and Popović discussed the killings on the morning of 12 July 1995; and (iv) Tolimir first ordered that Batković camp be prepared for a large number of detainees and thereafter conveyed that this plan had been given up.[1270]

370. Turning to Mladić's argument that the Trial Chamber failed to give sufficient weight to the military context in which his statements at the second Hotel Fontana meeting were made, the Appeals Chamber finds that the evidence cited by him does not support this argument.[1271] The Trial Chamber found that Mladić intended to commit genocide based in part on statements made at the second Hotel Fontana meeting wherein he stated that the Bosnian Muslims could either "live or vanish" and "survive or disappear".[1272] Mladić points to the evidence of Witnesses Richard Butler and Kovač in support of his argument.[1273] However, Witness Butler expressly declined to interpret Mladić's statements quoted above,[1274] while Witness Kovač's evidence cited by Mladić relates only

[1266] *See* Mladić Appeal Brief, paras. 585, 587-594; T. 25 August 2020 pp. 79-82.
[1267] *See, e.g.*, Mladić Appeal Brief, para. 594, *referring to*, *inter alia*, Trial Judgement, paras. 4932, 4934, 4936, 4937.
[1268] Trial Judgement, paras. 4953, 4956, 4980. The Trial Chamber considered Mladić's submission that there was no evidence of a meeting where the crimes were discussed. *See* Trial Judgement, para. 4972.
[1269] Trial Judgement, para. 4987.
[1270] Trial Judgement, para. 4987.
[1271] Mladić Appeal Brief, para. 595, *referring to* T. 16 September 2013 p. 16831, T. 16 November 2015 p. 41395. *See also* T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1272] Trial Judgement, paras. 5128, 5130.
[1273] Mladić Appeal Brief, para. 595, n. 705; T. 25 August 2020 p. 72; T. 26 August 2020 pp. 45, 46, *referring to*, *inter alia*, T. 12 September 2013 p. 16653.
[1274] T. 16 September 2013 pp. 16832, 16833. Specifically, Witness Butler only testified that it was "technically proper" from a military standpoint for Mladić to seek the surrender of the 28th Division of the ABiH following the capture of the

to the question of the surrender of the 28th Division of the ABiH, not the statements in question.[1275] The Appeals Chamber finds that this evidence does not substantiate Mladić's submission that the Trial Chamber failed to sufficiently consider the military context in which his statements were made and he has identified no error in this respect.

371. As to Mladić's contention that the Trial Chamber placed undue weight on his position and role in the military without sufficiently accounting for the absence of evidence showing his direct orders, the Appeals Chamber observes that Mladić refers to paragraphs of the Trial Judgement assessing his contributions and his *mens rea* with respect to the Srebrenica JCE in isolation.[1276] His undeveloped arguments do not demonstrate any errors in the conclusions reached in those paragraphs and, notably, ignore several findings of the Trial Chamber that he issued orders in relation to the Srebrenica operations.[1277] Consequently, the Appeals Chamber dismisses these contentions.

372. Based on the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not show that the Trial Chamber erred in relation to his participation in the Srebrenica JCE as it pertains to his convictions for genocide, extermination, and murder.

(c) Conclusion

373. In light of the above, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.A of Mladić's appeal.

2. Alleged Error Regarding Significant Contribution (Ground 5.B)

374. In concluding that Mladić significantly contributed to the Srebrenica JCE, the Trial Chamber considered his acts *vis-à-vis* the VRS and subordinated MUP units, given that all of the principal perpetrators of the crimes forming part of the Srebrenica JCE were VRS or MUP

Srebrenica enclave and to make arrangements to negotiate such surrender. T. 16 September 2013 pp. 16829-16831. *See also* T. 12 September 2013 p. 16653.

[1275] T. 16 November 2015 pp. 41395, 41396.

[1276] Mladić Appeal Brief, para. 596, *referring to* Trial Judgement, paras. 5098, 5088, 5129-5131. *See also* T. 25 August 2020 pp. 74, 78.

[1277] Trial Judgement, paras. 5052, 5066, 5067, 5097. The Trial Chamber found, *inter alia*, that Mladić ordered the mobilization of buses and the transportation of Bosnian Muslim civilians out of Potočari. *See* Trial Judgement, para. 5052. On 11 July 1995, he ordered Borovčanin to launch an attack in the early morning of 12 July 1995. *See* Trial Judgement, para. 5066. On 12 July 1995, he then ordered that part of Borovčanin's unit provide security for the transport of the civilians, while the other part was to go to Zvornik. *See* Trial Judgement, para. 5067. Between at least 11 July and 11 October 1995, Mladić issued several orders concerning the operation in and around Srebrenica. *See* Trial Judgement, para. 5097.

members.[1278] In this respect, the Trial Chamber found, *inter alia*, that: (i) Mladić exercised command and control over the VRS and the MUP forces deployed during the entire Srebrenica operation and its aftermath;[1279] (ii) Mladić failed to take adequate steps to investigate crimes and/or punish members of the VRS and other Serb forces under his effective control who committed crimes in Srebrenica;[1280] and (iii) Mladić's acts were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1281]

375. Mladić submits that the Trial Chamber erred by giving insufficient, if any, weight to exculpatory evidence of the *actus reus* of the Srebrenica JCE and failing to provide a reasoned opinion on probative evidence.[1282] In particular, Mladić argues that the Trial Chamber failed to give sufficient weight to: (i) evidence regarding his absence from Srebrenica when the crimes were committed, including the content of four orders issued between 14 and 16 July 1995 (collectively, the "Four Orders") and the change in the command structure of the VRS during his absence;[1283] (ii) evidence that the MUP was not under his effective control;[1284] (iii) the military context and content of orders he gave in Srebrenica;[1285] (iv) evidence undermining the authenticity and reliability of certain intercept communications;[1286] and (v) evidence that he had no knowledge of crimes, and/or he was unable to prevent or punish them, and that he or his subordinates did prosecute or investigate certain crimes.[1287] According to Mladić, had the Trial Chamber given sufficient weight to this evidence, it would not have concluded beyond reasonable doubt that he significantly contributed to furthering the objective of the Srebrenica JCE.[1288] Mladić therefore requests that the Appeals Chamber reverse his convictions under the Srebrenica JCE or, alternatively, reverse the findings to the extent of any errors.[1289] The Appeals Chamber will address each of Mladić's arguments in turn.

[1278] Trial Judgement, paras. 5096, 5098. *See also* Trial Judgement, paras. 2676, 2684, 2707, 2723, 2732, 2759, 2766, 2776, 2791, 2820, 2825, 2859, 2861, 2862, 2876, 2882, 2886, 2894, 2917, 2920, 2921, 2924, 2926, 2935, 3051, 4984, 4986.
[1279] Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5046-5053, 5066-5069.
[1280] Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5091-5094.
[1281] Trial Judgement, para. 5098.
[1282] *See* Mladić Notice of Appeal, p. 21, para. 57; Mladić Appeal Brief, paras. 601, 606-641; Mladić Reply Brief, paras. 94-98.
[1283] *See* Mladić Appeal Brief, paras. 607-615; Mladić Reply Brief, para. 94; T. 25 August 2020 pp. 83, 84. *See also* T. 25 August 2020 pp. 71, 74.
[1284] *See* Mladić Appeal Brief, paras. 616-619; Mladić Reply Brief, para. 98. *See also* T. 26 August 2020 pp. 44, 51-56.
[1285] *See* Mladić Appeal Brief, paras. 620-623; Mladić Reply Brief, paras. 95, 96. *See also* T. 25 August 2020 pp. 71, 72.
[1286] *See* Mladić Appeal Brief, paras. 624-628.
[1287] *See* Mladić Appeal Brief, paras. 630-641; Mladić Reply Brief, para. 97. *See also* T. 25 August 2020 p. 71; T. 26 August 2020 p. 56.
[1288] Mladić Appeal Brief, paras. 601, 641, 642. *See also* T. 25 August 2020 pp. 71, 72, 74, 83, 84; T. 26 August 2020 pp. 44, 56.
[1289] Mladić Notice of Appeal, paras. 57, 58, 63-65; Mladić Appeal Brief, paras. 641-643.

(a) Evidence of Mladić's Absence from Srebrenica

376. Mladić submits that, had sufficient weight been given to the evidence of his absence from Srebrenica at the time the crimes were committed, a reasonable trier of fact would not have concluded that he exercised command and control over VRS and MUP forces during that time period.[1290] In this respect, Mladić argues that in relying on four orders issued between 14 and 16 July 1995 to illustrate his command and control while he was away in Belgrade,[1291] the Trial Chamber failed to provide a reasoned opinion on how the Four Orders could be attributed to him.[1292] In particular, he submits that the Trial Chamber failed to give sufficient weight to the content of the Four Orders, specifically that they: (i) relate to the day-to-day running of the army, and not to, *inter alia*, military operations and Srebrenica;[1293] (ii) were not sent to units in Srebrenica or to any MUP forces;[1294] and (iii) had unique identification numbers, which indicates that the Four Orders emanated from the General Staff of the VRS.[1295] He also contends that while the Trial Chamber accepted Witness Stevanović's evidence that "s.r./signed" on a document did not always mean that the individual whose signature appeared on the document was aware of it or had actually signed it, the Trial Chamber did not consider this in respect of the Four Orders.[1296]

377. Mladić further submits that the Trial Chamber failed to give sufficient weight to evidence of the change in the command structure while he was in Belgrade in July 1995, in particular that the then VRS Chief of Staff, Manojlo Milovanović, replaced him as *de jure* and *de facto* Commander of the VRS.[1297] He contends that the Trial Chamber placed undue weight on four intercept

[1290] *See* Mladić Appeal Brief, paras. 607-615; Mladić Reply Brief, para. 94; T. 25 August 2020 pp. 83, 84. *See also* T. 25 August 2020 pp. 71, 74.
[1291] Mladić Appeal Brief, para. 610, *referring to* Exhibits P2122 (concerning an order dated 14 July 1995 from Mladić to the Supreme Commander, the VJ General Staff, the Serbian Army of Krajina Main Staff, and various VRS Corps instructing that any information the recipients had for the VRS Main Staff should be prepared and exchanged during certain hours), P2123 (concerning an order from the VRS Main Staff to the Command of the Drina Corps, dated 14 July 1995 and signed by Mladić, pertaining to the transport of DutchBat members), P2124 (concerning an order from the VRS Main Staff to the Command of the SRK and the Drina Corps, dated 14 July 1995 and signed by Mladić, with respect to the passage of UNPROFOR Commander Rupert Smith), and P2125 (concerning an order from the VRS Main Staff to the Command of the VRS East Bosnia Corps, dated 15 July 1995 and signed by Mladić, to maintain duty service for the Forward Command Post-2 communications system).
[1292] *See* Mladić Appeal Brief, paras. 609-612; T. 25 August 2020 pp. 83, 84.
[1293] Mladić Appeal Brief, para. 611, nn. 722, 724 (wherein Mladić submits that the Trial Chamber did not give sufficient weight to the evidence of Witness Tihomir Stevanović who testified that the "operative centre" of the VRS did not request approval from Mladić to draft and issue orders that concerned the general day-to-day workings of the army or to send telegrams directly relevant to this issue in his name); T. 25 August 2020 pp. 83, 84.
[1294] Mladić Appeal Brief, para. 611.
[1295] Mladić Appeal Brief, para. 611.
[1296] Mladić Appeal Brief, paras. 610, 612, *referring to* Trial Judgement, para. 4997.
[1297] Mladić Appeal Brief, para. 613, *referring to* T. 18 September 2013 pp. 16964-16977, T. 7 May 2015 p. 35265; T. 25 August 2020 p. 84.

communications between 14 and 16 July 1995,[1298] and that, even if authentic,[1299] they provided insufficient evidence for a reasonable trier of fact to conclude that Mladić continued to exercise command and control of the VRS while he was away.[1300]

378. The Prosecution responds that the Trial Chamber reasonably found that Mladić exercised command and control during the entire Srebrenica operation, including between 14 and 16 July 1995 when he was in Belgrade.[1301] Specifically, it argues that the Trial Chamber considered the Four Orders in their context to find that Mladić issued them, and that they, along with other mutually corroborating evidence, demonstrate his exercise of command and control from Belgrade.[1302] The Prosecution further contends that Mladić's undeveloped argument that Milovanović replaced him as Commander of the VRS while he was in Belgrade should be summarily dismissed,[1303] and that the Trial Chamber reasonably concluded that intercepted communications between 14 and 16 July 1995 demonstrate Mladić's continued command and control over the VRS from Belgrade.[1304]

379. The Appeals Chamber notes that the Trial Chamber found that irrespective of whether Mladić was in Srebrenica or in Belgrade in July 1995, he remained the Commander of the VRS

[1298] With respect to the four intercept communications, Mladić submits that: (i) Exhibit P1298 merely confirms his intention to leave the front line and that he did not issue any order to be implemented in his absence; (ii) Exhibit P1655 (under seal) demonstrates that he was informed that Karadžić was issuing orders and that Pandurević had made arrangements for Muslims to pass through Tuzla, but was not provided with any further information about what was occurring on the ground; (iii) Exhibit P1656 (under seal) demonstrates that, where the conversation extended to him informing a man that he would see him that night, no orders were given, and there is no evidence of who the man was, or his rank or role; and (iv) Exhibit P1657 (under seal) demonstrates that he spoke to Milovanović briefly, but did not give any orders or mention Srebrenica. *See* Mladić Appeal Brief, para. 614.

[1299] Mladić Appeal Brief, para. 615, *referring to* Mladić Appeal Brief, paras. 624-628. The Appeals Chamber will address Mladić's arguments in relation to the authenticity of the intercepts in Section III.D.2(d).

[1300] *See* Mladić Appeal Brief, paras. 613-615.

[1301] Prosecution Response Brief, para. 236; T. 26 August 2020 pp. 18, 19. The Prosecution adds that Mladić's responsibility for the crimes in Srebrenica was not premised on his presence at the crime site. *See* T. 26 August 2020 p. 19.

[1302] Prosecution Response Brief, paras. 236-238, *referring to*, *inter alia*, Trial Judgement, para. 5053; T. 26 August 2020 p. 19. Specifically, the Prosecution argues that: (i) Witness Stevanović's evidence, which comprises only one piece of the evidentiary record considered by the Trial Chamber, does not undercut the Trial Chamber's finding that orders bearing Mladić's name, with or without "s.r.", are attributable to him; (ii) the Four Orders pertaining to the "day-to-day operation of the army" support rather than undermine the Trial Chamber's conclusion that Mladić exercised command while in Belgrade; (iii) the Four Orders relate to the Srebrenica operation or are evidence of Mladić's continued command on 14 and 15 July 1995; and (iv) Mladić fails to show any error in the Trial Chamber's reliance on orders numerically designated "04/" or "06/", especially since the Defence tendered documents it attributed to Mladić bearing the numerical designation "06/" and other numerical designations. *See* Prosecution Response Brief, paras. 237, 238.

[1303] Prosecution Response Brief, para. 239, *referring to*, *inter alia*, Mladić Final Trial Brief, paras. 670, 3299, Trial Judgement, para. 5046. The Prosecution further argues that Mladić merely repeats his unsuccessful submissions at trial claiming communication problems. *See* Prosecution Response Brief, para. 239.

[1304] Prosecution Response Brief, para. 240. The Prosecution argues that Mladić's alternative interpretation of Exhibits P1655 (under seal) and P1657 (under seal) fails to show any error and that the totality of the evidence, which shows his familiarity with on-going operations and his issuance of related orders, supports the Trial Chamber's finding that

Main Staff.[1305] In reaching this finding, the Trial Chamber considered that, throughout July 1995, including during his travel to Belgrade, Mladić: (i) was in contact with the VRS Main Staff and maintained command and control; (ii) gave orders to VRS units which were implemented; (iii) took measures to ensure the implementation of his orders, including when he was not present on the ground; and (iv) communicated over the phone with Milovanović on a regular basis.[1306] In particular, the Trial Chamber addressed in detail communications and orders by Mladić, as well as conversations between Mladić and other members of the Bosnian Serb leadership, including Milovanović, during his absence from Srebrenica.[1307] In light of the above, the Appeals Chamber finds that Mladić's submission in relation to the Trial Chamber's weighing of evidence relating to his absence from Srebrenica reflects mere disagreement with the Trial Chamber's assessment of evidence without demonstrating any error. The Appeals Chamber recalls that the mere assertion that a trial chamber failed to give proper weight to evidence is liable to be summarily dismissed.[1308]

380. With respect to the alleged failure to provide a reasoned opinion on how the Four Orders could be attributed to Mladić, the Appeals Chamber recalls that, in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1309] In this regard, the Appeals Chamber considers that Mladić does not demonstrate that the Trial Chamber failed to provide a reasoned opinion with respect to the Four

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Mladić exercised command and control of the VRS while in Belgrade. *See* Prosecution Response Brief, para. 240. *See also* T. 26 August 2020 p. 19.

[1305] *See* Trial Judgement, para. 5053.

[1306] *See* Trial Judgement, para. 5053. *See also* Trial Judgement, paras. 5046-5052, *referring to*, *inter alia*, Trial Judgement, Chapters 3.1.4, 7.1.2, and 9.3.3. In Chapter 3.1.4, the Trial Chamber found that from his initial appointment as Commander on 12 May 1992 until at least 8 November 1996, Mladić remained in command of the VRS Main Staff. *See* Trial Judgement, para. 276. In Chapter 7.1.2, the Trial Chamber found that Mladić effectively issued orders to VRS forces to implement Directives no. 7 and no. 7/1, which were created in March 1995 in relation to the priorities of the VRS ("Directive 7" and "Directive 7/1", respectively"). *See* Trial Judgement, paras. 2382-2386. *See also* Trial Judgement, paras. 2379-2381. In Chapter 9.3.3, the Trial Chamber found that Mladić issued several orders and directives to VRS units, was respected as a leader by his subordinates, and possessed a very high level of command and control over them in spite of the lack of a declared state of war and occasional indiscipline in the VRS. *See* Trial Judgement, paras. 4388-4391. Furthermore, the Trial Chamber found that the VRS had a well-functioning communication system, which allowed Mladić to effectively and quickly communicate with his subordinates. *See* Trial Judgement, para. 4387. The Trial Chamber also found that from May 1992 until 1995, Mladić was stationed at the VRS Main Staff command post from where he had daily telephone communication with corps commanders, usually in the mornings and in the evenings, and that Mladić was kept up to date on the main issues by Milovanović. *See* Trial Judgement, para. 4385.

[1307] In Chapter 9.7.2 of the Trial Judgement, entitled "Commanding and Controlling the VRS", the Trial Chamber considered: (i) communication and orders by Mladić on 14 July 1995 (*see* Trial Judgement, paras. 5022-5024); and (ii) communication and orders by Mladić on 15 and 16 July 1995 (*see* Trial Judgement, paras. 5025-5032, 5046-5050, *referring to* Trial Judgement, Chapter 9.3.3). In Chapter 9.7.3, entitled "Commanding and Controlling Elements of the Serb Forces Integrated into, or Subordinated to, the VRS", the Trial Chamber recalled its finding in Chapter 9.7.2 about Mladić's command and control of VRS forces in the Srebrenica operation (*see* Trial Judgement, para. 5066).

[1308] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

Orders,[1310] given that it specifically described the content of each individual order in the Trial Judgement, considered the addressees, and noted that the Four Orders were either signed by or came from Mladić.[1311] Further, and contrary to the arguments raised by Mladić, the Four Orders do relate to the Srebrenica operations and/or Mladić's continued command over the VRS and the MUP during his time in Belgrade, and they are addressed to the Drina Crops or other units in Srebrenica.[1312] Mladić also fails to demonstrate how the unique identification numbers associated with the Four Orders would undermine the Trial Chamber's finding that he issued the Four Orders.[1313] Similarly, while the Trial Chamber did not expressly address, when assessing Mladić's role in issuing the Four Orders, Witness Stevanović's evidence that "s.r./signed" did not always mean that the individual whose signature appeared on the document was aware of it or had signed it, the Trial Chamber recalled this evidence when examining his role in issuing another order signed in this manner in respect of which it concluded that the order was issued by Mladić.[1314] Recalling that a trial judgement is to be considered as a whole,[1315] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber gave insufficient weight to this evidence or that it undermines the reasonableness of its findings relating to the Four Orders.

381. In relation to Mladić's contention regarding the change in the command structure, the Appeals Chamber observes that he merely repeats his submissions at trial that Milovanović replaced him as *de jure* and *de facto* Commander of the VRS while he was away in Belgrade.[1316]

[1309] *Karadžić* Appeal Judgement, para. 702; *Šešelj* Appeal Judgement, para. 49; *Prlić et al*. Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.
[1310] *See* Mladić Appeal Brief, para. 611; T. 25 August 2020 p. 83.
[1311] *See* Trial Judgement, paras. 4310, 5022, 5024, 5025. The Trial Chamber noted that: (i) in one order given by Mladić on 14 July 1995, admitted as Exhibit P2122, Mladić informed, *inter alios,* the Supreme Commander, the VJ General Staff, the Serbian Army of Krajina Main Staff, and various VRS Corps that due to failure of the power supply during the Srebrenica operation, the VRS Main Staff communications centre would operate only during limited hours the next day (*see* Trial Judgement, para. 5024); (ii) two orders from the VRS Main Staff to the Command of the Drina Corps and the SRK signed by Mladić and given on 14 July 1995, admitted as Exhibits P2123 and P2124, respectively, concerned the transfer of Dutch soldiers from Bratunac (*see* Trial Judgement, para. 5022); and (iii) one order from the VRS Main Staff to the VRS East Bosnia Corps Command and the VRS Main Staff Forward Command Post dated 15 July 1995 and signed by Mladić, admitted as Exhibit P2125, instructed the VRS East Bosnia Corps to send an officer to the Forward Command Post to report to Milovanović (*see* Trial Judgement, para. 5025).
[1312] *See* Exhibits P2122, P2123, P2124, and P2125. *See also* Trial Judgement, paras. 4310, 5022, 5024, 5025.
[1313] In this respect, the Appeals Chamber notes that at trial the Defence tendered documents it attributed to Mladić bearing the same designation, namely "06/" (or "6/"), that Mladić now argues is not attributable to him. *See*, *e.g.*, Exhibits D140, D1471, D1501, D1616, D1665, D1753, and D2167.
[1314] *See* Trial Judgement, paras. 4992, 4997, 5049. In relation to the VRS Main Staff Order of 11 July 1995, the Trial Chamber explicitly considered Witness Stevanović's evidence that "s.r./signed" on a document did not always mean that the individual whose signature appeared on the document was aware of it or had actually signed it. *See* Trial Judgement, para. 4997.
[1315] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[1316] *See* Mladić Appeal Brief, para. 613; T. 25 August 2020 p. 84. *See also* Mladić Final Trial Brief, para. 670 (wherein Mladić argued that, while in Belgrade, he was not in command of the army in accordance with VRS regulations and that he could not exercise command of the VRS as he was unable to communicate with them). In this respect, the Appeals Chamber recalls that the Trial Chamber found that the VRS had a well-functioning communication system

The Appeals Chamber recalls that on appeal a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[1317] While Mladić refers to the evidence of Witnesses Milovanović and Stevanović to support his argument,[1318] the Appeals Chamber observes that Witness Milovanović's evidence that, when the command and control structure did not function as intended, he always sought Mladić's approval before he proceeded, supports rather than undermines the Trial Chamber's finding in question.[1319] Furthermore, Witness Stevanović's testimony only shows that VRS Chief of Staff, Milovanović, might replace Mladić as *de jure* Commander of the VRS during his absence.[1320] Mladić does not demonstrate how this evidence could undermine the Trial Chamber's finding, based on the totality of the evidence, that he remained the Commander of the VRS Main Staff during his absence from Srebrenica.[1321] The Appeals Chamber therefore finds that, apart from repeating his submissions at trial, Mladić fails to demonstrate that the Trial Chamber's rejection of those arguments constituted an error, thereby failing to satisfy his burden on appeal.

382. The Appeals Chamber will now turn to Mladić's submission that the Trial Chamber placed undue weight on four intercept communications as evidence of his command and control over the VRS during his absence from Srebrenica. The Appeals Chamber observes that, when considering communications and orders issued by Mladić between 14 and 16 July 1995,[1322] the Trial Chamber examined the content of the four intercept communications, which showed, *inter alia*, the briefings he received and instructions he issued regarding the operations in the Zvornik area.[1323] Mladić's alternative interpretation that the four intercept communications do not contain any orders fails to

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which allowed Mladić to effectively and quickly communicate with his subordinates. *See* Trial Judgement, paras. 4383, 4387. The Trial Chamber noted that Witness Milovanović testified that he always sought Mladić's approval before proceeding. *See* Trial Judgement, para. 4297.

[1317] *See Karadžić* Appeal Judgement, paras. 19, 305, 598; *Šešelj* Appeal Judgement, paras. 17, 28; *Prlić et al.* Appeal Judgement, paras. 25, 128; *Ngirabatware* Appeal Judgement, para. 11; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27.

[1318] *See* Mladić Appeal Brief, para. 613, n. 728, *referring to* T. 18 September 2013 pp. 16964-16977, T. 7 May 2015 p. 35265. *See also* T. 25 August 2020 p. 84.

[1319] *See* T. 18 September 2013 pp. 16972, 16973. *See also* Trial Judgement, para. 4297.

[1320] *See* T. 7 May 2015 p. 35265.

[1321] *See supra* para. 379.

[1322] *See* Trial Judgement, paras. 5022-5032.

[1323] Exhibit P1298 (concerning Intercept of Mladić and a man, 14 July 1995 at 8.05 a.m.) reflects that the man told Mladić that he was just "here" with a narrow circle of friends and that now something would depend on Mladić. *See* Trial Judgement, para. 5023. Exhibit P1655 (concerning Intercept no. 664, 16 July 1995) (under seal) shows that [REDACTED]. *See* Trial Judgement, paras. 5028, 5112, n. 17684. Exhibit P1656 (concerning Intercept no. 648, 16 July 1995) (under seal) indicates that [REDACTED]. *See* Trial Judgement, para. 5027. Exhibit P1657 (concerning Intercepts no. 671 and no. 672, 16 July 1995) (under seal) shows that [REDACTED]. *See* Trial Judgement, paras. 5032, 5113, n. 17688.

show that the Trial Chamber's conclusion was unreasonable.[1324] In this respect, the Trial Chamber noted that certain of the intercepts do contain orders or instructions,[1325] and in any event, the Appeals Chamber considers that the absence of orders from the four intercept communications would not, in itself, undermine the Trial Chamber's finding that Mladić remained the Commander of the VRS Main Staff during his absence from Srebrenica.[1326] The Appeals Chamber therefore finds that Mladić's arguments in this respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. The Appeals Chamber reiterates that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1327]

383. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not show an error in the Trial Chamber's conclusion that he exercised command and control over VRS and MUP forces during his absence from Srebrenica.

(b) Command and Control over Members of the MUP

384. Mladić submits that, with a proper weighing of evidence, no reasonable trier of fact could have concluded that he exercised command and control over MUP forces.[1328] In this respect, he argues that the Trial Chamber gave undue weight to the joint elements of the MUP's cooperation with the VRS and insufficient weight to evidence that the MUP was acting as a separate entity.[1329] Mladić therefore contends that the Trial Chamber conflated "cooperation and coordinated action" with "re-subordination"[1330] and failed to consider the totality of the evidence demonstrating the MUP's coordination with the VRS, as opposed to re-subordination.[1331]

385. The Prosecution responds that Mladić fails to show any error in the Trial Chamber's conclusion that, from 11 until at least 17 July 1995, MUP units under Borovčanin's command

[1324] *See* Mladić Appeal Brief, para. 614.
[1325] For instance, Exhibit P1657 (concerning Intercepts no. 671 and no. 672, 16 July 1995) (under seal) wherein [REDACTED]. *See* Trial Judgement, paras. 5032, 5113, n. 17688.
[1326] *See supra* para. 379.
[1327] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1328] Mladić Appeal Brief, para. 619. *See also* T. 26 August 2020 pp. 44, 51-56.
[1329] *See* Mladić Appeal Brief, paras. 616, 617, 619, *referring to*, *inter alia*, T. 10 December 2013 pp. 20615-20625, T. 22 January 2015 pp. 30537-30545, T. 25 November 2015 p. 41921 (private session). *See also* Mladić Appeal Brief, para. 617 (in which Mladić argues that his 13 July 1995 order relating to the combat zone was not sent to any MUP units and that a report from Borovčanin, which contained information on VRS orders of 13 July 1995, did not mention MUP forces being sent to Žepa); T. 26 August 2020 p. 56.
[1330] *See* Mladić Appeal Brief, paras. 616-618, *referring to* Trial Judgement, paras. 2878, 2882, 4989, T. 5 September 2013 pp. 16285-16288, 16290. To the extent that Mladić refers to paragraphs 218 to 224 of his appellant's brief, the Appeals Chamber has addressed his arguments in this regard. *See supra* Section III.B.2(a)(i).
[1331] Mladić Appeal Brief, para. 618.

deployed in the area of Srebrenica were under VRS command and that the Trial Chamber properly distinguished cooperation and coordination from re-subordination.[1332] The Prosecution further contends that the evidence referenced by Mladić either supports the conclusions of the Trial Chamber or is irrelevant.[1333]

386. The Appeals Chamber observes that the Trial Chamber found that from 11 until at least 17 July 1995 the MUP forces deployed in the sector of Srebrenica under Borovčanin were under the command of the VRS.[1334] In reaching this finding, the Trial Chamber specifically addressed Mladić's submission and related evidence that MUP forces were operating under their own command under Borovčanin as of 12 or 13 July 1995.[1335] The Trial Chamber further addressed in detail other evidence demonstrating: (i) the involvement of MUP forces in the Srebrenica operation and in Potočari pursuant to an order from the VRS Supreme Commander;[1336] (ii) the direct orders Borovčanin and his forces received from Mladić and other VRS officers about their deployment and military actions;[1337] and (iii) the reporting of MUP activities to the VRS Bratunac Brigade.[1338]

387. Against this background, and recalling that trial chambers have broad discretion in weighing evidence,[1339] the Appeals Chamber finds Mladić's contention – that the Trial Chamber gave undue weight to the joint elements of the MUP's cooperation with the VRS and insufficient weight to evidence that the MUP was acting as a separate entity[1340] – to reflect mere disagreement with the Trial Chamber's assessment of the evidence without showing any error.

388. Moreover, contrary to Mladić's assertion,[1341] the Trial Chamber clearly distinguished coordination and re-subordination of military units.[1342] In particular, the Trial Chamber pointed out

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[1332] Prosecution Response Brief, paras. 241, 242, *referring to* Trial Judgement, paras. 2443, 2642, 4957, 5059, 5067. According to the Prosecution, Mladić's arguments that the Trial Chamber placed insufficient weight on certain pieces of evidence should be summarily dismissed. *See* Prosecution Response Brief, para. 241.
[1333] *See* Prosecution Response Brief, paras. 243-245.
[1334] *See* Trial Judgement, para. 4957.
[1335] *See* Trial Judgement, para. 4957, *referring to* Mladić Final Trial Brief, para. 2977 (*referring to* Exhibits D129, p. 1, P2118, P2119, p. 2, P1786, p. 3, T. 5 September 2013 pp. 16287, 16288).
[1336] *See* Trial Judgement, paras. 2443, 5059. *See also* Trial Judgement, para. 4957, *referring to* Chapters 7.1.6 (The Column), 7.2 (Jadar River (Schedule E.1.1)), 7.4 (Kravica Warehouse (Schedule E.3.1)), 7.5 (Sandići Meadow (Schedule E.4.1)), 7.14 (Bratunac Town (Schedule E.15)), 7.17 (Forcible Transfer and Deportation); and 8 (Legal Findings on Crimes) of the Trial Judgement.
[1337] *See* Trial Judgement, paras. 2642, 4957, 5059, 5066, 5067. *See also* Exhibit P724, pp. 2, 3; Exhibit P2117.
[1338] *See* Trial Judgement, para. 4957.
[1339] *Karadžić* Appeal Judgement, paras. 363, 530; *Šainović et al.* Appeal Judgement, para. 490. *See also Ngirabatware* Appeal Judgement, para. 69.
[1340] *See* Mladić Appeal Brief, paras. 616, 617, 619. *See also* T. 26 August 2020 p. 56.
[1341] *See* Mladić Appeal Brief, para. 617.
[1342] *Compare* Trial Judgement, paras. 2882, 3863 ("[Between mid-July and mid-August 1995,] the Skorpions worked in coordination with VRS units in an area under the responsibility of the SRK") *with* Trial Judgement, para. 4989 ("With regard to Scheduled Incident E.13.1 and the ill-treatment of the Trnovo victims prior to them being killed, there is insufficient evidence to suggest that members of the Skorpions unit were members of the Srebrenica JCE. Further, the

that "[w]hen re-subordinated, the MUP forces followed orders issued by the VRS. The Commander of the VRS unit to which the MUP unit was re-subordinated and the Commander of the MUP unit coordinated their work in carrying out the tasks assigned by the VRS".[1343] On the basis of this and other supporting evidence, the Trial Chamber explicitly found that when MUP units were participating in combat operations from at least 12 May 1992 until at least 26 September 1995, they were re-subordinated to the command of the VRS, meaning that they were tasked by the VRS and followed orders issued by the VRS.[1344] The Appeals Chamber further considers that evidence of joint operations of the MUP and the VRS does not, on its own, negate evidence of the MUP's subordination to the VRS at the time in question, and that evidence that distinguishes between coordination and re-subordination is consistent with the Trial Chamber's findings.[1345] Considering the Trial Chamber's detailed analysis of evidence demonstrating the re-subordination of the MUP to the VRS, as well as the MUP's coordination with the VRS,[1346] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber systematically adopted a selective approach to the evidence in its analysis in this respect. The Appeals Chamber also notes that Mladić selectively relies on certain portions of Witness Momir Nikolić's testimony to prove this alleged cooperation and coordinated action, disregards Witness Momir Nikolić's testimony that Borovčanin received orders from Mladić, and ignores other evidence establishing that MUP units were re-subordinated to the VRS and to Mladić.[1347] Furthermore, Mladić's claim that the fact that the VRS order of 13 July 1995, namely that "forces of the [VRS] mostly regrouped in order to go to Žepa", did not mention the MUP does not undermine the Trial Chamber's finding that MUP units were re-subordinated to the VRS.[1348] In fact, the Trial Chamber found that on 13 July 1995, Mladić tasked the MUP units with "organizing the evacuation of approximately 15,000 civilians from Srebrenica to Kladanj" and "[k]illing of about 8,000 Muslim soldiers".[1349]

Trial Chamber found that members of the Skorpions unit committed the killings set out in Scheduled Incident E.13.1 in coordination with VRS units. There is insufficient evidence to suggest that the Skorpions unit was subordinated to the VRS or that JCE members had other ways to use them as tools"). *See also* Trial Judgement, paras. 3794, 3796, 3826.

[1343] *See* Trial Judgement, para. 3794. *See also* Trial Judgement, para. 3826.

[1344] *See* Trial Judgement, para. 3826. *See also* Trial Judgement, paras. 3784-3819, 3824, 3825.

[1345] The definition provided by Witness Theunens was that the Commander of an MUP unit re-subordinated to the VRS receives operational orders from the VRS Commander and not from his MUP Commander, which is consistent with the Trial Chamber's analysis. Similarly, neither Witness Velimir Kevac's nor Witness Kovac's definition of re-subordination and coordination undercuts the Trial Chamber's finding. In particular, Witness Kovac testified that re-subordination means taking over command and jurisdiction, whereas coordinated action is between two neighbors, and the chains of command are separate. *See* Trial Judgement, paras. 3794, 3796, 3824, 3826; T. 10 December 2013 pp. 20620, 20621; T. 22 January 2015 pp. 30497, 30498; T. 23 January 2015 pp. 30510, 30545; T. 25 November 2015 p. 41921 (private session).

[1346] *See* Trial Judgement, paras. 3784-3819, 3824-3826.

[1347] *See* Mladić Appeal Brief, para. 617, *referring to* T. 4 June 2013 p. 12093; T. 4 June 2013 p. 12094; T. 5 June 2013 pp. 12164-12166; Trial Judgement, paras. 3784-3819, 3824-3826.

[1348] *See* Mladić Appeal Brief, para. 617, *referring to* Exhibit P724, p. 3.

[1349] *See* Trial Judgement, para. 5068.

389. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's finding that, from 11 until at least 17 July 1995, the MUP forces deployed in the sector of Srebrenica under Borovčanin were under VRS command and its dismissal of the argument that the MUP forces were operating under their own command in Srebrenica as of 12 or 13 July 1995.

(c) Orders Given by Mladić

390. Mladić submits that, in its analysis of his significant contribution to the Srebrenica JCE, the Trial Chamber failed to give sufficient weight to the military context and contents of legitimate military orders he issued in Srebrenica, and erroneously concluded that the only reasonable inference to be drawn from the orders was that he significantly contributed to the common criminal objective.[1350] Mladić contends that, in finding that Directive 7/1 did not rescind Directive 7, the Trial Chamber placed undue weight on the language of Directive 7,[1351] and, without providing a reasoned opinion, insufficient weight on the evidence of Witness Butler that operation Krivaja-95 ("Krivaja-95") was a legitimate military operation.[1352] Mladić further submits that, in finding that his order of 13 July 1995 was intended to mislead the media and the international community about the events in Srebrenica, the Trial Chamber did not properly consider the language of the order and the context in which it was given, while placing insufficient weight on similar orders aimed at preventing classified military information from being leaked.[1353]

391. The Prosecution responds that Mladić fails to show error in the Trial Chamber's conclusion that he significantly contributed to the common purpose by issuing orders concerning the Srebrenica operation to VRS and MUP forces.[1354] In this respect, the Prosecution argues that Mladić: (i) ignores that his contribution to the common purpose need not be *per se* criminal;[1355] (ii)

[1350] Mladić Appeal Brief, paras. 620, 623, *referring to*, *inter alia*, Trial Judgement, paras. 2323, 2374, 2376-2378, 2380, 2578, 2616, 2775, 2896, 2929, 2992. Mladić cites the following examples: (i) Directive no. 4 ("Directive 4"), which he argues ordered the adherence to the laws of war, including the Geneva Conventions (*see* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 2323, 2359, 5100); (ii) "a series of other orders issued up to 1995, including those to the Drina Corps" (*see* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 4329-4371); and (iii) other orders he argues required civilians to be removed from combat zones and harm (*see* Mladić Appeal Brief, para. 620, *referring to* Exhibits D302, D303). *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1351] Mladić Appeal Brief, para. 621. *See also* T. 25 August 2020 p. 72.
[1352] Mladić Appeal Brief, para. 621, *referring to* Trial Judgement, paras. 2364-2386, T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 p. 72; T. 26 August 2020 p. 46.
[1353] Mladić Appeal Brief, para. 622, *referring to* Trial Judgement, paras. 5081, 5082, 5117, 5128.
[1354] Prosecution Response Brief, paras. 246, 247, *referring to*, *inter alia*, Trial Judgement, paras. 5097, 5098.
[1355] Prosecution Response Brief, para. 246.

merely seeks to substitute his interpretation of orders regarding Directive 4,[1356] Krivaja-95,[1357] and Directive 7;[1358] and (iii) fails to demonstrate that the Trial Chamber acted unreasonably in considering his orders concerning the Srebrenica operation.[1359] The Prosecution further responds that, given that none of the allegedly "similar orders" Mladić cites is comparable, the Trial Chamber reasonably concluded that the 13 July 1995 order limiting access for local and foreign journalists to the Srebrenica area and banning the provision of information on prisoners of war, evacuated civilians, and escapees was intended to keep the international community from learning what was happening in Srebrenica.[1360]

392. The Appeals Chamber notes that the Trial Chamber found that Mladić significantly contributed to achieving the common objective by, *inter alia*: (i) issuing several orders to VRS forces, including the Drina Corps, concerning the operation in and around Srebrenica between at least 11 July and 11 October 1995; and (ii) giving orders to MUP Commander Borovčanin and his units on 11 and 12 July 1995.[1361] In reaching these findings, the Trial Chamber conducted a comprehensive assessment of orders issued by Mladić concerning the Srebrenica operation,[1362] and considered that these orders were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1363] The Appeals Chamber thus considers

[1356] *See* Prosecution Response Brief, paras. 246, 248 (wherein the Prosecution contends that Directive 4 is an illegal order to expel the ABiH and "the Muslim population" from Srebrenica and other areas). *See also* T. 26 August 2020 p. 8.
[1357] *See* Prosecution Response Brief, paras. 246, 250 (wherein the Prosecution argues that the language of Directive Krivaja-95 calling for adherence to the Geneva Conventions does not negate its illegal objective to forcibly remove the population and that the VRS did not act in accordance with the Geneva Conventions). *See also* T. 26 August 2020 pp. 9, 10.
[1358] *See* Prosecution Response Brief, paras. 246, 251 (wherein the Prosecution contends that the Trial Chamber carefully analyzed the content and context of Directive 7 and that, while the Trial Chamber did not refer to Krivaja-95 in concluding that Directive 7/1 did not rescind Directive 7, Krivaja-95 supports that conclusion, and that Mladić erroneously relied on Witness Butler's evidence in that regard). *See also* T. 26 August 2020 pp. 9, 10.
[1359] Prosecution Response Brief, para. 247.
[1360] Prosecution Response Brief, para. 252. *See also* T. 26 August 2020 pp. 6, 17, 18, 22.
[1361] *See* Trial Judgement, paras. 5097, 5098. *See also* Trial Judgement, paras. 5048, 5049, 5052, 5053, 5066, 5067.
[1362] Between 11 July and 11 October 1995, Mladić issued a number of orders in relation to the Srebrenica operation, including: (i) on 11 July 1995, ordering Borovčanin to go to Potočari and Milačevići with all available manpower and equipment to launch an attack in the early morning of 12 July 1995 (*see* Trial Judgement, paras. 5059, 5066, 5115); (ii) on the evening of 11 July 1995, ordering Petar Škrbić to mobilize buses and by 12 July 1995, ordering the transportation of Bosnian Muslims out of Potočari (*see* Trial Judgement, para. 5052); (iii) ordering the separation of Bosnian Muslim men from women, children and elderly in Potočari from 12 to 14 July 1995 (*see* Trial Judgement, paras. 5052, 5059, 5130); (iv) around 12 July 1995, ordering VRS units and MUP units to block the area and fight the column of Muslim men around the Konjević Polje-Cerska axis (*see* Trial Judgement, paras. 2641, 2642); (v) on 13 July 1995, ordering Zoran Marlinić and Bojan Subotić to secure the transfer of detainees to the Vuk Karadžić Elementary School in Bratunac (*see* Trial Judgement, para. 5052); (vi) before 15 July 1995, ordering Radomir Furtula to provide Beara with troops to carry out his work in Srebrenica (*see* Trial Judgement, paras. 4945, 5001, 5002, 5049); (vii) on 17 July 1995, ordering military units to comb the Bratunac-Drinjača-Milići-Bešići area to find and destroy Muslim groups (*see* Trial Judgement, para. 5033, *referring to* Exhibit P1579); (viii) in late July 1995, ordering to kill ten detainees held at the Standard Barracks at the Zvornik Brigade (*see* Trial Judgement paras. 2929, 5039, *referring to* Exhibit P1494 (under seal)); and (ix) on 11 October 1995, ordering, *inter alia*, the Corps Commands and the MUP to carry out combat security "as per Directive no. 7" (*see* Trial Judgement, para. 5043).
[1363] *See* Trial Judgement, paras. 5097, 5098.

that the Trial Chamber reasonably concluded that Mladić significantly contributed to achieving the common objective by issuing orders concerning the Srebrenica operation to VRS and MUP forces.

393. Turning to the Trial Chamber's alleged failure to give sufficient weight to the context and contents of orders that, according to Mladić, were legitimate military orders issued in Srebrenica, the Appeals Chamber recalls that an accused's contribution to a joint criminal enterprise need not be in and of itself criminal, as long as he or she performs acts that in some way contribute to the furtherance of the common purpose.[1364] Thus, in the Appeals Chamber's view, whether Mladić's orders were legitimate in the military context is not relevant to determining his significant contribution to the common purpose. What matters is that the accused significantly contributed to the commission of the crimes involved in the joint criminal enterprise.[1365] Considering the above, Mladić's assertion that his orders were consistent with legitimate military operations in light of the military context of Srebrenica[1366] cannot serve to demonstrate an error in the Trial Chamber's conclusion that Mladić significantly contributed to achieving the common objective.[1367]

394. In any event, the Appeals Chamber finds that Mladić fails to substantiate his claim that the Trial Chamber did not properly weigh the evidence pertaining to his orders in Srebrenica. In relation to Mladić's contention that Directive 4 ordered adherence to the laws of war, including the Geneva Conventions,[1368] the Appeals Chamber observes that this directive does not contain any reference to the laws of war, including the Geneva Conventions, and does not explicitly mandate respect for the laws of war.[1369] In fact, the Trial Chamber found that Directive 4 ordered the Drina Corps to inflict the heaviest possible losses on the ABiH and to force them to leave the Birač, Žepa, and Goražde areas with the Muslim population.[1370] Further, the Trial Chamber considered evidence that Mladić gave orders to respect the Geneva Conventions, but found that these orders were not indicative of his true state of mind.[1371] The Appeals Chamber thus finds that Mladić fails to demonstrate that the Trial Chamber erred in its assessment of Directive 4.

[1364] *See*, *e.g.*, *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, para. 1653; *Krajišnik* Appeal Judgement, para. 695.
[1365] *See*, *e.g.*, *Krajišnik* Appeal Judgement, para. 696; *Brđanin* Appeal Judgement, paras. 430, 431.
[1366] *See* Mladić Appeal Brief, para. 623. *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1367] *See Popović et al*. Appeal Judgement, para. 1615 (in which the ICTY Appeals Chamber 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).
[1368] *See* Mladić Appeal Brief, para. 620, *referring to* Trial Judgement, paras. 2323, 2359, 5100. *See also* T. 25 August 2020 pp. 82, 83.
[1369] *See* Exhibit P1968. It merely calls for providing the best possible living conditions for the army and civilian population during the winter and commanding the soldiers to try to disarm enemy groups and resort to killing them only if they refuse. *See* Exhibit P1968, pp. 4, 5.
[1370] *See* Trial Judgement, para. 5100. *See also* Trial Judgement, paras. 2323, 2359.
[1371] *See* Trial Judgement, para. 4687.

395. The Appeals Chamber now turns to Mladić's argument that the Trial Chamber placed undue weight on the language of Directive 7,[1372] and, without providing a reasoned opinion, insufficient weight on Witness Butler's evidence that Krivaja-95 was a legitimate military operation.[1373] The Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1374] Furthermore, as explained above, whether a military operation is legitimate is irrelevant to determining Mladić's significant contribution to the common purpose.[1375] In any event, the Appeals Chamber observes that the Trial Chamber carefully analyzed the context and content of both Directive 7[1376] and Directive 7/1,[1377] and considered evidence from Witnesses Ljubomir Obradović and Milovanović, as well as other documentary evidence, in reaching its finding that Directive 7/1 did not rescind or amend the content of Directive 7.[1378] Furthermore, while Mladić selectively relies on Witness Butler's evidence that "the VRS had the military legitimate right to attack the 28th Division" of the ABiH,[1379] he disregards this witness's consistent statement that Directive 7/1 did not supersede but rather supplemented Directive 7 with additional technical information.[1380] The Appeals Chamber thus finds that Mladić fails to demonstrate that the Trial Chamber erred in its assessment of Directive 7.

396. The Appeals Chamber also finds no merit in Mladić's contention that the Trial Chamber did not properly consider the language and context of his order of 13 July 1995, which prevented the

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[1372] *See* Mladić Appeal Brief, para. 621. *See also* T. 25 August 2020 p. 72.
[1373] *See* Mladić Appeal Brief, para. 621, *referring to* Trial Judgement, paras. 2364-2386, T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 pp. 71, 72; T. 26 August 2020 p. 46.
[1374] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1375] *See supra* para. 393.
[1376] The Trial Chamber found that, in March 1995, Radivoje Miletić and the VRS Main Staff drafted Directive 7, which was signed by Karadžić, Supreme Commander of the VRS, on 8 March 1995. In Directive 7, Karadžić outlined the four main priorities of the VRS: (i) through resolute offensive and defensive military operations, impose a military situation which the international community would be compelled to accept; (ii) improve the operational and strategic position of the VRS; (iii) reduce the front-line and create conditions for the economic revival of *Republika Srpska* by sending a number of military conscripts home; and (iv) create the conditions for the state and political leadership to negotiate a peace agreement and accomplish the strategic objectives of the war. *See* Trial Judgement, paras. 2382, 2383.
[1377] *See* Trial Judgement, paras. 2364-2386. The Trial Chamber found that, on 31 March 1995, the VRS Main Staff issued Directive 7/1, which was signed by Mladić, and wherein he repeated most of the tasks of the VRS outlined in Directive 7 and stated that he had decided to conduct, with the VRS main forces, a strategic operation under the code-name *Sadejstvo 95*. *See* Trial Judgement, para. 2384.
[1378] *See* Trial Judgement, paras. 2385, 2386, *referring to*, *inter alia*, Exhibits P345, P803, P4317, P5048. The Trial Chamber considered Witness Obradović's testimony that Directive 7 remained in force with respect to the VRS Second Krajina Corps, the SRK, and the VRS Herzegovina Corps, as stated in Directive 7/1, but that the main body of the force consisting of the VRS First Krajina Corps, the VRS East Bosnia Corps, and the Drina Corps, were tasked with what was set out in Directive 7/1. The Trial Chamber further considered Witness Milovanović's evidence that there is nothing in Directive 7/1 explicitly rescinding the controversial parts of Directive 7 and that in order to fully implement Directive 7/1 one would have to look at Directive 7.
[1379] *See* Mladić Appeal Brief, para. 621, *referring to* T. 11 September 2013 pp. 16498, 16499. *See also* T. 25 August 2020 pp. 71, 72; T. 26 August 2020 p. 46.
[1380] *See* T. 3 September 2013 pp. 16158, 16159; T. 4 September 2013 p. 16192.

entry of local and foreign journalists into the Srebrenica area and banned the provision of information on prisoners of war, evacuated civilians, and escapees.[1381] In this regard, the Appeals Chamber notes that the Trial Chamber's finding in question was based on the totality of the evidence, and particularly on the language of the order in its context.[1382] Further, the orders referenced by Mladić in support of his argument on appeal were issued to prevent classified military information from being leaked, and are thus different from his 13 July 1995 order, which was issued to restrict the international community's access to information in the midst of a mass murder operation.[1383] Accordingly, the Appeals Chamber finds that Mladić's contention in relation to his 13 July 1995 order reflects mere disagreement with the Trial Chamber's evaluation and interpretation of relevant evidence without demonstrating error. In this respect, the Appeals Chamber again recalls that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1384]

397. On the basis of the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Mladić's submission that the Trial Chamber erroneously concluded that he significantly contributed to the common criminal objective by issuing orders concerning the Srebrenica operation to VRS and MUP forces.

(d) Intercepts

398. Mladić submits that, although the Trial Chamber relied on certain intercepts to find that VRS forces committed crimes in Srebrenica and that he was complicit in those crimes, with a proper weighing of evidence, no reasonable trier of fact could have concluded that the intercepts

[1381] *See* Mladić Appeal Brief, para. 622, *referring to* Trial Judgement, paras. 5081, 5082, 5117, 5128.
[1382] *See* Trial Judgement, paras. 5071-5084. *See also* Exhibit P2120. Indeed, the Trial Chamber found that, between 11 July and 22 August 1995, Mladić was deliberately misleading the international community by: (i) claiming that the civilians in Srebrenica were free to stay or go; (ii) ordering the selling of the videotape of the distribution of food and water to foreign agencies; and (iii) denying alleged atrocities committed after the fall of Srebrenica and that executions had taken place. *See* Trial Judgement, paras. 5082-5084.
[1383] In this regard: (i) Exhibits P4332, P4383, P5161, P5173, P6549, and P6641 include general instructions to keep military operations confidential (*see* Exhibit P4332, p. 5; Exhibit P4383, p. 12; Exhibit P5161, p. 8; Exhibit P5173, p. 6; Exhibit P6549, p. 8; Exhibit P6641, p. 3); (ii) Exhibits P5068, P5069 relate to reporting within the chain of command (*see* Exhibit P5068, p. 1; Exhibit P5069, p. 1); (iii) Exhibit P5224 includes Mladić's 13 April 1994 order to isolate and restrict the movement of, *inter alia*, UNPROFOR, UN Military Observers ("UNMOs"), and foreign journalists, which the Trial Chamber found was issued in retaliation to NATO providing air support to UN safe areas (*see* Exhibit P5224, pp. 2, 3; *see also* Trial Judgement, para. 4604); and (iv) in relation to Exhibit P6646, a 19 November 1994 order from the VRS Main Staff's Sector for Moral Guidance, Religious and Legal Affairs on directions on some current issues regarding public information, the Trial Chamber found it to be one measure taken by that sector implementing Mladić's order "to conceal the real intent of the VRS forces and to gain support for their actions" (*see* Trial Judgement, paras. 4488, 4494, 4497-4500, *referring to* Exhibit P6646, pp. 1, 2).
[1384] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

were reliable and authentic.[1385] In this respect, he argues that the Trial Chamber erroneously disregarded evidence of Witness RM-316's partisanship and limited training, while relying on this witness to conclude that there was no evidence that the Intercepts were forgeries.[1386] Furthermore, according to Mladić, the Trial Chamber failed to give sufficient weight to: (i) the fact that [REDACTED];[1387] (ii) the lack of continuity or chain of custody in providing the intercepts to the ICTY;[1388] (iii) the incorrect identification of VRS relay routes and frequencies;[1389] and (iv) the scepticism Witness Butler expressed regarding the reliability of the Intercepts.[1390] In addition, Mladić submits that the Trial Chamber failed to adequately address inconsistencies within the Intercepts.[1391]

399. The Prosecution responds that Mladić fails to show that the Trial Chamber's assessment of the Intercepts was unreasonable in light of the totality of the evidence.[1392] It thus submits that Mladić's mere assertion that the Trial Chamber disregarded or failed to give sufficient weight to certain evidence should be summarily dismissed.[1393] The Prosecution further argues that the alleged inconsistencies Mladić raises are not supported by the evidence.[1394]

400. The Appeals Chamber notes that the Trial Chamber found the Intercepts to be genuine contemporaneous reports of intercepted VRS communications, and did not accept the argument that they were forged or manipulated.[1395] In reaching these findings, the Trial Chamber assessed the

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[1385] *See* Mladić Appeal Brief, paras. 624-628. In support of his submission, Mladić references specific paragraphs of the Trial Judgement where the Trial Chamber addressed the following intercepts: (i) Exhibit P1235 [REDACTED] (under seal), *see* Trial Judgement, para. 2480; (ii) Exhibit P4222 (concerning an intercept of Božidar Popović and Niđo Mihalić, 22 September 1995 at 6.44 p.m.) and Exhibit P4223 [REDACTED] (under seal), *see* Trial Judgement, paras. 2992, 2996; (iii) Exhibit P2126 [REDACTED] (under seal) and Exhibit P1322 (concerning an intercept of conversation between Beara and Krstić), *see* Trial Judgement, para. 4945; (iv) Exhibit P7397 [REDACTED] (under seal), p. 1, *see* Trial Judgement, para. 4950; (v) Exhibit P1320 [REDACTED] (under seal), p. 1, and Exhibit P1321 [REDACTED] (under seal), p. 1, *see* Trial Judgement, para. 5001; (vi) Exhibit P2126 [REDACTED] (under seal), *see* Trial Judgement, para. 5002; (vii) Exhibit P1297 [REDACTED] (under seal), *see* Trial Judgement, para. 5008; (viii) Exhibits P1338 and P1655 [REDACTED] (under seal), *see* Trial Judgement, paras. 5028, 5112; (ix) Exhibits P1657 and P1658 [REDACTED] (under seal), *see* Trial Judgement, paras. 5032, 5114 (collectively, "Intercepts").
[1386] Mladić Appeal Brief, para. 625, *referring to* Trial Judgement, para. 5046.
[1387] Mladić Appeal Brief, para. 626, *referring to* T. 28 June 2013 pp. 13575, 13576 (private session), Exhibit D316 (under seal).
[1388] Mladić Appeal Brief, para. 626, *referring to* T. 13 September 2013 pp. 16701, 16702, T. 1 November 2013 pp. 18643, 18644 (closed session).
[1389] Mladić Appeal Brief, para. 626, *referring to*, *inter alia*, Exhibits P1625, D879, D909, T. 25 June 2013 pp. 13338-13340, T. 18 February 2015 pp. 31900-31920, 31935-31937.
[1390] Mladić Appeal Brief, para. 626, *referring to* T. 3 September 2013 pp. 16115-16117.
[1391] Mladić Appeal Brief, para. 627, *referring to* Trial Judgement, paras. 4945, 5001, 5002, 5032, 5114, Exhibits P1320/P1321 (under seal), P2126 (under seal), P1332 (under seal), P1645/P1657 (under seal).
[1392] *See* Prosecution Response Brief, paras. 253-255, *referring to*, *inter alia*, Trial Judgement, paras. 5046, 5305-5308.
[1393] Prosecution Response Brief, para. 255, *referring to*, *inter alia*, Trial Judgement, paras. 5305-5308, nn. 18087, 18089.
[1394] *See* Prosecution Response Brief, paras. 256-258, *referring to*, *inter alia*, Trial Judgement, paras. 2792-2863, 4945, 5001, 5002, 5032, 5049, 5114.
[1395] *See* Trial Judgement, paras. 5046, 5307.

Intercepts in the context of the entire trial record, treated them with caution, and considered whether there was corroboration or further detail provided by other sources of evidence.[1396] In particular, the Trial Chamber considered the evidence of Witness RM-316[1397] as well as other evidence on the record, including evidence that the Intercepts were allegedly forgeries.[1398] In this context, Mladić's argument that the Trial Chamber failed to give sufficient weight to certain evidence reflects mere disagreement with the Trial Chamber's assessment of evidence without demonstrating any error.

401. Moreover, with respect to his submission regarding the Trial Chamber's assessment of the reliability and authenticity of the Intercepts, the Appeals Chamber considers that Mladić merely repeats his submissions at trial without demonstrating any error.[1399] A party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1400] Furthermore, although Mladić refers to Witness Butler's initial scepticism about the reliability of the Intercepts, this witness testified that he ultimately was "able to corroborate much of the information that was contained in those [I]ntercepts".[1401]

402. Turning to Mladić's submission that the Trial Chamber did not adequately address inconsistencies in the Intercepts, the Appeals Chamber recalls that it is within a trial chamber's discretion to assess inconsistencies and determine whether the evidence as a whole is reliable and credible.[1402] In this case, the Appeals Chamber is not convinced that the alleged inconsistencies Mladić refers to are supported by the evidence. For example, although Mladić argues that Exhibits P1320, P1321, and P2126 are inconsistent with Exhibit P1332,[1403] the Appeals Chamber observes that Exhibit P1332 is unrelated to the other three Intercepts, which pertain to the same conversation

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[1396] *See* Trial Judgement, paras. 5046, 5307, 5308. In considering the Intercepts, the Trial Chamber assessed their reliability as well as evidence supporting the identification of Mladić as a participant in the conversations. *See* Trial Judgement, para. 5046.
[1397] *See* Trial Judgement, para. 5046. The Trial Chamber considered Witness RM-316's evidence and was satisfied that Mladić would not have been identified unless the operators were certain that it was Mladić speaking in the intercept. *See also* Trial Judgement, para. 5028.
[1398] *See* Trial Judgement, paras. 5305-5308. *See also* Trial Judgement, paras. 5026-5030, 5032, 5046.
[1399] *See* Trial Judgement, para. 5305, *referring to*, *inter alia*, Mladić Final Trial Brief, para. 2620. With respect to the limited training of Witness RM-316, Mladić repeats his argument in paragraph 2620 of the Mladić Final Trial Brief. In relation to Witness RM-275, Mladić repeats his argument in paragraph 2618 of the Mladić Final Trial Brief. Regarding the lack of continuity or chain of custody, Mladić repeats his arguments in paragraphs 2595 and 2596 of the Mladić Final Trial Brief. As to radio-relay routes and frequencies, Mladić repeats his arguments in paragraphs 2619 to 2622, 2649, 2650, 2652 to 2654, 2656, and 2657 of the Mladić Final Trial Brief. All of the above-mentioned paragraphs were explicitly referenced by the Trial Chamber. *See* Trial Judgement, nn. 18087, 18089, *referring to*, *inter alia*, Mladić Final Trial Brief, paras. 2595, 2596, 2618-2622, 2649, 2650, 2652-2654, 2656, 2657.
[1400] *Karadžić* Appeal Judgement, paras. 19, 305, 598 and references cited therein.
[1401] *See* T. 3 September 2013 pp. 16115-16117.
[1402] *See Karadžić* Appeal Judgement, para. 363; *Prlić et al*. Appeal Judgement, para. 201; *Ntawukulilyayo* Appeal Judgement, para. 73 and references cited therein.
[1403] *See* Mladić Appeal Brief, para. 627, n. 763.

and are, in fact, consistent with each other, as they concern the same operation.[1404] Furthermore, although Mladić argues that Exhibits P1645 and P1657 are inconsistent with each other, the Appeals Chamber observes that Exhibit P1645 is not an intercept but a handwritten note and that Mladić's claims about the contents of Exhibit P1657 are incorrect because, contrary to his submission, [REDACTED].[1405]

403. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate error in the Trial Chamber's assessment of or reliance on the Intercepts.

(e) Knowledge, Investigation, and Punishment of Crimes

(i) Alleged Failure to Give Sufficient Weight to Probative Evidence

404. Mladić submits that, in finding that he failed to take adequate steps to investigate crimes and/or punish perpetrators, the Trial Chamber disregarded or failed to give sufficient weight to probative evidence that: (i) he had no knowledge of crimes and/or was unable to prevent or punish them; and (ii) he or his subordinates did investigate and prosecute certain crimes.[1406] With respect to the evidence that he had no knowledge of crimes, Mladić contends that the Zvornik Brigade[1407] daily combat report, dated 14 July 1995 ("Zvornik Brigade Report"), does not mention the commission of crimes,[1408] and that, to establish that crimes were reported, the Trial Chamber placed undue emphasis on Witness Ljubomir Bojanović's evidence that such information would be reported up the chain of command.[1409] According to Mladić, Witness Momir Nikolić confirmed that he concealed the killings from his commanders and provided misleading information about "asanacija/sanitisation" to cover up reburials.[1410] Mladić additionally argues that the Trial Chamber

[1404] *Compare* Exhibits P1320/P1321 (under seal) [REDACTED] *and* P2126 (under seal) [REDACTED] *with* Exhibit P1332 (under seal) [REDACTED].
[1405] *See* Mladić Appeal Brief, n. 763; Exhibit P1645 (concerning a handwritten note dated 7 August 1995); Exhibit P1657 (under seal).
[1406] *See* Mladić Appeal Brief, paras. 629-639, 641. *See also* T. 25 August 2020 p. 71; T. 26 August 2020 p. 56. Mladić further submits that, outside of his knowledge and unrelated to him, individuals from local areas, the MUP as well as Nikolić, and other "rogue members of the VRS security professional line of command", including Popović, took it upon themselves to conduct acts of revenge and killings in Srebrenica. *See* T. 25 August 2020 pp. 71, 80, 81, 84; T. 26 August 2020 pp. 44, 56.
[1407] The Zvornik Brigade was a VRS unit subordinate to the Drina Corps. *See* Trial Judgement, paras. 212, 215-218.
[1408] Mladić Appeal Brief, para. 632, *referring to*, *inter alia*, Trial Judgement, paras. 4961, 4966. According to Mladić, the Zvornik Brigade Report stated that there were "no unexpected events", although the Trial Chamber accepted that members of the Zvornik Brigade were falsifying records to conceal their involvement in the crimes. Mladić Appeal Brief, para. 632, n. 770, *referring to* Trial Judgement, para. 4966.
[1409] Mladić Appeal Brief, para. 632, *referring to* Trial Judgement, para. 4961.
[1410] Mladić Appeal Brief, para. 632, *referring to* Exhibits D1228, p. 3, P1494 (under seal), P1515, P1516, T. 28 May 2013 p. 11661 (closed session), T. 3 June 2013 pp. 11965, 11966; T. 25 August 2020 pp. 80, 81. Mladić argues that Witness Nikolić's report to the VRS Main Staff supports his statement that he concealed the crimes as it only contained information that wounded Muslim prisoners and Muslim UN staff were being evacuated. *See* Mladić Appeal Brief, para. 632, n. 773, *referring to* Exhibit P1515.

relied on a fuel order he signed to establish his knowledge of the crimes and the reburial operation, but failed to give sufficient weight to the fact that the unique identification number appearing on the fuel order was not his.[1411]

405. Mladić further argues that the Trial Chamber failed to give sufficient weight to evidence of: (i) parallel reporting and investigation processes; (ii) the institutional limitations of the military justice system; and (iii) conflicts with the civilian authorities, which led to his inability to prevent crimes and punish MUP perpetrators.[1412] With respect to evidence that he or his subordinates investigated and prosecuted crimes, Mladić points to: (i) ultimatums he issued on 23 September 1995 and 20 October 1995 stating that the MUP Command should prevent crimes and punish MUP perpetrators, or else face military action from the VRS;[1413] and (ii) a meeting on 26 March 1996 to form a joint investigation commission between the MUP and the VRS to investigate crimes committed in Srebrenica.[1414] Mladić argues that the Trial Chamber disregarded this evidence, ultimately leading to the impermissible inference that he failed to investigate crimes.[1415]

406. The Prosecution responds that Mladić's argument that the Trial Chamber disregarded and improperly weighed probative evidence should be dismissed.[1416] Specifically, it argues that the Trial Chamber reasonably found that Mladić was aware of the crimes[1417] and that he does not show

[1411] Mladić Appeal Brief, para. 633, *referring to* Trial Judgement, paras. 3002-3005. To the extent that Mladić refers to paragraphs 611 and 612 of his appellant's brief, the Appeals Chamber recalls that it has rejected his arguments in this regard. *See supra* para. 380.
[1412] Mladić Appeal Brief, paras. 635-639, 641, *referring to* Trial Judgement, paras. 5086, 5094, 5098. *See also* T. 26 August 2020 p. 56. Mladić also takes issue with the Trial Chamber's reliance on Witness Predrag Drinić in finding that no investigations were conducted by Bosnian Serb military or civilian organs. To the extent that Mladić develops this argument in Ground 5.I of his appeal, it will be evaluated in connection with the submissions made in support of that sub-ground of appeal. *See* Mladić Appeal Brief, para. 634, *referring to* Trial Judgement, para. 4963.
[1413] Mladić Appeal Brief, para. 637. Mladić alleges that, following this, his key subordinates were removed in October 1995 and subsequently replaced. *See* Mladić Appeal Brief, para. 637.
[1414] Mladić Appeal Brief, para. 637, *referring to* Trial Judgement, para. 4963, Exhibit P3353 (under seal).
[1415] Mladić Appeal Brief, paras. 637, 639.
[1416] Prosecution Response Brief, para. 259, *referring to* Trial Judgement, paras. 4987, 5093, 5094, 5097, 5098. *See also* T. 26 August 2020 pp. 19-22. The Prosecution further submits that the Defence's alleged "hypothetical conspiracy", involving a breakdown of command and rogue elements of the VRS and civilian police without Mladić's knowledge, cannot explain: (i) the extensive and coordinated involvement of many different military units and resources under Mladić's overall command, (ii) that Mladić did nothing to punish direct perpetrators and their superiors who, under his control, conducted the operation, and (iii) his praise for his soldiers in the conduct of the operation in Srebrenica. *See* T. 26 August 2020 pp. 21, 22.
[1417] Prosecution Response Brief, para. 260, *referring to*, *inter alia*, Trial Judgement, paras. 213, 2992, 3002, 4989, 5042, 5050, 5052, 5053, 5069, 5080, 5092, 5093, 5096, 5098, Exhibit P1500. *See also* T. 26 August 2020 pp. 21, 22. The Prosecution argues that: (i) Mladić fails to explain how the Trial Chamber placed undue emphasis on Witness Bojanović's evidence that the crimes would have been reported up the chain of command in the Zvornik Brigade Report when the Trial Chamber expressly stated that it did not rely on this aspect of his evidence (*see* Prosecution Response Brief, para. 261, *referring to*, *inter alia*, Trial Judgement, n. 12063); (ii) Mladić fails to show how the absence of explicit mention of crimes in the Zvornik Brigade Report undercuts the Trial Chamber's finding that VRS officers, including Mladić, were aware of the killings (*see* Prosecution Response Brief, para. 262, *referring to*, *inter alia*, Trial Judgement, paras. 4961, 5093); and (iii) Witness Momir Nikolić's evidence confirms Mladić's active participation in

that the Trial Chamber erred in concluding that he failed to take adequate steps to investigate the crimes and punish the perpetrators.[1418]

407. The Appeals Chamber observes that, in reaching its finding that Mladić was aware of crimes committed in Srebrenica in July 1995 by members of the VRS and the MUP but failed to take adequate steps to investigate crimes and punish perpetrators,[1419] the Trial Chamber recalled its previous findings, *inter alia*, that: (i) in 1995, the Drina Corps maintained an effective command and control structure with a strong reporting chain and there was a fully functioning communication system in place at the time;[1420] and (ii) VRS officers were aware of the killings of Bosnian Muslims in Srebrenica and the Zvornik area, but there were no investigations or prosecutions with respect to the July 1995 killings in Srebrenica.[1421] The Appeals Chamber further observes that the Trial Chamber explicitly pointed out that it "did not receive evidence to conclude that Mladić ordered any substantial or meaningful investigations into war crimes or crimes against humanity".[1422] Moreover, the Trial Chamber relied on its previous findings, based on extensive evidence, that Mladić: (i) possessed the authority to order investigations within the military justice system;[1423] (ii) was under a duty to take adequate steps to investigate and/or punish the crimes;[1424] (iii) was aware of crimes committed in Srebrenica in July 1995 by members of the VRS and the MUP;[1425] and (iv) engaged in actions that were deliberately misleading.[1426]

408. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber is not convinced that the Trial Chamber gave insufficient weight to evidence showing that Mladić had no knowledge of the crimes committed in Srebrenica.[1427] In relation to the Zvornik Brigade Report, the Appeals Chamber fails to see how the absence of explicit reference to the commission of crimes in the report, which is only pertinent to 14 July 1995 and to the Zvornik Brigade's area of responsibility, would undercut the Trial Chamber's finding that Mladić was aware of crimes committed in Srebrenica as a whole.[1428] With respect to Witness Bojanović's evidence that the mass

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and knowledge of the murder operation (*see* Prosecution Response Brief, para. 263; *see also* T. 26 August 2020 pp. 19, 20).

[1418] *See* Prosecution Response Brief, paras. 265-271. *See also* T. 26 August 2020 p. 22.

[1419] *See* Trial Judgement, paras. 5093, 5094.

[1420] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213.

[1421] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, para. 4968.

[1422] *See* Trial Judgement, para. 5094. *See also* Trial Judgement, para. 4545.

[1423] *See* Trial Judgement, para. 5091, *referring to* Trial Judgement, paras. 4516-4543, 4545.

[1424] *See* Trial Judgement, para. 5092, *referring to* Trial Judgement, paras. 2443-2448, 2676, 2684, 2706-2708, 2723, 2732, 2759, 2766, 2776, 2791, 2820, 2825, 2859, 2861, 2862, 2876, 2882, 2886, 2894, 2917, 2920, 2921, 2924, 2926, 2935, 3051, 4952-4958, 5046-5053, 5066-5069.

[1425] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 210-213, 2457-2478, 4959-4968.

[1426] *See* Trial Judgement, para. 5094, *referring to* Trial Judgement, paras. 5071-5084.

[1427] *See* Mladić Appeal Brief, paras. 630-633. *See also* T. 25 August 2020 pp. 71, 80, 81; T. 26 August 2020 p. 56.

[1428] *See* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213, 4968.

execution of detainees in the Zvornik Brigade's area of responsibility would have been reflected in the daily combat report, the Trial Chamber explicitly considered this evidence in determining the concealment of crimes, but did not rely on it, on the basis that Witness Bojanović was not involved in the drafting of the report and accordingly found his comments speculative.[1429] Regarding evidence concerning Witness Momir Nikolić, the Appeals Chamber observes that Mladić misinterprets Exhibit D1228, which shows that Witness Momir Nikolić discussed the killing of captured Muslims with his commander, Blagojević, on 12 and 13 July 1995, rather than concealed the killings from his commanders.[1430] Furthermore, Mladić merely offers an alternative interpretation of Witness Momir Nikolić's evidence without demonstrating the unreasonableness of the Trial Chamber's finding that the reburial operation was reported.[1431] Turning to the fuel order, contrary to Mladić's assertion,[1432] the Trial Chamber did not rely on it to determine his knowledge of the crimes or the reburial operation.[1433] In this respect, Mladić merely disagrees with the Trial Chamber's assessment of the unique identification number appearing on the fuel order without demonstrating an error.

409. With respect to Mladić's alleged inability to investigate crimes given the parallel reporting and investigation processes,[1434] he merely repeats his submissions at trial, arguing, *inter alia*, that "probative evidence showed that the crimes were reported to the civilian authorities".[1435] The Trial Chamber explicitly rejected this argument and found that "merely reporting the crimes to the MUP

[1429] *See* Trial Judgement, para. 2776, n. 12063. *See also* Trial Judgement, paras. 4961, 4966. Contrary to Mladić's assertion, the Trial Chamber did not rely on Witness Bojanović's evidence to find that the crimes were reported, but instead considered this evidence in reaching its finding that the crimes were concealed. *See* Mladić Appeal Brief, paras. 631, 632.

[1430] *See* Trial Judgement, para. 4939, *referring to* Exhibit D1228, p. 8. In addition, Exhibit D1228 shows that Witness Momir Nikolić only mentioned the killings in his verbal report and not in his written report, rather than that "he had never seen a written report about the killings". *See* Trial Judgement, para. 4939, *referring to* Exhibit D1228, p. 3. *See also* Mladić Appeal Brief, para. 632; Exhibit D1228, pp. 3, 8.

[1431] *See* Trial Judgement, para. 3004 (wherein the Trial Chamber found that "[o]n 16 October 1995, Momir Nikolić met with Blagojević, the command staff, and battalion commanders or their deputies, and reported that members of the Brigade were engaged in a reburial operation conducted under the name 'asanacija[',] or hygiene and sanitation measures, which had been ordered by the VRS Main Staff"). In reaching this finding, the Trial Chamber considered, *inter alia*, the evidence of Witnesses Momir Nikolić and RM-322. *See* Trial Judgement, paras. 2995, 2997, 2999, 5344, *referring to*, *inter alia*, T. 28 May 2013 p. 11661 (closed session), T. 3 June 2013 pp. 11963-11967, 11969, 11970, Exhibits D300, P1494 (under seal), P1516.

[1432] *See* Mladić Appeal Brief, para. 633, *referring to* Trial Judgement, paras. 3002-3005.

[1433] The Appeals Chamber has previously examined the Trial Chamber's determination of Mladić's knowledge of the crimes. *See supra* paras. 407, 408. *See also* Trial Judgement, para. 5093, *referring to* Trial Judgement, paras. 152, 213, 4968. Having reviewed relevant portions of the Trial Judgement, the Appeals Chamber observes that the Trial Chamber did not make a specific finding about Mladić's knowledge of the reburial operation. *See* Trial Judgement, paras. 2989-3007, 4959-4969, 5086-5095.

[1434] With respect to evidence of the institutional limitations of the military justice system, Mladić recalls his arguments in relation to Ground 3 of his appeal. To the extent that Mladić develops these arguments in Ground 3, they are evaluated in connection with the submissions made in support of that ground. *See* Mladić Appeal Brief, para. 638. *See supra* Section III.B.2(a)(iii)e.

[1435] *See* Mladić Appeal Brief, para. 635, *referring to* Trial Judgement, para. 5086, Mladić Final Trial Brief, paras. 3273-3292.

Commander would not satisfy [Mladić's] duties as commander".[1436] In addition, while Mladić refers to portions of Witness Theunens's testimony to support his contention that he could not take direct steps to investigate crimes perpetrated by MUP officers,[1437] nothing in those portions of the testimony supports this contention.[1438] On the contrary, Witness Theunens stated, without reference to any particular situation, that when the MUP units were conducting operations under military command, the VRS Commander in the area had the duty to investigate alleged crimes.[1439] In relation to evidence of conflicts with the civilian authorities, the Appeals Chamber notes that Mladić simply repeats his submissions presented at trial,[1440] where the Trial Chamber found that Mladić possessed the authority to order investigations within the military justice system,[1441] without identifying any error on the part of the Trial Chamber. The Appeals Chamber reiterates that a party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that rejecting them caused an error warranting the intervention of the Appeals Chamber.[1442]

410. Finally, with respect to Mladić's submission regarding evidence that he or his subordinates prosecuted or investigated crimes, the Appeals Chamber observes that the ultimatums issued by Mladić, to which he points on appeal, did not concern Srebrenica crimes.[1443] As such, these ultimatums were not relevant to the Trial Chamber's assessment of Mladić's contribution to the Srebrenica JCE. As to the meeting to form the joint investigation commission, the Appeals Chamber notes that the Trial Chamber considered evidence in this respect[1444] in finding that "on 23 March 1996, Karadžić ordered the VRS and MUP to immediately form a mixed commission to investigate the alleged discovery of two decomposed bodies in the Pilica area", however, it explicitly noted that the proposal to initiate such investigation by Drinić was never addressed.[1445]

[1436] *See* Trial Judgement, paras. 5086, 5091.
[1437] *See* Mladić Appeal Brief, para. 635, *referring to* T. 10 December 2013 pp. 20618-20625.
[1438] *See* T. 10 December 2013 pp. 20618-20625. Witness Theunens further testified that Mladić had the authority to order investigations within the military justice system, but only used it selectively, focusing on acts which had a negative impact on the combat readiness of the VRS. *See* Trial Judgement, para. 4531, *referring to* T. 6 December 2013 pp. 20388-20392. *See also* T. 6 December 2013 p. 20388.
[1439] T. 10 December 2013 p. 20623.
[1440] *Compare* Mladić Appeal Brief, paras. 636, 637 *with* Mladić Final Trial Brief, paras. 3284-3289.
[1441] *See* Trial Judgement, para. 5091, *referring to* Trial Judgement, para. 4545.
[1442] *See Karadžić* Appeal Judgement, paras. 19, 305, 598 and references cited therein.
[1443] The ultimatums instead relate to activities of Arkan's paramilitary unit in Sanski Most Municipality. *See* Exhibits D1503, P3095. Mladić's submissions regarding Exhibits D1503 and P3095 have been dismissed above in relation to the Overarching JCE. *See supra* Section III.B.1(b)(ii).
[1444] *See* Trial Judgement, para. 4963 (wherein Witness Drinić stated that he attended a meeting on 25 or 26 March 1996 to discuss an order from Karadžić of 23 March 1996 requesting the VRS and MUP to immediately form a mixed expert commission to investigate the alleged discovery of two decomposed bodies in the Pilica area in Zvornik Municipality). *See also* Exhibit P3351, pp. 10879, 10880; Exhibit P3353 (under seal), pp. 3, 6, 8.
[1445] *See* Trial Judgement, paras. 4963, 4968.

411. In light of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber committed an error in evaluating evidence regarding his knowledge of the crimes, his inability to punish crimes, and that he or his subordinates prosecuted or investigated crimes. In addition, recalling the finding that, *inter alia*, Mladić has failed to show an error in the Trial Chamber's findings that he exercised command and control over VRS and MUP forces, which were under VRS command from 11 until 17 July 1995, even during his absence from Srebrenica, the Appeals Chamber, Judge Nyambe dissenting, finds Mladić's claim of Momir Nikolić, the MUP, and other rogue members of the VRS committing revenge killings in Srebrenica without his knowledge to be speculative and unconvincing.[1446] His submissions in this regard are therefore summarily dismissed.

(ii) Alleged Error in Relying on Failure to Investigate and Punish Crimes to Determine Significant Contribution

412. Noting that the Trial Chamber relied on his failure to investigate and prosecute crimes committed in Srebrenica to determine his significant contribution to the Srebrenica JCE, Mladić submits that such omissions are insufficient evidence of his significant contribution.[1447] He argues that, as the ICC Appeals Chamber in *Bemba* confirmed, the measures taken by a commander cannot be faulted merely because of shortfalls in their execution.[1448]

413. The Prosecution responds that Mladić's reliance on the *Bemba* Appeal Judgement, which addressed measures that had been taken to prosecute and investigate crimes, is inapposite to these circumstances where no measures were taken.[1449]

414. The Appeals Chamber recalls that the law does not foresee specific types of conduct which *per se* cannot be considered a contribution to the common purpose of a joint criminal enterprise.[1450] What matters is that the accused performs acts that in some way contribute to the furtherance of the common purpose.[1451] Within these legal confines, the question of whether a failure to act could be taken into account to establish that the accused significantly contributed to a joint criminal

[1446] *See supra* paras. 383, 389.
[1447] Mladić Appeal Brief, paras. 636, 640.
[1448] Mladić Appeal Brief, para. 636, *referring to Bemba* Appeal Judgement, para. 180.
[1449] Prosecution Response Brief, para. 270.
[1450] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 696. In relation to Mladić's reliance on the *Bemba* Appeal Judgement, the Appeals Chamber reiterates that it is not bound by the findings of other courts – domestic, international, or hybrid – and that, even though it may consider such jurisprudence, it may nonetheless come to a different conclusion on a matter than that reached by another judicial body. *See, e.g., Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674. *See also Đorđević* Appeal Judgement, para. 83.

enterprise is a question of fact to be determined on a case-by-case basis.[1452] Furthermore, the Appeals Chamber recalls that failures to act or acts carried out in furtherance of a joint criminal enterprise need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all.[1453]

415. In the present case, as part of the factual determination of Mladić's significant contribution to the Srebrenica JCE, the Trial Chamber considered, together with his other actions,[1454] that: (i) Mladić commanded and controlled VRS and MUP units during the Srebrenica operation and its aftermath;[1455] and (ii) Mladić failed to take adequate steps to investigate crimes and/or punish members of the VRS and other elements of the Serb forces under his effective control who committed such crimes,[1456] despite his duty and ability to do so and his awareness of the crimes.[1457] The Trial Chamber further considered that the above-mentioned acts were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[1458] The Appeals Chamber recalls that a failure to intervene to prevent the recurrence of crimes or to halt abuses has been taken into account in assessing an accused's contribution to a joint criminal enterprise as well as his intent, where the accused had some power, influence, or authority over the perpetrators that was sufficient to prevent or halt the abuses but failed to exercise such power.[1459] Therefore, Mladić fails to show that the Trial Chamber erred in considering his failure to take adequate steps to investigate crimes and/or punish perpetrators in determining whether he significantly contributed to the Srebrenica JCE.

416. In light of the above, the Appeals Chamber, Judge Nyambe dissenting, rejects Mladić's contention that his failure to punish crimes is insufficient evidence of his significant contribution to the Srebrenica JCE.

(f) Conclusion

417. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.B of Mladić's appeal.

[1451] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Popović et al*. Appeal Judgement, para. 1653; *Krajišnik* Appeal Judgement, para. 695. *See also Brđanin* Appeal Judgement, para. 427.
[1452] *Stanišić and Župljanin* Appeal Judgement, para. 110. *See also Šainović et al.* Appeal Judgement, paras. 1233, 1242.
[1453] *Stanišić and Župljanin* Appeal Judgement, para. 110; *Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 427.
[1454] *See* Trial Judgement, paras. 5097, 5098.
[1455] *See* Trial Judgement, para. 5098.
[1456] *See* Trial Judgement, paras. 5097, 5098.
[1457] *See* Trial Judgement, paras. 5091-5093.
[1458] *See* Trial Judgement, para. 5098.

3. Alleged Errors in Reversing the Burden of Proof and Violating *In Dubio Pro Reo* (Ground 5.D)

418. In finding that Mladić shared the intent to achieve the common objective of the Srebrenica JCE, the Trial Chamber rejected Mladić's argument that his personal actions and behaviour did not support his criminal intent.[1460] In this respect, the Trial Chamber found that the only reasonable inference was that Mladić had the specific intent to commit genocide and that he intended to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men.[1461]

419. Mladić submits that the Trial Chamber relied on statements he made at the Hotel Fontana meetings, statements he made to the media, and his knowledge of crimes to establish that he shared a common state of mind with other members of the Srebrenica JCE.[1462] Mladić contends that the Trial Chamber erred in giving insufficient weight to exculpatory evidence, thereby incorrectly finding the requisite *mens rea* beyond a reasonable doubt and violating the principle of *in dubio pro reo*.[1463] In particular, Mladić submits that the Trial Chamber failed to give sufficient weight to: (i) his statements and actions to adhere to international law by evacuating civilians and ensuring the welfare of prisoners of war;[1464] and (ii) the orders he and his subordinates gave in Srebrenica.[1465] According to Mladić, had the Trial Chamber given sufficient weight to this evidence and viewed it in its totality, it would not have concluded beyond a reasonable doubt that he shared the necessary *mens rea* to achieve the common objective of the Srebrenica JCE and the specific intent to kill Bosnian Muslim men and boys.[1466] Mladić therefore requests that the Appeals Chamber reverse his conviction for the crimes committed under the Srebrenica JCE or, alternatively, reverse the findings to the extent of any errors.[1467]

(a) Statements and Affirmative Actions Taken by Mladić to Adhere to International Law

420. Mladić submits that the Trial Chamber erred in relying on statements that he made during the Hotel Fontana meetings on 11 and 12 July 1995 to establish that he shared the criminal intent

[1459] *Stanišić and Župljanin* Appeal Judgement, para. 111, n. 383; *Krajišnik* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, paras. 195, 196.
[1460] Trial Judgement, para. 5131.
[1461] Trial Judgement, para. 5130.
[1462] *See* Mladić Appeal Brief, para. 651, *referring to* Trial Judgement, paras. 5088, 5128, 5085, 5093, 5099-5131.
[1463] Mladić Notice of Appeal, paras. 59, 60. Mladić Appeal Brief, paras. 645, 652, 663.
[1464] *See* Mladić Appeal Brief, paras. 653-658. *See also* T. 25 August 2020 pp. 65-70, 72, 82-84; T. 26 August 2020 pp. 45-48.
[1465] *See* Mladić Appeal Brief, paras. 659-661. *See also* T. 25 August 2020 pp. 71, 72, 82, 83; T. 26 August 2020 pp. 45, 46.
[1466] *See* Mladić Appeal Brief, paras. 662-664.
[1467] Mladić Appeal Brief, para. 665.

for both objectives of the Srebrenica JCE.[1468] In particular, he argues that the Trial Chamber placed insufficient weight on the context in which these statements were made and contends that the language used in these statements was consistent with legitimate military language.[1469] He further submits that the Trial Chamber failed to give sufficient, if any, weight to his subsequent statements and actions, including: (i) his involvement with the UN in coordinating humanitarian evacuations; (ii) his statements that civilians had a choice to leave for Yugoslavia or the Federation or stay in *Republika Srpska*; (iii) his assurances to captured prisoners of war that they would be treated in accordance with the law; and (iv) his cooperation during the Belgrade discussions on 14 and 15 July 1995 with the UN, European Union, and UNPROFOR ("Belgrade Discussions"), which culminated in a signed assurance that the ICRC would be granted access to prisoners of war and that the Geneva Conventions would be adhered to.[1470] Finally, in relation to the Trial Chamber's consideration that he misled the media about the conditions in Srebrenica, Mladić contends that the Trial Chamber failed to give sufficient weight to information that was reported to him, to his reliance on the information available to him at the time, and the fact that he repeated it to the media.[1471]

421. The Prosecution responds that the Trial Chamber reasonably found that Mladić shared the intent to further the common purpose of the Srebrenica JCE.[1472] It contends that Mladić fails to identify any relevant evidence which the Trial Chamber disregarded and that his challenges reflect mere disagreement with the weighing of the evidence, without showing error.[1473] The Prosecution argues that Mladić fails to explain how the Trial Chamber gave insufficient weight to the context of his statements[1474] and submits that: (i) Mladić improperly extrapolates the testimony of two expert witnesses commenting on a certain order to claim that his statements at the second Hotel Fontana meeting were also legitimate;[1475] (ii) Mladić fails to explain how some of his statements could have been interpreted positively,[1476] or as legitimate military language,[1477] or how they were taken out of

[1468] Mladić Appeal Brief, paras. 651, 653, 654.
[1469] Mladić Appeal Brief, paras. 595, 655; T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1470] Mladić Appeal Brief, paras. 655, 656; T. 25 August 2020 pp. 65-70, 72, 82-84; T. 26 August 2020 pp. 47, 48.
[1471] Mladić Appeal Brief, para. 657.
[1472] Prosecution Response Brief, para. 272. *See also* T. 26 August 2020 p. 3.
[1473] *See* Prosecution Response Brief, paras. 272, 277, 278.
[1474] Prosecution Response Brief, para. 273. The Prosecution contends that the statements made by Mladić were correctly assessed by the Trial Chamber in their context, which included the plan to remove the Bosnian Muslim population from Eastern Bosnia and the systematic forcible transfer and murder of the Bosnian Muslim population in Srebrenica by Mladić's forces. *See* Prosecution Response Brief, para. 273, *referring to*, *inter alia*, Trial Judgement, paras. 2358-2362, 5096-5098.
[1475] Prosecution Response Brief, para. 274, *referring to*, *inter alia*, T. 16 September 2013 p. 16831, T. 16 November 2015 pp. 41395, 41396.
[1476] Prosecution Response Brief, para. 274, *referring to*, *inter alia*, Trial Judgement, paras. 2467, 2477, 5130; Exhibit P1147, pp. 41, 42.
[1477] Prosecution Response Brief, para. 274, *referring to*, *inter alia*, Trial Judgement, para. 5106.

context;[1478] and (iii) Mladić's subsequent conduct does not refute the criminal meaning of his statements and, on the contrary, his preferred alternative inference ignores findings clearly showing otherwise.[1479] The Prosecution further submits that Mladić's claim that the Trial Chamber failed to consider the totality of the evidence ignores a multitude of statements and acts it relied on to conclude that he shared the intent for the Srebrenica JCE,[1480] and that his claim that the Trial Chamber gave insufficient weight to his reliance on information available to him when talking to the media reflects mere disagreement with the Trial Chamber's assessment of the evidence.[1481]

422. With respect to Mladić's argument that the language used in his statements at the Hotel Fontana meetings was consistent with "legitimate military language",[1482] the Appeals Chamber recalls that it has already addressed and dismissed this argument.[1483] Furthermore, the Trial Chamber's finding that Mladić shared the intent to achieve the common objective of the Srebrenica JCE is only partly based on his statements calling for revenge on the Bosnian Muslims from Srebrenica,[1484] and, in any event, Mladić does not show that the Trial Chamber erred in assessing these statements.

423. Turning to Mladić's argument that the Trial Chamber failed to give sufficient weight to his speeches and actions after his statements at the Hotel Fontana meetings, the Appeals Chamber recalls that, as a result of the VRS attack on the Srebrenica enclave in July 1995, thousands of Bosnian Muslims fled to Potočari seeking refuge within the UNPROFOR compound before being transferred to Bosnian controlled territory under the auspices of the VRS and the MUP and, for the first convoy only, under the supervision and escort of UNPROFOR.[1485] The Appeals Chamber further notes that the Trial Chamber found that the Bosnian Muslims who left Potočari to go to

[1478] Prosecution Response Brief, para. 274, *referring to*, *inter alia*, Trial Judgement, para. 2476, Mladić Appeal Brief, para. 658, n. 800.
[1479] Prosecution Response Brief, para. 275, *referring to*, *inter alia*, Trial Judgement, paras. 2557, 2559, 2562, 2724-2732, 3159. Similarly, the Prosecution submits that the Trial Chamber found Mladić's statements to captured prisoners of war to be "misleading assurances", and that he also fails to show that his promises that the ICRC would be granted access to prisoners are different from his other misleading assurances. The Prosecution argues that Mladić points to no evidence that the ICRC was ever granted access to register the prisoners in Srebrenica, Bratunac, and Zvornik, which is consistent with Mladić's measures to conceal the ongoing murder and burial of thousands of Bosnian Muslim prisoners. *See* Prosecution Response Brief, para. 276, *referring to*, *inter alia*, Trial Judgement, paras. 5081, 5128, 5130, Exhibit D410, p. 2. *See also* T. 26 August 2020 p. 7 (where the Prosecution discussed Mladić's efforts to conceal the killings from the international community).
[1480] Prosecution Response Brief, para. 277, *referring to*, *inter alia*, Trial Judgement, paras. 2480, 5104, 5105, 5110, 5128, 5130, Exhibit P1147, p. 117, Exhibit P1235.
[1481] Prosecution Response Brief, paras. 272, 278.
[1482] Mladić Appeal Brief, paras. 595, 655, *referring to* Trial Judgement, paras. 5052, 5129, T. 16 September 2013 p. 16831, T. 16 November 2015 p. 41395. *See also* T. 25 August 2020 pp. 72, 74; T. 26 August 2020 pp. 45, 46.
[1483] *See supra* para. 370 (finding that the evidence cited by Mladić did not substantiate his submission that the Trial Chamber failed to sufficiently consider the military context in which his statements at the Hotel Fontana were made and that Mladić fails to identify any error in this respect).
[1484] *See* Trial Judgement, paras. 5106, 5126, 5128.

Bosnian Muslim controlled territory "did not have a genuine choice but to leave".[1486] Against this background, Mladić submits that the Trial Chamber gave insufficient weight to evidence that he and the UN coordinated humanitarian evacuations[1487] and to statements where he made it clear that civilians in Potočari had a choice to stay or leave.[1488] The Appeals Chamber recalls that it has already considered and rejected Mladić's submissions that he was "acting in coordination with high-level DutchBat/UNPROFOR officials to evacuate civilians" for humanitarian reasons and that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations.[1489] The Appeals Chamber has also already determined that Mladić's submission that he gave civilians a choice to stay or leave and that he was acting to evacuate civilians for humanitarian reasons was unconvincing, especially since the Trial Chamber found such statements to be "deliberately misleading".[1490] In this respect, the Appeals Chamber notes that the Trial Chamber considered the evidence to which Mladić points on appeal, in particular his statement in Potočari that everyone who wanted to leave had been evacuated safely.[1491] Specifically, the Trial Chamber considered the evidence of Witness Milovan Milutinović that "Mladić gave the Muslim delegation his word that everyone gathered at Potočari who had surrendered their weapons could cho[o]se whether to go to 'Yugoslavia, the Federation' or to stay in the Bosnian-Serb Republic, and guaranteed them full rights and freedoms".[1492] While the Trial Chamber did not discuss Exhibit P1147 when assessing Mladić's criminal intent, it addressed this evidence elsewhere in the Trial Judgement. In particular, the Trial Chamber considered that while in Potočari, Mladić said that Bosnian Serb authority had been established in Srebrenica and the entire enclave was under the control of the VRS and everyone who wanted to leave had been evacuated safely.[1493] In this respect, the Appeals Chamber recalls that a trial chamber is not required to articulate every step of its reasoning, that a trial judgement must be read as a whole, and that there is a presumption that the trial chamber has evaluated all the relevant evidence as long as there is no indication that it completely disregarded any particular piece of evidence.[1494] Mladić

[1485] Trial Judgement, paras. 2443, 2968, 3159.
[1486] Trial Judgement, para. 3159.
[1487] *See* Mladić Appeal Brief, paras. 595, 655, 658, *referring to* Trial Judgement, para. 2472, Exhibit P1147, pp. 26-42, 47-51, 55, 56; T. 25 August 2020 pp. 65-70; T. 26 August 2020 pp. 47, 48.
[1488] Mladić Appeal Brief, paras. 579, 656. *See also* T. 25 August 2020 pp. 66, 67, 69.
[1489] *See supra* paras. 357, 358 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave no or insufficient weight to evidence that the transfers were necessary for humanitarian reasons).
[1490] *See supra* paras. 357, 358 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave no or insufficient weight to evidence that he evacuated civilians pursuant to UN requests to coordinate humanitarian evacuations).
[1491] Mladić Appeal Brief, para. 579, *referring to* Trial Judgement, para. 2472, Exhibit P1147, p. 55. *See also* T. 25 August 2020 pp. 66, 67.
[1492] *See* Trial Judgement, para. 2472.
[1493] *See* Trial Judgement, para. 5009.
[1494] *See Karadžić* Appeal Judgement, paras. 563, 702, 744 and references cited therein.

ignores the Trial Chamber's extensive review of the evidence in support of its finding that the Bosnian Muslims who left Potočari to go to Bosnian Muslim controlled territory did not have a genuine choice but to leave.[1495] Mladić's argument that the Trial Chamber afforded insufficient weight to evidence that he gave civilians a choice to stay or leave is therefore without merit.

424. In relation to Mladić's contention that the Trial Chamber failed to give sufficient, if any, weight to statements he made to prisoners of war, Mladić refers to evidence of Witnesses RM-292, RM-253, and RM-364, that, while they were being held prisoner, Mladić assured them that they would be exchanged and returned to their families.[1496] While the Trial Chamber did not expressly discuss this particular evidence in the Trial Judgement, it considered and made findings on other evidence that Mladić addressed Bosnian Muslim soldiers and assured them that they would be exchanged.[1497] The Appeals Chamber notes, however, that the Trial Chamber ultimately found such statements to be "misleading assurances".[1498] The Appeals Chamber therefore finds that Mladić's arguments in this respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. In this regard, the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give proper weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1499]

[1495] Trial Judgement, para. 3159 (wherein the Trial Chamber considered: (i) the circumstances of the movement of population from Srebrenica to Potočari, including the orders to leave, the shells fired by the VRS at the UNPROFOR compound, the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, in particular the shots and shells fired around the compound, the dire living conditions, the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women, children, and the elderly onto the buses while some were hit by members of the MUP, and escorted the buses towards Bosnian-Muslim controlled territory).

[1496] T. 13 June 2013 pp. 12659, 12662 (wherein Mladić told prisoners that "[they] do not need to be afraid because they would return to their houses and be exchanged", after which "he was applauded by the prisoners"); T. 11 June 2013 p. 12532 (wherein Mladić told prisoners "[y]ou do not have to worry. You will be exchanged and join your families in Tuzla. Now you'll be transported by trucks to Bratunac or Kravica where you will spend the night and get some food."); Exhibit P1118, p. 3024 (wherein Mladić told prisoners "that [they] would all be exchanged and that they were not criminals."). *See also* T. 25 August 2020 pp. 82, 83.

[1497] Trial Judgement, paras. 5052, 5130.

[1498] In finding Mladić's intent for genocide, the Trial Chamber considered, in part, Mladić's presence at Nova Kasaba football field and Sandići Meadow on 13 July 1995, where several thousand Bosnian Muslim males were detained, and his misleading assurances that they would be taken to Bratunac to be exchanged. The Trial Chamber further considered Mladić's command and control over VRS and MUP units operating in and around Srebrenica from at least 11 July to 11 October 1995, his orders to separate the Bosnian Muslim men from the women, children, and elderly in Potočari from 12 July 1995, his statements and speeches between 11 July and August 1995, in which he articulated that it was time to take revenge, and threatened that the Bosnian Muslims of Srebrenica could either "live or vanish", "survive or disappear", that only the people who could secure the surrender of weapons would save the Bosnian Muslims from "destruction" as well as his presence at a meeting on 13 July 1995 with MUP and VRS officers during which the VRS tasked the MUP with the killing of about 8,000 Bosnian Muslim males near Konjević Polje. Trial Judgement, paras. 5052, 5130.

[1499] *See Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.

425. In support of his argument that the Trial Chamber did not give sufficient weight to evidence demonstrating his cooperation during the Belgrade Discussions, Mladić points to one exhibit about an informal agreement to allow the ICRC access to assess the welfare of prisoners of war and register them in accordance with the Geneva Conventions.[1500] Mladić ignores that the Trial Chamber considered and made findings on similar orders he gave to the VRS and other subordinated forces, in relation to the Overarching JCE, to grant freedom of movement to international humanitarian organizations and to respect the Geneva Conventions.[1501] The Appeals Chamber observes that the Trial Chamber found this evidence inconsistent with Mladić's other conduct and directly contradicted by his other contemporaneous statements.[1502] In particular, the Trial Chamber found, in its assessment of the Overarching JCE, that Mladić's orders to respect the Geneva Conventions were not indicative of his true state of mind.[1503] Recalling that the Trial Judgement must be read as a whole,[1504] the Appeals Chamber therefore finds that Mladić fails to demonstrate how the exhibit he points to on appeal could undermine the Trial Chamber's finding in this respect.

426. Mladić also submits that, in finding that he misled the media about the conditions in Srebrenica, the Trial Chamber failed to give sufficient weight to information that was reported to him, to his reliance on the information available to him at the time, and to the fact that he repeated this information to the media.[1505] Mladić, however, provides no support for any of these contentions, and the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed.[1506] Moreover, the Appeals Chamber notes that the Trial Chamber's findings are based on the totality of the evidence, including on the actions Mladić took to prevent the media and public from knowing what was happening in Srebrenica.[1507] The Appeals Chamber therefore finds, Judge Nyambe dissenting, that Mladić's unsupported arguments in this

[1500] Mladić Appeal Brief, para. 656, *referring to* Exhibit D410. *See also* T. 25 August 2020 p. 84.
[1501] *See* Trial Judgement, para. 4687. *See also, e.g.*, Trial Judgement, paras. 4555, 4556, *referring to* Exhibits D726 (wherein Mladić orders all the brigades, the Skelani Independent Battalion, and the Višegrad Tactical Group to enable the unhindered passage of humanitarian aid and observe in all respects the Geneva Conventions and other provisions of international laws of war), P5219 (wherein Mladić ordered that Commands at all levels were to ensure the delivery of humanitarian aid, and grant freedom of movement to all international humanitarian organizations).
[1502] Trial Judgement, para. 4687. *See also supra* paras. 259, 260.
[1503] Trial Judgement, para. 4687. *See also supra* paras. 259, 260.
[1504] *See, e.g., Karadžić* Appeal Judgement, paras. 563, 702, 744; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al*. Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[1505] Mladić Appeal Brief, para. 657.
[1506] *Karadžić* Appeal Judgement, para. 376; *Krajišnik* Appeal Judgement, para. 27; *Karemera and Ngirumpatse* Appeal Judgement, para. 179.
[1507] *See* Trial Judgement, paras. 5080-5084, 5117, 5128.

respect reflect mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error.

(b) Orders Made by Mladić and His Subordinates

427. Mladić submits that the Trial Chamber erred in its assessment of the Krivaja-95 operation and other related orders, and that it gave insufficient weight to the military context of these orders.[1508] Mladić further submits that the Trial Chamber did not afford sufficient weight to the language of his 13 July 1995 order preventing the media from entering the combat zone in the general sector of Srebrenica and Žepa, which he argues were prohibitions consistent with combat operations, as shown by other orders in other areas.[1509]

428. The Prosecution responds that Mladić repeats arguments made under another subsection regarding the Krivaja-95 operation while showing no error.[1510] The Prosecution further submits that Mladić fails to show any error in the Trial Chamber's finding that his 13 July 1995 order was intended to keep the media and international community from knowing what was happening in Srebrenica.[1511] In this regard, the Prosecution submits that Mladić ignores relevant evidence,[1512] and that, contrary to his claim, the language in other orders does not make the Trial Chamber's assessment of the 13 July 1995 order unreasonable.[1513]

429. The Appeals Chamber recalls that it has already rejected Mladić's argument that his orders were consistent with legitimate military operations in light of the military context of Srebrenica and found that they cannot serve to demonstrate any error in the Trial Chamber's conclusion that Mladić significantly contributed to achieving the common objective.[1514] The Appeals Chamber therefore finds no merit in Mladić's contention that the Trial Chamber failed to give sufficient

[1508] Mladić Notice of Appeal, para. 59; Mladić Appeal Brief, para. 659. *See also* T. 25 August 2020 pp. 71, 72, 82-84; T. 26 August 2020 pp. 45, 46.
[1509] Mladić Appeal Brief, paras. 660, 661. *See also* T. 26 August 2020 p. 45.
[1510] Prosecution Response Brief, para. 279. According to the Prosecution, while the Krivaja-95 operation had legitimate purposes, it also had a criminal objective, namely to create conditions for the elimination of the enclaves by targeting the civilian population, and legitimate military objectives do not negate criminal ones. *See* Prosecution Response Brief, para. 279; T. 26 August 2020 pp. 9, 10.
[1511] Prosecution Response Brief, para. 280. *See also* T. 26 August 2020 pp. 6, 17, 18, 22.
[1512] Prosecution Response Brief, para. 280. Specifically, the Prosecution argues that Mladić ignores that: (i) journalists from the VRS Main Staff were allowed entry; (ii) the take-over of Srebrenica and the removal of the Bosnian Muslims was complete before Mladić issued the 13 July 1995 order; (iii) he had previously proposed misleading the international public about the truth; and (iv) on 13 July 1995, hundreds of Bosnian Muslim men had been executed with thousands more in VRS custody awaiting transfer to Zvornik for execution. *See* Prosecution Response Brief, para. 280, *referring to* Trial Judgement, para. 5080.
[1513] Prosecution Response Brief, para. 280.
[1514] *See supra* paras. 393, 395 (wherein the Appeals Chamber rejects Mladić's argument that the Trial Chamber gave insufficient weight to evidence that Krivaja-95 was a legitimate military operation).

weight to the military context of his orders in Srebrenica when finding his *mens rea* for the Srebrenica JCE.

430. Turning to the 13 July 1995 order, the Trial Chamber found that Mladić gave this order, which called for the prevention of the entry of local and foreign journalists into the zones of combat operations in Srebrenica and Žepa, as well as a ban on giving any information to the media about operations in Srebrenica, particularly on prisoners of war, evacuated civilians, and escapees.[1515] The Trial Chamber further found that Mladić's aim was to keep the media and international community from knowing what was happening in Srebrenica.[1516] The Appeals Chamber recalls that it previously found no merit in Mladić's argument that the Trial Chamber did not properly consider the language and context of the 13 July 1995 order.[1517] Furthermore, the Appeals Chamber notes that while Mladić attempts to show that this order was aimed at prohibiting access to Srebrenica for the media's own protection and to prevent the spreading of rumours,[1518] he ignores that the Trial Chamber's finding is based on a number of other findings regarding Mladić's position,[1519] his presence on the ground in Potočari and involvement in the Hotel Fontana meetings,[1520] his proposal to mislead the international public about the truth at the 16th Assembly Session,[1521] and the reburials of the Bosnian Muslim men and boys murdered in Srebrenica.[1522] The Appeals Chamber finds, Judge Nyambe dissenting, that Mladić therefore fails to demonstrate that the Trial Chamber gave insufficient weight to his arguments regarding the Krivaja-95 operation and other orders as well as to the language of his 13 July 1995 order.

(c) Conclusion

431. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.D of Mladić's appeal.

[1515] Trial Judgement, para. 5081.
[1516] Trial Judgement, para. 5081.
[1517] *See supra* para. 396 (wherein the Appeals Chamber rejects Mladić's argument that, in finding that his order of 13 July 1995 was intended to mislead the media and the international community about the events in Srebrenica, the Trial Chamber did not properly consider the language of the order and the context in which it was given, while placing insufficient weight on similar orders aimed at preventing classified military information from being leaked).
[1518] Mladić Appeal Brief, para. 660, *referring to* T. 27 November 2014 pp. 29013, 29014 (private session).
[1519] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 3.1.3.
[1520] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapters 7.1.3-7.1.5.
[1521] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 9.4.3.
[1522] Trial Judgement, para. 5080, *referring to* Trial Judgement, Chapter 7.18.

4. Alleged Errors in Failing to Provide a Reasoned Opinion or Evaluate the Military Status of Victims (Genocide and Extermination in Srebrenica) (Ground 5.E)

432. The Trial Chamber found that in relation to scheduled and unscheduled incidents concerning Srebrenica, the victims of the killings were either civilians or "at least detained at the time of killing" and thus *hors de combat*, and concluded that "in all Srebrenica incidents, the victims were not actively participating in the hostilities at the time of the killings".[1523] With respect to the number of victims and the overall situation in the Srebrenica enclave, the Trial Chamber took judicial notice of Adjudicated Fact 1476 stating that between 7,000 and 8,000 Bosnian Muslim men were systematically murdered.[1524]

433. Mladić submits that the Trial Chamber failed to provide a reasoned opinion on the use of Adjudicated Fact 1476 in its findings and to consider the potential military status of the victims and/or the extent of combat casualties.[1525] He argues that "as a consequence of the error, [he] is unable to determine the extent to which the Trial Chamber relied upon the adjudicated fact and the impact this may have had [on] his conviction".[1526] Mladić specifically argues that the Trial Chamber failed to give a reasoned opinion that, based on Adjudicated Fact 1476, "*all* of the 7,000-8,000 victims of the killings in Srebrenica were not actively taking part in the hostilities".[1527] He contends that the Trial Chamber did not consider whether the men killed in Srebrenica were civilians or combatants and that this omission impacts the basis for its findings and his convictions.[1528] Mladić further submits that, at a minimum, the Trial Chamber erroneously considered Adjudicated Fact 1476 as evidence of his intent to further the Srebrenica JCE.[1529] In addition, Mladić submits that the Trial Chamber erred in applying a heightened standard to his disproving Adjudicated Fact 1476.[1530] According to Mladić, the Trial Chamber failed to consider any of the evidence he presented to rebut this fact,[1531] and this evidence was sufficient to rebut

[1523] *See* Trial Judgement, paras. 3051 (Schedule E and other incidents), 3062, 3115, 3546.
[1524] Trial Judgement, paras. 3007, 3042.
[1525] *See* Mladić Notice of Appeal, p. 23, para. 61; Mladić Appeal Brief, paras. 666, 669-677; Mladić Reply Brief, paras. 33-37, 99; T. 25 August 2020 pp. 84, 85; T. 26 August 2020 p. 64.
[1526] Mladić Appeal Brief, para. 676.
[1527] Mladić Reply Brief, para. 33; T. 25 August 2020 p. 85. *See also* Mladić Appeal Brief, paras. 670, 671. According to Mladić, the Trial Chamber's finding in this regard "effectively removed the possibility of any legitimate combat casualties". *See* Mladić Appeal Brief, para. 669.
[1528] Mladić Appeal Brief, para. 672; T. 25 August 2020 pp. 84, 85.
[1529] Mladić Appeal Brief, para. 676.
[1530] Mladić Appeal Brief, paras. 673, 674.
[1531] Mladić Appeal Brief, para. 674; T. 25 August 2020 p. 85. In this regard, Mladić points to: (i) evidence that bodies in the mass graves were killed at other times in combat; (ii) combat casualties from "kamikaze" attacks and combat in Zvornik; (iii) alternative explanations for deaths in the column other than VRS criminal activity; and (iv) forensic expert evidence relating to the alleged blindfolds on bodies potentially being bandannas worn by combatants. *See* Mladić Appeal Brief, para. 674, nn. 825-829, *referring to* Trial Judgement, paras. 3007, 5309, Mladić Final Trial Brief,

Adjudicated Fact 1476 on the military status of the victims.[1532] Accordingly, Mladić requests the Appeals Chamber to articulate the basis of his liability and, to the extent of any error, review the sentence imposed on him.[1533]

434. The Prosecution responds that the Trial Chamber did not rely on Adjudicated Fact 1476 to determine the circumstances of the victims' deaths, nor did it find that all victims were civilians, and submits that Mladić's attempt to appeal a non-existent finding should be summarily dismissed.[1534] The Prosecution further responds that the Trial Chamber: (i) gave a reasoned opinion regarding the status of victims through an incident-by-incident analysis, which Mladić has ignored in his submissions;[1535] (ii) clearly articulated the basis of his liability;[1536] and (iii) applied the correct legal standard to rebuttal evidence and considered the evidence that Mladić has relied on to rebut Adjudicated Fact 1476.[1537]

435. Mladić replies, *inter alia*, that the Appeals Chamber should reject the Prosecution's contention that the Trial Chamber limited its analysis of his responsibility to the victims established on the basis of the Prosecution's evidence.[1538] According to Mladić, contrary to the Prosecution's submission, the Trial Chamber relied on the number of victims contained in Adjudicated Fact 1476 to determine, among others, his intent to achieve the common purpose of the Srebrenica JCE, his specific intent to commit genocide, his significant contribution to the Srebrenica JCE, and his sentence.[1539] He further replies that the Prosecution does not engage with his argument regarding

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paras. 2689-2698, 2707, 2708, 2738-2751, T. 23 July 2014 pp. 24601, 24602, T. 31 May 2013 pp. 11896-11899 (closed session). *See also* T. 25 August 2020 p. 85.

[1532] Mladić Appeal Brief, para. 675; Mladić Reply Brief, para. 34. *See also* T. 25 August 2020 p. 85.

[1533] Mladić Appeal Brief, para. 677.

[1534] Prosecution Response Brief, para. 281; T. 26 August 2020 pp. 20, 21.

[1535] Prosecution Response Brief, paras. 282, 283; T. 26 August 2020 pp. 21, 38.

[1536] Prosecution Response Brief, paras. 285, 286. In the Prosecution's view, Mladić's claim that he is unable to determine the extent to which the Trial Chamber relied on Adjudicated Fact 1476 ignores the clear articulation in the Trial Judgement of the basis of his liability. *See* Prosecution Response Brief, para. 285. The Prosecution argues that the conclusions on Mladić's intent, significant contribution to the Srebrenica JCE, and sentence are all based on factual and legal findings in Chapters 7 and 8 of the Trial Judgement, in which the Trial Chamber listed the numbers of victims per incident. *See* Prosecution Response Brief, para. 286. The Prosecution adds that the Trial Chamber did not rely on Adjudicated Fact 1476 to find Mladić's criminal responsibility for killings in Srebrenica or in determining his sentence. *See* T. 26 August 2020 pp. 38, 39.

[1537] Prosecution Response Brief, para. 284. The Prosecution argues that the Trial Chamber considered evidence that some victims who died in Srebrenica were not victims of executions, and that where the manner of death or the victims' status was unclear, it did not count them in the total number of victims of killings. Additionally, the Prosecution contends that the Trial Chamber considered and rejected the alternative explanation that blindfolds on victims could have been bandannas worn by fighters. *See* Prosecution Response Brief, para. 283. The Prosecution reiterates that the Trial Chamber relied on Adjudicated Fact 1476 for a general finding and did not rely on this fact to determine the number and status of victims for whose killing Mladić was ultimately found responsible. *See* Prosecution Response Brief, para. 284.

[1538] Mladić Reply Brief, para. 37. *See also* T. 26 August 2020 p. 64.

[1539] Mladić Reply Brief, paras. 35, 36, nn. 62, 65, 67, *referring to* Trial Judgement, paras. 3007, 5191, Chapter 9.7. *See also* T. 26 August 2020 p. 64.

the Trial Chamber's failure to provide a reasoned opinion on the status of the victims, and that Adjudicated Fact 1476 should have been rebutted.[1540]

436. The Appeals Chamber will address in turn whether the Trial Chamber erred in: (i) failing to provide a reasoned opinion on the military status of the victims; (ii) articulating the basis of Mladić's liability, namely its alleged use of Adjudicated Fact 1476 to determine his *mens rea* and significant contribution to the Srebrenica JCE as well as his sentence; and (iii) failing to consider evidence presented by Mladić to rebut Adjudicated Fact 1476.

(a) Alleged Error in Failing to Provide a Reasoned Opinion on the Military Status of the Victims

437. The Appeals Chamber recalls that trial chambers are required to provide a reasoned opinion pursuant to Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.[1541] A reasoned opinion in the trial judgement is essential to ensuring that adjudications are fair; it, *inter alia*, allows for a meaningful exercise of the right of appeal by the parties, and enables the Appeals Chamber to understand and review the findings.[1542] Accordingly, a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused.[1543] In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1544]

438. The Appeals Chamber further recalls that in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and explain why this omission invalidates the decision.[1545] The Appeals Chamber understands that, at the core, Mladić submits that the Trial Chamber failed to provide a reasoned opinion that, based on Adjudicated Fact 1476, all of the 7,000 to 8,000 victims of the killings in Srebrenica were not actively taking part in hostilities.[1546]

439. The Appeals Chamber notes that the Trial Chamber took judicial notice of Adjudicated Fact 1476 stating that "between 7,000 and 8,000 Bosnian-Muslim men were systematically

[1540] Mladić Reply Brief, paras. 33, 34. *See also* T. 26 August 2020 p. 64.
[1541] *Karadžić* Appeal Judgement, para. 700; *Prlić et al*. Appeal Judgement, paras. 187, 990, 1778, 3099; *Stanišić and Župljanin* Appeal Judgement, para. 137. *See also Nyiramasuhuko et al*. Appeal Judgement, paras. 729, 1954; *Bizimungu* Appeal Judgement, para. 18.
[1542] *Prlić et al*. Appeal Judgement, para. 3099; *Bizimungu* Appeal Judgement, para. 18; *Hadžihasanović and Kubura* Appeal Judgement, para. 13.
[1543] *Karadžić* Appeal Judgement, para. 700; *Prlić et al*. Appeal Judgement, para. 3099, n. 423; *Bizimungu* Appeal Judgement, para. 18.
[1544] *Karadžić* Appeal Judgement, para. 700; *Ndindiliyimana et al*. Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320. *See also Prlić et al*. Appeal Judgement, para. 1778.
[1545] *Karadžić* Appeal Judgement, para. 702; *Šešelj* Appeal Judgement, para. 49; *Prlić et al*. Appeal Judgement, para. 19; *Ngirabatware* Appeal Judgement, para. 8.

murdered".[1547] On the one hand, the Trial Chamber explicitly referenced this adjudicated fact in sections of the Trial Judgement regarding burial operations and the *chapeau* elements of crimes against humanity, where it considered the number of victims and the overall situation in Srebrenica.[1548] On the other hand, the Trial Chamber found that "at least 3,720 Bosnian-Muslim males were killed" in relation to incidents in Srebrenica.[1549] The Appeals Chamber observes that this finding is based on an incident-by-incident analysis in Chapters 7 and 8.3.2 of the Trial Judgement regarding "Schedule E and other incidents",[1550] rather than on Adjudicated Fact 1476.

440. Having reviewed the relevant portions of the Trial Judgement, the Appeals Chamber finds Mladić's submission – "that the Trial Chamber failed to give a reasoned opinion that, based on [Adjudicated Fact] 1476, *all* of the 7,000-8,000 victims of the killings in Srebrenica were not actively taking part in hostilities"[1551] – to be based on a misinterpretation of the Trial Judgement. The Trial Chamber's finding that "all of the victims of the killings in Srebrenica were not actively participating in the hostilities at the time of the killings" is explicitly qualified by its findings in Chapter 8.3.2 of the Trial Judgement.[1552] Chapter 8.3.2, as elaborated below, sets out an incident-by-incident account of the killings in Srebrenica.[1553] Recalling that the Trial Judgement must be read as a whole,[1554] the Appeals Chamber considers that the Trial Chamber's statement about "all of the victims of the killings in Srebrenica" was a reference to those identified in the specific scheduled and unscheduled incidents.[1555] Contrary to Mladić's submission, there is no indication that the Trial Chamber made a finding, on the basis of Adjudicated Fact 1476, that *all* of the 7,000 to 8,000 victims of the killings in Srebrenica were not actively taking part in hostilities. Accordingly, Mladić's submission in this respect is dismissed.

441. The Appeals Chamber also finds no merit in Mladić's contention that the Trial Chamber failed to evaluate the military status of the victims in Srebrenica.[1556] The Appeals Chamber notes that the Trial Chamber conducted a detailed incident-by-incident analysis in Chapters 7 and 8.3.2 of

[1546] *See* Mladić Appeal Brief, paras. 666, 669-672; Mladić Reply Brief, para. 33. *See also* T. 25 August 2020 pp. 84, 85.
[1547] Trial Judgement, paras. 3007, 3042; Second Decision on Adjudicated Facts, para. 36. *See also* Prosecution Motion on Adjudicated Facts, Annex B, RP. 31130.
[1548] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.
[1549] *See* Trial Judgement, para. 5129.
[1550] *See* Trial Judgement, paras. 2662-2935, 3051, pp. 1608-1610.
[1551] *See* Mladić Reply Brief, para. 33. *See also* Mladić Appeal Brief, paras. 669-672; T. 25 August 2020 pp. 84, 85.
[1552] Trial Judgement, paras. 3115, 3546.
[1553] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1554] *See, e.g., Karadžić* Appeal Judgement, paras. 563, 702, 744; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al.* Appeal Judgement, paras. 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.
[1555] Trial Judgement, paras. 3051, 3062, 3115, 3546.
[1556] *See* Mladić Appeal Brief, para. 672.

the Trial Judgement and evaluated the status of the victims for each incident.[1557] Contrary to Mladić's assertion that the Trial Chamber found that "*all* of the victims were civilians",[1558] the Trial Chamber rather concluded that "a number of the victims were civilians".[1559] The Trial Chamber further specified that: "For many incidents, […] it remained unclear whether the victims were civilians or combatants. However, those people were at least detained at the time of killing, thus *hors de combat*".[1560] Based on these considerations, the Trial Chamber found that the victims were not actively participating in the hostilities at the time of the killings.[1561] Such a detailed and comprehensive assessment of the status of the victims in the Srebrenica incidents satisfies, in the Appeals Chamber's view, the Trial Chamber's obligation to provide a reasoned opinion.

[1557] Trial Judgement, paras. 2662-2935, 3051, 3062. Of the incidents that supported Mladić's liability in relation to the Srebrenica JCE, the Trial Chamber found that, between 12 and 23 July 1995, the following people, almost all of whom were Bosnian Muslim men, were killed: (a) 15 male detainees, including a 14-year-old boy and one man wearing civilian clothing (Scheduled Incident E.1.1) (*see* Trial Judgement, paras. 2676, 3051); (b) approximately 150 non-Serb males, including minors, 147 of whom were wearing civilian clothes (Scheduled Incident E.2.1) (*see* Trial Judgement, paras. 2682, 2684, 3051); (c) approximately 1,000 male detainees (Scheduled Incident E.3.1) (*see* Trial Judgement, paras. 2707, 3051); (d) 10 to 15 unarmed men, who had surrendered, and one wounded man (Scheduled Incident E.4.1) (*see* Trial Judgement, paras. 2723, 3051); (e) approximately 21 male detainees dressed in civilian clothes (Scheduled Incident E.5.1) (*see* Trial Judgement, paras. 2732, 3051); (f) two male detainees (Scheduled Incident E.6.1) (*see* Trial Judgement, paras. 2759, 3051); (g) at least 819 male detainees, many of whom were dressed in civilian clothing (Scheduled Incident Scheduled Incident E.6.2) (*see* Trial Judgement, paras. 2766, 3051); (h) about 20 male detainees (Scheduled Incident E.7.1) (*see* Trial Judgement, paras. 2776, 3051); (i) about 401 male detainees, including minors (Scheduled Incident E.7.2) (*see* Trial Judgement, paras. 2791, 3051); (j) at least 12 male detainees (Scheduled Incident E.8.1) (*see* Trial Judgement, paras. 2820, 3051); (k) at least 575 male detainees (Scheduled Incident E.8.2) (*see* Trial Judgement, paras. 2825, 3051); (l) at least eight men who wore civilian clothing (Scheduled Incident E.9.1) (*see* Trial Judgement, paras. 2859, 3051); (m) between 1,000 and 1,200 male detainees (Scheduled Incident E.9.2) (*see* Trial Judgement, paras. 2861, 3051); (n) approximately 500 men and two women, some of whom were wearing civilian clothes (Scheduled Incident E.10.1) (*see* Trial Judgement, paras. 2862, 3051); (o) 39 detained men and boys (Scheduled Incident E.12.1) (*see* Trial Judgement, paras. 2864-2876, 3051); (q) nine men who were wearing civilian clothes (Scheduled Incident E.14.1) (*see* Trial Judgement, paras. 2886, 3051); (r) an unarmed man wearing civilian clothing (Scheduled Incident E.14.2) (*see* Trial Judgement, paras. 2894, 3051); (s) more than 50 male detainees (Scheduled Incident E.15.1) (*see* Trial Judgement, paras. 2917, 3051); (t) an unarmed man (Scheduled Incident E.15.3) (*see* Trial Judgement, paras. 2920, 2921, 3051); (u) 15 detainees (unscheduled) (*see* Trial Judgement, paras. 2924, 3051); (v) four captured people, including a 15-year-old boy (unscheduled) (*see* Trial Judgement, paras. 2926, 3051); and (w) ten injured detainees (unscheduled) (*see* Trial Judgement, paras. 2935, 3051). The Trial Chamber, in Chapters 7 and 8.3.2 of the Trial Judgement, also found that, between mid-July and mid-August 1995, members of the Skorpions Unit killed six Bosnian Muslim men and boys from Srebrenica near the town of Trnovo (Scheduled Incident E.13.1 listed under letter "(p)"). *See* Trial Judgement, paras. 2882, 3051. The Trial Chamber found, however, that this scheduled incident was not part of Mladić's ultimate responsibility as the perpetrators were not considered members of the Srebrenica JCE, or subordinated to the VRS, or otherwise used as tools of members of this joint criminal enterprise. *See* Trial Judgement, para. 4989.

[1558] Mladić Appeal Brief, para. 672. *See also* T. 25 August 2020 p. 85.

[1559] Trial Judgement, para. 3062.

[1560] Trial Judgement, para. 3062, *referring to* Scheduled Incidents E.1.1, E.2.1, E.4.1, E.6.1, E.6.2, E.7.1, E.7.2, E.8.1, E.8.2, E.9.2, E.10.1, E.12.1, E.13.1, E.15.1. While the *chapeau* elements of crimes against humanity require the attack to be committed against a civilian population, it is well-established jurisprudence that victims of the underlying acts of crimes against humanity need not be civilians and can be individuals *hors de combat*. *See Tolimir* Appeal Judgement, paras. 141, 142; *Popović et al*. Appeal Judgement, para. 569; *Mrkšić and Šljivančanin* Appeal Judgement, para. 29; *Martić* Appeal Judgement, para. 307. Incidents of murder were considered by the Trial Chamber to fall under crimes against humanity as well as violations of the laws or customs of war pursuant to Counts 5 and 6 of the Indictment. *See* Trial Judgement, para. 3065; Indictment, para. 66.

[1561] Trial Judgement, para. 3062. *See also* Trial Judgement, paras. 3051, 3115, 3546.

442. The Appeals Chamber, Judge Nyambe dissenting, accordingly rejects Mladić's claim that the Trial Chamber failed to provide a reasoned opinion on the military status of the victims or that it erred in this respect in relation to Adjudicated Fact 1476.

(b) Alleged Error in the Use of Adjudicated Fact 1476 and in Articulating Mladić's Liability

443. The Appeals Chamber now turns to Mladić's allegation that the Trial Chamber erroneously relied on "the number of victims contained in [Adjudicated Fact] 1476" to make findings on his *mens rea* and significant contribution to the Srebrenica JCE as well as to determine his sentence.[1562] As noted above, the Trial Chamber referred to Adjudicated Fact 1476 only with respect to the burial operations and the *chapeau* elements of crimes against humanity in Srebrenica.[1563] This adjudicated fact is thus pertinent in this case to the overall situation in Srebrenica and not to Mladić's acts, conduct, and mental state. This is further supported by the fact that, as previously elaborated, the Trial Chamber did not rely on Adjudicated Fact 1476 to determine the number of killings for which Mladić was ultimately found responsible in relation to the Srebrenica JCE.[1564] Rather, that determination was based on a detailed incident-by-incident analysis of Schedule E incidents and unscheduled events in Chapters 7 and 8.3.2 of the Trial Judgement.[1565]

444. Regarding his intent to participate in the Srebrenica JCE and his genocidal intent, Mladić points to the Trial Chamber's consideration of his presence at a meeting on 13 July 1995 with the VRS and the MUP during which the task of killing 8,000 Muslim males was discussed.[1566] In the Appeals Chamber's view, Mladić has conflated Adjudicated Fact 1476 with Exhibit P2118, which states that he was present at a meeting that discussed the "[k]illing of about 8,000 Muslim soldiers whom [they] blocked in the woods near Konjević Polje […] [t]his job is being done solely by MUP units".[1567] There is no indication that Exhibit P2118 or the Trial Chamber's findings regarding his *mens rea* to participate in the Srebrenica JCE or to commit genocide were in any way based on Adjudicated Fact 1476. Having reviewed the Trial Chamber's analysis on Mladić's significant

[1562] Mladić Appeal Brief, para. 676; Mladić Reply Brief, paras. 35, 36.
[1563] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.
[1564] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1565] *See* Trial Judgement, paras. 2662-2935, 3051, pp. 1608-1610. Additionally, the Trial Chamber relied upon extensive evidence to make findings on Mladić's *mens rea* and significant contribution to the Srebrenica JCE. *See*, *e.g.*, Trial Judgement, paras. 4990-5131.
[1566] Mladić Reply Brief, para. 35, nn. 63, 64, *referring to* Trial Judgement, paras. 5128, 5130 (*referring to*, *inter alia*, Exhibit P2118).
[1567] *See* Exhibit P2118, para. 2; Trial Judgement, paras. 5063, 5128, nn. 17623, 17706.

contribution to the Srebrenica JCE,[1568] the Appeals Chamber finds that the same holds true – there is no indication that the Trial Chamber relied on Adjudicated Fact 1476 in this respect.

445. In relation to his sentence, Mladić argues that "the Trial Chamber relied on its findings in Chapters 7 and 8 where it established that 7,000-8,000 Bosnian-Muslim men were systematically murdered on the basis of [Adjudicated Fact] 1476".[1569] The Appeals Chamber observes that, when assessing the gravity of Mladić's offences, the Trial Chamber referred to its findings on the crimes in Chapters 7 and 8 as well as his significant contribution to the Srebrenica JCE in Chapter 9.7.[1570] As addressed above, there is no indication in the Trial Judgement that the Trial Chamber relied on Adjudicated Fact 1476 to determine his liability in those sections of the Trial Judgement.[1571] Thus, Mladić does not demonstrate that the Trial Chamber determined his sentence for crimes committed in Srebrenica on the basis of Adjudicated Fact 1476.

446. Based on the foregoing, the Appeals Chamber rejects, Judge Nyambe dissenting, Mladić's submissions that the Trial Chamber erred in using Adjudicated Fact 1476 as a basis for determining his liability or sentence with respect to the Srebrenica JCE.

(c) Alleged Error in Failing to Consider Rebuttal Evidence

447. With respect to Mladić's submissions regarding rebuttal evidence, the Appeals Chamber recalls that it has already rejected his blanket submission that the Trial Chamber erred by applying a heightened standard on the burden to rebut adjudicated facts.[1572] Mladić's bare statement to this effect in this part of the appeal[1573] is also rejected.

448. With respect to the alleged error in failing to consider evidence presented by Mladić to rebut Adjudicated Fact 1476, the Appeals Chambers recalls that the Trial Chamber only referenced this fact in sections of the Trial Judgement regarding burial operations and the *chapeau* elements of crimes against humanity, where it considered the number of victims and the overall situation in Srebrenica.[1574] Moreover, as already discussed, Mladić's responsibility for crimes committed in Srebrenica was based on a detailed incident-by-incident analysis of killings in Chapter 8.3.2 of the

[1568] *See* Trial Judgement, paras. 4990-5098. In assessing Mladić's significant contribution, the Trial Chamber similarly referred to Exhibit P2118. *See* Trial Judgement, para. 5068.
[1569] Mladić Reply Brief, para. 36.
[1570] Trial Judgement, para. 5191.
[1571] *See supra* paras. 443, 444.
[1572] *See supra* Section III.A.2(a)(ii).
[1573] *See* Mladić Appeal Brief, para. 673. *See also* T. 25 August 2020 p. 85.
[1574] Trial Judgement, paras. 3007, 3042. *See also* Trial Judgement, para. 3032.

Trial Judgement[1575] as well as extensive evidence of his participation in the Srebrenica JCE,[1576] rather than on Adjudicated Fact 1476. Given that the Trial Chamber did not use Adjudicated Fact 1476 to determine Mladić's acts, conduct, and mental state, and thus his liability for the Srebrenica JCE, the Appeals Chamber considers that any error on the Trial Chamber's part regarding the assessment of rebuttal evidence would have little, if any, impact on its findings in the Trial Judgement. The Appeals Chamber recalls that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not be considered on the merits.[1577] As such, the Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Mladić's argument that the Trial Chamber failed to address evidence rebutting Adjudicated Fact 1476.

(d) Conclusion

449. Based on the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.E of Mladić's appeal.

5. Alleged Error in Relying on Certain Evidence without Corroboration (Ground 5.I)

450. Mladić submits that, in reaching its findings in support of his Srebrenica JCE convictions under Counts 2 to 8 of the Indictment, the Trial Chamber erred by giving undue weight to "decisive hearsay" and adjudicated facts.[1578] In particular, he argues that the Trial Chamber erred by relying on: (i) uncorroborated hearsay to make findings linked to his significant contribution and intent;[1579] and (ii) adjudicated facts to prove the elemental requirements of the crime base.[1580] Mladić therefore requests that the Appeals Chamber reverse, to the extent of any error, the findings and the basis of his Srebrenica JCE convictions.[1581] The Appeals Chamber will address these contentions in turn.

[1575] *See* Trial Judgement, para. 3051, pp. 1608-1610.
[1576] *See* Trial Judgement, paras. 4990-5131.
[1577] *Karadžić* Appeal Judgement, para. 19; *Šešelj* Appeal Judgement, para. 17; *Ngirabatware* Appeal Judgement, para. 11.
[1578] *See* Mladić Appeal Brief, paras. 681, 694.
[1579] *See* Mladić Appeal Brief, paras. 684, 686-690.
[1580] *See* Mladić Appeal Brief, paras. 685, 691-693.
[1581] Mladić Appeal Brief, para. 694.

(a) Alleged Error in Relying on Uncorroborated Hearsay

451. The Trial Chamber admitted into evidence excerpts of Witness Deronjić's testimony in the *Blagojević and Jokić* case pursuant to Rule 92 *quater* of the ICTY Rules,[1582] excerpts of the testimony of Witness Drinić in the *Blagojević and Jokić* case,[1583] as well as excerpts of Witness Mevludin Orić's testimony in the *Popović et al*. case pursuant to Rule 92 *bis* of the ICTY Rules.[1584] Mladić submits that the Trial Chamber erred in law by relying on this untested evidence to make findings related to his significant contribution to and intent for the Srebrenica JCE.[1585] According to Mladić, without the Trial Chamber's erroneous reliance on this evidence, it would not have established the elements of Scheduled Incident E.15, nor the essential elements of the existence of the Srebrenica JCE and his participation in them.[1586]

452. The Prosecution responds that Mladić fails to show that the Trial Chamber erred by giving "undue weight to" or "relying on" three witnesses whom he did not cross-examine.[1587] In the Prosecution's view, the Trial Chamber properly relied on the evidence of Witnesses Deronjić, Drinić, and Orić.[1588] The Prosecution argues that Mladić's convictions under Counts 2 to 8 of the Indictment in relation to the Srebrenica JCE rest on numerous sources of evidence and findings set out over two volumes of the Trial Judgement and that his assertion that any of his convictions are based solely or in a decisive manner on "untested" evidence is incorrect.[1589]

453. The Appeals Chamber recalls that under Article 21(4)(e) of the ICTY Statute an accused has the right to examine, or have examined, the witnesses against him. In relation to the challenges to a trial chamber's reliance on evidence admitted pursuant to Rules 92 *bis* and 92 *quater* of the ICTY Rules when the defendant did not have an opportunity to cross-examine the witness, the Appeals Chamber has adopted the following statement of the law:

[1582] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Admit the Evidence of Ljubomir Bojanović and Miroslav Deronjić Pursuant to Rule 92 *quater*, 13 January 2014 ("Decision of 13 January 2014"), para. 13. *See also* Exhibit P3567.
[1583] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 20 December 2013 ("Decision of 20 December 2013"), para. 19. *See also Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica (Various), 3 April 2013 (confidential) ("Motion of 3 April 2013"). *See also* Exhibit P3351.
[1584] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Prosecution Motion to Admit Evidence of Mevludin Orić Pursuant to Rule 92 *bis*, 8 July 2013 ("Decision of 8 July 2013"), para. 10. *See* Exhibit P1757.
[1585] Mladić Appeal Brief, paras. 684, 690. *See also* Mladić Appeal Brief, paras. 686-688.
[1586] Mladić Appeal Brief, para. 690. While Mladić points to Scheduled Incident E.15 in his appellant's brief, the Appeals Chamber notes that, in support of his argument, he refers to paragraph 2921 of the Trial Judgement, which is only pertinent to Scheduled Incident E.15.3. *See* Mladić Appeal Brief, para. 688, n. 835.
[1587] Prosecution Response Brief, para. 287.
[1588] Prosecution Response Brief, paras. 288-293.
[1589] Prosecution Response Brief, para. 287, *referring to* Trial Judgement, Chapters 7, 8, 9.6, 9.7.

> [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. This principle applies "to any fact which is indispensable for a conviction", meaning "the findings that a trier of fact has to reach beyond reasonable doubt". It is considered to "run counter to the principles of fairness […] to allow a conviction based on evidence of this kind without sufficient corroboration".[1590]

(i) Witness Deronjić's Rule 92 *quater* Evidence

454. In finding the existence of the Srebrenica JCE and Mladić's significant contribution to it, the Trial Chamber considered an excerpt of Witness Deronjić's testimony admitted pursuant to Rule 92 *quater* of the ICTY Rules,[1591] in which he stated that Beara told him that he was about to kill all detainees in Bratunac and that he would do so based on "orders from the top".[1592] Further, with regard to the alleged concealment of crimes during the transportation of Bosnian Muslim civilians out of Potočari, the Trial Chamber, relying on the evidence of Witnesses RM-294 and Deronjić, found that a declaration signed by the DutchBat Deputy Commander Major Robert Franken, Deronjić, and Nesib Mandžić on 17 July 1995 did not reflect the reality with regard to options the population would have had, as no one was given a choice to remain or be evacuated.[1593]

455. Mladić submits that the Trial Chamber erroneously relied on Witness Deronjić's sole evidence linking Mladić's subordinate, Beara, to the statement that the orders to kill "came from the top", as evidence of Mladić's guilt.[1594] In his submission, the Trial Chamber also erred by considering that a declaration, signed by Witness Deronjić regarding the evacuations, concealed that the civilian departures were not voluntary in nature,[1595] and it relied on this evidence to find that Mladić was a member of and participated in the Srebrenica JCE and intended to conceal crimes.[1596]

456. The Prosecution responds that no conviction rests on Witness Deronjić's evidence alone.[1597] It contends that Witness Deronjić's testimony that Beara told him that the orders to kill came "from the top" was only a fraction of the evidence considered by the Trial Chamber in finding the

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[1590] *Karadžić* Appeal Judgement, para. 449, *referring to Popović et al*. Appeal Judgement, para. 96 (internal references omitted). *See also Prlić et al*. Appeal Judgement, para. 137; *Martić* Appeal Judgement, paras. 192, 193, n. 486.
[1591] *See* Decision of 13 January 2014, para. 13. *See also* Exhibit P3567.
[1592] *See* Trial Judgement, paras. 4940, 4973, 4987, 4992, 5096-5098.
[1593] Trial Judgement, paras. 4962, 4967, 4981. *See also* Trial Judgement, paras. 2549 (wherein the Trial Chamber noted that "Witness RM-294 testified that the declaration did not reflect the reality in that no one was given a choice either to remain or be evacuated"), 2550 (wherein the Trial Chamber noted that "[Witness] Deronjić stated that certain portions of the declaration were not a truthful reflection of the situation on the ground between 12 and 17 July 1995"), *referring to* Exhibit P3567, pp. 6216, 6217, 6219.
[1594] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, para. 4940.
[1595] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, para. 4967.
[1596] Mladić Appeal Brief, para. 686, *referring to* Trial Judgement, paras. 4968, 4969, 5092, 5094.
[1597] Prosecution Response Brief, para. 289.

existence of the Srebrenica JCE and Mladić's participation in it.[1598] The Prosecution also submits that the Trial Chamber reasonably relied on Witness Deronjić's evidence that the 17 July 1995 declaration he signed concealed the involuntary nature of the transfers.[1599]

457. The Appeals Chamber will now examine whether Mladić's convictions rest solely, or in a decisive manner, on the untested evidence of Witness Deronjić. In this regard, the Appeals Chamber observes that, in admitting Witness Deronjić's testimony pursuant to Rule 92 *quater* of the ICTY Rules, including its "limited references" to matters that go to the proof of Mladić's acts and conduct as charged in the Indictment, the Trial Chamber considered that this evidence is cumulative of other evidence and emphasized that "it cannot possibly enter a conviction [based] solely on Deronjić's evidence without other evidence to corroborate it".[1600]

458. In finding the existence of the Srebrenica JCE and Mladić's participation in it, although the Trial Chamber considered Witness Deronjić's testimony regarding the orders to kill,[1601] the Appeals Chamber observes that the Trial Chamber essentially relied on its other findings, based on extensive evidence, in relation to: (i) the take-over of the Srebrenica enclave;[1602] (ii) the crimes committed in the aftermath of the take-over, including murder, extermination, inhumane acts (forcible transfer), persecution, and genocide;[1603] and (iii) the various statements, acts, and meetings of Bosnian Serb individuals around the time of the take-over of the enclave.[1604] The Appeals Chamber thus considers that Witness Deronjić's testimony represents only a small fraction of the evidence considered by the Trial Chamber and Mladić's convictions would stand even without it. Accordingly, the Appeals Chamber finds that Witness Deronjić's testimony regarding the orders to kill cannot be classified as evidence which formed the sole or even a decisive basis for any of Mladić's convictions.

459. Furthermore, the Appeals Chamber notes that Mladić's characterization of the excerpt of Witness Deronjić's testimony regarding the orders to kill as hearsay evidence is correct to the extent that the content of the evidence is what Beara told him. The Appeals Chamber recalls that a trial chamber has the discretion to rely on hearsay evidence,[1605] and, accordingly, it is for Mladić to show that no reasonable trier of fact would have taken this evidence into account. However,

[1598] Prosecution Response Brief, para. 289.
[1599] Prosecution Response Brief, para. 290, *referring to* Trial Judgement, paras. 2559, 4967.
[1600] *See* Decision of 13 January 2014, para. 8.
[1601] *See* Trial Judgement, paras. 4940, 4973, 4987, 4992, 5096-5098.
[1602] *See* Trial Judgement, paras. 2319-2661, 4973-4983.
[1603] *See* Trial Judgement, paras. 2662-2986, 3049-3183, 3227-3555, 4973, 4984-4986.
[1604] *See* Trial Judgement, paras. 4926-4968, 4973.
[1605] *Karadžić* Appeal Judgement, para. 598; *Prlić et al.* Appeal Judgement, para. 1601; *Nyiramasuhuko et al.* Appeal Judgement, para. 1616; *Popović et al.* Appeal Judgement, para. 1307.

Mladić's general contentions concerning the Trial Chamber's use of this evidence fail to demonstrate that the Trial Chamber erred in this regard.

460. Turning to the excerpt of Witness Deronjić's testimony regarding the involuntary nature of the transfers, the Appeals Chamber notes that this evidence was corroborated by the evidence of Witnesses Robert Franken[1606] and RM-294,[1607] which demonstrated that the declaration did not reflect the reality because no one was given a genuine choice whether to stay or to be evacuated.[1608] Further, the Appeals Chamber observes that, in reaching its finding that approximately 25,000 Bosnian Muslims who left Potočari to go to Bosnian Muslim controlled territory did not have a genuine choice but to leave, the Trial Chamber did not only rely on evidence concerning the declaration.[1609] The Trial Chamber also recalled:

> (i) the circumstances surrounding the movement of population from Srebrenica to Potočari, including the orders by the 10th Sabotage Detachment to Srebrenica Town inhabitant[s] to leave, the shells fired by the VRS at the UNPROFOR Bravo compound in Srebrenica, the mortars fired along the road taken by the Bosnian Muslims fleeing towards Potočari; (ii) the situation in the UNPROFOR compound in Potočari and its surroundings, where the population sough[t] refuge, namely the shots and shell[s] fired around the compound, the dire living conditions, the fear and exhaustion of the Bosnian Muslims who had sought refuge there; and (iii) that the VRS, assisted by MUP units, coordinated the boarding of buses, ultimately forcing women[,] children and elderly onto the buses while some were hit by members of the MUP, and escorted the buses towards Bosnian-Muslim controlled territory.[1610]

461. Therefore, the Appeals Chamber considers that Witness Deronjić's testimony regarding the involuntary nature of the transfers was corroborated and that the Trial Chamber did not rely solely, or in a decisive manner, on his evidence in support of Mladić's convictions related to the Srebrenica JCE. Accordingly, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show any error in the Trial Chamber's reliance on Witness Deronjić's evidence.

(ii) Witness Drinić's Rule 92 *bis* Evidence

462. Relying in part on Witness Drinić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules,[1611] the Trial Chamber found that no investigations were conducted by any Bosnian Serb military or civilian authority in relation to crimes committed in Srebrenica in 1995.[1612] Mladić

[1606] *See* Trial Judgement, para. 2548, *referring to* T. 7 May 2013 pp. 10743, 10744, Exhibit P1417, para. 105.
[1607] *See* Trial Judgement, para. 2549, *referring to* T. 16 April 2013 pp. 9897, 9899-9903 (closed session), T. 17 April 2013 pp. 9962, 9965 (closed session).
[1608] *See* Trial Judgement, paras. 2548, 2549, 4962.
[1609] *See* Trial Judgement, para. 3159.
[1610] Trial Judgement, para. 3159.
[1611] *See* Decision of 20 December 2013, para. 19, *referring to* Motion of 3 April 2013, Annex A. *See also* Exhibit P3351.
[1612] Trial Judgement, paras. 4963 (wherein the Trial Chamber noted that "[a]ccording to [Witness Drinić], no investigations were conducted by any Bosnian-Serb military or civilian authority regarding crimes committed in Srebrenica in 1995"), 4968.

submits that the Trial Chamber erred in law by relying on Witness Drinić's untested testimony in a decisive manner to make this finding,[1613] and that, although he sought to recall Witness Drinić and cross-examine him, the Trial Chamber denied this request.[1614]

463. The Prosecution responds that the Trial Chamber properly relied on Witness Drinić's evidence to find that no investigations were conducted by Bosnian Serb military or civilian organs.[1615] The Prosecution argues that the Rule 92 *bis* evidence provided by Witness Drinić does not relate to Mladić's acts or conduct and is cumulative of Witness RM-513's testimony.[1616] It further submits that Mladić did not oppose admission of this evidence at trial[1617] or seek to recall Witness Drinić to cross-examine him on the basis of this evidence.[1618] The Prosecution further contends that, in any event, the Trial Chamber did not rely solely on this evidence to find that no investigations were conducted.[1619]

464. While it is undisputed that Mladić did not cross-examine Witness Drinić, the Appeals Chamber is not convinced by Mladić's submission that the Trial Chamber relied on Witness Drinić's evidence in a decisive manner to find that there were no investigations or prosecutions with regard to the Srebrenica killings.[1620] The Appeals Chamber notes that, in reaching its finding, the Trial Chamber relied on, in addition to Witness Drinić's evidence, the witness statement and testimony of Witness RM-513 showing that there were no investigations or prosecutions with

[1613] *See* Mladić Appeal Brief, paras. 634, 681, 687, 690, *referring to* Trial Judgement, para. 4963. In identifying the Trial Chamber's finding in question, Mladić makes a broader statement that "no investigations were conducted by Bosnian Serb military or civilian organs". Mladić supports this statement with reference to paragraph 4963 of the Trial Judgement, which addresses evidence pertinent to the investigation and punishment of the perpetrators of the Srebrenica killings and that he makes this statement in the context of Srebrenica JCE. *See* Mladić Appeal Brief, paras. 634, 687, *referring to* Trial Judgement, para. 4963.
[1614] Mladić Appeal Brief, para. 634, *referring to* T. 18 September 2014 p. 25771. *See also* Mladić Reply Brief, para. 97.
[1615] Prosecution Response Brief, paras. 265, 291, *referring to* Trial Judgement, paras. 4963, 4968, 4985, 5093.
[1616] Prosecution Response Brief, para. 291, *referring to* Decision of 20 December 2013, paras. 11, 15.
[1617] Prosecution Response Brief, para. 291, *referring to* Decision of 20 December 2013, para. 2.
[1618] Prosecution Response Brief, para. 266. The Prosecution contends that, contrary to Mladić's assertion, he sought to reintroduce Witness Drinić's evidence pursuant to Rule 92 *ter* of the ICTY Rules and proposed a statement that confirmed Witness Drinić's evidence that Mladić now challenges, namely that no investigation of war crimes committed by members of the VRS was conducted. *See* Prosecution Response Brief, para. 266, *referring to* T. 18 September 2014 p. 25771, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion to Amend Witness List, 10 July 2014 (confidential with confidential Annexes A, B, and C).
[1619] Prosecution Response Brief, paras. 265, 291.
[1620] *See* Mladić Appeal Brief, paras. 634, 681, 687, 690. Although evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules must not relate to the acts and conduct of the accused as charged in the indictment, Mladić does not argue on appeal that Witness Drinić's Rule 92 *bis* evidence went to his acts or conduct as charged in the Indictment. In view of the analysis and conclusion in this subsection, the Appeals Chamber will not examine this matter *proprio motu* as it could not impact the outcome.

regard to the killings of Muslims in Srebrenica or the Zvornik area by members of the Drina Corps, even though information of mass killings was discussed by VRS officers.[1621]

465. Further, the Appeals Chamber considers that the Trial Chamber's impugned finding could stand even without Witness Drinić's untested testimony. Indeed, the witness statement and testimony of Witness RM-513 suffice to support the Trial Chamber's finding in question. The Appeals Chamber notes that Mladić does not contest the Trial Chamber's reliance on or evaluation of the evidence of Witness RM-513 on appeal. The Appeals Chamber further recalls that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony.[1622] The Appeals Chamber observes that Mladić was given an opportunity to cross-examine Witness RM-513. However, he did not contest the reliability and credibility of the testimony of Witness RM-513 that there were no investigations or prosecutions with regard to the Srebrenica killings.[1623]

466. Accordingly, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber relied decisively on Witness Drinić's untested testimony in reaching its finding that there were no civilian or military investigations regarding crimes committed in Srebrenica and dismisses Mladić's submission in this regard.

(iii) Witness Orić's Rule 92 *bis* Evidence

467. Relying in part on Witness Orić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules,[1624] the Trial Chamber found that, in relation to Scheduled Incident E.15.3, on the night of 13 July 1995, VRS military policemen killed a Bosnian Muslim man who was forced off a bus parked in front of Vuk Karadžić Elementary School.[1625]

468. Mladić submits that the Trial Chamber erred in law by relying on Witness Orić's Rule 92 *bis* evidence to establish the crime of murder in Scheduled Incident E.15.3.[1626] Mladić argues that Witness Orić's testimony was uncorroborated by any other evidence and that he was unable to challenge it.[1627] Mladić further submits that without erroneously relying on Witness Orić's Rule 92

[1621] *See* Trial Judgement, paras. 4963, 4968, *referring to*, *inter alia*, Exhibits P1054 (under seal), paras. 82, 83, P3351, P3354, T. 27 February 2013 pp. 9267, 9268 (closed session).
[1622] *See Čelebići* Appeal Judgement, para. 506.
[1623] *See* T. 27 February 2013 pp. 9267, 9268 (closed session).
[1624] *See* Decision of 8 July 2013, para. 10. *See also* Exhibit P1757.
[1625] Trial Judgement, paras. 2918-2921, *referring to* Exhibit P1757.
[1626] Mladić Appeal Brief, paras. 688, 690, *referring to* Trial Judgement, para. 2921.
[1627] Mladić Appeal Brief, para. 688.

bis evidence, the Trial Chamber would not have been able to establish the elements of Scheduled Incident E.15.3, nor the essential elements of the existence of the Srebrenica JCE and his participation in it.[1628]

469. The Prosecution responds that Mladić fails to identify an error with respect to the Trial Chamber's reliance on Witness Orić's evidence in relation to Scheduled Incident E.15.3.[1629] According to the Prosecution, while corroboration was not required, Witness Orić's evidence was, in fact, corroborated by adjudicated facts considered by the Trial Chamber which demonstrated a pattern of conduct.[1630] The Prosecution further contends that Mladić's convictions under Counts 2 to 8 do not rest solely or decisively on Witness Orić's "untested evidence" because Scheduled Incident E.15.3 is one of many killings underlying Mladić's conviction for murder and genocide which would stand without the finding that Scheduled Incident E.15.3 took place.[1631]

470. The Appeals Chamber notes that Witness Orić's evidence was corroborated. In reaching its finding on the killing of one Bosnian Muslim man on 13 July 1995, the Trial Chamber also considered, *inter alia*, Adjudicated Facts 1502, 1503, 1505, 1506, 1518, and 1519, which demonstrate a pattern of conduct relating to the detention and killing of Bosnian Muslim men in and around the Vuk Karadžić Elementary School between 12 and 14 July 1995.[1632] In this respect, the Appeals Chamber recalls that evidence demonstrating a pattern of conduct relevant to serious violations of international humanitarian law may be used as corroborative evidence.[1633] There is also no indication that Mladić rebutted these adjudicated facts by introducing reliable and credible evidence to the contrary. Accordingly, the Appeals Chamber, Judge Nyambe dissenting, rejects

[1628] Mladić Appeal Brief, para. 690.
[1629] Prosecution Response Brief, para. 292, *referring to* Trial Judgement, paras. 2918-2921.
[1630] Prosecution Response Brief, para. 292, *referring to* Trial Judgement, para. 2918.
[1631] Prosecution Response Brief, para. 293, *referring to* Trial Judgement, paras. 3065, 3555, 5128, 5130. In addition, the Prosecution argues that Mladić cannot now complain that he was unable to challenge Witness Orić's evidence as he did not oppose the Prosecution's request to have Witness Orić's evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules. *See* Prosecution Response Brief, para. 292, *referring to* Decision of 8 July 2013, para. 1.
[1632] *See* Trial Judgement, paras. 2918-2921. Adjudicated Fact 1502 shows that members of the Bratunac Brigade Military Police participated in guarding hundreds of Bosnian Muslim men detained in the Vuk Karadžić School complex and the buses parked around Bratunac town on the night of 12 and 13 July 1995; Adjudicated Fact 1503 indicates that from 12 to 14 July 1995, several thousand Bosnian Muslim men were detained without adequate food and water in and around the Vuk Karadžić School and on board the between 80 to 120 buses lining the streets of Bratunac town; Adjudicated Fact 1505 shows that men detained in Bratunac between 12 and 14 July 1995 were executed at night opportunistically; Adjudicated Fact 1506 shows that the Vuk Karadžić School and the various buildings surrounding it were secured by several units of the *Republika Srpska* armed forces, including by members of the Bratunac Brigade Military Police Platoon, the special police, and the civilian police of the MUP, as well as by members of the Drina Wolves and paramilitary formations; Adjudicated Fact 1518 indicates that groups of men were taken from the buses to the school all through the night and did not return; and Adjudicated Fact 1519 shows that between 12 and 14 July 1995, more than 50 Bosnian Muslim men were summarily executed in and around the Vuk Karadžić School. *See* Adjudicated Facts 1502, 1503, 1505, 1506, 1518, 1519.
[1633] *Karadžić* Appeal Judgement, para. 457, n. 1203; *Popović et al*. Appeal Judgement, para. 104; *Kupreškić et al.* Appeal Judgement, para. 321.

Mladić's submission that the Trial Chamber erred in law by relying on Witness Orić's Rule 92 *bis* evidence when making its finding on Scheduled Incident E.15.3.[1634]

(b) Alleged Error in Relying on Adjudicated Fact 1612

471. Pursuant to Rule 94 of the ICTY Rules, the Trial Chamber took judicial notice of Adjudicated Fact 1612 which states that "[b]etween 1,000 and 1,200 men were killed in the course of [16 July 1995] at [the Branjevo Military Farm]".[1635] In relation to Scheduled Incident E.9.2, the Trial Chamber relied in part on Adjudicated Fact 1612 to determine that between 1,000 and 1,200 male Bosnian Muslim detainees were killed by VRS soldiers at the Branjevo Military Farm on 16 July 1995.[1636] The Trial Chamber also found that the victims of this incident were buried at the Branjevo Military Farm mass grave, and that bodies from this mass grave were subsequently reburied in the Čančari Road 4, 8, 9, 11, and 12 mass graves.[1637]

472. Mladić submits that the Trial Chamber erred in relying on Adjudicated Fact 1612 to find that the number of victims in relation to Scheduled Incident E.9.2 was between 1,000 and 1,200.[1638] Mladić argues that the Trial Chamber preferred Adjudicated Fact 1612 while it was rebutted by the Prosecution's forensic evidence, namely by the evidence of Witness William Haglund and former ICTY Prosecution Investigator Dušan Janc, showing that the number of victims was limited to 132 bodies at the primary burial site and 43 DNA matches to a secondary site.[1639]

473. The Prosecution responds that the Trial Chamber properly relied on Adjudicated Fact 1612.[1640] Specifically, it argues that: (i) the Trial Chamber correctly concluded that the forensic evidence did not contradict Adjudicated Fact 1612;[1641] (ii) Mladić fails to identify an error in the Trial Chamber's finding that the evidence of Witnesses Haglund and Janc does not contradict the

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[1634] *See* Mladić Appeal Brief, paras. 688, 690.
[1635] Trial Judgement, paras. 2843, 2860, n. 12494; Second Decision on Adjudicated Facts, para. 36. *See also* Adjudicated Fact 1612.
[1636] Trial Judgement, paras. 2843, 2860, 2861, n. 12494.
[1637] Trial Judgement, para. 2861.
[1638] *See* Mladić Appeal Brief, paras. 681, 685, 692, 693, *referring to* Trial Judgement, paras. 2843, 2846, 2849, 2861.
[1639] Mladić Appeal Brief, para. 692, *referring to* Trial Judgement, paras. 2846, 2849. Mladić additionally recalls his previous submission that the Trial Chamber erred in: (i) taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates (*see* Mladić Notice of Appeal, para. 21; Mladić Appeal Brief, paras. 62-95, 691); and (ii) applying a heightened standard of the burden to produce rebuttal evidence (*see* Mladić Notice of Appeal, para. 26; Mladić Appeal Brief, paras. 96-113, 691), and consequently submits that the Trial Chamber's error of law resulted in a defective evidentiary approach to the adjudicated facts (*see* Mladić Appeal Brief, para. 693). The Appeals Chamber has already rejected Mladić's blanket submission that the Trial Chamber erred in taking judicial notice of adjudicated facts relating to the conduct of his proximate subordinates, and applying a heightened standard of the burden to produce rebuttal evidence (*see supra* Section III.A.2(a)(ii)). Considering the foregoing, Mladić's statement to this effect in this part of the appeal (*see* Mladić Appeal Brief, para. 691) is also rejected.
[1640] *See* Prosecution Response Brief, paras. 287, 294.
[1641] Prosecution Response Brief, para. 294, *referring to* Trial Judgement, para. 2860.

total number of victims established through Adjudicated Fact 1612;[1642] and (iii) the Trial Chamber properly exercised its discretion in taking judicial notice of adjudicated facts.[1643]

474. The Appeals Chamber recalls that by taking judicial notice of an adjudicated fact, a trial chamber recognizes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial.[1644] It is well-established that facts judicially noticed pursuant to Rule 94(B) of the ICTY Rules are presumptions that may be rebutted with evidence at trial,[1645] and that their use does not shift the ultimate burden of proof or persuasion, which remains on the Prosecution.[1646] An accused may rebut the presumption by introducing "reliable and credible" evidence to the contrary.[1647] The final evaluation of the reliability and credibility, and hence the probative value of the evidence, will only be made in light of the totality of the evidence in the case, in the course of determining the weight to be attached to it.[1648]

475. The Appeals Chamber notes that, although Mladić challenged Adjudicated Fact 1612 at trial, he did not present any evidence to explicitly rebut it.[1649] Moreover, it is for a trial chamber to determine what conclusions, if any, are to be drawn from adjudicated facts when considered together with all of the evidence brought at trial.[1650] In determining the number of victims in Scheduled Incident E.9.2, the Trial Chamber considered, *inter alia*: (i) the evidence of Witness Haglund showing that the Pilica grave site, also referred to as the Branjevo Military Farm grave site, contained the remains of at least 132 men;[1651] and (ii) Janc's report on the Srebrenica investigation identifying 43 DNA connections between the remains identified at the Branjevo Military Farm primary mass grave, and the remains identified in the Čančari Road 4, 8, 9, 11, and 12 secondary mass graves.[1652] The Trial Chamber considered that this evidence did not establish the total number of victims in relation to Scheduled Incident E.9.2 because the Branjevo Military Farm

[1642] Prosecution Response Brief, para. 294, *referring to* Trial Judgement, paras. 2846, 2849, 5300.
[1643] Prosecution Response Brief, para. 294.
[1644] *Karadžić* Appeal Judgement, para. 452; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Anatole Nsengiyumva's Motion for Judicial Notice, 29 October 2010, para. 7 and references cited therein.
[1645] *Karadžić* Appeal Judgement, paras. 120, 128, 219 and references cited therein.
[1646] *Karadžić* Appeal Judgement, paras. 120, 219 and references cited therein.
[1647] *Karadžić* Appeal Judgement, para. 128 and references cited therein.
[1648] *Karadžić* Appeal Judgement, para. 128 and references cited therein.
[1649] *See* Defense Interlocutory Appeal Brief of 4 July 2012, Annex B, RP. 1013 (wherein Mladić challenged Adjudicated Fact 1612 at trial on the grounds that: (i) the interests of justice and right to a fair and public trial support leading evidence on the fact; (ii) the proposed fact goes directly or indirectly towards acts and conduct or responsibility of the Accused or to alleged acts/convictions of alleged subordinates of the Accused; and (iii) the proposed fact bears upon the responsibility of the Accused or relates to the objective and members of the joint criminal enterprise, as well as to facts relating to a fundamental issue raised in the operative indictment).
[1650] *Karemera et al.* Decision of 29 May 2009, para. 21.
[1651] *See* Trial Judgement, para. 2846, *referring to* Exhibits P1828, pp. 3751, 3752, 3754, P1833, pp. 10, 11, 17, 55.
[1652] *See* Trial Judgement, para. 2849, *referring to* Exhibit P1987.

and Čančari Road mass graves contained bodies from multiple incidents.[1653] It thus found that this evidence did not contradict Adjudicated Fact 1612 with respect to the total number of victims.[1654]

476. Having reviewed the relevant portions of the Trial Judgement, the Appeals Chamber finds no merit in Mladić's contention that Adjudicated Fact 1612 is contradicted by the Prosecution evidence with respect to the number of victims. In the Appeals Chamber's view, Mladić misinterprets the evidence of Witness Haglund and the report of Janc by asserting that this evidence limits the victims to "132 bodies at the primary burial site and 43 DNA matches to a secondary site".[1655] Moreover, in determining whether evidence contradicts an adjudicated fact, the Appeals Chamber recalls that it previously upheld the Trial Chamber's analysis that considered whether the evidence was "unambiguous in its meaning", namely that it must either point to "a specific alternative scenario" or "unambiguous[ly] demonstrat[e] that the scenario as found in the Adjudicated Fact must reasonably be excluded as true".[1656] In respect of Adjudicated Fact 1612, the Prosecution evidence that Mladić refers to on appeal does not point to a specific alternative scenario nor does it unambiguously demonstrate that the scenario as found in Adjudicated Fact 1612, namely that between 1,000 and 1,200 men were killed in the course of 16 July 1995 at the Branjevo Military Farm,[1657] must be reasonably excluded as true.[1658] Accordingly, the Appeals Chamber finds that Mladić fails to identify any error in the Trial Chamber's finding that the evidence of Witness Haglund and the report of Janc do not contradict Adjudicated Fact 1612 with respect to the total number of victims in relation to Scheduled Incident E.9.2.

477. On the basis of the foregoing, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to show that the Trial Chamber erred in relying on Adjudicated Fact 1612 to find that the number of victims in relation to Scheduled Incident E.9.2 was between 1,000 and 1,200.

(c) Conclusion

478. In light of the foregoing, the Appeals Chamber, Judge Nyambe dissenting, dismisses Ground 5.I of Mladić's appeal.

[1653] *See* Trial Judgement, para. 2860.
[1654] *See* Trial Judgement, para. 2860.
[1655] *See* Mladić Appeal Brief, para. 692, n. 838, *referring to* Trial Judgement, paras. 2846, 2849.
[1656] *See supra* para. 56. *See also* Trial Judgement, para. 5273.
[1657] *See* Adjudicated Facts 1612. *See also* Trial Judgement, paras. 2843, 2860, n. 12494.
[1658] *See* Trial Judgement, paras. 2860, 5273.

E. Alleged Errors Related to the Hostage-Taking JCE (Ground 6)

479. The Trial Chamber found that, between 25 May and 24 June 1995, VRS soldiers and officers, including members of the military police, and Bosnian Serb police officers and others, detained UNPROFOR and UNMO personnel ("UN Personnel") in Pale, Banja Luka, Goražde, and in and around Sarajevo, held some of them in strategic military locations which were potential targets of NATO air strikes, and threatened to kill them in order to exert leverage over NATO to end air strikes against Bosnian Serb military targets, recover Serb weapons under UNPROFOR control, and compel UNPROFOR forces to surrender or exchange prisoners.[1659] The Trial Chamber found that these acts constituted the crime of taking of hostages as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute.[1660]

480. The Trial Chamber further concluded that, from around 25 May 1995, when NATO air strikes commenced, until approximately 24 June 1995, when the last of the detained UN Personnel was released, the Hostage-Taking JCE existed with the common objective of capturing UN Personnel deployed in various parts of Bosnia and Herzegovina and detaining them at strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets.[1661] The Trial Chamber found that members of the Hostage-Taking JCE, which included Radovan Karadžić, Nikola Koljević, as well as members of the VRS Main Staff and corps commands, implemented the common objective themselves or by using VRS members.[1662] The Trial Chamber further found that Mladić, Commander of the VRS Main Staff, was "closely involved […] throughout every stage of the hostage-taking" and significantly contributed to the Hostage-Taking JCE.[1663] It also found that Mladić, as well as other members of the Hostage-Taking JCE, shared the intent to achieve the common objective of the joint criminal enterprise.[1664] The Trial Chamber convicted Mladić under Count 11 of the Indictment for the crime of taking of hostages as a violation of the laws or customs of war on the basis of his participation in the Hostage-Taking JCE.[1665]

481. Mladić submits that the Trial Chamber erred in finding that he intended the objective of the Hostage-Taking JCE and that he committed the *actus reus* and shared the requisite intent for the crime of hostage-taking. In particular, he submits that the Trial Chamber: (i) applied a wrong legal

[1659] Trial Judgement, paras. 2315, 2316. *See also* Trial Judgement, paras. 3218-3220, 5136.
[1660] Trial Judgement, paras. 3221, 3226. *See also* Trial Judgement, paras. 3215-3220, 3222-3225.
[1661] Trial Judgement, para. 5141.
[1662] Trial Judgement, para. 5142.
[1663] Trial Judgement, paras. 5146, 5156. *See also* Trial Judgement, paras. 5147-5155, 5157.
[1664] Trial Judgement, paras. 5142, 5163. *See also* Trial Judgement, paras. 5157-5162.
[1665] Trial Judgement, para. 5214. *See also* Trial Judgement, paras. 3226, 5141, 5142, 5156, 5163, 5168.

standard in finding that the detention of UN Personnel constituted the crime of hostage-taking; (ii) made incorrect conclusions from its assessment of evidence relating to the detention of UN Personnel; and (iii) erred by assessing circumstantial evidence in a manner that violated the principle of *in dubio pro reo*.[1666] The Appeals Chamber will address these contentions in turn.

1. Alleged Error in Applying the Legal Standard to Find that the Detention of UN Personnel Constituted the Crime of Hostage-Taking (Ground 6.A)

482. In concluding that the events between 25 May and 24 June 1995 constituted the crime of hostage-taking as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute, the Trial Chamber found that it had jurisdiction over the alleged violation and that the captured UN Personnel fell within the protection guaranteed by Common Article 3 to the four Geneva Conventions ("Common Article 3").[1667] The Trial Chamber held that violations of Common Article 3 fall within the ambit of Article 3 of the ICTY Statute,[1668] and that the charge of hostage-taking under Common Article 3(1)(b) meets the jurisdictional requirements and general conditions of Article 3 of the ICTY Statute.[1669] In this regard, the Trial Chamber, relying on ICTY Appeals Chamber jurisprudence, held, *inter alia*, that the rules in Common Article 3 are part of customary international law in international and non-international armed conflicts and that violations of such rules entail individual criminal responsibility.[1670] The Trial Chamber also recalled that the protection of Common Article 3 applies to any person taking no active part in the hostilities including combatants placed *hors de combat* at the time the offence was committed.[1671]

483. Mladić submits that his conviction under Count 11 of the Indictment should be reversed as the Trial Chamber erroneously convicted him for acts which did not constitute a crime under customary international law during the Indictment period.[1672] Mladić asserts that the ICTY's jurisdiction is limited to the ICTY Statute and only the Security Council may "revise and reinterpret the Statute".[1673] He submits that the Trial Chamber in this case erroneously relied on a decision of the ICTY Appeals Chamber in the *Tadić* case in finding that violations of Common Article 3 fall

[1666] *See* Mladić Notice of Appeal, paras. 67-69; Mladić Appeal Brief, paras. 695-759.
[1667] Trial Judgement, paras. 3010, 3224.
[1668] Trial Judgement, para. 3010, *referring to Mrkšić and Šljivančanin* Appeal Judgement, para. 70, *Kunarac et al.* Appeal Judgement, para. 68, *Čelebići* Appeal Judgement, paras. 125, 133-136, *Tadić* Decision of 2 October 1995, para. 89.
[1669] *See* Trial Judgement, paras. 3009, 3010, 3012, 3020, 3222-3226. *See also* Trial Judgement, paras. 3013-3017.
[1670] Trial Judgement, para. 3010, *referring to Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("*Karadžić* Decision of 9 July 2009"), paras. 23, 25-26, *Čelebići* Appeal Judgement, paras. 138, 139, 143, 147, 167, 173, 174, *Tadić* Decision of 2 October 1995, paras. 89, 98, 134.
[1671] Trial Judgement, paras. 3012, 3017, 3224.
[1672] *See* Mladić Appeal Brief, paras. 695-697, 702-710.

within the ambit of Article 3 of the ICTY Statute.[1674] He contends that the Trial Chamber failed to conduct an analysis of its jurisdiction, and that, had it done so, it would have found cogent reasons to depart from the *Tadić* Decision of 2 October 1995.[1675] Mladić submits that, by relying on the *Tadić* Decision of 2 October 1995, the Trial Chamber violated the principle of *nullum crimen, nulla poena sine praevia lege*, which, according to him, "requires a trier of fact to exercise great caution in finding that an alleged act, not regulated in [Article 3] of the [ICTY] Statute, forms part of a crime."[1676]

484. Mladić argues that, in May and June 1995, the taking of combatants as hostages entailed only state responsibility and not individual criminal responsibility under customary international law.[1677] He contends that the prohibition against taking non-civilians hostage was introduced as a war crime in 2002 with the entry into force of the Statute of the ICC ("ICC Statute") and that, during the Indictment period, only the killing of hostages was criminalized.[1678] Mladić adds that, during the events, individual criminal responsibility extended only to the hostage-taking of civilians and that the UN Personnel could not be considered civilians.[1679]

485. The Prosecution responds that hostage-taking of any detainee was criminalized under customary international law in 1995 and that the ICTY had jurisdiction over this crime.[1680] The Prosecution contends that Mladić fails to provide cogent reasons to depart from the well-established jurisprudence that Common Article 3 formed part of customary international law during the

[1673] Mladić Appeal Brief, para. 701.
[1674] *See* Mladić Appeal Brief, paras. 698-701, *referring to*, *inter alia*, *Tadić* Decision of 2 October 1995.
[1675] Mladić Appeal Brief, para. 699.
[1676] Mladić Appeal Brief, para. 700.
[1677] Mladić Appeal Brief, paras. 702, 704-708.
[1678] Mladić Appeal Brief, paras. 704-708, *referring to*, *inter alia*, Article 8 of the ICC Statute, 17 July 1998, 2187 U.N.T.S. 3, Article 6(b) of the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279, Principle VI(b) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Article 2(1)(b) of Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55, Sections 625, 626 of the United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, The War Office, HMSO, 1958 ("United Kingdom Military Manual"), United States Field Manual (1956), as amended by Change No. 1, 1976 ("United States Military Manual"), Criminal Code of the SFRY.
[1679] Mladić Appeal Brief, paras. 702, 703, *referring to* Article 147 of Geneva Convention IV. Mladić asserts that the prohibition against hostage-taking is not evinced in the 1899 and 1907 Hague Regulations or the "grave breaches provisions" of the three Geneva Conventions and Additional Protocol I. Mladić Appeal Brief, para. 704, *referring to* Geneva Convention I, Geneva Convention II, Geneva Convention III. He further claims that reference to hostage-taking in the first draft of Article 3 of the ICTY Statute was not carried through to the final version endorsed by the UN Secretary General to the Security Council in 1993. Mladić Appeal Brief, para. 704.
[1680] *See* Prosecution Response Brief, paras. 298, 304-306, *referring to*, *inter alia*, *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 ("*Karadžić* Decision of 11 December 2012"), para. 21, *Karadžić* Decision of 9 July 2009, paras. 6, 22, 28, 29.

relevant events and that its breaches entailed individual criminal responsibility.[1681] It asserts that in light of the "clear ICTY case law", and since Mladić never raised the jurisdictional argument at trial, the Trial Chamber was not required to provide a detailed analysis for hostage-taking as a serious violation of Common Article 3.[1682]

486. Mladić replies that the Prosecution fails to address his submissions and that its reliance on the *Karadžić* Decision of 11 December 2012 is misguided as the decision does not deal with the issues challenged in his appeal.[1683]

487. The Appeals Chamber observes that Mladić did not raise the issue regarding the Trial Chamber's alleged lack of jurisdiction over the crime of hostage-taking at trial.[1684] The Appeals Chamber recalls that if a party raises no objection to a particular issue before the 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 its right to adduce the issue as a valid ground of appeal.[1685] The Appeals Chamber notes, however, that as discussed below, the matter of the ICTY's jurisdiction over violations of Common Article 3 and, in particular, the crime of hostage-taking was settled by the ICTY Appeals Chamber and was therefore binding on the Trial Chamber in the present case.[1686] Consequently, even if Mladić had raised this jurisdictional challenge at trial, it would not have been open to the Trial Chamber in this case to depart from the jurisprudence of the ICTY Appeals Chamber. In these circumstances, the Appeals Chamber exercises its discretion to examine Mladić's submissions on appeal in respect of the ICTY's alleged lack of jurisdiction over the crime of hostage-taking.

488. As to whether cogent reasons exist for the Appeals Chamber to depart from the jurisprudence in this regard, the standards of appellate review require Mladić to demonstrate that

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[1681] Prosecution Response Brief, para. 304, *referring to*, *inter alia*, *Čelebići* Appeal Judgement, paras. 167, 173, 174, *Tadić* Decision of 2 October 1995, para. 134. The Prosecution adds that the lack of express mention of hostage-taking in Article 3 of the ICTY Statute and the grave breaches system of the Geneva Conventions is of "no significance" and does not imply that it attracts no criminal responsibility. It further contends that Mladić's reliance on the Hague Regulations and the norms applicable during the Nuremberg trials ignores subsequent developments in customary international law. *See* Prosecution Response Brief, para. 305.
[1682] Prosecution Response Brief, para. 306.
[1683] Mladić Reply Brief, para. 101.
[1684] *See* Mladić Pre-Trial Brief, paras. 107-111; Mladić Final Trial Brief, paras. 165-181, 3308-3386; T. 9 December 2016 pp. 44609, 44610; T. 13 December 2016 pp. 44808-44810, 44812-44818. The Appeals Chamber observes that in the decision concerning Mladić's request for acquittal pursuant to Rule 98 *bis* of the ICTY Rules, the Trial Chamber noted that Mladić did not specifically challenge Count 11 of the Indictment or the general elements and jurisdictional requirements that must be proven under Article 3 of the ICTY Statute. *See* T. 15 April 2014 p. 20955.
[1685] *Karadžić* Appeal Judgement, para. 312; *Prlić et al*. Appeal Judgement, para. 165; *Nyiramasuhuko et al*. Appeal Judgement, para. 63; *Musema* Appeal Judgement, para. 127.
[1686] *See infra* paras. 488-494; *Aleksovski* Appeal Judgement, para. 113. *See also Gotovina et al*. Decision of 1 July 2010, para. 24.

the decision to exercise jurisdiction over the crime of hostage-taking was made on the basis of a wrong legal principle or was "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[1687] The Appeals Chamber recalls ICTY Appeals Chamber jurisprudence holding that Article 3 of the ICTY Statute is a general and residual clause which refers to a broad category of offences, namely all "violations of the laws or customs of war", not limited to the list of violations enumerated therein.[1688] The ICTY Appeals Chamber has consistently held that Article 3 of the ICTY Statute may cover all violations of international humanitarian law not falling under Articles 2, 4, or 5 of the ICTY Statute, including violations of Common Article 3,[1689] which contains a prohibition of hostage-taking.[1690] The Appeals Chamber further recalls that the ICTY Appeals Chamber in the *Tadić* case examined, *inter alia*, findings of the International Military Tribunal at Nuremberg, domestic prosecutions, military manuals and legislation – including the law of the former Yugoslavia – and Security Council resolutions, and confirmed the formation of *opinio juris* to the effect that customary international law imposes criminal liability for those who commit serious violations of Common Article 3.[1691] Furthermore, the ICTY Appeals Chamber has previously rejected arguments that there are cogent reasons to depart from the *Tadić* jurisprudence on the questions of whether Common Article 3 is included in the scope of Article 3 of the ICTY Statute[1692] and whether breaches of its provisions give rise to individual criminal

[1687] *Karadžić* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 11. *See also Stanišić and Župljanin* Appeal Judgement, para. 968; *Ngirabatware* Appeal Judgement, para. 6; *Bizimungu* Appeal Judgement, para. 370; *Munyarugarama* Decision of 5 October 2012, para. 6.
[1688] *Kunarac et al.* Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, para. 125; *Tadić* Decision of 2 October 1995, paras. 87, 89. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 47.
[1689] *Kunarac et al.* Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, paras. 125, 136; *Tadić* Decision of 2 October 1995, paras. 87, 89, 91. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 47.
[1690] Common Article 3 provides, in relevant part, that:

> (1) Persons 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 sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) […]
> (b) taking of hostages; […]

[1691] *See Tadić* Decision of 2 October 1995, paras. 128-136. *See also Čelebići* Appeal Judgement, paras. 153-156, 160, 162-168, 174.
[1692] *See Čelebići* Appeal Judgement, paras. 129-136. The ICTY Appeals Chamber rejected the submissions that violations of Common Article 3 are not within the jurisdiction of the ICTY on the basis, *inter alia*, that: (i) the Security Council never intended to permit prosecutions under Article 3 of the ICTY Statute for violations of Common Article 3; (ii) Article 3 of the ICTY Statute is limited to the "Hague law"; and (iii) unlike the ICTR Statute, the ICTY Statute does not explicitly include Common Article 3. *See Čelebići* Appeal Judgement, paras. 130-133, 136, 178.

responsibility.[1693] The ICTY Appeals Chamber has stated that the acts enumerated in Common Article 3 were intended to be criminalized within the international legal order as early as 1949.[1694]

489. Furthermore, the ICTY has exercised its jurisdiction under Article 3 of the ICTY Statute to try individuals for violations of Common Article 3,[1695] including on the basis of hostage-taking.[1696] In this respect, the ICTY Appeals Chamber in the *Karadžić* case upheld the ICTY Trial Chamber's determination that the ICTY had jurisdiction over the crime of hostage-taking under Article 3 of the ICTY Statute.[1697] The ICTY Appeals Chamber has held that, under Common Article 3, there is an absolute prohibition of taking hostage of any person taking no active part in hostilities as well as detained individuals irrespective of their status prior to detention.[1698] It has also rejected the submission that the crime of hostage-taking is limited under customary international law to the taking of civilians hostage.[1699] In light of this jurisprudence, the Appeals Chamber considers that the matter of the ICTY's jurisdiction over the crime of hostage-taking was settled by the ICTY Appeals Chamber.

[1693] *See Čelebići* Appeal Judgement, paras. 157-174. The ICTY Appeals Chamber rejected, *inter alia*, the submissions that: (i) the evidence presented in the *Tadić* Decision of 2 October 1995 did not establish that Common Article 3 is customary international law that creates individual criminal responsibility on the basis that there is no showing of state practice and *opinio juris*; (ii) the exclusion of Common Article 3 from the Geneva Conventions grave breaches system demonstrates that it entails no individual criminal responsibility; (iii) Common Article 3 imposes duties on states only and is meant to be enforced by domestic legal systems; and (iv) there is evidence demonstrating that Common Article 3 is not a rule of customary law which imposes liability on individuals. *See Čelebići* Appeal Judgement, paras. 157, 158, 163, 167-170, 174. Similarly, the Appeals Chamber finds that Mladić's assertion that the lack of mention of the prohibition against hostage-taking in the ICTY Statute, the 1899 and 1907 Hague Regulations, and the "grave breaches provisions" of the three 1949 Geneva Conventions and Additional Protocol I does not undermine that hostage-taking entailed individual criminal responsibility in customary international law at the time of the events in question. As discussed by the ICTY Appeals Chamber in the *Čelebići* case, the Geneva Conventions impose an obligation on State Parties to implement the conventions in their domestic legislation, including by taking measures necessary for the suppression of *all* breaches of the Geneva Conventions, including those outside the grave breaches provisions. *See* Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III, Article 146 of Geneva Convention IV ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article."). *See also* ICRC, Commentary of 1958 on Article 146(3) of Geneva Convention IV, p. 594 ("[…]This shows that all breaches of the Convention should be repressed by national legislation. […] [T]he authorities of the Contracting Parties […] should institute judicial or disciplinary punishment for breaches of the Convention."). *See Čelebići* Appeal Judgement, paras. 164-166.

[1694] *Čelebići* Appeal Judgement, para. 163.

[1695] *See, e.g., Strugar* Appeal Judgement, paras. 164, 171-179, p. 146; *Boškoski and Tarčulovski* Appeal Judgement, paras. 38, 47, 53; *Kunarac et al.* Appeal Judgement, paras. 51, 66-70.

[1696] *See, e.g., Karadžić* Trial Judgement, paras. 5951, 5993, 6010. *See also Karadžić* Appeal Judgement, paras. 654, 659-661, 775, 777.

[1697] *See Karadžić* Decision of 9 July 2009, paras. 2-4, 6, 22-27, 29. *See also Karadžić* Appeal Judgement, para. 777; *Karadžić* Trial Judgement, paras. 467, 468.

[1698] *Karadžić* Decision of 11 December 2012, paras. 16, 21; *Karadžić* Decision of 9 July 2009, para. 22. *See also Karadžić* Appeal Judgement, para. 659; *Popović et al.* Appeal Judgement, para. 794; *Đorđević* Appeal Judgement, para. 747; *Strugar* Appeal Judgement, n. 460.

[1699] *Karadžić* Decision of 9 July 2009, paras. 3, 6, 22, 27. *See also Karadžić* Appeal Judgement, para. 659; *Karadžić* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21.

490. In attempting to demonstrate that there are cogent reasons to depart from this well established jurisprudence, Mladić submits that during the Indictment period, with the exception of the killing of hostages or the taking of civilians hostage, the taking of "non-civilians" hostage was not prohibited and did not entail individual criminal responsibility under customary international law. Mladić's argument that the laws and norms applicable to the International Military Tribunal at Nuremberg only apply to the killing of hostages[1700] does not undermine the fact that the prohibition of hostage-taking of any person taking no active part in the hostilities was nevertheless well established in customary international law during the period covered by the Indictment and entailed individual criminal responsibility. The Appeals Chamber recalls that Article 4 of the ICTR Statute, which was adopted in 1994, expressly prohibits hostage-taking as a violation of Common Article 3 and Additional Protocol II. The ICTY Appeals Chamber has stated that the ICTR applies *existing* customary international law and that it was established to prosecute crimes which were already the subject of individual criminal responsibility.[1701] Furthermore, an analysis of state practice confirms the formation of *opinio juris* that customary international law imposes individual criminal responsibility for violations of Common Article 3 and Additional Protocol II during the Indictment period. For example, legislation and military manuals of a number of states prohibited such violations,[1702] and Additional Protocol II, which specifically contains the prohibition against hostage-taking of "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted", was adopted in 1977 by consensus and had been ratified by over 120 states at the time of the events included in the Indictment.[1703]

491. Against this background, the Appeals Chamber finds that Mladić's reliance on two domestic military manuals in support of his arguments is unpersuasive and fails to undermine well-established law on the prohibition of hostage-taking. In this respect, Mladić's submission that the military manual of the United States only prohibits the taking of civilians hostage neglects that the same manual restates Common Article 3 and criminalizes "every violation of the law of war" as a

[1700] Mladić Appeal Brief, para. 704.
[1701] *See Čelebići* Appeal Judgement, paras. 170, 178.
[1702] *See, e.g.*, Ireland, Geneva Conventions Act as amended (1962), Sections 4(1) and 4(4) (providing that, in addition to grave breaches, any "minor breaches" of the 1949 Geneva Conventions, including violations of Common Article 3, are punishable offences); Belgium, *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions* (1993), Article 1(7) (implementing the 1949 Geneva Conventions and the two Additional Protocols and providing that Belgian courts have jurisdiction to adjudicate crimes under international law such as hostage-taking); France, *Décret n°75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées* (1975), as amended in 1982, Article 9(1) (prohibiting hostage-taking of persons placed *hors de combat* and providing that they be treated humanely); Germany, Humanitarian Law in Armed Conflicts – Manual (1992), para. 1209 (qualifying as an "indictable offence" hostage-taking of persons protected by Common Article 3); The Netherlands, Military Manual (1993), pp. VIII-3, XI-1, XI-4 (restating the prohibition of hostage-taking found in Common Article 3 and Article 4 of Additional Protocol II).

war crime.[1704] Similarly, his contention that the military manual of the United Kingdom only prohibits the killing of civilian hostages omits that the same section of the manual provides a non-exhaustive list of acts amounting to war crimes and criminalizes "all other violations of the [Geneva] Conventions".[1705]

492. With respect to Mladić's assertion that hostage-taking did not form part of Article 144 of the Criminal Code of the SFRY,[1706] it is worth noting that: (i) Article 142(1) of the same criminal code entitled "War crimes against the civilian population" forbids an attack against persons *hors de combat* and includes a prohibition against hostage-taking;[1707] and (ii) as previously noted by the ICTY Appeals Chamber, the SFRY Parliament enacted a law in 1978 to implement the two Additional Protocols of the Geneva Conventions, which contain the prohibition against hostage-taking, rendering them "directly applicable to the courts of former Yugoslavia".[1708]

493. In light of the above considerations, the Appeals Chamber finds that Mladić fails to demonstrate that the decision to exercise jurisdiction over the crime of hostage-taking was made on the basis of a wrong legal principle or has been wrongly decided and that, therefore, there are cogent reasons to depart from well-settled jurisprudence in this respect.

494. The Appeals Chamber notes that in finding that it had jurisdiction over the crime of hostage-taking, the Trial Chamber recalled the four conditions set out in the *Tadić* Decision of 2 October 1995 to satisfy Article 3 of the ICTY Statute's "residual jurisdiction", namely that: (i) the offence charged must violate a rule of international humanitarian law; (ii) the rule must bind the parties at the time of the alleged offence; (iii) the rule must protect important values and its

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[1703] Additional Protocol II, Articles 4(1), 4(2)(c). *See also* ICRC, Commentary of 1987 on Additional Protocol II, paras. 4417, 4418 ("[…] Protocol II was adopted as a whole by consensus on 8 June 1977.").
[1704] Sections 11, 499 of the United States Military Manual. *See also Tadić* Decision of 2 October 1995, para. 131.
[1705] Section 626 of the United Kingdom Military Manual. *See also Tadić* Decision of 2 October 1995, para. 131.
[1706] Mladić Appeal Brief, para. 706.
[1707] Article 142(1) of the Criminal Code of the SFRY ("Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack on the civilian population, settlement, individual civilians or persons *hors de combat*, which results in death or serious injury to body or health; […] use of measures of intimidation and terror, taking of hostages, collective punishment, unlawful taking to concentration camps and other unlawful confinements, deprivation of rights to a fair and impartial trial; […] shall be punished by no less than five years in prison, or by the death penalty.").
[1708] *Tadić* Decision of 2 October 1995, para. 132, *referring to* the SFRY Law on the Ratification of the Additional Protocol to the Geneva Convention from 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol I) and the Additional Protocol with the Geneva Convention of 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol II), 26 December 1978, Article 210 of the Constitution of SFRY, 1974. *See also* Additional Protocol I, Article 75(1) ("[…] [P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article […]"), Article 75(2)(c) ("The following acts are and shall remain prohibited at any time and in any place whatsoever […] the taking of hostages"); Additional Protocol II. *See also* SFRY Military Manual, Article 17 (recognizing applicable "basic rules of

violation must have grave consequences for the victim; and (iv) that such a violation must entail the individual criminal responsibility of the perpetrator.[1709] The Trial Chamber relied, *inter alia*, on the ICTY Appeals Chamber jurisprudence in the *Tadić*, *Čelebići*, and *Karadžić* cases and concluded that hostage-taking under Article 3(1)(b) common to the Geneva Conventions met these conditions as the rules in Common Article 3 are part of customary international law in international and non-international armed conflicts, the acts prohibited by Common Article 3 breach rules protecting important values and involve grave consequences for the victims, and violations of such rules entail individual criminal responsibility.[1710] In light of the established jurisprudence on this matter, the Appeals Chamber finds that the Trial Chamber correctly relied on the *Tadić* Decision of 2 October 1995 and other consistent ICTY Appeals Chamber jurisprudence in the exercise of its jurisdiction over the crime of hostage-taking and, contrary to Mladić's argument, it was not required to conduct a more detailed analysis in this respect.[1711]

495. With respect to Mladić's submission that the Trial Chamber violated the principle of *nullum crimen sine lege*, the Appeals Chamber recalls that this principle prescribes that a person may only be found guilty of a crime in respect of acts which constituted a violation of a norm which existed at the time of their commission.[1712] In light of the well-established jurisprudence that hostage-taking was a crime under customary international law during the period covered by the Indictment, the Appeals Chamber rejects Mladić's contention that, by relying on the *Tadić* Decision of 2 October 1995, the Trial Chamber breached the principle of *nullum crimen sine lege*.

496. Mladić therefore fails to demonstrate that the Trial Chamber erred in finding that it had jurisdiction over the hostage-taking of the UN Personnel or that there are cogent reasons to depart from well-established jurisprudence on this matter. Based on the foregoing, the Appeals Chamber dismisses Ground 6.A of Mladić's appeal.

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humanity" contained in Common Article 3), Article 31 (prohibiting the taking hostage of, *inter alia*, civilians and prisoners of war "even as a reprisal").

[1709] Trial Judgement, para. 3009, *referring to Tadić* Decision of 2 October 1995, paras. 94, 143.

[1710] Trial Judgement, para. 3010, *referring to*, *inter alia*, *Karadžić* Decision of 9 July 2009, paras. 23, 25, 26, *Čelebići* Appeal Judgement, paras. 138, 139, 143, 147, 167, 173, 174, *Tadić* Decision of 2 October 1995, paras. 89, 98, 134.

[1711] The Appeals Chamber finds without merit Mladić's argument that the ICTY Appeals Chamber in the *Čelebići* and *Kunarac et al.* cases "implicitly" affirmed the need for a trial chamber to conduct a detailed analysis of its jurisdiction where jurisdiction may be in issue. *See Mladić* Appeal Brief, para. 699, *referring to Kunarac et al.* Appeal Judgement, paras. 67, 68, *Čelebići* Appeal Judgement, paras. 167, 168. The relevant jurisprudence to which he refers shows that the ICTY Appeals Chamber relied on the *Tadić* jurisprudence and reaffirmed that Article 3 of the ICTY Statute encompasses violations of Common Article 3. *See Kunarac et al.* Appeal Judgement, para. 68, nn. 60-62; *Čelebići* Appeal Judgement, paras. 168, 169.

[1712] *See Milutinović et al.* Decision of 21 May 2003, para. 37; *Aleksovski* Contempt Appeal Judgement, para. 38; *Čelebići* Appeal Judgement, para. 576; *Aleksovski* Appeal Judgement, para. 126. *See also Hadžihasanović et al.* Decision of 16 July 2003, para. 51.

2. Alleged Error in Conclusions from Assessment of Evidence Relating to the Detention of UN Personnel (Ground 6.B)

497. Upon considering Mladić's argument that the UN Personnel were combatants and not entitled to the protection of Common Article 3, the Trial Chamber found their status as combatants or civilians to be irrelevant since the protection of Common Article 3 applies to any person taking no active part in the hostilities at the time the offence was committed, including combatants rendered *hors de combat* by detention.[1713] The Trial Chamber concluded that the captured UN Personnel fell within the protection guaranteed by Common Article 3.[1714]

498. Mladić submits that the Trial Chamber erred by failing to make a determination of the status of the UN Personnel and in finding that their status as combatants or civilians was irrelevant.[1715] He contends that the UN Personnel were combatants and that the detention of combatants as prisoners of war, who become *hors de combat*, does not entail any criminal responsibility.[1716] Consequently, Mladić submits, the Trial Chamber did not have jurisdiction over the alleged crime of taking the UN Personnel hostage.[1717]

499. The Prosecution responds that the UN Personnel were rendered *hors de combat* by their detention and, as such, were protected under Common Article 3 regardless of their status prior to detention.[1718] It submits that the ICTY had jurisdiction over the crime of hostage-taking relating to all detained individuals and that the determination of the status of the UN Personnel prior to detention was unnecessary.[1719]

500. Mladić replies that the Prosecution does not engage directly with his submission that the status of the UN Personnel was relevant to whether the Trial Chamber had jurisdiction over the alleged crimes.[1720]

501. As discussed above, the Trial Chamber correctly found that the protection of Common Article 3 applies to any person taking no active part in the hostilities including combatants placed *hors de combat* at the time the offence was committed.[1721] The prohibition against hostage-taking in

[1713] Trial Judgement, para. 3224.
[1714] Trial Judgement, para. 3224.
[1715] Mladić Appeal Brief, paras. 711, 722, 724, 731. *See also* Mladić Appeal Brief, paras. 712, 713.
[1716] Mladić Appeal Brief, paras. 723, 725-730, 732. *See also* Mladić Appeal Brief, paras. 715-719.
[1717] Mladić Appeal Brief, paras. 732, 733. *See also* Mladić Appeal Brief, paras. 712, 713, 734.
[1718] Prosecution Response Brief, paras. 300, 303.
[1719] Prosecution Response Brief, paras. 298-303, *referring to Karadžić* Decision of 11 December 2012, paras. 8, 15, 16, 21, *Karadžić* Decision of 9 July 2009, paras. 6, 22, 26, 28.
[1720] Mladić Reply Brief, para. 102.
[1721] *See supra* Section III.E.1.

Common Article 3 applies to all detained individuals irrespective of their status prior to detention.[1722] Accordingly, the Appeals Chambers of the ICTY and the Mechanism have affirmed that the UN Personnel were entitled to protection under Common Article 3.[1723] Mladić therefore fails to demonstrate that the Trial Chamber erred in finding that the status of the UN Personnel, as combatants or civilians, was irrelevant to determining whether they were entitled to the protection against hostage-taking in Common Article 3.

502. Based on the foregoing, the Appeals Chamber dismisses Ground 6.B of Mladić's appeal.

3. Alleged Errors in Assessing Circumstantial Evidence (Ground 6.C)

503. As recalled above, the Trial Chamber concluded that, from around 25 May 1995 until approximately 24 June 1995, the Hostage-Taking JCE existed with the common objective of capturing the UN Personnel deployed in various parts of Bosnia and Herzegovina and detaining them at strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets.[1724] The Trial Chamber also found that Mladić significantly contributed to and, along with other members of the Hostage-Taking JCE, shared the intent to achieve the common objective of this joint criminal enterprise.[1725]

504. Mladić submits that the Trial Chamber gave insufficient weight to exculpatory evidence in relation to the Hostage-Taking JCE, leading it to err in finding that his significant contribution[1726] and *mens rea*[1727] were established beyond reasonable doubt.[1728] The Appeals Chamber will address these contentions in turn.

(a) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's Significant Contribution to the Hostage-Taking JCE

505. In concluding that Mladić significantly contributed to the Hostage-Taking JCE, the Trial Chamber considered its findings that, *inter alia*, Mladić ordered VRS units to detain the UN Personnel and to place them at potential NATO air strike targets and, when requested to release

[1722] *Karadžić* Appeal Judgement, para. 659; *Karadžić* Decision of 11 December 2012, paras. 16, 21; *Karadžić* Decision of 9 July 2009, para. 22. *See also Popović et al*. Appeal Judgement, para. 794; *Đorđević* Appeal Judgement, para. 747; *Strugar* Appeal Judgement, n. 460.
[1723] *Cf. Karadžić* Appeal Judgement, paras. 659, 660; *Karadžić* Decision of 11 December 2012, paras. 9, 10, 16, 20, 21.
[1724] Trial Judgement, para. 5141.
[1725] Trial Judgement, paras. 5142, 5156, 5163. *See also* Trial Judgement, paras. 5146-5155, 5157-5162.
[1726] Mladić Appeal Brief, paras. 741, 751.
[1727] Mladić Appeal Brief, paras. 752, 758.
[1728] Mladić Notice of Appeal, para. 69; Mladić Appeal Brief, paras. 751, 758.

them, informed the UNPROFOR Commander that the detainees' release was contingent on the cessation of air strikes.[1729]

506. Mladić submits that the Trial Chamber erred in fact in making findings on his significant contribution to the Hostage-Taking JCE, namely by: (i) relying on orders not issued by him; (ii) failing to give sufficient weight to other orders issued by him to treat the UN Personnel as prisoners of war in accordance with the Geneva Conventions; and (iii) failing to correctly assess evidence relating to the filming of the UN Personnel.[1730]

507. Specifically, Mladić submits that, in finding that he ordered the placement of the UN Personnel at potential NATO air strike targets and that he significantly contributed to the Hostage-Taking JCE, the Trial Chamber failed to give sufficient weight to the fact that two orders on which it relied in making this finding were not issued by him.[1731] He argues that the order dated 27 May 1995 was not signed by him and originated from the "Supreme Defence Counsel" headed by Karadžić.[1732] In addition, he contends that this order and another order, dated 30 May 1995, on which the Trial Chamber relied did not contain his "unique identification number", and that both were "inconsistent with [his] military notebooks" and orders to his subordinates.[1733]

508. Mladić further submits that, in finding that his subordinates made threats against the UN Personnel and that his orders to detain them illustrate his significant contribution to the Hostage-Taking JCE, the Trial Chamber failed to give sufficient weight to orders he gave to subordinates to treat detainees as prisoners of war in accordance with the Geneva Conventions, which were followed.[1734] Mladić asserts that his orders to detain and disarm the UN Personnel were lawful under international humanitarian law.[1735]

509. Mladić also submits that, in finding that he visited the detainees between 2 and 4 June 1995 and ordered their filming, the Trial Chamber relied on Witness Janusz Kalbarczyk whose evidence was inconsistent and differed from testimonies of other detained UN Personnel who did not confirm

[1729] Trial Judgement, para. 5156. *See also* Trial Judgement, para. 5157.
[1730] Mladić Appeal Brief, paras. 741, 751. *See also* Mladić Appeal Brief, paras. 742-750.
[1731] Mladić Appeal Brief, paras. 743, 744, *referring to* Exhibits P789, P5230.
[1732] Mladić Appeal Brief, para. 744.
[1733] *See* Mladić Appeal Brief, paras. 743-745, *referring to*, *inter alia*, Exhibit P5230.
[1734] Mladić Appeal Brief, paras. 746, 750.
[1735] Mladić Appeal Brief, para. 749, *referring to* Exhibits P6611, para. 68, P2558, para. 3. Mladić adds that orders forbidding leakage of information regarding the detention and contact with the detainees were legitimate to ensure the security of VRS soldiers and the detainees in the eventuality of rescue operations. *See* Mladić Appeal Brief, para. 749, *referring to* Exhibits P6716, paras. 7-11, P5230, p. 1.

seeing Mladić.[1736] Mladić asserts that the Trial Chamber found that he ordered the filming of the detainees without referring to evidence.[1737] He contends that the Trial Chamber relied on the hearsay evidence of Witness Patrick Rechner that Mladić had ordered the transport of the detainees to be filmed on different dates and locations, and that this evidence was not corroborated by "other UN prisoners present there".[1738] He argues that this evidence was inconsistent with: (i) Witness Kalbarczyk's testimony affirming Mladić's absence during the filming on 2 and 3 June 1995 and that the filming was done by a civilian journalist;[1739] (ii) the lack of mention of the filming between 2 and 4 June 1995 by Witness Griffiths Evans;[1740] and (iii) the evidence of Witness Snježan Lalović, the journalist who conducted the filming, that he was not ordered to film by anyone in the military but by his editors and "who denies any mention of [Mladić]" during the transportation of the detainees on 26 May 1995.[1741]

510. The Prosecution responds that none of the evidence cited by Mladić undermines the Trial Chamber's findings and that he ignores critical evidence establishing his central involvement in the implementation of the common purpose.[1742] Specifically, the Prosecution contends that the Trial Chamber did not attribute the order dated 27 May 1995 to Mladić or rely on it in finding that he ordered the placement of the UN Personnel at potential air strike targets.[1743] The Prosecution submits that the Trial Chamber did not fail to give sufficient weight to orders to treat detainees as prisoners of war, but points out that those same orders also include instructions to take the UN Personnel as hostages.[1744] Consequently, in its submission, the Trial Chamber properly relied on such orders in making its finding that Mladić and the other members of the joint criminal enterprise issued them in furtherance of the common objective of the Hostage-Taking JCE.[1745] The Prosecution further submits that the Trial Chamber reviewed the evidence to which Mladić refers

[1736] Mladić Appeal Brief, para. 742, *referring to* Exhibits P396, p. 9, P397, p. 8, D393, pp. 12, 13. Mladić also asserts that Witness Kalbarczyk's evidence had "a number of inconsistencies" and was inconsistent with his military notebooks. *See* Mladić Appeal Brief, para. 742.
[1737] Mladić Appeal Brief, para. 747, *referring to* Trial Judgement, para. 5153.
[1738] Mladić Appeal Brief, para. 748, *referring to* Trial Judgement, para. 2238, Exhibit P2554, para. 52, T. 29 October 2013 pp. 18494, 18528, 18529. The Appeals Chamber notes that Mladić's reference to "other UN prisoners present there" pertains to the evidence of one witness, Witness Kalbarczyk. *See* Mladić Appeal Brief, para. 748, *referring to* T. 14 November 2013 pp. 19352, 19353.
[1739] Mladić Appeal Brief, para. 747, *referring to* Exhibit P2801, p. 5.
[1740] Mladić Appeal Brief, para. 747, *referring to* Exhibit P396, p. 9.
[1741] Mladić Appeal Brief, paras. 747, 748, *referring to* Exhibit D858, paras. 3, 15, T. 16 December 2014 p. 29887.
[1742] Prosecution Response Brief, para. 308.
[1743] Prosecution Response Brief, para. 310, *referring to* Trial Judgement, paras. 5137, 5141, 5142. The Prosecution adds that the Trial Chamber reasonably attributed the order dated 30 May 1995 to Mladić as the order contains his signature and, at trial, he did not challenge its admissibility or deny that he signed this order, and tendered other documents with different identification numbers as "his". *See* Prosecution Response Brief, para. 309.
[1744] Prosecution Response Brief, para. 311. The Prosecution adds that the argument that the orders to block, detain, and disarm the UN Personnel were lawful does not undermine the finding that Mladić significantly contributed to the Hostage-Taking JCE. *See* Prosecution Response Brief, para. 314.
[1745] Prosecution Response Brief, para. 311.

with respect to the filming of the detainees and submits that the Trial Chamber reasonably concluded that he ordered the filming.[1746] The Prosecution adds that, in any event, the Trial Chamber's finding of Mladić's significant contribution does not depend on any finding concerning the filming of the detainees, in light of Mladić's orders to detain the UN Personnel and place them at potential NATO air strike targets as well as his negotiating about their release.[1747]

511. Mladić replies that he demonstrated that the Trial Chamber erred by relying on inconsistent evidence and failing to give sufficient weight to exculpatory evidence regarding his participation in the Hostage-Taking JCE.[1748]

512. Mladić contends that the Trial Chamber relied on two orders not issued by him, pointing to orders dated 27 May 1995 and 30 May 1995.[1749] With respect to the order dated 27 May 1995, the Appeals Chamber recalls that the Trial Chamber found that it contained an order to various VRS corps and units to place captured and disarmed UNPROFOR forces at potential NATO air strike targets ("Order of 27 May 1995").[1750] With respect to the order dated 30 May 1995, the Trial Chamber found that Mladić informed VRS corps commands and units that NATO was preparing an operation to free the captured UN Personnel and ordered: (i) all units to open fire on the area of airborne assault and of the deployment of UNPROFOR troops in the event NATO launched such an operation; and (ii) the SRK Command to complete the disarming of the detainees and deploy them to potential NATO strike targets ("Order of 30 May 1995").[1751] The Appeals Chamber observes that the Trial Chamber explicitly noted that the Order of 27 May 1995 was signed by Milovanović who was the Chief of Staff and Deputy Commander of the VRS Main Staff.[1752] The Trial Chamber therefore did not attribute this order to Mladić personally, but rather to the VRS Main Staff.[1753] To the extent that Mladić argues that the Trial Chamber erred in attributing the Order of 30 May 1995 to him, the Appeals Chamber finds this to be without merit as this order bears his signature and Mladić did not claim at trial that the order was not attributable to him.[1754] In addition, the Appeals Chamber summarily dismisses Mladić's undeveloped submissions that the two orders were

[1746] Prosecution Response Brief, paras. 312, 313.
[1747] Prosecution Response Brief, para. 313, *referring to* Trial Judgement, para. 5156.
[1748] Mladić Reply Brief, para. 103.
[1749] Mladić Appeal Brief, paras. 743, 744, *referring to* Exhibits P789, P5230.
[1750] Trial Judgement, paras. 2219, 5137, *referring to* Exhibit P789.
[1751] Trial Judgement, paras. 2223, 5151, 5152.
[1752] Trial Judgement, para. 2219. *See also* Trial Judgement, para. 240.
[1753] Mladić's argument that the Order of 27 May 1995 was not signed by him and did not contain his "unique identification number" does not identify any error on the part of the Trial Chamber. *See* Mladić Appeal Brief, para. 744.
[1754] *See* Exhibit P5230; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Prosecution Motion to Admit Evidence From the Bar Table, 31 October 2013 (public with confidential annexes), Annex A (confidential), p. 210 (item 382); *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Response in Opposition to "Prosecution Motion to Admit

inconsistent with his military notebooks and orders to his subordinates. The Appeals Chamber finds that Mladić fails to demonstrate error in the Trial Chamber's assessment related to the Order of 27 May 1995 and the Order of 30 May 1995.

513. The Appeals Chamber turns to Mladić's submission that the Trial Chamber failed to give sufficient weight to his orders to subordinates to treat detainees as prisoners of war in accordance with the Geneva Conventions. The Appeals Chamber observes that in support of this argument Mladić refers to paragraphs of the Trial Judgement without pointing to any specific orders or evidence on the record.[1755] A review of the Trial Judgement reveals that in some of the paragraphs which Mladić cites, the Trial Chamber discussed evidence concerning orders regarding the treatment of detainees[1756] or their actual treatment.[1757] In reviewing some of the evidence which Mladić claims concerns the treatment of the detainees as prisoners of war in accordance with the Geneva Conventions, the Trial Chamber also considered that: (i) the detainees were beaten, abused, and handcuffed to flagpoles; (ii) Mladić and VRS members issued threats to the UN Personnel or

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Evidence From the Bar Table", 30 December 2013, pp. 2-18. *See also* Mladić Final Trial Brief, pp. 2-916; T. 9 December 2016 pp. 44579-44661; T. 12 December 2016 pp. 44662-44739; T. 13 December 2016 pp. 44740-44834.

[1755] *See* Mladić Appeal Brief, paras. 746, 750, *referring to*, *inter alia*, Trial Judgement, paras. 2219, 2220, 2227, 2228, 2235, 2240, 2241, 2253, 2256, 2262, 2268, 2279, 2316.

[1756] *See* Trial Judgement, para. 2219 ("[O]n 25 May 1995, Mladić […] ordered the Ilidža Brigade to block and disarm the UNPROFOR members and put them under its control as [prisoners of war]. On 27 May 1995, Mano[jl]o Milovanović ordered […] UN [P]ersonnel were to be treated with military respect and as [prisoners of war]"), *referring to* Exhibits P6611, para. 68, P789, pp. 1, 2, P1849, T. 26 June 2014 pp. 23056, 23057, 23069, 23070. *See* Trial Judgement, para. 2220 ("Milenko Indić […] received an order from the VRS Main Staff to place under control, disarm, and seize the communication devices of UNPROFOR members in the SRK territory, but not to harm them in any manner."), *referring to* Exhibit D614, para. 27, T. 2 September 2014 pp. 25112, 25113. *See* Trial Judgement, para. 2253 ("Milorad Šehovac testified that […] the SRK 2nd Sarajevo Light Infantry Brigade declared five to seven UNMOs […] as [prisoners of war]. […] The SRK unit acted in execution of an order from the SRK to capture 'everything' in their defence zone and treat them as [prisoners of war]. […] [T]he SRK unit did not mistreat the detainees nor used any kind of restraint or force against them. The UNMOs were allowed to make phone calls, provided three meals per day, and allowed to see a doctor."), *referring to* T. 15 July 2014 pp. 24052, 24053. *See* Trial Judgement, para. 2316 ("Živanović ordered that the UNPROFOR soldiers […] be treated as [prisoners of war]."). *See also* Trial Judgement, para. 2283 ("Živanović ordered that the UN soldiers be treated as [prisoners of war] in a correct manner throughout their capture and detention."), *referring to* Exhibit P2545, para. 5.

[1757] *See* Trial Judgement, para. 2227 (stating that on 25 May 1995, two soldiers arrested Gunnar Westlund and his team and "[…] allowed [them] to keep their IDs, wallets and cigarettes."), *referring to* Exhibit P400, pp. 3, 4. *See* Trial Judgement, para. 2236 (stating that VRS soldiers were threatening detained UNMOs and that "[…] Captain Vojvodić, sent back these soldiers."), *referring to* Exhibit P397, p. 4. *See* Trial Judgement, para. 2240 (stating that on 26 May 1995 "Kozusnik was selected to leave and collect some personal items for the team."), *referring to* Exhibit P396, p. 4. *See* Trial Judgement, para. 2241 (stating that on 26 May 1995, UNMO personnel put under house arrest were told "[…] that it was for their own safety, as NATO air strikes had hit a school and a hospital."), *referring to* Exhibit P3581, p. 2. *See* Trial Judgement, para. 2256 (stating that on 27 May 1995, the Serb military police declared the detainees prisoners of war), *referring to* Exhibit P399, p. 3. *See* Trial Judgement, para. 2268 (stating that on 26 May 1995, Indić informed UNPROFOR personnel that they were VRS prisoners of war), *referring to* Exhibits P3586, paras. 28, 30, 31, P5234, p. 2. The Appeals Chamber observes that the remaining paragraphs of the Trial Judgement to which Mladić refers do not contain any order or evidence relevant to the alleged humane treatment of the detainees as prisoners of war. *See* Trial Judgement, paras. 2228, 2235, 2262, 2279. To the contrary, some of these paragraphs reveal that the UN Personnel were mistreated. *See*, *e.g.*, Trial Judgement paras. 2262 ("Several of the UNPROFOR soldiers were kicked and punched by Serb soldiers to speed up their surrender."), 2279 ("A man […] struck the head of [a French soldier] on the temple with his dagger, and kicked the other French soldier who was in the room in the face."). The Appeals Chamber will therefore not examine further Mladić's allegation of error pertaining to these paragraphs of the Trial Judgement.

UNPROFOR headquarters on the fate of the detainees with the aim of stopping the air strikes; and (iii) UN Personnel were used as "human shields".[1758] In these circumstances, Mladić does not demonstrate an error on the part of the Trial Chamber in assessing or weighing the evidence.

514. The Appeals Chamber also observes that, in discussing Mladić's contribution to the Hostage-Taking JCE, the Trial Chamber specifically recalled some of the evidence concerning the alleged treatment of the detained UN Personnel as prisoners of war[1759] and found that he: (i) ordered VRS units to detain the UN Personnel and to place them at potential NATO air strike targets; (ii) when requested to release the detained UN Personnel, informed an UNPROFOR representative that such release was contingent on the cessation of air strikes; and (iii) was closely involved throughout every stage of the hostage-taking, including as a negotiator with UNPROFOR representatives.[1760] In light of such evidence and findings, Mladić does not show how selective orders to treat the detained UN Personnel as prisoners of war or examples of alleged favourable treatment of the detainees who were threatened, abused, and used as "human shields", could undermine the Trial Chamber's conclusion that he significantly contributed to the Hostage-Taking JCE. Similarly, in light of these considerations, the Appeals Chamber finds that Mladić's arguments that his orders to detain and disarm the UN Personnel, as well as orders forbidding leakage of information regarding the detention and contact with the detainees were lawful, fail to identify any error or undermine the Trial Chamber's finding that he significantly contributed to the Hostage-Taking JCE.

[1758] *See* Trial Judgement, para. 2227 ("[…] [a VRS soldier] ordered the witness to contact UNMO headquarters and tell them that the team would be shot one by one unless the NATO air strikes stopped. […] [D]runken VRS soldiers beat and abused the Nigerian and the Pakistani UNMOs by hitting them with the butts of their rifles."), *referring to* Exhibit P400, pp. 3, 4. *See* Trial Judgement, para. 2236 ("Gelissen testified that [UNMO personnel] Golubev was also handcuffed to a flagpole in front of the barracks.[…] [O]ne VRS soldier was making gestures of shooting the [NATO] plane and cutting throats towards the UNMOs while others were shouting."), *referring to* Exhibit P397, pp. 2-4. *See* Trial Judgement, para. 2236 ("After 4 p.m., two UNMOs, Alves and Gelissen, were brought to join [Romero and Evans] and were handcuffed to another flagpole for approximately four hours"), *referring to* Exhibit P396, p. 3. *See* Trial Judgement, para. 2241 ("A young Bosnian-Serb soldier told the witness's group that they were VRS hostages and that they would be taken to the Jahorina radar station and used as 'human shields'."), *referring to*, *inter alia*, Exhibit P3581, p. 2. *See* Trial Judgement, para. 2256 ("The conditions at the compound in Banja Luka were bad: the detainees barely received any food, the mattresses were unusable, and there was no soap, bed linen, or hot water. One of the military police commanders in Banja Luka explained that the purpose of splitting them into groups was to stop NATO air strikes by using them as 'human shields' at particularly important facilities which were possible targets of NATO attacks."), *referring to* Exhibit P399, p. 3. *See also* Trial Judgement, paras. 2264 ("The soldiers transported to Doboj were then held at various positions and 'very likely' used as 'human shields' against eventual air attacks."), 2266 ("The second group composed of UNMO and UNPROFOR personnel was […] split up and detained at different military positions."), 2270 ("Serb soldiers threatened and beat the [French Battalion] Commander during his detention."), 2274 ("[A French platoon leader] was then compelled at gunpoint to assemble his soldiers and forced to kneel and used as a 'human shield'"), 2305 ("They further heard that they had all been held at military sites, including hospitals, command posts, artillery firing positions, and ammunition depots."), *referring to*, *inter alia*, Exhibit P5234, p. 1; Exhibit P3586, paras. 35, 36 ("the captain said that we were not prisoners of war but hostages.").

[1759] *See*, *e.g.*, Trial Judgement, paras. 5148-5150.

[1760] *See* Trial Judgement, para. 5156.

515. With respect to Mladić's contention that the Trial Chamber erred in relying on inconsistent evidence in finding that he visited some of the detainees between 2 and 4 June 1995 and ordered to film them, the Appeals Chamber observes that the Trial Chamber did not rely on this evidence in making a finding on Mladić's significant contribution to the Hostage-Taking JCE.[1761] The Trial Chamber mainly relied on the evidence and findings that Mladić ordered VRS units to detain the UN Personnel and place them at potential NATO air strike targets, informed an UNPROFOR representative that their release was contingent on the cessation of air strikes, ordered such release, and was closely involved throughout every stage of the hostage-taking including as a negotiator with UNPROFOR representatives.[1762] Therefore, any error on the part of the Trial Chamber relating to Mladić's visit and order to film the detainees between 2 and 4 June 1995 would not disturb the Trial Chamber's conclusion that he significantly contributed to the Hostage-Taking JCE. Consequently, as Mladić's submissions on this point do not have the potential to demonstrate a miscarriage of justice or cause the Trial Judgement to be reversed or revised, the Appeals Chamber dismisses them without further consideration in accordance with the applicable standard of review.[1763]

516. The Appeals Chamber finds that Mladić therefore fails to demonstrate that the Trial Chamber erred in assessing the evidence concerning his contribution to the Hostage-Taking JCE.

(b) Alleged Failure to Give Sufficient Weight to "Exculpatory Evidence" Concerning Mladić's *Mens Rea*

517. In concluding that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE, the Trial Chamber found that he intended to capture the UN Personnel and detain them in strategic military locations in order to prevent NATO from launching further air strikes on Bosnian Serb military targets.[1764] The Trial Chamber particularly considered Mladić's statements and conduct including: (i) his orders to detain the UN Personnel and place them at potential NATO air strike locations; (ii) his statements on the fate of the UN Personnel; (iii) evidence that he communicated to UNPROFOR that the release of the detainees was contingent on the cessation of

[1761] *See* Trial Judgement, para. 5156.
[1762] Trial Judgement, para. 5156.
[1763] *See supra* Section II. *See also Karadžić* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 12; *Ngirabatware* Appeal Judgement, para. 7. *See also, e.g., Prlić et al.* Appeal Judgement, para. 18; *Nyiramasuhuko et al.* Appeal Judgement, para. 29.
[1764] Trial Judgement, para. 5163.

air strikes; and (iv) evidence that his subordinates threatened the UN Personnel with the aim of stopping the air strikes.[1765]

518. Mladić submits that in finding that he possessed the *mens rea* for the Hostage-Taking JCE, the Trial Chamber erred by giving insufficient weight to his "proactive actions and conduct", which reflected his intent "to bring a peaceful end to the situation".[1766] Mladić namely points to his attempt to open "direct and more efficient" channels of communication and prompt action to end the crisis by: (i) negotiating a possible termination of hostilities to end the captivity of the UN Personnel despite the fact that they "can be detained until the definitive termination of hostilities";[1767] and (ii) instructing his subordinates to release the UN Personnel immediately after such decision was made by the political leadership.[1768] Mladić further submits that the Trial Chamber gave insufficient, if any, weight to the evidence of Witness Radoje Vojvodić who, on the orders of the VRS Main Staff, removed the UN Personnel from risk and harm inflicted by others and treated them in accordance with international humanitarian law.[1769]

519. The Prosecution responds that the evidence cited by Mladić incriminates, rather than exculpates him, and does not undermine the fact that the UN Personnel were taken hostage on his orders.[1770] It contends that Mladić's argument that prisoners of war can be detained until the termination of hostilities is "beside the point" given his role in conditioning their release on the cessation of hostilities which amounts to a gross violation of international humanitarian law.[1771] The Prosecution submits that Mladić played a central role in the implementation of the Hostage-Taking JCE and fails to show error in the Trial Chamber's findings in relation to his *mens rea*.[1772]

520. Mladić replies that the Prosecution mischaracterizes and fails to respond to his submissions that he took proactive actions in order to bring an end to the crisis.[1773]

521. With respect to the alleged failure to give sufficient weight to Mladić's negotiating a possible termination of hostilities,[1774] the Appeals Chamber notes that the Trial Chamber took

[1765] Trial Judgement, para. 5163.
[1766] Mladić Appeal Brief, paras. 752, 753, 758.
[1767] Mladić Appeal Brief, para. 756, *referring to* Exhibits P2196, P2198, Article 118 of Geneva Convention III.
[1768] Mladić Appeal Brief, para. 754, *referring to*, *inter alia*, Exhibits P2480, P2481. Mladić adds that, after liberating 231 of the detained UN Personnel, he continued his diplomatic efforts with UNPROFOR to negotiate the release of four VRS prisoners. *See* Mladić Appeal Brief, para. 754.
[1769] Mladić Appeal Brief, para. 755, *referring to* Exhibit D1224, paras. 5-16, T. 8 September 2015 pp. 38790-38801. Mladić adds that Witness Vojvodić's testimony was corroborated by a report from the ICRC which confirms adequate accommodation, meals, and medical attention. *See* Mladić Appeal Brief, para. 755, *referring to* Exhibits D1224, para. 12, D1226, D1227.
[1770] Prosecution Response Brief, para. 316. *See also* Prosecution Response Brief, para. 318.
[1771] Prosecution Response Brief, para. 317.
[1772] Prosecution Response Brief, para. 318. *See also* Prosecution Response Brief, para. 316.

express note of and discussed the evidence cited by Mladić of conversations between him and UNPROFOR Commander General Bernard Janvier concerning such negotiations.[1775] The Trial Chamber found that when requested to release the UN Personnel, Mladić informed Commander Janvier that their release was contingent on a guarantee that the air strikes would cease.[1776] The Trial Chamber took this evidence into account, among other evidence of Mladić's acts and conduct, in concluding that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE.[1777] The Appeals Chamber finds that Mladić does not demonstrate error in the Trial Chamber's assessment of his negotiating efforts.

522. With respect to the alleged failure to give sufficient weight to his instructions to release the UN Personnel immediately upon the decision of the political leadership to do so,[1778] the Trial Chamber reviewed the evidence to which Mladić refers that, on 2 and 6 June 1995, in compliance with the orders from Karadžić, Mladić ordered various VRS units to release 215 of the detained UN Personnel.[1779] While the Trial Chamber did not expressly discuss this evidence in assessing Mladić's intent to achieve the common objective of the Hostage-Taking JCE, in light of the evidence and the Trial Chamber's findings that he had ordered their initial detention and placement at potential NATO air strike locations,[1780] Mladić does not demonstrate how the fact that he implemented orders by his superior to release some of the detained UN Personnel could undermine the Trial Chamber's conclusion that he shared the intent to achieve the common objective of the Hostage-Taking JCE.[1781]

[1773] Mladić Reply Brief, para. 104.
[1774] Mladić Appeal Brief, para. 756, *referring to*, *inter alia*, Exhibits P2196, P2198.
[1775] *See* Trial Judgement, para. 2297 ("In a meeting held on 4 June 1995, General Janvier informed Mladić that all UN personnel held as 'hostages' by the VRS should be liberated immediately […] [i]n response, Mladić stated that the liberation of the [prisoners of war] was directly linked to a guarantee that air strikes will not take place again in the future. Mladić requested the immediate ratification of an agreement with UNPROFOR stating that (i) the VRS would no longer threaten the life and security of UNPROFOR members; (ii) UNPROFOR would not engage any of its forces or air strikes against Serb objectives or territory; and (iii) upon signing of the agreement, all [prisoners of war] would be liberated."), *referring to* Exhibit P2196 (concerning a meeting between Mladić and Commander Janvier on 4 June 1995). *See also* Trial Judgement, paras. 2302, *referring to* Exhibit P2198 (concerning a meeting between Mladić and Commander Janvier on 17 June 1995), 5160, 5163.
[1776] Trial Judgement, para. 5160.
[1777] Trial Judgement, para. 5163.
[1778] Mladić Appeal Brief, para. 754, *referring to* Exhibits P2480, P2481.
[1779] *See* Trial Judgement, para. 2296, n. 9797, *referring to* Exhibits P2480, P2481. The Trial Chamber also stated that Mladić further ordered the VRS to not divulge any information on the remaining captured UN Personnel. *See* Trial Judgement, para. 2296.
[1780] *See* Trial Judgement, paras. 5157, 5163.
[1781] Similarly, to the extent that Mladić is alleging that the Trial Chamber erred in assessing the evidence concerning his continuing diplomatic efforts to negotiate the release of VRS prisoners after the release of some of the detained UN Personnel, Mladić does not demonstrate how such evidence could undermine the conclusion that he shared the intent to achieve the common objective of the Hostage-Taking JCE.

523. The Appeals Chamber turns to the alleged failure to give sufficient weight to the evidence of Witness Vojvodić, a VRS officer in charge of the Koran military barracks in Pale,[1782] who Mladić claims removed the detained UN Personnel from harm and treated them in accordance with international humanitarian law.[1783] Although the Trial Chamber did not expressly consider this evidence in the section of the Trial Judgement concerning Mladić's *mens rea* for the Hostage-Taking JCE, the Trial Chamber discussed Witness Vojvodić's treatment of the detainees in Chapter 6 of the Trial Judgement, which sets out the evidence relating to hostage-taking.[1784] The Trial Chamber considered, for example, that on one occasion Witness Vojvodić sent back soldiers who had made threats to the life of UN Personnel detained at the Koran military barracks.[1785] However, the Trial Chamber also reviewed evidence that: (i) on 26 May 1995, Bosnian Serb soldiers drove two of the detained UN Personnel to the Koran headquarters and handcuffed them to flagpoles in front of the building;[1786] (ii) on the same day, a VRS commander told detained UN Personnel that they would be chained to strategic places if NATO strikes were to continue;[1787] and (iii) on 27 May 1995, following a visit of Witness Vojvodić, detained UN Personnel were moved to another building so that they could be chained more quickly to NATO's potential targets.[1788] In light of this evidence considered by the Trial Chamber, Mladić fails to demonstrate that the alleged selective favourable treatment of the detained UN Personnel by one VRS officer could undermine the Trial Chamber's conclusion that Mladić shared the intent to achieve the common objective of the Hostage-Taking JCE.

524. In light of the evidence and the Trial Chamber's findings that Mladić issued orders to detain the UN Personnel and place them at potential NATO air strike locations, made statements on the

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[1782] Trial Judgement, para. 2240.
[1783] Mladić Appeal Brief, para. 755, *referring to* Exhibit D1224, paras. 5-16, T. 8 September 2015 pp. 38790-38801. Witness Vojvodić testified that the detainees were not abused, were fed, and were allowed to contact relatives, to go out, as well as be visited by a medical team and the ICRC. He also claimed that one detainee was released for medical reasons. *See* Exhibit D1224, paras. 9, 10, 12; T. 8 September 2015 pp. 38799-38801.
[1784] *See*, *e.g.*, Trial Judgement, paras. 2236 ("[O]ne VRS soldier was making gestures of shooting the plane and cutting throats towards the UNMOs while others were shouting. One commander, […] Captain Vojvodić, sent back these soldiers."), 2247 ("[T]he detainees were held in a room for 24 hours a day, under constant guard. They had no radio and food was brought to them. Vojvodić visited them daily and Evans and his team would request medical attention due to the unsatisfactory hygiene conditions. Their demands were not met until later. The UNMOs requested to know their status and Vojvodić answered that they were detained as [prisoners of war]. The UNMOs then requested to have the same rights as [prisoners of war]. Vojvodić responded that he would contact Major Batinić but the UNMOs never heard anything from him."), 2309 ("Later on, Captain Vojvodić drove the detainees to their respective accommodations and offices so that they could retrieve some of their belongings and call their relatives. […] [A]t the Koran Military Barracks, the detained UNMOs were provided food and water, but not permitted to meet with a doctor until 5 June 1995; on 8 June 1995 the UNMOs were finally visited by delegates of the ICRC, following which they received clothing and toiletry, and on 10 June they could call home. […] [T]hey were also allowed to write messages, which were checked by Vojvodić's superiors, to their next of kin.").
[1785] Trial Judgement, paras. 2236, 2315.
[1786] Trial Judgement, para. 2236.
[1787] Trial Judgement, para. 2240.
[1788] Trial Judgement, para. 2244.

fate of the detainees, informed UNPROFOR that their release was contingent on the cessation of air strikes, and that his subordinates threatened the UN Personnel with the aim of stopping the air strikes,[1789] the Appeals Chamber finds that Mladić fails to demonstrate that the Trial Chamber insufficiently considered his "proactive actions and conduct" or that the Trial Chamber assessed the evidence in an unreasonable manner in finding that he shared the intent to achieve the common purpose of the Hostage-Taking JCE.

(c) Conclusion

525. Based on the foregoing, the Appeals Chamber dismisses Ground 6.C of Mladić's appeal.

[1789] *See* Trial Judgement, para. 5163.

F. Alleged Errors Regarding Modes of Liability (Ground 7)

526. The Trial Chamber convicted Mladić under Article 7(1) of the ICTY Statute for his commission of crimes through his participation in four joint criminal enterprises.[1790] In doing so, it recalled jurisprudence that where both individual responsibility under Article 7(1) and superior responsibility under Article 7(3) of the ICTY Statute are alleged under the same count and the elements of both modes of liability are satisfied, a trial chamber should enter a conviction on the basis of Article 7(1) of the ICTY Statute only, and consider the accused's superior position as an aggravating factor in sentencing.[1791] Following this elucidation of the law, the Trial Chamber explicitly stated that Mladić's "conduct and superior position is encapsulated within the conduct relied upon to establish his participation in the four" joint criminal enterprises.[1792] Accordingly, when determining Mladić's sentence, the Trial Chamber took into account his participation in the four joint criminal enterprises in his official capacity as Commander of the VRS Main Staff, finding that it amounted to an abuse of his superior position.[1793]

527. Mladić submits that the Trial Chamber erred by failing to provide a reasoned opinion in its findings on his superior responsibility and to establish his liability under Article 7(3) of the ICTY Statute beyond reasonable doubt.[1794] Specifically, he argues that the Trial Chamber failed to: (i) set out its analysis of relevant evidence;[1795] and (ii) establish that all elements of Article 7(3) of the ICTY Statute were proven beyond reasonable doubt, in particular whether he took all the necessary and reasonable measures to prevent the commission of crimes and punish perpetrators.[1796] Mladić asserts that, while the Trial Chamber did not convict him under Article 7(3) of the ICTY Statute, it should have satisfied itself that all the elements under this provision were proven beyond reasonable doubt in order to consider the mode of superior responsibility as an aggravating factor in sentencing.[1797] He argues that, as a result of the Trial Chamber's errors, his superior responsibility

[1790] Trial Judgement, paras. 5214, 5166. *See also*, *e.g.*, Trial Judgement, paras. 4232, 4238, 4612, 4685, 4688, 4740, 4893, 4921, 4987, 4988, 5098, 5128, 5130, 5131, 5141, 5142, 5156, 5163.
[1791] *See* Trial Judgement, para. 5166, *referring to Đorđević* Appeal Judgement, para. 939, *Jokić* Sentencing Appeal Judgement, para. 23, *Kordić and Čerkez* Appeal Judgement, para. 34, *Blaškić* Appeal Judgement, paras. 91, 92, *Čelebići* Appeal Judgement, para. 745, *Aleksovski* Appeal Judgement, para. 183.
[1792] Trial Judgement, para. 5166.
[1793] *See* Trial Judgement, para. 5193. *See also infra* Section III.H.
[1794] *See* Mladić Notice of Appeal, paras. 72-76; Mladić Appeal Brief, paras. 762, 772.
[1795] Mladić Appeal Brief, para. 773. *See also* Mladić Appeal Brief, paras. 775, 779 (wherein Mladić submits that the Trial Chamber omitted to conduct the relevant analysis in relation to the four joint criminal enterprises).
[1796] Mladić Appeal Brief, paras. 774, 778. *See also* Mladić Reply Brief, paras. 105, 107.
[1797] *See* Mladić Appeal Brief, paras. 764, 774, 778, *referring to Strugar* Appeal Judgement, paras. 252-262, *D. Milošević* Appeal Judgement, para. 281. *See also* Mladić Appeal Brief, paras. 762, 763, 765-773, 775-780; Mladić Reply Brief, paras. 105, 107.

was not proven beyond reasonable doubt and thus could not have been considered in sentencing.[1798] He requests that the Appeals Chamber revise his sentence accordingly.[1799]

528. The Prosecution responds that the Trial Chamber was not required to make findings on the elements of superior responsibility under Article 7(3) of the ICTY Statute because abuse of authority is a distinct aggravating factor that is not dependent upon a finding of superior responsibility under Article 7(3) of the ICTY Statute.[1800] The Prosecution submits that the Trial Chamber made all necessary findings on abuse of authority as an aggravating factor.[1801]

529. In convicting and sentencing Mladić for crimes under Article 7(1) of the ICTY Statute, the Trial Chamber stated that his superior responsibility was "encapsulated" within his joint criminal enterprise liability.[1802] The Appeals Chamber considers that this statement on Mladić's superior responsibility falls short of a reasoned opinion.[1803] The Appeals Chamber recalls that a trial chamber should set out in a clear and articulate manner the factual and legal findings on the basis of which it reached the decision to convict or acquit an accused. In particular, a trial chamber is required to provide clear, reasoned findings of fact as to each element of the crime charged.[1804] Notwithstanding, the Appeals Chamber considers that Mladić confuses superior responsibility under Article 7(3) of the ICTY Statute with abuse of authority as an aggravating factor in sentencing. These two issues are distinct and the consideration of abuse of an accused's position of authority as an aggravating factor in sentencing does not require a finding of superior responsibility.[1805] The Appeals Chamber therefore dismisses Mladić's argument that the Trial Chamber should have made findings on the elements of Article 7(3) of the ICTY Statute in order to consider his abuse of authority as an aggravating factor in sentencing.[1806]

[1798] *See* Mladić Appeal Brief, paras. 775-778.
[1799] Mladić Appeal Brief, paras. 778, 780; Mladić Reply Brief, paras. 105, 107. *See also infra*, paras. 542-548.
[1800] Prosecution Response, para. 321. *See also* Prosecution Response, paras. 319, 320, 322, 323.
[1801] Prosecution Response, para. 321.
[1802] *See* Trial Judgement, para. 5166.
[1803] *See* Article 23(2) of the ICTY Statute and Rule 98 *ter* (C) of the ICTY Rules.
[1804] *See Karadžić* Appeal Judgement, para. 700; *Ndindiliyimana et al.* Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320. *See also Prlić et al.* Appeal Judgement, para. 1778.
[1805] *Cf. Munyakazi* Appeal Judgement, para. 170; *Kamuhanda* Appeal Judgement, paras. 347, 348; *Babić* Sentencing Appeal Judgement, paras. 80, 81; *Semanza* Appeal Judgement, para. 336. According to the ICTR Appeals Chamber, "[t]he question of criminal responsibility as a superior is analytically distinct from the question of whether an accused's prominent status should affect his or her sentence". *See Semanza* Appeal Judgement, para. 336. Indeed, while an accused's superior position *per se* does not constitute an aggravating factor for sentencing purposes, the abuse of authority may. *See Prlić et al.* Appeal Judgement, para. 3264; *D. Milošević* Appeal Judgement, para. 302; *Stakić* Appeal Judgement, para. 411. *See also Kamuhanda* Appeal Judgement, para. 347.
[1806] The paragraph of the *D. Milošević* Appeal Judgement to which Mladić refers is inapposite as it concerns the ICTY Appeals Chamber's assessment that the trial chamber in that case made the necessary findings for establishing Dragomir Milošević's responsibility under Article 7(3) of the ICTY Statute. *See* Mladić Appeal Brief, para. 764, *referring to D. Milošević* Appeal Judgement, para. 281. Similarly, the part of the *Strugar* Appeal Judgement Mladić

530. Consequently, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić does not demonstrate that the Trial Chamber erred by not providing a reasoned opinion on his superior responsibility under Article 7(3) of the ICTY Statute.[1807] The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 7 of Mladić's appeal.

references does not support his argument as it concerns the ICTY Appeal Chamber's analysis of a superior's effective control as well as ability to prevent crimes and punish perpetrators in assessing the legal requirements and application of Article 7(3) of the ICTY Statute. *See* Mladić Appeal Brief, paras. 764, 774, *referring to Strugar* Appeal Judgement, paras. 252-262. However, the jurisprudence to which Mladić points reflects no indication that when a trial chamber considers an accused's abuse of authority as an aggravating factor, it must establish that the elements of superior responsibility under Article 7(3) of the ICTY Statute are satisfied. Mladić's submission that the Trial Chamber was required to establish that the elements of Article 7(3) of the ICTY Statute were fulfilled in considering his abuse of authority as an aggravating factor in sentencing will be further addressed under Ground 9.A of Mladić's appeal.

[1807] Mladić's submission that the Trial Chamber failed to enter findings on whether he took, and was able to take in the circumstances of the conflict, all necessary and reasonable measures to prevent the commission of crimes and punish their perpetrators is further addressed, in the context of the Overarching JCE, under Ground 3.B of Mladić's appeal.

535. The Appeals Chamber recalls that it has dismissed Grounds 1 to 8(A-D) of Mladić's appeal. Furthermore, regarding the "five categories" of error, the Appeals Chamber has reviewed every portion of Mladić's appellant's brief that he cross-references under this ground, and recalls that it has already dismissed all individual allegations of error.[1816] Given that Mladić has failed to establish any error warranting the Appeals Chamber's intervention in Grounds 1 to 8(A-D) of his appeal, his request for a retrial or remittance to remedy "cumulative" errors in the Trial Judgement is without merit.

536. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 8.E of Mladić's appeal.

[1816] In this regard, the Appeals Chamber has dismissed Mladić's arguments regarding the Trial Chamber's alleged: (i) application of an erroneous legal standard (*see*, *e.g.*, Ground 6.A); (ii) failure to provide a reasoned opinion (*see*, *e.g.*, Grounds 4.B, 5.E, 7, 8.B); (iii) error in assessing his *mens rea* and *actus reus* in relation to the Overarching JCE and the Sarajevo JCE (*see*, *e.g.*, Grounds 3.B, 4.A); (iv) errors in its use of adjudicated facts, namely the issues of his proximate subordinates (*see*, *e.g.*, Grounds 2.A, 3.A), a heightened standard for rebuttal evidence (*see* Grounds 2.A, 3.A, 5.E), and the conclusions on crime-based evidence (*see* Grounds 3.A, 5.I); and (v) violation of his fair trial rights regarding his effective participation (*see*, *e.g.*, Ground 8.B), the Prosecution's use of communication protected by lawyer-client privilege (*see*, *e.g.*, Ground 8.B), and equality of arms (*see*, *e.g.*, Grounds 8.A, 8.D).

H. Sentencing (Ground 9)

537. The Trial Chamber sentenced Mladić to a single sentence of life imprisonment for genocide, crimes against humanity (persecution, extermination, murder, deportation, and inhumane acts), and violations of the laws or customs of war (murder, terror, unlawful attacks on civilians, and taking of hostages).[1817] In determining his sentence, the Trial Chamber considered, *inter alia*, the gravity of Mladić's offences and the totality of his culpable conduct, his individual circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia.[1818]

538. Pursuant to Article 24 of the ICTY Statute and Rule 101(B) of the ICTY Rules, trial chambers of the ICTY were required to take into account the following factors in sentencing: (i) the gravity of the offence or totality of the culpable conduct; (ii) the individual circumstances of the convicted person; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; and (iv) aggravating and mitigating circumstances.[1819]

539. The Appeals Chamber recalls that appeals against a sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a corrective nature and are not trials *de novo*.[1820] Trial chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualize the penalties to fit the circumstances of the accused and the gravity of the crime.[1821] 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.[1822] It is for the party challenging the sentence to demonstrate how the trial chamber ventured outside its discretionary framework in imposing the sentence.[1823] 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 considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it

[1817] Trial Judgement, paras. 5213-5215.
[1818] Trial Judgement, paras. 5184-5212.
[1819] *Karadžić* Appeal Judgement, para. 748; *Prlić et al.* Appeal Judgement, para. 3203; *Stanišić and Župljanin* Appeal Judgement, para. 1099; *Tolimir* Appeal Judgement, para. 626. *See also Šešelj* Appeal Judgement, para. 179.
[1820] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.
[1821] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 626; *Popović et al.* Appeal Judgement, para. 1961.
[1822] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Nyiramasuhuko et al.* Appeal Judgement, para. 3349; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.
[1823] *Karadžić* Appeal Judgement, para. 749; *Prlić et al.* Appeal Judgement, para. 3204; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1961.

exercised its discretion, or that its decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the trial chamber failed to properly exercise its discretion.[1824]

540. Mladić appeals against the sentence of life imprisonment imposed by the Trial Chamber.[1825] He challenges the Trial Chamber's consideration of: (i) his abuse of authority;[1826] (ii) his mitigating circumstances;[1827] and (iii) the sentencing practices and laws in the former Yugoslavia.[1828] The Appeals Chamber will address these submissions in turn.

1. Abuse of Authority (Ground 9.A)

541. As part of its assessment on the gravity of the offences and the totality of the culpable conduct, the Trial Chamber considered that Mladić's participation in all four joint criminal enterprises was undertaken in his official capacity as Commander of the VRS Main Staff, a position which he held throughout the entire Indictment period.[1829] The Trial Chamber found that Mladić abused this position and that, *inter alia*, this "abuse of his superior position" added to the gravity of the offences.[1830]

542. Mladić submits that the Trial Chamber did not prove the elements of superior responsibility under Article 7(3) of the ICTY Statute beyond reasonable doubt and thus erred by "aggravating [his] sentence with superior responsibility".[1831] Mladić requests the Appeals Chamber to revise the sentence accordingly.[1832]

543. The Prosecution responds that Mladić's sentence should stand, as life imprisonment is the only sentence that reflects both the gravity of his crimes and the form and degree of his participation in them and any other sentence would be "unreasonable and plainly unjust".[1833] The

[1824] *Karadžić* Appeal Judgement, para. 749; *Stanišić and Župljanin* Appeal Judgement, para. 1100; *Tolimir* Appeal Judgement, para. 627; *Popović et al.* Appeal Judgement, para. 1962; *Ngirabatware* Appeal Judgement, para. 255.
[1825] *See* Mladić Notice of Appeal, pp. 30, 31, paras. 88-91; Mladić Appeal Brief, paras. 917-958; Mladić Reply Brief, paras. 128-135.
[1826] *See* Mladić Appeal Brief, paras. 917-920.
[1827] *See* Mladić Appeal Brief, paras. 921-931. *See also* Mladić Reply Brief, paras. 130, 131.
[1828] *See* Mladić Appeal Brief, paras. 932-958. *See also* Mladić Reply Brief, paras. 132, 133, 135.
[1829] Trial Judgement, para. 5193.
[1830] Trial Judgement, para. 5193.
[1831] Mladić Appeal Brief, paras. 917, 919; Mladić Reply Brief, para. 129. Mladić recalls his arguments set forth in paragraphs 771 to 780 (Ground 7) of his appellant's brief. *See* Mladić Appeal Brief, para. 919.
[1832] Mladić Appeal Brief, para. 920.
[1833] Prosecution Response Brief, para. 376; T. 26 August 2020 pp. 40-42. The Prosecution contends that the crimes committed in this case are some of the gravest and the crime base is one of the largest attributed to an accused at the ICTY, comparable with the *Karadžić* case where the Appeals Chamber of the Mechanism found that a 40-year sentence was so unreasonable and plainly unjust that it constituted an abuse of the Trial Chamber's discretion and increased Karadžić's sentence to life imprisonment. *See* T. 26 August 2020 pp. 41, 42, *referring to Karadžić* Appeal Judgement, paras. 773, 776. The Prosecution adds that other cases involving Mladić's subordinates, such as Popović, Beara,

Prosecution submits that the Trial Chamber appropriately considered Mladić's abuse of authority as an aggravating factor, which did not require a finding of superior responsibility.[1834]

544. Mladić replies that the Prosecution fails to undermine the legal and factual grounds of appeal under Ground 9.[1835]

545. The Appeals Chamber recalls that the primary goal in sentencing is to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.[1836] While gravity of the offence is the primary factor in sentencing, the inherent gravity must be determined by reference to the particular circumstances of the case and the form and degree of the accused's participation in the crime.[1837] In this regard, the Appeals Chamber recalls that while a position of influence or authority, even at a high level, does not automatically warrant a harsher sentence, its abuse may constitute an aggravating factor.[1838]

546. The Appeals Chamber notes that, in assessing his liability, the Trial Chamber stated that "Mladić's conduct and superior position [were] encapsulated within the conduct relied upon to establish his participation in the four [joint criminal enterprises]".[1839] The Trial Chamber did not enter convictions pursuant to superior responsibility under Article 7(3) of the ICTY Statute but indicated that it would consider Mladić's superior position for the purposes of sentencing.[1840] The Appeals Chamber is of the view that this legal approach is consistent with settled jurisprudence.[1841] In the sentencing portion of the Trial Judgement, the Trial Chamber considered that Mladić's participation in all four joint criminal enterprises "was undertaken in his official capacity as Commander of the VRS Main Staff", and that he held this position throughout the entire Indictment

Tolimir, and Galić, whose conduct was attributable to Mladić and which dealt with only parts of the crime base for which Mladić is responsible, have also resulted in life sentences. *See* T. 26 August 2020 p. 42.

[1834] Prosecution Response Brief, para. 378.

[1835] Mladić Reply Brief, para. 128. *See also* T. 26 August 2020 p. 68.

[1836] *See Martić* Appeal Judgement, para. 350; *Čelebići* Appeal Judgement, para. 430.

[1837] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 3431; *Šainović et al.* Appeal Judgement, para. 1837; *Martić* Appeal Judgement, para. 350; *Galić* Appeal Judgement, para. 442.

[1838] *See, e.g., Prlić et al.* Appeal Judgement, para. 3264; *Nzabonimana* Appeal Judgement, para. 464; *Munyakazi* Appeal Judgement, para. 170; *Rukundo* Appeal Judgement, para. 250; *D. Milošević* Appeal Judgement, para. 302; *Babić* Sentencing Appeal Judgement, para. 80.

[1839] Trial Judgement, para. 5166.

[1840] Trial Judgement, para. 5166.

[1841] Where liability under both Articles 7(1) and 7(3) of the ICTY Statute is alleged, and where the legal requirements for both are met, a trial chamber should enter a conviction on the basis of Article 7(1) of the ICTY Statute alone and consider the superior position in sentencing. *See, mutatis mutandis*, Articles 6(1) and 6(3) of the ICTR Statute. *See also Nyiramasuhuko et al.* Appeal Judgement, para. 3359; *Đorđević* Appeal Judgement, para. 939; *Setako* Appeal Judgement, para. 266; *Kordić and Čerkez* Appeal Judgement, para. 34. The Trial Chamber correctly recalled this principle. *See* Trial Judgement, para. 5166.

period.[1842] The Trial Chamber then concluded that he therefore "abused his position" and found that "Mladić's abuse of his superior position" added to the gravity of the offences.[1843]

547. Contrary to Mladić's contention, the Appeals Chamber finds no indication that the Trial Chamber aggravated his sentence with superior responsibility under Article 7(3) of the ICTY Statute.[1844] Rather, according to the Trial Chamber, it was the abuse of his position as Commander of the VRS Main Staff that aggravated the gravity of his offences.[1845] The Appeals Chamber notes the Trial Chamber's conclusion that Mladić was "responsible for having committed a wide range of criminal acts through his participation in four [joint criminal enterprises]",[1846] and that he did so while, *inter alia*: (i) commanding and controlling VRS units and other groups subordinated to the VRS; (ii) having knowledge of crimes committed by those under his command; (iii) placing severe restrictions on humanitarian aid; (iv) providing misleading information about crimes to representatives of the international community; and (v) failing to investigate crimes and/or punish perpetrators of the crimes.[1847] Given the totality of the Trial Chamber's findings on Mladić's responsibility, the Appeals Chamber finds no discernible error in the Trial Chamber's conclusion that Mladić abused his position of authority and that this added to the gravity of the crimes. The Appeals Chamber notes that Mladić appears to also argue that the Trial Chamber "double count[ed]" his superior responsibility.[1848] Given that he provides no argument or other basis to support this submission, his contention in this regard is dismissed.

548. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate any error in the Trial Chamber's conclusion in determining his sentence that the abuse of his superior position added to the gravity of the offences. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 9.A of Mladić's appeal.

2. Mitigating Circumstances (Grounds 9.B and 9.C)

549. In determining Mladić's sentence, the Trial Chamber considered whether, *inter alia*, his benevolent treatment of and assistance to victims, diminished mental capacity, poor physical health, and advanced age amounted to mitigating circumstances.[1849] Owing to the gravity of the offences,

[1842] Trial Judgement, para. 5193.
[1843] Trial Judgement, para. 5193.
[1844] *See* Mladić Appeal Brief, paras. 917, 919.
[1845] *See* Trial Judgement, para. 5193.
[1846] Trial Judgement, paras. 5188-5192. *See also*, *e.g.*, Trial Judgement, paras. 4612, 4688, 4893, 4921, 5098, 5131, 5156, 5163.
[1847] *See*, *e.g.*, Trial Judgement, paras. 4612, 4893, 5097, 5098, 5146, 5156.
[1848] *See* Mladić Notice of Appeal, p. 30.
[1849] Trial Judgement, paras. 5195-5204.

the Trial Chamber did not consider his sporadic benevolent acts in mitigation.[1850] It also observed that the evidence the Defence relied on did not establish that Mladić suffered from diminished mental capacity.[1851] The Trial Chamber also noted that Mladić suffered from certain health problems, but found that these were not such as to warrant mitigation, and further noted that his general condition was stable, concluding that it would not consider Mladić's health as a factor in mitigation.[1852] Finally, the Trial Chamber stated that it gave due consideration to Mladić's age in sentencing.[1853]

550. Mladić submits that the Trial Chamber erred in failing to give sufficient weight to the following mitigating circumstances: (i) his ill health combined with his age; (ii) his daughter's death; and (iii) his benevolent treatment of and assistance to victims.[1854] According to Mladić, the Trial Chamber, in noting that his general condition was stable, failed to give sufficient weight to the totality of the medical evidence and his medical history.[1855] In relation to his daughter's death, he argues that the Trial Chamber presented it under the heading of diminished mental capacity but did not give weight to this as part of his "family circumstances".[1856] As to evidence of his benevolent treatment of and assistance to victims, he challenges the Trial Chamber's conclusion that his benevolent acts were "sporadic".[1857] Mladić asks that the Appeals Chamber give these factors due weight and revise the sentence accordingly.[1858]

551. The Prosecution responds that the Trial Chamber considered each of the mitigating factors Mladić presented at trial,[1859] and that he fails on appeal to show how the Trial Chamber abused its discretion by either not considering certain factors or by giving them insufficient weight.[1860] The Prosecution contends that the Trial Chamber expressly considered Mladić's age, health, and benevolent acts in mitigation.[1861] The Prosecution further argues that Mladić only raised his daughter's death at trial in relation to his diminished mental capacity and not in relation to his family circumstances, and cannot raise this argument for the first time on appeal.[1862] The Prosecution argues that, in any event, none of the factors relied on by Mladić, either individually or

[1850] Trial Judgement, para. 5198.
[1851] Trial Judgement, paras. 5200, 5201.
[1852] Trial Judgement, para. 5203.
[1853] Trial Judgement, para. 5204.
[1854] *See* Mladić Appeal Brief, paras. 921, 923-925, 927, 929. *See also* Mladić Reply Brief, paras. 130, 131.
[1855] Mladić Appeal Brief, paras. 923, 925.
[1856] Mladić Appeal Brief, paras. 924, 925.
[1857] Mladić Appeal Brief, paras. 927, 929.
[1858] Mladić Appeal Brief, paras. 926, 930, 931.
[1859] Prosecution Response Brief, para. 379.
[1860] *See* Prosecution Response Brief, paras. 379-385.
[1861] Prosecution Response Brief, paras. 380-383.
[1862] Prosecution Response Brief, paras. 384, 385.

cumulatively, could outweigh the gravity of the crimes for which he has been convicted to justify a sentence below life imprisonment.[1863]

552. Mladić replies that the Appeals Chamber should reject the Prosecution's submission that the mitigating factors are insufficient to reduce his life sentence.[1864]

553. The Appeals Chamber recalls that a trial chamber is required to consider any mitigating circumstance when determining the appropriate sentence, and that it enjoys considerable discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to the factors identified.[1865] Furthermore, the existence of mitigating factors does not automatically imply a reduction of sentence or preclude the imposition of a particular sentence.[1866]

554. In relation to Mladić's health and age, the Appeals Chamber recalls that the age of the accused may be a mitigating factor[1867] and that poor health is accepted as a mitigating factor in exceptional cases only.[1868] The Appeals Chamber notes that the Trial Chamber expressly stated that it gave due consideration to Mladić's age in sentencing.[1869] The Trial Chamber further noted that Mladić suffered from certain health problems and that his general condition was stable.[1870] It decided not to consider his health as a factor in mitigation.[1871] In assessing his health, the Trial Chamber referred to, *inter alia*, five medical reports, showing his general condition as stable.[1872] Mladić has not identified any evidence that would support a conclusion that his health condition was exceptional and warranted consideration in mitigation. The Appeals Chamber therefore finds

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[1863] Prosecution Response Brief, para. 386.
[1864] Mladić Reply Brief, para. 131. *See also* Mladić Reply Brief, para. 128.
[1865] *See, e.g., Karadžić* Appeal Judgement, para. 753; *Stanišić and Župljanin* Appeal Judgement, para. 1130; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265.
[1866] *See, e.g., Karadžić* Appeal Judgement, para. 753; *Nyiramasuhuko et al.* Appeal Judgement, para. 3394; *Ngirabatware* Appeal Judgement, para. 265 and references cited therein.
[1867] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 1170; *Đorđević* Appeal Judgement, paras. 974, 980; *Babić* Sentencing Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 696. The ICTY Appeals Chamber has noted the limited weight given to advanced age as a mitigating factor in the jurisprudence of the ICTY. *See Stanišić and Župljanin* Appeal Judgement, para. 1170, n. 3847 and references cited therein.
[1868] *See, e.g., Prlić et al.* Appeal Judgement, para. 3315; *Šainović et al.* Appeal Judgement, para. 1827; *Galić* Appeal Judgement, para. 436; *Blaškić* Appeal Judgement, para. 696.
[1869] Trial Judgement, para. 5204.
[1870] Trial Judgement, paras. 5202, 5203. The Appeals Chamber observes that the Trial Chamber cited and considered regular medical reports submitted by the Deputy Registrar. *See* Trial Judgement, para. 5203, n. 17806.
[1871] Trial Judgement, para. 5203.
[1872] Trial Judgement, n. 17806, *referring to Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 7 April 2017 (confidential), Annex B, RP. 110644, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 13 April 2017 (confidential), Annex, RP. 110669, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Independent Expert's Medical Report, 10 October 2017 (confidential), *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 12 October 2017 (confidential), Annex, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Second Registry Submission in Relation to Defence Motion on the Provision of Medical Records, 3 November 2017 (public with confidential annex), Annex.

that Mladić does not demonstrate any error in the Trial Chamber's assessment of his age and health as mitigating circumstances.

555. The Appeals Chamber now turns to Mladić's submission that the Trial Chamber erred in failing to consider the death of his daughter as part of his "family circumstances".[1873] According to Article 24(2) of the ICTY Statute, the Trial Chamber was required to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. The Appeals Chamber recalls that such circumstances could include family circumstances but that little weight is afforded to this factor in the absence of exceptional family circumstances.[1874] The Appeals Chamber notes that, at trial, Mladić did not rely upon the death of his daughter in relation to family circumstances as a mitigating factor, but rather pointed to his daughter's death only in relation to his "diminished mental responsibility",[1875] which the Trial Chamber explicitly considered.[1876] The Appeals Chamber recalls that it is an accused's prerogative to identify any mitigating circumstances before the trial chamber,[1877] and if he fails to specifically refer in his final brief or closing arguments to a mitigating circumstance, he cannot raise it for the first time on appeal.[1878] In light of this standard, the Appeals Chamber does not consider further Mladić's submission that the Trial Chamber failed to consider the death of his daughter as "evidence of his family circumstances".

556. Regarding Mladić's submission on his benevolent treatment of and assistance to victims, the Appeals Chamber recalls that an accused's assistance to victims or detainees can be considered in mitigation of his or her sentence.[1879] However, such acts must be weighed against the gravity of the offences.[1880] The Trial Chamber considered the Defence's submissions that Mladić took steps to minimize the number of victims and their suffering to the best of his ability through, *inter alia*, a demilitarization agreement, ordering troops to protect persons of Bosnian Serb and other nationalities alike, ordering a ceasefire to allow civilians to safely withdraw, insisting that patients

[1873] *See* Mladić Appeal Brief, paras. 924, 925.
[1874] *See, e.g., Prlić et al.* Appeal Judgement, para. 3309; *Ntabakuze* Appeal Judgement, para. 284; *Krajišnik* Appeal Judgement, para. 816; *Blaškić* Appeal Judgement, para. 696.
[1875] *See* Mladić Final Trial Brief, paras. 3403-3406.
[1876] Trial Judgement, paras. 5200, 5201.
[1877] *See* Rule 86(C) of the ICTY Rules; *Tolimir* Appeal Judgement, para. 644; *Đorđević* Appeal Judgement, para. 945. *See, mutatis mutandis*, Rule 86(C) of the ICTR Rules; *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165.
[1878] *See, e.g., Prlić et al.* Appeal Judgement, paras. 3296, 3302; *Stanišić and Župljanin* Appeal Judgement, paras. 1133, 1170; *Popović et al.* Appeal Judgement, para. 2060; *Nzabonimana* Appeal Judgement, para. 459; *Bizimungu* Appeal Judgement, para. 389; *Đorđević* Appeal Judgement, para. 945.
[1879] *See, e.g., Prlić et al.* Appeal Judgement, paras. 3301, 3302; *Krajišnik* Appeal Judgement, para. 817; *Babić* Sentencing Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 696; *Čelebići* Appeal Judgement, para. 776.
[1880] *See Prlić et al.* Appeal Judgement, paras. 3296, 3302; *Krajišnik* Appeal Judgement, para. 817; *Niyitegeka* Appeal Judgement, para. 266; *Čelebići* Appeal Judgement, para. 776.

not be discriminated against at a military hospital, assisting the daughter of a Bosnian Muslim, and providing kindness and sweets to children throughout the conflict.[1881] In relation to the order that troops should protect Bosnian Serb and other nationalities, the Trial Chamber noted that "the order only concerned 'honest' members of other nationalities".[1882] The Trial Chamber also noted that the ceasefire ordered for civilians to withdraw related to only the Jewish population in Sarajevo, and did not constitute benevolent treatment of or assistance to Bosnian Muslims or Bosnian Croats.[1883] The Trial Chamber concluded that while some of the acts cited by Mladić may have shown "at best some kindness" towards individual Bosnian Muslims and Bosnian Croats, they did not affect the achievement of the common objective of the Overarching JCE.[1884] It considered that, bearing in mind the gravity of Mladić's crimes, the assistance he provided "was sporadic".[1885] Noting the central position Mladić held within the leadership of the VRS, the Trial Chamber was of the view that he "had the power to provide assistance to the victimized population on a large scale, had he wished to do so".[1886] The Trial Chamber recalled that "sporadic benevolent acts or ineffective assistance may be disregarded", and therefore did not consider this factor in mitigation of Mladić's sentence.[1887] The Appeals Chamber considers that in light of the gravity of the offences committed by Mladić and the noted sporadic nature of the benevolent treatment and assistance undertaken by Mladić, he does not demonstrate a discernible error in the Trial Chamber's assessment of his assistance as a mitigating circumstance.

557. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Grounds 9.B and 9.C of Mladić's appeal.

3. Sentencing Practices in the Courts of the Former Yugoslavia (Ground 9.D)

558. The Trial Chamber noted that it was required to consider the general practice regarding the prison sentences in the courts of the former Yugoslavia, but recalled that it was not "obliged to conform to that practice".[1888] The Trial Chamber considered the relevant sentencing provisions and practices of the former Yugoslavia during the Indictment period,[1889] and noted that the maximum term of imprisonment at the time was 15 years, but that for the most serious crimes the death

[1881] Trial Judgement, para. 5196, nn. 17793, 17794, *referring to* Mladić Final Trial Brief, paras. 3393-3397.
[1882] Trial Judgement, para. 5197, n. 17795, *referring to* Exhibit P3032, p. 1.
[1883] Trial Judgement, para. 5197, n. 17796, *referring to* Exhibit P4264, paras. 1, 2.
[1884] Trial Judgement, para. 5198.
[1885] Trial Judgement, para. 5198.
[1886] Trial Judgement, para. 5198.
[1887] Trial Judgement, para. 5198, n. 17797, *citing Krajišnik* Appeal Judgement, para. 817, *Čelebići* Appeal Judgement, para. 776.
[1888] Trial Judgement, para. 5205. *See also* Trial Judgement, paras. 5206-5209.
[1889] Trial Judgement, paras. 5206-5209.

penalty or a prison sentence of 20 years could have been imposed instead.[1890] The Trial Chamber further considered that the ICTY Appeals Chamber had previously upheld sentences of more than 20 years of imprisonment as not infringing the principle of *nulla poena sine lege*.[1891]

559. Mladić submits that the Trial Chamber erred in sentencing him to life imprisonment based on "oversights in the jurisprudence".[1892] He argues that the jurisprudence of the ICTY has "overlooked the distinction" between Article 24 of the ICTY Statute and Rule 101(A) of the ICTY Rules.[1893] To support this argument, Mladić asserts that Article 24 of the ICTY Statute, adopted in 1993, "imported" into the ICTY the domestic sentencing practice of the former Yugoslavia, which had a maximum sentence of 20 years' imprisonment at the time the crimes were committed.[1894] He argues that the "subsequent adoption" of Rule 101(A) of the ICTY Rules in February 1994 "create[d] another penal law" within the same jurisdiction in contradistinction to Article 24 of the ICTY Statute, and "retroactively" established life imprisonment.[1895] He contends that life imprisonment was thus not accessible or foreseeable to an accused, including himself, at the ICTY.[1896] Relying on a judgement from the ECtHR,[1897] Mladić contends that the Trial Chamber's imposition of a life sentence according to Rule 101(A) of the ICTY Rules therefore breached the principles of *nulla poena sine lege* and *lex mitior*.[1898] Mladić requests that the Appeals Chamber articulate the correct legal standard, review the factual findings of the Trial Chamber, reverse the life sentence imposed by the Trial Chamber, and impose a sentence of 20 years' imprisonment.[1899]

560. The Prosecution responds, *inter alia*, that pursuant to Article 24 of the ICTY Statute, the Trial Chamber was not bound by the sentencing practices of the former Yugoslavia but need only

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[1890] Trial Judgement, para. 5208.
[1891] Trial Judgement, para. 5208, n. 17821, *referring to Stakić* Appeal Judgement, para. 398.
[1892] Mladić Appeal Brief, paras. 932, 933, 955, 957.
[1893] Mladić Appeal Brief, para. 955.
[1894] *See* Mladić Appeal Brief, paras. 937, 946, 951-953, 955, 956; Mladić Reply Brief, paras. 133, 135.
[1895] *See* Mladić Appeal Brief, paras. 932, 938, 945, 946, 952, 954; Mladić Reply Brief, para. 133. Mladić further submits that the ICTY Appeals Chamber in the *Čelebići* case erred by reasoning that an accused must have been aware that the most serious violations of humanitarian law were punishable by the most severe penalties, including life imprisonment. *See* Mladić Appeal Brief, paras. 947-949; Mladić Reply Brief, para. 135. In this regard, Mladić contends that the ICTY Appeals Chamber in the *Čelebići* case, relying on case law from the European Court of Human Rights ("ECtHR"), conflated "the accessibility and foreseeability of a conviction with the accessibility and foreseeability of a sentence". *See* Mladić Appeal Brief, paras. 947-949, *referring to Čelebići* Appeal Judgement, para. 817, nn. 1399, 1400, *In the Case of S.W. v. The United Kingdom*, Application No. 20166/92, Judgment, 22 November 1995.
[1896] According to Mladić, given that Article 24 of the ICTY Statute imported the domestic sentencing law of the former Yugoslavia, life imprisonment was not "accessible and foreseeable" to an accused, and the only foreseeable and accessible penalty was a maximum of 20 years of imprisonment. *See* Mladić Appeal Brief, paras. 951, 953, 956.
[1897] Mladić Appeal Brief, paras. 932, 934, 939-943, 956; Mladić Reply Brief, para. 132, *referring to*, *inter alia*, *Case of Maktouf and Damjanović v. Bosnia and Herzegovina*, Application Nos. 2312/08 and 34179/08, Judgement, 18 July 2013 ("*Maktouf and Damjanović* Judgement"). Regarding the principle of *lex mitior*, Mladić also relies on the *D. Nikolić* Sentencing Appeal Judgement. *See* Mladić Appeal Brief, para. 952, n. 1238, *referring to D. Nikolić* Sentencing Appeal Judgement, para. 81.
[1898] Mladić Appeal Brief, paras. 956, 957; Mladić Reply Brief, para. 133. *See also* Mladić Appeal Brief, para. 952.

have "recourse" to them, and that in such circumstances the Trial Chamber's imposition of life imprisonment did not violate the principles of *nulla poena sine lege* and *lex mitior*.[1900] It also argues that the *Maktouf and Damjanović* Judgement can be distinguished from the present case, as it related to changes in sentencing laws within the same jurisdiction, whereas Mladić was sentenced "under a unified penal scheme with a maximum sentence that was solidly rooted in customary international law in 1992".[1901]

561. Mladić replies, *inter alia*, that the Prosecution misunderstands his submissions regarding the legality of imposing a life sentence, and fails to address his argument that the maximum sentence of imprisonment available in the former Yugoslavia was 20 years' imprisonment.[1902]

562. The Appeals Chamber recalls that, pursuant to Article 24(1) of the ICTY Statute, trial chambers "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[1903] Furthermore, according to Rule 101(A) of the ICTY Rules, a "convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life".[1904] The Appeals Chamber also recalls that the principle of *nulla poena sine lege* prohibits retroactive punishment.[1905] The principle of *lex mitior* prescribes that if the law relevant to the offence of the accused has been amended, the less severe law should be applied;[1906] however, the relevant law must be binding upon the court.[1907]

563. The Appeals Chamber considers that Mladić's submission regarding "oversights in the jurisprudence" is based on the erroneous foundation that, having "recourse" to the sentencing practices of the former Yugoslavia meant that Article 24 of the ICTY Statute "incorporated" or "import[ed]" domestic sentencing practices into international law and the sentencing practice of the

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[1899] Mladić Appeal Brief, para. 958.
[1900] *See* Prosecution Response Brief, paras. 387-390. The Prosecution contends that owing to the sentences ordered by international tribunals preceding the ICTY, the imposition of a life sentence for the most serious violations of international humanitarian law was foreseeable to Mladić. *See* Prosecution Response Brief, paras. 387, 392, 393.
[1901] Prosecution Response Brief, para. 391.
[1902] *See* Mladić Reply Brief, paras. 132-135. *See also* Mladić Reply Brief, para. 128.
[1903] *See also* Rule 101(B)(iii) of the ICTY Rules. There are almost identical provisions in the Statute and Rules of the Mechanism. *See* Article 22(2) of the Statute; Rule 125(B)(iii) of the Rules.
[1904] There is an almost identical provision in the Rules of the Mechanism. *See* Rule 125(A) of the Rules.
[1905] *See Čelebići* Appeal Judgement, n. 1382, *referring to*, *inter alia*, Article 15 of the International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, 999 U.N.T.S. 171 ("ICCPR"). Article 15(1) of the ICCPR stipulates, *inter alia*, that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed. *See also Krajišnik* Appeal Judgement, para. 750; *Stakić* Appeal Judgement, para. 398.
[1906] *See Deronjić* Sentencing Appeal Judgement, para. 96; *D. Nikolić* Sentencing Appeal Judgement, para. 81. Article 15(1) of the ICCPR states, in part, that if, subsequent to the commission of the offence, a provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
[1907] *See Galić* Appeal Judgement, para. 398, n. 1201; *Deronjić* Sentencing Appeal Judgement, para. 97; *D. Nikolić* Sentencing Appeal Judgement, paras. 81, 84, 85.

ICTY.[1908] It is settled jurisprudence that the ICTY was not in any way bound by the laws or sentencing practices of the former Yugoslavia; rather, trial chambers were only obliged to take such practice into consideration.[1909]

564. There is also no merit in Mladić's submissions that the introduction of Rule 101(A) of the ICTY Rules created another sentencing regime within the jurisdiction of the ICTY and "retroactively" provided for life imprisonment,[1910] or that life imprisonment was not "accessible or foreseeable" to accused, including himself, at the ICTY.[1911] His contention that Rule 101(A) of the ICTY Rules, which was adopted subsequent to the ICTY Statute, established a different sentencing regime is misguided. The Appeals Chamber recalls that judicial power to adopt rules of procedure and evidence at the ICTY was subject to the principles and parameters set out in the ICTY Statute and international law.[1912] Given that Article 24 of the ICTY Statute does not adopt or incorporate the sentencing practices of the former Yugoslavia into the ICTY's sentencing practices, Mladić fails to establish that the creation of Rule 101(A) of the ICTY Rules deviates from the principle set out in the ICTY Statute.[1913] Regarding the foreseeability of life imprisonment, Mladić ignores jurisprudence that the imposition of life imprisonment has been available for the most serious violations of international humanitarian law since at least the tribunals established after World War II.[1914] Additionally, the Appeals Chamber finds no merit in Mladić's submission that the ICTY Appeals Chamber in the *Čelebići* case conflated issues of liability (*nullem crimen sine lege*) and punishment (*nulla poena sine lege*).[1915] The ICTY Appeals Chamber specifically considered the question of penalty independent of liability, concluding that there could be no doubt that the accused must have been aware that the crimes for which they were indicted were the most serious violations of international humanitarian law, punishable by the most severe penalties.[1916] Furthermore, since the establishment of the ICTY, convicted persons before it have received

[1908] *See* Mladić Appeal Brief, paras. 951, 953, 955; Mladić Reply Brief, para. 133.
[1909] *See, e.g., Prlić et al.* Appeal Judgement, n. 11069; *Popović et al.* Appeal Judgement, para. 2087; *Šainović et al.* Appeal Judgement, para. 1830; *Stakić* Appeal Judgement, para. 398; *D. Nikolić* Sentencing Appeal Judgement, paras. 69, 84.
[1910] *See* Mladić Appeal Brief, paras. 932, 938, 945, 946, 952, 954; Mladić Reply Brief, para. 133.
[1911] *See* Mladić Appeal Brief, paras. 951, 953, 956.
[1912] *See* Article 15 of the ICTY Statute; *Prosecutor v. Vidoje Blagojević et al.*, Case Nos. IT-02-60-AR73, IT-02-60-AR73.2 & IT-02-60-AR73.3, Decision, 8 April 2003, para. 15.
[1913] *See also D. Nikolić* Sentencing Appeal Judgement, para. 82.
[1914] *Čelebići* Appeal Judgement, para. 817, n. 1401 (where the ICTY Appeals Chamber noted that judgements rendered at Nuremberg, Tokyo, and other successor tribunals provide clear authority for custodial sentences up to and including life imprisonment, and that individuals convicted before the Nuremberg Tribunal were given life sentences). *See also Čelebići* Appeal Judgement, n. 1382, *referring to, inter alia*, Article 15(2) of the ICCPR (stating that "[n]othing in [Article 15] shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations").
[1915] *See* Mladić Appeal Brief, paras. 947-949.
[1916] *See Čelebići* Appeal Judgement, para. 817.

sentences of life imprisonment pursuant to the ICTY Statute and Rules.[1917] Most recently, the Appeals Chamber imposed a sentence of life imprisonment in the *Karadžić* case before the Mechanism.[1918] The Appeals Chamber thus finds that Rule 101(A) of the ICTY Rules did not create another sentencing regime inconsistent with Article 24(1) of the ICTY Statute,[1919] and Mladić fails to demonstrate that life imprisonment was not an accessible or foreseeable punishment.

565. In light of the foregoing, and recalling that determinations of other courts – domestic, international, or hybrid – are not binding upon it,[1920] the Appeals Chamber further considers that Mladić's reliance on the *Maktouf and Damjanović* Judgement is misguided. The ECtHR in the *Maktouf and Damjanović* Judgement held, *inter alia*, that a retrospective change to the domestic sentencing frameworks of the former Yugoslavia in relation to war crime offences violated Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[1921] As discussed above, given that there was no change in the ICTY's sentencing regime, such analysis is not applicable to the ICTY.

566. Turning to the circumstances in this case, the Appeals Chamber observes that the Trial Chamber set out the applicable ICTY law and reviewed the pertinent sentencing provisions in the former Yugoslavia, noting that the range of penalties included fines, confiscation of property, imprisonment, and the death penalty.[1922] The Trial Chamber considered, *inter alia*, that, at the time of the crimes, the maximum sentence applicable in the former Yugoslavia had been 15 years of imprisonment and that, for the most serious crimes, the death penalty or a prison sentence of 20 years could be imposed in lieu.[1923] Given the foregoing, the Appeals Chamber considers that the Trial Chamber properly took into account the general sentencing practice in the former Yugoslavia, and correctly stated that sentences imposed by the ICTY can exceed those in the former Yugoslavia.[1924] Mladić's submissions that the principles of *nulla poena sine lege* and *lex mitior* were violated are thus without merit.

[1917] *See D. Nikolić* Sentencing Appeal Judgement, para. 83. *See, e.g., Tolimir* Appeal Judgement, paras. 648, 649; *Popović et al.* Appeal Judgement, paras. 2110, 2111, 2117; *Galić* Appeal Judgement, p. 185.
[1918] *See Karadžić* Appeal Judgement, paras. 776, 777.
[1919] *See D. Nikolić* Sentencing Appeal Judgement, para. 82.
[1920] *See, e.g., Karadžić* Appeal Judgement, para. 434; *Stanišić and Župljanin* Appeal Judgement, para. 598; *Popović et al.* Appeal Judgement, para. 1674; *Đorđević* Appeal Judgement, para. 83.
[1921] *Maktouf and Damjanović* Judgement, paras. 68, 74-76. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.
[1922] Trial Judgement, paras. 5180, 5205-5209.
[1923] Trial Judgement, paras. 5206, 5208. The Trial Chamber further noted that, following amendments in Bosnia and Herzegovina, the maximum sentence that may currently be imposed in Bosnia and Herzegovina and in *Republika Srpska* is 45 years' imprisonment for the gravest forms of serious criminal offences perpetrated with intent. *See* Trial Judgement, para. 5208.
[1924] *See* Trial Judgement, para. 5205.

567. In light of the above, the Appeals Chamber finds, Judge Nyambe dissenting, that Mladić fails to demonstrate that the Trial Chamber erred in imposing a life sentence. The Appeals Chamber, Judge Nyambe dissenting, therefore dismisses Ground 9.D of Mladić's appeal.

IV. THE APPEAL OF THE PROSECUTION

568. Under Count 1 of the Indictment, the Prosecution alleged that, between 31 March 1992 and 31 December 1992, Mladić committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat groups, as such, in some municipalities of Bosnia and Herzegovina, particularly Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica.[1925]

569. The Trial Chamber found that a large number of Bosnian Muslims and/or Bosnian Croats in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica were the victims of prohibited acts, such as killings or serious bodily or mental harm, which contributed to the destruction of their groups.[1926] The Trial Chamber further found, by majority, that certain physical perpetrators of these prohibited acts had the intent to destroy a part of the Bosnian Muslim group when carrying out the prohibited acts, except in relation to Bosnian Muslims in Ključ.[1927] The Trial Chamber was not, however, convinced beyond reasonable doubt that those perpetrators intended to destroy the Bosnian Muslims in Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica ("Count 1 Municipalities") "as a *substantial* part of the protected group".[1928] The Trial Chamber was also not convinced beyond reasonable doubt that the Bosnian Serb leadership possessed genocidal intent or that the crime of genocide formed part of the objective of the Overarching JCE.[1929] The Trial Chamber accordingly acquitted Mladić of genocide under Count 1 of the Indictment.[1930]

570. The Prosecution submits that the Trial Chamber erred in finding that: (i) the Bosnian Muslim communities of the Count 1 Municipalities ("Count 1 Communities") did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina (Ground 1);[1931] and (ii) Mladić and other members of the Overarching JCE did not possess "destructive

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[1925] Indictment, paras. 35-39.
[1926] Trial Judgement, paras. 3446, 3451. In particular, the Trial Chamber determined that a large number of Bosnian Muslims in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica, as well as Bosnian Croats in Prijedor and Sanski Most, were murdered, and that Bosnian Muslims in Foča, Prijedor, and Vlasenica, as well as Bosnian Croats in Prijedor, were subjected to serious bodily or mental harm which contributed to the destruction of their groups. *See also* Trial Judgement, paras. 3458, 3464, 3469, 3473, 3479, 3496, 3502, 3503. The Trial Chamber also determined that Bosnian Muslims and Bosnian Croats are protected groups within the meaning of Article 4 of the ICTY Statute. *See* Trial Judgement, para. 3442.
[1927] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236. The Trial Chamber considered that, for Bosnian Muslims in Ključ, and for Bosnian Croats in Prijedor and Sanski Most, the evidence did not allow an inference that the physical perpetrators of murders and/or serious bodily or mental harm shared the intent to destroy, in part, their respective groups. *See* Trial Judgement, para. 3504.
[1928] Trial Judgement, para. 3535 (emphasis added). *See also* Trial Judgement, para. 3536.
[1929] Trial Judgement, paras. 4236, 4237.
[1930] Trial Judgement, para. 5214.
[1931] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16; Prosecution Reply Brief, para. 1; T. 26 August 2020 pp. 74, 82-85, 99-101.

intent" (Ground 2).[1932] The Prosecution requests that the Appeals Chamber correct these errors and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first, or alternatively the third, category of joint criminal enterprise, or alternatively, as a superior under Article 7(3) of the ICTY Statute.[1933]

571. Mladić responds that the Prosecution demonstrates no error in the Trial Chamber's findings and invites the Appeals Chamber to dismiss Grounds 1 and 2 of the Prosecution's appeal.[1934]

A. Alleged Errors in Finding that the Count 1 Communities Did Not Constitute a Substantial Part of the Protected Group (Ground 1)

572. In concluding that it could not find that the physical perpetrators intended to destroy each of the Count 1 Communities "as a *substantial* part of the protected group",[1935] the Trial Chamber found that: (i) the physical perpetrators had limited geographical control or authority to carry out activities;[1936] (ii) the Bosnian Muslims targeted in each of the Count 1 Municipalities formed a relatively small part of the Bosnian Muslim population in the Bosnian Serb-claimed territory or in Bosnia and Herzegovina as a whole;[1937] and (iii) there was insufficient evidence indicating why the Count 1 Communities or the Count 1 Municipalities had a special significance or were emblematic in relation to the Bosnian Muslim group as a whole.[1938]

573. The Prosecution submits that the Trial Chamber erroneously concluded that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group.[1939] Drawing parallels with findings in relation to the Bosnian Muslims of Srebrenica,[1940] the Prosecution argues that each of the Count 1 Communities was substantial not only in size, consisting of many thousands of Bosnian Muslims,[1941] but also in nature, with a unique historic and cultural identity

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[1932] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 1, 3, 19-41; Prosecution Reply Brief, paras. 1, 19; T. 26 August 2020 pp. 74-82, 101-103.
[1933] Prosecution Notice of Appeal, paras. 4, 9; Prosecution Appeal Brief, paras. 1, 4, 17, 18, 42-50. *See also* T. 26 August 2020 pp. 74, 85, 102, 103.
[1934] *See* Mladić Response Brief, paras. 9-343; T. 26 August 2020 pp. 86-97.
[1935] Trial Judgement, para. 3535 (emphasis added). *See also* Trial Judgement, para. 3536.
[1936] Trial Judgement, para. 3535. *See also* Trial Judgement, paras. 3530-3534.
[1937] Trial Judgement, paras. 3530-3534.
[1938] Trial Judgement, paras. 3530-3535.
[1939] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16; T. 26 August 2020 pp. 74, 82-85.
[1940] Prosecution Appeal Brief, paras. 7, 9, 11-15.
[1941] Prosecution Appeal Brief, paras. 2, 6-10; T. 26 August 2020 pp. 84, 85, 99, 100, 102. The Prosecution contends that the evaluation of substantiality is only about intention rather than about how many people were harmed by the genocidal acts in each place. It states that the smallest numeric size of the targeted group in Kotor Varoš consisted of 11,000 group members and the largest, in Prijedor, consisted of 50,000 group members. Furthermore, it adds that Mladić's subordinates and other "tools of the joint criminal enterprise" targeted over 128,000 men, women, and children on the basis of their ethnic characteristics and group identity across all five municipalities. This included

that made them prominent and emblematic of the Bosnian Muslim group as a whole.[1942] The Prosecution also argues that the Count 1 Municipalities held immense strategic importance for the Bosnian Serb leadership[1943] and that the territories of the Count 1 Municipalities represented the full extent of the perpetrators' respective areas of activity and control.[1944] The Prosecution contends that, in light of these factors, no reasonable trier of fact could have failed to conclude that the destruction of the Count 1 Communities would in each case have been significant enough to have an impact on the Bosnian Muslim group as a whole.[1945]

574. Mladić responds that the Prosecution repeats arguments made at trial and fails to demonstrate that the evidence was so unambiguous that a reasonable trial chamber was obliged to infer that each of the Count 1 Communities constituted a substantial part of the overall Bosnian Muslim group.[1946] He contends that the Trial Chamber correctly concluded that the numerical size of the targeted part of the Bosnian Muslim group, when considered with the physical perpetrators' control in each of the Count 1 Municipalities, was not substantial.[1947] He further argues that the Prosecution's claims that the Count 1 Municipalities held immense strategic importance for the Bosnian Serb leadership and that the Count 1 Communities had a unique historic and cultural identity to evidence their prominence and emblematic nature, including through the eyes of the Bosnian Muslim group as a whole, are unsubstantiated.[1948] Mladić also submits that none of the Count 1 Communities is comparable to Srebrenica in size[1949] or in qualitative importance.[1950]

Colonel Basara, one of Mladić's VRS subordinates, who targeted close to 80,000 group members across two municipalities. *See* T. 26 August 2020 pp. 84, 85, 99, 100.

[1942] Prosecution Appeal Brief, paras. 2, 11-15. *See also* Prosecution Reply Brief, para. 16.

[1943] Prosecution Appeal Brief, para. 14.

[1944] Prosecution Appeal Brief, paras. 2, 6, 10.

[1945] Prosecution Appeal Brief, para. 16; T. 26 August 2020 pp. 99-101. The Prosecution adds that, while the purpose of the substantiality requirement was to ensure that the label of genocide not be "imposed lightly" or applied to crimes that are too small, genocide is not limited to crimes on the horrific scale of the Holocaust or the Rwandan genocide. According to the Prosecution, as with respect of many cases concerning Srebrenica, genocide could be committed in a single municipality. It contends that, in this case, the targeting of tens of thousands of Bosnian Muslims across five municipalities, involving a pattern of crimes aiming at the very existence of the Bosnian Muslim group as such "falls squarely within the definition of genocide on the numbers alone". The Prosecution submits that recognizing this would not be applying the term genocide "lightly". *See* T. 26 August 2020 pp. 83-85, *referring to*, *inter alia*, *Krstić* Appeal Judgement, para. 37.

[1946] Mladić Response Brief, paras. 15-86; T. 26 August 2020 pp. 86-90.

[1947] Mladić Response Brief, paras. 49-53; T. 26 August 2020 pp. 87, 88.

[1948] Mladić Response Brief, paras. 61-72, 82-85; T. 26 August 2020 pp. 88-90.

[1949] Mladić Response Brief, paras. 49, 55-58. In this respect, Mladić submits that, unlike in respect of the Count 1 Municipalities, the Trial Chamber found that the physical perpetrators possessed exclusive and total geographical control and authority to carry out activities in Srebrenica. *See* Mladić Response Brief, para. 57.

[1950] Mladić Response Brief, paras. 60, 73-81. In this respect, Mladić submits that, unlike in respect of the Count 1 Municipalities, the Trial Chamber found that Srebrenica: (i) was one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*; (ii) had become a refuge for Bosnian Muslims from across Bosnia and Herzegovina; (iii) was a designated UN safe area; (iv) suffered other simultaneous crimes in the area; and (v) had symbolic impact given the extent of Bosnian Serb control over the area. *See* Mladić Response Brief, para. 75.

575. The Prosecution replies that Mladić misconstrues the Trial Chamber's findings on the numeric size of the targeted parts in that his arguments are premised on the misconception that the parts of the Bosnian Muslim group targeted for destruction comprised subsets of the Bosnian Muslim population within each of the Count 1 Municipalities.[1951] The Prosecution also argues that Mladić's arguments on the prominent and emblematic nature of the Count 1 Communities are permeated by a false theory that this factor must be assessed solely "through the eyes" of the protected group, and that his remaining arguments mischaracterize the Prosecution's submissions.[1952]

576. The Appeals Chamber recalls that, where a conviction for genocide relies on the intent to destroy a protected group "in part", the targeted part must be a substantial part of that group.[1953] The ICTY Appeals Chamber in the *Krstić* case identified the following non-exhaustive and non-dispositive guidelines that may be considered when determining whether the part of the group targeted is substantial enough to meet this requirement: (i) the numeric size of the targeted part as the necessary starting point, evaluated not only in absolute terms, but also in relation to the overall size of the entire group; (ii) the targeted part's prominence within the group; (iii) whether the targeted part is emblematic of the overall group or essential to its survival; and/or (iv) the perpetrators' areas of activity and control, as well as the possible extent of their reach.[1954] The applicability of these factors, together with their relative weight, will vary depending on the circumstances of the particular case.[1955]

577. In relation to the numeric size of the targeted part, the Trial Chamber noted that the population of Bosnia and Herzegovina in 1991 was approximately 4.4 million people, 43.7 per cent of whom were Bosnian Muslims.[1956] The Prosecution argues that the Count 1 Communities, which the Trial Chamber noted ranged from 11,090 people in Kotor Varoš to 49,700 people in Prijedor,[1957]

[1951] Prosecution Reply Brief, paras. 1, 3-12.
[1952] Prosecution Reply Brief, paras. 13-18.
[1953] *See Krstić* Appeal Judgement, para. 8. *See also* 18 U.S.C. § 1093(8) (2006) ("the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part").
[1954] *See Krstić* Appeal Judgement, paras. 12-14. *See also Karadžić* Appeal Judgement, para. 727 and references cited therein; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker U.N. Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, 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.").
[1955] *See Krstić* Appeal Judgement, para. 14. The ICTY Appeals Chamber in the *Popović et al.* case noted that "it is the objective, contextual characteristics of the targeted part of the group, […] that form the basis for determining whether the targeted part of the group is substantial". *Popović et al.* Appeal Judgement, para. 422.
[1956] Trial Judgement, para. 3529. The overall size of the Bosnian Muslim group in Bosnia and Herzegovina in 1991 was therefore approximately 1.9 million people, noting that 43.7 per cent of 4.4 million is 1,922,800.
[1957] Trial Judgement, paras. 3530-3534.

were sufficiently sizeable to satisfy the substantiality requirement.[1958] Considering, however, that the Count 1 Communities effectively comprised between approximately 0.6 and 2.6 per cent of the overall Bosnian Muslim group in Bosnia and Herzegovina,[1959] the Appeals Chamber finds that the Prosecution does not demonstrate error in the Trial Chamber's conclusion that the Count 1 Communities each formed "a relatively small part" of the group.[1960]

578. The Appeals Chamber recalls that, because the intent to destroy formed by perpetrators of genocide will always be limited by the opportunity presented to them, the perpetrators' areas of activity and control, as well as the possible extent of their reach, should be considered when determining whether the part of the protected group they intended to destroy was substantial.[1961] In this respect, the Trial Chamber determined that, from the perspective of the physical perpetrators, the Count 1 Communities were the only parts of the Bosnian Muslim group within their respective areas of control, and that the perpetrators' authority did not extend beyond each of the Count 1 Municipalities in which they committed prohibited acts.[1962] The Appeals Chamber considers that these conclusions, when viewed in the light of the Trial Chamber's finding that the perpetrators intended to destroy the Count 1 Communities,[1963] evince that the perpetrators targeted as substantial a part of the overall Bosnian Muslim group for destruction as they could. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.[1964] The Trial Chamber in the present case considered this factor, among others, in its analysis concluding that the physical perpetrators did not have the intent to destroy the Count 1 Communities as a substantial part of the Bosnian Muslim group.[1965]

579. The Trial Chamber also considered that it had "received insufficient evidence indicating why […] [each of the Count 1 Communities or the Count 1 Municipalities] themselves had a special significance or were emblematic in relation to the protected group as a whole".[1966] However,

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[1958] Prosecution Appeal Brief, paras. 2, 6-10.
[1959] *See* Trial Judgement, paras. 3530-3534. The Prosecution points out that the Trial Chamber incorrectly found that the Bosnian Muslims of Prijedor comprised 2.2 per cent, rather than approximately 2.6 per cent, of the overall Bosnian Muslim group. *See* Prosecution Appeal Brief, n. 14, *referring to* Trial Judgement, paras. 3529, 3534. The Appeals Chamber does not consider that the Trial Chamber's mathematical error in this respect impacted its decision.
[1960] *See* Trial Judgement, para. 3535.
[1961] *See Krstić* Appeal Judgement, para. 13.
[1962] *See* Trial Judgement, paras. 3530-3534. *See also* Trial Judgement, para. 3535.
[1963] Trial Judgement, para. 3526.
[1964] *See Krstić* Appeal Judgement, para. 13. In this respect, the Appeals Chamber notes that a relevant factor in the determination of the ICTY Appeals Chamber in the *Krstić* case that the Bosnian Muslims of Srebrenica formed a substantial part of the Bosnian Muslim group was that the authority of the Bosnian Serb forces charged with the take-over of Srebrenica did not extend beyond the Central Podrinje region, and that the Bosnian Muslims of Srebrenica were the only part of the Bosnian Muslim group within the perpetrators' area of control. *See Krstić* Appeal Judgement, para. 17.
[1965] Trial Judgement, para. 3535.
[1966] Trial Judgement, para. 3535.

the Appeals Chamber notes that the Trial Chamber identified several factors which reflected the strategic and/or symbolic importance of the Count 1 Municipalities to Bosnian Serbs and/or Bosnian Muslims.[1967] The Appeals Chamber further notes that such factors were considered to support findings that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group, not only in previous cases,[1968] but also by the Trial Chamber in the present case.[1969] The core of the Prosecution's argument is that the similarities in the Trial Chamber's predicate findings about the importance of the Count 1 Communities and the Bosnian Muslims of Srebrenica underscore the unreasonableness of its contradictory conclusions about their substantiality.[1970] The Prosecution contends that the Trial Chamber was therefore obliged to infer that the destruction of the Count 1 Communities, like that of the Bosnian Muslims of Srebrenica, would in each case have been significant enough "to have an impact on the Bosnian Muslim [g]roup as a whole".[1971]

580. The Appeals Chamber recalls that it is not just *any* impact on a protected group that supports a finding of genocidal intent; rather, it is the impact that the destruction of the targeted part will have on the overall *survival* of that group which indicates whether there is intent to destroy a

[1967] *See* Trial Judgement, paras. 3530-3534. In particular, the Trial Chamber noted, *inter alia*, that: (i) Karadžić and Krajišnik stressed the strategic significance of Sanski Most and the need to retain it (*see* Trial Judgement, para. 3530); (ii) Mladić was informed that "Foča 'was supposed to be the Second Islamic Centre for Muslims in Europe' but was now 99 per cent Serb", and Karadžić explained that "Foča 'is extremely important to' the Muslims, 'but it will never be theirs again'" (*see* Trial Judgement, para. 3531); (iii) Kotor Varoš was strategically important as it was located "almost on the border of the Federation and Republika Srpska" (*see* Trial Judgement, para. 3532); (iv) Mladić noted that "'whoever controls Vlasenica, controls eastern Bosnia'" (*see* Trial Judgement, para. 3533); and (v) Prijedor was "significant to the Bosnian Serbs because of its location as part of the land corridor that linked the Serb-dominated area in the Croatian Krajina in the west with Serbia and Montenegro in the east and south, […] [and] a symbol throughout the region of Yugoslavia of 'brotherhood and unity', to the extent that Bosnian Muslims thought it was 'the last town where ethnic conflict was possible'" (*see* Trial Judgement, para. 3534).

[1968] *See*, *e.g.*, *Popović et al.* Appeal Judgement, para. 422 (affirming that the strategic importance of Srebrenica is a relevant factor in determining whether the substantiality requirement is met); *Krstić* Appeal Judgement, paras. 15 ("Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted."), 16 ("In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. […] In its resolution declaring Srebrenica a safe area, the Security Council announced that it 'should be free from armed attack or any other hostile act.'"). *See also*, *inter alia*, *Karadžić* Trial Judgement, para. 5672; *Popović et al.* Trial Judgement, para. 865.

[1969] *See* Trial Judgement, para. 3554 ("[T]he Trial Chamber finds that the enclave of Srebrenica was of significant strategic importance to the Bosnian-Serb leadership during the conflict because the majority Bosnian-Muslim population of this region made it difficult for them to claim the land as inherently Serb. The Bosnian-Serb leadership, in particular, accorded Srebrenica importance as it was in close geographical proximity to Serbia and, therefore, was required for maintaining a Serb-populated border area contiguous with Serbia. During the war, Srebrenica also became a refuge to Bosnian Muslims from the region especially when it was designated a UN safe area. The Trial Chamber is, therefore, satisfied that the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian Muslim population of Bosnia-Herzegovina.").

[1970] *See* Prosecution Appeal Brief, paras. 7, 11-15.

[1971] Prosecution Appeal Brief, para. 16. *See also* Prosecution Appeal Brief, paras. 5, 6, 8, 46; Prosecution Reply Brief, paras. 4, 39.

substantial part thereof.[1972] In this respect, the Appeals Chamber notes that, in upholding the conclusion that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group, the ICTY Appeals Chamber in the *Krstić* case considered, *inter alia*, that: (i) "[t]he capture and ethnic purification of Srebrenica would […] severely undermine the military efforts of the Bosnian Muslim state to ensure its viability";[1973] (ii) "[c]ontrol over the Srebrenica region was consequently essential to […] the continued survival of the Bosnian Muslim people";[1974] (iii) "[b]ecause most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population";[1975] and (iv) "[t]he elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would serve as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces".[1976] In reaching the same conclusion, the Trial Chamber in the present case similarly considered such factors as, *inter alia*: (i) Srebrenica having become a refuge to Bosnian Muslims in the region;[1977] (ii) the symbolic impact of the murder of Bosnian Muslims in a designated UN safe area;[1978] and (iii) Srebrenica being one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*.[1979]

581. With respect to the Count 1 Communities, however, neither the Trial Chamber's findings nor the evidence referred to by the Prosecution reflects a similar threat to the viability or survival of the Bosnian Muslim group. In addition, the Appeals Chamber notes that the events in the Count 1 Municipalities occurred in 1992, closer to the outset of the war.[1980] By contrast, the events in Srebrenica took place three years later in July 1995, by which time tens of thousands of Bosnian Muslims seeking refuge, many of whom were "injured […] exhausted, lethargic, and frightened",[1981] and only "five percent of whom were able-bodied men",[1982] had gathered in Srebrenica in dire living conditions.[1983] Thus, although the destruction directed against each of the Count 1 Communities may have "represented powerful, early steps in the Bosnian Serb campaign

[1972] *See Krstić* Appeal Judgement, para. 8 ("the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group"). *See also Tolimir* Appeal Judgement, para. 261 and references cited therein.
[1973] *Krstić* Appeal Judgement, para. 15.
[1974] *Krstić* Appeal Judgement, para. 15.
[1975] *Krstić* Appeal Judgement, para. 15.
[1976] *Krstić* Appeal Judgement, para. 16.
[1977] Trial Judgement, para. 3554.
[1978] Trial Judgement, paras. 3553, 3554.
[1979] Trial Judgement, para. 3553.
[1980] *See, e.g.*, Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3513-3523, 3525.
[1981] Trial Judgement, para. 2450.
[1982] Trial Judgement, para. 2453.

towards an ethnically homogeneous state",[1984] it was open to the Trial Chamber to infer that such destruction was not significant enough to have an impact on the overall survival of the Bosnian Muslim group at the relevant time.

582. In light of the foregoing, the Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber erred in concluding that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina.

583. The Appeals Chamber, Judges N'gum and Panton dissenting, therefore dismisses Ground 1 of the Prosecution's appeal.

B. Alleged Errors in Finding that Mladić and Other Overarching JCE Members Did Not Possess "Destructive Intent" (Ground 2)

584. In determining that the crime of genocide did not form part of the objective of the Overarching JCE,[1985] the Trial Chamber recalled its finding that the physical perpetrators in the Count 1 Municipalities did not have the intent to destroy a substantial part of the Bosnian Muslim group.[1986] The Trial Chamber considered that, while the speeches and statements of Mladić and other Overarching JCE members were inflammatory, caused fear, and incited hatred, they "could have been directed to the military enemy and have been used as propaganda, rather than to demonstrate an expression of a genocidal intent."[1987] The Trial Chamber also considered that "frequent references to 'ethnic cleansing' and other similar expressions […] do not necessarily indicate intent to physically destroy the protected group",[1988] and that "[t]he rhetorical speeches and statements assisted in the task of ethnic separation and division rather than the physical destruction of the protected groups."[1989]

585. In addition, the Trial Chamber recalled the majority's finding that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group, but considered that "[a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 [M]unicipalities through the use of a number of physical perpetrators as tools requires more."[1990] The Trial Chamber concluded that, "[i]n the absence of other evidence which would unambiguously

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[1983] *See*, *e.g.*, Trial Judgement, paras. 2445-2454.
[1984] Prosecution Appeal Brief, para. 15.
[1985] Trial Judgement, para. 4237.
[1986] Trial Judgement, para. 4234. *See also* Trial Judgement, paras. 3535, 3536.
[1987] Trial Judgement, para. 4235.
[1988] Trial Judgement, para. 4235.
[1989] Trial Judgement, para. 4235.
[1990] Trial Judgement, para. 4236.

support a finding of genocidal intent, drawing an inference on the basis of prohibited acts of physical perpetrators alone is insufficient."[1991]

586. The Prosecution submits that the Trial Chamber erred in concluding that genocide did not form part of the common purpose of the Overarching JCE by failing to infer the "destructive intent" of Mladić and other Overarching JCE members, and by applying a heightened evidentiary threshold in its assessment thereof.[1992] It contends that no reasonable trier of fact could have found, on the one hand, that the local perpetrators in the Count 1 Municipalities intended to destroy a part of the Bosnian Muslim group, while, on the other hand, that Mladić and other Overarching JCE members, who orchestrated and controlled the overall criminal campaign, and exercised greater authority than any of the local perpetrators they used as tools, did not.[1993] The Prosecution further contends that Mladić and other Overarching JCE members made public statements reflecting an intent to destroy the Bosnian Muslim group, and that the Trial Chamber unreasonably concluded that such statements were aimed only at ethnic separation and division.[1994] The Prosecution argues that, in contrast to local perpetrators found to have "destructive intent" in their respective municipalities, Mladić and other Overarching JCE members intended to destroy all five Count 1 Communities, which cumulatively formed a substantial part of the Bosnian Muslim group.[1995] It requests that the Appeals Chamber find that Mladić and other Overarching JCE members possessed and shared genocidal intent in relation to the Count 1 Communities, conclude that genocide formed part of the Overarching JCE's common purpose, and convict Mladić of genocide under Count 1 of the Indictment pursuant to the first category of joint criminal enterprise.[1996]

[1991] Trial Judgement, para. 4236.

[1992] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 19-41; T. 26 August 2020 pp. 74-82, 101-103. *See also* Prosecution Reply Brief, paras. 28-38.

[1993] Prosecution Appeal Brief, paras. 19, 22-36; T. 26 August 2020 pp. 74-80, 102. *See also* Prosecution Reply Brief, paras. 19-27. The Prosecution argues that the Trial Chamber "appeared to justify its differential treatment of intent in relation to local perpetrators versus [joint criminal enterprise] members on the basis that the former group physically participated in genocidal and other culpable acts, while the latter did not", and reiterates that "[t]his is not only flawed in principle, it is also misconceived in that some of these so-called physical perpetrators were mid- and low- level commanders who did not physically commit any crimes". *See* Prosecution Appeal Brief, para. 31 (internal citations omitted). *See also* Prosecution Appeal Brief, para. 25; T. 26 August 2020 pp. 77, 78.

[1994] Prosecution Appeal Brief, paras. 37-41; T. 26 August 2020 pp. 76, 80-82. *See also* Prosecution Reply Brief, paras. 35-38.

[1995] Prosecution Appeal Brief, paras. 45, 46; Prosecution Reply Brief, para. 39. The Prosecution argues cumulative substantiality in the alternative to its contention, as elaborated under Ground 1 of its appeal, that each of the Count 1 Communities individually formed a substantial part of the Bosnian Muslim group. *See* Prosecution Notice of Appeal, para. 9(c); Prosecution Appeal Brief, paras. 44, 45. *See also* T. 26 August 2020 pp. 84, 85. The Appeals Chamber has dismissed Ground 1 of the Prosecution's appeal (*see supra* Section IV.A), and will accordingly only consider the Prosecution's alternative argument in this regard.

[1996] Prosecution Notice of Appeal, para. 9; Prosecution Appeal Brief, paras. 42-44, 47; T. 26 August 2020 pp. 74, 82, 85, 102, 103. The Prosecution alternatively requests the Appeals Chamber to convict Mladić of genocide pursuant to the third category of joint criminal enterprise or as a superior pursuant to Article 7(3) of the ICTY Statute as a consequence of correcting the errors alleged under Ground 1 of its appeal. *See* Prosecution Appeal Brief, paras. 48-50.

587. Mladić responds that the Trial Chamber applied the correct evidentiary standard to conclude that it could not be satisfied that the only reasonable conclusion that could be drawn from the evidence was that he and other Overarching JCE members possessed the requisite intent and that genocide formed part of the common plan.[1997] He submits that the Prosecution fails to demonstrate that the evidence of his and other Overarching JCE members' intent is such that a reasonable trier of fact was obliged to infer that all reasonable doubt of their guilt had been eliminated, thereby failing to meet the appellate standard.[1998] Mladić accordingly requests that the Appeals Chamber dismiss the Prosecution's appeal and requested remedies entirely.[1999]

588. As recalled above, where a conviction for genocide relies on the intent to destroy a protected group "in part", the targeted part must be a substantial part of that group.[2000] As such, the Prosecution's contention that the Trial Chamber was compelled to find that Mladić intended to destroy the Count 1 Communities has no potential to invalidate its decision to acquit him of genocide unless the Prosecution demonstrates that the Trial Chamber was also compelled to find that the Count 1 Communities formed a substantial part of the Bosnian Muslim group. In this respect, the Prosecution submits that, when aggregating the Count 1 Communities, "the correspondingly larger numerical part of the Bosnian Muslim [g]roup unquestionably comprised a substantial part [thereof]",[2001] and reiterates that the key consideration in assessing substantiality is whether the part is significant enough "to have an impact on the group as a whole".[2002]

589. The Appeals Chamber recalls, however, that a substantiality assessment considers the impact that the destruction of the targeted part will have on the overall survival of that group.[2003] Noting that the Count 1 Communities collectively comprised approximately 6.7 per cent of the Bosnian Muslim group,[2004] the Appeals Chamber considers that a reasonable trier of fact could reasonably have concluded that the Count 1 Communities, individually as well as cumulatively,

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See also Mladić Response Brief, paras. 202-342; Prosecution Reply Brief, paras. 40-57; T. 26 August 2020 pp. 94-99. The Appeals Chamber recalls that it has dismissed Ground 1 of the Prosecution's appeal (*see supra* Section IV.A), and accordingly dismisses the Prosecution's requested alternative remedy in this regard.

[1997] Mladić Response Brief, paras. 88-142; T. 26 August 2020 pp. 90-93.

[1998] Mladić Response Brief, paras. 144-186; T. 26 August 2020 pp. 93, 94.

[1999] Mladić Response Brief, paras. 143, 187-201, 343; T. 26 August 2020 p. 94.

[2000] *See supra* para. 576, *referring to Krstić* Appeal Judgement, para. 8.

[2001] Prosecution Appeal Brief, para. 45.

[2002] Prosecution Appeal Brief, para. 46. *See also* Prosecution Appeal Brief, paras. 5, 6, 8, 16; Prosecution Reply Brief, paras. 4, 39.

[2003] *See supra* para. 580, *referring to*, *inter alia*, *Krstić* Appeal Judgement, para. 8 ("the substantiality requirement both captures genocide's defining character as a crime of massive proportions and reflects the Convention's concern with the impact the destruction of the targeted part will have on the overall survival of the group").

[2004] The Count 1 Communities collectively comprised 128,443 Bosnian Muslims, whereas the overall size of the Bosnian Muslim group in 1991 was approximately 1.9 million people, noting that 43.7 per cent of 4.4 million is 1,922,800. *See* Trial Judgement, paras. 3529-3534. *See also supra* para. 577; Prosecution Appeal Brief, n. 122.

formed "a relatively small part" thereof.[2005] The Appeals Chamber therefore concludes that a reasonable trier of fact could also have found that the destruction of the Count 1 Communities, individually as well as cumulatively, was not sufficiently substantial to have an impact on the group's overall survival at the relevant time.[2006]

590. Recalling that the Appeals Chamber will only review alleged errors that have the potential to affect the outcome of an appeal,[2007] the Appeals Chamber need not address the Prosecution's remaining arguments and remedial requests in relation to the Trial Chamber's alleged failure to infer Mladić's "destructive intent" and convict him of genocide under Count 1 of the Indictment.

591. Based on the foregoing, the Appeals Chamber, Judges N'gum and Panton dissenting, dismisses Ground 2 of the Prosecution's appeal.

[2005] *See* Trial Judgement, para. 3535. *See also supra* para. 577.
[2006] *See supra* Section IV.A.
[2007] *See supra* Section II.

V. DISPOSITION

592. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the appeal hearing on 25 and 26 August 2020;

SITTING in open session;

DISMISSES Mladić's appeal in its entirety, Judge Nyambe dissenting as to Grounds 1, 2, 3, 4, 5, 7, 8, and 9 of Mladić's appeal;

DISMISSES, Judges N'gum and Panton dissenting, the Prosecution's appeal in its entirety;

AFFIRMS, Judges N'gum and Panton dissenting, the disposition of the Trial Chamber finding Mladić not guilty of genocide under Count 1 of the Indictment;

AFFIRMS the disposition of the Trial Chamber finding Mladić guilty of taking of hostages as a violation of the laws or customs of war under Count 11 of the Indictment, pursuant to Article 7(1) of the ICTY Statute, and **FURTHER AFFIRMS**, Judge Nyambe dissenting, the disposition of the Trial Chamber finding Mladić guilty of genocide under Count 2 of the Indictment, persecution as a crime against humanity under Count 3 of the Indictment, extermination as a crime against humanity under Count 4 of the Indictment, murder as a crime against humanity under Count 5 of the Indictment, murder as a violation of the laws or customs of war under Count 6 of the Indictment, deportation as a crime against humanity under Count 7 of the Indictment, inhumane acts (forcible transfer) as a crime against humanity under Count 8 of the Indictment, terror as a violation of the laws or customs of war under Count 9 of the Indictment, and unlawful attacks on civilians as a violation of the laws or customs of war under Count 10 of the Indictment, pursuant to Article 7(1) of the ICTY Statute;

AFFIRMS, Judge Nyambe dissenting, the sentence of life imprisonment imposed on Mladić by the Trial Chamber;

RULES that this Judgement shall be enforced immediately pursuant to Rule 145(A) of the Rules; and

ORDERS that, in accordance with Rules 127(C) and 131 of the Rules, Mladić shall remain in the custody of the Mechanism pending the finalization of the arrangements for his transfer to the State where he will serve his sentence.

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

Judge Prisca Matimba Nyambe, Presiding

Judge Aminatta Lois Runeni N'gum

Judge Seymour Panton

Judge Elizabeth Ibanda-Nahamya

Judge Mustapha El Baaj

Judge Prisca Matimba Nyambe, Judge Aminatta Lois Runeni N'gum, and Judge Seymour Panton append partially dissenting opinions.

Done this 8th day of June 2021 at The Hague, the Netherlands.

[Seal of the Mechanism]

VI. PARTIALLY DISSENTING OPINION OF JUDGE NYAMBE

593. I respectfully disagree with the Majority's determination to dismiss all grounds of Mr. Mladić's appeal. I am of the view that Mr. Mladić's appeal should have been granted on all grounds except Ground 6.[2008] My position is based on the reasons that follow. Given the complexity and size of the case file and the appeal, and constrained by the requirements to proceed expeditiously and work remotely, I address only errors made by the Trial Chamber that I deem most egregious.[2009]

A. Ground 1 – Indictment and Notice

594. Mr. Mladić submits that the Trial Chamber erred by holding him criminally liable or responsible for "unnamed unscheduled incidents".[2010] By definition, scheduled incidents are incidents that are identified in a schedule attached to the Indictment.[2011] They are numbered, named, and listed.[2012] Notice is given that they form part of the allegations against the accused by the very fact that they are annexed to the Indictment.[2013] Unscheduled incidents are incidents that can be relied on by the Prosecution to prove material elements of the crime, for example, a course of conduct.[2014] Notice of these is given in, for example, the Rule 65 *ter* witness list in which the Prosecution explicitly states that a witness will be called to give evidence on an "unscheduled incident".[2015]

595. Unnamed unscheduled incidents are incidents that do not fall in either of the aforementioned.[2016] They are incidents that witnesses made accusations about at trial in the course of their evidence on scheduled incidents or other defined subjects but about which no notice was provided to the Defence that they are in fact incidents, either scheduled or unscheduled, for which Mr. Mladić could be held responsible.[2017] These are not charged. A trier of fact cannot enter a conviction on these other accusations. The Prosecution would have to put the Defence on notice that it sought to add them to the Indictment before any convictions could be entered. Before

[2008] Ground 6 concerns alleged errors related to the Hostage-Taking JCE.
[2009] Before going into the substance, I wish to remark that I do not agree with the Majority's statement in the Standards of Appellate Review section that the Mechanism is "not bound by the jurisprudence of the ICTR or the ICTY", considering that throughout the Trial Judgement and indeed this Appeal Judgement references are made to the jurisprudence and specific cases decided by the ICTR and ICTY. *See* Appeal Judgement, para. 14.
[2010] *See* Mladić Appeal Brief, paras. 41-60; Mladić Reply Brief, paras. 8-14; T. 25 August 2020 pp. 20-24, 27, 28; T. 26 August 2020 pp. 59-62.
[2011] *See* T. 25 August 2020 p. 21.
[2012] *See* T. 25 August 2020 p. 21.
[2013] *See* T. 25 August 2020 p. 21.
[2014] *See* T. 25 August 2020 p. 21.
[2015] *See* T. 25 August 2020 p. 21.
[2016] *See* T. 25 August 2020 p. 21.
[2017] *See* T. 25 August 2020 pp. 21, 22.

convictions can be entered, notice must be given to the Defence.[2018] Mr. Mladić only became aware of these incidents when the Trial Judgement was rendered, and thus he did not waive his right to raise this error on appeal.[2019]

596. I respectfully disagree with the Majority's conclusions on this Ground. I agree with Mr. Mladić's arguments that by *proprio motu* considering incidents not enumerated in Schedules A to G of the Indictment and/or unscheduled incidents that were not otherwise identified by the Prosecution through its Rule 65 *ter* filings as part of its case against him ("Unnamed Unscheduled Incidents") and relying on them to prove the elements of the crimes, whereas he was not put on notice of such incidents, the Trial Chamber materially impaired his ability to prepare his defence. The Prosecution failed to address Mr. Mladić's submission that it failed to direct the Trial Chamber to enter convictions on the Unnamed Unscheduled Incidents and that the Trial Chamber did so *proprio motu*.[2020] This is the Trial Chamber's error. It convicted Mr. Mladić of such accusations that were never identified as scheduled or unscheduled incidents.[2021]

597. I note, by way of example, the incidents identified in paragraph 48 of the Mladić Appeal Brief: (i) Srebrenica incident (u) opportunistic killings, 13 to 14 July 1995; (ii) sniping incident (e) 31 March 1993; (iii) Srebrenica incident (w) 23 July 1995; (iv) sniping incident (k) 9 November 1993; (v) shelling incident (d) 14 May 1992; (vi) cruel and inhumane treatment incident (j)(ii) 31 May - 8 June 1992; and (vii) unlawful detention incident (e)(iii).[2022]

598. For each of these, the Rule 65 *ter* list did not make any reference to these accusations as unscheduled incidents in the summary.[2023] It was the Trial Chamber that referred and identified them as unscheduled incidents, not the Prosecution. The Prosecution fails to establish that Mr. Mladić received sufficient notice that the Unnamed Unscheduled Incidents would be relied upon to establish separate criminal acts by: (i) giving notice that a witness would provide evidence related to the Scheduled Incidents; (ii) mentioning Unnamed Unscheduled Incidents in a witness summary or motion or leading evidence on them; and (iii) relying on the Unnamed Unscheduled Incidents as adjudicated facts to establish the legal elements of a crime.[2024] Contrary to the Prosecution's contention,[2025] the use of inclusive language in the Indictment should not serve to include any

[2018] *See* T. 25 August 2020 p. 22.
[2019] *See* Mladić Appeal Brief, para. 43; T. 25 August 2020 p. 23.
[2020] *See* Mladić Reply Brief, para. 8.
[2021] *See* T. 25 August 2020 p. 22; Mladić Appeal Brief, paras. 41-58.
[2022] *See* Mladić Appeal Brief, para. 48; T. 25 August 2020 p. 23.
[2023] *See* T. 25 August 2020 p. 23.
[2024] *See* Mladić Reply Brief, paras. 11, 12, 14; T. 25 August 2020, pp. 22, 23.
[2025] *See* Appeal Judgement, n. 83.

accusations made before the Trial Chamber without proper notice and the Prosecution must identify what case and for which incidents it seeks conviction. The first time that the Defence was made aware that these accusations were being treated as unscheduled incidents was when the Trial Judgement was rendered.[2026]

599. In the absence of notice that these accusations were being treated by the Prosecution as unscheduled incidents, the Trial Chamber erred by treating them as such.[2027] Absent notice and specifically of the crimes alleged, the Defence could only put forward a general defence. A general defence cannot counter a specific accusation or incident.[2028]

600. As stated in the Karadžić Appeal Judgement:

> [A] trial chamber can only convict an accused of crimes that are charged in the indictment. 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 and enable him or her to prepare a meaningful defence.[2029]

601. The above indicates that the Indictment lacked sufficient detailed material facts to enable Mr. Mladić to prepare a meaningful defence.

602. In relation to cross-examination, this can be deployed to undermine the Prosecution's case when the Defence knows in precise terms what case it has to meet and the incident which the Prosecutions seeks a conviction on.[2030]

603. In my view, the impact of this error is as follows. As a result of the Trial Chamber's error, Mr. Mladić was held criminally responsible for these Unnamed Unscheduled Incidents, which constituted crimes against humanity, terror, unlawful acts, and persecution.[2031] The Trial Chamber then took these into account when determining the ambits of the count on the Indictment and the extent of Mr. Mladić's criminal responsibility.[2032]

604. Upholding any findings in this regard would be unfair, and prejudicial to Mr. Mladić's fair trial rights as enshrined in the Statute and Rules of Procedure and Evidence. For the foregoing reasons, I would conclude that the Trial Chamber's findings based on the Unnamed Unscheduled

[2026] *See* T. 25 August 2020 p. 23.
[2027] *See* T. 25 August 2020 p. 23.
[2028] *See* T. 25 August 2020 p. 27.
[2029] *Karadžić* Appeal Judgement, para. 441.
[2030] *See* T. 25 August 2020 p. 27.
[2031] *See* T. 25 August 2020 p. 27.
[2032] *See* T. 25 August 2020 pp. 27, 28.

Incidents and the convictions on Counts 3, 5, 9 and 10 of the Indictment, as are identified in paragraphs 51 to 58 of the Mladić Appeal Brief, are invalidated, and grant Ground 1.

B. Ground 2 – Adjudicated Facts

1. Alleged Error in the Use of Adjudicated Facts (Ground 2.A)

605. Mr. Mladić submits that: (i) there are compelling reasons for the Appeals Chamber to revisit the *Karemera et al*. Decision of 16 June 2006 to determine whether the Trial Chamber erred by taking judicial notice of facts relating to Mr. Mladić's proximate subordinates under Rule 94(B) of the ICTY Rules; and (ii) the Trial Chamber erred by applying a heightened standard to rebuttal evidence.[2033]

(a) Use of Adjudicated Facts Relating to the Conduct of Subordinates

606. The ICTR Appeals Chamber held in the *Karemera et al*. Decision of 16 June 2006 that facts relating to the conduct of the physical perpetrators of crimes for which an accused is alleged to be criminally responsible may be subject to judicial notice.[2034] The relevance of the ICTY Appeals Chamber's findings in the *Galić* Decision of 7 June 2002 and the *D. Milošević* Decision of 26 June 2007 lies in the further guidance they issued about the circumstances in which trial chambers should withhold their discretion in this specific context.[2035]

607. In the *Galić* Decision of 7 June 2002, the ICTY Appeals Chamber held that "[w]here the evidence is [...] pivotal to the Prosecution case, and where the person whose acts and conduct the written statement describes is [...] proximate to the accused, the [t]rial [c]hamber *may decide that it would not be fair to the accused* to permit the evidence to be given in written form. An easy example of where the exercise of that discretion would lead to the rejection of a written statement could be where the acts and conduct of a person other than the accused described in the written statement occurred in the presence of the accused."[2036] Furthermore, in the *D. Milošević* Decision of 26 June 2007, the ICTY Appeals Chamber reiterated the holding from the *Karemera et al*. Decision of 16 June 2006 that "it is prohibited to take judicial notice of 'adjudicated facts relating to the acts, conduct, and mental state of the accused'".[2037]

[2033] *See* Mladić Appeal Brief, paras. 62-114; Mladić Reply Brief, paras. 16-32; T. 25 August 2020 pp. 28-40; T. 26 August 2020 pp. 62-64.
[2034] *See Karemera et al*. Decision of 16 June 2006, para. 50; T. 25 August 2020 p. 28.
[2035] *See* T. 25 August 2020 p. 28.
[2036] *See Galić* Decision of 7 June 2002, para. 13 (emphasis added).
[2037] *See D. Milošević* Decision of 26 June 2007, para. 16.

608. The *Galić* Decision of 7 June 2002 considered that admitting Rule 92 *bis* evidence that went to the conduct of the "immediately proximate subordinates" of an accused was inherently unfair when they were charged under Article 7(3) of the ICTY Statute or the evidence goes to elements of Article 7(1) of the ICTY Statute.[2038] The ICTY Appeals Chamber decided this on the basis of what it considered to be a "short step" from a finding that crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that these crimes were about to be or had been committed.[2039] The ICTY Appeals Chamber said that careful consideration should always be given by trial chambers to the exercise of their discretion in these "special and sensitive" situations.[2040]

609. The ICTY Appeals Chamber in the *Galić* Decision of 7 June 2002 did not define "immediate proximate subordinates" with reference to the rank of an accused, but rather whether their conduct was so widespread that the inference would be drawn that "there is no way that the accused could not have known about it" or "the accused had to be aware" of the objectives of his subordinates.[2041] It considered that where this link became sufficiently pivotal to the Prosecution's case on responsibility "it may not be fair to the accused" to permit this evidence in written form as it could not be challenged by the Defence.[2042]

610. In the same vein, but specifically in the context of adjudicated facts, the ICTY Appeals Chamber in the *D. Milošević* Decision of 26 June 2007 held that "while it is possible to take judicial notice of adjudicated facts regarding the existence of such crimes, the *actus reus* and the *mens rea* supporting the responsibility of the accused for the crimes in question must be proven by other means than judicial notice."[2043] It distinguished this from adjudicated facts that provided evidence as to the existence of crimes committed by others which the accused was not charged with.[2044]

611. Therefore, both ICTY Appeals Chambers considered that if the link between the accused and the crime committed was such that the responsibility of an accused could be easily inferred from the untested witness statement or adjudicated fact, then the Prosecution would have to establish this by calling evidence that could be confronted by the Defence.[2045] This, Mr. Mladić argues, is the conceptual difference that was overlooked by the ICTR Appeals Chamber in the

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[2038] *See Galić* Decision of 7 June 2002, paras. 16, 19; T. 25 August 2020 pp. 28, 29.
[2039] *See Galić* Decision of 7 June 2002, para. 14; T. 25 August 2020 p. 29.
[2040] *See Galić* Decision of 7 June 2002, para. 19; T. 25 August 2020 p. 29.
[2041] *See Galić* Decision of 7 June 2002, para. 14; T. 25 August 2020 p. 29.
[2042] *See Galić* Decision of 7 June 2002, para. 15; T. 25 August 2020 p. 29.
[2043] *See D. Milošević* Decision of 26 June 2007, para. 16; T. 25 August 2020 pp. 29, 30.
[2044] *See D. Milošević* Decision of 26 June 2007, para. 16; T. 25 August 2020 p. 30.
[2045] *See* T. 25 August 2020 p. 30.

Karemera et al. Decision of 16 June 2006 and why the Trial Chamber's reliance on it led it into discernible error.[2046]

612. By way of example, I refer to the Incident of 23 July 1995, at paragraph 2210 of the Trial Judgement.[2047] The Trial Chamber took judicial notice of a number of adjudicated facts in relation to the SRK's possession of modified air bombs between August 1994 and November 1995 and relating to a shelling incident on this day.[2048] It specifically took judicial notice of the fact that the "modified air bomb was fired from a north-westerly direction from SRK-held territory".[2049] On the basis of a judicial fact alone, no Prosecution evidence, the Trial Chamber concluded that "a member or members of the SRK launched a modified air bomb" on that day and killed two civilians, seriously injuring others.[2050]

613. The Prosecution's case was that Mr. Mladić was the most senior officer in the VRS and that he significantly contributed to achieving the objectives of the joint criminal enterprises primarily through the use of VRS forces.[2051] These specifically included the SRK, which the Prosecution said "implemented" Mr. Mladić's orders through ethnically cleansing municipalities and terrorising Sarajevo's civilians through a campaign of shelling and sniping.[2052] In light of this, the adjudicated fact established that the crimes charged were committed by Mr. Mladić's alleged subordinates.[2053] Given that the Prosecution's case was that the SRK was implementing Mr. Mladić's orders and they were used as tools to achieve the objectives of the joint criminal enterprises, the adjudicated fact on the identity of the perpetrators went to the core of its case on his responsibility.[2054] Despite this, the Trial Chamber took judicial notice of this fact in the absence of any Prosecution evidence that could establish the SRK's responsibility for this incident.[2055]

614. This example demonstrates the error with the Trial Chamber's reliance on the approach in the *Karemera et al*. Decision of 16 June 2006.[2056] The Trial Chamber considered that there were no limitations on which adjudicated facts judicial notice could be taken of in the context of the conduct of other members of the joint criminal enterprise or the physical perpetrators.[2057] I note other

[2046] *See* T. 25 August 2020 p. 30.
[2047] *See also* T. 25 August 2020 p. 32.
[2048] *See* Trial Judgement, para. 2209. *See also* T. 25 August 2020 p. 32.
[2049] *See* Trial Judgement, para. 2210, n. 9385, Adjudicated Fact 2871; T. 25 August 2020 p. 32.
[2050] *See* Trial Judgement, para. 2212; T. 25 August 2020 p. 32.
[2051] *See* Indictment, para. 13; T. 25 August 2020 p. 32.
[2052] *See* Prosecution Final Trial Brief, paras. 102, 103; T. 25 August 2020 p. 32.
[2053] *See* T. 25 August 2020 p. 32.
[2054] *See* T. 25 August 2020 p. 33.
[2055] *See* T. 25 August 2020 p. 33.
[2056] *See* T. 25 August 2020 p. 33.
[2057] *See* T. 25 August 2020 p. 33.

examples as set out at paragraphs 107 and 108 of the Mladić Appeal Brief, as well as instances of how other trial chambers have exercised their discretion to highlight a divergence in practice.[2058]

615. There are broadly two approaches that can be seen from the jurisprudence: the *Karemera et al*. approach and the *D. Milošević* approach.[2059] An example of the latter approach was taken by the ICTY Trial Chamber in the *Stanišić and Župljanin* case. The Judges held that:

> Where the proposed fact goes to the core of the Prosecution's case and relates to the conduct of others for whose criminal acts and omissions the accused is alleged to be responsible, the Trial Chamber will nevertheless exercise its discretion to withhold judicial notice if it considers that doing so would be in the interests of justice.[2060]

616. In light of the Prosecution's case against Mićo Stanišić and Stojan Župljanin, namely, that in their roles as the Minister of the *Republika Srpska* MUP and Chief Regional Security Services Centre of Banja Luka respectively, they committed crimes through the police, the ICTY Trial Chamber in that case concluded that "where a proposed fact refers to the criminal activities conducted by the police within an [Autonomous Region of Krajina] municipality, the fact is considered to go to the core of the case".[2061] For that reason, it withheld judicial notice of such facts in the interests of justice.

617. Importantly, the Trial Chamber in this case did not limit which members of the police this would apply to by, for example, rank. It considered that all members of the police could constitute the accused's "immediately proximate subordinates".[2062] Had the *Mladić* Trial Chamber taken the approach of the *Stanišić and Župljanin* Trial Chamber, it would have withheld its discretion and declined to take judicial notice of facts that related to the criminal activities conducted by those the Prosecution alleged were Mr. Mladić's subordinates in the interests of justice.[2063]

618. The fact that there is such a divergence in the approach taken in the jurisprudence gives further impetus to revisit the ICTR Appeals Chamber's determination in the *Karemera et al*. Decision of 16 June 2006 and articulate the correct legal standard.[2064]

619. The Trial Chamber fell into error when it admitted a specific category of facts; namely, those that related to the criminal activities conducted by those the Prosecution alleged were Mr.

[2058] *See* Mladić Appeal Brief, para. 69, nn. 97, 98 and references cited therein; T. 25 August 2020 p. 33.
[2059] *See D. Milošević* Decision of 26 June 2007; *Karemera et al*. Decision of 16 June 2006; T. 25 August 2020 p. 33.
[2060] *See Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010 ("*Stanišić and Župljanin* Decision of 1 April 2010"), para. 41; T. 25 August 2020 pp. 33, 34.
[2061] *See Stanišić and Župljanin* Decision of 1 April 2010, para. 46; T. 25 August 2020 p. 34.
[2062] *See* T. 25 August 2020 p. 34.
[2063] *See* T. 25 August 2020 pp. 34, 35.
[2064] *See* T. 25 August 2020 p. 35.

Mladić's subordinates acting under his orders. These were sufficiently pivotal to the Prosecution's case on his responsibility for the alleged conduct. Therefore, it should have presented evidence itself in this regard.[2065]

620. The Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. The *Galić* Decision of 7 June 2002 recognized that it was a matter within the discretion of the trial chamber, observing that in such circumstances, the trial chamber "*may decide that it would not be fair to the accused*" to permit the admission.[2066] As articulated in the *Karemera et al*. Decision of 16 June 2006, paragraph 52, "it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it - and thus shifting the burden of producing evidence rebutting it to the accused - is consistent with the accused's rights under the circumstances of the case".[2067] In my view I would adopt a cautious approach as outlined above because it is consistent with Mr. Mladić's fair trial rights. Therefore, contrary to the Majority disposition, it is necessary to reconsider the Appeal Decision on Adjudicated Facts to prevent an injustice. It is not sufficient to state that the Trial Chamber only considered the adjudicated facts in connection with "other evidence during its deliberations" without specifically pointing to the actual evidence.[2068]

621. Furthermore, the Trial Chamber erroneously failed to provide reasons for rejecting evidence in rebuttal of adjudicated facts and repeatedly failed to state in the Trial Judgement which adjudicated facts it was taking judicial notice of and/or which it relied on in making findings of fact, and also relied on adjudicated facts from cases which the judges of the Trial Chamber had previously presided over in which there were references to Mr. Mladić's role and guilt, thereby resulting in a perception of bias.[2069]

622. In my view, the Trial Chamber erred in exercising its discretion, invalidating the findings affected by this approach, identified, for example, in paragraphs 107 and 108 of the Mladić Appeal Brief.[2070]

[2065] *See* T. 25 August 2020 p. 35.
[2066] *See Galić* Decision of 7 June 2002, para. 13 (emphasis added).
[2067] *Karemera et al*. Decision of 16 June 2006, para. 52.
[2068] *See* Appeal Judgement, para. 48.
[2069] *See* Appeal Judgement, para. 39.
[2070] *See* T. 25 August 2020 p. 35.

(b) Heightening the Standard of the Burden to Produce Rebuttal Evidence

623. Mr. Mladić submits that the Trial Chamber erred by applying a heightened standard to rebuttal evidence.[2071] For the reasons that follow, I am inclined to agree with his submissions and would reverse the Trial Chamber's findings to the extent of the error identified by the Defence.

624. Taking judicial notice under Rule 94(B) of the ICTY Rules creates a rebuttable presumption of accuracy of that fact. However, as the Trial Chamber acknowledged at paragraph 5272 of the Trial Judgement, the ultimate burden of persuasion remains with the Prosecution. Nevertheless, the standard applied to the Defence rebuttal evidence was heightened. As a result, the Defence was deprived of its opportunity to enliven the debate and from that rebut the adjudicated fact.[2072]

625. The jurisprudence states that the Defence bears the burden to produce credible and reliable evidence sufficient to bring the accuracy of the adjudicated fact into dispute. The threshold of credible and reliable rebuttal evidence, as the ICTR Appeals Chamber *Karemera et al*. Decision of 29 May 2009 states, is "relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia".[2073] The Trial Chamber itself recognised, in a decision it issued on 2 May 2012 regarding adjudicated facts, that the accuracy of facts could, for example, be challenged through the cross-examination of Prosecution witnesses or the presentation of Defence evidence to meet this threshold.[2074]

626. Therefore, contrary to the Prosecution's assertion at paragraph 37 of the Prosecution Response Brief, the Defence was not required necessarily to present rebuttal evidence as part of its case to bring the accuracy of the adjudicated fact into dispute. It was, as the Trial Chamber acknowledged in that decision, able to do so by confronting the Prosecution evidence and eliciting inconsistencies and weaknesses therein.[2075] Despite this, the Trial Chamber imposed an erroneous additional requirement on the evidence presented by the Defence. The Trial Chamber required the evidence to be "unambiguous".[2076]

627. The Trial Chamber explained, at paragraph 5273 of the Trial Judgement, how the Defence could enliven the evidentiary debate:

[2071] *See* Mladić Appeal Brief, paras. 96-114; Mladić Reply Brief, paras. 20-37; T. 25 August 2020 pp. 35-40; T. 26 August 2020 pp. 63, 64.
[2072] *See* T. 25 August 2020 pp. 35, 36.
[2073] *See Karemera et al*. Decision of 29 May 2009, para. 15; T. 25 August 2020 p. 36.
[2074] *See* Fourth Decision on Adjudicated Facts, para. 19; T. 25 August 2020 p. 36.
[2075] *See* T. 25 August 2020 p. 36.
[2076] *See* T. 25 August 2020 p. 37.

> in either presenting evidence on a specific alternative scenario, as opposed to a mere suggestion of one or more possible alternative scenarios, or in the unambiguous demonstration that a scenario as found in the [a]djudicated [f]act must reasonably be excluded as true.[2077]

628. To further explain what it meant by a "specific alternative scenario", the Trial Chamber gave an example in the only footnote within that paragraph.[2078] It reads: "if an adjudicated fact stated that 'B killed C', and the Trial Chamber received evidence that 'C was possibly/likely killed by A'", the Trial Chamber said that this would be deemed insufficient to reach the threshold of "unambiguous" evidence.[2079]

629. If something is possible or likely, then there is doubt. Where there is doubt, it is trite in criminal law that that doubt must be resolved in favour of the accused.[2080] To expect the Defence to present evidence that is without doubt is to reverse the burden of proof and impose a heightened standard – that of beyond reasonable doubt.[2081] It follows then that eliciting doubt through cross-examination of Prosecution witnesses, such that inconsistencies or weaknesses could be pointed out, would not be sufficient.[2082]

630. Therefore, following the Trial Chamber's example, to challenge the accuracy of the adjudicated fact on the basis of its standard, the Defence would have had to have proved beyond reasonable doubt that C was killed by A.[2083] The Defence would have had to have done so by presenting evidence in this regard. There is no legal basis for this standard. The fact that the Trial Chamber does not cite a single authority for it in paragraph 5273 of the Trial Judgement is perhaps indicative of this.[2084]

631. At paragraph 5274 of the Trial Judgement, the Trial Chamber stated that it is "*mindful that evidence contradicting adjudicated facts does not automatically rebut the adjudicated fact*".[2085] The Defence also had to show that the evidence that was brought was reliable and credible.[2086] The reliability and credibility test was a secondary consideration.[2087] As such, the Trial Chamber

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[2077] *See* T. 25 August 2020 p. 37.
[2078] *See* Trial Judgement, para. 5273, n. 18018; T. 25 August 2020 p. 37.
[2079] *See* Trial Judgement, para. 5273, n. 18018; T. 25 August 2020 p. 37.
[2080] *See* T. 25 August 2020 p. 37.
[2081] *See* T. 25 August 2020 p. 37.
[2082] *See* T. 25 August 2020 pp. 37. 38.
[2083] *See* T. 25 August 2020 p. 38.
[2084] *See* T. 25 August 2020 p. 38.
[2085] *See* T. 25 August 2020 p. 38 (emphasis added).
[2086] *See* T. 25 August 2020 p. 38.
[2087] *See* T. 25 August 2020 p. 38.

imposed an additional hurdle that the Defence had to overcome before it could reach the accepted standard required by the jurisprudence to enliven the evidentiary debate.[2088]

632. In light of the Trial Chamber's explanation of its methodology, I am satisfied that the Trial Chamber applied a heightened standard. The consequences of this error are identified by the Defence at paragraphs 106 to 113 of the Mladić Appeal Brief and paragraphs 22 to 37 of the Mladić Reply Brief.[2089] In this regard, as a result of the heightened standard applied, the Trial Chamber found that the evidence presented by the Defence was insufficient to enliven the evidentiary debate or to rebut the accuracy of the adjudicated fact. Its evaluation of the evidence was erroneous, as the Trial Chamber relied on unrebutted adjudicated facts to substantiate the evidentiary basis for Mr. Mladić's responsibility under the Overarching JCE. For example, the Trial Chamber relied on Adjudicated Fact 1476 to establish Mr. Mladić's criminal responsibility for the killing of all of the 7,000-8,000 victims who were not actively taking part in hostilities in Srebrenica.[2090] Even when the accuracy of the adjudicated facts was challenged through evidence presented by the Prosecution, the Trial Chamber's approach prevented Mr. Mladić from enlivening the evidentiary debate through cross-examination. In light of the heightened standard applied, the only way Mr. Mladić could rebut the adjudicated fact was to disprove it beyond reasonable doubt. Mr. Mladić's inability to rebut the adjudicated facts facilitated the discharge of the Prosecution's legal burden to prove his guilt beyond reasonable doubt. No reasonable trier of fact would have applied the heightened standard used by the Trial Chamber. Had the proper legal standard been applied, the rebuttal evidence derived from cross-examination or presented by the Defence would have enlivened the debate and the adjudicated facts would have been rebutted. As the Prosecution's evidence was insufficiently reliable to establish criminal responsibility, the Trial Chamber would have reached a different conclusion had the correct standard been applied to the adjudicated facts. Therefore, the Trial Chamber's reliance on the judicially noticed facts to find Mr. Mladić responsible for the crimes constituted an error that occasioned a miscarriage of justice.[2091]

633. Another example of the Trial Chamber's erroneous approach relates to the unscheduled Incident of 24 October 1994 at paragraphs 2001 to 2003 of the Trial Judgement.[2092]

634. The Trial Chamber sought to rely on adjudicated facts that said that the shot came from a known sniper location of the SRK and that the shots were fired by a member of the SRK.[2093] The

[2088] *See* T. 25 August 2020 p. 38.
[2089] *See also* T. 25 August 2020 p. 38.
[2090] *See* Mladić Reply Brief, paras. 33-37.
[2091] Mladić Appeal Brief, paras. 106-113; Mladić Reply Brief, paras. 22-37.
[2092] *See* T. 25 August 2020 p. 39.

Defence argued that the Prosecution's expert evidence from Witness Patrick van der Weijden, that there was a direct line of sight between the sniper location and the victim, was defective, as there was no clear visibility.[2094] It also produced a Defence expert testimony in which it was said that the trees were likely to have blocked the line of sight.[2095] The Trial Chamber held that that was likely not enough to contradict the relevant adjudicated fact.[2096] Further, it did not have to address the Defence's submissions on the deficiencies within the Prosecution evidence because it relied on the unrebutted adjudicated fact "instead".[2097] Therefore, even when the Defence could introduce doubt through an expert and also point to weaknesses in the Prosecution's evidence, this was insufficient to bring the accuracy of the adjudicated fact into dispute.[2098] Had the debate been enlivened, the Prosecution's evidence would not have been sufficient to re-establish the accuracy of the fact as to the clear line of sight, as it would not have been able to overcome the lingering doubt created by the Defence expert and the weaknesses in its own evidence.[2099]

635. I agree with Mr. Mladić's argument that the Trial Chamber's error in heightening the standard of rebuttal evidence resulted in his evidence being deemed "insufficient" to enliven the rebuttal procedure or to rebut the accuracy of the adjudicated fact. As argued by the Defence, the standard applied by the Trial Chamber to rebuttal evidence was erroneous.[2100] As a result, its approach to evidence tendered by the Defence or reliance on inconsistencies or weaknesses in the Prosecution's case to enliven the evidentiary debate was flawed.[2101] This infected the Trial Chamber's approach to adjudicated facts throughout the judgement.[2102] The examples provided in the Mladić Appeal Brief demonstrate the existence of this systematic error such that the Trial Chamber's approach to every single adjudicated fact is called into question.[2103] As Mr. Mladić asserts, I am satisfied that the Trial Chamber fell into discernible error and applied a standard that no reasonable Trial Chamber would and, in fact, ever has applied.[2104]

636. In light of the above I find that the Trial Chamber erred by applying a heightened standard of the burden to produce rebuttal evidence or shifting the burden of persuasion onto Mr. Mladić. In

[2093] *See* Trial Judgement, para. 2001, nn. 8506, 8507, *referring to*, Adjudicated Facts 2752, 2753; T. 25 August 2020 p. 39.
[2094] *See* Trial Judgement, para. 2001; T. 25 August 2020 p. 39; Mladić Final Trial Brief, paras. 2234-2239.
[2095] *See* Trial Judgement, para. 2001; T. 25 August 2020 p. 39.
[2096] *See* Trial Judgement, para. 2002; T. 25 August 2020 p. 39.
[2097] *See* Trial Judgement, para. 2002; T. 25 August 2020 p. 39.
[2098] *See* T. 25 August 2020 p. 39.
[2099] *See* T. 25 August 2020 p. 39.
[2100] *See* T. 25 August 2020 p. 39.
[2101] *See* T. 25 August 2020 pp. 39, 40.
[2102] *See* T. 25 August 2020 p. 40.
[2103] *See* T. 25 August 2020 p. 40.
[2104] *See* T. 25 August 2020 p. 40.

conjunction with my conclusions on the Trial Chamber's erroneous use of adjudicated facts relating to the conduct of subordinates, this means I would grant Ground 2.A.

2. Alleged Errors in Applying an Incorrect Standard of Proof, Failing to Provide a Reasoned Opinion, and Relying on Untested Evidence (Grounds 2.B, 2.C, and 2.D)

637. Mr. Mladić submits that the Trial Chamber systematically erred in law and in fact throughout the Trial Judgement by:

i. Applying an incorrect standard of proof, thereby alleviating the Prosecution's burden to prove his guilt beyond reasonable doubt;

ii. Failing to address clearly relevant exculpatory evidence in its reasoning, thereby indicating that it either failed to consider such evidence or gave insufficient weight thereto; and

iii. Relying on untested evidence in a sole or decisive manner.

638. The Prosecution did not undermine these submissions. In doing so the Trial Chamber committed a discernible error resulting in considerable prejudice to Mr. Mladić systematically throughout the Trial Judgement. The Trial Chamber's errors and their impact, which Mr. Mladić elaborates more specifically in Grounds 3 to 7 of his Appellant's brief, individually or cumulatively, invalidate the findings on which his convictions rest. I would therefore grant Grounds 2.B, 2.C, and 2.D of Mr. Mladić's Appeal.

C. Ground 3 – Overarching JCE

1. Temporal Geographical Scope of the Overarching JCE

639. The Overarching JCE is defined as lasting from 1991 to 30 November 1995, and is limited to the geographic scope of Bosnia and Herzegovina.[2105] It is a fundamental principle of criminal law that there be a temporal co-existence of the *actus reus* and the *mens rea* of the prescribed conduct.[2106] According to the *Nahimana et al*. Appeal Judgement:

> the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present. […] The acts and omissions of the accused establishing his responsibility under any of the modes of responsibility referred to in Article 6(1) and 6(3) of the [ICTR] Statute occurred in 1994, and at the time of such acts or omissions the

[2105] *See* Trial Judgement, paras. 4232, 4610; T. 25 August 2020 p. 41.
[2106] *See* T. 25 August 2020 p. 41.

> accused had the requisite intent (*mens rea*) in order to be convicted pursuant to the mode of responsibility in question.[2107]

640. According to the *Simba* Appeal Judgement:

> [t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.[2108]

641. The ICTY Appeals Chamber in the *Naletilić and Martinović* Appeal Judgement followed this same approach:

> The principle of individual guilt requires that an accused can only be convicted for a crime if his *mens rea* comprises the *actus reus* of the crime. To convict him without proving that he knew of the facts that were necessary to make his conduct a crime is to deny him his entitlement to the presumption of innocence. The specific required mental state will vary, of course, depending on the crime and the mode of liability. But the core principle is the same: for a conduct to entail criminal liability, it must be possible for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[2109]

642. Judge Tuzmukhamedov supported this approach in his dissent to the *Šainović et al*. Appeal Judgement, where he stated that neither conduct prior to the period of the joint criminal enterprise nor any actions on the part of the accused thereafter could have reasonably amounted to a significant contribution to the joint criminal enterprise.[2110]

643. The Trial Chamber erred in its approach, especially insofar as to infer Mr. Mladić's *mens rea* from statements beyond the scope of the Overarching JCE made in 1991 in Croatia, not in Bosnia and Herzegovina.[2111]

644. The Indictment alleged that Mr. Mladić was not considered part of the Overarching JCE until 12 May 1992 when he was appointed Chief of the VRS Main Staff.[2112] Prior to that month, he neither was on the territory of Bosnia and Herzegovina nor within the command structure of the VRS since he was in Croatia and in the JNA at that time.[2113] In my view, the first error of the Trial Chamber is that it violated the aforementioned jurisprudence by trying to attribute Mr. Mladić's speeches to Bosnia and Herzegovina in 1991, when he was neither temporally nor geographically linked to those events.[2114] At this time, Mr. Mladić was not in the chain of command for receiving

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[2107] *See Nahimana et al*. Appeal Judgement, para. 313; T. 25 August 2020 pp. 41, 42.
[2108] *See Simba* Appeal Judgement, para. 266; T. 25 August 2020 p. 42.
[2109] *See Naletilić and Martinović* Appeal Judgement, para. 114; T. 25 August 2020 p. 42.
[2110] *See Šainović et al*. Appeal Judgement, Dissenting Opinion of Judge Tuzmukhamedov, para. 8; T. 25 August 2020 pp. 42, 43.
[2111] *See* Mladić Appeal Brief, para. 304; T. 25 August 2020 p. 43.
[2112] *See* Indictment, para. 5; T. 25 August 2020 p. 43.
[2113] *See* Mladić Appeal Brief, para. 203; T. 25 August 2020 p. 43.
[2114] *See* Mladić Appeal Brief, para. 203; T. 25 August 2020 p. 43.

reports about events, and certainly could not send commands to persons outside of his chain of command either to commit these crimes or to punish perpetrators.[2115]

645. The second error was that the Trial Judgement performs an analysis of what others, such as politicians, the police, or other armed groups said or did in the same time period prior to Mr. Mladić coming to Bosnia and Herzegovina.[2116] Many of the crimes underpinning the Overarching JCE come in this time period before Mr. Mladić was in Bosnia and Herzegovina and before the VRS.[2117] In my view, this violates the above jurisprudence as the Trial Chamber utilised events that pre-date Mr. Mladić's appointment and geographic position to establish his *mens rea* and contribution to a joint criminal enterprise where the *actus reus* was before his physical and temporal presence.[2118] The Trial Judgement's analysis as to the Overarching JCE relies heavily on adjudicated facts.[2119] Crimes that took place before Mr. Mladić and his VRS had hierarchy and military command and control in all regions of Bosnia and Herzegovina cannot be used to establish his *mens rea*, even if the *actus reus* is shown to be perpetrated by others.[2120]

2. Use of Circumstantial Evidence

646. The Defence argues, and I am in agreement, that the Trial Chamber erred in almost exclusively basing its analysis of Mr. Mladić's purported contribution to the Overarching JCE on circumstantial evidence.[2121] In using this modus, these conclusions had to be the only reasonable inferences available. According to the *Lukić and Lukić* Appeal Judgement, the ICTY Appeals Chamber recalled that:

> in order to successfully challenge the trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.[2122]

647. The ICTY Appeals Chamber in the *Boškoski and Tarčulovski* Appeal Judgement similarly noted that where a conviction is based on circumstantial evidence, the conclusion arrived at must be the "*only* reasonable conclusion".[2123]

[2115] *See* T. 25 August 2020 p. 43.
[2116] *See* T. 25 August 2020 pp. 43-45.
[2117] *See* T. 25 August 2020 p. 45.
[2118] *See* T. 25 August 2020 p. 45.
[2119] *See* T. 25 August 2020 p. 46.
[2120] *See* T. 25 August 2020 p. 46.
[2121] *See, e.g.*, T. 25 August 2020 p. 46.
[2122] *See Lukić and Lukić* Appeal Judgement, para. 149; T. 25 August 2020 p. 46.
[2123] *See Boškoski and Tarčulovski* Appeal Judgement, para. 99; T. 25 August 2020 p. 46.

648. There was direct evidence that Mr. Mladić did not share a criminal intent in accordance with the Overarching JCE, namely his orders to the VRS to respect the Geneva Conventions and ceasefire agreements, as well as his notebooks,[2124] the contents of which will be elaborated where relevant in the analysis below. This was not accepted by the Trial Chamber because it felt it had more circumstantial evidence to the contrary.[2125] This disregard of direct evidence in favour of circumstantial evidence is a discernible error.[2126] It violates the above jurisprudence and the principle of *in dubio pro reo*, which states that, where any doubt exists, it should be resolved in favour of the defendant.[2127]

649. Having conceded that direct evidence exists showing a lack of criminal intent or *mens rea* as to Mr. Mladić, and if indeed this direct evidence is corroborated by other circumstantial evidence, as set out in the Mladić Appeal Brief,[2128] then no reasonable trier of fact can choose to ignore this direct evidence and go with "more" circumstantial evidence to say that the "only" available inference is one indicative of guilt.[2129] Circumstantial evidence cannot outweigh direct evidence. I further note that much of the direct evidence that was available to the Trial Chamber and which was disregarded included the notebooks that the Trial Chamber asserted as being authored by Mr. Mladić himself. I take note of the examples as set out in paragraphs 202, 234, and 309 of the Mladić Appeal Brief.[2130] In this regard, Mr. Mladić's notebooks contained direct evidence of the constraints he experienced when operating in the municipalities as well as of how he intended to protect Bosnian Muslims and Bosnian Croats,[2131] of declining discipline within the VRS and the dismantling of the MUP,[2132] and of his efforts to stop crimes from being committed by rebel military formations.[2133] For example, Mr. Mladić:

i. wrote in his notebook about problems with paramilitaries and crimes that were being committed;[2134]

[2124] *See* Mladić Appeal Brief, paras. 202, 234, 309, 311, 312, *referring to*, *inter alia*, Exhibits P352, P354, P356, P358, P474, D451; T. 25 August 2020 pp. 46, 47.
[2125] *See* T. 25 August 2020 pp. 46, 47.
[2126] *See* T. 25 August 2020 p. 47.
[2127] *See* T. 25 August 2020 p. 47; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 16 October 1998 ("*Tadić* Decision of 16 October 1998"), para. 73.
[2128] *See* Mladić Appeal Brief, para. 312, n. 463; T. 25 August 2020 p. 47.
[2129] *See* T. 25 August 2020 p. 47.
[2130] *See* T. 25 August 2020 p. 47.
[2131] *See* Exhibits P356, pp. 179, 180, 218; D1514; D187.
[2132] *See* Exhibit P358, p. 242.
[2133] *See* Exhibits P352, pp. 331, 338; P354, pp. 48.
[2134] *See* Exhibit P356, pp. 179, 180.

ii. issued an order to protect the Muslim population in certain villages from possible violence from individuals, because they expressed loyalty to *Republika Srpska*;[2135] and

iii. issued an order, *inter alia*, forbidding the cruel treatment and abuse of civilians, prisoners of war and members of international organizations, and mandating that all prisoners of war should be treated in accordance with the international law of war.[2136]

650. In my view, the Trial Chamber erred in law by employing this defective method that resulted in a finding of Mr. Mladić's *mens rea* being satisfied beyond reasonable doubt on the basis of circumstantial evidence and disregarding direct evidence, and I find that he has satisfied his burden on appeal in this regard.[2137]

651. The first error was that the Trial Chamber made findings of Mr. Mladić's *mens rea* before the *actus reus* was established.[2138] To establish the *actus reus* element of a joint criminal enterprise, the Trial Chamber must determine the existence and scope of a common criminal purpose shared by a plurality of persons. This is a necessary prerequisite in determining whether the acts performed by the Appellant were related and contributed to the participation in the common criminal objective.[2139]

652. The doctrine of joint criminal enterprise demands that Mr. Mladić made a significant contribution to the crimes for which he was convicted.[2140] This requires the trier of fact to characterise Mr. Mladić's contribution to the common criminal purpose.[2141]

653. The Trial Chamber made assumptions and drew inferences to circumstantially link Mr. Mladić to crimes based on his position in the VRS and the evidence of the behaviour of alleged subordinates to satisfy the guilt of Mr. Mladić by this mode of liability.[2142] The Trial Chamber also relied on circumstantial "links" rather than finding actual understanding or agreement by Mr. Mladić to support any aspect of the Overarching JCE.[2143]

654. According to Judge Tuzmukhamedov's dissent in the *Šainović et al.* Appeal Judgement:

[2135] *See* Exhibit D1514, p. 1.
[2136] *See* Exhibit D187, p. 1.
[2137] *See* T. 25 August 2020 p. 47.
[2138] *See* T. 25 August 2020 p. 47.
[2139] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 p. 48, *referring to*, *inter alia*, Mladić Appeal Brief, paras. 271-285.
[2140] *See Krajišnik* Appeal Judgement, para. 215; *Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 48.
[2141] *See Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 48.
[2142] *See* T. 25 August 2020 p. 48, *referring to*, *inter alia*, Trial Judgement, paras. 3561, 4218-4239.
[2143] *See* T. 25 August 2020 p. 49.

> no one incurs criminal liability merely by virtue of being a person of authority or capable of issuing instructions. Responsibility justifying a criminal conviction may attach only to individuals who actually put their powers into use for the commission of crimes or culpably fail to exert their influence over perpetrators. This is what the Prosecution should prove beyond reasonable doubt and the trier of fact should find, based on a reasoned opinion in the judgement.[2144]

655. Once the *actus reus* is established, the Trial Chamber is then required to examine whether Mr. Mladić's shared intent to further the common criminal objective could be inferred from his knowledge, acts, words, and interactions with others.[2145] The Trial Chamber is required to determine the objective *actus reus* elements of the joint criminal enterprise first before the subjective *mens rea* element can be considered.[2146]

656. The second error in the Trial Chamber's analysis was when it made *mens rea* findings while doing the *actus reus* consideration.[2147]

657. The consequence of this is that if *mens rea* inferences are drawn prior to the *actus reus* being established, not only does this contravene the established method explained in the first error, but how can the Trial Chamber then, moving into the *mens rea* consideration, remain objective when they have already made findings about and against Mr. Mladić's mental state?[2148] Reliance on conclusions already drawn about Mr. Mladić's guilt does not provide an objective or balanced analysis of his *mens rea*.[2149] Instead, the Trial Chamber automatically applied these findings to conclude Mr. Mladić's guilt, thereby indelibly tainting its findings.[2150]

658. In light of the foregoing, I consider that the method used by the Trial Chamber to establish the different elements of the Overarching JCE is flawed, which invalidates the findings for this joint criminal enterprise.[2151] Such a piecemeal approach deprived Mr. Mladić of his rights under the principle of *in dubio pro reo*, which states that, where any doubt exists, it should be resolved in favour of the defendant,[2152] and trial fairness.[2153] I am further of the view that the Trial Chamber has not been able to articulate by what measure Mr. Mladić was involved in crimes or furthered the common criminal purpose.[2154] The Trial Judgement failed to properly characterise through which specific conduct Mr. Mladić contributed to the Overarching JCE during the relevant time period he

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[2144] *See Šainović et al.* Appeal Judgement, Dissenting Opinion of Judge Tuzmukhamedov, para. 34; T. 25 August 2020 p. 49.
[2145] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 pp. 49, 50.
[2146] *See Stanišić and Simatović* Appeal Judgement, para. 82; T. 25 August 2020 p. 50.
[2147] *See* Mladić Appeal Brief, paras. 262-290; T. 25 August 2020 p. 50.
[2148] *See* T. 25 August 2020 pp. 50, 51.
[2149] *See* T. 25 August 2020 p. 51.
[2150] *See* Mladić Appeal Brief, para. 291; Mladić Reply Brief, para. 55; T. 25 August 2020 p. 51.
[2151] *See* T. 25 August 2020 p. 51.
[2152] *See Tadić* Decision of 16 October 1998, para. 73.
[2153] *See* T. 25 August 2020 p. 51.

was in Bosnia and Herzegovina and in the VRS.[2155] By using such a nebulous and blurred analysis, muddling the *actus reus* analysis and the *mens rea* analysis, the Trial Chamber ultimately left open whether it held Mr. Mladić responsible for active conduct, omission, or both.[2156]

3. Control Over Paramilitaries and the MUP

(a) Paramilitaries

659. The Trial Chamber identified approximately 60 paramilitary groups on the territory of the Bosnian Serb Republic, totaling between four and five thousand men as of July 1992.[2157] It also conceded Mr. Mladić's efforts to disarm and disband those units and groups, stating that:

> [o]n 28 July 1992, Mladić ordered the disarmament of all paramilitary formations, groups, and individuals in the territory of the Bosnian-Serb Republic by 15 August 1992 in order to put all armed formations and individuals under the unified command of the VRS.[2158]

660. No reasonable trier of fact would ignore the constant attempts of Mr. Mladić and his VRS to eradicate paramilitaries, while including acts that were alleged to be committed by these same paramilitaries, naming them as participants in the Overarching JCE.[2159] Mr. Mladić cannot have been fighting to eradicate Serbian paramilitaries while at the same time contributing to their actions and thus significantly contributing to the alleged common objective through these paramilitaries.[2160] I agree with the Defence that the Trial Chamber failed to give sufficient weight to Mr. Mladić's many orders to subordinates to break up, disarm, and liquidate Serbian paramilitary groups and arrest them if they had committed crimes.[2161] For example:

i. In his order of 30 July 1992, Mr. Mladić *ordered that all paramilitaries with honourable intentions should be offered to join the VRS, and those who refused or "carried out misdeeds, robberies or other crimes", should be "disarmed, arrested and prosecuted"*;[2162]

[2154] *See* T. 25 August 2020 p. 51.
[2155] *See* T. 25 August 2020 p. 51.
[2156] *See* T. 25 August 2020 pp. 51, 52.
[2157] *See* Trial Judgement, para. 3855; T. 25 August 2020 p. 52.
[2158] *See* Trial Judgement, para. 3855; T. 25 August 2020 p. 52.
[2159] *See* T. 25 August 2020 p. 52.
[2160] *See* T. 25 August 2020 p. 52.
[2161] *See* Mladić Appeal Brief, paras. 309, 310; Trial Judgement, paras. 3840, 3847, 3852, 4419, *referring to* Exhibits P5112 (Order by Mladić to disarm all paramilitary formations, 28 July 1992), P5116 (Order by Mladić on reports of disarmament of paramilitary formations, 17 August 1992), D1499 (Order from Mladić to the VRS Corps Commands Regarding Discipline, 22 May 1993); T. 25 August 2020 p. 52.
[2162] *See* Exhibit P5112, p. 3 (emphasis added).

ii. In his order of 17 August 1992, Mr. Mladić *ordered various VRS corps that reports should be submitted on the disarmament of paramilitary formations in their zones of responsibility*;[2163]

iii. In his order of 22 May 1993, Mr. Mladić *ordered disciplinary measures for misconduct and that paramilitary groups "shall be arrested and eliminated, and in the case of resistance, physically liquidated"*.[2164]

661. Mr. Mladić's approach to not tolerate any actions or existence of paramilitary groups is supported by various meetings evidenced in the notebooks attributed to him.[2165] Mr. Mladić's opposition to the existence and activities of paramilitary groups is evidenced and documented from the entire period from when he came to Bosnia and Herzegovina in 1992 through the end of the alleged Overarching JCE in 1995.[2166]

662. Instead of reaching conclusions in favour of Mr. Mladić under the direct evidence of his opposition to paramilitaries, the Trial Chamber attempted to somehow portray non-existing connections and the impression of joint furtherance of common objectives with the VRS through ambiguous terminology based on circumstantial evidence and unacceptable for proper analysis under Article 7(3) of the ICTY Statute, using words like "operated in cooperation", "worked in coordination", and "worked in cooperation" with VRS units.[2167]

663. However, direct evidence shows otherwise. For example, an elite VRS unit directly subordinated under Mr. Mladić, the 65th Protection Regiment, was personally sent by him to Ilidža and engaged to deal with a paramilitary group. This is based on the testimony of Witness Vladimir Radojčić, wherein he stated that that pertinent paramilitary group outnumbered the military police available to that brigade commander who asked for Mr. Mladić's help to deal with this group.[2168]

664. Many orders were issued to disarm and arrest them, including Exhibits P5112, P5116, and D1499, as cited in the Trial Judgement and as described in paragraph 660 above.[2169] Only those who had not committed crimes were allowed to submit to the rules of war and submit to army

[2163] *See* Exhibit P5116.
[2164] *See* Exhibit D1499, p. 2 (emphasis added).
[2165] *See* Mladić Appeal Brief, para. 309, n. 452 and references cited therein; T. 25 August 2020 p. 52.
[2166] *See* Mladić Appeal Brief, para. 310; T. 25 August 2020 pp. 52, 53.
[2167] *See* Trial Judgement, paras. 3859, 3863, 3866, 3873; T. 25 August 2020 p. 53.
[2168] *See* T. 26 June 2014 p. 23055; T. 25 August 2020 p. 53.
[2169] *See* Mladić Appeal Brief, paras. 309, 310; Trial Judgement, paras. 3840, 3847, 3852, 4419, *referring to* Exhibits P5112 (Order by Mladić to disarm all paramilitary formations, 28 July 1992), P5116 (Order by Mladić on reports of disarmament of paramilitary formations, 17 August 1992), D1499 (Order from Mladić to the VRS Corps Commands Regarding Discipline, 22 May 1993); T. 25 August 2020 p. 53.

induction, and they were separated, assigned to different units so as not to work together.[2170] The VRS's and Mr. Mladić's position as to paramilitaries is "*that the patriotic motives of the above-mentioned individuals are secondary, and unlawful enrichment and looting is the only reason for their presence in this area*".[2171]

(b) MUP

665. The Trial Chamber's flawed approach is most evident in its use of adjudicated facts and flawed logic to establish that Mr. Mladić had command and control over the MUP.[2172] This error is best illustrated in the Trial Judgement where the Trial Chamber concedes it cannot distinguish between actions and crimes committed by the VRS or members of the MUP and others but rather blends them together for purposes of the Overarching JCE.[2173] For example, at paragraph 4239 of the Trial Judgement, the Trial Chamber stated that:

> [m]any of the charged crimes were committed by members of the VRS, who were under the operational command of one of the corps, and ultimately of the VRS Main Staff. Many other crimes were committed by MUP members, either under the operational supervision of the VRS or under the supervision of the MUP. Some crimes were committed by [Territorial Defence] members, under the supervision of the Bosnian Serb [Ministry of Defence]. Crimes were also committed by paramilitary groups subordinated to the VRS or MUP.[2174]

666. The Trial Chamber invented a brand new mode of liability in command and control jurisprudence – "operational supervision".[2175] Upon what basis in the law and jurisprudence does it arise? The Trial Chamber is silent on this point.[2176] Evidence to the contrary is not silent.[2177]

667. First of all, I note that evidence was submitted to rebut the adjudicated facts as to command and control.[2178] Secondly, the record is replete with reliable and credible evidence that coordinated action of the MUP with the VRS did not lead to re-subordination under the army's command.[2179] This includes testimonial evidence from the Prosecution's own expert, Witness Theunens.[2180] Witness Theunens testified that:

[2170] *See* T. 25 August 2020 p. 53.
[2171] *See* T. 25 August 2020 p. 54 (emphasis added).
[2172] *Compare* Mladić Appeal Brief, paras 218-221 *with* Trial Judgement, para. 3794. *See* T. 25 August 2020 p. 54.
[2173] *See* T. 25 August 2020 p. 54.
[2174] *See also* T. 25 August 2020 p. 54.
[2175] *See* T. 25 August 2020 p. 55.
[2176] *See* T. 25 August 2020 p. 55.
[2177] *See* T. 25 August 2020 p. 55.
[2178] *See* Mladić Appeal Brief, para. 218; T. 25 August 2020 p. 55.
[2179] *See* Mladić Appeal Brief, para. 221; T. 25 August 2020 p. 55.
[2180] *See* T. 10 December 2013 pp. 20615-20617; T. 25 August 2020 p. 55.

> when unit A and unit B have to co-ordinate their operations, there is no subordination relation between unit A and unit B. However, above these two units there is, of course, a commander who orders and instructs how these two units are to co-ordinate their operations.[2181]

668. The evidence showed that at all times the effective control, reporting, and discipline of MUP units remained with the MUP commander and MUP Ministry.[2182]

669. Based on this evidence as to the MUP, and in accordance with the requirements of the principle of *in dubio pro reo*, it was unreasonable and therefore an error for the Trial Chamber to find that Mr. Mladić shared the intent of the MUP or that he contributed towards the common criminal purpose of the Overarching JCE via the actions of the MUP.[2183]

4. Legitimate Military Goals of the VRS

670. The Trial Chamber erred in its conclusions linking Mr. Mladić's legitimate activities to political goals of politicians.[2184] The Trial Chamber found that Mr. Mladić could influence the political leadership.[2185] Nevertheless, at the same time, it referred to evidence that Mr. Mladić was continually subject to the political leadership.[2186] The Trial Chamber chose selectively the statements of UN outsiders interpreting the behaviour of Mr. Mladić that were often contradictory to one another.[2187]

671. For example, contrary to the Trial Chamber's reliance on Witness Wilson,[2188] and its use and oversimplification elsewhere in the Trial Judgement as to the existence of the Supreme Command for all tasks and objectives of the armed struggle, the same document used throughout the Trial Judgement, Exhibit P338, plainly set forth that Mr. Mladić's VRS Main Staff was formulating its own military tasks, i.e., seven overall military goals, instead of six strategic objectives as formulated by politicians.[2189] The seven overall military goals were:

i. the "defence of the Serbian people against genocide at the hands of the Muslim-Croat forces";

ii. the "protection of the property and cultural heritage of the Serbian people";

[2181] T. 10 December 2013 p. 20616.
[2182] *See* Mladić Appeal Brief, para. 221, n. 327 and references cited therein; T. 25 August 2020 p. 55.
[2183] *See* T. 25 August 2020 p. 55.
[2184] *See* T. 25 August 2020 pp. 55, 56.
[2185] *See* Trial Judgement, para. 4474; Mladić Appeal Brief, para. 204; T. 25 August 2020 p. 56.
[2186] *See* Trial Judgement, para. 4466, 4472-4474; T. 25 August 2020 p. 56.
[2187] *See* Mladić Appeal Brief, para. 204; T. 25 August 2020 p. 56.
[2188] *See* Trial Judgement, para. 4473; T. 25 August 2020 p. 56.
[2189] *See* Exhibit P338 (Report on analysis of the combat readiness and activities of the VRS in 1992, 5 April 1993), p. 159; T. 25 August 2020 p. 56.

iii. the "liberation of territories which are ours and belong to [the Serbian people] by historical birth right";

iv. the "infliction of the greatest possible losses on the Muslim-Croat forces", by "neutralising and destroying their personnel and combat ordnance";

v. the "neutralising of facilities in enemy territory, or their destruction";

vi. the "spreading of the enemy forces over a broad area on all the battlefields of former Bosnia and Herzegovina"; and

vii. the "gradual erosion of the enemy's offensive power, i.e. the shattering of his forces, and the seizing of the initiative and creating conditions for resolute offensive operations in order to defeat his forces and expel them from areas that have always belonged to [the Serbian people], while at the same time preventing extensive losses in [Serb] ranks".[2190]

672. There was no malicious meaning attached to them.[2191] They simply provided for formulating legitimate military tasks.[2192]

673. The Trial Judgement, besides speculative narratives, does not contain conclusions nor important analysis as to whether even the political strategic objectives, nor the A/B variant document, were criminal *per se*.[2193] The *Perišić* Appeal Judgement guides us that the implementation of the *Republika Srpska* strategic objectives did not entail the systematic commission of crimes.[2194]

674. Merely citing and speculating on objectives of a political nature do not satisfy the standard of evidence sufficient to establish the existence of a common criminal plan.[2195] According to the *Martić* Appeal Judgement, political intentions are not sufficient to establish a joint criminal enterprise.[2196]

[2190] *See* Exhibit P338 (Report on analysis of the combat readiness and activities of the VRS in 1992, 5 April 1993), p. 159.
[2191] *See* T. 25 August 2020 p. 56.
[2192] *See* T. 25 August 2020 p. 56.
[2193] *See* T. 25 August 2020 pp. 56, 57.
[2194] *See Perišić* Appeal Judgement, paras. 100-102; Mladić Appeal Brief, para. 243; T. 25 August 2020 p. 57.
[2195] *See* T. 25 August 2020 p. 57.
[2196] *See Martić* Appeal Judgement, paras. 123, 124; T. 25 August 2020 p. 57.

675. The absence of any correlation or identical agenda between Mr. Mladić and the VRS on the one side and political authorities on the other, let alone a common criminal objective, is seen in paragraph 3707 of the Trial Judgement.[2197] The Trial Chamber stated:

> In a 8 November 1992 meeting with *inter alios* Karadžić, Krajišnik, and corps commanders, Mladić noted Krajišnik as having stated that '[w]e have a disproportionate engagement of the army in relation to the strategic objectives. We have not achieved: The Neretva, the sea, and the Podrinje area. We have achieved: The corridor and separation with the Muslims'.[2198]

676. Instead of analysing the clear divergence between political and military goals, the Trial Judgement lacks proper analysis and application of the principle of *in dubio pro reo*.[2199]

677. Performing routine duties in isolation is insufficient to establish indication of guilt and cannot substitute the requisite *actus reus* or *mens rea* as to the Overarching JCE.[2200] The Trial Chamber failed to explain how the performance of routine military duties of Mr. Mladić had an actual effect on and substantially contributed to the activities of perpetrators in the course of crimes in furtherance of the common objective.[2201] Without such analysis, the Trial Chamber has not been able to articulate by what measure Mr. Mladić was involved in crimes committed in furtherance of the alleged common objective.[2202] I consider that there was a clear error in reasoning in the Trial Chamber's conclusion that Mr. Mladić made a significant contribution to the Overarching JCE.[2203] I further note that, according to the *Perišić* Appeal Judgement, the VRS was confirmed to be an organization that was not criminal itself and which undertook lawful combat activities.[2204] In this regard, the ICTY Appeals Chamber in the *Perišić* case "underscore[d] that the VRS was participating in lawful combat activities and was not a purely criminal organisation".[2205]

678. Even the highly controversial doctrine of joint criminal enterprise demands that Mr. Mladić made a significant contribution to the crimes, which requires the accused's contribution to the common objective.[2206] How the acts and conduct of Mr. Mladić performing his routine duties as a

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[2197] *See* T. 25 August 2020 p. 57.
[2198] Trial Judgement, para. 3707.
[2199] *See* T. 25 August 2020 p. 57.
[2200] *See* T. 25 August 2020 pp. 57, 58.
[2201] *See* T. 25 August 2020 p. 58.
[2202] *See* T. 25 August 2020 p. 58.
[2203] *See* T. 25 August 2020 p. 58.
[2204] *See* Mladić Appeal Brief, para. 206, n. 308, *referring to Perišić* Appeal Judgement, paras. 57-69; T. 25 August 2020 p. 58.
[2205] *Perišić* Appeal Judgement, para. 57.
[2206] *See Brđanin* Appeal Judgement, para. 430; T. 25 August 2020 p. 58.

military commander had any tangible effect on crimes which were committed in furtherance of a common objective remains completely unanswered.[2207] This is an error.[2208]

679. The Trial Chamber ignored the reasonable inference of Mr. Mladić's comments and speech at the 16th Assembly Session when he first assumed his title in the VRS, wherein he stated: "*we do not want a war against the Muslims as a people, or against the Croats as a people*".[2209] This was said after Karadžić proclaimed the six strategic objectives, and its plain interpretation is *to only engage in war when attacked and against combatants, not civilians*, which is a legitimate stance.[2210]

680. Orders from the VRS Main Staff in evidence, particularly those from Mr. Mladić, were entirely lawful and legitimate.[2211] They were specific to the extent that can be interpreted as of a military nature.[2212] Their purpose cannot in any way be connected to any criminal plan or objective.[2213] For example:

i. In the VRS Main Staff Directive of 6 June 1992, Mr. Mladić provided updates on military and political developments, gave instructions on further military action to be taken, and indicated, *inter alia*, the goal to ensure the safety of aircrafts bringing in humanitarian aid and the normal supply of food and medications to the civilian population;[2214]

ii. On 23 June 1992, Mr. Mladić issued a VRS Main Staff Directive concerning the expansion of the corridor between Romanija and Semberija and the liberation of roads in the central watercourse of the Drina River;[2215]

iii. A VRS Main Staff letter of 17 October 1993, signed by Mr. Mladić, concerned the lack of control by Serbian forces in the illegal transfer of persons and goods, including the crossing of the frontline by refugees coming from enemy-controlled territory and enabling them and persons of mixed marriages to travel through *Republika Srpska*;[2216]

iv. On 16 April 1994, Mr. Mladić, noting global media attention, ordered that civilians and prisoners of war in Goražde be treated better, that "cruel treatments are severely forbidden,

[2207] *See* T. 25 August 2020 p. 58.
[2208] *See* Mladić Appeal Brief, para. 235; T. 25 August 2020 p. 58.
[2209] *See* Mladić Appeal Brief, para. 325, n. 475, *referring to* Exhibit P431, p. 33 (emphasis added); T. 25 August 2020 pp. 58, 59.
[2210] *See* Mladić Appeal Brief, para. 326; T. 25 August 2020 p. 59.
[2211] *See, e.g.*, Exhibits P474; P3673; P4145; D187; D726; D1514; T. 25 August 2020 p. 59.
[2212] *See* T. 25 August 2020 p. 59.
[2213] *See* T. 25 August 2020 p. 59.
[2214] *See* Exhibit P474.
[2215] *See* Exhibit P3673.
[2216] *See* Exhibit P4145.

as well as abuse and physical destruction of civilian population, prisoners of war and members of the international organizations", and that "[a]ll prisoners of war are to be treated in compliance with the international law of war";[2217]

v. In the VRS Main Staff Order of 14 May 1993, Mr. Mladić ordered, *inter alia*, the unhindered passage of humanitarian aid, and compliance with international humanitarian law, including the Geneva Conventions;[2218]

vi. In the VRS Main Staff Order of 16 June 1993, Mr. Mladić ordered that Commands at all levels were to ensure the delivery of humanitarian aid, and grant freedom of movement to all international humanitarian organizations;[2219] and

vii. In the VRS Main Staff Order of 28 November 1992, Mr. Mladić ordered, *inter alia*, that the Muslim population in specific villages should be protected from violence because they expressed loyalty to *Republika Srpska*.[2220]

681. Starting with a directive issued on 6 June 1992 where, upon assuming command of the VRS, Mr. Mladić consistently urged adherence to the Geneva Conventions and proper treatment of civilians and prisoners of war.[2221] These orders indicate that Mr. Mladić ordered his subordinates to abide by international law and did not order them to further the objectives of any common criminal objective.[2222]

682. Given the Trial Chamber's complete disregard of this direct evidence of lawful orders from Mr. Mladić, it is incumbent upon the Appeals Chamber to intervene in the Trial Chamber's *mens rea* analysis where this direct evidence of probative value has not been given sufficient weight.[2223]

5. Conclusion

683. For these reasons, I would vacate the Trial Chamber's convictions based on the Overarching JCE and grant Ground 3 of Mr. Mladić's appeal.

[2217] *See* Exhibit D187.
[2218] *See* Exhibit D726.
[2219] *See* Exhibit P5219.
[2220] *See* Exhibit D1514.
[2221] *See* Mladić Appeal Brief, paras. 311, 312, *referring to*, *inter alia*, Exhibit P474; T. 25 August 2020 p. 59.
[2222] *See* T. 25 August 2020 p. 59.
[2223] *See* T. 25 August 2020 p. 59.

D. Ground 4 – Sarajevo JCE

684. Mr. Mladić submits, *inter alia*, that the Trial Chamber erred in law by finding that the Tribunal has jurisdiction over the crime of terror.[2224] I note that, from the outset, Mr. Mladić's argument is focused on the fact that the criminalisation of terror could not be considered to have formed part of customary international law during the indictment period. He does not challenge the finding that there existed a custom on the prohibition against terror.[2225]

685. The legal basis upon which the Trial Chamber relied to the effect that it had jurisdiction on the crime of terror is found at paragraph 3185 of the Trial Judgement, where it held that "[t]he [ICTY] Appeals Chamber has confirmed that the Tribunal has jurisdiction over this crime" and cited two cases supporting this conclusion – the *Galić* Appeal Judgement and the *D. Milošević* Appeal Judgement.[2226]

686. The *Galić* Appeals Chamber, in the first instance, acknowledged *the UN* Secretary-General's remarks that "*the International Tribunal was expected to apply 'rules of international humanitarian law which are beyond any doubt part of customary law'*."[2227] The ICTY Appeals Chamber then went on to explain the importance of forensically analysing the jurisprudence to avoid confusing a custom prohibiting certain conduct with a custom that criminalises it.[2228] This was because "in most cases, treaty provisions will only provide for the prohibition of a certain conduct, not for its criminalisation, or the treaty provision itself will not sufficiently define the elements of the prohibition they criminalise".[2229]

687. After considering domestic practice to determine whether or not there was sufficient state practice to evidence a norm of customary international law for the criminalisation of terror, the ICTY Appeals Chamber in the *Galić* case found that individual criminal responsibility could be inferred from state practice.[2230] It pointed to six states to evidence state practice: the Ivory Coast, Czechoslovakia, Ethiopia, the Netherlands, Norway, and Switzerland.[2231] The other states it pointed to – Ireland, Bangladesh, the United States, China, and the Former Yugoslavia – on closer inspection did not, in fact, criminalise terror so cannot be said to constitute evidence of state

[2224] *See* Mladić Appeal Brief, paras. 336-349; Mladić Reply Brief, paras. 67-69; T. 25 August 2020 pp. 60-64; T. 26 August 2020 pp. 66-68.
[2225] *See* Mladić Appeal Brief, para. 341; T. 25 August 2020 p. 60.
[2226] *See* Trial Judgement, para. 3185, n. 13183, *referring to Galić* Appeal Judgement, paras. 87-90, *D. Milošević* Appeal Judgement, para. 30; T. 25 August 2020 p. 60.
[2227] *See Galić* Appeal Judgement, para. 81 (emphasis added); T. 25 August 2020 p. 61.
[2228] *See Galić* Appeal Judgement, para. 83; T. 25 August 2020 p. 61.
[2229] *See Galić* Appeal Judgement, para. 83; T. 25 August 2020 p. 61.
[2230] *See Galić* Appeal Judgement, para. 92; T. 25 August 2020 p. 61.

practice in this regard.[2232] Therefore, on the basis of six, or at best 12 states, the ICTY Appeals Chamber in the *Galić* case concluded beyond any doubt that a breach of the prohibition against terror in a manner corresponding to the additional protocols of the Geneva Conventions gave rise to individual criminal responsibility under customary international law.[2233] Judge Schomburg dissented,[2234] concluding that, while the *prohibition* of the crime of terror was indisputably part of international criminal law,[2235] its *penalization* was not supported by sufficient state practice at the time when Galić committed his crimes, and therefore individual criminal responsibility could not be attached to Galić on this basis.[2236]

688. The ICTY Appeals Chamber in the *D. Milošević* case relied on the *Galić* Appeal Judgement to conclude that the Tribunal had jurisdiction over the crime of terror because its criminalisation was part of customary international law.[2237] Judge Liu dissented in the *D. Milošević* Appeal Judgement.[2238] He endorsed Judge Schomburg's dissenting analysis in the *Galić* Appeal Judgement and concluded that a custom criminalising terror could not be established due to the absence of sufficient state practice.[2239] I endorse Judge Liu's and Judge Schomburg's analysis and join them in concluding that a custom criminalising terror cannot be established due to the absence of sufficient state practice at the time relevant to the Indictment.

689. It is important and instructive to consider the *Galić* Appeals Chamber's approach to state practice in light of the judgement in the *North Sea Continental Shelf* case.[2240] In this case, the International Court of Justice found that state practice could only evidence a custom where it was "both extensive and virtually uniform".[2241] Accordingly, where state practice is inconclusive, a custom cannot be established.[2242]

690. Of the six states that the *Galić* Appeals Chamber pointed to that did actually criminalise terror, there is not a single state from the Permanent Five Members of the UN Security Council at

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[2231] *See Galić* Appeal Judgement, paras. 94, 95; T. 25 August 2020 p. 61.
[2232] *See Galić* Appeal Judgement, paras. 94-96; T. 25 August 2020 p. 61.
[2233] *See Galić* Appeal Judgement, para. 96; T. 25 August 2020 p. 62.
[2234] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 9-13; Mladić Reply Brief, para. 68; T. 25 August 2020 p. 61.
[2235] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7, 19.
[2236] *See Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 2, 4-24.
[2237] *See D. Milošević* Appeal Judgement, para. 30; T. 25 August 2020 p. 62.
[2238] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, paras. 1-13; T. 25 August 2020 p. 62.
[2239] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, paras. 1-13; T. 25 August 2020 p. 62.
[2240] *See North Sea Continental Shelf*, Judgement, 20 February 1969, ICJ Reports 1969, p. 3 ("*North Sea Continental Shelf* Judgement"); T. 25 August 2020 p. 62.
[2241] *See North Sea Continental Shelf* Judgement, para. 74; T. 25 August 2020 p. 62.
[2242] *See* T. 25 August 2020 p. 62.

the time, not a single one located in Asia, the Americas, or Oceania.[2243] There are no common law or other legal systems represented.[2244] The state practice that the *Galić* Appeal Judgement purported to find from these six states is insufficient evidence of settled practice, extensive practice, or virtually uniform practice as required by the *North Sea Continental Shelf* Judgement.[2245] In my view, the conclusion in the *Galić* Appeal Judgement falls demonstrably short of what was required to show beyond any doubt that the criminalisation of terror was part of customary international law at the material time.[2246]

691. The Fourth Condition, as set out by the ICTY Appeals Chamber in the *Tadić* Decision of 2 October 1995, reads: "the violation of the rule must entail, under customary international law, the individual criminal responsibility of the person breaching the rule" – a condition which was referenced by Judges Schomburg and Liu in their respective dissents in the *Galić* Appeal Judgement and the *D. Milošević* Appeal Judgement.[2247] Mr. Mladić submits that the *Galić* Appeal Judgement failed to establish such a custom.[2248] I agree. This is supported by Judge Schomburg's dissenting position in the *Galić* Appeal Judgement, as I have summarized in paragraph 687 above, as well as Judge Liu's dissent in the *D. Milošević* Appeal Judgement, where he stated that, in his view, "there is no basis to find that [the] prohibition [on the crime of terror] was criminalised beyond any doubt under customary international law at the time relevant to the Indictment".[2249] As a result, I find cogent reasons to depart from the *Galić* Appeal Judgement in this regard.

692. I now turn to the impact that the Trial Chamber's deference to the *Galić* Appeal Judgement had on Mr. Mladić's case. As demonstrated by paragraph 3185 of the Trial Judgement, the Trial Chamber relied on and recycled the erroneous legal basis proffered by the *Galić* Appeal Judgement for the criminalisation of terror.[2250] The error in the *Galić* Appeal Judgement was pointed out by the Defence at trial, but the Trial Chamber failed to engage with the issue and concluded that there was "nothing in the Defence's submissions which would lead it to deviate from the established case law".[2251] Had the Trial Chamber conducted any form of legal analysis, it could not have satisfied

[2243] *See Galić* Appeal Judgement, paras. 94-97; T. 25 August 2020 p. 62.
[2244] *See* T. 25 August 2020 p. 62.
[2245] *See* T. 25 August 2020 pp. 62, 63.
[2246] *See* T. 25 August 2020 p. 63.
[2247] *See Galić* Appeal Judgement, para. 91; *Galić* Appeal Judgement, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 5; *D. Milošević* Appeal Judgement, Partly Dissenting Opinion of Judge Liu Daqun, para. 2; *Tadić* Decision of 2 October 1995, para. 94; T. 25 August 2020 p. 63.
[2248] T. 25 August 2020 p. 63.
[2249] *See D. Milošević* Appeal Judgement, Partially Dissenting Opinion of Judge Liu Daqun, para. 1.
[2250] *See* T. 25 August 2020 p. 63.
[2251] *See* Trial Judgement, para. 3185; T. 25 August 2020 p. 63.

itself beyond any doubt that the criminalisation of terror was part of customary international law during Mr. Mladić's indictment period.[2252]

693. The UN Secretary-General made it clear that the principle of *nullum crimen sine lege* required the Tribunal to apply rules that were beyond any doubt part of customary law at the time of the relevant offence.[2253] The criminalisation of terror does not meet this threshold.[2254] I am therefore of the view that the Trial Chamber fell into error when it relied on the *Galić* Appeal Judgement's findings that it could exercise jurisdiction over the crime of terror under Article 3 of the ICTY Statute.

694. For the foregoing reasons, I would grant Ground 4. Considerations on the crime of terror should not have been part of the analysis pertinent to the Sarajevo JCE.

E. Ground 5 – Srebrenica JCE

1. Forcible Transfer

695. As to forcible transfer, the Defence submits that the Trial Chamber selectively relied upon evidence, including from Witness Franken, a DutchBat officer, only when it supported its erroneous conclusion, but disregarded this witness's evidence that the forcible transfer was a humanitarian evacuation ordered, and indeed organised, at the highest levels of the UN, and that the UN asked Mr. Mladić to assist with this humanitarian evacuation.[2255] In these paragraphs alone, Witness Franken is selectively cited out of context no fewer than 61 times, and Witness Momir Nikolić is referred to 35 times in these same paragraphs.[2256] Witness Momir Nikolić is identified by the DutchBat and other witnesses as the main instigator of abuses relating to the buses, not Mr. Mladić.[2257] For example, the Defence submitted during trial that while Witness Momir Nikolić downplayed his role in the Hotel Fontana meetings, Witness Pieter Boering's evidence indicated that Witness Momir Nikolić was "in charge of everything at that point".[2258] The Trial Chamber also relied on other even lower-level DutchBat officers who may not have known of the evacuation

[2252] *See* T. 25 August 2020 pp. 63, 64.
[2253] *See Galić* Appeal Judgement, para. 81; T. 25 August 2020 p. 64.
[2254] *See* T. 25 August 2020 p. 64.
[2255] *See* Mladić Appeal Brief, paras. 575-583; Mladić Reply Brief, paras. 87, 88; T. 25 August 2020 pp. 64-71; Trial Judgement, paras. 2474-2478, 2480-2559.
[2256] *See* T. 25 August 2020 p. 65.
[2257] *See* T. 25 August 2020 p. 65.
[2258] *See* Trial Judgement, para. 2475; Mladić Final Trial Brief, para. 2567; Exhibit P1139, pp. 1878, 1879.

agreement that the UN presented to Mr. Mladić at his first meeting with Colonel Thom Karremans.[2259]

696. The Prosecution, in its response at paragraph 224, recalls that the Trial Chamber also relied upon the evidence of Witness Eelco Koster, an even lower-level subordinate who had a direct encounter with Mr. Mladić, relying on Witness Koster's testimony but not on the video of their encounter.[2260] The entire exchange is video recorded. Witness Koster has memorised events according to an incorrect contemporaneous interpretation he received on the ground that was not corrected until many years later by the translation services of the ICTY after a review of this video.[2261]

697. In the video clip:

> UNPROFOR member: Hmm ... Roger, I will inform my commander.
>
> Interpreter: He says that all of the people will get the buses –
>
> Mladić: Anyone who wishes to be transported will be transported, be the person small, big, old or young. Don't be afraid. Slowly, slowly, let the women and children go first. 30 buses will arrive and will transport you towards Kladanj. From here, you will pass onto the territory controlled by Alija's forces. Just don't panic. Let the children and the women go first. Be careful not to lose a child. Don't be afraid. Nobody will harm you.
>
> Man from the crowd: May you live long.[2262]

698. The Serbian words uttered by Mr. Mladić were mistranslated into something much worse to Witness Koster, who identified himself as the DutchBat soldier in the blue helmet speaking to Mr. Mladić via interpreter when shown this video during his testimony at trial.[2263] His commander on the radio is Witness Franken.[2264]

699. To demonstrate the veracity of Mr. Mladić's intent to engage in a humanitarian and voluntary evacuation, Mr. Mladić is seen in the video repeating to civilians that if they want to go, buses will be made available.[2265] As noted in the video clip referenced above, Mr. Mladić was thanked and praised by the crowd of Bosnian Muslim civilians.[2266] Later on in the same video, Mr. Mladić talks to another gathering of civilians explicitly telling them that those who want to stay and

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[2259] *See* Mladić Appeal Brief, para. 578; T. 25 August 2020 p. 65.
[2260] *See* Prosecution Response Brief, para. 224, n. 802, *referring to* Trial Judgement, para. 5118; T. 25 August 2020 p. 65.
[2261] *See* Mladić Reply Brief, para. 88; T. 25 August 2020 p. 66; Exhibit P1147.
[2262] *See* Exhibit P1147; T. 25 August 2020 p. 66.
[2263] *See* T. 20 July 2012 pp. 1229, 1230; T. 25 August 2020 pp. 66, 67.
[2264] *See* T. 25 August 2020 p. 67.
[2265] *See* Exhibit P1147; T. 25 August 2020 p. 67.
[2266] *See* Exhibit P1147; T. 25 August 2020 p. 67.

return to their homes may do so.[2267] Mr. Mladić's words and deeds in Potočari, spoken in the same language as that understood by the Bosnian Muslims, do not accord to the DutchBat lower level officer's understanding of the same.[2268]

700. First, what transpired before Mr. Mladić's appearance in Potočari, predating the arrival of the buses, is that the highest leadership of the UN had determined an evacuation was necessary for humanitarian reasons from Potočari.[2269] The Defence cited ample evidence in this regard at paragraph 578 of the Mladić Appeal Brief, including the evidence of Witnesses Cornelis Nicolai (UNPROFOR Chief of Staff in Bosnia and Herzegovina from 28 February to 2 September 1995), Pieter Boering (DutchBat Major from 3 January to July 1995), and Joseph Kingori (a Kenyan UNMO present in Srebrenica from March 1995 to around 20 July 1995).[2270]

701. Second, Witness Nicolai provided evidence that he had obtained the agreement of the Dutch Minister of Defence to issue an order to Colonel Karremans (the DutchBat Commander in Srebrenica) to obtain Mr. Mladić's help, to ask for it, for an urgent humanitarian evacuation from Potočari.[2271] This was before any of the meetings at the Hotel Fontana with Mr. Mladić.[2272]

702. Third, at the first Hotel Fontana meeting, the video shows that Colonel Karremans expressed that the Bosnian Muslim civilian leadership had asked to leave and conveyed the UN's request for assistance in a humanitarian evacuation to Mr. Mladić.[2273] This is confirmed by the Prosecution's military expert Witness Richard Butler, who stated that, based on his research, the "refugees wanted to leave" but that the circumstances under which they wanted to do so was "a matter of debate".[2274] Furthermore, Colonel Karremans's own deputy commander, Witness Boering, who was physically present, testified at trial that the UN did not have enough buses to do this evacuation on its own.[2275] Indeed, according to the evidence of Witness RM-253, the Muslim civilian leaders had already ordered their own people to leave, women and children and elderly to Potočari and fighters to Šušnjari.[2276]

[2267] *See* Exhibit P1147; T. 25 August 2020 p. 67.
[2268] *See* T. 25 August 2020 p. 67.
[2269] *See* Mladić Appeal Brief, para. 578; T. 25 August 2020 p. 67.
[2270] *See* Mladić Appeal Brief, para. 578, n. 659 and references cited therein; Trial Judgement, para. 4548; T. 25 August 2020 p. 67.
[2271] *See* Mladić Appeal Brief, para. 578, n. 661 and references cited therein; T. 25 August 2020 pp. 67, 68.
[2272] *See* T. 25 August 2020 p. 68.
[2273] *See* Exhibit P1147; Mladić Appeal Brief, para. 578, n. 663 and references cited therein; T. 25 August 2020 p. 68.
[2274] *See* Mladić Appeal Brief, para. 578, n. 662; T. 16 September 2013 p. 16825; T. 25 August 2020 p. 68.
[2275] *See* Mladić Appeal Brief, para. 578, nn. 663, 664 and references cited therein; T. 25 August 2020 p. 68.
[2276] *See* Exhibit P1547, para. 2; T. 11 June 2013 pp. 12516, 12517; T. 25 August 2020 p. 68.

703. These high level UN meetings and discussions involved UNPROFOR Commander General Rupert Smith, Ambassador Yasushi Akashi, and then-Under Secretary-General of the UN Kofi Annan.[2277] In my view, the sum total of all these meetings and discussions was that the UN asked for Mr. Mladić to help evacuate civilians out of Potočari.

704. In all three Hotel Fontana meetings, as demonstrated in video Exhibit P1147, Mr. Mladić is seen welcoming, offering comforts to attendees, including cigarettes, beer, and sandwiches for lunch.[2278] This pattern of behaviour is similarly demonstrated in the third Hotel Fontana meeting with Bosnian Muslim civilian attendees, including Mr. Mladić offering his own vehicle to safely escort a female participant, Ćamila Omanović, her daughter, grandchild, and mother during the evacuation.[2279] Prosecution Witness Richard Butler could not identify anything criminal said in these meetings by Mr. Mladić.[2280] In this regard, the witness testified that:

> in the technical sense that Srebrenica has just been captured, General Mladić is seeking the surrender of the 28th Division rather than to continue to engage them in battle, the fact that he would offer a cease-fire and the fact that he would make the necessary provisions to allow for those individuals to travel to, in this case the Hotel Fontana, to negotiate that surrender, I mean, that's all technically proper.[2281]

705. Demonstrative of its error, the Trial Chamber disregarded its own finding which accepted that during the Hotel Fontana meetings, Mr. Mladić offered civilians a choice to leave for Yugoslavia or the Federation or to stay in *Republika Srpska*.[2282] Witness Milovan Milutinović gave evidence that:

> Mladić gave the Muslim delegation his word that everyone gathered at Potočari who had surrendered their weapons could cho[o]se whether to go to 'Yugoslavia, the Federation' or to stay in the Bosnian-Serb Republic, and guaranteed them full rights and freedoms.[2283]

706. Returning to DutchBat officer Witness Franken, who is among the primary lower-level officers selectively relied upon to convert this humanitarian evacuation into the crime of forcible transfer, the Trial Chamber focused on Witness Franken's evidence to find "that the transportation of Bosnian Muslims out of Potočari to Kladanj was not a decision made by the Muslim delegation but rather ordered by Mladić".[2284] It is puzzling and a discernible error that the Trial Chamber

[2277] *See* Exhibit D1479; T. 25 August 2020 p. 68.
[2278] *See* Exhibit P1147, p. 31; T. 25 August 2020 p. 69.
[2279] *See* Exhibit P1147, p. 50; T. 25 August 2020 p. 69.
[2280] *See* T. 25 August 2020 p. 69.
[2281] *See* T. 16 September 2013 p. 16831; T. 25 August 2020 p. 72.
[2282] *See* Trial Judgement, para. 2472; Mladić Appeal Brief, para. 579, n. 668 and references cited therein; T. 25 August 2020 p. 69.
[2283] *See* Trial Judgement, para. 2472.
[2284] *See* Trial Judgement, para. 5004; T. 25 August 2020 p. 69.

disregarded this witness's own testimony to the contrary, in violation of the principle of *in dubio pro reo*.[2285]

707. In this regard, Witness Franken acknowledged that his commander, Colonel Karremans, ordered the witness to assist the VRS with the humanitarian evacuation and that Franken later found that General Rupert Smith and other high-ranking UN officials had asked Mr. Mladić for the evacuation, and that separation of men was proper according to the laws of war to see if they were combatants.[2286] Most importantly, the Trial Chamber disregarded that Witness Franken had not viewed the entire Hotel Fontana video before.[2287] Against this backdrop, it was an error on the part of the Trial Chamber to rely selectively on the other evidence of Witnesses Franken, Koster, and other lower-level DutchBat officers in light of the overwhelming evidence, even from Witness Franken, and especially higher-level DutchBat and UN officials that demonstrate the UN, not Mr. Mladić, ordered this evacuation for humanitarian purposes, and that Mr. Mladić agreed with the UN to help.[2288] I support my views with the submissions of the former UNPROFOR Commander, General Sir Michael Rose, before the United Kingdom House of Lords on 6 September 2017, which Mr. Mladić sought to admit as additional evidence on appeal.[2289] According to General Sir Michael Rose's statement, "*the UN was succeeding remarkably well in [...] delivering humanitarian aid [and] Bosnia remains one of the few major conflicts of our time where no one died, or very few people died, either of cold or hunger*".[2290] At this juncture, I mention that admission of this statement was rejected by the Majority of this Appeals Chamber.[2291] I dissented as I find that General Sir Michael Rose's statement is relevant, credible, exculpatory, and containing new evidence, which, if admitted, could have been a decisive factor in reaching the decision at trial and ought to have been admitted on appeal as additional new evidence, particularly because of the high position in the UN system that General Sir Rose held. He was involved in the negotiations and was actually on the ground. It should have been admitted pursuant to Rule 142(C) of the Rules, which provides:

> If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final

[2285] *See* T. 25 August 2020 p. 69.
[2286] *See* T. 8 May 2013 pp. 10804, 10807, 10817-10823, 10824, 10825; Exhibit D280, p. 6; T. 25 August 2020 p. 70.
[2287] *See* T. 8 May 2013 pp. 10803-10807; T. 25 August 2020 p. 70.
[2288] *See* T. 25 August 2020 p. 70.
[2289] Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with confidential Annex A and public Annex B) ("Motion of 31 December 2018").
[2290] Motion of 31 December 2018, Annex B, RP. 8772 (emphasis added).
[2291] Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), paras. 23, 117.

> judgement in accordance with Rule 144. Where the Appeals Chamber finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice.[2292]

708. This evidence impacts the Trial Chamber's assessment of Mr. Mladić's responsibility and convictions.[2293] I further note that the Prosecution, in its response to Mr. Mladić's motion to admit this additional evidence on appeal, submitted, *inter alia*, that:

> [s]hould the Appeals Chamber be minded to consider the [proposed additional evidence], [General Sir Michael Rose] should appear for cross-examination to allow the Prosecution to test [his] credibility and the reliability of [his] evidence.[2294]

709. In view of the above, I find that there was no forcible transfer of Bosnian Muslims from Srebrenica, nor was there a common objective for the alleged joint criminal enterprise under a correct view of the above evidence and under the appropriate standard.[2295] The requisite elements of establishing the crime of forcible transfer must include expulsion or other forms of coercion as to carrying out forced displacement of persons.[2296] The forced character of the displacement is determined by the absence of a genuine choice by the victim in his or her displacement.[2297] In all this, it must be established with proper application of the principle of *in dubio pro reo*.[2298] It is clear that in the Trial Judgement the Trial Chamber did not abide by this jurisprudence, nor by this standard, and thus committed a discernible error in convicting Mr. Mladić of forcible transfer.[2299]

2. Genocide, Extermination, and Murders

710. It is not disputed that, in addition to legitimate combat casualties, some individuals, including individuals from the local area, the MUP, and even Momir Nikolić and other rogue members of the VRS security professional line of command, took it upon themselves to conduct acts of revenge and killings of prisoners of war, but did so during the time-period when Mr. Mladić was not in the area and contrary to any orders of Mr. Mladić, or his knowledge at that time.[2300] The

[2292] Rule 142(C) of the Rules.
[2293] Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), paras. 8-14.
[2294] Prosecution Response to Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 24 May 2019 (confidential; public redacted version filed on 6 June 2019), para. 32.
[2295] *See* T. 25 August 2020 p. 70.
[2296] *See* T. 25 August 2020 p. 70.
[2297] *See Stakić* Appeal Judgement, para. 279; *Krnojelac* Appeal Judgement, paras. 229, 233; T. 25 August 2020 pp. 70, 71.
[2298] *See* T. 25 August 2020 p. 71.
[2299] *See* T. 25 August 2020 p. 71.
[2300] *See* T. 25 August 2020 p. 71. Regarding orders from Mr. Mladić, *see* Mladić Appeal Brief, para. 620, *referring to*, *inter alia*, Trial Judgement, paras. 2323, 2359, 4329-4371, Exhibits D302, D303.

VRS security line had its own parallel chain of command, separate and apart from the normal chain of command, such that it could exclude Mr. Mladić.[2301]

711. It is noteworthy that the Krivaja-95 Military Operation was conceded to be a legitimate military operation due to the failure to demilitarise the Srebrenica "safe area". Lead Prosecution Counsel for this part of the case, Peter McCloskey, explicitly stated *during trial that Krivaja-95 had the objective to attack the Bosnia and Herzegovina forces, cut them off from the Žepa enclave, separate the two enclaves from supporting each other, which was a "legitimate military objective" to stop ABiH army activity*.[2302] The Prosecution's chief expert on Srebrenica, Witness Richard Butler, confirmed this during his testimony, stating that "*the VRS had the military legitimate right to attack the 28th Division" of the ABiH*.[2303] Further, Directive 7.1, issued by Mr. Mladić, replaced Directive 7, which was issued by President Karadžić, and both Directive 7.1 and the Krivaja-95 Order of the Drina Corps, by their wording, directed that civilians not be targeted and that the laws of war be followed including the Geneva Conventions.[2304] To this effect, the Krivaja-95 Order stated: "*In all dealings with prisoners of war and the civilian population abide by the Geneva Conventions*".[2305] Directive 7.1 stated that "*[a]ll forms of inappropriate behaviour [...] should be promptly and effectively punished*".[2306] The column of men and boys set out from Srebrenica in combat formation and armed, and engaged in ambushes, combat, suicides, infighting, minefields, and deaths in "kamikaze" style attacks.[2307] Unfortunately, we will never know the true number of actual legitimate casualties and those related to acts of the crime of murder.[2308]

712. Recall that at the Hotel Fontana meetings the language used by Mr. Mladić had been declared legitimate military language and non-criminal by Witness Richard Butler during his testimony. While already summarized above, I find it important to reiterate this Witness Butler's testimony that:

> General Mladić [wa]s seeking the surrender of the 28th Division [of the ABiH] rather than to continue to engage them in battle, the fact that he would offer a cease-fire and the fact that he would make the necessary provisions to allow for those individuals to travel to, in this case the Hotel Fontana, to negotiate that surrender, I mean, that's all technically proper.[2309]

[2301] *See* Trial Judgement, para. 4293; T. 25 August 2020 p. 71.
[2302] *See* T. 17 May 2012 p. 486 (emphasis added); T. 25 August 2020 pp. 71, 72.
[2303] *See* T. 11 September 2013 pp. 16498, 16499 (emphasis added); T. 25 August 2020 p. 72.
[2304] *See* Exhibits P1470 (Directive 7.1); D302 (Krivaja-95); T. 25 August 2020 p. 72.
[2305] Exhibit D302, p. 5 (emphasis added).
[2306] Exhibit P1470, p. 6 (emphasis added).
[2307] *See* Mladić Appeal Brief, para. 674 and references cited therein; T. 25 August 2020 p. 72.
[2308] *See* T. 25 August 2020 p. 72.
[2309] *See* T. 16 September 2013 p. 16831; T. 25 August 2020 p. 72.

713. Therefore, the Trial Chamber's conclusion that Krivaja-95 intended the ethnic cleansing of Bosnian Muslims from Srebrenica is an impermissible inference, unsupported by the evidence. This error was already addressed above in relation to forcible transfers.

714. In order to establish joint criminal enterprise liability for Mr. Mladić for genocide and killings in Srebrenica, the evidentiary bar was supposed to be set at a high level.[2310] As per the jurisprudence, for example, the *Milutinović et al*. Trial Judgement, the standard of proof is beyond a reasonable doubt, which presents a high hurdle for the Prosecution to overcome.[2311] The ICTY Trial Chamber stated that:

> [i]n order for an accused to be found guilty of a crime charged in an indictment, the Prosecution must prove beyond a reasonable doubt (a) each element of the statutory crime (including the *mens rea* and *actus reus* of the underlying offence and the general requirements for the statutory crime) and (b) the mental and physical elements of at least one of the forms of responsibility with which the accused is charged.[2312]

715. As articulated in the *Martić* Appeal Judgement, the standard of proof must meet more than "a high degree of probability".[2313] Furthermore, as set forth in the *Čelebići* Appeal Judgement, a trial chamber's finding must be the only available conclusion under law and fact, as existence of any alternative conclusion mandates acquittal.[2314] The ICTY Appeals Chamber stated, about concluding on the guilt of an accused in a circumstantial case, that:

> [s]uch a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[2315]

716. Additionally, since the charge is genocide, the evidence must, in accordance with stated high standards, establish specific intent, *dolus specialis*, for genocide.[2316] Since the mode of liability at issue is joint criminal enterprise, Mr. Mladić must be shown to have agreed to a common criminal purpose and significantly contributed to the same.[2317]

717. There are numerous instances where the Trial Chamber erred in respect of applying the jurisprudence to the facts.[2318] Per the Prosecution's submissions and the Trial Judgement, the joint criminal enterprise to kill and commit genocide in Srebrenica did not even exist prior to the night

[2310] *See* T. 25 August 2020 p. 72.
[2311] *See Milutinović et al*. Trial Judgement, Vol. 1, para. 62; T. 25 August 2020 pp. 72, 73.
[2312] *Milutinović et al*. Trial Judgement, Vol. 1, para. 62.
[2313] *See Martić* Appeal Judgement, para. 57; T. 25 August 2020 p. 73.
[2314] *See Čelebići* Appeal Judgement, para. 458; T. 25 August 2020 p. 73.
[2315] *Čelibići* Appeal Judgement, para. 458.
[2316] *See Munyakazi* Appeal Judgement, para. 141; T. 25 August 2020 p. 73.
[2317] *See Stanišić and Župljanin* Appeal Judgement, paras. 110, 136, 917; T. 25 August 2020 p. 73.
[2318] *See* T. 25 August 2020 p. 73.

between 11 and 12 July 1995.[2319] As discussed above, under the jurisprudence, conduct and statements before the pertinent joint criminal enterprise and outside its temporal scope cannot be used to prove Mr. Mladić was part of that joint criminal enterprise. However, as to the Srebrenica JCE, the Trial Chamber does precisely erroneously rely on that type of evidence and so does the Prosecution.[2320] As elaborated below regarding the evidence of Witness Momir Nikolić, the Trial Chamber and the Prosecution also relied on circumstantial evidence and hearsay to establish Mr. Mladić's agreement to a criminal plan requiring specific intent to commit genocide in addition to murder.[2321] It is noteworthy that the Prosecution agrees that Mr. Mladić was not in Srebrenica, but far away in Belgrade when the killings started.[2322]

718. Again, as to the Hotel Fontana meetings that are on video, both Prosecution and Defence military experts say the language used was appropriate as it was aimed in the context of the armed 28th Division of the ABiH still on the loose in the area of Srebrenica.[2323] Without any direct orders, without any direct evidence linking Mr. Mladić to any killings, the Trial Chamber committed its gravest error.

719. The key insider witness relied upon by the Chamber is Witness Momir Nikolić.[2324] In fact, it was not Witness Momir Nikolić himself but primarily hearsay evidence, including Exhibit D1228, which encompasses hearsay notes of an interview taken by Prosecution investigator Bruce Bursik for the purposes of litigation that is among the main sources cited.[2325] It should be noted that Exhibit D1228 was not presented for the truth of the matters asserted in it but was only presented to Witness Momir Nikolić by the Prosecution to confirm an illusionary hand gesture from an unclear location from a purported meeting with Mr. Mladić.[2326] The Trial Chamber rejected that as being unreliable evidence.[2327] Exhibit D1228 was only used in cross-examination of Witness Bursik to establish that Witness Momir Nikolić lacked credibility and was evasive.[2328] Witness Bursik could not corroborate Witness Momir Nikolić as to any encounter with Mr. Mladić.[2329] Exhibit D1228

[2319] *See* Prosecution Final Trial Brief, para. 1063; Trial Judgement, para. 4926; Mladić Appeal Brief, para. 586; T. 25 August 2020 p. 73.
[2320] *See* Prosecution Response Brief, paras. 270-278; Trial Judgement, paras. 2358-2362; T. 25 August 2020 pp. 73, 74.
[2321] *See* T. 25 August 2020 p. 74.
[2322] *See* T. 25 August 2020 p. 74.
[2323] *See* Mladić Appeal Brief, para. 595 and references cited therein; T. 25 August 2020 p. 74.
[2324] *See* Mladić Appeal Brief, para. 587, n. 678 and references cited therein; Trial Judgement, paras. 4926, 4927, 4970, 5096, 5097, 5128; T. 25 August 2020 p. 79.
[2325] *See* Exhibit D1228; T. 25 August 2020 p. 79.
[2326] *See* Trial Judgement, para. 5127; T. 25 August 2020 p. 79.
[2327] *See* Trial Judgement, para. 5127; T. 25 August 2020 p. 79.
[2328] *See* Mladić Appeal Brief, paras. 588-592; T. 25 August 2020 p. 79.
[2329] *See* Mladić Appeal Brief, paras. 588-592; T. 25 August 2020 pp. 79, 80.

could not be relied upon as to the truth of the hearsay comments of Witness Momir Nikolić as it would be in violation of the *lex specialis* of then Rules 92 *bis* and *ter* of the ICTY Rules.[2330]

720. Witness Momir Nikolić is someone who appears everywhere – everywhere that there are killings, either directing them or as an accomplice. He admitted to hiding crimes from superiors, including the VRS Main Staff.[2331] In this regard, I note and accept the Defence submission that Witness Momir Nikolić confirmed that he concealed the killings from his commanders and provided misleading information about "asanacija/sanitisation" to cover up reburials.[2332] The Trial Chamber further erred in relying upon Witness Momir Nikolić's evidence despite another insider, Witness RM-265, who testified as to opportunistic revenge killings that they witnessed in the presence of Witness Momir Nikolić, and that prisoners of war taken to schools in Zvornik were undertaken under the orders of Witness Momir Nikolić and his superior within the security chain of command in the brigade, Lieutenant-Colonel Popović.[2333] Witness RM-265 did not implicate Mr. Mladić in any of Witness Momir Nikolić's or Popović's illegal and criminal activities.[2334]

721. It is noteworthy that Witness Momir Nikolić's security chain of command superior, Popović, was implicated by another Prosecution insider witness from the VRS, a high-ranking officer, Witness RM-376, who also does not implicate Mr. Mladić in any of the events relating to revenge killings, but does identify that the very same Popović of the security chain of command asked for volunteers outside the army, i.e., civilians, to execute Bosnian Muslim prisoners, which this VRS officer refused.[2335]

722. This begs the question – if Mr. Mladić, Commander of the VRS Main Staff, had hypothetically or implicitly agreed to significantly contribute to genocide, why would security officers aligned with Witness Momir Nikolić, not even in the direct chain of command to Mr. Mladić, be in charge of the killings, and why would they be asking for non-army volunteers to do the killing while actual VRS officers and subordinates under Mr. Mladić refused such requests and never received them from Mr. Mladić through the normal chain of command?[2336]

[2330] *See* Mladić Appeal Brief, para. 590, n. 691 and references cited therein; T. 25 August 2020 p. 80.
[2331] *See* T. 3 June 2013 pp. 11965, 11966; Exhibit D301, p. 7; T. 25 August 2020 p. 80.
[2332] T. 3 June 2013 pp. 11965, 11966, 11969. *See also* Mladić Appeal Brief, para. 632; T. 25 August 2020 pp. 80, 81. According to the Defence, Witness Momir Nikolić's report to the VRS Main Staff supports his statement that he concealed the crimes as it only contained information that wounded Muslim prisoners and Muslim UN staff were being evacuated. *See* Mladić Appeal Brief, para. 632, n. 773, *referring to* Exhibit P1515.
[2333] *See* Exhibit P2540, pp. 40, 41; T. 25 August 2020 p. 80.
[2334] *See* T. 25 August 2020 p. 80.
[2335] *See* Exhibit P1594, pp. 31-42; T. 25 August 2020 pp. 80, 81.
[2336] *See* T. 25 August 2020 p. 81.

723. In my view, this demonstrates an error in the Trial Chamber's implied reasoning linking Mr. Mladić to these crimes.

724. Witness Momir Nikolić pleaded guilty to try to get a better deal for himself, despite having his arms soaked in blood.[2337] Further, this witness confirmed he destroyed documentary evidence which could have compromised him in relation to Srebrenica crimes.[2338] Regarding this alleged meeting, at an unclear location, Witness Momir Nikolić could not be relied upon by the Trial Chamber as to this meeting because even he did not have direct evidence about it.[2339]

725. No fewer than five insider witnesses, three from the Defence, two from the Prosecution, gave direct evidence that the only meeting during this critical time period was related to Žepa and contained only legitimate military instructions.[2340] By disregarding this evidence in favour of the impermissible hearsay of Witness Momir Nikolić, the Trial Chamber erred. This is particularly true given the jurisprudence that accomplice evidence is to be treated with caution.[2341] The ICTR Appeals Chamber in the *Setako* Appeal Judgement highlighted such concerns and indicated that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[2342] Momir Nikolić had a HUGE incentive to lie as evidenced by the Plea Agreement between him and the Prosecution whereby genocide was dropped from his indictment in consideration of him testifying against others, including Mr. Mladić.[2343] It paid well as evidenced by the fact that Momir Nikolić was eventually sentenced to 20 years only[2344] for an offence carrying a life sentence, if the charge of genocide had not been dropped. According to the *Setako* Appeal Judgement, "when weighing the probative value of [the evidence of accomplice witnesses], the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered".[2345]

726. In the instant case as to Witness Momir Nikolić, the Trial Chamber erred, and in doing so, tried to make this witness the illusory link to Mr. Mladić with the joint criminal enterprise that

[2337] *See* T. 25 August 2020 p. 81.
[2338] *See* Exhibit D301, p. 7; T. 25 August 2020 p. 81.
[2339] *See* Trial Judgement, para. 4953; Mladić Appeal Brief, para. 587; T. 25 August 2020 p. 81.
[2340] *See* Mladić Appeal Brief, para. 594; T. 25 August 2020 p. 82.
[2341] *See* T. 25 August 2020 p. 82.
[2342] *See Setako* Appeal Judgement, para. 143; T. 25 August 2020 p. 82.
[2343] *See M. Nikolić* Sentencing Trial Judgement, paras. 13, 16-19.
[2344] *See M. Nikolić* Sentencing Appeal Judgement, para. 135, p. 48.
[2345] *See Setako* Appeal Judgement, para. 143; T. 25 August 2020 p. 82.

could not be proven in accordance with the prevailing legal jurisprudence and thus resorted to the legal fiction of guilt by implication.[2346]

727. Further evidence by several Prosecution and Defence witnesses attests to the fact that Mr. Mladić made similar non-criminal statements to captured or surrendered members of the 28th Division of the ABiH column, where he tells them they will be fed and then transported and exchanged with the other side's forces.[2347] For example:

i. Witness Zoran Malinic testified that "prisoners [did] not need to be afraid because they would return to their houses and be exchanged";[2348]

ii. Witness RM-253 testified that Mr. Mladić said to the prisoners: "You do not have to worry. You will be exchanged and join your families in Tuzla. Now you'll be transported by trucks to Bratunac or Kravica where you will spend the night and get some food";[2349] and

iii. Witness Bojan Subotić testified that Mr. Mladić "went in among [the prisoners and] shook hands with some of them. [...] He talked with them [...] and they stood up and applauded. And he told them that they would be exchanged, [...] and he told us strictly to take care of the prisoners, that some buses would be arriving within an hour, that the men should [...] all board the bus and deliver it to the civilian police in Bratunac".[2350]

728. This evidence also shows us that Mr. Mladić's direct orders to subordinates were consistent with protecting these prisoners during transportation and medical aid and water were provided to them in accordance with these orders.[2351] As set out before in paragraphs 680, 681, and 711, Mr. Mladić issued orders that prisoners of war should be treated well and in accordance with international law.

729. In light of the foregoing, I am not persuaded that such actions could be considered a significant contribution to the implied joint criminal enterprise related to killings in Srebrenica that

[2346] *See* T. 25 August 2020 p. 82.
[2347] These include, *inter alia*, Witnesses RM-253, Zoran Malinić, Bojan Subotić. *See* T. 13 June 2013 pp. 12659-12662; T. 11 June 2013 p. 12532; T. 9 March 2015 pp. 32826, 32827; T. 25 August 2020 pp. 82, 83.
[2348] *See* T. 13 June 2013 p. 12659.
[2349] *See* T. 11 June 2013 p. 12532.
[2350] *See* T. 9 March 2015 pp. 32826, 32827.
[2351] *See* T. 9 March 2015 pp. 32826, 32827; Exhibit D926, paras. 30-34; T. 25 August 2020 p. 83.

the Trial Chamber concluded.[2352] The Trial Chamber's findings do not accord with the principle of *in dubio pro reo*.[2353]

3. Alibi

730. While Mr. Mladić was far from Srebrenica attending to a secret peace meeting with the international community, in Belgrade at a wedding, and at a hospital, he could not have effective control, nor information from Bosnia and Herzegovina, let alone exercise command.[2354] His absence was not contested by the Prosecution at trial.[2355] The Trial Chamber's failure to give a reasoned opinion as to four routine orders issued in this time, between 14 and 16 July 1995, when Mr. Mladić was away, by others under Mr. Mladić's name, is set forth in paragraphs 610 to 612 of the Mladić Appeal Brief, including errors as to an inference that Mr. Mladić personally signed such orders from another country, and failure to analyse and give weight to their content because none of them related to Srebrenica, and each had log entries showing they did not come from Mr. Mladić's office.[2356]

731. The Trial Chamber's conclusion that Mr. Mladić issued the orders and was in command and control while he was physically and geographically absent from Srebrenica in another country is contrary to evidence and is therefore a discernible error.[2357] It disregarded and contradicted itself in the Trial Judgement at paragraph 4299 in stating that "[i]n Mladić's absence, reports were to be submitted to Milovanović".[2358] Witness Milovanović, VRS Chief of Staff, and other military witnesses confirmed that during this time period when Mr. Mladić was gone in July of 1995 Milovanović was in charge as deputy commander to Mr. Mladić.[2359]

732. As set out in paragraph 605 of the Mladić Appeal Brief, Mr. Mladić attended a meeting where a plan was signed to allow the ICRC access to Srebrenica prisoners of war and that they were to be exchanged "all for all" with the other side for Serb detainees.[2360] Also, a lasting and

[2352] *See* T. 25 August 2020 p. 83.
[2353] *See* T. 25 August 2020 p. 83.
[2354] *See* Mladić Appeal Brief, para. 605; T. 25 August 2020 p. 83.
[2355] *See* Mladić Appeal Brief, para. 605 and references cited therein; T. 25 August 2020 p. 83.
[2356] *See* Mladić Appeal Brief, paras. 610-612 and references cited therein; T. 25 August 2020 p. 83. The four orders from the VRS Main Staff concerned (i) hours of operation of a communications centre; (ii) the transport of DutchBat members; (iii) the passage of a UNPROFOR commander; and (iv) the maintenance of round-the-clock communication duty shifts. *See* Exhibits P2122, P2123, P2124, and P2125.
[2357] *See* T. 25 August 2020 pp. 83, 84.
[2358] *See* T. 25 August 2020 p. 84.
[2359] This includes evidence from Witnesses Milovanović and Stevanović. *See* T. 18 September 2013 pp. 16950, 16987; T. 7 May 2015 p. 35265; T. 25 August 2020 p. 84.
[2360] *See* Mladić Appeal Brief, para. 605; Trial Judgement, para. 5016; T. 25 August 2020 p. 84.

permanent cease-fire was negotiated to try to end the war.[2361] No reasonable trier of fact could conclude that Mr. Mladić could engage in complex peace negotiations with high officials in Dobanovci, Serbia, with UN officials, while exercising effective control in Srebrenica.[2362] Such conduct, agreeing to allow the ICRC access to Srebrenica prisoners of war before exchanging them, cannot be used to support knowledge of, nor a purported contribution to, any joint criminal enterprise to exterminate, let alone commit genocide against these same persons.[2363]

4. Status of Victims

733. It must be emphasized that any illegal killings in Srebrenica that were outside of combat are reprehensible, but they are not tied to Mr. Mladić.[2364] The Trial Chamber erred in not performing any analysis to determine which were victims of murder and which were deaths that resulted from alternate legitimate reasons.[2365] The Trial Chamber relied upon adjudicated facts to establish all were victims of crimes and all were civilians.[2366] In doing so, the Trial Chamber disregarded its own finding that armed elements of the column of men in Srebrenica had casualties.[2367]

734. The Trial Chamber further disregarded the Prosecution's own demography expert, Witness Ewa Tabeau, whose evidence indicated that 70 per cent of the victims were registered as soldiers of the ABiH.[2368] It also disregarded evidence rebutting Adjudicated Fact 1476 and showing that bodies in the mass graves came from different events in different years and included legitimate casualties of combat, such as suicides, minefields, "kamikaze" attacks, etc.[2369] Both Defence and Prosecution forensic experts relating to the alleged blindfolds said they could have been bandanas dropped over the eyes as bodies decayed, bandanas as seen in the footage of the ABiH fighters that arrived in Tuzla from Srebrenica.[2370]

735. The lack of analysis by the Trial Chamber therefore failed to establish the number of victims and their relation to any crime, let alone genocide.[2371]

[2361] *See* T. 25 August 2020 p. 84.
[2362] *See* T. 25 August 2020 p. 84.
[2363] *See* T. 25 August 2020 p. 84.
[2364] *See* T. 25 August 2020 p. 84.
[2365] *See* T. 25 August 2020 pp. 84, 85.
[2366] *See* Mladić Appeal Brief, paras. 669-672; Trial Judgement, paras. 3062, 3546; T. 25 August 2020 p. 85.
[2367] *See* Mladić Appeal Brief, para. 671; Trial Judgement, paras. 2395, 2444, 2446, 2573-2586, 2615-2645; T. 25 August 2020 p. 85.
[2368] *See* Mladić Appeal Brief, para. 671 and references cited therein; T. 25 August 2020 p. 85.
[2369] *See* Mladić Appeal Brief, para. 674 and references cited therein; T. 25 August 2020 p. 85.
[2370] *See* Mladić Appeal Brief, para. 674, n. 829 and references cited therein; T. 25 August 2020 p. 85.
[2371] *See* T. 25 August 2020 p. 85.

5. Conclusion

736. In light of the foregoing, I find that the Trial Chamber erred in convicting Mr. Mladić for the crimes related to the Srebrenica JCE, including genocide. I would thus grant Ground 5 of his appeal in its entirety.

F. Ground 6 – Hostage-Taking JCE

737. I agree with the Majority disposition regarding the alleged errors related to the Hostage-Taking JCE.

G. Ground 8.A – Failure to Ensure Equality of Arms

738. The principle of equality of arms provides that each party must have a reasonable opportunity to defend its interests under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.

739. Rule 85 of the ICTY Rules provides that each party is entitled to call witnesses and present evidence and according to Rule 87(A) of the ICTY Rules the hearing shall be closed when "both parties have completed their presentation of the case".

740. As stated elsewhere herein, Trial Chambers may use their discretionary powers in the interests of justice. According to Rule 73 *ter* (F) of the ICTY Rules, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. Contextual factors of the case, including the potential importance of a witness's evidence, may be relevant considerations in determining whether to grant additional time for a party to present evidence.

741. Mr. Mladić contends that [REDACTED]. Specifically, he contends that [REDACTED]. By denying these requests the Trial Chamber failed to consider or gave insufficient weight to the relevance, context and potential impact of the testimonies of [REDACTED], as well as the interests of justice. The Trial Chamber's summary denial of evidence was an unreasonable exercise of its discretion. The "questionable relevance" and "negligible probative value" could only be determined if the witnesses had been heard, and cross-examined by the Prosecution.

742. The Trial Chamber noted that [REDACTED] would provide first-hand experience [REDACTED][2372] and found it relevant and concluded that the anticipated testimonies of [REDACTED] were not significant as to weigh in favour of varying the deadline for presentation of the Defence case. This was a discernible error and the Trial Chamber's error invalidates the findings made on Srebrenica and Sarajevo to the extent of the error identified.

743. By denying these two defence witnesses the Trial Chamber violated the principle of equality of arms, which requires that each party must have a reasonable opportunity to defend its interests and also that each party is entitled to call witnesses and present evidence and that the hearing shall be closed when both parties have completed their presentation of the case. The Trial Chamber committed a discernible error by summarily denying the requests for their testimony to be heard resulting in considerable prejudice to the Defence case. The decision is so unfair and unreasonable as to constitute an abuse of the Trial Chamber's discretion.

744. In reference to paragraphs 787 and 793 of the Mladić Appeal Brief, I note that the Trial Chamber erroneously did not allow the Defence to call one witness who was a member of the Srebrenica column of Bosnian Muslim men.[2373] It was submitted that since trial, they have died, thus increasing the gravity of this refusal and this error.[2374]

H. Ground 8.D – Disclosure Violations

745. Mr. Mladić submits that the Trial Chamber failed to provide an adequate remedy for the Prosecution's disclosure violations. I agree with Mr. Mladić that, as a consequence of the Prosecution's late disclosures and failure to provide metadata with disclosure through Electronic Disclosure Suite, he was left at an unfair disadvantage and his ability to prepare his defence was impaired. The Trial Chamber's failure to remedy this constituted an error, and thus Ground 8.D must be granted.

I. Ground 9 – Sentence

746. As concluded by the majority, the principle of *nulla poene sine lege* prohibits retroactive punishment. Further, Article 15 of the International Covenant on Civil and Political Rights stipulates *inter alia* that a heavier penalty shall not be imposed than the one that was applicable at the time when the criminal offence was committed. Additionally, at the time of commission of the

[2372] *See* Decision of 15 August 2016, para. 7, *referring to* Request of 13 July 2016 concerning [REDACTED], paras. 1, 2, 13-16.
[2373] *See* Mladić Appeal Brief, paras. 787, 793 and references cited therein; T. 25 August 2020 pp. 85, 86.
[2374] *See* T. 25 August 2020 p. 86.

crimes charged, the domestic sentencing practice of the former Yugoslavia had a maximum sentence of 20 years.

747. The health of the Appellant is also a factor. He was already of ill health by the time he was incarcerated at the United Nations Detention Unit. Numerous medical reports indicate how his health deteriorated further while in detention awaiting his appeal. He was hospitalised leading to an operation. Taking into account all the above factors and giving them sufficient weight, I would have imposed a sentence of 20 years imprisonment.

J. Conclusion

748. As set out above, having considered the Indictment, the Trial Judgement, the jurisprudence and authorities cited herein, as well as the written and oral submissions of the parties, I reiterate my disagreement with the Majority's determination to dismiss all grounds of Mr. Mladić's appeal. I am of the view that Mr. Mladić has satisfied the high standard set out on appeal and would thus grant Grounds 1 to 5 and 7 to 9 of his appeal in their entirety.

749. The Trial Chamber's errors and their impact as elaborated elsewhere, but more specifically in Grounds 3 through to 5, and 7 to 9 of Mr. Mladić's Appellant's Brief individually or cumulatively invalidate the Trial Chamber's findings on which his convictions rest.

750. In view of all the above, taking into account the nature and scale of the errors of law identified in this case, pursuant to Rule 144(C) of the Rules, I would order that Mr. Mladić be retried before another trial chamber on all counts excluding Ground 6 concerning the Hostage-Taking JCE.

751. As stated above, given the complexity of the case and the size of the case file and the appeal and constrained by the requirements to proceed expeditiously and work remotely, I have only addressed errors on the Trial Chamber's part that I deem most egregious.

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

Done this 8th day of June 2021, at The Hague, The Netherlands

Judge Prisca Matimba Nyambe

[Seal of the Mechanism]

VII. JOINT PARTIALLY DISSENTING OPINION OF JUDGE N'GUM AND JUDGE PANTON

752. After considering the Indictment, the Trial Judgement, as well as the written and oral submissions of the parties on appeal, we respectfully disagree with the Majority's decision to dismiss Grounds 1 and 2 of the Prosecution's appeal. It is our considered opinion that the Prosecution has demonstrated that the Trial Chamber erred in acquitting Mladić of genocide under Count 1 of the Indictment. In this opinion, we elaborate on our reasons for reaching such a decision.

753. Under Count 1 of the Indictment, the Prosecution alleged that between 31 March 1992 and 31 December 1992, Mladić committed in concert with others, planned, instigated, ordered, and/or aided and abetted genocide against a part of the Bosnian Muslim and/or Bosnian Croat groups, as such, in some municipalities of Bosnia and Herzegovina, particularly Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica.[2375]

754. The Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[2376] However, the Trial Chamber was not convinced that the crime of genocide formed part of the objective of the Overarching JCE.[2377] In this regard, the Trial Chamber found that Bosnian Muslims and Bosnian Croats are protected groups within the meaning of Article 4 of the ICTY Statute[2378] and that a large number of Bosnian Muslims and/or Bosnian Croats in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica municipalities were the victims of prohibited acts of genocide, such as killings and acts causing serious bodily or mental harm which contributed to the destruction of their groups.[2379] The majority of the Trial Chamber further found that with respect to the municipalities of Sanski Most, Foča, Kotor Varoš, Prijedor, and Vlasenica, or the "Count 1 Municipalities", certain physical perpetrators of the prohibited acts had the intent to destroy a part of the Bosnian Muslim group when carrying out these acts.[2380] Nevertheless, the Trial Chamber was not convinced beyond reasonable doubt that those perpetrators intended to destroy the Bosnian Muslims in these

[2375] *See* Indictment, paras. 35-39.
[2376] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[2377] Trial Judgement, para. 4237. *See also* Trial Judgement, paras. 4234-4236.
[2378] Trial Judgement, para. 3442.
[2379] Trial Judgement, paras. 3446, 3451.

municipalities "as a *substantial* part of the protected group".[2381] The Trial Chamber was also not convinced beyond reasonable doubt that the Bosnian Serb leadership possessed genocidal intent.[2382] The Trial Chamber accordingly acquitted Mladić of genocide under Count 1 of the Indictment.[2383]

755. For the reasons explained below, we are in agreement with the Prosecution's submission that the Trial Chamber committed an error in finding that: (i) the Bosnian Muslim communities in the Count 1 Municipalities, or the "Count 1 Communities", did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina (Ground 1 of the Prosecution's Appeal);[2384] and (ii) Mladić and other members of the Overarching JCE did not possess "destructive intent" (Ground 2 of the Prosecution's Appeal).[2385] We respectfully disagree with the Majority's decision to dismiss the Prosecution's Appeal and find that the Appeals Chamber should have granted the Prosecution's request to convict Mladić of genocide under Count 1 of the Indictment pursuant to the first form of joint criminal enterprise.[2386]

A. Ground 1 of the Prosecution's Appeal: The Trial Chamber's Errors in Finding that the Bosnian Muslim Communities in the Count 1 Municipalities Did Not Constitute a Substantial Part of the Bosnian Muslim Group in Bosnia and Herzegovina

756. In concluding that it could not find that the physical perpetrators of the prohibited acts of genocide intended to destroy the Count 1 Communities "as a *substantial* part of the protected group", the Trial Chamber found that: (i) the physical perpetrators had limited geographical control or authority to carry out activities; (ii) the Bosnian Muslims targeted in each of the Count 1 Municipalities formed a relatively small part of the Bosnian Muslim population in the Bosnian Serb-claimed territory or in Bosnia and Herzegovina as a whole; and (iii) there was insufficient evidence indicating why the Count 1 Municipalities or Count 1 Communities had a special significance or were emblematic in relation to the Bosnian Muslim group as a whole.[2387]

757. We note the Prosecution's submission that the Trial Chamber erroneously concluded that the Count 1 Communities did not constitute a substantial part of the Bosnian Muslim group as: (i) the Count 1 Communities consisted of many thousands of Bosnian Muslims, had a unique historic

[2380] Trial Judgement, paras. 3511, 3513, 3515, 3519, 3524, 3526, 4236.
[2381] Trial Judgement, paras. 3535, 3536 (emphasis added).
[2382] *See* Trial Judgement, paras. 4236, 4237.
[2383] Trial Judgement, para. 5214.
[2384] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16, 45, 46; Prosecution Reply Brief, paras. 1, 3-18.
[2385] *See* Prosecution Notice of Appeal, paras. 5-8; Prosecution Appeal Brief, paras. 1, 3, 19-41; Prosecution Reply Brief, paras. 1, 19-38.
[2386] *See* Prosecution Notice of Appeal, paras. 4, 9; Prosecution Appeal Brief, paras. 1, 4, 17, 18, 42-47.

and cultural identity that made them prominent and emblematic of the Bosnian Muslim group as a whole, and held immense strategic importance for the Bosnian Serb leadership; and (ii) the territories of the Count 1 Municipalities represented the full extent of the perpetrators' respective areas of activity and control.[2388]

758. We recall that Article 4(2) of the ICTY Statute defines genocide to encompass certain prohibited acts, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, including: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; and (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. As correctly recalled by the Trial Chamber, the *mens rea* required for genocide is a specific intent to destroy, in whole or in part, a protected group.[2389] The ICTY Appeals Chamber in the *Krstić* case held that where only part of a protected group is targeted, that part must constitute a substantial part of that group such that it is significant enough to have an impact on the group as a whole.[2390] It further held that the determination of when the targeted part is substantial enough to meet this requirement may be guided by a number of "non-exhaustive and non-dispositive" considerations, such as: (i) the numeric size of the targeted part of the group in both absolute terms as well as in relation to the overall size of the entire group; (ii) its prominence within the group and whether it is emblematic of the overall group or essential to its survival; and (iii) the area of the perpetrators' activity and control and the possible extent of their reach.[2391] Based on a review of the Trial Chamber's findings concerning these factors, it is our considered opinion that the only reasonable inference from the evidence is that the perpetrators intended to destroy the Bosnian Muslims in the Count 1 Municipalities as a substantial part of the Bosnian Muslims in Bosnia and Herzegovina.

759. Firstly, with respect to the numeric size of the targeted group, the Trial Chamber noted that in April 1991, there were approximately 1.9 million Bosnian Muslims, comprising 43.7 per cent of the population of Bosnia and Herzegovina.[2392] In relation to the Count 1 Communities, the Trial Chamber noted that Bosnian Muslims constituted 47 per cent of the population in Sanski Most (amounting to 28,136 people), 51 per cent of the population in Foča (amounting to 20,790 people),

[2387] Trial Judgement, paras. 3535, 3536 (emphasis added). *See also* Trial Judgement, paras. 3530-3534.
[2388] *See* Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 5-16, 45, 46; T. 26 August 2020 pp. 74, 82-85, 99-101.
[2389] *See* Trial Judgement, paras. 3433, 3435; Article 4(2) of the ICTY Statute.
[2390] *See* Trial Judgement, para. 3437, *referring to Krstić* Appeal Judgement, para. 8. *See also Popović et al.* Appeal Judgement, para. 419.
[2391] *Krstić* Appeal Judgement, paras. 12-14. *See* Trial Judgement, paras. 3437, 3528. *See also Karadžić* Appeal Judgement, para. 727; *Tolimir* Appeal Judgement, para. 261; *Popović et al.* Appeal Judgement, para. 422.
[2392] *See* Trial Judgement, para. 3529.

30 per cent of the population of Kotor Varoš (amounting to 11,090 people), 55 per cent of the population in Vlasenica (amounting to 18,727 people), and 44 per cent of the population in Prijedor (amounting to 49,700 people).[2393] While the Trial Chamber found that the number of Bosnian Muslims in each of the Count 1 Municipalities would have formed a larger proportion of the population of Bosnian Muslims in the Bosnian Serb-claimed territory than they did of Bosnia and Herzegovina as a whole, it concluded that they were still a relatively small part of the population under Bosnian Serb activity and control.[2394] In our considered opinion, while the Bosnian Muslim group in each of the Count 1 Municipalities ranged between approximately 0.57 and 2.6 per cent of the entire Bosnian Muslim group in Bosnia and Herzegovina, this size is nevertheless substantial as it translates into the targeting of tens of thousands of Bosnian Muslims in these municipalities. Significantly, the Bosnian Muslim group in Prijedor Municipality formed approximately 2.6 per cent of the Bosnian Muslim population in Bosnia and Herzegovina. The Bosnian Muslim group targeted by the VRS 6th Krajina Brigade under the command of Basara charged with the take-over of Sanski Most and Prijedor Municipalities formed approximately 4.1 per cent of the Bosnian Muslim population in Bosnia and Herzegovina.[2395] Consequently, we consider that the mass scale targeting of 49,700 Bosnian Muslims in one municipality and 77,836 Bosnian Muslims in two municipalities, on its own and in the context of an overall limited size of the Bosnian Muslim population of 1.9 million, is substantial in size. To put this into perspective, the Bosnian Muslim group in Srebrenica, which the Trial Chamber had found to constitute a substantial part of the Bosnian Muslim population, formed less than two per cent of the overall Bosnian Muslim group.[2396] The numeric size of the Bosnian Muslim group in the Count 1 Municipalities is even more significant when considered cumulatively in relation to the overall size of the Bosnian Muslim group as a whole. In this regard, we find it unreasonable that the Trial Chamber concluded that 6.7 per cent of the Bosnian Muslim group, comprising 128,443 Bosnian Muslims in all Count 1 Municipalities, formed "a relatively small part" of the overall size of approximately 1.9 million Bosnian Muslims.[2397]

[2393] *See* Trial Judgement, paras. 3530-3534.
[2394] *See* Trial Judgement, paras. 3530-3534. The Trial Chamber noted that the Bosnian Muslims in: Sanski Most formed approximately 1.5 per cent; Foča formed approximately 1.08 per cent; Kotor Varoš formed approximately 0.57 per cent; and Vlasenica formed approximately 0.97 per cent of the Bosnian Muslim population in Bosnia and Herzegovina. *See* Trial Judgement, paras. 3530-3533. With respect to Prijedor, the Trial Chamber incorrectly found that the Bosnian Muslims of Prijedor comprised 2.2 per cent, rather than approximately 2.6 per cent, of the overall Bosnian Muslim group in Bosnia and Herzegovina. *See* Trial Judgement, paras. 3529, 3534; Prosecution Appeal Brief, para. 9, n. 14.
[2395] *See* Trial Judgement, paras. 3530, 3534.
[2396] Trial Judgement, para. 3551.
[2397] *See* Trial Judgement, paras. 3529-3535. *Cf. Brđanin* Trial Judgement, para. 967, n. 2440 (where the Trial Chamber found that 10.78 per cent of Bosnian Muslims – amounting to 233,128 out of 2,162,426 – and 7.96 per cent of Bosnian Croats – amounting to 63,314 out of 795,745 – living in certain municipalities constituted a substantial part of the protected groups, both intrinsically and in relation to the overall Bosnian Muslim and Bosnian Croat groups in Bosnia

760. Secondly, as correctly recalled by the Trial Chamber, in determining whether the targeted part of the protected group is substantial, consideration must be given, *inter alia*, to the physical perpetrators' activity, control, and reach.[2398] In this regard, the Trial Chamber found that the authority of the following Bosnian Serb forces charged with the take-over of each of the Count 1 Municipalities did not extend beyond those municipalities from early to mid-1992 onwards: (i) the VRS 6th Krajina Brigade under the command of Basara charged with the take-over of Sanski Most and Prijedor Municipalities; (ii) the VRS Foča Tactical Brigade under the command of Marko Kovač charged with the take-over of Foča Municipality; (iii) the VRS 1st Kotor Varoš Brigade and VRS 22nd Brigade under the command of Janko Trivić charged with the take-over of Kotor Varoš Municipality; (iv) the Vlasenica SJB under the command of Mane Đurić charged with the take-over of Vlasenica Municipality; and (v) the 43rd Motorized Brigade charged with the take-over of Prijedor Municipality.[2399] The Trial Chamber further found that from the perspective of the physical perpetrators belonging to those forces, the Bosnian Muslims in each municipality were the only part of the Bosnian Muslim group within their area of control.[2400] As noted by the Trial Chamber, the perpetrators committed the prohibited acts of genocide and other culpable acts in each of the Count 1 Municipalities within their geographical control, on a mass scale, and in a short period of time.[2401] Within the span of only a few months, very few Bosnian Muslims were left in the Count 1 Municipalities.[2402] Moreover, considering that the intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him,[2403] the perpetrators in this case targeted the destruction of the Bosnian Muslim group in their respective municipalities to the possible extent of their reach and the opportunity presented to them, within their "limited geographical control or authority to carry out activities".[2404] These considerations, in our view, reinforce rather than preclude the inference that the perpetrators intended to destroy a substantial part of the Bosnian Muslim group.

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and Herzegovina, and considered it unnecessary to inquire further into other relevant factors to determine substantiality). *See also* T. 26 August 2020 pp. 84, 85, 100-102.

[2398] Trial Judgement, para. 3528, *referring to Krstić* Appeal Judgement, paras. 13, 14.

[2399] *See* Trial Judgement, paras. 3530-3534.

[2400] *See* Trial Judgement, paras. 3530-3535.

[2401] *See* Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535.

[2402] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.

[2403] *Krstić* Appeal Judgement, para. 13 ("The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis."). *See also Karadžić* Appeal Judgement, para. 727.

[2404] *See* Trial Judgement, para. 3535.

761. Thirdly, the Trial Chamber's findings on the importance of the Count 1 Municipalities and Count 1 Communities further supports the conclusion that the targeting of Bosnian Muslims in these municipalities is significant enough to have an impact on the Bosnian Muslim group as a whole. A case in point is that, in assessing the importance of Sanski Most, the Trial Chamber considered that Karadžić and Krajišnik stressed the strategic significance of this municipality and the need to retain it.[2405] It further considered Krajišnik's statement at the 50th session of the Bosnian Serb Assembly that "[t]he fact that we have organised this jubilee session in Sanski Most, a beautiful town in Krajina, is symbolical. Our presence here is a guarantee that Sanski Most was Serbian and will remain such, regardless of map-drawing and those engaged in such futile efforts".[2406]

762. Additionally, in assessing the importance of Foča Municipality, the Trial Chamber considered that in September 1992, the Crisis Staff and War Commission President Miroslav Stanić informed Mladić that Foča "was supposed to be the second Islamic Centre for Muslims in Europe" but was now 99 per cent Serb.[2407] It further noted that during the war, Bosnian Serb authorities renamed Foča "Srbinje" or "town of the Serbs" and that in January 1994, Karadžić explained that Foča "is extremely important to" the Muslims, "but it will never be theirs again".[2408] The Trial Chamber noted that Vojislav Maksimović, the Bosnian Serb Republic Commissioner for Foča, promoted a "firm attitude that the Muslims and the Croats will not be allowed to return to the areas under our rule" and that "any thought about having 500 or more Muslims within our future country is out of the question".[2409] The Trial Chamber also noted that in August 1994, Krajišnik praised Bosnian Serbs in Foča for having created "a true Serbian town" and preventing Foča from becoming "another Mecca".[2410]

763. Moreover, with respect to Kotor Varoš Municipality, the Trial Chamber considered that it was, marginally, a majority Serb municipality and such municipalities with a majority Serbian population were targeted to become a part of the *Republika Srpska*.[2411] It found that being located almost on the border of the Federation and *Republika Srpska* made Kotor Varoš strategically important.[2412]

[2405] Trial Judgement, para. 3530.
[2406] Trial Judgement, para. 3530.
[2407] Trial Judgement, para. 3531.
[2408] Trial Judgement, para. 3531.
[2409] Trial Judgement, para. 3531.
[2410] Trial Judgement, para. 3531.
[2411] Trial Judgement, para. 3532.
[2412] Trial Judgement, para. 3532.

764. Furthermore, in assessing the importance of Vlasenica Municipality, the Trial Chamber found that it was understood that controlling Vlasenica would have allowed the advancement of the first and third strategic objectives and that forcing the Muslim population to leave Vlasenica would have created access to Eastern Herzegovina.[2413] In this regard, the Trial Chamber noted Mladić's statement that "whoever controls Vlasenica, controls eastern Bosnia".[2414]

765. Additionally, with respect to Prijedor Municipality, the Trial Chamber found that this municipality was significant to the Bosnian Serbs because of its location as part of the land corridor that linked the Serb-dominated area in the Croatian Krajina in the west with Serbia and Montenegro in the east and south, which was said to be essential for supplying units of the VRS as it was the only land connection between western Bosnia and Herzegovina and Serbia.[2415] The Trial Chamber considered that senior figures in the Bosnian Serb-claimed territory emphasised that Prijedor and the Bosnian Muslim and Bosnian Croat communities living there symbolised World War II throughout the region.[2416] The Trial Chamber further considered that *Republika Srpska* Prime Minister Vladimir Lukić said in a speech that Prijedor had to be Serb because it had been Serb-majority before "the slaughter", referring to World War II.[2417] The Trial Chamber noted that in 1994, Karadžić continued to emphasise the need for continuing Serb control over Prijedor.[2418] It found that Prijedor, as a multi-ethnic area, was a symbol throughout the region of Yugoslavia of "brotherhood and unity", to the extent that Bosnian Muslims thought it was "the last town where ethnic conflict was possible".[2419] The Trial Chamber recalled its findings that after the Serbian Democratic Party's take-over of Prijedor Town with the aid of the military and police forces on 30 April 1992, a Serbian flag was raised over the Municipal Assembly building and VRS soldiers changed the name of the town to "Serbian Prijedor" and occupied all of the prominent institutions such as the radio station, medical centre, and bank.[2420] It further recalled its finding that sometime before the attack on Prijedor, the President of the Autonomous Region of Krajina Crisis Staff,

[2413] Trial Judgement, para. 3533. The Trial Chamber found that, on 12 May 1992, the Bosnian Serb Assembly adopted the six strategic objectives presented by Karadžić, which included the demarcation of a Serbian state separate from any Croatian and Muslim state and involved the separation of people along ethnic lines. *See* Trial Judgement, paras. 3694-3702, 3708, 4222, 4460, 4625, *referring to*, *inter alia*, Exhibit P431.
[2414] Trial Judgement, para. 3533.
[2415] Trial Judgement, para. 3534.
[2416] Trial Judgement, para. 3534.
[2417] Trial Judgement, para. 3534.
[2418] Trial Judgement, para. 3534.
[2419] Trial Judgement, para. 3534.
[2420] Trial Judgement, para. 3534.

Radoslav Brđanin, said on television that "non-Serbs would not need wood for the winter", which among the non-Serb population was understood as a concealed threat and caused fear and panic.[2421]

766. Consequently, after taking into consideration the Trial Chamber's findings above and the abundance of evidence concerning the importance of the Count 1 Municipalities and Count 1 Communities, we find it unreasonable that the Trial Chamber concluded that it "received insufficient evidence indicating why the Bosnian Muslims [in these municipalities] had a special significance or were emblematic in relation to the protected group as a whole".[2422] To the contrary, these findings, in our opinion, clearly indicate the prominence and emblematic nature of the Bosnian Muslim group in each Count 1 Municipality in relation to the protected group in Bosnia and Herzegovina. To put this into perspective, similar factors have been considered by the Trial Chamber and other chambers of the ICTY to support findings that the Bosnian Muslims of Srebrenica constituted a substantial part of the Bosnian Muslim group.[2423] For example, the Trial Chamber considered Mladić's statement that Srebrenica was a large "Islamic and Turkish" stronghold until the war started, that "although they had been the majority population there, the heritage did not belong to the 'Turks'", and that the Drina was a synonym of domination over the Serbs, dating from the time of the powerful Turkish empire.[2424] The Trial Chamber found that the enclave of Srebrenica was of significant strategic importance to the Bosnian Serb leadership during the conflict because the majority Bosnian Muslim population of this region made it difficult for them to claim the land as inherently Serb, Srebrenica was in close geographical proximity to Serbia and therefore was required for maintaining a Serb-populated border area contiguous with Serbia, and during the war, Srebrenica also became a refuge to Bosnian Muslims from the region especially when it was designated a UN safe area.[2425]

767. Furthermore, we disagree with the Majority's determination that the Trial Chamber's findings and evidence referred to by the Prosecution concerning the Count 1 Communities do not reflect a similar threat to the viability or survival of the Bosnian Muslim group as it did with respect

[2421] Trial Judgement, para. 3534.
[2422] *See* Trial Judgement, para. 3535.
[2423] *See* Trial Judgement, paras. 3552, 3554. *See*, *e.g.*, *Popović et al.* Appeal Judgement, para. 422 (affirming that the strategic importance of Srebrenica is a relevant factor in determining whether the substantiality requirement is met); *Krstić* Appeal Judgement, paras. 15 ("Srebrenica (and the surrounding Central Podrinje region) were of immense strategic importance to the Bosnian Serb leadership. Without Srebrenica, the ethnically Serb state of Republika Srpska they sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted."), 16 ("In addition, Srebrenica was important due to its prominence in the eyes of both the Bosnian Muslims and the international community. […] In its resolution declaring Srebrenica a safe area, the Security Council announced that it 'should be free from armed attack or any other hostile act.'"). *See also Karadžić* Trial Judgement, para. 5672; *Tolimir* Appeal Judgement, paras. 186-188; *Popović et al.* Appeal Judgement, paras. 420-426; *Tolimir* Trial Judgement, para. 774; *Popović et al.* Trial Judgement, para. 865.
[2424] Trial Judgement, para. 3552.

to Srebrenica.[2426] In our opinion, while the events in Srebrenica took place three years after the events in the Count 1 Municipalities, the elimination of Bosnian Muslims in Srebrenica is not completely independent from the destruction of the Count 1 Communities. As acknowledged by the Majority, the destruction directed against each of the Count 1 Communities may have "represented powerful, early steps in the Bosnian Serb campaign towards an ethnically homogeneous state".[2427] Consequently, it is our considered opinion that the only reasonable inference based on the evidence is that the destruction of the Bosnian Muslims in Bosnia and Herzegovina started with the destruction of Bosnian Muslims in certain municipalities, including the Count 1 Communities, and culminated in the destruction of Bosnian Muslims in Srebrenica. In this regard, the killings and cruel and inhumane treatment of thousands of Bosnian Muslims in the Count 1 Municipalities in 1992, in the context of other crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation committed throughout Bosnia and Herzegovina between 1991 and 30 November 1995, could not *but* have threatened the ultimate survival of the Bosnian Muslim group in Bosnia and Herzegovina.[2428]

768. As a case in point, in Prijedor alone, the Trial Chamber found that at least 993 Bosnian Muslims were killed, where they were slaughtered by the hundreds.[2429] In this regard, with respect to Scheduled Incident A.6.1, from 24 until around 26 May 1992, over 800 inhabitants of the predominantly Bosnian Muslim town of Kozarac were killed during the shelling of the town and its surrounding villages. The shelling was followed by the advance of tanks and infantry, during which houses were set on fire and civilians and policemen were killed. When a doctor tried to negotiate safe passage of a severely injured boy to a hospital, the perpetrators responded that they would kill the Muslims anyway.[2430] In relation to Scheduled Incident B.13.1, the killing of between 190 and 220 Bosnian Muslim and/or Bosnian Croat detainees at Keraterm camp on or around 25 July 1992, occurred by corralling them into a single room, using some form of chemical gas to cause the

[2425] Trial Judgement, para. 3554.
[2426] *See supra* para. 581.
[2427] *See supra* para. 581.
[2428] *See* Trial Judgement, paras. 3446, 3451, 4224-4232, 4610. The Trial Chamber found that in relation to Foča Municipality, 46 Bosnian Muslims as well as hundreds of predominantly Bosnian-Muslim detainees at KP Dom Foča were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.2.1, B.5.1. In relation to Kotor Varoš Municipality, the Trial Chamber found that at least 185 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incident A.4.4, Unscheduled Incidents of 13 June 1992 and 2 July 1992. In relation to Prijedor Municipality, the Trial Chamber found that at least 993 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.6.1, A.6.2, A.6.3, A.6.4, A.6.5, A.6.6, A.6.7, A.6.8, A.6.9, B.13.1, B.13.2, B.13.3, B.13.4, B.13.5, C.15.3, C.15.5. In relation to Sanski Most Municipality, the Trial Chamber found that at least 94 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.7.1, A.7.2, A.7.3, A.7.4, A.7.5. In Vlasenica Municipality, the Trial Chamber found that at least 169 Bosnian Muslims were killed. *See* Trial Judgement, para. 3446, *referring to* Scheduled Incidents A.9.1, B.16.1, B.16.2.
[2429] *See* Trial Judgement, para. 3446.
[2430] *See* Trial Judgement, paras. 1036-1041, 3051, 3053, 3073, p. 1602.

detainees to panic, and then using a machine gun aimed at the entrance of the room to shoot the detainees as they exited. The soldiers and guards proceeded to shoot detainees inside the room, including some who were trying to hide in the toilets. There was intermittent singing by the Serb guards while the shooting occurred as well as singing long into the night following the killings.[2431]

769. The Trial Chamber also found that thousands of Bosnian Muslims detained in Foča, Prijedor, and Vlasenica Municipalities were subjected to serious bodily or mental harm and that this harm contributed to the destruction of the protected group. The Trial Chamber considered that the brutality of the harm had a long-lasting, devastating, physical, and mental impact on the victims who survived, which gravely affected their ability to lead normal and constructive lives. Other victims, who were later killed, suffered before facing their deaths.[2432] In this regard, Bosnian Muslim detainees, including civilian men, women, and children were subjected to severe mistreatment such as beatings, torture, rape, sexual violence, starvation, and lack of medical care in a discriminatory manner.[2433]

770. For example, in relation to Scheduled Incident C.6.1, between 12 May 1992 and October 1994, non-Serb civilian men, mostly of Bosnian Muslim ethnicity, between the ages of 15 and 80 years, were detained from four months to more than two and a half years at KP Dom and referred to by the derogatory term "*balija*". In the summer of 1992, there were about 500 to 600 detainees crowded into a small number of rooms. Many of them were stabbed, blindfolded, made to stand spread-eagled against a wall, chained to a wall, and regularly beaten with batons, a thick wire, or sticks.[2434]

771. In relation to Scheduled Incidents C.6.2, C.6.3, C.6.4, and C.6.5, Bosnian Muslim civilian detainees lived in an atmosphere of intimidation and were held in unhygienic conditions and not provided with sufficient food, hot water, or medical care. During July and August 1992, several groups of Bosnian Muslim women and girls as young as 12 years old were "kept" and repeatedly raped by many soldiers simultaneously and consecutively and forced to have sexual intercourse with the men they were "assigned to". The women and girls were held in the house and were forced to cook, clean, and wash uniforms for the soldiers. They were severely beaten if they refused to obey orders. Some women were burnt with cigarettes.[2435]

[2431] *See* Trial Judgement, paras. 1121, 1122, 3051, 3092, pp. 1605, 1606.
[2432] Trial Judgement, para. 3451.
[2433] *See* Trial Judgement, para. 3451, *referring to*, *inter alia*, Scheduled Incidents C.6.1, C.6.2, C.6.3, C.6.4, C.6.5 , C.15.2, C.15.3, C.15.4, C.15.5, C.19.3, and Unscheduled Incident at Vlasenica Secondary School.
[2434] *See* Trial Judgement, paras. 652-655.
[2435] *See* Trial Judgement, paras. 664-666, 673, 683, 684, 689, 690.

772. In relation to Scheduled Incident C.15.2, the Trial Chamber found that between 27 May and 16 August 1992, approximately 3,300 Bosnian Muslims and Bosnian Croats were detained at Omarska camp. The detainees included the elderly, women, and children, including impaired and sick people. The detainees also included politicians and religious leaders who were earmarked for elimination as well as persons who associated themselves with those leaders. The detainees were fed starvation rations of usually spoiled food. Drinking water was often denied to the detainees for long periods and, when it was provided, it was unfit for human consumption such that it caused intestinal problems. There were acute cases of diarrhea and dysentery. Some detainees lost 20 to 30 kilograms, or considerably more, in body weight. There was very little in the way of lavatory provision with detainees having to wait for hours to use them and often forced to excrete and urinate in their rooms. With no effective washing facilities, detainees and their clothes quickly became filthy in the summer heat and skin diseases were prevalent. Often guards refused to open windows in crowded rooms or demanded the handing over of possessions in return for an open window or a plastic jar of water. As many as 600 prisoners were made to sit or lie prone outdoors on the *pista*, regardless of the weather, for many days and nights on end with machine guns trained on them. The detainees were not provided with any medical care and were frequently and severely beaten. During interrogations detainees were knocked off chairs, hit, kicked, trodden, and jumped upon while interrogators looked on. After their interrogation, in some instances, detainees were made to sign false statements regarding their involvement in acts against Serbs. Detainees were called out from their rooms and attacked with a variety of sticks, iron bars, or lengths of heavy electric cable. Other forms of beatings inflicted on detainees included throwing detainees onto burning tires, strikes to a detainee's mouth resulting in broken teeth, beatings of detainees with metal and other implements sometimes resulting in broken bones, placing a knife against a detainee's throat to obtain money, forcing a man to drink motor oil, and forcing detainees to walk on broken glass. Detainees were humiliated: they were regularly forced to sing Serb songs, one detainee was forced to hit his head against a wall, one detainee was forced to beat another, at least one detainee was forced to lick his own blood, another was forced to cross the *pista* naked whilst pursued by a guard with a whip. Both male and female detainees were regularly threatened with death and subjected to derogatory ethnic remarks and insults which included phrases like "Fuck your *balija* mothers, your *Ustaša* mothers. You all need to be killed". On religious holidays or if the relative of a guard was killed in the battlefield, beatings intensified. Female detainees were raped and sexually assaulted. One detainee was ordered by Serb guards to strip naked together with a female detainee and was forced to rape her. Other detainees could hear those being raped screaming

and crying for help and could identify bruises and marks on their faces and arms and other signs of abuse and beatings.[2436]

773. In relation to Scheduled Incident C.15.3, the Trial Chamber found that Keraterm camp held approximately 4,000 male and female detainees, including civilians and primarily Bosnian Muslim and Bosnian Croat men. Detainees were locked in a number of unlit, intensely hot, and insufficiently ventilated rooms for days on end. There was barely enough space for them to lie down on the concrete floors. The conditions at the camp were unsanitary. Detainees had access to only one toilet, which they could use once per day. After it became blocked, they were provided with barrels that leaked. There were infestations of lice and dysentery. Detainees were provided with insufficient food and water and suffered from malnutrition and starvation. No medical care for illnesses was provided at the camp. Guards called detainees out of their cells and beat them on a nightly basis, in some instances with rifle butts, brass knuckles, iron bars, and other implements. On one occasion, detainees were beaten for two to three hours. On another occasion, guards ordered arriving detainees to lie face down on hot asphalt with their hands behind their necks and, when a detainee tried to avoid contact with the asphalt, a guard kicked him in the head. A detainee was shot in the palm and a guard called him an "*Ustaša*" or "*balija*" for asking permission to use the toilet. In another instance, two detainees were shot for fidgeting and their Croat and Muslim mothers were cursed. Detainees were also beaten if they did not eat their bread rations quickly enough and they were forced to lean against the wall on three fingers and sing "Chetnik" songs. Guards, members of paramilitary units, or civilians raped female detainees at the camp. In one instance in mid-July 1992, a number of guards raped a female detainee until she lost consciousness and awoke the next morning lying in a pool of blood. A guard then ordered her to clean herself up, took her to the yard, and made her sit on a rock for several hours.[2437]

774. In relation to Scheduled Incident C.15.4, the Trial Chamber found that Trnopolje camp was in operation from at least 26 May 1992 until the end of September 1992. From late May to early June 1992, there were approximately 8,000 detainees and by late August 1992, up to 4,000 people were detained at the camp. The detainees were Bosnian Muslim and Bosnian Croat civilians, including women and children. The buildings at Trnopolje were insufficient to house all the detainees, causing many of them to camp outdoors with little or no shelter. There was no electricity, nor were there beds, blankets, or bathing facilities in the camp. There was no running water and the little drinking water that was available was dirty and contaminated. There were very limited

[2436] *See* Trial Judgement, paras. 1231-1236.
[2437] *See* Trial Judgement, paras. 1265-1269.

lavatory facilities and the camp authorities supplied an insufficient amount of food to the detainees. In some cases, food was distributed only to those who could pay for it. Because of the lack of sufficient food as well as the unsanitary and crowded conditions, lice and scabies were rampant and the majority of detainees suffered from dysentery. The detainees also suffered from a wide range of ailments including hepatitis, chronic diarrhea, and high fevers. Several detainees had their teeth removed with pliers without the use of anesthetic. Some of the wounded detainees had maggots in their wounds. Camp guards frequently and severely beat detainees with baseball bats, iron bars, rifle butts, their hands and feet, or whatever they had at their disposal. In August 1992, a Serb guard who came from Keraterm camp, greeted newly arriving detainees by saying "[g]od help you Turks" and beat a detainee severely and began kicking him and jumping on him after the detainee had fallen down. The guards beat some detainees to death. A Bosnian woman who had been detained along with her children and registered as a "Hambarine extremist" upon arrival, was accused by camp guards of buying and storing arms. The guards called her a "*balija*" and beat her in the presence of her children whom the guards also threatened. Camp guards and others, including VRS soldiers from outside the camp, raped many women and girls in and around the camp. These guards and soldiers were allowed in the camp to select their victims, the youngest of whom was 12 years old. A Bosnian Muslim woman was raped nearly every night for approximately a month. She was also threatened, beaten, and stabbed on multiple occasions when she resisted and was threatened that other soldiers would be brought in to rape her. During these rapes she was told: "let's see how Muslim women fuck", "your Muslims are raping our Serbian sisters, so now it is your turn to see how it is", and "Muslim women must have Serbian children".[2438]

775. In relation to Scheduled Incident C.15.5, the Trial Chamber found that from around 21 July 1992, 114 predominantly Bosnian Muslim and Bosnian Croat unarmed men were detained at Miška Glava Dom, in a small café in hot conditions for several days. One of the men was separated from the group when he said that his mother was a Serb and the rest were ill-treated while forced to sing songs about Greater Serbia. The detainees were provided with a single loaf of bread and a packet of sweets to share for three days and they had to sing songs about Greater Serbia in order to obtain water. The detainees were regularly beaten with fists and rifle butts.[2439]

776. In relation to Scheduled Incident C.19.3, the Trial Chamber found that between 2,000 and 2,500 Bosnian Muslims of both genders and all ages, including civilians, were detained at Sušica camp. In June and July 1992, approximately half of the detainees were women. The detainees were

[2438] *See* Trial Judgement, paras. 1322-1325.
[2439] *See* Trial Judgement, para. 1329.

held in unhygienic conditions and not provided with sufficient food, water, or medical care. They were frequently and severely beaten and referred to as "*balija*'s mother". The guards also subjected them to mistreatment, such as scaring them by putting a knife in their mouths if they asked questions, tying their thumbs together behind their backs with wire and then tying them to rain spouts at the warehouse entrance, forcing them to remain in a kneeling position all day, and stabbing them in the mouth. The guards and people coming from outside the camp also raped female detainees.[2440]

777. In relation to the Unscheduled Incident at Vlasenica Secondary School, the Trial Chamber found that between 31 May 1992 and 8 June 1992, about 160 men were detained in Vlasenica secondary school including Bosnian Muslim men aged between 13 and 87. During their detention, the detainees were not allowed to maintain personal hygiene, with no functioning lavatories provided in the building. They were fed a small slice of bread and a small portion of egg each day. There were two liters of water for 160 people each day. They were severely beaten, including when they refused to sing songs identified as "Chetnik" songs. The guards put out cigarettes on the hands of a detainee and said to another detainee "if you don't lick this blood by the time I return, I will cut your throats".[2441]

778. Furthermore, as discussed above, these prohibited acts of genocide, along with other culpable acts of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation committed within the scope of the Overarching JCE, were committed on a large scale and were of a systematic, organized, and discriminatory nature.[2442] Within the span of only a few months, there were only very few Bosnian Muslims left in the Count 1 Municipalities.[2443] For example, in considering the forced displacement in Kotor Varoš Municipality, the Trial Chamber noted Witness Pašić's evidence that: (i) six Bosnian Muslim families remained in Hrvaćani when his family fled in mid-1992; (ii) after leaving Hrvaćani, the witness and his family, along with 50 to 70 people, mainly civilians, returned to Hrvaćani en route to another location and encountered Serb soldiers who called them "*balijas*" and who told the group that there was nothing left for them in Hrvaćani and that they should go to Turkey; and (iii) in their passage through Hrvaćani, "the village

[2440] *See* Trial Judgement, paras. 1794-1796.
[2441] *See* Trial Judgement, para. 1802.
[2442] *See*, *e.g.*, Trial Judgement, paras. 3446, 3451, 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535, 4224-4232, 4610.
[2443] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.

was destroyed, houses had been stripped, animals killed, and the elderly who had remained were either shot or burnt".[2444]

779. After the continuous attacks against the Bosnian Muslims in the municipalities in Bosnia and Herzegovina, including the Count 1 Municipalities, the process of the destruction of the Bosnian Muslim group culminated in Srebrenica in 1995, which became one of the few remaining predominantly Bosnian Muslim populated territories in the area claimed as *Republika Srpska*. Therefore, based on the Trial Chamber's findings and evidence discussed above, we are convinced that the destruction of the Count 1 Communities, as with respect to the Bosnian Muslims in Srebrenica, similarly threatened the viability or survival of the Bosnian Muslim group as a whole.

780. As correctly put by the Prosecution, "the only consideration that stood in the way of the [Trial] Chamber's finding that genocide was committed by the local perpetrators [was 'substantiality']".[2445] We take note of the Prosecution's submission that the concern behind the statement "[i]f only a part of the group is targeted for destruction, it must be a substantial part to be considered genocide" was to ensure that the label of genocide is not imposed "lightly" or applied to crimes that are too small.[2446] However, in light of the above considerations concerning the size of the targeted group, the area of the perpetrators' activity and control, the prominence and emblematic nature of the Count 1 Municipalities and Count 1 Communities, the patterns of heinous crimes, as well as the threat or impact on the viability and survival of the Bosnian Muslim group in Bosnia and Herzegovina, finding that the Count 1 Communities constituted a substantial part of the group would be anything but applying the term genocide "lightly". Similarly, based on these considerations, we are of the view that the Prosecution has shown that all reasonable doubt of guilt has been eliminated and that no reasonable trial chamber could have found that the perpetrators did not intend to destroy the Bosnian Muslims in the Count 1 Municipalities as a *substantial* part of the protected group in Bosnia and Herzegovina. We therefore respectfully disagree with the Majority's finding that the Prosecution has failed to demonstrate that the Trial Chamber erred in concluding that the Count 1 Communities did not each constitute a substantial part of the Bosnian Muslim group in Bosnia and Herzegovina. We find that the Appeals Chamber should have granted Ground 1 of the Prosecution's Appeal.

[2444] Trial Judgement, paras. 949, 952, *referring to* T. 9 July 2012 pp. 550, 551, 553, 555, 556.
[2445] T. 26 August 2020 p. 82.
[2446] T. 26 August 2020 p. 83, *referring to Krstić* Appeal Judgement, para. 37 ("[The] proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name.").

B. Ground 2 of the Prosecution's Appeal: The Trial Chamber's Errors in Finding that Members of the Overarching JCE Did Not Possess "Destructive Intent"

781. As recalled above, the Trial Chamber found that, between 1991 and 30 November 1995, the Overarching JCE existed with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through the crimes of persecution, extermination, murder, inhumane acts (forcible transfer), and deportation.[2447] The Trial Chamber found that crimes related to the Overarching JCE were committed throughout the following "Municipalities" in Bosnia and Herzegovina, including in the Count 1 Municipalities: Banja Luka, Bijeljina, Foča, Ilidža, Kalinovik, Ključ, Kotor Varoš, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, and Vlasenica.[2448] It concluded that members of the Overarching JCE included Karadžić, Krajišnik, Plavšić, Koljević, Subotić, Mandić, Stanišić, and Mladić,[2449] who used "tools", which included VRS and MUP members, to commit these crimes.[2450]

782. With respect to the Count 1 Municipalities, the Trial Chamber found that a large number of Bosnian Muslims in these municipalities were the victims of prohibited acts of genocide, such as killings and acts causing serious bodily or mental harm which contributed to the destruction of their groups.[2451] In particular, the Trial Chamber determined that a large number of Bosnian Muslims in Foča, Ključ, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica were murdered and that Bosnian Muslims in Foča, Prijedor, and Vlasenica were subjected to serious bodily or mental harm which contributed to the destruction of their groups.[2452] The Trial Chamber further found, by majority, that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group when carrying out the prohibited acts.[2453] The Trial Chamber also reviewed "inflammatory" statements made by Mladić and other members of the Overarching JCE.[2454] Nevertheless, the Trial Chamber concluded that it was not satisfied that genocide formed part of the objective of the Overarching JCE or that members of the Overarching JCE possessed genocidal intent.[2455]

783. We note the Prosecution's submission that the Trial Chamber erred in concluding that genocide did not form part of the common purpose of the Overarching JCE by: (i) applying a

[2447] Trial Judgement, paras. 4232, 4610. *See also* Trial Judgement, paras. 4218-4231.
[2448] *See* Trial Judgement, paras. 4218, 4225, 4227, 4229-4231. *See also* Trial Judgement, pp. 176-948.
[2449] *See*, *e.g.*, Trial Judgement, paras. 4238, 4610, 4612, 4688, 5188, 5189. *See also*, *e.g.*, Trial Judgement, paras. 3578-3741, 3784-3827.
[2450] *See*, *e.g.*, Trial Judgement, paras. 4225-4231, 4239. *See also*, *e.g.*, Trial Judgement, paras. 108-271, 3784-3985.
[2451] Trial Judgement, paras. 3446, 3451.
[2452] Trial Judgement, paras. 3446, 3451. *See also* Trial Judgement, paras. 3458, 3464, 3469, 3473, 3479, 3496, 3502, 3503.
[2453] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236.
[2454] Trial Judgement, para. 4235.

heightened evidentiary threshold in determining the "destructive intent" of Mladić and other Overarching JCE members; (ii) unreasonably finding that Mladić and other Overarching JCE members, who orchestrated and controlled the overall criminal campaign and exercised greater authority than any of the perpetrators they used as tools, did not intend to destroy the Bosnian Muslim group while the perpetrators did; and (iii) unreasonably concluding that statements by Mladić and other Overarching JCE members did not reflect an intent to destroy the Bosnian Muslim group.[2456]

784. For the reasons discussed below, we find the Trial Chamber's conclusion that genocide did not form part of the objective of the Overarching JCE and that members of the Overarching JCE did not possess genocidal intent to be erroneous and unreasonable. In reaching this conclusion, the Trial Chamber recalled, *inter alia*, its finding that the physical perpetrators in the Count 1 Municipalities did not have the intent to destroy a *substantial* part of the Bosnian Muslim group.[2457] As discussed above with respect to Ground 1 of the Prosecution's Appeal, we have found the Trial Chamber's finding unreasonable in this respect.

785. The Trial Chamber further recalled the majority's finding that certain physical perpetrators had the intent to destroy a part of the Bosnian Muslim group, but considered that:

> [a]n inference that the Bosnian-Serb leadership sought to destroy the protected groups in the Count 1 [M]unicipalities through the use of a number of physical perpetrators as tools requires more. In the absence of other evidence which would unambiguously support a finding of genocidal intent, drawing an inference on the basis of prohibited acts of physical perpetrators alone is insufficient.[2458]

We find that the Trial Chamber's above-quoted statement is unsupported and amounts to an error of law. We recall that the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" may be inferred from, *inter alia,* 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, the repetition of destructive and discriminatory acts, as well as the existence of a plan or policy.[2459] In our opinion, as a matter of law, the jurisprudence does not restrict a trial chamber

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[2455] Trial Judgement, paras. 4236, 4237.
[2456] *See* Prosecution Appeal Brief, paras. 19-41. *See also* Prosecution Reply Brief, paras. 19-38; T. 26 August 2020 pp. 74-82, 101-103.
[2457] Trial Judgement, para. 4234 (emphasis added).
[2458] Trial Judgement, para. 4236.
[2459] *Rutaganda* Appeal Judgement, paras. 525, 528 (stating that inferring specific intent from other facts, such as the general context and the perpetration of other acts systematically directed against a given group does not imply that the guilt of an accused may be inferred only from his affiliation with "a guilty organization"); *Jelisić* Appeal Judgement, para. 47. *See also Karadžić* Appeal Judgement, para. 727, *referring to*, *inter alia*, *Tolimir* Appeal Judgement, para. 246,

from inferring the genocidal intent of members of a joint criminal enterprise solely on the basis of prohibited acts of physical perpetrators who are acting as their tools. We recall that explicit manifestations of criminal intent are often rare in the context of criminal trials and in the absence of explicit direct proof, specific intent may be inferred from relevant facts and circumstances, in order to prevent perpetrators from escaping convictions simply because such manifestations are absent.[2460] In this regard, we take note of the Prosecution's submission that "the effect of the [Trial] Chamber's legal error is that it will only be possible to convict leadership accused in those rare situations where they unambiguously state their genocidal intent, because according to [the] Trial Chamber, without […] other unambiguous evidence, the entire pattern of crimes that a leader unleashes on a population is legally insufficient to prove genocidal intent".[2461]

786. With respect to the Trial Chamber's factual assessment, we are of the view that, based on the Trial Chamber's findings on the prohibited acts committed by the perpetrators, the statements and conduct of Mladić and other members of the Overarching JCE, and Mladić's knowledge of the crimes committed on the ground, the only reasonable inference is that genocide formed part of the Overarching JCE and that Mladić and other members of the joint criminal enterprise shared the intent to destroy a substantial part of the Bosnian Muslim group.

787. In this regard, we recall the Trial Chamber's findings that the perpetrators committed the prohibited acts of murder and causing serious bodily or mental harm, as well as other culpable acts, on a large scale and in a systematic, organized, and discriminatory manner.[2462] Significantly, as discussed above in relation to our opinion concerning Ground 1 of the Prosecution's Appeal, in Prijedor Municipality, for example, the Trial Chamber found that at least 993 Bosnian Muslims were killed.[2463] The Trial Chamber also found that the brutality of the harm suffered by thousands of Bosnian Muslims detained in Foča, Prijedor, and Vlasenica Municipalities had a long-lasting, devastating, physical and mental impact on the victims who survived, which gravely affected their ability to lead normal and constructive lives, and that this contributed to the destruction of the protected groups. The Trial Chamber further found that other victims, who were later killed, suffered before facing their deaths.[2464] Within the span of only a few months, there were only very

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Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR98*bis*.1, Judgement, 11 July 2013, para. 80, *Stakić* Appeal Judgement, para. 42.

[2460] *See Rutaganda* Appeal Judgement, para. 525, *referring to Kayishema and Ruzindana* Appeal Judgement, para. 159.

[2461] T. 26 August 2020 p. 78.

[2462] *See*, *e.g.*, Trial Judgement, paras. 3446, 3451, 3464, 3473, 3479, 3496, 3502, 3510, 3513-3516, 3519, 3520, 3524, 3535, 4224-4232, 4610.

[2463] *See* Trial Judgement, para. 3446.

[2464] *See* Trial Judgement, para. 3451, *referring to* Scheduled Incidents C.6.1, C.6.2, C.6.3, C.6.4, C.6.5 , C.15.2, C.15.3, C.15.4, C.15.5, C.19.3, Unscheduled Incident at Vlasenica Secondary School, and Unscheduled Incident at Sitnica School. *See also supra* paras. 738-746.

few Bosnian Muslims left in the Count 1 Municipalities.[2465] The Trial Chamber also found that certain physical perpetrators – who were members of the Bosnian Serb forces acting as tools of the members of the Overarching JCE – had the intent to destroy a part of the Bosnian Muslim group.[2466] In light of these findings, we are convinced that the only reasonable inference based on the acts of the physical perpetrators is that genocide formed part of the Overarching JCE.

788. Additionally, contrary to the Trial Chamber's view that "there is an absence of other evidence which would unambiguously support a finding of genocidal intent" of the members of the Overarching JCE,[2467] we find that there is an abundance of evidence supporting a finding of such intent, such as the statements and conduct of Mladić and other members of the Overarching JCE in the preparation and implementation of the criminal campaign committed in municipalities throughout Bosnia and Herzegovina, including the Count 1 Municipalities. As discussed below, such evidence points to the only reasonable inference that the members of the Overarching JCE sought to destroy the Bosnian Muslim group in the Count 1 Municipalities.

789. In this regard, we recall the Trial Chamber's finding that the Bosnian Serb leadership advocated threats of violence, extinction, and transfers of populations in preparing for the take-over of Serb-claimed territory from at least July 1991 to May 1992.[2468] The Bosnian Serb leadership also adopted policies and strategies, such as the Variant A/B Instructions, and created Bosnian Serb political, military, and police structures throughout the municipalities to implement their ethnic division objective.[2469] On 12 May 1992, the Bosnian Serb leadership adopted Karadžić's "six strategic objectives", which included the demarcation of a Serb state involving the separation of people along ethnic lines, and emphasised that such separation should be achieved by "whatever means".[2470] As of May 1992, over the course of a few months, a similar pattern of widespread and systematic attacks against Bosnian Muslims was perpetrated by Serbian forces, including VRS forces, MUP units, and regional and municipal authorities, in certain municipalities throughout Bosnia and Herzegovina, including in the Count 1 Municipalities.[2471]

790. We further recall the Trial Chamber's findings, *inter alia*, that: (i) the Overarching JCE members controlled the Bosnian Serb forces, including that Mladić exercised a "very high level of

[2465] *See* Trial Judgement, paras. 3513, 3514, 3516, 3520, 3530-3534.
[2466] Trial Judgement, paras. 3504, 3511, 3513, 3515, 3519, 3524, 3526, 4236. *See, e.g.*, Trial Judgement, paras. 4225-4231, 4239.
[2467] Trial Judgement, para. 4236.
[2468] *See* Trial Judgement, paras. 3669, 4220.
[2469] *See* Trial Judgement, paras. 87-89, 3668, 3674, 3675, 3689, 3690, 3708, 3979, 4219, 4221.
[2470] *See* Trial Judgement, para. 3708.
[2471] *See* Trial Judgement, paras. 3464, 3473, 3479, 3496, 3502, 3510, 3511, 3513-3524. *See also* Trial Judgement, paras. 3036-3039, 3041, 3045, 3459-3463, 3470-3472, 3474-3478, 3480-3495, 3497-3501, 3819, 3824, 3982, 3983.

command and control over VRS subordinates", was respected by his subordinates as a leader, demanded "absolute obedience" in the VRS, closely monitored the implementation of his orders, and communicated regularly with his subordinates;[2472] that Karadžić controlled the *Republika Srpska* military and political structure;[2473] and that Mićo Stanišić exercised "exclusive authority" over the MUP's security-related operations;[2474] (ii) Mladić's acts and omissions during the existence of the Overarching JCE were so instrumental to the commission of the crimes that without them crimes would not have been committed;[2475] (iii) Mladić knew crimes were committed against non-Serbs in the Municipalities; [2476] and (iv) Mladić failed to investigate and punish crimes committed by the Bosnian Serb forces.[2477]

791. We also recall the numerous statements by Mladić and other members of the Overarching JCE calling for the disappearance and destruction of Bosnian Muslims. Upon reviewing these statements, we find the Trial Chamber's conclusion that they do not indicate genocidal intent on the part of the members of the Overarching JCE to be unreasonable. In particular, the Trial Chamber found that in conversations, meetings, and speeches that took place from at least July 1991 to May 1992, members of the Bosnian Serb political leadership, in particular Karadžić, threatened violence and extinction should Bosnian Muslims attempt to create a sovereign state, described Muslims and Croats as enemies with whom the Bosnian Serbs could not coexist and threatening violence against those groups, and advocated the transfers of populations.[2478] The Trial Chamber found that, in doing so, Karadžić repeatedly referred to, *inter alia*, the "expulsion", "disappearance", and "extinction" of the Bosnian Muslims.[2479] The Trial Chamber also considered evidence that on 12 May 1992 at the 16th Assembly Session, Mladić stated that "we must make our move and eliminate them, either temporarily or permanently, so that they will not be in the trenches".[2480] Furthermore, during the 17th Session of the Bosnian Serb Assembly held from 24 to 26 July 1992, Karadžić stated that "this conflict was roused in order to eliminate the Muslims", and "[t]hey think that they are being nationally established, but in fact they are vanishing."[2481] The Trial Chamber also considered that Mladić stated at the session of the Bosnian Serb Assembly on 10 January 1994 that

[2472] Trial Judgement, paras. 4390-4393.
[2473] *See* Trial Judgement, paras. 18-31, 104, 265, 341.
[2474] Trial Judgement, paras. 338, 341.
[2475] Trial Judgement, paras. 4611, 4612. *See also*, *e.g.*, Trial Judgement, paras. 4241-4610, 4615, 4685, 4686, 5189.
[2476] *See*, *e.g.*, Trial Judgement, paras. 4546, 4630-4643, 4685.
[2477] Trial Judgement, paras. 4546, 4611. *See also* Trial Judgement, paras. 4529-4545.
[2478] Trial Judgement, para. 3669.
[2479] Trial Judgement, para. 3669.
[2480] Trial Judgement, paras. 4460, 4625. *referring to* Exhibit P341, p. 33.
[2481] Exhibit P4581, p. 86.

"[t]he enemy that we are facing is getting stronger every day […] determined to fight until the last one of us lives […] My concern is to have them vanish completely."[2482]

792. When viewing these statements in the context of the prohibited acts of genocide committed on a mass scale by perpetrators who are tools of the members of the joint criminal enterprise, along with other statements containing propaganda and derogatory language against Bosnian Muslims,[2483] painting Bosnian Muslims as genocidal enemies,[2484] and calling for the "extermination, destruction, disappearance, and extinction" of Bosnian Muslims in the context of their attempts to create a sovereign state,[2485] we are of the opinion that it was unreasonable for the Trial Chamber to consider these statements as merely "rhetorical speeches" for ethnic separation and division or as propaganda directed to the military enemy, rather than demonstrating genocidal intent.[2486]

793. In this regard, with respect to statements containing propaganda and derogatory language against Bosnian Muslims, we note that the Trial Chamber found that, between September 1992 and at least March 1995, Mladić participated in establishing and using the machinery for the dissemination of anti-Muslim propaganda, either through his subordinates or personally, in order to engender in Bosnian Serbs fear and hatred of Bosnian Muslims.[2487] The Trial Chamber found that, in media interviews, Mladić used derogatory language towards Bosnian Muslims such as "the Muslims were the worst scum", claimed the historical territorial rights of the Serbs, and recalled the narratives about genocide and crimes committed against Serbs by Bosnian Croats and Bosnian Muslims.[2488]

794. With respect to statements painting Bosnian Muslims as genocidal enemies, we note the Trial Chamber's findings that: (i) in an interview with the VRS magazine *Srpska Vojska* of 18 November 1992, Mladić noted that the Muslims thought that they would easily "clear the Serbian people out of the territory of Bosnia and Herzegovina";[2489] (ii) according to the magazine *Srpska Vojska*, during a meeting in the beginning of April 1993 attended by, *inter alia*, Mladić, Karadžić, Krajišnik, and representatives of state and political organs of the Bosnian Serb Republic, Mladić stated that the "strategic-operative conditions were created to prevent the greatest genocide and total annihilation of the Serbian people" west of the Drina River;[2490] and (iii) during an interview

[2482] *See* Trial Judgement, paras. 4468, 4629, *referring to* Exhibit P3076, p. 20.
[2483] *See* Trial Judgement, paras. 4499, 4500.
[2484] *See*, *e.g.*, Trial Judgement, paras. 4482-4484, 4486, 4499, 4648, 4649.
[2485] *See*, *e.g.*, Trial Judgement, paras. 3603, 3609, 3610, 3670.
[2486] *See* Trial Judgement, para. 4235.
[2487] *See* Trial Judgement, para. 4500.
[2488] *See* Trial Judgement, para. 4499.
[2489] *See* Trial Judgement, paras. 4482, 4499, *referring to* Exhibit P7391, p. 4.
[2490] *See* Trial Judgement, paras. 4483, 4499, *referring to* Exhibit P3918, p. 2.

published on 25 June 1993, Mladić stated that "[t]he Muslims had betrayed the Serb people and repressed them for 500 years".[2491] The Trial Chamber also received evidence that Mladić stated: (i) in an edition of the *Oslobođenje* newspaper dated 8 November 1994, that Serbs would "return the territories that the Muslims took" during World War II "and as punishment, even more than that";[2492] and (ii) in a video clip dated 26 June 1995, that the Serb people organised for defence, protected the majority of Serb historical territories, and prevented "the planned and prepared […] genocide".[2493] Furthermore, we note that a VRS Main Staff report from September 1992 signed by Mladić read that "[w]e had to take all measures available to defend ourselves from genocidal intentions and actions of our enemies".[2494]

795. Specifically, with respect to statements calling for the extermination of Bosnian Muslims in the context of the attempts by Bosnian Muslims to create a sovereign state, the Trial Chamber found that Karadžić: (i) stated, on 12 October 1991 in a telephone conversation, that such attempt would result in "bloodshed", that should Bosnian Muslims "rise up against the Serbs", they would "disappear", that "300,000 Muslims [would] die" in Sarajevo, and that "the Muslim people would be exterminated";[2495] and (ii) on 15 October 1991, in a speech before the 8th Joint Session of the Assembly of the Socialist Republic of Bosnia and Herzegovina, described the Bosnian Muslims' pursuit of an independent state as a "highway of hell and suffering" and, in a telephone conversation, elaborated that the Serbs would "destroy them completely" in a "war until their extinction".[2496] We further note Karadžić's statement that "the Muslims know […] it is hell in which five-six hundreds of thousands of them will disappear".[2497]

796. In our considered opinion, the only reasonable inference based on the totality of evidence, is that these statements indicate intent to physically destroy the Bosnian Muslim group.

797. For the reasons set out above, considering: (i) the control the Overarching JCE members had over the Bosnian Serb forces; (ii) their participation in the planning and execution of crimes committed in the Municipalities; (iii) their numerous statements calling for the disappearance and destruction of Bosnian Muslims; (iv) Mladić's knowledge of the crimes committed on the ground; (v) the Trial Chamber's finding that certain members of the Serbian forces, who were acting as

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[2491] *See* Trial Judgement, paras. 4484, 4499, *referring to* Exhibit P7719, p. 4.
[2492] *See* Trial Judgement, paras. 4486, 4648, *referring to* Exhibit P1975, p. 1.
[2493] *See* Trial Judgement, paras. 4486, 4649, *referring to* Exhibit P1976, p. 1.
[2494] *See* Exhibit P1966, p. 3.
[2495] *See* Trial Judgement, paras. 3603, 3670, *referring to* Exhibit P4109, pp. 7-9, 16, 18, 21-23.
[2496] *See* Trial Judgement, paras. 3609, 3610, 3670, *referring to* Exhibit P108, pp. 5, 6, Exhibit P2004, pp. 2-4, Exhibit P2654, p. 6.
[2497] *See* Exhibit P4110, p. 3.

tools for the Overarching JCE members, committed prohibited acts of genocide with the intent to destroy a part of the Bosnian Muslim group; and (vi) its finding that within the span of only a few months, there were only very few Bosnian Muslims left in the Count 1 Municipalities, we find it unreasonable that the Trial Chamber found that genocide did not form part of the objective of the Overarching JCE. Against this background, we find it absurd that the Trial Chamber found that certain perpetrators possessed the intent to destroy a part of the Bosnian Muslim group whereas Mladić and other members of the Overarching JCE, who were using these perpetrators as tools to commit crimes in the Municipalities in furtherance of the Overarching JCE, did not themselves possess such intent.

798. In light of these considerations, we find that the Trial Chamber committed an error of law and an error of fact in failing to find that genocide formed part of the objective of the Overarching JCE or that members of the Overarching JCE possessed genocidal intent. We find that the Prosecution has shown that all reasonable doubt of guilt has been eliminated. We respectfully disagree with the Majority's decision to dismiss the Prosecution's submissions in this respect and find that the Appeals Chamber should have granted Ground 2 of the Prosecution's Appeal.

C. Mladić Should be Convicted for Committing Genocide in the Count 1 Municipalities

799. Having found that the Trial Chamber erred in finding that: (i) the Bosnian Muslims in the Count 1 Municipalities did not constitute a substantial part of the protected group in Bosnia and Herzegovina; and (ii) genocide did not form part of the objective of the Overarching JCE or that members of the Overarching JCE did not possess genocidal intent, we therefore find that Mladić should be convicted of genocide under the first form of joint criminal enterprise.

800. We recall that liability under the first form of joint criminal enterprise consists of: (i) a plurality of persons; (ii) the existence of a common purpose which amounts to or involves the commission of a crime; and (iii) the participation and shared intent of the accused in the common purpose.[2498] Considering: (i) the Trial Chamber's finding that from 12 May 1992 until 30 November 1995, Mladić participated in the Overarching JCE, which involved a plurality of persons including members of the Bosnian Serb leadership, with the objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory in Bosnia and Herzegovina through persecution, extermination, murder, inhumane acts (forcible transfer), and

[2498] *See, e.g., Stanišić and Simatović* Appeal Judgement, para. 77; *Brđanin* Appeal Judgement, paras. 364, 365, 430; *Stakić* Appeal Judgement, paras. 64, 65; *Krajišnik* Appeal Judgement, paras. 200-208, 707; *Tadić* Appeal Judgement, paras. 227, 228. *See also Nizeyimana* Appeal Judgement, para. 325; *Gotovina and Markač* Appeal Judgement, para. 89.

deportation;[2499] and (ii) our finding that genocide formed part of the objective of the Overarching JCE and that Mladić and other members of the Overarching JCE shared the genocidal intent of the perpetrators of crimes acting as their tools, we respectfully disagree with the Majority's decision to affirm Mladić's acquittal of genocide under Count 1 of the Indictment. We find that the Appeals Chamber should have granted the Prosecution's request to convict Mladić of genocide for the crimes committed in the Count 1 Municipalities pursuant to the first form of joint criminal enterprise.

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

Done this 8th day of June 2021, at The Hague, The Netherlands

Judge Aminatta Lois Runeni N'gum

Judge Seymour Panton

[Seal of the Mechanism]

[2499] *See*, *e.g.*, Trial Judgement, paras. 4232, 4238, 4610-4612, 4685, 4686, 4688, 5189.

VIII. ANNEX A: PROCEDURAL HISTORY

801. The main aspects of the appeal proceedings are summarized below.

A. Composition of the Appeals Chamber

802. On 19 December 2017, the President of the Mechanism ordered that the Bench in the present case be composed of Judges Theodor Meron (presiding), Carmel Agius, Liu Daqun, Prisca Matimba Nyambe, and Seymour Panton.[2500] On 20 December 2017, Judge Meron designated himself as the Pre-Appeal Judge in this case.[2501] On 3 September 2018, Judge Jean-Claude Antonetti granted Mladić's requests to disqualify Judges Meron, Agius, and Liu for reason of apparent bias.[2502] On 4 September 2018, Judge Antonetti assigned Judges Mparany Mamy Richard Rajohnson, Gberdao Gustave Kam, and Elizabeth Ibanda-Nahamya to the Bench.[2503] Judge Nyambe was elected as the Presiding Judge in this case and, on 12 September 2018, assigned herself as the Pre-Appeal Judge.[2504] Judge Rajohnson was replaced by Judge Aminatta Lois Runeni N'gum on 14 September 2018.[2505] Judge Kam was replaced by Judge Mustapha El Baaj on 18 February 2021.[2506]

B. The Appeals

803. Following the Pre-Appeal Judge's decisions granting Mladić and the Prosecution an extension of 90 days to file their notices of appeal,[2507] both parties filed their respective notices of appeal on 22 March 2018.[2508]

[2500] Order Assigning Judges to a Case Before the Appeals Chamber, 19 December 2017, p. 1.
[2501] Order Assigning a Pre-Appeal Judge, 20 December 2017, p. 1.
[2502] Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 (originally filed in French, English translation filed on 20 September 2018), paras. 81-87.
See also Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias, 18 June 2018, paras. 1, 21-23, p. 9; Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias, 18 June 2018, paras. 1, 22-24, p. 10; Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias, 18 June 2018, paras. 1, 18-20, p. 8.
[2503] Order Assigning Three Judges Pursuant to Rule 18 of the Rules, 4 September 2018 (originally filed in French, English translation filed on 5 September 2018), p. 1.
[2504] Order Assigning a Pre-Appeal Judge, 12 September 2018, p. 1.
[2505] Order Replacing a Judge, 14 September 2018 (originally filed in French, English translation filed on 27 February 2019), p. 1.
[2506] Order Replacing a Judge in a Case before the Appeals Chamber, 18 February 2021, p. 1.
[2507] Decision on Motion for Extension of Time to File Notice of Appeal, 21 December 2017, p. 2.
See also Decision on a Further Motion for an Extension of Time to File a Notice of Appeal, 9 March 2018, p. 2; Decision on Ratko Mladić's Motions for Reconsideration, 16 March 2018, pp. 3, 4.
[2508] Notice of Appeal of Ratko Mladić, 22 March 2018 (public with public and confidential annexes); Prosecution's Notice of Appeal, 22 March 2018.

804. On 22 May 2018, the Pre-Appeal Judge granted Mladić and the Prosecution extensions of 60 days for filing their respective appellant's and respondent's briefs.[2509] In the same decision, the Pre-Appeal Judge also granted Mladić an extension of the word limit for his appellant's brief, authorizing him to file a brief not exceeding 75,000 words, and granted the Prosecution an equivalent extension of the word limit for its respondent's brief.[2510]

805. On 6 August 2018, Mladić and the Prosecution filed their respective appellant's briefs.[2511] Both parties subsequently filed their respective respondent's briefs on 14 November 2018,[2512] and their respective reply briefs on 29 November 2018.[2513]

C. Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings

806. On 30 April 2018, the Appeals Chamber dismissed Mladić's motion seeking to stay appeal proceedings and to vacate the Trial Judgement on the basis of his alleged [REDACTED] fitness.[2514]

D. Decisions Pursuant to Rule 142 of the Rules

807. On 31 December 2018, Mladić filed five motions requesting the admission of additional evidence on appeal.[2515] On 11 March 2020, the Appeals Chamber, by majority, denied all five of Mladić's motions to admit additional evidence on appeal.[2516]

[2509] Decision on Ratko Mladić's Motion for Extensions of Time and Word Limits, 22 May 2018 ("Extension Decision of 22 May 2018"), pp. 3, 4.
[2510] Extension Decision of 22 May 2018, p. 4.
[2511] Appeal Brief on Behalf of Ratko Mladić, 6 August 2018 (confidential); Notice of Filing of Corrigendum to: Appeal Brief on Behalf of Ratko Mladić, 16 August 2018 (confidential; public redacted version filed on 11 September 2018); Prosecution Appeal Brief, 6 August 2018 (confidential; public redacted version filed on 7 August 2018).
[2512] Prosecution Response Brief, 14 November 2018 (confidential; public redacted version filed on 1 February 2019); Response to Prosecution's Appeal Brief on Behalf of Ratko Mladić, 14 November 2018.
[2513] Reply to Prosecution's Response Brief on Behalf of Ratko Mladić, 29 November 2018 (confidential; public redacted version filed on the same date); Prosecution Reply Brief, 29 November 2018 (confidential; public redacted version filed on 21 January 2019).
[2514] Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings, 30 April 2018 (confidential; public redacted version filed on 8 June 2018), pp. 1, 4, 5; Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Motion to Vacate the Trial Judgement and Stay the Proceedings, 26 June 2018 (confidential; public redacted version filed on the same date), pp. 1, 3, 4. *See also* Defence Motion to Vacate Judgment and Impose Stay of Proceedings, 31 January 2018 (confidential with public and confidential annexes; public redacted version filed on the same date).
[2515] Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 31 December 2018 (public with confidential Annex A and public Annex B); Notice of Filing of as to: Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 1 February 2019 (public with confidential Annex A3 and public Annex B); Second Notice of Filing of Translations Relating to: Ratko Mladić's First Motion to Admit New Evidence Pursuant to Rule 142 – International Witnesses, 8 March 2019 (confidential); Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 31 December 2018 (public with confidential annexes); Corrigendum to Ratko Mladić's Second Motion to Admit New Evidence Pursuant to Rule 142, 10 January 2019 (public with confidential annexes); Ratko Mladić's Third Motion to Admit New Evidence Pursuant to Rule 142 – Documents Made Accessible by the Central Intelligence Agency of the United States of America, 31 December 2018; Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment,

E. Status Conferences

808. In accordance with Rule 69 of the Rules, Status Conferences were held on 10 July 2018,[2517] 6 November 2018,[2518] 18 February 2019,[2519] 13 June 2019,[2520] 3 October 2019,[2521] 30 January 2020,[2522] and 24 July 2020.[2523] A Status Conference was scheduled for 19 November 2020 but was postponed at Mladić's request until a time when counsel would be available to appear with him in court.[2524]

F. Hearing of the Appeals

809. On 16 December 2019, the Appeals Chamber scheduled the hearing of the appeals to take place on 17 and 18 March 2020.[2525] On 6 March 2020, the Appeals Chamber stayed the hearing on the basis of Mladić's then-upcoming surgery, and requested weekly reports from the Registrar on the scheduling of Mladić's surgery and his recovery therefrom in order to facilitate the expeditious rescheduling of the hearing.[2526] On 1 May 2020, noting Mladić's progress in recovering from the surgery, the Appeals Chamber rescheduled the appeal hearing to take place on 16 and 17 June 2020, "subject to change should coronavirus pandemic-related restrictions inhibit the necessary travel or the holding of the hearing for other reasons".[2527] On 28 May 2020, based on submissions from the Registrar and the Defence, the Appeals Chamber, *inter alia*, found it not feasible to hold the appeal hearing on 16 and 17 June 2020 and stayed the hearing until further notice.[2528] On 17 July 2020, the

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31 December 2018; Notice of Filing of as to: Ratko Mladić Fourth Motion to Admit New Evidence Pursuant to Rule 142 – Sarajevo Segment, 1 February 2019; Ratko Mladić's Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 31 December 2018; Notice of Filing of Translations Relating to: Ratko Mladić's Fifth Motion to Admit New Evidence Pursuant to Rule 142 – Armija BiH Documents, 1 February 2019. *See also* Decision on Prosecution's Motion to Strike Mladić's Motions to Admit Additional Evidence, 22 January 2019.

[2516] Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date), para. 117. *See also* Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decisions on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date).

[2517] T. 10 July 2018 pp. 1-20. *See also* Order Scheduling a Status Conference, 19 June 2018, p. 1.

[2518] T. 6 November 2018 pp. 1-6. *See also* Order Scheduling a Status Conference, 5 October 2018, p. 1.

[2519] T. 18 February 2019 pp. 1-10. *See also* Order Scheduling a Status Conference, 3 January 2019, p. 1.

[2520] T. 13 June 2019 pp. 1-6. *See also* Order Scheduling a Status Conference, 5 April 2019, p. 2.

[2521] T. 3 October 2019 pp. 1-8. *See also* Order Scheduling a Status Conference, 29 August 2019, p. 2.

[2522] T. 30 January 2020 pp. 1-11. *See also* Order Scheduling a Status Conference, 17 October 2019, p. 2.

[2523] T. 24 July 2020 pp. 1-26. *See also* Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020 ("Decision of 17 July 2020"), p. 10; Order Concerning the Status Conference and Medical Reporting by the Registrar, 22 May 2020; Order Relating to the Status Conference, 20 May 2020; Order Scheduling a Status Conference, 11 May 2020.

[2524] *See* Order on the Scheduling of a Status Conference, 10 November 2020, pp 1, 2. *See also* Order Scheduling a Status Conference, 28 October 2020, p. 2.

[2525] Scheduling Order for the Hearing of the Appeals, 16 December 2019, p. 1.

[2526] Decision on a Motion to Stay the Appeal Hearing, 6 March 2020 (confidential; public redacted version filed on 11 March 2020), p. 4. *See also* Decision on a Motion to Reconsider the Decision Staying the Appeal Hearing, 11 March 2020 (confidential; public redacted version filed on the same date).

[2527] Second Order Scheduling the Hearing of the Appeals, 1 May 2020, p. 2.

[2528] Order Regarding the Hearing of the Appeals, 28 May 2020, pp. 3-5.

Appeals Chamber rescheduled the appeal hearing to take place on 25 and 26 August 2020 in The Hague, The Netherlands and provided for the remote participation of judges and the parties at the hearing given the circumstances of the coronavirus pandemic-related restrictions, should they so wish.[2529] On 14 August 2020, the Appeals Chamber denied the Defence requests to, *inter alia*, vacate the dates of the rescheduled appeal hearing, adjourn the proceedings until the coronavirus pandemic-related restrictions are eased so as to allow Mladić to be examined by medical professionals, and order a competency review process to determine Mladić's capacity for legal proceedings.[2530]

810. The Appeals Chamber heard the parties' oral arguments at the appeal hearing held in The Hague, The Netherlands on 25 and 26 August 2020.[2531] During the hearing, Judge Ibanda-Nahamya was present in the courtroom in person, while Judges Nyambe (presiding), N'gum, Kam, and Panton participated via videoconference-link.

[2529] *See* Decision of 17 July 2020, paras. 3-5, 14, 19, 20, pp. 10, 11.
[2530] Decision on Defence Submissions, 14 August 2020 ("Decision of 14 August 2020"), pp. 2, 6; Dissenting Opinion of Judge Prisca Matimba Nyambe to the "Decision on Defence Submissions" Filed on 14 August 2020, 14 August 2020. On 20 August 2020, the Appeals Chamber denied the Defence request to reconsider the Decision of 14 August 2020. *See* Decision on a Defence Motion to Reconsider the "Decision on Defence Submissions", 20 August 2020.
[2531] T. 25 August 2020 pp. 1-110; T. 26 August 2020 pp. 1-109.

IX. ANNEX B - CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Mechanism

MLADIĆ, Ratko

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Replacing a Judge in a Case before the Appeals Chamber, 18 February 2021

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order on the Scheduling of a Status Conference, 10 November 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 28 October 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Defence Motion to Reconsider the "Decision on Defence Submissions", 20 August 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Defence Submissions, 14 August 2020 ("Decision of 14 August 2020")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Dissenting Opinion of Judge Prisca Matimba Nyambe to the "Decision on Defence Submissions" Filed on 14 August 2020, 14 August 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on the Scheduling of the Appeal Hearing and a Status Conference, 17 July 2020 ("Decision of 17 July 2020")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Regarding the Hearing of the Appeals, 28 May 2020

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Concerning the Status Conference and Medical Reporting by the Registrar, 22 May 2020

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 11 May 2020

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Dissenting Opinion of Judge Prisca Matimba Nyambe to the Decisions on Motions for Admission of Additional Evidence on Appeal, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Reconsider the Decision Staying the Appeal Hearing, 11 March 2020 (confidential; public redacted version filed on the same date)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Stay the Appeal Hearing, 6 March 2020 (confidential; public redacted version filed on 11 March 2020)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Scheduling Order for the Hearing of the Appeals, 16 December 2019

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 17 October 2019

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 5 April 2019

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Scheduling a Status Conference, 3 January 2019

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Replacing a Judge, 14 September 2018 (originally filed in French, English translation filed on 27 February 2019)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Assigning a Pre-Appeal Judge, 12 September 2018

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Order Assigning Three Judges Pursuant to Rule 18 of the Rules, 4 September 2018 (originally filed in French, English translation filed on 5 September 2018)

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Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Ratko Mladić's Motion for Extensions of Time and Word Limits, 22 May 2018 ("Extension Decision of 22 May 2018")

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on a Motion to Vacate the Trial Judgement and to Stay Proceedings, 30 April 2018 (confidential; public redacted version filed on 8 June 2018)

Prosecutor v. Ratko Mladić, Case No. MICT-13-56-A, Decision on Ratko Mladić's Motions for Reconsideration, 16 March 2018

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Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Registrar's Submission of Medical Report, 24 July 2014 (confidential), Annex B ([REDACTED] of 7 July 2014) ("Medical Report of 7 July 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Report, 9 July 2014 (confidential), Annex A ([REDACTED] of 28 June 2014) ("Medical Report of 28 June 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Supplemental Submission of Preliminary Witness and Exhibit List Under Rule 65 *ter* (G), 19 May 2014 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Deputy Registrar's Submission of Medical Reports, 24 January 2014 (confidential) ("Submission of 24 January 2014")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response in Opposition to "Prosecution Motion to Admit Evidence From the Bar Table", 30 December 2013

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution Motion to Admit Evidence From the Bar Table, 31 October 2013 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response to Prosecution Motion to Amend its Rule 65 *ter* Witness List, 4 July 2013

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List, 20 June 2013

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Second Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 16 April 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution Twenty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*: Srebrenica (Various), 3 April 2013 (confidential) ("Motion of 3 April 2013")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Response to Prosecution Motion for Admission into Evidence the Utterances of the Accused, 2 April 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013 (confidential) ("Motion of 18 March 2013")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 15 January 2013 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-AR73.2, Defense Interlocutory Appeal Brief Against the Trial Chamber Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 21 August 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-AR73.1, Defense Interlocutory Appeal Brief Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 4 July 2012 ("Defense Interlocutory Appeal Brief of 4 July 2012")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure, 3 July 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Supplement to Motion to Reconsider Decision of 24 May 2012, 5 June 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Motion to Reconsider Decision of 24 May 2012, 31 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution's Submission of Informal Correspondence, 16 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Urgent Defence Motion to Adjourn and Continue Trial or in the Alternative Bar the Prosecution from Presenting any Witnesses or Exhibits that were Untimely Disclosed, 14 May 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Eighth Prosecution Report on Pre-Trial Preparations, 1 May 2012 (confidential) ("Eighth Prosecution Pre-Trial Report")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Report on Disclosure and Motion to Continue Trial, 1 May 2012 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Defense Response to the Prosecution "Corrigendum" Seeking Addition of Documents to the Rule 65 *ter* Exhibit List, 12 April 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Notice Pursuant to Chamber Direction of 29 March 2012, and Urgent Motion to Compel, 10 April 2012 (confidential)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Pre-Trial Brief, 24 February 2012

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Amended Defense Submission Pursuant to Instruction from Chambers, and Motion Relative to Problems with Disclosure that Prevent Trial Preparations, 9 February 2012 (public with confidential annexes)

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedule of Incidents, 16 December 2011

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 December 2011 ("Prosecution Motion on Adjudicated Facts")

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Defense Preliminary Motion Objecting to the Form of the Second Amended Indictment, 12 September 2011

Prosecutor v. Radovan Karadžić, Case No. IT-95-05/18-PT, Karadžić Pre-Trial Brief, 29 June 2009

C. Other Materials

Belgium, *Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977 additionnels à ces Conventions*, 5 August 1993

Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279

Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted on 28 September 1976, entered into force on 1 July 1977, and repealed by the Criminal Code of the Republic of Serbia on 1 January 2006

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55.
Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221

France, *Décret n°75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées (1975)*, as amended in 1982

Germany, Humanitarian Law in Armed Conflicts – Manual, Federal Ministry of Defence, Federal Republic of Germany, 1992

International Committee of the Red Cross, Commentary of 1958 on Article 146(3) of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 12 August 1949

International Committee of the Red Cross, Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

Ireland, Geneva Conventions Act No.11 of 21 April 1962

Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, adopted on 13 April 1988 ("SFRY Military Manual")

Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker U.N. Doc. E/CN.4/Sub.2/1985/6, 2 July 1985

The Constitution of the Socialist Federal Republic of Yugoslavia, Belgrade, 1974

The Netherlands, Military Manual, 1993

The SFRY Law on the Ratification of the Additional Protocol to the Geneva Convention from 12 August 1949 on the Protection of Victims of International Organized Conflicts (Protocol I) and the Additional Protocol with the Geneva Convention of 12 August 1949 on the Protection of victims of International Organized Conflicts (Protocol II), 26 December 1978

United Kingdom, The Law of War on Land being Part III of the Manual of Military Law, The War Office, HMSO, 1958 ("United Kingdom Military Manual")

United States, Field Manual, US Department of the Army, 18 July 1956, as amended by Change No. 1, 1976 ("United States Military Manual")

United States, United States Code, 2006 Edition, Supplement 5, Title 18, Crimes and Criminal Procedure ("18 U.S.C. § 1093(8) (2006)")

D. Defined Terms and Abbreviations

16th Assembly Session

The 16th Session of the Bosnian Serb Assembly held on 12 May 1992

24th Assembly Session

The 24th Session of the Bosnian Serb Assembly held on 8 January 1993

Additional Protocol I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3

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 (Protocol II), 8 June 1977, 1125 U.N.T.S. 609

Additional Protocols

Additional Protocols I and II, collectively

ABiH

Army of the Republic of Bosnia and Herzegovina (*Armija Bosne i Hercegovine*)

Alleged Utterances

Statements uttered by Ratko Mladić during recess on 18 February 2013

Appeals Chamber

Appeals Chamber of the Mechanism

Arkan

Željko Ražnatović

Batch 4-c

Portions of the Prosecution's disclosure to the Defence on 3 October 2011 that had, for technical reasons, not been properly disclosed

Batch 5

Portions of the Prosecution's disclosure to the Defence on 11 November 2011 that had, for technical reasons, not been properly disclosed

Belgrade Discussions

Discussions in Belgrade that took place on 14 and 15 July 1995 between, *inter alia*, Mladić, the UN, European Union, and UNPROFOR

Common Article 3

Common Article 3 to the Geneva Conventions of 1949

Count 1 Communities

Bosnian Muslim communities within the Count 1 Municipalities

Count 1 Municipalities

Municipalities of Bosnia and Herzegovina referred to in paragraph 37 of the Indictment, including: Foča, Kotor Varoš, Prijedor, Sanski Most, and Vlasenica

Crime of attacking undefended locales

Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings as a violation of the laws or customs of war pursuant to Article 3(c) of the ICTY Statute

Crime of terror

Acts of violence the primary purpose of which is to spread terror among the civilian population as a violation of the laws or customs of war punishable under Article 3 of the ICTY Statute

CSB

Security Services Centre (*Centar službi bezbjednosti*)

DutchBat

Dutch Battalion of UNPROFOR

Directive 4

A directive issued by Ratko Mladić to the VRS on 19 November 1992 that relates to, *inter alia*, the treatment of Muslim and Croatian forces

Directive 7

A directive signed by Radovan Karadžić on 8 March 1995 that outlined the four priorities of the VRS: (i) through resolute offensive and defensive military operations, imposing a military situation which the international community would be compelled to accept; (ii) improving the operational and strategic position of the VRS; (iii) reducing the front-line, and creating conditions for the economic revival of *Republika Srpska* by sending a number of military conscripts home; and (iv) creating the conditions for the state and political leadership to negotiate a peace agreement and accomplishing the strategic objectives of the war

Directive 7/1

A directive signed by Ratko Mladić on 31 March 1995 that repeated most of the tasks of the VRS as outlined in Directive 7 and translated Directive 7 into operational military tasks

ECtHR

European Court of Human Rights

EDS

Electronic Disclosure Suite

Four Orders

Four orders issued by Mladić or the VRS Main Staff between 14 and 16 July 1995

Fourth Condition

The last of four conditions, set out by the ICTY Appeals Chamber in the *Tadić* Decision of 2 October 1995, to satisfy Article 3 of the ICTY Statute's residual jurisdiction, namely that the violation of the rule must entail, under customary international law, individual criminal responsibility of the person breaching the rule

Geneva Convention I

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31

Geneva Convention II

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85

Geneva Convention III

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135

Geneva Convention IV

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287

Geneva Conventions

Geneva Convention I, Geneva Convention II, Geneva Convention III and Geneva Convention IV, collectively

Hostage-Taking JCE

Joint criminal enterprise that existed between approximately 25 May 1995 and approximately 24 June 1995 with the objective to capture UN Personnel deployed in Bosnia and Herzegovina and detain them in strategic military locations to prevent NATO from launching air strikes against Bosnian Serb military targets

ICC

International Criminal Court

ICC Statute

Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 3

ICCPR

International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, 999 U.N.T.S. 171

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

ICTR Rules

ICTR Rules of Procedure and Evidence

ICTR Statute

Statute of the ICTR

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

ICTY Rules

ICTY Rules of Procedure and Evidence

ICTY Statute

Statute of the ICTY

Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Prosecution Submission of the Fourth Amended Indictment and Schedules of Incidents, 16 December 2011, Annex A

Intercepts

Exhibits P1235, P1297, P1320, P1321, P1322, P1338, P1655, P1657, P1658, P2126, P4222, P4223, and P7397 concerning intercepts dated between 12 July 1995 and 22 September 1995

JNA

Yugoslav People's Army (*Jugoslavenska Narodna Armija*)

Krivaja-95

A code-named operation based on two orders signed by Drina Corps Commander General Major Milenko Živanović on 2 July 1995, laying out plans for an attack on the Srebrenica enclave and ordering various Drina Corps units to ready themselves for combat

Mechanism

International Residual Mechanism for Criminal Tribunals

Mladić Appeal Brief

Appeal Brief on Behalf of Ratko Mladić, 6 August 2018 (confidential); Notice of Filing of Corrigendum to: Appeal Brief on Behalf of Ratko Mladić, 16 August 2018, Annex C (confidential; public redacted version filed on 11 September 2018)

Mladić Final Trial Brief

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

Mladić Notice of Appeal

Notice of Appeal of Ratko Mladić, 22 March 2018 (public and confidential annexes)

Mladić Pre-Trial Brief

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Defense Pre-Trial Brief, 3 April 2012

Mladić Reply Brief

Reply to Prosecution's Response Brief on Behalf of Ratko Mladić, 29 November 2018 (confidential; public redacted version filed on the same date)

Mladić Response Brief

Response to Prosecution's Appeal Brief on Behalf of Ratko Mladić, 14 November 2018

Prosecution Appeal Brief

Prosecution Appeal Brief, 6 August 2018 (confidential; public redacted version filed on 7 August 2018)

Prosecution Final Trial Brief

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Prosecution's Submission of Final Trial Brief, 25 October 2016 (confidential)

Prosecution Notice of Appeal

Prosecution's Notice of Appeal, 22 March 2018

Prosecution Reply Brief

Prosecution Rep[l]y Brief, 29 November 2018 (confidential; public redacted version filed on 21 January 2019)

Prosecution Response Brief

Prosecution Response Brief, 14 November 2018 (confidential; public redacted version filed on 1 February 2019)

Registry

Office of the Registrar of the ICTY or the Mechanism

RP.

Registry Pagination

Rule 65 *ter* filings

Filings pursuant to Rule 65 *ter* of the ICTY Rules

Rule 92 *bis* Evidence

Evidence admitted pursuant to Rule 92 *bis* of the ICTY Rules

Rules

Rules of Procedure and Evidence of the Mechanism

Sarajevo JCE

Joint criminal enterprise that existed between 12 May 1992 and November 1995 with the objective to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling, including through the commission of murder, terror, and unlawful attacks against civilians

Scheduled Incidents

The 106 incidents enumerated in Schedules A to G of the Indictment

Second Amended Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-I, Prosecution's Second Amended Indictment, 1 June 2011

Security Council Resolution 1966

UN Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010

SFRY

Socialist Federal Republic of Yugoslavia

SJB

Public Security Station (*Stanica Javne Bezbjednosti*)

Srebrenica JCE

Joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys and forcibly removing the women, young children, and some elderly men from the days immediately preceding 11 July 1995 to at least October 1995

SRK

Sarajevo Romanija Corps of the VRS (*Sarajevo Romanija Korpus*)

Statute

Statute of the Mechanism

Supreme Command

Supreme Command of the VRS

Third Amended Indictment

Prosecutor v. Ratko Mladić, Case No. IT-09-92-PT, Third Amended Indictment, 20 October 2011

Trial Chamber

Trial Chamber of the ICTY seized of the case of *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T

Trial Judgement

Prosecutor v. Ratko Mladić, Case No. IT-09-92-T, Judgment, 22 November 2017 (confidential; public redacted version filed on the same date)

UN

United Nations

UNMO(s)

United Nations Military Observer(s)

UN Personnel

UNPROFOR and UNMO personnel detained by VRS soldiers and officers between 25 May and 24 June 1995 in relation to the Hostage-Taking JCE

UNPROFOR

United Nations Protection Force

Unscheduled Incidents

Incidents that the Trial Chamber considered and made findings on, but were not enumerated in Schedules A to G of the Indictment

VRS

Army of *Republika Srpska* (*Vojska Republike Srpske*)

VJ

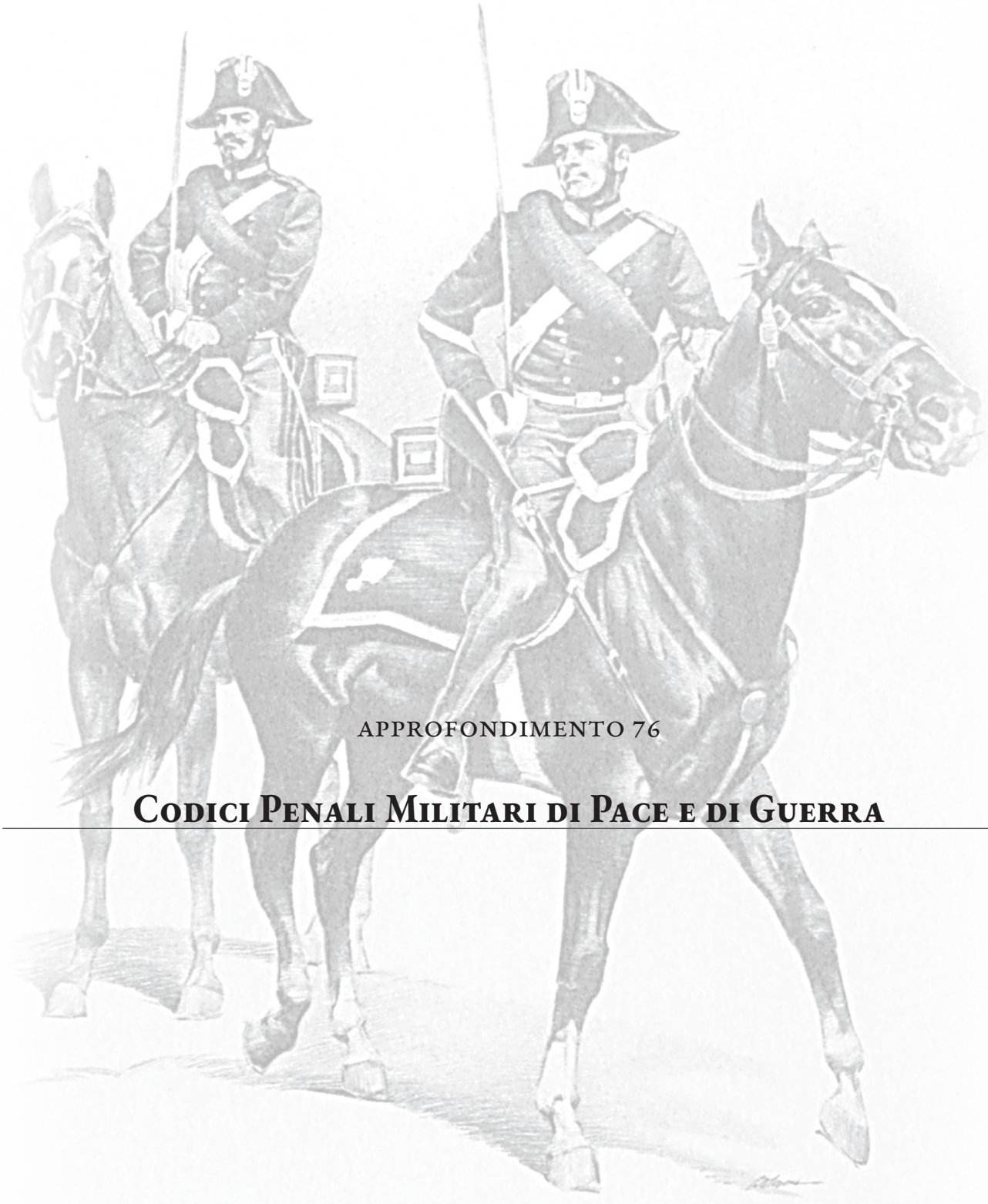
Yugoslav Army (*Vojska Jugoslavije*)

Warning of 23 August 2012

The warning given by the Trial Chamber to Mladić on 23 August 2012 that loud and audible statements "shouted across a courtroom" are considered a waiver of his lawyer-client privilege

Zvornik Brigade Report

A daily combat report issued by the Zvornik Brigade Command on 14 July 1995 to the Drina Corps Command



APPROFONDIMENTO 76

Codici Penali Militari di Pace e di Guerra

REGIO DECRETO 20 febbraio 1941, n. 303
Codici penali militari di pace e di guerra (041U0303) (Gazzetta Ufficiale n.107 del 6-5-1941 - Suppl. Ordinario)

CODICE PENALE MILITARE DI PACE

TITOLO PRIMO DELLA LEGGE PENALE MILITARE

TITOLO SECONDO DELLE PENE MILITARI

CAPO I Delle specie di pene militari, in generale

CAPO II Delle pene militari principali, in particolare

CAPO III Delle pene militari accessorie, in particolare

TITOLO TERZO DEL REATO MILITARE

CAPO I Del reato consumato e tentato

CAPO II Circostanze del reato militare

LIBRO PRIMO DEI REATI MILITARI, IN GENERALE

CAPO III Del concorso di reati

TITOLO QUARTO DEL REO

CAPO I Della recidiva

CAPO II Del concorso di persone nel reato

TITOLO QUINTO DELL'APPLICAZIONE E DELLA ESECUZIONE DELLA PENA

TITOLO SESTO DELLA ESTINZIONE DEL REATO MILITARE E DELLA PENA MILITARE

TITOLO SETTIMO DELLE MISURE AMMINISTRATIVE DI SICUREZZA

LIBRO SECONDO DEI REATI MILITARI, IN PARTICOLARE

TITOLO PRIMO DEI REATI CONTRO LA FEDELTÀ E LA DIFESA MILITARE

CAPO I Del tradimento

CAPO II Dello spionaggio militare e della rivelazione di segreti militari

CAPO III Disposizioni comuni ai capi precedenti

TITOLO SECONDO DEI REATI CONTRO IL SERVIZIO MILITARE

CAPO I Dei reati in servizio

» Sezione I Della violazione di doveri generali inerenti al comando

» Sezione II Dell'abbandono di posto e della violazione di consegna

» Sezione III Della violazione di doveri inerenti a speciali servizi

» Sezione IV Della violazione di speciali doveri inerenti alla qualità militare

» Sezione V Della ubriachezza in servizio

CAPO II Dei reati contro militari in servizio

CAPO III Dei reati di assenza dal servizio alle armi

» Sezione I Dell'allontanamento illecito

» Sezione II Della diserzione

» Sezione III Della mancanza alla chiamata

» Sezione IV Disposizioni comuni alle sezioni seconda e terza

CAPO IV Della mutilazione e della simulazione d'infermità

CAPO V Della distruzione, alienazione, acquisto o ritenzione di effetti militari

CAPO VI Distruzione o danneggiamento di opere, di edifici o di cose mobili militari

TITOLO TERZO DEI REATI CONTRO LA DISCIPLINA MILITARE

CAPO I Della disobbedienza

CAPO II Della rivolta, dell'ammutinamento e della sedizione militare

REGIO DECRETO
20 febbraio 1941, n. 303
Codici penali militari di pace e di guerra
(041U0303)
(GU n.107 del 6-5-1941 - Suppl. Ordinario)

VITTORIO EMANUELE III
PER GRAZIA DI DIO E PER VOLONTÀ
DELLA NAZIONE
RE D'ITALIA E DI ALBANIA
IMPERATORE D'ETIOPIA

Vista la legge 25 novembre 1926-V, n. 2153, che delega al Governo del Re la facoltà di provvedere alla riforma della legislazione penale militare;
Sentito il parere della Commissione delle assemblee legislative, à termini dell'articolo 2 della legge predetta;
Udito il Consiglio dei Ministri;
Sulla proposta del DUCE del Fascismo, Capo del Governo, Ministro della guerra, della marina e dell'aeronautica, di concerto con il Ministro di grazia e giustizia, con il Ministro dell'Africa Italiana e con il Ministro delle finanze;
Abbiamo decretato e decretiamo:

Art. 1.

Il testo del Codice penale militare di pace e il testo del Codice penale militare di guerra, portanti la data di questo giorno, sono approvati e avranno esecuzione a cominciare dal 1° ottobre 1941-XIX.

Art. 2.

Un esemplare del Codice penale militare di pace e un esemplare del Codice penale militare di guerra, firmati da Noi e contrassegnati dal DUCE del Fasciamo, Capo del Governo, Ministro della guerra della marina e dell'aeronautica, serviranno da originali e saranno depositati e custoditi nell'Archivio del Regno.

Art. 3.

La pubblicazione dei predetti codici si eseguirà col trasmettere un esemplare stampato di ciascuno di essi a ogni Comune del Regno, per essere depositato nella sala comunale, e tenuto ivi esposto, durante un mese successivo, per sei ore in ciascun giorno, affinché ognuno possa prenderne cognizione.
Ordiniamo che il presente decreto, munito del sigillo dello Stato, sia inserto nella Raccolta ufficiale delle leggi e dei decreti del Regno d'Italia, mandando a chiunque spetti di osservarlo e di farlo osservare.

Dato a Roma, addì 20 febbraio 1941-XIX

VITTORIO EMANUELE

Mussolini - Grandi - Teruzzi - Di Revel

Visto:
(ai sensi del R. decreto 20 febbraio 1941-XIX, n. 76)

MUSSOLINI
Registrato alla Corte dei conti, addì 3 maggio 1941-XIX

Atti del Governo, registro 433, foglio 17. - Mancini

CODICE PENALE MILITARE DI PACE LIBRO PRIMO DEI REATI MILITARI, IN GENERALE TITOLO PRIMO DELLA LEGGE PENALE MILITARE

CODICE PENALE MILITARE DI PACE

Art. 1.

(Persone soggette alla legge penale militare).

La legge penale militare si applica ai militari in servizio alle armi e a quelli considerati tali.
La legge determina i casi, nei quali la legge penale militare si applica ai militari in congedo, ai militari in congedo assoluto, agli assimilati ai militari, agli iscritti ai corpi civili militarmente ordinati e a ogni altra persona estranea alle forze armate dello Stato.

Art. 2.

(Denominazioni di «militari» e di «forze armate dello Stato»).

Il presente codice comprende:
1° sotto la denominazione di militari, quelli del Regio esercito, della Regia marina, della Regia aeronautica, della Regia guardia di finanza, della Milizia volontaria per la sicurezza nazionale, del Corpo di polizia dell'Africa italiana e le persone che a norma di legge acquistano la qualità di militari;
2° sotto la denominazione di forze armate dello Stato, le forze militari suindicate.

Art. 3.

(Militari in servizio alle armi).

Salvo che la legge disponga altrimenti, ai militari in servizio alle armi la legge penale militare si applica:
1° relativamente agli ufficiali, dal momento della notificazione del provvedimento di nomina fino al giorno della notificazione del provvedimento, che li colloca fuori del servizio alle armi;
2° relativamente agli altri militari, dal momento stabilito per la loro presentazione fino al momento in cui, inviati in congedo, si presentano all'Autorità competente del comune di residenza da essi prescelto; o, se sottufficiali di carriera, fino al momento della notificazione del provvedimento, che li colloca fuori del servizio alle armi.
L'assenza del militare dal servizio alle armi per licenza, ancorché illimitata, per infermità, per detenzione preventiva, o per altro analogo motivo, non esclude l'applicazione della legge penale militare.
Agli effetti delle disposizioni di questo titolo, per notificazione del provvedimento s'intende la comunicazione personale di questo all'interessato, ovvero, quando la comunicazione personale non sia ancora avvenuta, la pubblicazione del provvedimento nel bollettino ufficiale, o nei corrispondenti mezzi di notificazione delle varie forze armate dello Stato.

Art. 4.

(Appartenenti alla Milizia volontaria per la sicurezza nazionale).

Agli appartenenti alla Milizia volontaria per la sicurezza nazionale la legge penale militare si applica, quando prestano comunque servizio alle armi.
Agli effetti della legge penale militare, gli appartenenti alla Milizia volontaria per la sicurezza nazionale, quando sono chiamati per prestare servizio alle armi, sono considerati in servizio, ancorché' non si presentino, dal momento stabilito per la loro presentazione fino al momento stabilito per la cessazione del servizio stesso.
Fuori dei casi preveduti dai commi precedenti, agli appartenenti alla Milizia volontaria per la sicurezza nazionale la legge penale militare si applica, quando commettono un reato preveduto dalla legge medesima a causa del servizio, ovvero a danno di questo o della amministrazione militare.

Art. 5.

(Militari considerati in servizio alle armi).

Agli effetti della legge penale militare, sono considerati in servizio alle armi:
1° gli ufficiali collocati in aspettativa, o sospesi dall'impiego, o che comunque, à termini delle leggi

che ne regolano lo stato, sono nella posizione di servizio permanente, ancorché' non prestino servizio effettivo alle armi;
2° i sottufficiali di carriera collocati in aspettativa;
3° i militari in stato di allontanamento illecito, diserzione o mancanza alla chiamata, o comunque arbitrariamente assenti dal servizio;
4° i militari in congedo, che scontano una pena militare detentiva, originaria o sostituita a pene comuni;
5° i militari in congedo, che si trovano in stato di detenzione preventiva in un carcere militare, per un reato soggetto alla giurisdizione militare;
6° ogni altro militare in congedo, considerato in servizio alle armi a norma di legge o dei regolamenti militari.

Art. 6.

(Militari richiamati in servizio alle armi).

Ai militari in congedo richiamati in servizio alle armi la legge penale militare si applica dal momento stabilito per la presentazione alle armi fino al loro rinvio in congedo; osservate le norme dei regolamenti militari e, relativamente al congedo, le disposizioni dell'articolo 3.

Art. 7.

(Militari in congedo non considerati in servizio alle armi).

((Fuori dei casi in cui sono considerati in servizio alle armi ai sensi dei precedenti articoli 5 e 6, ai militari in congedo illimitato la legge penale militare si applica:
1) quando commettono alcuno dei reati contro la fedeltà o la difesa militare, previsti negli articoli 77 (alto tradimento); 78 (istigazione all'alto tradimento, cospirazione e banda armata); 84 (intelligenza con lo straniero e offerta di servizi); 85 (soppressione, distruzione, falsificazione o sottrazione di atti, documenti o cose concernenti la forza, la preparazione o la difesa militare dello Stato); 86 (rivelazione di segreti militari a scopo di spionaggio); 87 (accordo per commettere rivelazioni di segreti militari a scopo di spionaggio); 88 (procacciamento di notizie segrete, a scopo di spionaggio); 89-bis (esecuzione indebita di disegni, ed introduzione clandestina in luoghi di interesse militare a scopo di spionaggio);99 (corrispondenza con Stato estero diretta a commettere fatti di tradimento e di spionaggio militare); e nell'art. 98 (istigazione od offerta), quando l'istigazione o l'offerta si riferisce ad alcuni dei reati previsti negli articoli 84, 85, 86, 87, 88 e 89-bis.
Al militare in congedo che commette uno dei reati sopra elencati, sono applicabili anche le disposizioni degli articoli 96, 101 e 102 di questo Codice;
2) quando commettono i reati previsti negli articoli 157, 158 e 159 (procurata infermità al fine di sottrarsi agli obblighi (lei servizio militare, e simulazione d'infermità); nell'art. 212 (istigazione a commettere reati militari), e nell'art. 238 (reati commessi a causa del servizio prestato); nei limiti ed alle condizioni previste rispettivamente negli articoli 160, 214 e 238 di questo Codice;
3) per il reato di omessa presentazione alla chiamata di controllo, ai sensi degli articoli 4 e 7 della legge 27 marzo 1930, n. 460, modificata dalla legge 3 giugno 1935, n. 1018, e dalla legge 7 dicembre 1951, n. 1565, degli articoli 205 e 207 del regio decreto 24 febbraio 1938, n. 329, e 103 del regio decreto 28 luglio 1932, n. 1365)).

Art. 8.

(Cessazione dell'appartenenza alle forze armate dello Stato).

Agli effetti della legge penale militare, cessano di appartenere alle forze armate dello Stato:
1° gli ufficiali, dal giorno successivo alla notificazione del provvedimento, che stabilisce la cessazione definitiva degli obblighi di servizio militare;
2° gli altri militari, dal momento della consegna a essi del foglio di congedo assoluto. ***((24))***

AGGIORNAMENTO 824)
La Corte Costituzionale con sentenza 12 - 20 dicembre 1989 n. 556 (in G.U. 1a s.s. 27/12/1989 n. 52) ha dichiarato "l'illegittimità costituzionale dell'art. 8, n. 2, del codice penale militare di pace, nella parte in cui prevede che, agli effetti della legge penale militare, i sottufficiali ed i militari di truppa cessano di appartenere alle Forze Armate dello Stato dal momento della consegna a essi del foglio di congedo assoluto, anziché' dal momento del loro effettivo congedamento".

Art. 9.

(Ufficiali di complemento di prima nomina).

Agli effetti della legge penale militare, sono considerati militari in congedo gli ufficiali di complemento,

dal momento della notificazione del provvedimento di nomina fino al momento stabilito per iniziare il servizio di prima nomina.

Art. 10.

(Assimilati ai militari. Iscritti ai corpi civili militarmente ordinati).

La legge penale militare si applica agli assimilati ai militari e agli iscritti ai corpi civili militarmente ordinati:
1° nei casi preveduti dalle rispettive leggi speciali;
2° per i reati commessi mentre si trovano in stato di detenzione preventiva in un carcere militare.

Art. 11.

(Piloti e capitani di navi mercantili o aeromobili civili. Persone imbarcate).

La legge penale militare si applica:
1° ai piloti e ai capitani di navi mercantili o aeromobili civili, per i reati che, rispetto a essi, sono preveduti da questo codice;
2° a ogni persona imbarcata sopra nave o aeromobile militare, dal momento della notificazione della sua destinazione a bordo fino all'atto di sbarco regolare, ovvero, nel caso di perdita della nave o dell'aeromobile, fino allo scioglimento dell'equipaggio.
Agli effetti della legge penale militare, sono navi militari e aeromobili militari le navi e gli aeromobili da guerra, le altre navi o aeromobili regolarmente trasformati in navi o aeromobili da guerra, e ogni altra nave e ogni altro aeromobile adibiti al servizio delle forze armate dello Stato alla dipendenza di un comandante militare.

Art. 12.

(Determinazione del grado degli assimilati e delle persone imbarcate).

Agli effetti della legge penale militare, gli assimilati ai militari e ogni altra persona imbarcata sopra navi o aeromobili militari sono considerati come aventi il grado, al quale, rispettivamente, corrisponde l'assimilazione ovvero il rango in cui furono collocati nell'ordine d'imbarco.

Art. 13.

(Militari in congedo, assimilati ai militari e iscritti ai corpi civili militarmente ordinati, considerati come estranei alle forze armate dello Stato).

Fuori dei casi preveduti dagli articoli precedenti, i militari in congedo, i militari in congedo assoluto, gli assimilati ai militari e gli iscritti ai corpi civili militarmente ordinati sono considerati, agli effetti della legge penale militare, come persone estranee alle forze armate dello Stato.

Art. 14.

(Estranei alle forze armate dello Stato).

Sono soggette alla legge penale militare le persone estranee alle forze armate dello Stato, che concorrono a commettere un reato militare.
Oltre i casi espressamente enunciati nella legge, alle persone estranee alle forze armate dello Stato, che commettono alcuno dei fatti preveduti dagli articoli 94, 136, 140, 141, 142, 145, 182 e 184, si applicano le pene stabilite per i militari, sostituite le pene comuni alle militari secondo le disposizioni dell'articolo 65.
Tuttavia, il giudice può diminuire la pena.

Art. 15.

(Reati commessi durante il servizio e scoperti o giudicati dopo la cessazione di esso).

La legge penale militare si applica per i reati militari commessi durante il servizio militare, ancorché siano scoperti o giudicati quando il colpevole si trovi in congedo o abbia cessato di appartenere alle forze armate dello Stato.

Art. 16.

(Nullità dell'arruolamento; incapacità; prestazione di fatto del servizio alle armi).

La legge penale militare si applica alle persone appartenenti alle forze armate dello Stato, ancorché, posteriormente al reato commesso, sia dichiarata la nullità dell'arruolamento o la loro incapacità di appartenere alle forze stesse; e, in generale, a chiunque presta di fatto servizio alle armi.

Art. 17.

(Reati commessi in territorio estero di occupazione, di soggiorno o di transito).

La legge penale militare si applica alle persone che vi sono soggette, anche per i reati commessi in territorio estero di occupazione, soggiorno o transito delle forze armate dello Stato, osservate le convenzioni e gli

usi internazionali.

Art. 18.

(Reati commessi in territorio estero).

Fuori dei casi preveduti dall'articolo precedente, per i reati commessi in territorio estero, le persone soggette alla legge penale militare sono punite secondo la legge medesima, a richiesta del Ministro competente à termini dell'articolo 260.

Art. 19.

(Materie regolate da altre leggi penali militari).

Le disposizioni di questo codice si applicano anche alle materie regolate dalla legge penale militare di guerra e da altre leggi penali militari, in quanto non sia da esse stabilito altrimenti.

Art. 20.

(Applicazione della legge penale militare di guerra nello stato di pace).

La legge determina i casi, nei quali la legge penale militare di guerra si applica nello stato di pace.

Art. 21.

((ARTICOLO ASOPPRESSO DALLA L. 23 MARZO 1956, N. 167))

TITOLO SECONDO
DELLE PENE MILITARI
CAPO I
Delle specie di pene militari, in generale

Art. 22.

(Pene militari principali: specie).

Le pene militari principali sono:
1° la morte;
2° la reclusione militare.
La legge penale militare determina i casi, nei quali, per i reati militari, si applicano le pene comuni dell'ergastolo e della reclusione.

Art. 23.

(Denominazione e classificazione della reclusione militare).

Sotto la denominazione di pene detentive o restrittive della libertà personale è compresa, oltre le pene indicate nel primo comma dell'articolo 18 del codice penale, anche la reclusione militare.

Art. 24.

(Pene militari accessorie: specie).

Le pene militari accessorie sono:
1° la degradazione;
2° la rimozione;
3° la sospensione dall'impiego;
4° la sospensione dal grado;
5° la pubblicazione della sentenza di condanna.

CAPO II
Delle pene militari principali, in particolare

Art. 25.

(Pena di morte).

La pena di morte è eseguita mediante fucilazione nel petto, in un luogo militare.
La pena di morte è eseguita mediante fucilazione nella schiena, quando la condanna importa la degradazione.
Le norme per l'esecuzione della pena di morte sono stabilite dai regolamenti militari approvati con decreto Reale.
Nei casi in cui la legge penale militare, per reati commessi da persone estranee alle forze armate dello Stato, stabilisce espressamente la pena della morte mediante fucilazione nella schiena, questa s'intende equiparata, a ogni effetto, alla pena di morte con degradazione.

Art. 26.

(Reclusione militare).

La pena della reclusione militare si estende da un mese a ventiquattro anni, ed è scontata in uno degli stabilimenti a ciò destinati, con l'obbligo del lavoro, secondo le norme stabilite dalla legge o dai regolamenti militari approvati con decreto Reale.
Se la durata della reclusione militare non supera sei mesi, essa può essere scontata in una sezione speciale del carcere giudiziario militare.
Gli ufficiali, che per effetto della condanna non hanno perduto il grado, scontano la pena della reclusione militare in uno stabilimento diverso da quello desti-

nato agli altri militari.

Art. 27.

(Sostituzione della reclusione militare alla reclusione).

Alla pena della reclusione, inflitta o da infliggersi ai militari per reati militari, è sostituita la pena della reclusione militare per eguale durata, quando la condanna non importa la degradazione.
Nel caso preveduto dal comma precedente, per la determinazione delle pene accessorie e degli altri effetti penali della condanna, si ha riguardo alla pena della reclusione militare. ***((36))***

AGGIORNAMENTO (36)
La Corte Costituzionale con sentenza 26 - 30 luglio 1993 n. 358 (in G.U. 1a s.s. 04/08/1993 n. 32) ha dichiarato "l'illegittimità costituzionale dell'art. 27 c.p.m.p. nella parte in cui consente che la conversione della pena della reclusione comune in quella della reclusione militare possa avvenire in relazione alla sanzione penale comminata per il reato previsto nell'art. 8, secondo comma, della legge 15 dicembre 1972, n. 772".

CAPO III
Delle pene militari accessorie, in particolare

Art. 28.

(Degradazione)

La degradazione si applica a tutti i militari, è perpetua e priva il condannato:
1° della qualità di militare e, salvo che la legge disponga altrimenti, della capacità di prestare qualunque servizio, incarico od opera per le forze armate dello Stato;
2° delle decorazioni, delle pensioni e del diritto alle medesime per il servizio anteriormente prestato.***((7))***
La legge determina i casi, nei quali la condanna alla pena di morte importa la degradazione.
La condanna all'ergastolo, la condanna alla reclusione per un tempo non inferiore a cinque anni e la dichiarazione di abitualità o di professionalità nel delitto, ovvero di tendenza a delinquere, pronunciate contro militari in servizio alle armi o in congedo, per reati militari, importano la degradazione.
Nel caso di condanna alla pena di morte con degradazione e in quelli indicati nel comma precedente, restano fermi le pene accessorie e gli altri effetti penali derivanti dalla condanna a norma della legge penale comune.

AGGIORNAMENTO 87)
La Corte Costituzionale con sentenza 15 giugno - 3 luglio 1967 n. 78 (in G.U. 1a s.s. 08/07/1967 n. 170) ha dichiarato l'illegittimità costituzionale dell'art. 28 "del Codice penale militare di pace approvato con R.D. 20 febbraio 1941, n. 303, limitatamente alla parte del primo comma n. 2, in base alla quale la degradazione priva il condannato "delle pensioni e del diritto alle medesime per il servizio anteriormente prestato"."

Art. 29.

(Rimozione).

La rimozione si applica, a tutti i militari rivestiti di un grado o appartenenti a una classe superiore all'ultima; è perpetua, priva il militare condannato del grado e lo fa discendere alla condizione di semplice soldato o di militare di ultima classe.
La condanna alla reclusione militare, salvo che la legge disponga altrimenti, importa la rimozione:
1° per gli ufficiali e sottufficiali, quando è inflitta per durata superiore a tre anni;
2° per gli altri militari, quando è inflitta per durata superiore a un anno. ***((34))***

AGGIORNAMENTO (34)
La Corte Costituzionale con sentenza 26 maggio - 1 giugno 1993 n. 258 (in G.U. 1a s.s. 09/06/1993 n. 24) ha dichiarato "l'illegittimità costituzionale dell'art. 29 del codice penale militare di pace nella parte in cui prevede che "per gli altri militari" la rimozione consegue alla condanna alla reclusione militare per una durata diversa da quella stabilita "per gli ufficiali e sottufficiali"."

Art. 30.

(Sospensione dall'impiego).

La sospensione dall'impiego si applica agli ufficiali, e consiste nella privazione temporanea dell'impiego.
Fuori dei casi preveduti dall'articolo precedente, la condanna alla reclusione militare importa la sospensione dall'impiego durante l'espiazione della pena.

Art. 31.

(Sospensione dal grado).
La sospensione dal grado si applica ai sottufficiali e ai graduati di truppa, e consiste nella privazione temporanea del grado militare.

Fuori dei casi preveduti dall'articolo 29, la condanna alla reclusione militare importa la sospensione dal grado durante l'espiazione della pena.

Art. 32.

(Pubblicazione della sentenza di condanna).

La sentenza di condanna alla pena di morte o alla pena dell'ergastolo è pubblicata per estratto mediante affissione nel comune dove è stata pronunciata, in quello dove il reato fu commesso e in quello dove ha sede il corpo o è ascritta la nave, a cui il condannato apparteneva.
Il giudice, se ricorrono particolari motivi, può disporre altrimenti, o anche che la sentenza non sia pubblicata.

Art. 33.

(Pene militari accessorie conseguenti alla condanna per delitti preveduti dalla legge penale comune).

La condanna pronunciata contro militari in servizio alle armi o in congedo, per alcuno dei delitti preveduti dalla legge penale comune, oltre le pene accessorie comuni, importa:
1° la degradazione, se trattasi di condanna alla pena di morte o alla pena dell'ergastolo, ovvero di condanna alla reclusione che, a norma della legge penale comune, importa la interdizione perpetua dai pubblici uffici;
2° la rimozione, se, fuori dei casi indicati nel numero 1°, trattasi di delitto non colposo contro la personalità dello Stato, o di alcuno dei delitti preveduti dagli articoli 476 a 493, 530 a 537, 624, 628, 629, 630, 640, 643, 644 e 646 del codice penale, o di bancarotta fraudolenta; ovvero se il condannato, dopo scontata la pena, deve essere sottoposto a una misura di sicurezza detentiva diversa dal ricovero in una casa di cura o di custodia per infermità psichica, o alla libertà vigilata;
3° la rimozione, ovvero la sospensione dall'impiego o dal grado, secondo le norme stabilite, rispettivamente, dagli articoli 29, 30 e 31, in ogni altro caso di condanna alla reclusione, da sostituirsi con la reclusione militare a termini degli articoli 63 e 64.
La dichiarazione di abitualità o di professionalità nel delitto, ovvero di tendenza a delinquere, pronunciata in qualunque tempo contro militari in servizio alle armi o in congedo, per reati preveduti dalla legge penale comune, importa la degradazione.

Art. 34.

(Decorrenza delle pene militari accessorie).

Le pene della degradazione e della rimozione decorrono, a ogni effetto, dal giorno in cui la sentenza è divenuta irrevocabile.
Le pene della sospensione dall'impiego e della sospensione dal grado decorrono dal momento in cui ha inizio l'esecuzione della pena principale.

Art. 35.

(Condizione giuridica del condannato alla pena di morte con degradazione).

Il condannato alla pena di morte con degradazione è equiparato al condannato all'ergastolo, per quanto concerne la sua condizione giuridica.

Art. 36.

(Condanna per reati commessi con abuso di un pubblico ufficio).

In caso di condanna per reati militari, non si applica la disposizione dell'articolo 31 del codice penale.

TITOLO TERZO
DEL REATO MILITARE
CAPO I
Del reato consumato e tentato

Art. 37.

(Reato militare).

Qualunque violazione della legge penale militare è reato militare.
È reato esclusivamente militare quello costituito da un fatto che, nei suoi elementi materiali costitutivi, non è, in tutto o in parte, preveduto come reato dalla legge penale comune.
I reati preveduti da questo codice, e quelli per i quali qualsiasi altra legge penale militare commina una delle pene indicate nell'articolo 22, sono delitti.

Art. 38.

(Trasgressione disciplinare).
Le violazioni dei doveri del servizio e della disciplina militare, non costituenti reato, sono prevedute dalla legge ovvero dai regolamenti militari approvati con

decreto Reale, e sono punite con le sanzioni in essi stabilite.

Art. 39.

(Ignoranza dei doveri militari).

Il militare non può invocare a propria scusa l'ignoranza dei doveri inerenti al suo stato militare.***((39))***

AGGIORNAMENTO (39)
La Corte Costituzionale con sentenza 20- 24 febbraio 1995, n. 61 (in G.U. 1a s.s. 01/03/1995 n. 9) ha dichiarato "l'illegittimità costituzionale dell'art. 39 del codice penale militare di pace, nella parte in cui non esclude dall'inescusabilità dell'ignoranza dei doveri inerenti allo stato militare l'ignoranza inevitabile".

Art. 40.

((ARTICOLO ABROGATO DALLA L. 11 LUGLIO 1978, N. 382))

Art. 41.

(Uso legittimo delle armi).

Non è punibile il militare, che, a fine di adempiere un suo dovere di servizio, fa uso, ovvero ordina di far uso delle armi o di altro mezzo di coazione fisica, quando vi è costretto dalla necessità di respingere una violenza o di vincere una resistenza.
La legge determina gli altri casi, nei quali il militare è autorizzato a usare le armi o altro mezzo di coazione fisica.

Art. 42.

(Difesa legittima).

Per i reati militari, in luogo dell'articolo 52 del codice penale, si applicano le disposizioni dei commi seguenti.
Non è punibile chi ha commesso un fatto costituente reato militare, per esservi stato costretto dalla necessità di respingere da sé o da altri una violenza attuale e ingiusta, sempre che la difesa sia proporzionata all'offesa.
Non è punibile il militare, che ha commesso alcuno dei fatti preveduti dai capi terzo e quarto del titolo terzo, libro secondo, per esservi stato costretto dalla necessità:
1° di difendere i propri beni contro gli autori di rapina, estorsione, o sequestro di persona a scopo di rapina o estorsione, ovvero dal saccheggio;
2° di respingere gli autori di scalata, rottura o incendio alla casa o ad altro edificio di abitazione o alle loro appartenenze, se ciò avviene di notte; ovvero se la casa o l'edificio di abitazione, o le loro appartenenze, sono in luogo isolato, e vi è fondato timore per la sicurezza personale di chi vi si trovi.
Se il fatto è commesso nell'atto di respingere gli autori di scalata, rottura o incendio alla casa o ad altro edificio di abitazione, o alle loro appartenenze, e non ricorrono le condizioni prevedute dal numero 2° del comma precedente, alla pena di morte con degradazione è sostituita la reclusione non inferiore a dieci anni; alla pena dell'ergastolo è sostituita la reclusione da sei a venti anni; e le altre pene sono diminuite da un terzo alla metà.

Art. 43.

(Nozione della violenza).

Agli effetti della legge penale militare, sotto la denominazione di violenza si comprendono l'omicidio, ancorché tentato o preterintenzionale, le lesioni personali, le percosse, i maltrattamenti, e qualsiasi tentativo di offendere con armi.

Art. 44.

(Casi particolari di necessità militare).

Non è punibile il militare, che ha commesso un fatto costituente reato, per esservi stato costretto dalla necessità di impedire l'ammutinamento, la rivolta, il saccheggio, la devastazione, o comunque fatti tali da compromettere la sicurezza del posto, della nave o dell'aeromobile.

Art. 45.

(Eccesso colposo).

Quando, nel commettere alcuno dei fatti preveduti dagli articoli 40, 41, 42, escluso l'ultimo comma, e 44, si eccedono colposamente i limiti stabiliti dalla legge o dall'ordine del superiore o di altra Autorità, ovvero imposti dalla necessità, si applicano le disposizioni concernenti i reati colposi, se il fatto è preveduto dalla legge come reato colposo.

Art. 46.

(Pena per il delitto tentato).

Il colpevole di delitto tentato è punito:
1° con la reclusione da ventiquattro a trenta anni, se dalla legge è stabilita per il delitto la pena di morte con degradazione;
2° con la reclusione militare non inferiore a quindici anni, se la pena stabilita è la morte mediante fucilazione nel petto;
3° con la reclusione non inferiore a dodici anni, se la pena stabilita è l'ergastolo;
4° negli altri casi, con la pena stabilita per il delitto, diminuita da un terzo a due terzi.

CAPO II
Circostanze del reato militare

Art. 47.

(Circostanze aggravanti comuni).

Oltre le circostanze aggravanti comuni prevedute dal codice penale, aggravano il reato militare, quando non ne sono elementi costitutivi o circostanze aggravanti speciali, le circostanze seguenti:
1° l'avere agito per timore di un pericolo, al quale il colpevole aveva un particolare dovere giuridico di esporsi;
2° l'essere il militare colpevole rivestito di un grado o investito di un comando;
3° l'avere commesso il fatto con le armi di dotazione militare, o durante un servizio militare, ovvero a bordo di una nave militare o di un aeromobile militare;
4° l'avere commesso il fatto alla presenza di tre o più militari, o comunque in circostanze di luogo, per le quali possa verificarsi pubblico scandalo;
5° l'avere il militare commesso il fatto in territorio estero, mentre vi si trovava per causa di servizio, o mentre vestiva, ancorché indebitamente, l'uniforme militare.

Art. 48.

(Circostanze attenuanti comuni).

Oltre le circostanze attenuanti comuni prevedute dal codice penale, e salva la disposizione dell'articolo seguente, attenuano il reato militare, quando non ne sono elementi costitutivi o circostanze attenuanti speciali, le circostanze seguenti:(15)
1° l'avere commesso il fatto per eccesso di zelo nell'adempimento dei doveri militari;
2° l'essere il fatto commesso da militare, che non abbia ancora compiuto trenta giorni di servizio alle armi, quando trattasi di reato esclusivamente militare;
((3° l'aver commesso il fatto per i modi non convenienti usati da altro militare)).

Per i reati militari, la pena può essere diminuita, quando il colpevole sia militare di ottima condotta o di provato valore.

AGGIORNAMENTO (15)
La Corte Costituzionale con sentenza 12-18 luglio 1984 n. 213 (in G.U. 1a s.s. 25/07/1984 n. 204) ha dichiarato "ex art. 27 della legge 11 marzo 1953, n. 87, l'illegittimità costituzionale dell'art. 48 dello stesso codice limitatamente all'inciso "e salva la disposizione dell'articolo seguente"".

Art. 49.

(Provocazione).

Per i reati militari, l'avere reagito in stato d'ira, determinato da un fatto ingiusto altrui, costituisce circostanza di attenuazione soltanto nei casi espressamente stabiliti dalla legge.***((15))***

AGGIORNAMENTO (15)
La Corte Costituzionale con sentenza 12-18 luglio 1984 n. 213 (in G.U. 1a s.s. 25/07/1984 n. 204) ha dichiarato "l'illegittimità costituzionale dell'art. 49 del codice penale militare di pace".

Art. 50.

(Aumento di pena nel caso di una sola circostanza aggravante).

Quando ricorre una circostanza aggravante, e l'aumento di pena non è determinato dalla legge, è aumentata fino a un terzo la pena che dovrebbe essere inflitta per il reato commesso.
Nondimeno, la pena detentiva, temporanea da applicare per effetto dell'aumento non può superare gli anni trenta.

Art. 51.

(Diminuzione di pena nel caso di una sola circostanza attenuante).

Quando ricorre una circostanza attenuante, e la diminuzione di pena non è determinata dalla legge, si osservano le norme seguenti:
1° alla pena di morte con degradazione è sostituita la reclusione da ventiquattro a trenta anni;
2° alla pena di morte mediante fucilazione nel petto

è sostituita la reclusione militare da ventiquattro a trenta anni;
3° alla pena dell'ergastolo è sostituita la reclusione da venti a ventiquattro anni;
4° le altre pene sono diminuite in misura non eccedente un terzo.

Art. 52.

(Limiti degli aumenti e delle diminuzioni di pena nel caso di concorso di più circostanze aggravanti o attenuanti).

Se concorrono più circostanze aggravanti o attenuanti, per determinare i limiti degli aumenti o delle diminuzioni di pena, si applicano le disposizioni del codice penale.
La pena della reclusione militare da applicare per effetto degli aumenti non può comunque eccedere gli anni trenta.
La pena da applicare per effetto delle diminuzioni non può essere inferiore:
1° a quindici anni di reclusione, se per il delitto la legge stabilisce la pena di morte con degradazione;
2° a quindici anni di reclusione militare, se per il delitto la legge stabilisce la pena di morte mediante fucilazione nel petto.

CAPO III
Del concorso di reati

Art. 53.

(Pena di morte).

Al colpevole di più reati, di cui uno importa la pena di morte mediante fucilazione nel petto e un altro la degradazione, si applica la pena di morte con degradazione, fermi gli effetti derivanti da ciascuna pena.

Art. 54.

(Concorso di reati che importano l'ergastolo).

Al colpevole di più reati, ciascuno dei quali importa l'ergastolo, si applica la pena di morte con degradazione.

Art. 55.

(Concorso di reati che importano la reclusione e di reati che importano la reclusione militare).

Quando concorrono più reati, alcuni dei quali importano la reclusione e altri la reclusione militare, si applica una pena unica, osservate le norme seguenti:
1° se la condanna alla reclusione importa la degradazione, si applica la reclusione; con un aumento pari alla durata complessiva della reclusione militare, che si dovrebbe infliggere per i reati concorrenti;
2° se la condanna alla reclusione non importa la degradazione, si applica la reclusione militare, con un aumento pari alla durata complessiva della reclusione, che si dovrebbe infliggere per i reati concorrenti.

Art. 56.

(Limiti dell'aumento di pena).

Nel caso di concorso di reati, la pena da applicare a norma dell'articolo precedente e dell'articolo 73 del codice penale non può essere superiore al quintuplo della più grave fra le pene concorrenti, né, comunque, eccedere trenta anni per la reclusione o la reclusione militare.

TITOLO QUARTO
DEL REO
CAPO I
Della recidiva

Art. 57.

(Recidiva facoltativa fra reati comuni e reati esclusivamente militari).

Il giudice, salvo che si tratti di reati della stessa indole, ha facoltà di escludere la recidiva fra reati preveduti dalla legge penale comune e reati esclusivamente militari.

CAPO II
Del concorso di persone nel reato

Art. 58.

(Circostanze aggravanti).

Nel caso di concorso di più persone nel reato militare, la pena da infliggere per il reato commesso è aumentata, oltre che nei casi in cui ricorrono le circostanze degli articoli 111 e 112 o quelle del secondo comma dell'articolo 113 del codice penale, anche per il superiore, che è concorso nel reato con un inferiore.
La condanna a pena detentiva, fuori dei casi in cui ne deriva la degradazione, importa, per il militare che è concorso con l'inferiore, la rimozione.

Art. 59.

(Circostanze attenuanti).

La pena da infliggere per il reato militare può essere diminuita:
1° per l'inferiore, che è stato determinato dal superiore a commettere il reato;
2° per il militare, che nella preparazione o nella esecuzione del reato ha prestato opera di minima importanza; eccettuati i casi indicati nell'articolo precedente.

TITOLO QUINTO
DELL'APPLICAZIONE E DELLA ESECUZIONE DELLA PENA

Art. 60.

(Detenzione ordinata in via disciplinare. Equiparazione alla carcerazione preventiva).

La detenzione ordinata in via disciplinare dall'Autorità militare in attesa del procedimento penale è equiparata, agli effetti della decorrenza della pena, alla carcerazione sofferta prima che la sentenza sia divenuta irrevocabile.

Art. 61.

(Vigilanza sulla esecuzione della pena militare detentiva. Ordinamento degli stabilimenti militari di pena).

L'esecuzione della pena militare detentiva è vigilata dal giudice.
I regolamenti militari approvati con decreto Reale stabiliscono l'ordinamento degli stabilimenti militari di pena, e provvedono relativamente ai modi di esecuzione della pena militare detentiva e alla vigilanza relativa.

Art. 62.

(Infermità psichica sopravvenuta al condannato).

Nel caso preveduto dall'articolo 148 del codice penale, il ricovero del condannato in un manicomio comune, anziché in un manicomio giudiziario, può essere disposto anche se la pena inflitta sia la reclusione militare per durata inferiore a tre anni.

Art. 63.

(Esecuzione delle pene comuni inflitte ai militari in servizio permanente).

Nella esecuzione delle pene inflitte ai militari in servizio permanente alle armi, per reati preveduti dalla legge penale comune, compresi quelli indicati nell'articolo 264 di questo codice, si osservano le norme seguenti:
1° la pena di morte è eseguita mediante fucilazione nella schiena, previa degradazione;
2° la pena dell'ergastolo e quella della reclusione, se la condanna importa la interdizione perpetua dai pubblici uffici, sono eseguite nei modi comuni, con degradazione del condannato secondo le norme stabilite dalla legge e dai regolamenti militari;
3° alla pena della reclusione, se la condanna non importa la interdizione perpetua dai pubblici uffici, è sostituita la reclusione militare per eguale durata, ancorché la reclusione sia inferiore a un mese;
4° alla pena della multa, non eseguita per insolvibilità del condannato, è sostituita la reclusione militare per non oltre tre anni, computandosi un giorno di reclusione militare per ogni cinquanta lire, o frazione di cinquanta lire, di multa;
5° alla pena dell'arresto è sostituita la reclusione militare, computandosi un giorno di reclusione militare per due di arresto;
6° alla pena dell'ammenda, non eseguita per insolvibilità del condannato, è sostituita la reclusione militare per non oltre un anno, computandosi un giorno di reclusione militare per ogni cento lire, o frazione di cento lire, di ammenda.

Art. 64.

(Esecuzione delle pene comuni inflitte ai militari in servizio temporaneo).

Nella esecuzione delle pene inflitte a militari in servizio temporaneo alle armi, per reati preveduti dalla legge penale comune, si osservano le norme seguenti:
1° se trattasi dei reati indicati nell'articolo 264, si applicano le disposizioni dell'articolo precedente;
2° se trattasi di altro reato, si applicano le disposizioni dei numeri 1° e 2° dell'articolo precedente, se la condanna importa la interdizione perpetua dai pubblici uffici;
3° in ogni altro caso, la pena si sconta alla cessazione del servizio alle armi per ferma di leva o per richiamo dal congedo.

Art. 65.

(Esecuzione delle pene militari inflitte alle persone

che non hanno, o che hanno perduto, la qualità di militare, o che prestano di fatto servizio alle armi).

Nei casi preveduti dall'articolo 16, per la esecuzione delle pene militari si osservano le norme seguenti:
1° la pena di morte è eseguita secondo le norme stabilite dall'articolo 25;
2° alla pena della reclusione militare è sostituita la pena della reclusione per eguale durata.
Le disposizioni di questo articolo si applicano anche quando, per un reato militare, sia pronunciata condanna contro chi ha cessato di appartenere alle forze armate dello Stato, contro gli assimilati ai militari, gli iscritti ai corpi civili militarmente ordinati e le altre persone estranee alle forze predette.

TITOLO SESTO
DELLA ESTINZIONE DEL REATO MILITARE E DELLA PENA MILITARE

Art. 66.

(Norma generale).

Le disposizioni del codice penale sulla estinzione del reato e della pena, in quanto applicabili in materia penale militare, si osservano anche per il reato e per le pene militari, con le modificazioni stabilite dagli articoli seguenti.
Agli effetti indicati nel comma precedente, la pena di morte preveduta dalla legge penale militare e la pena della reclusione militare si intendono equiparate, rispettivamente, alla pena di morte e alla pena della reclusione prevedute dal codice penale.

Art. 67.

(Prescrizione: reati punibili con la pena di morte mediante fucilazione nel petto).

I reati, per i quali la legge stabilisce la pena di morte mediante fucilazione nel petto, si prescrivono in trenta anni.

Art. 68.

(Disposizioni speciali per i reati di diserzione e di mancanza alla chiamata).

Per i reati di diserzione e di mancanza alla chiamata, il termine per la prescrizione del reato e quello per la estinzione della pena per decorso del tempo decorrono, se l'assenza perduri, dal giorno in cui il militare ha compiuto l'età, per la quale cessa in modo assoluto l'obbligo del servizio militare, a norma delle leggi sul reclutamento.
Questa disposizione non si applica per i reati di allontanamento illecito e di mancanza alla chiamata per istruzione.

Art. 69.

((ARTICOLO ABROGATO DALLA L. 7 FEBBRAIO 1990, N. 19))

Art. 70.

(Non menzione della condanna nel certificato del casellario).

Il giudice può ordinare che non sia fatta menzione della condanna nel certificato del casellario giudiziale, anche quando con una prima condanna è inflitta la pena della reclusione militare non superiore a tre anni, purché ricorrano le altre condizioni stabilite dall'articolo 175 del codice penale.
La disposizione di questo articolo si applica anche se alla condanna conseguono pene militari accessorie.

Art. 71.

(Liberazione condizionale).

Il condannato a pena militare detentiva per un tempo superiore a tre anni, il quale abbia scontato metà della pena, o almeno tre quarti se è recidivo, e in ogni caso non meno di tre anni, e abbia dato prova costante di buona condotta, può essere ammesso alla liberazione condizionale, se il rimanente della pena non supera tre anni.
La concessione, gli effetti e la revoca della liberazione condizionale sono regolati dalla legge penale comune, salva la disposizione dell'articolo 76 di questo codice.

Art. 72.

(Riabilitazione militare).

La riabilitazione ordinata a norma della legge penale comune non estingue le pene militari accessorie e gli altri effetti penali militari.
Nei confronti della persona riabilitata a norma della legge penale comune, le pene militari accessorie e ogni altro effetto penale militare si estinguono con la riabilitazione conceduta nei modi stabiliti dalla legge penale militare.
La sentenza della riabilitazione conceduta a norma del comma precedente è revocata di diritto nei casi

preveduti dagli articoli 180 e 181 del codice penale.

Art. 73.

(Effetti dell'amnistia, dell'indulto, della grazia e della riabilitazione militare relativamente alla perdita del grado conseguente alla condanna).

Salvo che il decreto disponga altrimenti, l'amnistia, l'indulto o la grazia non restituisce il grado perduto per effetto della condanna.
Salvo che la legge disponga altrimenti, la riabilitazione militare non restituisce il grado perduto per effetto della condanna.

TITOLO SETTIMO
DELLE MISURE AMMINISTRATIVE DI SICUREZZA

Art. 74.

(Norma generale).

Le disposizioni della legge penale comune relative alle misure amministrative di sicurezza si osservano anche in materia penale militare, salve le norme degli articoli seguenti.
Agli effetti della disposizione del comma precedente, la pena di morte preveduta dalla legge penale militare e la pena della reclusione militare s'intendono equiparate, rispettivamente, alla pena di morte e alla pena della reclusione prevedute dal codice penale. Tuttavia, in caso di condanna alla reclusione militare, non si applica la disposizione dell'articolo 230, numero 1°, del codice penale.

Art. 75.

(Divieto di soggiorno).

Oltre che nei casi indicati nell'articolo 233 del codice penale, al colpevole di alcuno dei reati contro la fedeltà o la difesa militare può essere imposto il divieto di soggiornare in uno o più comuni o in una o più provincie, designati dal giudice, osservate le disposizioni della legge penale comune.

Art. 76.

(Sospensione dell'esecuzione di misure di sicurezza).

Durante il servizio alle armi, è sospesa la esecuzione delle misure di sicurezza ordinate in applicazione della legge penale comune o della legge penale militare, tranne che si tratti del ricovero in una casa di cura o di custodia, in un manicomio giudiziario, o in un riformatorio giudiziario, ovvero della confisca.
Alla cessazione del servizio alle armi, o durante l'esecuzione della misura di sicurezza, anche prima che sia decorso il tempo corrispondente alla durata minima stabilita dalla legge, il Ministro della giustizia può revocare la misura di sicurezza applicata dal giudice, o, quando trattasi di misura di sicurezza detentiva, sostituirla con altra non detentiva.

LIBRO SECONDO
DEI REATI MILITARI, IN PARTICOLARE
TITOLO PRIMO
DEI REATI CONTRO LA FEDELTÀ E LA DIFESA MILITARE
CAPO I
Del tradimento

Art. 77.

(((Alto tradimento).))

((Il militare, che commette alcuno dei delitti contro la personalità dello Stato preveduti dagli articoli 241, 276, 277, 283, 285, 288, 289 e 290-bis del Codice penale, modificati dal decreto legislativo luogotenenziale 14 settembre 1944, n. 288, e dalla legge 11 novembre 1947, n. 1317, è punito a norma delle corrispondenti disposizioni dello stesso Codice, aumentata di un terzo la pena della reclusione.
È punito con l'ergastolo il militare che commette alcuno dei delitti preveduti dagli articoli 242 e 284 del Codice penale per il solo fatto di essere insorto in armi, o di aver portato le armi contro lo stato, ovvero di aver partecipato ad una insurrezione armata)).

Art. 78.

(Istigazione all'alto tradimento; cospirazione; banda armata).

È punito a norma delle corrispondenti disposizioni del codice penale, aumentata la pena della reclusione da un terzo alla metà:
1° il militare colpevole di istigazione o cospirazione, dirette a commettere alcuno dei reati indicati nell'articolo precedente;
2° il militare, che, per commettere alcuno dei reati indicati nell'articolo precedente, promuove, costituisce od organizza una banda armata, ovvero vi partecipa.

Art. 79.

((Offesa all'onore ed al prestigio del Presidente della Repubblica.))

((Il militare che offende l'onore o il prestigio del Presidente della Repubblica, o di chi ne fa le veci, è punito con la reclusione militare da cinque a quindici anni)).

Art. 80.

((ARTICOLO ASOPPRESSO DALLA L. 23 MARZO 1956, N. 167))

Art. 81.

((Vilipendio della Repubblica, delle Istituzioni costituzionali e delle Forze armate dello Stato.))

((Il militare, che pubblicamente vilipende la Repubblica, le Assemblee legislative o una di queste, ovvero il Governo o la Corte Costituzionale o l'Ordine giudiziario, è punito con la reclusione militare da due a sette anni.
La stessa pena si applica al militare che pubblicamente vilipende le Forze armate dello Stato o una parte di esse, o quelle della liberazione)).

Art. 82.

(Vilipendio alla nazione italiana).

Il militare, che pubblicamente vilipende la nazione italiana, è punito con la reclusione militare da due a cinque anni.
Se il fatto è commesso in territorio estero, si applica la reclusione militare da due a sette anni.

Art. 83.

(Vilipendio alla bandiera nazionale o ad altro emblema dello Stato).

Il militare, che vilipende la bandiera nazionale o un altro emblema dello Stato, è punito con la reclusione militare da tre a sette anni.
Se il fatto è commesso in territorio estero, la pena è della reclusione militare da tre a dodici anni.
Le disposizioni dei commi precedenti si applicano anche al militare, che vilipende i colori nazionali raffigurati su cosa diversa da una bandiera.

Art. 84.

(Intelligenze con lo straniero e offerta di servizi).

Il militare, che tiene intelligenze con lo straniero, dirette a favorire, per il caso di guerra con lo Stato italiano, le operazioni militari di uno Stato estero, è punito con la reclusione non inferiore a quindici anni.
Se trattasi di offerte di servizi non ancora accettate, la pena è della reclusione non inferiore a dieci anni.

Art. 85.

(Soppressione, distruzione, falsificazione o sottrazione di atti, documenti o cose concernenti la forza, la preparazione o la difesa militare dello Stato).

Il militare, che, in tutto o in parte, sopprime, distrugge, falsifica, ovvero carpisce, sottrae o distrae, anche temporaneamente, atti, documenti o altre cose concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segreti, è punito con la reclusione non inferiore a dieci anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la pena di morte con degradazione.

((Agli effetti delle disposizioni di questo articolo, non possono comunque essere considerati come segreti gli atti, i documenti o altre cose che non abbiano destinazione esclusiva per le Forze armate)).

CAPO II
Dello spionaggio militare e della rivelazione di segreti militari

Art. 86.

(Rivelazione di segreti militari, a scopo di spionaggio).

Il militare, che rivela, nell'interesse di uno Stato estero, notizie concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segrete, è punito con la morte con degradazione.

Art. 87.

(Accordo di militari per commettere rivelazione di segreti militari, a scopo di spionaggio).

Quando due o più militari si accordano al fine di commettere il reato preveduto dall'articolo preceden-

te, ciascuno di essi è punito, se il reato non è commesso, con la reclusione da cinque a quindici anni.
Per i capi, i promotori e gli organizzatori, la pena è della reclusione non inferiore a quindici anni.

Art. 88.

(Procacciamento di notizie segrete, a scopo di spionaggio).

Il militare, che, allo scopo di darne comunicazione a uno Stato estero, si procura notizie concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segrete, è punito con la reclusione non inferiore a venti anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la pena di morte con degradazione.

Art. 89.

(Procacciamento di notizie segrete, non a scopo di spionaggio).

Il militare, che, fuori dei casi preveduti dall'articolo precedente, si procura, senza l'autorizzazione dell'Autorità militare competente, le notizie in esso indicate, ovvero compie atti diretti a procurarsele, è punito con la reclusione militare da tre a dieci anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la reclusione militare non inferiore a dieci anni.

Art. 89-bis.

((Esecuzione di disegni, introduzione in luoghi di interesse militare a scopo di spionaggio.))

((È punito con la reclusione da sei a dodici anni il militare che, a scopo di spionaggio:
1) senza la necessaria autorizzazione, esegue disegni, modelli, schizzi o fotografie di cose concernenti la forza, la preparazione o la difesa militare dello Stato, ovvero fa ricognizione sulle cose medesime;
2) per commettere alcuno dei fatti indicati nel n. 1), o per procurarsi notizie rispetto ai fatti medesimi, si introduce clandestinamente o con inganno nei luoghi o zone di terra, di acqua o di aria, nei quali è vietato l'accesso nell'interesse militare dello Stato;
3) si intrattiene in tali luoghi o zone, o in loro prossimità, in possesso ingiustificato di mezzi idonei a commettere spionaggio;
4) acquista, riceve, o comunque detiene carte, schizzi, fotografie o qualsiasi altra cosa atta a fornire notizie concernenti la forza, la preparazione o la difesa militare dello Stato)).

Art. 90.

(Esecuzione indebita di disegni; introduzione clandestina in luoghi d'interesse militare; possesso ingiustificato di mezzi di spionaggio).

È punito con la reclusione da cinque a dieci anni il militare:
1° che, senza la necessaria autorizzazione, esegue disegni, modelli, schizzi o fotografie di cose concernenti la forza, la preparazione o la difesa militare dello Stato, ovvero fa ricognizione sulle cose medesime;(40)
2° che, per commettere alcuno dei fatti indicati nel numero 1°, o per procurarsi notizie rispetto ai fatti medesimi, si introduce clandestinamente o con inganno nei luoghi o zone di terra, di acqua o di aria, nei quali è vietato l'accesso nell'interesse militare dello Stato;(40)
3° che è colto in tali luoghi o zone, o in loro prossimità, in possesso ingiustificato di mezzi idonei a commettere alcuno dei fatti indicati nel numero 1°;(40)
4° che è colto in possesso ingiustificato di carte, scritti, disegni, modelli, schizzi, fotografie o di qualsiasi altra cosa atta a fornire notizie concernenti la forza, la preparazione o la difesa militare dello Stato.(21)
Per il solo fatto di introdursi clandestinamente o con inganno nei suddetti luoghi o zone, il militare è punito con la reclusione militare da due a cinque anni. ***((42))***

Fuori dei casi suindicati, al militare si applica la pena della reclusione militare fino a un anno, per il solo fatto di introdursi, senza la necessaria autorizzazione, in luoghi in cui è vietato l'accesso nell'interesse militare dello Stato.

AGGIORNAMENTO (21)
La Corte Costituzionale con sentenza 9 - 16 febbraio 1989 n. 49 (in G.U. 1a s.s. 22/02/1989 n. 8) ha dichiarato "l'illegittimità costituzionale dell'art. 90, primo comma, n.4, del codice penale militare di pace, nella parte in cui punisce i fatti previsti dal n. 4 dello stesso comma con la reclusione da cinque a dieci anni".

AGGIORNAMENTO (40)
La Corte Costituzionale con sentenza 26 giugno - 5 luglio 1995 n. 298 (in G.U. 1a s.s. 12/07/1995 n. 29) ha dichiarato "l'illegittimità costituzionale

dell'art. 90, primo comma, numero 1, del codice penale militare di pace nella parte in cui punisce i fatti previsti con la reclusione da cinque a dieci anni anziché con la reclusione da uno a cinque anni" e "in applicazione dell'art. 27 della legge 11 marzo 1953, n. 87 - l'illegittimità costituzionale dell'art. 90, primo comma, numeri 2 e 3, del codice penale militare di pace, nella parte in cui punisce i fatti previsti con la reclusione da cinque a dieci anni anziché con la reclusione da uno a cinque anni".

AGGIORNAMENTO (42)

La Corte Costituzionale con sentenza 26 marzo - 6 aprile 1998 n. 97 (in G.U. 1a s.s. 15/04/1998 n. 15) ha dichiarato "l'illegittimità costituzionale dell'art. 90, secondo comma, del codice penale militare di pace, nella parte in cui prevede la pena della reclusione da due a cinque anni, anziché da uno a cinque anni".

Art. 91.

(Rivelazione di notizie segrete, non a scopo di spionaggio).

Fuori del caso indicato nell'articolo 86, il militare, che rivela notizie concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segrete, è punito con la reclusione militare non inferiore a cinque anni.

Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la reclusione militare non inferiore a venti anni.

Se il fatto è commesso per colpa, la pena è della reclusione militare da sei mesi a due anni, nel caso preveduto dal primo comma, e da tre a quindici anni, nel caso preveduto dal secondo comma.

Art. 92.

(Circostanze aggravanti).

Se il colpevole del reato preveduto dall'articolo precedente era, per ragione di ufficio o di servizio, a cognizione delle notizie ivi indicate, o se il fatto è stato commesso con qualsiasi mezzo di pubblicità, la pena è aumentata.

Art. 93.

(Procacciamento o rivelazione di notizie di carattere riservato).

Per i fatti preveduti dagli articoli precedenti, quando le notizie indicate negli articoli stessi non sono fra quelle che devono rimanere segrete, ma hanno carattere riservato, per esserne stata vietata la divulgazione dall'Autorità competente, alla pena di morte con degradazione è sostituita la reclusione non inferiore a venti anni, e le altre pene sono diminuite da un terzo alla metà.

Art. 94.

(Comunicazione all'estero di notizie non segrete né riservate).

Il militare, che comunica a uno Stato estero notizie concernenti la forza, la preparazione o la difesa militare dello Stato, diverse da quelle che devono rimanere segrete o che hanno carattere riservato, è punito, se dal fatto può derivare nocumento alla forza, alla preparazione o alla difesa militare dello Stato, con la reclusione militare fino a cinque anni.

Art. 95.

(Militare che ottiene le notizie indicate negli articoli precedenti).

Le pene stabilite dagli articoli precedenti si applicano anche al militare, che ottiene le notizie ivi indicate.

Art. 96.

(Fine di favorire lo Stato italiano).

Per i reati preveduti dagli articoli precedenti, la punibilità non è esclusa, se il colpevole ha agito con il fine di favorire lo Stato italiano. Tuttavia, la pena può essere diminuita.

CAPO III

Disposizioni comuni ai capi precedenti

Art. 97.

(Agevolazione colposa).

Il militare, che, avendo, per ragione di ufficio o di servizio, la custodia o il possesso delle cose, ovvero, per lo stesso motivo, essendo a cognizione delle notizie o esercitando la vigilanza dei luoghi d'interesse militare, ha reso possibile, o soltanto agevolato, per colpa, la esecuzione di alcuno dei reati preveduti dagli articoli 85, 86, 88, 89, 90, comma primo, 91 e 93, è punito con la reclusione militare fino a cinque anni.

Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la reclusione militare

da tre a quindici anni.

Art. 98.

(Istigazione od offerta).

Il militare, che istiga altri a commettere alcuno dei reati preveduti dagli articoli 84 a 91, ovvero si offre per commetterlo, è punito, se l'istigazione o l'offerta non è accolta, ovvero se l'istigazione o l'offerta è accolta, ma il reato non è commesso:
1° con la reclusione da cinque a dodici anni, se la pena stabilita per il reato è la morte con degradazione;
2° negli altri casi, con la pena stabilita per il reato, diminuita dalla metà a due terzi.

Art. 99.

(Corrispondenza con lo Stato estero diretta a commettere fatti di tradimento o di spionaggio militare).

Il militare, che tiene con uno Stato estero corrispondenza diretta a commettere alcuno dei fatti indicati negli articoli 85,86, 87 e 88, o che comunque compie atti diretti a commettere alcuno dei fatti stessi, è punito con la reclusione non inferiore a dieci anni.

Art. 100.

(Omesso rapporto).

Il militare, che, avendo notizia di alcuno dei reati preveduti da questo capo e dai capi precedenti, per il quale la legge stabilisce la pena della reclusione o della reclusione militare, non inferiore nel massimo a cinque anni, o una pena più grave, non ne fa immediatamente rapporto ai superiori, è punito con la reclusione militare da tre mesi a due anni.
Se il colpevole è un ufficiale, si applica la reclusione militare da uno a tre anni.

Art. 101.

(Parificazione degli Stati alleati).
Le pene stabilite dagli articoli 84 e seguenti si applicano anche quando il reato è commesso a danno di uno Stato alleato o associato, a fine di guerra, con lo Stato italiano.

Art. 102.

(Circostanza attenuante).

Le pene stabilite per i reati preveduti da questo capo e dai capi precedenti sono diminuite, quando, per la natura, la specie, i mezzi, le modalità o le circostanze dell'azione, ovvero per la particolare tenuità del danno o del pericolo, il fatto risulti di lieve entità.

TITOLO SECONDO
DEI REATI CONTRO IL SERVIZIO MILITARE
CAPO I
Dei reati in servizio
Sezione I
Della violazione di doveri generali inerenti al comando

Art. 103.

(Atti ostili del comandante contro uno Stato estero).

Il comandante, che, senza l'autorizzazione del Governo, o fuori dei casi di necessità, compie atti ostili contro uno Stato estero, è punito con la reclusione militare fino a tre anni.
Se gli atti ostili sono tali da esporre lo Stato italiano, o i suoi cittadini ovunque residenti, o chiunque goda della protezione delle leggi dello Stato, al pericolo di rappresaglie o di ritorsioni, la pena è della reclusione militare da due a otto anni. Se segue la rottura delle relazioni diplomatiche, o se avvengono le ritorsioni o le rappresaglie, la pena è della reclusione militare da cinque a dieci anni.
Se gli atti sono tali da esporre lo Stato italiano al pericolo di una guerra, si applica la reclusione militare non inferiore a dieci anni.
Se, per effetto degli atti ostili, la guerra avviene, ovvero è derivato incendio o devastazione o la morte di una o più persone, la pena è della morte mediante fucilazione nel petto.
La condanna importa la rimozione.

Art. 104.

(Eccesso colposo).

Nei casi indicati nell'articolo precedente, se il comandante eccede colposamente i limiti dell'autorizzazione o della necessità, alla pena di morte è sostituita la reclusione militare non inferiore a cinque anni, e le altre pene sono diminuite da un terzo a due terzi; ferma la pena accessoria della rimozione.

Art. 105.

(Perdita o cattura di nave o aeromobile).

Il comandante di una forza navale o aeronautica, il quale cagiona la perdita o la cattura di una o più

navi o di uno o più aeromobili, dipendenti dal suo comando, è punito con la morte con degradazione.
La stessa pena si applica:
1° al comandante di una nave isolata o di un aeromobile isolato, il quale cagiona la perdita o la cattura della nave o dell'aeromobile stesso;
2° a ogni altro militare, che cagiona la perdita o la cattura della nave o dell'aeromobile, su cui è imbarcato.
Se ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è della reclusione non inferiore a sette anni.

Art. 106.

(Perdita colposa o cattura colposa di nave o aeromobile).
Quando alcuno dei fatti preveduti dall'articolo precedente è commesso per colpa del comandante di una forza navale o di una nave isolata, o per colpa di altro militare imbarcato sulla nave perduta o catturata, si applica la reclusione militare fino a dieci anni.
Se nel fatto ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è della reclusione militare fino a cinque anni.
Le stesse pene si applicano al comandante di una forza aeronautica o di un aeromobile isolato in manovra, o ad altro militare su di esso imbarcato, che, per negligenza o imprudenza o per inosservanza di leggi, regolamenti, ordini o discipline, commette alcuno dei fatti preveduti dall'articolo precedente.

Art. 107.

(Investimento, incaglio o avaria di una nave o di un aeromobile).

Il comandante di una nave, il quale ne cagiona l'investimento, l'incaglio o un'avaria, o il comandante di un aeromobile, il quale ne cagiona l'investimento o un'avaria, è punito con la reclusione non inferiore a otto anni; e, se dai fatti suindicati è derivata la perdita della nave o dell'aeromobile, con la reclusione non inferiore a quindici anni.

Le stesse pene si applicano a ogni altro militare, che cagiona i danni suddetti alla nave o all'aeromobile su cui è imbarcato.
Se nel fatto ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è della reclusione non inferiore a cinque anni.

Art. 108.

(Investimento o incaglio colposo o avaria colposa di nave o aeromobile).

Quando alcuno dei fatti preveduti dall'articolo precedente è commesso per colpa del comandante della nave, o di altro militare su di essa imbarcato, si applica la reclusione militare fino a due anni.
La stessa pena si applica al comandante di un aeromobile, o ad altro militare su di esso imbarcato, che, per negligenza o imprudenza o per inosservanza di leggi, regolamenti, ordini o discipline, commette alcuno dei fatti preveduti dall'articolo precedente.

Art. 109.

(Agevolazione colposa).

Quando l'esecuzione di alcuno dei fatti preveduti dagli articoli 105 e 107 è stata resa possibile, o soltanto agevolata, per colpa del militare che aveva la custodia o la vigilanza delle cose ivi indicate, questi è punito con la reclusione militare da uno a cinque anni.

Art. 110.

(Omesso uso di mezzi per limitare il danno, in caso d'incendio o di altro sinistro).

Il comandante di una fortezza, di uno stabilimento militare, di una nave o di un aeromobile, o, in generale, di qualunque opera o costruzione militare, il quale, nel caso d'incendio, investimento, naufragio o di qualsiasi altro sinistro, non adopera tutti i mezzi, di cui può disporre, per limitare il danno, è punito con la reclusione militare fino a cinque anni.

Art. 111.

(Abbandono o cessione del comando in circostanze di pericolo).

Il comandante, che in qualsiasi circostanza di pericolo, senza giustificato motivo, abbandona il comando o lo cede, è punito con la reclusione militare fino a dieci anni.
La condanna importa la rimozione.

Art. 112.

(Violazione del dovere del comandante di essere l'ultimo ad abbandonare la nave, l'aeromobile o il posto, in caso di pericolo).

Il comandante, che, in caso di pericolo ovvero di perdita della nave o dell'aeromobile o del posto affidato

al suo comando, non è l'ultimo ad abbandonare la nave, l'aeromobile o il posto, è punito con la reclusione militare non inferiore a un anno.
Se dal fatto è derivata la impossibilità di salvare la nave o l'aeromobile o il posto, la reclusione militare non è inferiore a quindici anni.
Se dal fatto è derivata la morte di alcuna delle persone imbarcate o in servizio nel posto, la pena è della morte mediante fucilazione nel petto.
La condanna importa la rimozione.

Art. 113.

(Omissione di soccorso o di protezione, in caso di pericolo).

Il comandante di una forza militare, che, senza giustificato motivo, omette di soccorrere altra forza militare, che abbia bisogno di assistenza in caso di pericolo, è punito con la reclusione militare fino a tre anni.
La stessa pena si applica al comandante di una o più navi militari, o di uno o più aeromobili militari, il quale, fuori dei casi preveduti dal comma precedente, non presta a navi o ad aeromobili, ancorché non nazionali, l'assistenza o la protezione, che era in grado di dare.
La condanna importa la rimozione.

Art. 114.

(Usurpazione di comando)

Il militare, che indebitamente assume o ritiene un comando, è punito con la reclusione militare da due a quindici anni.
Se il comando indebitamente assunto è ritenuto contro l'ordine dei capi, la pena è aumentata da un terzo alla metà.
Se il fatto è commesso a bordo di una nave o di un aeromobile, la pena è aumentata.
In ogni caso, se il fatto ha compromesso l'esito di una operazione militare, la pena è della morte mediante fucilazione nel petto.

Art. 115.

(Movimento arbitrario di forze militari).

Il comandante, che, senza speciale incarico o autorizzazione, ovvero senza necessità, ordina un movimento di forze militari, è punito con la reclusione militare da uno a sette anni.

Art. 116.

(Intempestiva od omessa apertura di piego chiuso).

Il comandante di una spedizione militare, che, avendo un piego da aprirsi in tempo o luogo determinato, lo apre in tempo o in luogo diverso, ovvero non lo apre, è punito, se dal fatto è derivato pregiudizio al buon esito della spedizione, con la reclusione militare non inferiore a cinque anni.
Se il fatto è commesso per colpa, si applica la reclusione militare fino a tre anni.

Art. 117.

(Omessa esecuzione di un incarico)

Il comandante di una forza militare, che, senza giustificato motivo, non esegue l'incarico affidatogli, è punito con la reclusione militare fino a tre anni.
La condanna importa la rimozione.
Se l'incarico non è eseguito per negligenza, la pena è della reclusione militare fino a un anno.

Sezione II
Dell'abbandono di posto e della violazione di consegna

Art. 118.

(Abbandono di posto o violata consegna da parte di un militare in servizio di sentinella, vedetta o scolta).

Il militare, che, essendo di sentinella, vedetta o scolta, abbandona il posto o viola la consegna, è punito con la reclusione militare fino a tre anni.
La reclusione militare è da uno a cinque anni, se il fatto è commesso:
1° nella guardia a rimesse di aeromobili o a magazzini o depositi di armi, munizioni o materie infiammabili o esplosive;
2° a bordo di una nave o di un aeromobile;
3° in qualsiasi circostanza di grave pericolo.
In ogni caso, se dal fatto è derivato grave danno, la pena è della reclusione militare da sette a quindici anni.

Art. 119.

(Militare di sentinella, vedetta o scolta, che si addormenta).

Il militare, che, essendo di sentinella, vedetta o scolta in alcuna delle circostanze indicate nel secondo comma dell'articolo precedente, si addormenta, è punito con la reclusione militare fino a un anno.

Se dal fatto è derivato grave danno, la pena è della reclusione militare fino a due anni.

Art. 120.

(Abbandono di posto o violata consegna da parte di militare di guardia o di servizio).

Fuori dei casi enunciati nei due articoli precedenti, il militare, che abbandona il posto ove si trova di guardia o di servizio, ovvero viola la consegna avuta, è punito con la reclusione militare fino a un anno.
Se il colpevole è il comandante di un reparto o il militare preposto a un servizio o il capo di posto, ovvero se si tratta di servizio armato, la pena è aumentata.

Art. 121.

(Abbandono del convoglio o colposa separazione da esso).

Il comandante della scorta di un convoglio, che l'abbandona, è punito con la reclusione militare da uno a cinque anni.
Se egli, per colpa, rimane separato da tutto o parte del convoglio, la pena è della reclusione militare fino a due anni.

Art. 122.

(Violata consegna da parte di militare preposto di guardia a cosa determinata).

Il militare, che, essendo preposto di guardia a cosa determinata, la sottrae, distrae, devasta, distrugge, sopprime, disperde o deteriora, o la rende, in tutto o in parte, inservibile, è punito, per il solo fatto della violata consegna, con la reclusione militare non inferiore a due anni. ***((32))***

AGGIORNAMENTO (32)
La Corte Costituzionale con sentenza 15 - 24 giugno 1992, n. 299 (in G.U. 1a s.s. 1/7/1992, n. 28) ha dichiarato l'illegittimità costituzionale del presente articolo.

Art. 123.

(Omessa presentazione in servizio).

Il militare, che, senza giustificato motivo, omette di intraprendere il servizio cui è stato comandato, ovvero di raggiungere il suo posto in caso di allarme, è punito con la reclusione militare fino a sei mesi.
La stessa pena si applica al militare appartenente a un corpo militare volontario, il quale, chiamato a prestare servizio, non si presenta ad assumerlo, senza giustificato motivo.

Art. 124.

(Separazione di una parte delle forze militari dal capo od omissione di riunirsi a esso).

Nel caso di spedizione o altra operazione militare, il comandante di una parte delle forze militari, che si separa dal suo capo, o che, costretto da forza maggiore, o comunque da giustificato motivo, a separarsi, omette di riunirsi al suo capo nel più breve tempo possibile, è punito con la reclusione militare fino a tre anni.
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a un anno.
Le stesse pene si applicano a ogni altro militare, che cagiona alcuno dei fatti suindicati.

Sezione III
Della violazione di doveri inerenti a speciali servizi

Art. 125.

(Inosservanza di istruzioni ricevute).

L'ufficiale incaricato di una missione o di una spedizione od operazione militare, che non ottempera, senza giustificato motivo, alle istruzioni ricevute, è punito, se il fatto ha pregiudicato l'esito della missione, spedizione od operazione, con la reclusione militare fino a tre anni.
La condanna importa la rimozione.
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a sei mesi.

Art. 126.

(Militare custode che cagiona per colpa l'evasione di persona arrestata o detenuta).
Il militare, incaricato della custodia, anche temporanea, di una persona arrestata o detenuta per un reato soggetto alla giurisdizione militare, il quale ne cagiona, per colpa, l'evasione, è punito con la reclusione militare fino a tre anni.
Il colpevole non è punibile, se nel termine di tre mesi dall'evasione procura la cattura della persona evasa o la presentazione di questa all'Autorità.

Art. 127.

(Divulgazione di notizie segrete o riservate).

Salvo che il fatto costituisca un più grave reato, il militare, che rivela notizie concernenti il servizio o la disciplina militare in generale, da lui conosciute per ragione o in occasione del suo ufficio o servizio, e che devono rimanere segrete, è punito con la reclusione militare da sei mesi a tre anni.
Se le notizie non sono segrete, ma hanno carattere riservato, per esserne stata vietata la divulgazione dall'Autorità competente, si applica la reclusione militare fino a due anni.
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a un anno.

Art. 128.

(Violazione, soppressione, omessa consegna di dispacci; rivelazione del contenuto di comunicazioni).

Il militare, che indebitamente apre, sopprime, falsifica o non consegna un ordine scritto o altro dispaccio qualsiasi, che era incaricato di portare, o che rivela il contenuto di comunicazioni telegrafiche, radiotelegrafiche, telefoniche e simili, conosciuto da lui per ragione del suo ufficio o servizio, è punito con la reclusione militare fino a cinque anni.
Alla stessa pena soggiace il militare incaricato del servizio di comunicazioni telegrafiche, radiotelegrafiche, telefoniche e simili, che sopprime, trascrive infedelmente o comunque falsifica un ordine o un dispaccio inerente al servizio.
Il militare, che omette per colpa di custodire, consegnare o trasmettere al destinatario, a cui era diretto, l'ordine o altro dispaccio, o la comunicazione, è punito con la reclusione militare fino a un anno.

Art. 129.

(Violazione o sottrazione di corrispondenza, commessa da militare addetto al servizio postale, telegrafico o telefonico militare).

Il militare addetto al servizio postale, telegrafico o telefonico militare, che, abusando di tale qualità, prende cognizione del contenuto di una corrispondenza chiusa o di altro piego chiuso o pacco, ovvero sottrae o distrae, al fine di prenderne o di farne da altri prendere cognizione, una corrispondenza chiusa o aperta, o altro piego chiuso o pacco, ovvero, in tutto o in parte, li distrugge o sopprime, è punito, se il fatto non è preveduto come reato da altra disposizione di legge, con la reclusione militare da sei mesi a tre anni.
Se il colpevole, senza giusta causa, rivela, in tutto o in parte, il contenuto della corrispondenza o di un piego chiuso o pacco, si applica, se il fatto non costituisce un più grave reato, la reclusione militare da sei mesi a cinque anni.
Le disposizioni precedenti si applicano anche al militare incaricato del recapito della corrispondenza, il quale commette alcuno dei fatti suindicati. Tuttavia, la pena è diminuita.
Agli effetti delle disposizioni di questa sezione, per corrispondenza s'intende quella epistolare, telegrafica o telefonica.

Art. 130.

(Rivelazione del contenuto di corrispondenza o di comunicazione da parte di militare addetto al servizio postale, telegrafico o telefonico militare).

Il militare addetto al servizio postale, telegrafico o telefonico militare, che, avendo notizia, in questa sua qualità, del contenuto di una corrispondenza aperta o di una comunicazione telegrafica o di una conversazione telefonica, lo rivela, senza giusta causa, ad altri che non sia il destinatario, ovvero a una persona diversa da quelle, fra le quali la comunicazione o la conversazione è interceduta, è punito con la reclusione militare da sei mesi a tre anni.

Art. 131.

(Circostanza aggravante).

Se da alcuno dei fatti indicati nei tre articoli precedenti è derivato nocumento al servizio militare, la pena, è aumentata.

Art. 132.

(Inadempienza nelle somministrazioni militari).

Il militare, che, essendo obbligato, per ragione di ufficio o servizio, a provvedere all'approvvigionamento o a somministrazioni di viveri o di altre cose necessarie ad alcuno dei servizi militari, li fa mancare, è punito con la reclusione militare da uno a cinque anni.
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a un anno.

Art. 133.

(Requisizione arbitraria).

Il militare, che procede a requisizione senza averne la facoltà, è punito con la reclusione militare fino a tre anni.
Ove sia stata usata violenza, si applica la reclusione militare da uno a cinque anni.

Art. 134.

(Abuso nelle requisizioni).

Il militare incaricato di requisizioni di cose o di opere, che rifiuta di rilasciare ricevuta della prestazione eseguita, ovvero in qualunque modo abusa delle facoltà conferite dalle leggi o dai regolamenti, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a tre anni.
Ove l'abuso sia commesso con violenza, si applica la reclusione militare fino a dieci anni.
Se trattasi di alloggio militare, il militare, che costringe colui che è tenuto all'alloggio a dargli più di ciò che è dovuto, ovvero a tollerare che egli se ne impossessi o, comunque, ne usufruisca, è punito, per ciò solo, con la reclusione militare fino a tre anni.

Art. 135.

(Abuso nell'imbarco di merci o passeggeri).

Il militare, che arbitrariamente imbarca o permette che s'imbarchino merci o passeggeri a bordo di navi o aeromobili militari, è punito con la reclusione militare fino a due anni.

Art. 136.

(Abuso nel lavoro delle officine o di altri laboratori militari).

Il militare addetto alle officine o ad altri laboratori militari, che, contro le disposizioni dei regolamenti, o gli ordini dei superiori o dirigenti, vi lavora o vi fa lavorare per conto proprio o di altri, è punito con la reclusione militare fino a due anni.

Sezione IV
Della violazione di speciali doveri inerenti alla qualità militare

Art. 137.

(Manifestazioni di codardia).

Il militare, che, in caso di tempesta, naufragio, incendio o altra circostanza di grave pericolo, compie atti che possono incutere lo spavento o provocare il disordine, è punito, se lo spavento o il disordine si produce e il fatto è tale da compromettere la sicurezza di un posto militare, con la reclusione militare da sei mesi a cinque anni.
La condanna importa la rimozione.

Art. 138.

(Omesso impedimento di reati militari).

Ferma in ogni altro caso la disposizione del secondo comma dell'articolo 40 del codice penale, il militare, che, per timore di un pericolo o altro inescusabile motivo, non usa ogni mezzo possibile per impedire la esecuzione di alcuno dei reati contro la fedeltà o la difesa militare, o di rivolta o di ammutinamento, che si commette in sua presenza, è punito:
1° con la reclusione non inferiore a dieci anni, se per il reato è stabilita la pena di morte con degradazione o quella dell'ergastolo;
2° negli altri casi, con la pena stabilita per il reato, diminuita dalla metà a due terzi.
Se il colpevole è il più elevato in grado, o, a parità di grado, superiore in comando o più anziano, si applica la pena stabilita per il reato. Nondimeno, il giudice può diminuire la pena.
Agli effetti delle disposizioni dei commi precedenti, per la determinazione della pena stabilita per i reati in essi indicati, non si ha riguardo a quella che la legge stabilisce per i capi, promotori od organizzatori del reato o per coloro che ne hanno diretto la esecuzione.

Sezione V
Della ubriachezza in servizio

Art. 139.

(Nozione del reato e circostanze aggravanti).

Il militare, che, in servizio, ovvero dopo di essere stato comandato per il servizio, è colto in stato di ubriachezza, volontaria o colposa, tale da escludere o menomare la sua capacità di prestarlo, è punito con la reclusione militare fino a sei mesi.
Se il fatto è commesso dal comandante del reparto o da un militare preposto al servizio o capo di posto, la pena è della reclusione militare fino a un anno.
Le stesse disposizioni si applicano, quando la capacità di prestare il servizio sia esclusa o menomata dall'azione di sostanze stupefacenti.

CAPO II
Dei reati contro militari in servizio

Art. 140.

(Forzata consegna).

Il militare, che in qualsiasi modo forza una consegna, è punito con la reclusione militare da sei mesi a due anni.
Se il fatto è commesso in alcuna delle circostanze indicate nel secondo comma dell'articolo 118, la pena è della reclusione militare da due a sette anni.
Se il fatto è commesso con armi, ovvero da tre o più persone riunite, o se ne è derivato grave danno, la pena è aumentata.

Art. 141.

(Resistenza, minaccia o ingiuria a sentinella, vedetta o scolta).

Il militare, che non ottempera all'ingiunzione fatta da una sentinella, vedetta o scolta, nella esecuzione di una consegna ricevuta, è punito con la reclusione militare fino a un anno.
Il militare, che minaccia o ingiuria una sentinella, vedetta o scolta, è punito con la reclusione militare da uno a tre anni.

Art. 142.

(Violenza a sentinella, vedetta o scolta).

Il militare, che usa violenza a una sentinella, vedetta o scolta, è punito con la reclusione militare da uno a cinque anni.
Se la violenza è commessa con armi o da più persone riunite, si applica la reclusione militare da tre a sette anni.

Art. 143.

(Resistenza alla forza armata).

Il militare, che usa violenza o minaccia per opporsi alla forza armata militare, mentre questa adempie i suoi doveri, è punito con la reclusione militare da sei mesi a cinque anni.
Se la violenza o la minaccia è commessa con armi o da più persone riunite, la pena è aumentata.
Se la violenza o minaccia è commessa da più di cinque persone riunite, mediante uso di armi anche da parte soltanto di una di esse, ovvero da più di dieci persone, ancorché senza uso di armi, la pena è della reclusione militare da tre a sette anni.

Art. 144.

(Circostanze aggravanti).

Nei casi preveduti dagli articoli 142 e 143, se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale gravissima o grave, si applicano le corrispondenti pene, stabilite dal codice penale. Tuttavia, la pena detentiva temporanea è aumentata.

Art. 145.

(Impedimento a portatori di ordini militari).

Il militare, che, con violenza o inganno, ferma o trattiene militari o altre persone, imbarcazioni, aeromobili o, in generale, veicoli, spediti con ordini o dispacci riflettenti il servizio militare, ovvero sottrae i dispacci o ne impedisce altrimenti la trasmissione, è punito con la reclusione militare da due a sette anni.

Art. 146.

(Minaccia a un inferiore per costringerlo a fare un atto contrario ai propri doveri).

Il superiore, che minaccia l'inferiore per costringerlo a fare un atto contrario ai propri doveri, ovvero a compiere o ad omettere un atto inerente al proprio ufficio o servizio, è punito con la reclusione militare da sei mesi a cinque anni.

CAPO III
Dei reati di assenza dal servizio alle armi
Sezione I
Dell'allontanamento illecito

Art. 147.

(Nozione del reato, sanzione penale).

Il militare, che, essendo in servizio alle armi, se ne allontana senza autorizzazione e rimane assente per un giorno, è punito con la reclusione militare fino a sei mesi.
Alla stessa pena soggiace il militare, che, essendo legittimamente assente, non si presenta; senza giusto motivo, nel giorno successivo a quello prefisso.
Le disposizioni di questo articolo non si applicano, quando il fatto costituisce il reato di diserzione.

Sezione II
Della diserzione

Art. 148.

(Nozione del reato; sanzione penale).

Commette il reato di diserzione, ed è punito con la reclusione militare da sei mesi a due anni:
1° il militare, che, essendo in servizio alle armi, se ne allontana senza autorizzazione e rimane assente per cinque giorni consecutivi;
2° il militare, che, essendo in servizio alle armi e trovandosi legittimamente assente, non si presenta, senza giusto motivo, nei cinque giorni successivi a quello prefisso. ***((35))***

AGGIORNAMENTO (35)
La Corte Costituzionale con sentenza 20 - 28 luglio 1993, n. 343 (in G.U. 1a s.s. 4/8/1993, n. 32) ha dichiarato "l'illegittimità costituzionale dell'art. 8, terzo comma, della legge 15 dicembre 1972, n. 772 (Norme per il riconoscimento dell'obiezione di coscienza), in connessione con l'art. 148 c.p.m.p., nella parte in cui non prevede l'esonero dalla prestazione del servizio militare di leva a favore di coloro che, avendo rifiutato totalmente in tempo di pace la prestazione del servizio stesso dopo aver addotto motivi diversi da quelli indicati nell'art. 1 della legge n. 772 del 1972 o senza aver addotto motivo alcuno, abbiano espiato per quel comportamento la pena della reclusione in misura complessivamente non inferiore a quella del servizio militare di leva".

Art. 149.

(Casi di diserzione immediata).

È considerato immediatamente disertore:
1° il militare destinato a un corpo di spedizione od operazione, ovvero appartenente all'equipaggio di una nave militare o di un aeromobile militare, che, senza autorizzazione, si trova assente al momento della partenza del corpo, della nave o dell'aeromobile;
2° il militare, che evade mentre sta scontando la pena detentiva militare;
3° il militare, che evade mentre è in stato di detenzione preventiva in un carcere militare; o dovunque, per un reato soggetto alla giurisdizione militare;
4° il militare, che, senza autorizzazione, prende servizio a bordo di una nave estera o di un aeromobile estero, ovvero nelle forze armate di uno Stato estero;
5° il militare, che abbandona il servizio alle armi, facendosi sostituire.
Il disertore è punito con la reclusione militare da uno a tre anni nei casi indicati nei numeri 1°, 2° e 3°; da due a cinque anni nel caso indicato nel numero 4°; da cinque a sette anni nel caso indicato nel numero 5°.
Nei casi indicati nei numeri 2°, e 3°, non si applicano le disposizioni dell'articolo 385 del codice penale.

Art. 150.

(Circostanze aggravanti: passaggio all'estero; previo accordo).

Nei casi preveduti dagli articoli precedenti, se il militare, per sottrarsi all'obbligo del servizio militare, si reca all'estero, la pena è aumentata.
Le pene stabilite dagli articoli precedenti sono aumentate da un terzo alla metà, quando la diserzione è commessa da tre o più militari, previo accordo.
Nel caso preveduto dal comma precedente, l'aumento è sempre della metà per i capi, promotori od organizzatori.

Sezione III
Della mancanza alla chiamata

Art. 151.

(Nozione del reato: sanzione penale).

Il militare, che, chiamato alle armi per adempiere il servizio di ferma, non si presenta, senza giusto motivo, nei cinque giorni successivi a quello prefisso, è punito con la reclusione militare da sei mesi a due anni.
La stessa pena si applica al militare in congedo, che, chiamato alle armi, non si presenta, senza giusto motivo, nei tre giorni successivi a quello prefisso.
Se la chiamata alle armi è fatta per solo scopo di istruzione, il militare, che non si presenta, senza giusto motivo, negli otto giorni successivi a quello prefisso, è punito con la reclusione militare fino a sei mesi.

Art. 152.

(Circostanza aggravante: passaggio all'estero).

Nei casi preveduti dai primi due commi dell'articolo precedente, se il militare, per sottrarsi all'obbligo del servizio militare, si reca all'estero, la pena è aumentata.

Art. 153.

(Militare chiamato alle armi, che si fa sostituire).

Il militare, che, chiamato in servizio alle armi in alcuno dei casi enunciati nell'articolo 151, non si presenta, facendo presentare altri in sua vece, è considerato

immediatamente mancante alla chiamata e punito con le pene rispettivamente stabilite dall'articolo stesso, aumentate da un terzo alla metà.

Sezione IV
Disposizioni comuni alle sezioni seconda e terza

Art. 154.

(Circostanza aggravante e circostanza attenuante in relazione alla durata dell'assenza).

Nei casi preveduti dalle sezioni seconda e terza:
1° se la durata dell'assenza supera sei mesi, la pena è aumentata da un terzo alla metà;
2° se la durata dell'assenza non supera quindici giorni, la pena può essere diminuita da un terzo alla metà.

Art. 155.

(Persona che sostituisce il militare disertore o il mancante alla chiamata).

Nei casi preveduti dal numero 5° dell'articolo 149 e dall'articolo 153, colui che si sostituisce al militare disertore o mancante alla chiamata è punito con le pene ivi stabilite. Tuttavia, la pena può essere diminuita.

Art. 156.

(Rimozione).

La condanna per alcuno dei reati preveduti dalle sezioni seconda e terza, eccettuato quello preveduto dall'ultimo comma dell'articolo 151, importa la rimozione.

CAPO IV
Della mutilazione e della simulazione d'infermità

Art. 157.

(Procurata infermità a fine di sottrarsi permanentemente all'obbligo del servizio militare).

Il militare, che, a fine di sottrarsi permanentemente all'obbligo del servizio militare, stabilito dalla legge o volontariamente assunto, si mutila o si procura infermità o imperfezioni, o in qualsiasi altro modo si rende permanentemente inabile a prestare il servizio stesso, è punito con la reclusione da sei a quindici anni.
Nel caso di delitto tentato, si applicano le disposizioni dell'articolo 46, sostituita alla reclusione la reclusione militare.

Art. 158.

(Procurata infermità a fine di sottrarsi temporaneamente all'obbligo del servizio militare).

Il militare, che, a fine di sottrarsi temporaneamente all'obbligo del servizio militare, stabilito dalla legge o volontariamente assunto, si mutila o si procura infermità o imperfezioni, o in qualsiasi altro modo si rende temporaneamente inabile a prestare il servizio stesso, è punito con la reclusione militare fino a cinque anni.
La stessa pena si applica al militare, che, a fine di sottrarsi a un particolare servizio di un corpo, di un'arma o di una specialità, o comunque di menomare la sua incondizionata idoneità al servizio militare, si mutila o si procura infermità o imperfezioni, o in qualsiasi altro modo si rende inabile a prestare un particolare servizio di un corpo, di un'arma o di una specialità, o menoma la sua incondizionata idoneità al servizio militare, o si rende temporaneamente inabile al servizio stesso.
Se dai fatti indicati nei commi precedenti è derivata inabilità permanente al servizio militare, si applica la reclusione da cinque a dieci anni.

Art. 159.

(Simulazione d'infermità).

Il militare, che simula infermità o imperfezioni, in modo tale da indurre in errore i suoi superiori o altra Autorità militare, è punito con la reclusione militare fino a tre anni, se la simulazione è commessa a fine di sottrarsi all'obbligo del servizio militare, stabilito dalla legge o volontariamente assunto; e con la reclusione militare fino a un anno, se la simulazione è commessa per sottrarsi a un particolare servizio di un corpo, di un'arma o di una specialità.

Art. 160.

(Fatti commessi dagli iscritti di leva o durante lo stato di congedo).

Le disposizioni degli articoli precedenti si applicano anche:
1° agli iscritti di leva;
2° ai militari in congedo illimitato, per i fatti commessi durante lo stato di congedo, se i militari stessi sono richiamati in servizio alle armi e dal momento stabilito per la loro presentazione.

Art. 161.

(Procurata inabilità o simulata infermità a fine di sottrarsi all'adempimento di alcuno dei doveri inerenti al servizio militare).

Fuori dei casi indicati negli articoli precedenti, il militare, che, a fine di sottrarsi all'adempimento di alcuno dei doveri inerenti al servizio militare, in qualsiasi modo si rende inabile al detto adempimento, ovvero simula una infermità o una imperfezione, è punito con la reclusione militare fino a sei mesi.
Se dal fatto è derivata inabilità al servizio militare, si applicano le disposizioni dell'articolo 158.

Art. 162.

(Circostanza aggravante per i concorrenti nel reato).

Nel caso di concorso di persone in alcuno dei reati preveduti da questo capo, la pena è aumentata per coloro che hanno commesso il fatto a fine di lucro.
Il pubblico ufficiale, il medico, il chirurgo o altro esercente una professione sanitaria, che concorre in alcuno dei reati preveduti dagli articoli precedenti, soggiace alle pene ivi stabilite, aumentate da un terzo alla metà. L'aumento è della metà, se il colpevole è un ufficiale.

Art. 163.

(Pena militare accessoria).

Nei casi indicati negli articoli precedenti, la condanna, quando non ne derivi la degradazione, importa la rimozione.

CAPO V
Della distruzione, alienazione, acquisto o ritenzione di effetti militari

Art. 164.

(Distruzione o alienazione di oggetti d'armamento militare).

Il militare, che distrae, distrugge, sopprime, disperde, deteriora o rende, in tutto o in parte, inservibili, o in qualsiasi modo aliena le armi, gli oggetti di armamento, le munizioni di guerra, materiali o altri oggetti, che, a norma dei regolamenti, gli sono forniti dall'amministrazione militare come costituenti il suo armamento militare, è punito con la reclusione militare fino a quattro anni.

Art. 165.

(Distruzione o alienazione di effetti di vestiario o equipaggiamento militare).

Il militare, che distrae, distrugge, sopprime, disperde, rende inservibili o in qualsiasi modo aliena oggetti, che, a norma dei regolamenti, gli sono forniti dall'amministrazione militare come costituenti il suo vestiario o equipaggiamento militare, è punito con la reclusione militare fino a sei mesi. (1) ***((6))***

AGGIORNAMENTO (1)
Il D.Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 3, comma 1) che "La pena per il reato di distruzione o di alienazione di effetti di vestiario o di equipaggiamento militare, previsto dall'art. 165 del Codice penale militare di pace, è della reclusione militare fino a due anni".

AGGIORNAMENTO (6)
La L. 8 febbraio 1958, n. 109 nel modificare l'art. 3 del D.Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha conseguentemente disposto (con l'articolo unico) che "Le norme dell'art. 3 del decreto legislativo luogotenenziale 21 marzo 1946, n. 144, cessano di avere applicazione dal giorno della pubblicazione della presente legge nella Gazzetta Ufficiale".

Art. 166.

(Acquisto o ritenzione di effetti militari).

Chiunque acquista o per qualsiasi titolo ritiene oggetti di vestiario, equipaggiamento o armamento militare o altre cose destinate a uso militare, senza che siano muniti del marchio o del segno di rifiuto, o comunque senza che egli possa dimostrare che tali oggetti abbiano legittimamente cessato di appartenere al servizio militare, soggiace alle pene rispettivamente stabilite dagli articoli precedenti.
(1) ***((6))***

AGGIORNAMENTO (1)
Il D.Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 3, comma 2) che la pena per il reato di acquisto o di ritenzione di effetti di vestiario o di equipaggiamento militare o di altre cose destinate a uso militare, previsto dal presente articolo, è della reclusione militare fino a due anni.

AGGIORNAMENTO (6)
La L. 8 febbraio 1958, n. 109 nel modificare l'art. 3 del D.Lgs. Luogotenenziale 21 marzo 1946, n. 144

ha conseguentemente disposto (con l'articolo unico) che "Le norme dell'art. 3 del decreto legislativo luogotenenziale 21 marzo 1946, n. 144, cessano di avere applicazione dal giorno della pubblicazione della presente legge nella Gazzetta Ufficiale".

CAPO VI
Distruzione o danneggiamento di opere, di edifici o di cose mobili militari

Art. 167.

(Distruzione o sabotaggio di opere militari).

Il militare, che, fuori dei casi preveduti dagli articoli 105 a 108, distrugge o rende inservibili, in tutto o in parte, anche temporaneamente, navi, aeromobili, convogli, strade, stabilimenti, depositi o altre opere militari o adibite al servizio delle forze armate dello Stato, è punito con la reclusione non inferiore a otto anni. ***((55))***
Se il fatto ha compromesso la preparazione o la efficienza bellica dello Stato, si applica la pena di morte con degradazione.
Se il fatto è commesso per colpa, si applica la reclusione militare fino a cinque anni.

AGGIORNAMENTO (55)
La Corte Costituzionale con sentenza 19 ottobre - 2 dicembre 2022,
n. 244 (in G.U. 1ª 07/12/2022, n. 244) ha dichiarato l'illegittimità "costituzionale dell'art. 167, primo comma, del codice penale militare di pace, nella parte in cui non prevede che la pena sia diminuita se il fatto di rendere temporaneamente inservibili, in tutto o in parte, navi, aeromobili, convogli, strade, stabilimenti, depositi o altre opere militari o adibite al servizio delle Forze armate dello Stato risulti, per la particolare tenuità del danno causato, di lieve entità".

Art. 168.

(Danneggiamento di edifici militari).

Fuori dei casi preveduti dai due primi commi dell'articolo precedente, il militare, che comunque danneggia edifici militari, è punito con la reclusione militare fino a cinque anni.

Art. 169.

(Distruzione o deterioramento di cose mobili militari).

Il militare, che, i fuori dei casi preveduti dagli articoli 164 e 165, distrugge, disperde, deteriora, o rende inservibili, in tutto o in parte, oggetti, armi, munizioni o qualunque altra cosa mobile appartenente all'amministrazione militare, è punito con la reclusione militare da sei mesi a quattro anni.
Se il fatto è commesso a bordo di una nave militare o di un aeromobile militare, la reclusione militare è da due a cinque anni; e può estendersi fino a quindici anni, se dal fatto è derivata la perdita della nave o dell'aeromobile, o se l'una o l'altro non sia più atto al servizio cui era destinato.

Art. 170.

(Fatti colposi).

Se alcuno dei fatti preveduti dagli articoli 168 e 169 è commesso per colpa, si applica la reclusione militare fino a sei mesi.

Art. 171.

(Circostanza aggravante e circostanza attenuante in relazione alla entità del danno).

Nei casi preveduti dagli articoli 168 e 169:
1° si applica la reclusione non inferiore a cinque anni, se dal fatto è derivato un danno di rilevante entità;
2° la pena è diminuita, se, per la particolare tenuità del danno, il fatto risulta di lieve entità.

Art. 172.

(Uccisione o deterioramento di un cavallo o altro animale destinato al servizio delle forze armate dello Stato).

Il militare, che, senza necessità, uccide, o rende inservibile, o comunque danneggia un cavallo o altro animale destinato al servizio delle forze armate dello Stato, è punito con la reclusione militare da sei mesi a quattro anni.

TITOLO TERZO
DEI REATI CONTRO LA DISCIPLINA MILITARE
CAPO I
Della disobbedienza

Art. 173.

(Nozione del reato e circostanza aggravante).

Il militare, che rifiuta, omette o ritarda di obbedire a un ordine attinente al servizio o alla disciplina, intimatogli da un superiore, è punito con la reclusione militare fino a un anno.
Se il fatto è commesso in servizio, ovvero a bordo di una nave o di un aeromobile, la reclusione militare è da sei mesi a un anno; e può estendersi fino a cinque anni, se il fatto è commesso in occasione d'incendio o epidemia o in altra circostanza di grave pericolo.

CAPO II
Della rivolta, dell'ammutinamento e della sedizione militare

Art. 174.

(Rivolta).

Sono puniti con la reclusione militare da tre a quindici anni i militari, che, riuniti in numero di quattro o più:
1° mentre sono in servizio armato, rifiutano, omettono o ritardano di obbedire a un ordine di un loro superiore;
2° prendono arbitrariamente le armi e rifiutano, omettono o ritardano di obbedire all'ordine di deporle, intimato da un loro superiore;
3° abbandonandosi a eccessi o ad atti violenti, rifiutano, omettono o ritardano di obbedire alla intimazione di disperdersi o di rientrare nell'ordine, fatta da un loro superiore.
La pena per chi ha promosso, organizzato o diretto la rivolta è della reclusione militare non inferiore a quindici anni.
La condanna importa la rimozione.

((Non si applica l'articolo 131-bis del codice penale.))

Art. 175.

(Ammutinamento).

Fuori dei casi indicati nell'articolo precedente, sono puniti con la reclusione militare da sei mesi a tre anni i militari, che, riuniti in numero di quattro o più:
1° rifiutano, omettono o ritardano di obbedire a un ordine di un loro superiore;
2° persistono nel presentare, a voce o per iscritto, una domanda, un esposto o un reclamo.
La pena per chi ha promosso, organizzato o diretto l'ammutinamento è della reclusione militare da uno a cinque anni.
Se il fatto ha carattere di particolare gravità per il numero dei colpevoli o per i motivi che lo hanno determinato, ovvero se è commesso in circostanze di pericolo a bordo di una nave o di un aeromobile, le pene suddette sono aumentate dalla metà a due terzi.
La condanna importa la rimozione.
Se il colpevole cede alla prima intimazione, si applica la reclusione militare fino a sei mesi; tranne che abbia promosso, organizzato o diretto l'ammutinamento, nel qual caso la pena è della reclusione militare fino a un anno.

Art. 176.

(Provocazione del superiore).

Quando alcuno dei reati preveduti dai due articoli precedenti è commesso nello stato d'ira determinato dal fatto ingiusto del superiore, consistente in una violenza o altra grave offesa verso l'inferiore, e subito dopo di essa, le pene ivi stabilite sono diminuite da un terzo alla metà.

Art. 177.

(Omesso rapporto).

Il militare, che, sebbene non presente ad alcuno dei fatti enunciati negli articoli 174 e 175, omette di farne rapporto ai superiori appena ne abbia avuto notizia, è punito con la reclusione militare fino a un anno.
Se il colpevole è un ufficiale, la reclusione militare è da uno a due anni.

Art. 178.

(Accordo a fine di commettere rivolta o ammutinamento).

Quando quattro o più militari si accordano a fine di commettere alcuno dei reati di rivolta o ammutinamento preveduti dagli articoli precedenti, coloro che partecipano all'accordo sono puniti, se il reato non è commesso, con la pena stabilita per il reato stesso, diminuita da un terzo alla metà.

Art. 179.

(Cospirazione per compromettere la sicurezza del posto o l'autorità del comandante).

Quando più militari si accordano per commettere un reato a fine di compromettere la sicurezza della nave o dell'aeromobile, del forte o del posto, o di impedire l'esercizio dei poteri del comandante, ciascuno di essi,

per ciò solo, è punito con la reclusione militare non inferiore a due anni.

Art. 180.

(Domanda, esposto o reclamo collettivo, previo accordo).

Quando dieci o più militari, collettivamente o separatamente, ma previo accordo, presentano una stessa domanda o uno stesso esposto o reclamo, ciascuno di essi è punito con la reclusione militare fino a un anno. ***((18))***
Se la domanda, l'esposto o il reclamo è presentato da quattro o più militari mediante pubblica manifestazione, la pena è della reclusione militare da sei mesi a tre anni.

AGGIORNAMENTO (18)
La Corte Costituzionale con sentenza 29 aprile - 2 maggio 1985, n. 126 (in G.U. 1a s.s. 8/5/1985, n. 107) ha dichiarato "l'illegittimità costituzionale dell'art. 180, comma primo, del codice penale militare di pace".

Art. 181.

(Casi di non punibilità).

Nei casi indicati nei tre articoli precedenti, non sono punibili:
1° coloro che recedono dall'accordo prima che sia commesso il reato per cui l'accordo è intervenuto, e anteriormente all'arresto ovvero al procedimento;
2° coloro che impediscono comunque che sia compiuta l'esecuzione del reato per cui l'accordo è intervenuto.

Art. 182.

(Attività sediziosa).

Il militare, che svolge un'attività diretta a suscitare in altri militari il malcontento per la prestazione del servizio alle armi o per l'adempimento di servizi speciali, è punito con la reclusione militare fino a due anni.

Art. 183.

(Manifestazioni e grida sediziose).

Il militare, che pubblicamente compie manifestazioni sediziose o emette grida sediziose, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a un anno.

Art. 184.

(Raccolta di sottoscrizioni per rimostranza o protesta. Adunanza di militari).

Il militare, che raccoglie sottoscrizioni per una collettiva rimostranza o protesta in cose di servizio militare o attinenti alla disciplina, o che la sottoscrive, è punito con la reclusione militare fino a sei mesi.
La stessa pena si applica al militare, che, per trattare di cose attinenti al servizio militare o alla disciplina, arbitrariamente promuove un'adunanza di militari, o vi partecipa.

Art. 185.

(Rilascio arbitrario di attestazioni o dichiarazioni).

Se più militari rilasciano arbitrariamente attestazioni o dichiarazioni concernenti cose o persone militari, ciascuno di essi è punito con la reclusione militare fino a sei mesi.

CAPO III
Della insubordinazione

Art. 186.

(((Insubordinazione con violenza).))

((Il militare che usa violenza contro un superiore è punito con la reclusione militare da uno a tre anni.
Se la violenza consiste nell'omicidio volontario, consumato o tentato, nell'omicidio preterintenzionale ovvero in una lesione personale grave o gravissima, si applicano le corrispondenti pene stabilite dal codice penale. La pena detentiva temporanea può essere aumentata)).

AGGIORNAMENTO (13)
La Corte Costituzionale con sentenza 5 - 24 maggio 1979, n. 26 (in G.U. 1a s.s. 30/5/1979, n. 147) ha dichiarato: - "l'illegittimità costituzionale dell'art. 186 primo comma del codice penale militare di pace, limitatamente alle parole "tentato o""; - "in applicazione dell'art. 27 della legge 11 marzo 1953, n. 87 - l'illegittimità costituzionale dell'art. 186 primo comma, limitatamente alle parole " ancorché... preterintenzionale""; - "in applicazione dell'art. 27 della legge 11 marzo 1953, n. 87 - l'illegittimità costituzionale dell'art 186 secondo comma del codice

penale militare di pace, limitatamente alle parole "la pena di morte con degradazione, se il superiore è un ufficiale, e".

AGGIORNAMENTO (14)

La Corte Costituzionale con sentenza 20 - 27 maggio 1982, n. 103 (in G.U. 1a s.s. 2/6/1982, n. 150) ha dichiarato "l'illegittimità costituzionale dell'art. 186 ultimo comma c.p.m.p. limitatamente alle parole "con la reclusione militare non inferiore a cinque anni se il superiore è un ufficiale e con la stessa pena da tre a dodici anni se il superiore non è un ufficiale"" e "in applicazione dell'art. 27 legge 11 marzo 1953 n. 87, l'illegittimità costituzionale dell'art. 186 secondo comma c.p.m.p. limitatamente alle parole "e la reclusione da sette a quindici anni, se il superiore non è un ufficiale"".

Art. 187.

((Circostanze aggravanti).))

((Nella ipotesi di cui all'articolo precedente la pena può essere aumentata se il superiore offeso è il comandante del reparto o il militare preposto al servizio o il capo di posto)).

Art. 188.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

Art. 189.

(((Insubordinazione con minaccia o ingiuria).))

((Il militare, che minaccia un ingiusto danno ad un superiore in sua presenza, è punito con la reclusione militare da sei mesi a tre anni.
Il militare, che offende il prestigio, l'onore o la dignità di un superiore in sua presenza, è punito con la reclusione militare fino a due anni.
Le stesse pene si applicano al militare, che commette i fatti indicati nei commi precedenti mediante comunicazione telegrafica, telefonica, radiofonica o televisiva, o con scritti o disegni o con qualsivoglia altro mezzo di comunicazione, diretti al superiore)).

AGGIORNAMENTO (14)

La Corte Costituzionale con sentenza 20 - 27 maggio 1982, n. 103 (in G.U. 1a s.s. 2/6/1982, n. 150) ha dichiarato "l'illegittimità costituzionale dell'art. 189 primo comma c.p.m.p. limitatamente alle parole "con la reclusione militare da tre a sette anni, se il superiore è un ufficiale, e da uno a cinque anni, se il superiore non è un ufficiale"".

Art. 190.

(((Circostanze aggravanti).))

((Le pene stabilite dall'articolo precedente sono aumentate:
1) se la minaccia è usata per costringere il superiore a compiere un atto contrario ai propri doveri, ovvero a compiere o ad omettere un atto del proprio ufficio o servizio, ovvero per influire comunque sul superiore;
2) se il superiore offeso è il comandante del reparto o il militare preposto al servizio o il capo di posto;
3) se la minaccia è grave o ricorre alcuna delle circostanze indicate nel primo comma dell'articolo 339 del codice penale.
Se ricorre alcuna delle circostanze indicate nel secondo comma dello stesso articolo 339, si applica la reclusione militare da tre anni a quindici anni)).

Art. 191.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

Art. 192.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

Art. 193.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

Art. 194.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

CAPO IV
Dell'abuso di autorità

Art. 195.

(((Violenza contro un inferiore).))

((Il militare, che usa violenza contro un inferiore, è punito con la reclusione militare da uno a tre anni.
Se la violenza consiste nell'omicidio volontario, consumato o tentato, nell'omicidio preterintenzionale, ovvero in una lesione personale grave o gravissima, si applicano le corrispondenti pene stabilite dal codice penale. La pena detentiva temporanea può essere aumentata)).

Art. 196.

(((Minaccia o ingiuria a un inferiore).))

((Il militare, che minaccia un ingiusto danno ad un inferiore in sua presenza, è punito con la reclusione militare da sei mesi a tre anni.
Il militare, che offende il prestigio, l'onore o la dignità di un inferiore in sua presenza, è punito con la reclusione militare fino a due anni.
Le stesse pene si applicano al militare che commette i fatti indicati nei commi precedenti mediante comunicazione telegrafica, telefonica, radiofonica o televisiva, o con scritti o disegni o con qualsivoglia altro mezzo di comunicazione, diretti all'inferiore.
La pena è aumentata se la minaccia è grave o se ricorre alcuna delle circostanze indicate nel primo comma dell'articolo 339 del codice penale.
Se ricorre alcuna delle circostanze indicate nel secondo comma dello stesso articolo 339, si applica la reclusione militare da tre a quindici anni)).

AGGIORNAMENTO (17)
La Corte Costituzionale con sentenza 2 - 4 aprile 1985, n. 102 (in G.U. 1a s.s. 10/4/1985, n. 85) ha dichiarato "l'illegittimità costituzionale dell'art. 196, terzo comma, c.p.m.p. limitatamente alle parole "la reclusione militare fino a tre anni"".

Art. 197.

((ARTICOLO ABROGATO DALLA L. 26 NOVEMBRE 1985, N. 689))

CAPO V
Disposizione comune ai capi terzo e quarto

Art. 198.

(((Provocazione).))

((Se alcuno dei reati preveduti dai capi terzo e quarto è commesso nello stato d'ira determinato da un fatto ingiusto del superiore o dell'inferiore, e subito dopo di esso o subito dopo che il colpevole ne ha avuta notizia, alla pena dell'ergastolo è sostituita la reclusione non inferiore a quindici anni e le altre pene sono diminuite da un terzo alla metà)).

Art. 199.

(Cause estranee al servizio o alla disciplina militare).

Le disposizioni dei capi terzo e quarto non si applicano quando alcuno dei fatti da esse preveduto è commesso per cause estranee al servizio e alla disciplina militare, fuori dalla presenza di militari riuniti per servizio e da militare che non si trovi in servizio o a bordo di una nave militare o di un aeromobile militare o in luoghi militari. ***((29))***

AGGIORNAMENTO (29)
La Corte Costituzionale con sentenza 17 - 24 gennaio 1991, n. 22 (in G.U. 1a s.s. 30/1/1991, n. 5) ha dichiarato "l'illegittimità costituzionale dell'art. 199 del codice penale militare di pace, limitatamente alle parole: "o in luoghi militari"".

CAPO VI
Del reato militare di duello
Sezione I
Disposizione generale

Art. 200.

(((Disposizioni penali applicabili).))

((In caso di sfida a duello, di accettazione di sfida o di uso delle armi in duello fra militari in servizio, in luogo delle disposizioni del Codice penale relativo ai reati suindicati, si applicano quelle delle sezioni seguenti)).

Sezione II
Del duello fra superiore e inferiore

Art. 201.

(Inferiore che sfida il superiore; accettazione; duello).

Il militare, che sfida a duello un superiore, anche se la sfida non è accettata, è punito, se il duello non avviene, con la reclusione militare da sei mesi a due anni.
Il superiore, che accetta la sfida, è punito con la reclusione militare fino a un anno, sempre che il duello non avvenga.

Se il duello avviene, si applica la reclusione militare da uno a sette anni per l'inferiore, e da sei mesi a tre anni per il superiore.

Art. 202.

(Superiore che sfida l'inferiore; accettazione; duello).

Il militare, che sfida a duello un inferiore, anche se la sfida non è accettata, è punito, se il duello non avviene, con la reclusione militare fino a un anno.
L'inferiore, che accetta la sfida, è punito con la reclusione militare fino a otto mesi, sempre che il duello non avvenga.
Se il duello avviene, si applica la reclusione militare da sei mesi a tre anni per il superiore, e da tre mesi a due anni per l'inferiore.

Art. 203.

(Promozione dell'inferiore).

Le disposizioni degli articoli precedenti si applicano anche nel caso in cui la sfida è portata, o il duello avviene, dopo che l'inferiore è stato promosso a grado eguale a quello del superiore, ma per cause di servizio anteriori alla promozione.

Sezione III
Del duello fra eguali

Art. 204.

(Sfida; accettazione; duello).

Il militare, che sfida a duello altro militare di pari grado, anche se la sfida non è accettata, è punito, se il duello non avviene, con la reclusione militare fino a due mesi.
La stessa pena si applica al militare, che accetta la sfida, sempre che il duello non avvenga.
Il duellante è punito con la reclusione militare fino a tre anni.

Sezione IV
Disposizioni comuni alle sezioni seconda e terza

Art. 205.

(Casi di non punibilità).

Non sono punibili i padrini o secondi, le persone che hanno agevolato il duello e il sanitario che presta la propria assistenza ai duellanti.

Art. 206.

(Circostanze aggravanti e circostanza attenuante).

Le pene stabilite dalle disposizioni delle sezioni precedenti sono aumentate da un terzo alla metà:
1° se la sfida è portata o il duello avviene per causa di servizio;
2° se il duello avviene, senza che la vertenza sia stata deferita al giuri d'onore e da questo decisa, ovvero dopo che il giuri d'onore ha deciso che non v'era ragione a contesa o che la vertenza doveva essere amichevolmente composta.
Le pene stabilite dalle disposizioni delle sezioni precedenti sono diminuite fino a un sesto, se il colpevole è stato indotto alla sfida o al duello da grave insulto o da grave onta.

Art. 207.

(Esclusione della rimozione).

La condanna per alcuno dei reati preveduti dalle sezioni precedenti non importa la rimozione.

Art. 208.

(Omesso deferimento della vertenza al giuri' d'onore).

Ciascuno dei militari rappresentanti delle parti, il quale, nel caso in cui non sia stato possibile comporre la vertenza sorta fra due militari, omette di deferirla al giuri d'onore, è punito con la reclusione militare fino a un anno.

Art. 209.

(Casi di applicazione delle pene stabilite per la insubordinazione, l'abuso di autorità, l'omicidio e la lesione personale).

Se ricorre alcuna delle circostanze prevedute dal primo comma dell'articolo 397 del codice penale, in luogo delle disposizioni degli articoli precedenti, si applicano:
1° quelle contenute nei capi terzo e quarto di questo titolo, nel caso di duello fra militari di grado diverso;
2° quelle relative ai reati contro la vita e l'incolumità individuale, preveduti da questo codice e dal codice penale, nel caso di scontro fra militari di pari grado.
La frode o la violazione delle condizioni stabilite quanto alla scelta delle armi o allo scontro, è a carico non solo di chi ne è l'autore, ma anche di quello fra i duellanti, padrini o secondi, che ne ha avuto cono-

scenza prima o durante lo scontro.
Le disposizioni del primo comma di questo articolo si applicano anche a chi ha provocato il duello con l'intento di carpire denaro o altra utilità; ferma, in ogni caso, l'applicazione delle disposizioni dell'articolo 629 del codice penale.

Art. 210.

(Facoltà di non rinviare a giudizio o di non pronunciare condanna).

Nei casi preveduti dall'articolo 204, quando ricorrono circostanze di particolare valore morale, il giudice può astenersi dal rinviare a giudizio, e, qualora si proceda al giudizio, può, nella stessa sentenza, astenersi dal pronunciare condanna.
Nei casi medesimi, il giudice, qualora non ritenga di astenersi dal rinviare a giudizio o dal pronunciare condanna, può diminuire la pena da un terzo a due terzi.

Art. 211.

((ARTICOLO SOPPRESSO DALLA L. 23 MARZO 1956, N. 167))

CAPO VII
Della istigazione a delinquere

Art. 212.

(((Istigazione a commettere reati militari).))

***((Salvo che la legge disponga altrimenti, il militare, che istiga uno o più militari in servizio alle armi a commettere un reato militare, è punito, se l'istigazione non è accolta, ovvero se l'istigazione è accolta ma il reato non è commesso, con la reclusione militare fino a cinque anni. Tuttavia, la pena è sempre applicata in misura inferiore alla metà della pena stabilita per il reato al qual si riferisce l'istigazione.
La stessa pena si applica se l'istigato è un militare in congedo illimitato, e l'istigazione si riferisce ad uno dei reati per i quali, secondo l'art. 7 di questo Codice, ai militari in congedo illimitato è applicabile la legge penale militare. Se il colpevole è superiore dell'istigato, la condanna importa la rimozione))***.

Art. 213.

(Istigazione di militari a disobbedire alle leggi).

Il militare, che commette alcuno dei fatti d'istigazione o di apologia indicati nell'articolo 266 del codice penale, verso militari in servizio alle armi o in congedo, soggiace alle pene ivi stabilite, aumentate da un sesto a un terzo.
Le stesse pene si applicano al militare, che istiga iscritti di leva a violare i doveri inerenti a questa loro qualità.
La condanna, quando non ne derivi la degradazione, importa la rimozione.

Art. 214.

(((Militari in congedo).))

((Le disposizioni dell'art. 212 si applicano anche se il fatto è commesso da un militare in congedo illimitato, sempreché l'istigazione si riferisca a reati esclusivamente militari ovvero a reati per i quali è prevista, a norma dell'art. 7 del Codice penale militare di pace, l'applicabilità della legge penale militare ai militari in congedo)).

TITOLO QUARTO
REATI SPECIALI CONTRO L'AMMINISTRAZIONE MILITARE, CONTRO LA FEDE PUBBLICA, CONTRO LA PERSONA E CONTRO IL PATRIMONIO
CAPO I
Del peculato e della malversazione militare

Art. 215.

(Peculato militare).

Il militare incaricato di funzioni amministrative o di comando, che, avendo per ragione del suo ufficio o servizio il possesso di denaro o di altra cosa mobile, appartenente all'amministrazione militare, se l'appropria, ovvero lo distrae a profitto proprio o di altri, è punito con la reclusione da due a dieci anni. (30) (47)

((Non si applica l'articolo 131-bis del codice penale.))

AGGIORNAMENTO (30)
La Corte Costituzionale con sentenza 4 - 13 dicembre 1991, n. 448 (in G.U. 1a s.s. 18/12/1991, n. 50) ha dichiarato "l'illegittimità costituzionale dell'art. 215 del codice penale militare di pace, limitatamente alle parole: "ovvero lo distrae a profitto proprio o di altri"".

AGGIORNAMENTO (47)

La Corte Costituzionale con sentenza 9 - 18 luglio 2008, n. 286 (in G.U. 1a s.s. 23/7/2008, n. 31) ha dichiarato "l'illegittimità costituzionale dell'art. 215 del codice penale militare di pace nella parte in cui si riferisce anche al militare che abbia agito al solo scopo di fare uso momentaneo della cosa e, dopo l'uso momentaneo, l'abbia immediatamente restituita".

Art. 216.

(Malversazione a danno di militari).

Il militare incaricato di funzioni amministrative o di comando, che si appropria, o comunque distrae a profitto proprio o di un terzo, denaro o altra cosa mobile, appartenente ad altro militare e di cui egli ha il possesso per ragione del suo ufficio o servizio, è punito con la reclusione da due a otto anni.

Art. 217.

(Peculato e malversazione del portalettere).

Il militare incaricato del servizio di portalettere, che commette l'appropriazione o la distrazione preveduta dai due articoli precedenti, o che, comunque, si appropria, o distrae a profitto proprio o di altri, con danno dell'amministrazione militare o di militari, valori o cose di cui ha il possesso per ragione del suo servizio, è punito con le pene in detti articoli stabilite, diminuite da un terzo alla metà.

Art. 218.

(Peculato militare mediante profitto dell'errore altrui).

Il militare incaricato di funzioni amministrative o di comando, che, nell'esercizio di esse, giovandosi dell'errore altrui, riceve o ritiene indebitamente, per sé o per un terzo, denaro o altra cosa mobile, appartenente ad altro militare o all'amministrazione militare, è punito con la reclusione militare da due mesi a tre anni.

Art. 219.

(Pena accessoria).

La condanna per alcuno dei reati indicati negli articoli precedenti, quando non ne derivi la degradazione, importa la rimozione.

CAPO II
Reati di falso

Art. 220.

(Falso in fogli di licenza, di via e simili).

Il militare, che forma, in tutto o in parte, un falso foglio di licenza o di via o un permesso o una autorizzazione di libera uscita o d'ingresso o di libera circolazione in uno stabilimento militare, o un documento di entrata in un luogo di cura militare o di uscita da questo, ovvero altera alcuno di detti fogli, autorizzazioni o documenti veri, è punito con la reclusione militare fino a un anno.
La stessa pena si applica al militare, che fa uso di alcuno dei fogli, autorizzazioni o documenti indicati nel comma precedente, da altri falsificato o alterato, ovvero regolarmente rilasciato ad altro militare e non alterato.

Art. 221.

(Usurpazione di decorazioni o distintivi militari).

Il militare, che porta abusivamente in pubblico decorazioni militari, o segni distintivi di grado, cariche, specialità, brevetti militari, è punito con la reclusione militare fino a sei mesi.

((COMMA SOPPRESSO DALLA L. 23 MARZO 1956, N. 167)).

CAPO III
Reati contro la persona

Art. 222.

(Percosse).

Il militare, che percuote altro militare, se dal fatto non deriva una malattia nel corpo, o nella mente, è punito con la reclusione militare fino a sei mesi.
Tale disposizione non si applica, quando la legge considera la violenza come elemento costitutivo o come circostanza aggravante di un altro reato.

Art. 223.

(Lesione personale).

Il militare, che cagiona ad altro militare una lesione personale, dalla quale deriva una malattia nel corpo o nella mente, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da due mesi

a due anni.
Se la malattia ha una durata non superiore ai dieci giorni, e non ricorre alcuna delle circostanze aggravanti prevedute dagli articoli 583 e 585 del codice penale, si applica la reclusione militare fino a sei mesi.

Art. 224.

(Lesione personale grave o gravissima).

Se la lesione personale, commessa dal militare a danno di altro militare, è grave, si applica la reclusione da due a sette anni. Se la lesione personale è gravissima, si applica la reclusione da cinque a dodici anni.

Art. 225.

(Circostanza aggravante e circostanza attenuante).

Nei casi preveduti dai due articoli precedenti, la pena è aumentata da un terzo alla meta, se ricorre alcuna delle circostanze aggravanti indicate nell'articolo 576 del codice penale; ed è aumentata fino a un terzo, se ricorre alcuna delle circostanze aggravanti indicate nell'articolo 577 di detto codice, ovvero se il fatto è commesso con armi o con sostanze corrosive.
Se alcuno dei fatti preveduti dai tre articoli precedenti è commesso a causa d'onore, nelle circostanze indicate nell'articolo 587 del codice penale, si applicano le disposizioni di detto codice, sostituita la pena della reclusione militare alla pena della reclusione.

Art. 226.

(Ingiuria).

Il militare, che offende l'onore o il decoro di altro militare presente, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a quattro mesi.
Alla stessa pena soggiace il militare, che commette il fatto mediante comunicazione telegrafica o telefonica, o con scritti o disegni, diretti alla persona offesa.
La pena è della reclusione militare fino a sei mesi, se l'offesa consiste nell'attribuzione di un fatto determinato.

Art. 227.

(Diffamazione).

Il militare, che, fuori dei casi indicati nell'articolo precedente, comunicando con più persone, offende la reputazione di altro militare, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a sei mesi.
Se l'offesa consiste nell'attribuzione di un fatto determinato, o è recata per mezzo della stampa o con qualsiasi altro mezzo di pubblicità, ovvero in atto pubblico, la pena è della reclusione militare da sei mesi a tre anni.
Se l'offesa è recata a un corpo militare, ovvero a un ente amministrativo o giudiziario militare, le pene sono aumentate. ***((49))***

AGGIORNAMENTO (49)
La Corte Costituzionale con sentenza 19-29 ottobre 2009, n. 273 (in G.U. 1a s.s. 4/11/2009, n. 44) ha dichiarato: - l'illegittimità costituzionale del presente articolo nella parte in cui non prevede l'applicabilità anche al delitto di diffamazione militare dell'art. 596, terzo comma, numero 1), e quarto comma, del codice penale; - ai sensi dell'art. 27 della legge 11 marzo 1953, n. 87, l'illegittimità costituzionale del presente articolo nella parte in cui non prevede l'applicabilità anche al delitto di diffamazione militare dell'art. 596, terzo comma, numero 2), e quarto comma, del codice penale.

Art. 228.

(Ritorsione. Provocazione).

Nei casi preveduti dall'articolo 226, se le offese sono reciproche, il giudice può dichiarare non punibili uno o entrambi gli offensori.
Non è punibile chi ha commesso alcuno dei fatti preveduti dagli articoli 226 e 227 nello stato d'ira determinato da un fatto ingiusto altrui, e subito dopo di esso.

Art. 229.

(Minaccia).

Il militare, che minaccia ad altro militare un ingiusto danno, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a due mesi.
Se la minaccia è grave, si applica la reclusione militare fino a sei mesi.
Se la minaccia è fatta in uno dei modi indicati nell'articolo 339 del codice penale, la pena è della reclusione militare fino a un anno.

CAPO IV
Reati contro il patrimonio

Art. 230.

(Furto militare).

Il militare, che, in luogo militare, si impossessa della cosa mobile altrui, sottraendola ad altro militare che la detiene, al fine di trarne profitto per sé o per altri, è punito con la reclusione militare da due mesi a due anni.
Se il fatto è commesso a danno dell'amministrazione, militare, là pena è della reclusione militare da uno a cinque anni.
La condanna importa la rimozione.
Agli effetti della legge penale militare, sotto la denominazione di luogo militare si comprendono le caserme, le navi, gli aeromobili, gli stabilimenti militari e qualunque altro luogo dove i militari si trovano, ancorché momentaneamente, per ragione di servizio.

Art. 231.

(Circostanze aggravanti).

La pena è della reclusione da uno a cinque anni nel caso preveduto dal primo comma dell'articolo precedente, e da due a sette anni nel caso preveduto dal secondo comma dell'articolo stesso:
1° se il colpevole usa violenza sulle cose o si vale di un qualsiasi mezzo fraudolento;
2° se il colpevole porta in dosso armi o narcotici, senza farne uso;
3° se il fatto è commesso con destrezza, ovvero strappando la cosa di mano o di dosso alla persona;
4° se il fatto è commesso da tre o più persone, ovvero anche da una sola, che sia travisata.
Se concorrono due o più delle circostanze indicate nel comma precedente, ovvero se una di tali circostanze concorre con altra fra quelle indicate nell'articolo 51 del codice penale o nell'articolo 47 di questo codice, si applica la reclusione da due a otto anni, nel caso preveduto dal primo comma dell'articolo precedente, e la reclusione da tre a dieci anni, nel caso preveduto dal secondo comma dell'articolo stesso.
La condanna, quando non ne derivi la degradazione, importa la rimozione.

Art. 232.

(Furto a danno del superiore al cui personale servizio il colpevole sia addetto, o nell'abitazione detto stesso superiore).

Il militare addetto al personale servizio di un superiore, che, in qualsiasi luogo, s'impossessa della cosa mobile altrui, sottraendola al superiore che la detiene, al fine di trarne profitto per sé o per altri, è punito con la reclusione da due a sette anni.
La disposizione del comma precedente si applica anche se il fatto è commesso, nell'abitazione del superiore, a danno di persona con questo convivente.
Se ricorre alcuna delle circostanze indicate nel primo comma dell'articolo precedente, la pena è della reclusione da tre a dieci anni.
Se concorrono due o più delle circostanze indicate nel primo comma dell'articolo precedente, o se alcuna di dette circostanze concorre con altra fra quelle indicate nell'articolo 61 del codice penale o nell'articolo 47 di questo codice, la pena è della reclusione da quattro a dodici anni.
La condanna, quando non ne derivi la degradazione, importa la rimozione.

Art. 233.

(Furto d'uso o su cose di tenue valore; Furto di oggetti di vestiario o di equipaggiamento).

Si applica la reclusione militare fino a sei mesi:
1° se il colpevole ha agito al solo scopo di fare uso momentaneo della cosa sottratta, e questa, dopo l'uso momentaneo, è stata immediatamente restituita; ***((28))***
2° se il fatto è commesso su cose di tenue valore, per provvedere a un grave e urgente bisogno;
3° se il fatto è commesso su oggetti di vestiario o di equipaggiamento militare, al solo scopo di sopperire a deficienze del proprio corredo.
Tali disposizioni non si applicano, se ricorre alcuna delle circostanze indicate nei numeri 1°, 2° e 3° del primo comma dell'articolo 231.

AGGIORNAMENTO (28)
La Corte Costituzionale con sentenza 8-10 gennaio 1991, n. 2 (in G.U. 1a s.s. 16/1/1991, n. 3) ha dichiarato "l'illegittimità costituzionale dell'art. 233, primo comma, n. 1, del codice penale militare di pace, nella parte in cui non estende la disciplina ivi prevista alla mancata restituzione, dovuta a caso fortuito o forza maggiore, della cosa sottratta."

Art. 234.

(Truffa).

Il militare, che, con artifici o raggiri, inducendo taluno in errore, procura a sé o ad altri un ingiusto profitto con danno di altro militare è punito con la reclusione militare da sei mesi a tre anni.

La pena è della reclusione militare da uno a cinque anni:
1° se il fatto è commesso a danno dell'amministrazione militare o col pretesto di fare esonerare taluno dal servizio militare;
2° se il fatto è commesso, ingenerando nella persona offesa, il timore di un pericolo immaginario o l'erroneo convincimento di dover eseguire un ordine dell'Autorità.
La condanna importa la rimozione.

Art. 235.

(Appropriazione indebita).

Il militare, che, per procurare a sé o ad altri un ingiusto profitto, si appropria il denaro o la cosa, mobile di altro militare, di cui abbia, a qualsiasi titolo, il possesso, è punito con la reclusione militare fino a tre anni.
Se il fatto è commesso su cose possedute a titolo di deposito necessario o appartenenti all'amministrazione militare, la pena è aumentata.
Se il fatto è commesso su oggetti di vestiario o di equipaggiamento militare, al solo scopo di sopperire a deficienze del proprio corredo, si applica la reclusione militare fino a sei mesi.
Nei casi preveduti dal primo e dal secondo comma, la condanna importa la rimozione.

Art. 236.

(Appropriazione di cose smarrite o avute per errore o caso fortuito).

È punito con la reclusione militare fino a sei mesi:

1° il militare, che, avendo trovato, in luogo militare, denaro o cose da altri smarrite, se li appropria o non li consegna al superiore entro ventiquattro ore;
2° il militare, che si appropria cose appartenenti ad altri militari o all'amministrazione militare, delle quali sia venuto in possesso per errore altrui o per caso fortuito.
Se il colpevole conosceva il proprietario della cosa che si è appropriata, la pena è della reclusione militare fino a due anni.

Art. 237.

(Ricettazione).

Fuori dei casi di concorso nel reato, il militare, che, al fine di procurare a sé o ad altri un profitto, acquista, riceve od occulta denaro o cose provenienti da un qualsiasi reato militare, o comunque si intromette nel farli acquistare, ricevere od occultare, è punito con la reclusione militare fino a due anni.
Se il denaro o le cose provengono da un reato militare, che importa una pena detentiva superiore nel massimo a cinque anni o una pena più grave, si applica la reclusione fino a sei anni.
Le disposizioni di questo articolo si applicano anche quando l'autore del reato, da cui il denaro o le cose provengono, non è imputabile o non è punibile.
La condanna, quando non ne derivi la degradazione, importa la rimozione.

TITOLO QUINTO
DISPOSIZIONI RELATIVE AI MILITARI IN CONGEDO, AI MOBILITATI CIVILI E ALLE PERSONE ESTRANEE ALLE FORZE ARMATE DELLO STATO

CAPO I
Disposizioni per i militari in congedo

Art. 238.

(((Reati commessi dal militare in congedo a causa del servizio prestato).))
((È punito a norma delle rispettive disposizioni di questo Codice il militare in congedo che, a causa del servizio prestato, commette verso un militare in servizio o in congedo alcuno dei fatti preveduti dai capi terzo, quarto e sesto del titolo terzo di questo libro; purché il fatto medesimo sia stato commesso entro due anni dal giorno in cui il militare ha cessato di prestare servizio alle armi)).

Art. 239.

(Reati commessi contro militari in congedo a causa del servizio prestato).

È punito a norma delle rispettive disposizioni di questo codice il militare in servizio alle armi o considerato tale, che, a causa del servizio prestato, commette verso un militare in congedo alcuno dei fatti preveduti dai capi terzo, quarto e sesto del titolo terzo di questo libro.

Art. 240.

(((Reati commessi contro militari in congedo che vestono, ancorché indebitamente, l'uniforme militare).))

((Il militare in servizio alle armi, o considerato

tale, che commette alcuno dei fatti previsti dai capi terzo, quarto e sesto del titolo terzo di questo libro, contro un militare in congedo mentre questi veste, ancorché indebitamente, l'uniforme militare, è punito a norma delle rispettive disposizioni di questo Codice)).

Art. 241.

(((Militari in congedo assoluto).))

((Le disposizioni contenute nei tre articoli precedenti si applicano anche se gli offesi avevano, al momento del fatto, cessato di appartenere alle Forze armate dello Stato)).

CAPO II
Disposizioni per i mobilitati civili

Art. 242.

(Mutilazione o infermità procurata o simulazione d'infermità).

Chiunque, a fine di sottrarsi agli obblighi della mobilitazione civile, si mutila o si procura infermità o imperfezioni, ovvero simula infermità o imperfezioni, è punito a norma delle disposizioni degli articoli 157, 158, primo e terzo comma, e 159, relative al militare che commette i fatti predetti a fine di sottrarsi all'obbligo del servizio militare. Tuttavia, la pena è diminuita.

Art. 243.

(Abbandono del servizio da parte del mobilitato civile).

Chiunque, appartenendo al personale di uno stabilimento statale di produzione per la guerra ovvero a uno stabilimento privato mobilitato, si assenta senza autorizzazione dallo stabilimento per oltre cinque giorni, ovvero, essendone legittimamente assente, non vi rientra, senza giusto motivo, nei cinque giorni successivi a quello prefissogli, è punito con la reclusione militare da sei mesi a due anni.
La stessa pena si applica al militare dispensato, all'ammesso a ritardo o all'esonerato dal richiamo alle armi per mobilitazione, che, appartenendo al personale di alcuno degli stabilimenti indicati nel comma precedente, si assenta senza autorizzazione dallo stabilimento per oltre ventiquattro ore, ovvero, essendone legittimamente assente, non vi rientra, senza giusto motivo, nello stesso termine.
Se il fatto è commesso da tre o più persone, previo accordo, la pena è aumentata da un terzo alla metà.
Se la durata dell'assenza non supera quindici giorni, la pena può essere diminuita da un terzo alla metà.

Art. 244.

(Violenza contro superiori nella gerarchia tecnica o amministrativa o contro militari preposti alla sorveglianza disciplinare).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo precedente, usa violenza contro un superiore nella gerarchia tecnica o amministrativa dello stabilimento stesso, ovvero contro chi rappresenta l'Autorità militare preposta alla sorveglianza disciplinare dello stabilimento, è punito con la reclusione militare da due a cinque anni.
Se il fatto è commesso per cause estranee al servizio, si applica la reclusione militare da uno a tre anni.
Se il colpevole ha reagito in stato d'ira determinato da un fatto ingiusto del superiore o del rappresentante dell'Autorità militare, la pena è diminuita da un terzo alla metà.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale gravissima o grave, si applicano le corrispondenti pene stabilite dal codice penale, Tuttavia, la pena detentiva temporanea è aumentata.

Art. 245.

(Minaccia o ingiuria a superiori nella gerarchia tecnica o amministrativa o contro militari preposti alla sorveglianza disciplinare).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo 243, minaccia un ingiusto danno a un superiore nella gerarchia tecnica o amministrativa dello stabilimento stesso, ovvero a chi rappresenta l'Autorità militare preposta alla sorveglianza disciplinare dello stabilimento, ovvero ne offende, in sua presenza, l'onore o il decoro, è punito con la reclusione militare fino a tre anni.
La stessa pena si applica, se l'ingiuria è commessa mediante comunicazione telegrafica o telefonica, o con scritti o disegni, diretti alla persona offesa.
Se il fatto è commesso per cause estranee al servizio, la pena è della reclusione militare fino a due anni.
Se il colpevole ha reagito in stato d'ira determinato da un fatto ingiusto del superiore o del rappresentante dell'Autorità militare, la pena è diminuita da un terzo alla metà.

Art. 246.

(Rifiuto di obbedienza a superiori nella gerarchia tecnica o amministrativa o a militari preposti alla sorveglianza disciplinare).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo 243, rifiuta, omette o ritarda di obbedire a un ordine, inerente al servizio o alla disciplina, di un superiore nella gerarchia tecnica o amministrativa dello stabilimento, ovvero di chi rappresenta l'Autorità militare preposta alla sorveglianza disciplinare dello stabilimento, è punito con la reclusione militare fino a otto mesi.
Se il fatto è commesso durante il servizio, o in presenza di più persone appartenenti allo stabilimento stesso, la pena è aumentata.

Art. 247.

(Violenza usata da superiori nella gerarchia tecnica o amministrativa o da militari preposti alla sorveglianza disciplinare).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo 243, usa violenza contro un inferiore nella gerarchia tecnica o amministrativa dello stabilimento stesso, è punito con la reclusione militare da sei mesi a un anno.
Se il colpevole ha reagito in stato d'ira determinato da un fatto ingiusto dell'inferiore, la pena è diminuita dalla metà ai due terzi.
Le stesse disposizioni si applicano, se il fatto è commesso da chi rappresenta l'Autorità militare preposta alla sorveglianza disciplinare dello stabilimento, contro un appartenente allo stabilimento medesimo.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale, si applicano le corrispondenti pene del codice penale. Tuttavia, la pena detentiva temporanea è aumentata.

Art. 248.

(Minaccia o ingiuria a un inferiore).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo 243, minaccia un ingiusto danno a un inferiore nella gerarchia tecnica o amministrativa dello stabilimento stesso, ovvero ne offende, in sua presenza, l'onore o il decoro, è punito con la reclusione militare fino a otto mesi.
La pena è della reclusione militare fino a due anni, se la minaccia è grave o è fatta in uno dei modi indicati nell'articolo 339 del codice penale.
Le stesse pene si applicano, se il fatto è commesso mediante comunicazione telegrafica o telefonica, o con scritti o disegni, diretti alla persona offesa.
Si applica la disposizione del secondo comma dell'articolo precedente.

Art. 249.

(Violenza a causa d'onore).

Quando alcuno dei fatti preveduti dagli articoli 244 e 247 è commesso a causa d'onore nelle circostanze indicate nell'articolo 587 del codice penale, si applicano le disposizioni di detto codice.

Art. 250.

(Ostruzionismo o sabotaggio nei lavori).

Chiunque, appartenendo al personale di alcuno degli stabilimenti indicati nell'articolo 243, ostacola il corso dei lavori, ovvero esegue lavorazione difettosa, o deteriora il materiale di lavoro affidatogli, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da uno a cinque anni.
Se dal fatto è derivato grave danno, si applica la reclusione militare non inferiore a sette anni.

Art. 251.

(Violazione di disposizioni dell'Autorità statale preposta alle fabbricazioni di guerra).

Salvo che il fatto costituisca un più grave reato, è punito con la reclusione militare da tre mesi a cinque anni il dirigente o preposto a un ente o stabilimento privato mobilitato o che abbia ricevuto dall'Autorità statale preposta alle fabbricazioni di guerra il preavviso della dichiarazione di ausiliarietà, il quale:
1° ritarda od omette di comunicare notizie o dati richiesti dalla predetta Autorità, relativi all'attività dello stabilimento, ovvero li fornisce in modo infedele o incompleto;
2° presenta all'Autorità suindicata domanda di assegnazione di materie prime o di prodotti industriali per quantità superiore a quella necessaria e sufficiente;
3° aliena le materie prime o i prodotti industriali assegnatigli dalla detta Autorità, ovvero li utilizza per scopi diversi da quelli per i quali erano stati concessi;
4° omette o trascura la manutenzione degli impianti dello stabilimento, cagionando la riduzione della sua rapacità produttiva;
5° procede, senza autorizzazione dell'Autorità suindi-

cata, a trasformazioni o trasferimenti di stabilimenti o reparti, oppure ad alienazione di tutti o parte degli stessi, o di macchinari.

CAPO III
Disposizioni per i piloti non militari di navi militari o aeromobili militari, per i capitani di navi mercantili e per i comandanti di aeromobili civili

Art. 252.

(Pilota che cagiona la perdita, ovvero l'investimento, l'incaglio o l'avaria della nave).
Il pilota, che cagiona la perdita di una nave militare da lui condotta o di una nave di un convoglio sotto scorta o direzione militare da lui condotto, è punito con la morte mediante fucilazione nella schiena.
Il pilota, che cagiona l'investimento di una nave militare da lui condotta o di una nave di un convoglio sotto scorta o direzione militare da lui condotto, o cagiona ad essa incaglio o grave avaria, è punito con la reclusione non inferiore a otto anni.
Se il fatto è commesso per colpa, si applica:
1° la reclusione fino a dieci anni, nel caso preveduto dal primo comma;
2° la reclusione fino a due anni, nel caso preveduto dal secondo comma.

Art. 253.

(Pilota che abbandona la nave).

Il pilota, che abbandona la nave militare o la nave di un convoglio sotto scorta o direzione militare, da lui condotti, è punito con la reclusione da uno a cinque anni.
Se il fatto è commesso in caso di pericolo, si applica la reclusione da tre a dieci anni.

Art. 254.

(Pilota che rifiuta, omette o ritarda di prestare servizio).

Il pilota, che, incaricato di condurre una nave militare o un convoglio sotto scorta o direzione militare, rifiuta, omette o ritarda di assumere, o comunque di prestare il servizio, è punito con la reclusione da sei mesi a tre anni.

Art. 255.

(Pilota che induce in errore il comandante).

Il pilota di una nave militare o di una nave di un convoglio sotto scorta o direzione militare, che, mediante indicazioni o suggerimenti o in qualsiasi altro modo, induce in errore il comandante, con danno del servizio, è punito con la reclusione da due a dieci anni.
Se l'errore del comandante deriva dalla colpa del pilota, questi è punito con la reclusione fino a un anno.

Art. 256.

(Perdita, investimento, avaria o abbandono di un aeromobile).
Le disposizioni degli articoli precedenti si applicano anche a colui, che è chiamato a esercitare, relativamente a un aeromobile militare, funzioni analoghe a quelle del pilota marittimo.

Art. 257.

(Reati di comandanti di navi mercantili o aeromobili civili).

Il comandante di una nave mercantile o di un aeromobile civile in convoglio sotto scorta o direzione militare, che cagiona la perdita della nave o dell'aeromobile, è punito con la morte mediante fucilazione nella schiena.
Se il comandante si separa dal convoglio, si applica la reclusione fino a tre anni.
Se il fatto è commesso per colpa, la pena è della reclusione fino a dieci anni nel caso preveduto dal primo comma, e della reclusione fino a un anno nel caso preveduto dal secondo comma.

Art. 258.

(Circostanze attenuanti).

Quando, nei fatti preveduti dal primo e dal secondo comma dell'articolo 252 e dal primo comma dell'articolo 253, ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, alla pena di morte è sostituita la reclusione non inferiore a sette anni, e le altre pene sono diminuite dalla metà a due terzi.

Art. 259.

(Rifiuto di assistenza a nave o aeromobile militare).

Il comandante di una nave mercantile o di un aeromobile civile, cittadino dello Stato, che rifiuta od omette di prestare a una nave militare o ad un aero-

mobile militare l'assistenza chiestagli in circostanze di pericolo, è punito con la reclusione da uno a tre anni.

TITOLO SESTO
DISPOSIZIONI COMUNI AI TITOLI PRECEDENTI

Art. 260.

(Richiesta di procedimento).

I reati preveduti dagli articoli 94, 103, 104, 105, 106, 107, 108, 109, 110, 111 ***((112, 115, 116, secondo comma, 117, terzo comma, e 167, terzo comma))*** sono puniti a richiesta del Ministro da cui dipende il militare colpevole; o, se più sono i colpevoli e appartengono a forze armate diverse, a richiesta del Ministro da cui dipende il più elevato in grado, o, a parità di grado, il più anziano.
I reati, per i quali la legge stabilisce la pena della reclusione militare non superiore nel massimo a sei mesi, e quello preveduto dal numero 2° dell'articolo 171 sono puniti a richiesta del comandante del corpo o di altro ente superiore, da cui dipende il militare colpevole, o, se più sono i colpevoli e appartengono a corpi diversi o a forze armate diverse, dal comandante del corpo dal quale dipende il militare più elevato in grado, o, a parità di grado, il superiore in comando o il più anziano. (31)
Agli effetti della legge penale militare, per i militari non appartenenti al Regio esercito, al comandante del corpo è sostituito il comandante corrispondente delle altre forze armate dello Stato.
Nei casi preveduti dal secondo e dal terzo comma, la richiesta non può essere più proposta, decorso un mese dal giorno in cui l'Autorità ha avuto notizia del fatto che costituisce il reato.
Nei casi preveduti dal primo e dal secondo comma:
1° se il colpevole non è militare, alla richiesta del Ministro indicato nel primo comma è sostituita la richiesta del Ministro della forza armata alla quale appartiene il comando dell'unità, presso cui è costituito il tribunale militare competente; e alla richiesta del comandante del corpo è sostituita la richiesta del comandante dell'unità, presso cui è costituito il tribunale militare competente;
2° se più sono i colpevoli e alcuno di essi non è militare, la richiesta di procedimento a carico del militare colpevole si estende alle persone estranee alle forze armate dello Stato, che sono concorse nel reato.

AGGIORNAMENTO (31)
La Corte Costituzionale con sentenza 4 -13 dicembre 1991, n. 449 (in G.U. 1a s.s. 18/12/1991, n. 50) ha dichiarato "l'illegittimità costituzionale dell'art. 260, secondo comma, del codice penale militare di pace, nella parte in cui non prevede che i reati ivi previsti siano puniti a richiesta del comandante di altro ente superiore, allorché il comandante del corpo di appartenenza del militare colpevole sia la persona offesa dalla condotta contestata."

LIBRO TERZO
DELLA PROCEDURA PENALE MILITARE
TITOLO PRIMO
DISPOSIZIONI PRELIMINARI
Art. 261.

(Applicazione delle disposizioni del codice di procedura penale).

Salvo che la legge disponga diversamente, le disposizioni del codice di procedura penale si osservano anche per i procedimenti davanti ai tribunali militari, sostituiti:
1° al tribunale e al procuratore del Re Imperatore, rispettivamente, il tribunale militare e il procuratore militare del Re Imperatore;
2° alla corte di cassazione e al procuratore generale presso di questa, rispettivamente, il tribunale supremo militare e il procuratore generale militare del Re Imperatore;
3° al ricorso per cassazione, il ricorso per annullamento al tribunale supremo militare;
4° al segretario, il cancelliere.

Art. 261-bis.

(((Procedimenti riguardanti i magistrati).))

((Quando per i militari dell'Esercito, della Marina, dell'Aeronautica o della Guardia di finanza che svolgano la funzione di giudice presso tribunali militari o corti militari d'appello si verificano le condizioni previste dall'articolo 11 del codice di procedura penale, si applicano le disposizioni dell'articolo medesimo, con la sostituzione, all'ufficio giudiziario territorialmente competente, del giudice militare del capoluogo della corte d'appello o della sezione distaccata di corte d'appello, determinato nel modo seguente:
a) dalla corte militare d'appello di Roma alla sezione distaccata di Napoli;
b) dalla sezione distaccata di Napoli alla sezione distaccata di Verona;
c) dalla sezione distaccata di Verona alla corte militare di appello di Roma)).

Art. 261-ter.

(((Ricorso per Cassazione).))

((Contro i provvedimenti dei giudici militari è ammesso ricorso per Cassazione secondo le norme del codice di procedura penale)).

Art. 261-quater.

(Giudizio davanti alla Corte militare di Appello).
Il giudizio d'appello ***((...))*** è regolato dalle norme del codice di procedura penale; sulla impugnazione dei provvedimenti del giudice per l'udienza preliminare decide la Corte militare di appello, in camera di consiglio.

Art. 261-quinquies.

(((Malfunzionamento dei sistemi informatici degli uffici giudiziari militari).))

((Il malfunzionamento dei sistemi informatici in uso presso gli uffici giudiziari militari è certificato dal responsabile della transizione al digitale del Ministero della difesa, attestato sul portale della Giustizia militare e comunicato dal dirigente dell'ufficio giudiziario, con modalità tali da assicurarne la tempestiva conoscibilità ai soggetti interessati. Il ripristino del corretto funzionamento è certificato, attestato e comunicato con le medesime modalità.
Le certificazioni, attestazioni e comunicazioni di cui al primo comma contengono l'indicazione della data e, ove risulti, dell'orario dell'inizio e della fine del malfunzionamento, registrati, in relazione a ciascun settore interessato, dal responsabile della transizione al digitale del Ministero della difesa.
Nei casi di cui al primo e al secondo comma, a decorrere dall'inizio e sino alla fine del malfunzionamento dei sistemi informatici, atti e documenti sono redatti in forma di documento analogico e depositati con modalità non telematiche, fermo quanto disposto dagli articoli 110, comma 4, e 111-ter, comma 3, del codice di procedura penale.
La disposizione di cui al terzo comma si applica, altresì, nel caso di malfunzionamento del sistema non certificato ai sensi del primo comma, accertato ed attestato dal dirigente dell'ufficio giudiziario, e comunicato con modalità tali da assicurare la tempestiva conoscibilità ai soggetti interessati della data di inizio e della fine del malfunzionamento.
Se la scadenza di un termine previsto a pena di decadenza si verifica nel periodo di malfunzionamento certificato ai sensi del primo e del secondo comma o accertato ai sensi del quarto comma 4, si applicano le disposizioni dell'articolo 175 del codice di procedura penale)).

TITOLO SECONDO
DELL'ESERCIZIO DELLA GIURISDIZIONE MILITARE
CAPO I
Della giurisdizione militare

Art. 262.

(Unicità della giurisdizione militare).

La giurisdizione militare è unica per tutte le forze armate dello Stato, terrestri, marittime ed aeree.

Art. 263.

(Giurisdizione militare in relazione alle persone e ai reati militari).

Appartiene ai tribunali militari la cognizione dei reati militari commessi dalle persone alle quali è applicabile la legge penale militare.(22)***((33))***

AGGIORNAMENTO (22)
La Corte Costituzionale con sentenza 22 febbraio - 3 marzo 1989, n. 78 (in G.U. 1a s.s. 8/3/1989, n. 10), ha dichiarato l'illegittimità costituzionale del presente articolo nella parte in cui sottrae al tribunale per i minorenni la cognizione dei reati militari commessi dai minori degli anni diciotto appartenenti alle forze armate.

AGGIORNAMENTO (33)
La Corte Costituzionale con sentenza 23 ottobre - 10 novembre 1992, n. 429 (in G.U. 1a s.s. 18/11/1992, n. 48) ha dichiarato "l'illegittimità costituzionale dell'art. 263 del codice penale militare di pace, nella parte in cui assoggetta alla giurisdizione militare le persone alle quali è applicabile la legge penale militare, anziché i soli militari in servizio alle armi o considerati tali dalla legge al momento del commesso reato."

Art. 264.

(((Connessione di procedimenti).))

((Tra i procedimenti di competenza della autorità giudiziaria ordinaria e i procedimenti di competenza dell'autorità giudiziaria militare si ha connessione solamente quando essi riguardano delitti commessi nello stesso tempo da più persone riunite o da più persone anche in tempi e luoghi diversi, ma in concorso tra loro, o da più persone in danno reciprocamente le une delle altre, Ovvero delitti commessi gli uni per eseguire o per occultare gli altri o per conseguirne o assicurarne, al colpevole o ad altri, il profitto, il prezzo, il prodotto o la impunità.
Nei casi preveduti nel comma precedente è competente per tutti i procedimenti l'autorità giudiziaria ordinaria. Non di meno la Corte di cassazione, su ricorso del pubblico ministero presso il giudice ordinario o presso il giudice militare, ovvero risolvendo un conflitto, può ordinare, per ragioni di convenienza, con sentenza, la separazione dei procedimenti.
Il ricorso ha effetto sospensivo)).

CAPO II
Effetti della connessione dei procedimenti sulla competenza dei tribunali militari

Art. 265.

(Proscioglimento di alcuno degli imputati).

Durante l'istruzione, quando si procede congiuntamente contro persone soggette alla giurisdizione militare e persone originariamente soggette alla giurisdizione ordinaria, il giudice militare, se proscioglie dall'imputazione le prime, rinvia le altre all'Autorità giudiziaria ordinaria per l'ulteriore corso del procedimento, qualora non ritenga di prosciogliere.
Se il proscioglimento avviene in esito al giudizio, non v'è luogo a rimessione; e l'Autorità giudiziaria militare giudica anche le persone che sarebbero state originariamente soggette alla giurisdizione ordinaria.

Art. 266.

(Effetti della connessione sulla competenza dell'Autorità giudiziaria militare e su quella dell'Alta Corte di giustizia).

Nel caso di connessione fra procedimenti di competenza dell'Autorità giudiziaria militare e procedimenti di competenza dell'Alta Corte di giustizia, la competenza per tutti appartiene all'Alta Corte, osservate le disposizioni del regolamento giudiziario del Senato.

Art. 267.

(Giurisdizione militare italiana in territorio estero).

Presso i corpi di spedizione all'estero, l'esercizio della giurisdizione militare italiana è regolato dagli accordi stipulati con lo Stato, che concede il transito o il soggiorno al corpo di spedizione; e, in mancanza di accordi, dagli usi internazionali.

Art. 268.

(Sostituzione della giurisdizione militare alla giurisdizione consolare).

Nei paesi nei quali i trattati e gli usi internazionali attribuiscono ai consoli la giurisdizione penale, alla giurisdizione consolare è sostituita quella militare italiana, inerente ai corpi di spedizione all'estero, alle navi militari e agli aeromobili militari.
Se trattasi di giurisdizione consolare straniera, si applica la disposizione dell'articolo precedente.

TITOLO TERZO
DISPOSIZIONI GENERALI
CAPO I
Delle azioni

Art. 269.

(Officialità dell'azione penale).

Per i reati soggetti alla giurisdizione militare, l'azione penale è pubblica, e, quando non sia necessaria la richiesta o la querela, è iniziata d'ufficio in seguito a rapporto, a referto, a denuncia o ad altra notizia del reato.

Art. 270.

(Azione civile per le restituzioni e per il risarcimento del danno).

Nei procedimenti di competenza del giudice militare, l'azione civile per le restituzioni e per il risarcimento del danno non può essere proposta davanti ai tribunali militari. ***((41))***
Il giudizio su di essa è sospeso fino a che sull'azione penale sia pronunciata, nella istruzione, la sentenza di proscioglimento non più soggetta a impugnazione, o, nel giudizio, la sentenza irrevocabile, ovvero sia

divenuto esecutivo il decreto di condanna.*((41))*

AGGIORNAMENTO (41)
La Corte Costituzionale con sentenza 22-28 febbraio 1996, n. 60 (in G.U. 1a s.s. 6/3/1996, n. 10) ha dichiarato: - l'illegittimità costituzionale del primo comma del presente articolo; - ai sensi dell'art. 27 della legge 11 marzo 1953, n. 87, l'illegittimità costituzionale del secondo comma del presente articolo.

CAPO II
Del giudice
Sezione I
Organi della giurisdizione militare

Art. 271.

(Disposizione generale).

La legge relativa all'ordinamento giudiziario militare determina la specie, la composizione e il numero degli organi, che esercitano la giurisdizione militare.

Sezione II
Della competenza
§ 1
Della competenza dei tribunali militari territoriali

Art. 272.

(Competenza dei tribunali militari territoriali).

Appartiene ai tribunali militari territoriali la cognizione dei reati soggetti alla giurisdizione militare, esclusi quelli di competenza dei tribunali militari di bordo e dei tribunali militari istituiti presso forze armate concentrate.
Per la determinazione della competenza territoriale, si osservano le norme del codice di procedura penale, salve le disposizioni degli articoli seguenti.

Art. 273.

(((Reati commessi all'estero o in corso di navigazione).))

((Per i reati commessi all'estero è competente il Tribunale militare di Roma.
La cognizione dei reati commessi in corso di navigazione, su navi o aeromobili militari, è di competenza del Tribunale militare del luogo di stanza dell'unità militare alla quale appartiene l'imputato)).

Art. 274.

(Reati di diserzione, di mancanza alla chiamata e di allontanamento illecito).

Per i reati di diserzione, di mancanza alla chiamata e di allontanamento illecito, è competente il tribunale militare del luogo in cui ha sede il corpo o reparto al quale l'imputato apparteneva o avrebbe dovuto presentarsi.
In caso di arresto, consegna o volontaria costituzione, la competenza appartiene al tribunale militare del luogo dell'arresto, della consegna o della volontaria costituzione.

Art. 275.

(Reati di perdita di nave o aeromobile e di abbandono di comando).

Per i reati preveduti dagli articoli 105, 106, 111, 112, 252, primo comma e numero 1° del terzo comma, e 257, è competente il tribunale militare territoriale designato dal tribunale supremo militare.

Art. 276.

(Effetti della connessione sulla competenza per territorio).

La competenza per i procedimenti connessi, rispetto ai quali sono competenti per territorio tribunali militari diversi, appartiene al tribunale militare del luogo nel quale fu commesso il reato più grave, o, in caso di reati di pari gravità, il maggior numero di essi.
Se i reati soggetti alla competenza di tribunali militari diversi sono di pari gravità e numero, è competente a conoscerne il tribunale militare territoriale designato dal tribunale supremo militare.

§ 2
Della competenza dei tribunali militari di bordo

Art. 277.

(Competenza ordinaria dei tribunali militari di bordo).

Appartiene ai tribunali militari di bordo la cognizione dei reati soggetti alla giurisdizione militare, commessi, sia a terra, sia a bordo, da qualsiasi persona iscritta, sotto qualunque titolo, nel ruolo d'equipaggio di una nave militare in armamento o in riserva, quando questa non dipenda da un'Autorità diparti-

mentale, ovvero, pur dipendendone organicamente, faccia parte temporaneamente di gruppi di unità al comando di un ufficiale ammiraglio o di un capitano di vascello.
La dipendenza della nave da un'Autorità dipartimentale o navale è stabilita in base alla composizione organica del Regio naviglio.
Ai tribunali militari di bordo appartiene inoltre la cognizione:
1° dei reati soggetti alla giurisdizione militare, commessi a bordo di una nave militare che si trovi nelle condizioni indicate nel primo comma, da qualsiasi persona su di essa imbarcata;
2° dei delitti preveduti dal codice penale e dalle altre leggi penali dello Stato, commessi fuori delle acque territoriali di questo, da qualsiasi persona iscritta, sotto qualunque titolo, nel ruolo di equipaggio di una nave militare che si trovi nelle condizioni indicate nel primo comma. In questo caso, alla richiesta, autorizzazione o querela, cui sia subordinato, a norma della legge penale, l'esercizio della azione penale, è sostituito, a ogni effetto, l'ordine del comandante della squadra o della divisione o del gruppo di navi o della nave isolata, presso cui il tribunale si deve costituire.

Art. 278.

(Competenza speciale dei tribunali militari di bordo).

I tribunali militari di bordo giudicano altresì:
1° le persone imbarcate sopra navi mercantili in convoglio sotto scorta di navi militari, per i reati soggetti alla giurisdizione militare;
2° le persone imbarcate sopra navi mercantili nazionali, che all'estero concorrono nella diserzione di militari imbarcati su navi militari;
3° i piloti e i capitani di navi mercantili nazionali, per i reati che, rispetto a essi, sono preveduti da questo codice;
4° coloro che, in una rada dello Stato o straniera, occupata militarmente da forze navali, commettono alcuno dei reati militari di tradimento, spionaggio, istigazione di militari alla diserzione o concorso in essa, danneggiamento di opere, edifici o cose mobili militari, ovvero alcuno dei delitti indicati nel numero 1° dell'articolo 264.
Nel caso preveduto dal numero 2° del comma precedente, la competenza è determinata con riferimento alla nave a cui appartiene il militare colpevole di diserzione.

Art. 279.

(Effetti della connessione sulla competenza di tribunali militari territoriali e sulla competenza di tribunali militari di bordo).

Nel caso di procedimenti connessi, se alcuno appartiene alla competenza dei tribunali militari territoriali e altri appartengono alla competenza dei tribunali militari di bordo, la competenza appartiene per tutti ai tribunali militari territoriali.

Art. 280.

(Effetti della connessione sulla competenza di tribunali militari di bordo diversi).

Nel caso di procedimenti connessi di competenza di tribunali militari di bordo diversi, è competente, per tutti, il tribunale cui spetta di giudicare l'imputato più elevato in grado, o, a parità di grado, il numero maggiore di imputati, ovvero, a parità di grado e di numero, l'imputato più anziano nel grado, o, qualora trattasi di non graduati, nel servizio.

Art. 281.

(Effetti della connessione sulla competenza dei tribunali militari di bordo e sulla competenza del giudice ordinario).

Nel caso di procedimenti connessi, se alcuno appartiene alla competenza dei tribunali militari di bordo e altri appartengono alla competenza del giudice ordinario, la competenza, per tutti, appartiene al tribunale militare territoriale del luogo del commesso reato, o, se il reato è stato commesso in navigazione o all'estero, al tribunale militare territoriale del luogo del primo approdo della nave; ferma la facoltà del giudice militare di ordinare la separazione dei procedimenti, a norma dell'ultimo comma dell'articolo 49 del codice di procedura penale.

Art. 282.

(Cessazione della competenza dei tribunali militari di bordo).

La competenza dei tribunali militari di bordo cessa:
1° quando il tribunale non si possa costituire per mancanza del numero di ufficiali richiesto dalla legge;
2° quando la nave non si trovi più nelle condizioni prevedute dal primo comma dell'articolo 277;
3° quando la nave non si trovi più nel luogo del commesso reato e l'imputato l'abbia abbandonata, o sia stato sbarcato d'ordine del comandante indicato

nell'ultimo comma dell'articolo 277.
Nei casi indicati nel comma precedente, è competente a giudicare il tribunale militare territoriale costituito presso la forza armata cui appartiene l'imputato, più vicino al luogo del commesso reato, o, se questo sia stato commesso in navigazione o all'estero, più vicino al luogo del primo approdo.

§ 3
Della competenza dei tribunali militari presso forze armate concentrate

Art. 283.

(Tribunali all'interno e all'estero).

La competenza dei tribunali militari presso forze armate concentrate all'interno è determinata dal decreto Reale che li istituisce.
Per la competenza dei tribunali militari presso forze armate concentrate all'estero, oltre le disposizioni del decreto Reale che li istituisce, si osservano gli accordi stipulati con lo Stato che concede il transito o il soggiorno al corpo di spedizione, e, in mancanza di accordi, gli usi internazionali. Ove occorra, provvede il comandante del corpo di spedizione, mediante bando.

Sezione III
Dei conflitti di competenza

Art. 284.

(Denuncia e risoluzione dei conflitti di competenza fra giudici militari).

Quando più giudici militari contemporaneamente prendono o ricusano di prendere cognizione dello stesso reato, la decisione sul conflitto spetta al tribunale supremo militare.
I conflitti preveduti dal comma precedente cessano per effetto del provvedimento di uno dei giudici che dichiara, secondo i casi, la propria competenza o la propria incompetenza.
Le norme sui conflitti si applicano altresì in ogni caso analogo a quelli preveduti da questo articolo.
Il giudice, che rileva il conflitto, pronuncia ordinanza, con cui rimette gli atti al tribunale supremo militare.
Il tribunale supremo militare provvede in camera di consiglio.
Nel risolvere il conflitto, il tribunale supremo militare determina se e in quale parte devono conservare validità gli atti compiuti dal giudice dichiarato incompetente.
La sentenza del tribunale supremo militare sulla competenza ha autorità di cosa giudicata, salvo che nuovi fatti o circostanze, nel seguito del giudizio, vengano a modificare la competenza.

Sezione IV
Della rimessione dei procedimenti

Art. 285.

(Casi di rimessione e norme relative).

In ogni stato del procedimento di merito, per motivi di ordine pubblico, di servizio o di disciplina, sulla richiesta del procuratore generale militare del Re Imperatore il tribunale supremo militare può rimettere il procedimento da uno a un altro tribunale militare. ***((8))***
Il tribunale supremo militare decide in camera di consiglio, con ordinanza non motivata.(4)
Nei procedimenti di competenza dei tribunali militari di bordo, la richiesta per rimessione può essere fatta anche dal comandante indicato nell'ultimo comma dell'articolo 277; e il tribunale supremo militare decide, inteso il procuratore generale militare del Re Imperatore.
Qualora sorgano elementi nuovi, su proposta del procuratore generale militare del Re Imperatore, il tribunale supremo militare può revocare la precedente rimessione, oppure procedere ad altra designazione.
L'imputato non può proporre istanza di rimessione.

AGGIORNAMENTO (4)
La Corte Costituzionale con sentenza 3-8 luglio 1957, n. 119 (in G.U. 1a s.s. 13/7/1957, n. 174) ha dichiarato "l'illegittimità costituzionale della disposizione contenuta nel secondo comma dell'art. 285 Cod. pen. mil. di pace - con riferimento all'art. 111, primo comma, della Costituzione - nella parte in cui lo stesso art. 285 consente che sia "non motivata" l'ordinanza con la quale il Tribunale supremo militare decide in camera di consiglio sulla rimessione dei procedimenti penali da uno ad un altro tribunale militare".

AGGIORNAMENTO (8)
La Corte Costituzionale con sentenza 21-26 aprile 1971, n. 82 (in G.U. 1a s.s. 28/4/1971, n. 106) ha dichiarato "l'illegittimità costituzionale dell'art. 285, primo comma, del codice penale militare di pace nella parte relativa alle parole "di servizio"."

Art. 286.

(Effetti del procedimento per rimessione).

Il procedimento per rimessione non sospende l'istruzione o il giudizio, salvo che il tribunale supremo militare pronunci ordinanza di sospensione; nel qual caso rimane salva la facoltà di compiere gli atti urgenti.

Art. 287.

(Applicazione delle norme del codice di procedura penale).

In quanto non sia diversamente disposto dagli articoli precedenti, al procedimento per rimessione relativo a reati soggetti alla giurisdizione militare si applicano le disposizioni del codice di procedura penale.

Sezione V
Della incompatibilità, dell'astensione e della ricusazione del giudice

Art. 288.

(Applicazione delle norme del codice di procedura penale).

Per la incompatibilità, l'astensione e la ricusazione dei magistrati e dei giudici militari, si applicano le disposizioni del codice di procedura penale, relative alla incompatibilità, all'astensione e alla ricusazione del giudice, salve le norme dell'articolo seguente.

Art. 289.

(Incompatibilità speciali per i procedimenti militari).

Oltre i casi indicati negli articoli 61 e 62 del codice di procedura penale, non possono sotto qualsiasi titolo concorrere alla istruzione di un procedimento, far parte di un tribunale militare o del tribunale supremo militare, o esercitarvi le funzioni di pubblico ministero:
1° colui che è stato offeso dal reato;
2° gli ufficiali della compagnia, o reparto corrispondente, cui appartiene l'imputato, e gli ufficiali che hanno partecipato a un precedente giudizio disciplinare per lo stesso fatto, o che comunque hanno avuto una diretta ingerenza nella repressione disciplinare del fatto stesso;
3° gli ufficiali che si trovavano immediatamente agli ordini dell'imputato al tempo in cui fu commesso il reato o iniziato il procedimento penale;
4° l'ufficiale che ha proceduto ad atti preliminari all'istruzione.

CAPO III
Delle parti
Sezione I
Del pubblico ministero

Art. 290.

(Esercizio dell'azione penale da parte del pubblico ministero).

Il pubblico ministero presso i tribunali militari inizia ed esercita l'azione penale per i reati soggetti alla giurisdizione militare.

Art. 291.

(Attribuzioni del procuratore militare del Re Imperatore).

Il procuratore militare del Re Imperatore, sotto la dipendenza e la direzione del procuratore generale militare del Re Imperatore:
1° vigila sull'osservanza delle leggi, sull'ordine delle competenze e sulla sollecita spedizione delle cause;
2° fa eseguire i provvedimenti dei tribunali militari e del giudice istruttore;
3° esercita tutte le altre attribuzioni, che gli sono conferite dalle leggi e dai regolamenti militari approvati con decreto Reale.

Sezione II
Dell'imputato

Art. 292.

(Dubbio sulla identità personale dell'imputato nel giudizio davanti al tribunale supremo militare).

Quando il dubbio sulla identità personale dell'imputato sorge nel giudizio davanti al tribunale supremo militare, questo, se lo ritiene fondato, delega, anche d'ufficio, l'istruzione sull'incidente al giudice istruttore del tribunale militare presso il quale fu emesso il provvedimento impugnato.

Art. 293.

(Difensori).

((COMMA ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20

AGOSTO 1947, N. 1103)).

((COMMA ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103)).

((COMMA ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103)).

((Qualora occorra tutelare il segreto politico o militare il giudice istruttore o il presidente, con provvedimento non soggetto a impugnazione, può escludere il difensore o il consulente tecnico non militare)).

Art. 294.

(Disciplina dei difensori militari).

Il difensore militare, nominato di ufficio o scelto dall'imputato, non può rifiutare l'incarico senza giusti motivi. Se ricorrono giusti motivi, il presidente ha facoltà di concedere la dispensa.
Se il rifiuto di assumere la difesa non è giustificato, al difensore militare è inflitta dallo stesso tribunale militare, in via disciplinare, una delle punizioni, che, a norma dei regolamenti, può infliggere il superiore gerarchico.
Il difensore militare, ancorché scelto dall'imputato, se accetta qualsiasi compenso, in qualunque forma, per il servizio della difesa, soggiace a provvedimenti disciplinari, senza pregiudizio dell'azione penale, qualora il fatto costituisca reato.

Art. 295.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

CAPO IV
Degli atti processuali
Sezione I
Delle notificazioni e delle copie degli atti

Art. 296.

(Obbligo d'osservanza delle norme processuali).

Nei procedimenti di competenza dell'Autorità giudiziaria militare, i magistrati militari, i giudici militari, i cancellieri giudiziari militari, gli ufficiali giudiziari, i messi giudiziari militari, gli ufficiali di polizia giudiziaria militare sono obbligati a osservare le norme stabilite da questo codice e, in quanto applicabili, quelle del codice di procedura penale, anche quando l'inosservanza non importa nullità o altra sanzione particolare.

Art. 297.

(Rilascio di copie, di estratti o di certificati).

Il rilascio di copie, estratti o certificati di singoli atti di un procedimento penale militare può essere consentito soltanto dal pubblico ministero.

Art. 298.

(Notificazione degli atti).

In quanto la legge non disponga diversamente, per la notificazione degli atti si osservano le norme del codice di procedura penale. Le mansioni spettanti all'ufficiale giudiziario possono essere disimpegnate anche dal messo giudiziario militare.

Art. 299.

(Notificazioni ai militari che devono comparire come testimoni, periti, interpreti o custodi di cose sequestrate).

Le notificazioni ai militari in servizio alle armi, che devono comparire, come testimoni, periti, interpreti o custodi di cose sequestrate, davanti ai tribunali militari, sono eseguite con semplice avviso per iscritto o telegrafico, diretto dall'Autorità procedente al comando da cui il militare dipende. Il comando stesso trasmette senza indugio all'Autorità procedente l'attestato della fatta intimazione.
Se ricorrono particolari ragioni di urgenza, i militari in servizio alle armi possono essere citati con avviso verbale, anche telefonico, diretto ai rispettivi superiori, che hanno l'obbligo di curare l'immediata intimazione.
Se i militari sono in congedo o altrimenti lontani dalla sede del corpo, l'avviso può essere notificato a cura dell'arma dei carabinieri Reali del luogo, che invia subito la sua relazione all'Autorità procedente.

Sezione II
Delle nullità

Art. 300.

(Nullità non sanabili).

Le nullità stabilite dall'articolo 185 del codice di procedura penale non possono essere sanate in alcun modo. Esse possono essere dedotte in ogni stato e grado del procedimento, e devono anche essere dichiarate d'ufficio.

TITOLO QUARTO
DELLA ISTRUZIONE
CAPO I
Disposizioni generali
Sezione I
Degli atti preliminari alla istruzione
§ 1
Degli atti di polizia giudiziaria militare

Art. 301.

(Persone che esercitano le funzioni di polizia giudiziaria militare).

Per i reati soggetti alla giurisdizione militare, salva la disposizione dell'articolo 415, le funzioni di polizia giudiziaria, sono esercitate, nell'ordine seguente:
1° dai comandanti di corpo, di distaccamento o di posto delle varie forze armate;
2° dagli ufficiali e sottufficiali dei carabinieri Reali e dagli altri ufficiali di polizia giudiziaria indicati nell'articolo 221 del codice di procedura penale.
Concorrendo più militari fra quelli rispettivamente indicati nei numeri 1° e 2°, le funzioni sono esercitate dal più elevato in grado o, a parità di grado, dal più anziano.
I militari suddetti hanno la facoltà di richiedere la forza pubblica.
In ogni caso, tutte le persone indicate nel primo comma, senza interrompere le indagini, devono informarne immediatamente il procuratore militare del Re Imperatore.

Art. 302.

(Subordinazione della polizia giudiziaria militare).

Le persone indicate nell'articolo precedente esercitano le loro attribuzioni, sotto la direzione del procuratore generale militare del Re Imperatore e del procuratore militare del Re Imperatore, osservate le disposizioni, che, nei rispettivi ordinamenti, ne regolano i rapporti interni di dipendenza gerarchica.

Art. 303.

(Arresti, ispezioni o perquisizioni).

Quando devono procedere ad arresti, ispezioni o perquisizioni, gli ufficiali di polizia giudiziaria, militare od ordinaria, osservano le norme speciali stabilite dagli articoli 310 e 327.

Art. 304.

(Trasmissione degli atti e informazioni al procuratore militare del Re Imperatore).

Terminate le operazioni, le persone indicate nell'articolo 301 devono trasmettere immediatamente gli atti compilati e le cose sequestrate al procuratore militare del Re Imperatore.
Le dette persone devono inoltre riferire al procuratore militare del Re Imperatore ogni notizia che loro successivamente pervenga, e compiere in qualsiasi momento gli atti necessari per assicurare le prove del reato.

Art. 305.

(Sanzioni disciplinari per le persone che esercitano le funzioni di polizia giudiziaria militare).

Le persone indicate nell'articolo 301, che violano le disposizioni di legge per le quali non è stabilita una sanzione speciale, o che ricusano, omettono o ritardano l'esecuzione di un ordine dell'Autorità giudiziaria militare, ovvero eseguono l'ordine soltanto in parte o negligentemente, sono punite con sanzioni disciplinari dai superiori gerarchici, a richiesta del procuratore generale militare del Re Imperatore.

§ 2
Degli atti di polizia giudiziaria del procuratore militare del Re Imperatore

Art. 306.

(Assunzione di atti di polizia giudiziaria).

Il procuratore militare del Re Imperatore, prima di richiedere la istruzione formale o di iniziare la istruzione sommaria, può procedere direttamente, o per mezzo delle persone indicate nell'articolo 301, ad atti di polizia giudiziaria, secondo le norme del paragrafo precedente.

Art. 307.

(Assistenza del cancelliere).

Il procuratore militare del Re Imperatore, in tutti gli

atti che compie, è assistito dal cancelliere.

Sezione II

Della libertà personale dell'imputato

§ 1

Dell'arresto

Art. 308.

(Arresto in flagranza).

Le persone indicate nell'articolo 301 devono procedere o far procedere all'arresto di chiunque è colto in flagranza di un reato militare, punibile con pena detentiva o con pena più grave, ferma la osservanza dei modi prescritti dai regolamenti per l'accesso in luoghi militari.***((23))***

Dell'arresto è compilato processo verbale. L'arrestato è posto immediatamente a disposizione del procuratore militare del Re Imperatore, e intanto è custodito, preferibilmente, in luogo militare, e, se trattasi di militare, è tenuto separato da persone estranee alle forze armate dello Stato.

AGGIORNAMENTO (23)

La Corte Costituzionale con sentenza 26 ottobre - 15 novembre 1989, n. 503 (in G.U. 1a s.s. 22/11/1989, n. 47) ha dichiarato "l'illegittimità costituzionale dell'art. 308, primo comma, del codice penale militare di pace."

Art. 309.

(Arresto fuori dei casi di flagranza).

Fuori dei casi di flagranza, il militare in servizio alle armi, imputato di un reato, ancorché non soggetto alla giurisdizione militare, non può essere arrestato o fermato o trattenuto sotto custodia, se non in dipendenza di un mandato od ordine di cattura o di arresto dell'Autorità giudiziaria; salve le misure precauzionali che il comandante da cui il militare dipende ritenga di adottare.***((16))***

AGGIORNAMENTO (16)

La Corte Costituzionale con sentenza 19-20 marzo 1985, n. 74 (in G.U. 1a s.s. 27/3/1985, n. 74) ha dichiarato "l'illegittimità costituzionale dell'art. 309 del codice penale militare di pace."

Art. 310.

(Arresto in luoghi privati o in stabilimenti non dipendenti dall'Autorità militare).

Se, fuori dei casi di flagranza e in seguito a mandato od ordine dell'Autorità giudiziaria militare, si deve procedere, in case o altri luoghi privati, ovvero in stabilimenti non dipendenti dall'Autorità militare, all'arresto di imputati soggetti alla giurisdizione militare, gli ufficiali di polizia giudiziaria militare vi procedono direttamente.

Art. 311.

(Arresto in stabilimenti o altri luoghi dipendenti dall'Autorità militare).

Quando, per un reato soggetto alla giurisdizione ordinaria, fuori dei casi di flagranza e in seguito a mandato od ordine dell'Autorità giudiziaria ordinaria, si deve procedere all'arresto dell'imputato, militare o non militare, in caserme, navi, stabilimenti o altri luoghi dipendenti dall'Autorità militare, l'Autorità giudiziaria ordinaria ne fa richiesta all'Autorità militare, la quale è tenuta a porre immediatamente l'imputato a disposizione dell'Autorità giudiziaria.

Art. 312.

(Provvedimenti del procuratore militare del Re Imperatore).

Il procuratore militare del Re Imperatore, appena l'arrestato è stato posto a sua disposizione, procede all'interrogatorio, e, se ritiene che ricorre alcuno dei casi indicati nei due primi commi dell'articolo 246 o nell'articolo 249 del codice di procedura penale, ordina che sia posto in libertà.

§ 2

Dei mandati

Art. 313.

(Casi nei quali il mandato di cattura è obbligatorio).

Per i reati soggetti alla giurisdizione militare, deve essere emesso il mandato di cattura contro l'imputato:

1° di un reato contro la fedeltà o la difesa militare;

2° di mutilazione o simulazione d'infermità per sottrarsi all'obbligo del servizio militare, di rivolta, di ammutinamento, di sedizione militare o di istigazione a delinquere;

3° di un reato non colposo, per il quale la legge stabilisce una pena detentiva superiore nel massimo a tre anni, o una pena più grave; salvo che trattisi di alcuno dei reati di duello preveduti da questo codice.

Deve essere parimenti emesso il mandato di cattu-

ra contro l'imputato di delitto non colposo, per il quale la legge stabilisce la pena detentiva, quando l'imputato è stato dichiarato delinquente abituale, professionale o per tendenza, o si trova nelle condizioni stabilite dall'articolo 102 del codice penale per la dichiarazione di abitualità nel delitto, ovvero è assegnato a una colonia agricola o a una casa di lavoro, o è sottoposto a libertà vigilata.

Art. 314.

(Casi nei quali il mandato di cattura è facoltativo).

Può essere emesso il mandato di cattura contro l'imputato di reato non colposo, per il quale la legge stabilisce una pena detentiva non superiore nel massimo a tre anni, salvo che trattisi di alcuno dei reati di duello preveduti da questo codice.

Art. 315.

(Determinazione della pena agli effetti degli articoli precedenti).

Per il computo della pena agli effetti degli articoli precedenti, si osservano le disposizioni dell'articolo 255 del codice di procedura penale.

Art. 316.

(Revoca e nuova emissione del mandato di cattura).

In ogni stato dell'istruzione, quando vengono a mancare le condizioni che legittimano il mandato di cattura, il giudice deve revocarlo.
Fuori dei casi preveduti dall'articolo 313, il giudice, in ogni stato dell'istruzione, quando non ritiene più necessario mantenere il mandato di cattura, può revocarlo ed emettere, se occorre, mandato di comparizione o di accompagnamento.
La revoca è disposta con ordinanza. Il mandato di cattura già revocato o convertito può essere, quando ne ricorrono le condizioni, nuovamente emesso.

Art. 317.

(Casi nei quali può emettersi mandato di comparizione o di accompagnamento; successiva emissione del mandato di cattura).

Fuori dei casi preveduti dagli articoli 313 e 314, può essere emesso soltanto mandato di comparizione o di accompagnamento.
Il mandato di comparizione può essere convertito in quello di accompagnamento, se l'imputato non si presenta senza un legittimo impedimento.
Il mandato di accompagnamento può emettersi nei casi preveduti dall'articolo 314, quando il giudice non ritiene di emettere mandato di cattura o di comparizione, o quando vi è fondato motivo per ritenere che il mandato di comparizione abbia a rimanere senza effetto.
L'imputato, contro il quale è stato emesso mandato di accompagnamento, non può essere privato della libertà, in forza di tale mandato, oltre il giorno successivo a quello del suo arrivo nel luogo in cui si trova il giudice.
Dopo il mandato di comparizione o di accompagnamento, può essere emesso il mandato di cattura, se risultano elementi che autorizzano la cattura.

Art. 318.

(Esecuzione dei mandati).

I mandati di accompagnamento, di arresto e di cattura, emessi contro un militare, sono trasmessi per la esecuzione al comandante del corpo o della nave, a cui appartiene l'imputato; e ne è consegnata copia all'imputato stesso.
Il mandato di comparizione è notificato nei modi stabiliti dall'articolo 298.
Se l'imputato non è un militare, la esecuzione dei mandati di accompagnamento, d'arresto e di cattura è regolata dal codice di procedura penale.

§ 3
Della custodia preventiva

Art. 319.

(Scarcerazione dell'imputato: sottoposizione a cauzione o malleveria; inoppugnabilità dell'ordinanza relativa).

Se, durante l'istruzione e dopo l'interrogatorio, è ordinata dal giudice o dal pubblico ministero la scarcerazione per mancanza di indizi sufficienti, ma rimangono motivi di sospetto, l'imputato estraneo alle forze armate dello Stato può essere sottoposto a cauzione o malleveria o ad altri obblighi, con le forme stabilite dal codice di procedura penale.
Contro l'ordinanza, con la quale il giudice istruttore o il pubblico ministero provvede sulla scarcerazione dell'imputato, non è ammessa impugnazione.

Art. 320.

(Provvedimenti relativi alla durata della custodia preventiva).

Il regolamento giudiziario militare stabilisce i provvedimenti diretti a evitare la durata eccessiva della custodia preventiva, e ad accertare le responsabilità del ritardo nella definizione dei procedimenti penali.

Art. 321.

(Mandato di cattura dopo il rinvio a giudizio).

Dopo ordinata la scarcerazione, il mandato di cattura deve essere emesso, successivamente alla sentenza di rinvio o al decreto di citazione a giudizio, dal presidente del tribunale che deve giudicare, nei casi preveduti dall'articolo 314, qualora l'imputato si sia dato o sia per darsi alla fuga.

§ 4
Della libertà provvisoria

Art. 322.

(Casi nei quali la libertà provvisoria è ammessa).

All'imputato, che si trova nello stato di custodia preventiva, può essere conceduta la libertà provvisoria.
La libertà provvisoria non è ammessa nei casi preveduti dall'articolo 313.***((10))***

AGGIORNAMENTO (10)
La Corte Costituzionale con sentenza 6-13 marzo 1974, n. 68 (in G.U. 1a s.s. 20/3/1974, n. 75) ha dichiarato "l' illegittimità costituzionale dell'art. 322, secondo comma, del codice penale militare di pace, nella parte in cui non consente che sia concessa la libertà provvisoria nei casi, previsti dall'art. 313 dello stesso codice, in cui sia obbligatorio il mandato di cattura."

Art. 323.

(Momento in cui può concedersi la libertà provvisoria: cauzione o malleveria).

La libertà provvisoria può essere conceduta in ogni stato dell'istruzione e nel giudizio, escluso il giudizio davanti al tribunale supremo militare.***((11))***
Non è ammessa impugnazione contro i provvedimenti del giudice istruttore o del pubblico ministero, concernenti la libertà provvisoria.
Il militare, al quale è stata conceduta la libertà provvisoria, non può essere sottoposto a cauzione o malleveria.

AGGIORNAMENTO (11)
La Corte Costituzionale con sentenza 28 maggio - 6 giugno 1974, n. 167 (in G.U. 1a s.s. 12/6/1974, n. 153) ha dichiarato "l'illegittimità costituzionale dell'inciso "escluso il giudizio dinanzi al tribunale supremo militare", contenuto nell'art. 323, primo comma, del codice penale militare di pace".

CAPO II
Della istruzione formale
Sezione I
Disposizioni generali

Art. 324.

(Casi in cui è obbligatoria l'istruzione formale).

Per i reati soggetti alla giurisdizione militare, per i quali la legge stabilisce la pena di morte o quella dell'ergastolo, si procede con istruzione fermale.
Per i reati soggetti alla giurisdizione militare, per i quali la legge stabilisce una pena diversa da quella indicata nel comma precedente, il procuratore militare del Re Imperatore può richiedere l'istruzione formale a sensi del secondo comma dell'articolo 350.***((9))***
In ogni caso si osserva l'istruzione formale per i procedimenti nei quali occorra tutelare il segreto politico o militare.

AGGIORNAMENTO (9)
La Corte Costituzionale con sentenza 21-26 aprile 1971, n. 83 (in G.U. 1a s.s. 28/4/1971, n. 106) ha dichiarato l'illegittimità costituzionale ai sensi dell'art. 27 della legge 11 marzo 1953, n. 87, del secondo comma del presente articolo.

Art. 325.

(Attività e delegazioni del giudice istruttore militare).

L'istruzione formale è compiuta dal giudice istruttore militare, a richiesta del pubblico ministero.
Per gli atti da eseguirsi fuori del comune in cui risiede, il giudice istruttore, quando non ritiene di dovere, per ragioni di urgenza o per altro motivo, procedere personalmente, richiede il giudice istruttore militare del luogo, o, in mancanza, l'Autorità giudiziaria ordinaria, secondo le norme stabilite dall'articolo 296 del codice di procedura penale.
Se il militare da sentirsi quale testimone è in navigazione, e non vi è probabilità di pronto ritorno, il giudice istruttore richiede per l'esame il comandante

della nave o dell'aeromobile, che delega un ufficiale per ricevere con giuramento la deposizione.
Se la nave si trova in un porto estero, può essere richiesto anche il Regio console.

Art. 326.

(Vigilanza del procuratore militare del Re Imperatore sulla istruzione).

Il procuratore militare del Re Imperatore deve vigilare e, occorrendo, richiedere tutto ciò che ritiene opportuno, perché la istruzione sia speditamente compiuta, riferendo anche, ove sia necessario, al procuratore generale militare del Re Imperatore.

Sezione II
Disposizioni speciali
§ 1
Delle ispezioni, delle perquisizioni e degli esperimenti giudiziali

Art. 327.

(Ispezioni e perquisizioni in luoghi dipendenti dall'Autorità militare da parte del giudice istruttore militare).

Quando si deve procedere a ispezione o perquisizione in caserme, navi, stabilimenti o altri luoghi dipendenti dalla Autorità militare, il giudice istruttore, osservate le disposizioni dei regolamenti per l'accesso in luoghi militari, procede alla ispezione o perquisizione, presente il comandante del luogo o un ufficiale da esso delegato; ovvero una superiore Autorità militare, quando il magistrato procedente lo ritenga necessario per particolari ragioni di giustizia.

Art. 328.

(Esperimenti giudiziali).

Ferma la disposizione dell'ultimo comma dell'articolo 312 del codice di procedura penale, nei procedimenti per reati soggetti alla giurisdizione militare sono vietati gli esperimenti giudiziali che possono turbare il servizio, la disciplina o l'ordine dei luoghi militari.

§ 2
Dei periti e dei consulenti tecnici

Art. 329.

(Nomina del perito).

Quando è necessario procedere a perizia, il giudice nomina il perito, scegliendolo preferibilmente fra gli ufficiali delle forze armate dello Stato.

Art. 330.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 331.

(Incapacità o incompatibilità del perito).

((Oltre i casi di incompatibilità o incapacità del perito e del consulente tecnico, stabiliti dal Codice di procedura penale, non può prestare ufficio di perito o consulente tecnico l'ufficiale che ha compilato il rapporto o la denuncia, o che ha proceduto ad atti preliminari all'istruzione)).

Art. 332.

(Termine per la presentazione della relazione del perito).

Quando per la natura o per la difficoltà delle indagini il parere del perito non può essere dato immediatamente, il giudice stabilisce, per la presentazione in iscritto della relazione, un termine che non può superare la durata di due mesi. Questo termine può essere prorogato una sola volta dallo stesso giudice, sentito il procuratore militare del Re Imperatore. Se il perito non presenta la relazione nel termine prefissogli, il giudice lo sostituisce, ed applica le disposizioni dell'articolo 321 del codice di procedura penale. Degli atti suindicati il giudice fa compilare processo verbale.

§ 3
Degli interpreti

Art. 333.

(Nomina dell'interprete).

Quando è necessario ricorrere all'opera di un interprete, il giudice lo nomina, scegliendolo preferibilmente fra gli ufficiali delle forze armate dello Stato.

Art. 334.

(Incapacità o incompatibilità dell'interprete).

Oltre i casi d'incapacità o d'incompatibilità dell'interprete, stabiliti dal codice di procedura penale, non può prestare l'ufficio d'interprete l'ufficiale che ha compilato il rapporto o la denuncia, o che ha proceduto ad atti preliminari alla istruzione.

§ 4
Del sequestro per il procedimento penale

Art. 335.

(Sequestro in luoghi dipendenti dall'Autorità militare).

Quando si debba procedere al sequestro di cose pertinenti al reato in luoghi dipendenti dalla Autorità militare, si osservano, per l'accesso nei luoghi militari, le disposizioni dei regolamenti.
Al sequestro si procede alla presenza dell'Autorità militare da cui il luogo dipende o di persona da essa delegata; ovvero di una superiore Autorità militare, quando il magistrato procedente lo ritenga necessario per particolari ragioni di giustizia.

Art. 336.

(Atti o cose costituenti segreto militare o di ufficio).

Quando il militare, che ha in deposito, o che custodisce o detiene atti, documenti o cose di carattere militare, non aderisce alla richiesta di esibirli, fattagli dal giudice istruttore, dichiarando che trattasi di segreto militare o di segreto d'ufficio, il giudice, ove non ritenga fondata tale dichiarazione, rimette gli atti al procuratore generale militare del Re Imperatore, il quale provvede a norma dell'articolo 339, se la dichiarazione concerne un segreto militare, e può disporre che il giudice istruttore proceda al sequestro, se la dichiarazione concerne un segreto d'ufficio.

Art. 337.

(Nomina del custode delle cose sequestrate).

Nei procedimenti per reati soggetti alla giurisdizione militare, nel caso indicato nel secondo comma dell'articolo 344 del codice di procedura penale, se il giudice sceglie un custode militare, questi è nominato senza obbligo di cauzione.

§ 5
Dei testimoni

Art. 338.

(Segreto professionale).

Il diritto di astenersi dal testimoniare, determinato dal segreto professionale a norma dell'articolo 351 del codice di procedura penale, spetta anche al militare incaricato della difesa di un imputato davanti ai tribunali militari.

Art. 339.

(Segreto d'ufficio).

Nei casi preveduti dall'articolo 352 del codice di procedura penale, quando il giudice istruttore ritiene non fondata la dichiarazione del militare, rimette gli atti al procuratore generale militare del Re Imperatore, che ne informa il Ministro da cui il militare dipende. In tal caso, non si procede, per il delitto preveduto dall'articolo 372 del codice penale, senza l'autorizzazione del Ministro medesimo.

Sezione III
Della chiusura della istruzione formale

Art. 340.

(Rapporti fra il giudice istruttore e il pubblico ministero).

Compiuta l'istruzione, il giudice istruttore comunica gli atti al procuratore militare del Re Imperatore.
Il procuratore militare del Re Imperatore presenta le sue requisitorie al giudice istruttore.
Le requisitorie non sono notificate.

Art. 341.

(Dissenso fra il giudice istruttore e il pubblico ministero sulla competenza del tribunale militare).

Il giudice istruttore, se ritiene che la cognizione del fatto appartiene al tribunale militare, e il pubblico ministero ha chiesto invece la trasmissione degli atti ad altra Autorità, provvede con ordinanza alla trasmissione degli atti al pubblico ministero, il quale ha l'obbligo di presentare senz'altro le sue requisitorie definitive in merito; salva la facoltà di proporre la questione di competenza nel dibattimento.

Art. 342.

(Sentenza d'incompetenza).

Quando il giudice istruttore ritiene che la cognizione del fatto appartiene ad altro tribunale militare, ovvero all'Autorità giudiziaria ordinaria, o ad altro giudice speciale, pronuncia sentenza, con cui ordina l'invio degli atti all'Autorità competente.
Se il giudice istruttore riconosce che il fatto costituisce un reato di competenza di un tribunale di bordo, ordina l'invio degli atti al comandante a cui spetta di convocare il tribunale.

Art. 343.

(Sentenza di rinvio a giudizio. Provvedimenti relativi alla libertà personale dell'imputato).

Il giudice istruttore, se riconosce che il fatto costituisce un reato di competenza del tribunale al quale egli è addetto, e che vi sono sufficienti prove a carico dell'imputato per rinviarlo a giudizio, ordina, con sentenza, il rinvio dell'imputato davanti al tribunale medesimo, salvo che ritenga di concedere il perdono giudiziale, o di astenersi dal rinviare a giudizio in applicazione dell'articolo 210.
Con la stessa sentenza, il giudice istruttore, se non ha disposto anteriormente, può dare i provvedimenti menzionati nell'articolo 301 del codice di procedura penale, ovvero può modificarli o revocarli.
Se l'imputato non è detenuto per il reato per cui si procede, si applicano le disposizioni dell'articolo 375 del codice di procedura penale.

Art. 344.

(Sentenza di proscioglimento).

Nel caso di proscioglimento, è ordinata la cessazione delle pene accessorie e delle misure di sicurezza già provvisoriamente applicate e che devono essere revocate in conseguenza del proscioglimento, e sono applicate le misure di sicurezza a norma della legge penale comune e di questo codice.

Art. 345.

(Sentenza di astensione dal rinvio a giudizio per il reato militare di duello).

Nel caso preveduto dall'articolo 210, il giudice pronuncia sentenza, con la quale dichiara non doversi procedere, enunciandone la causa nel dispositivo.

Art. 346.

(Requisiti formali della sentenza del giudice istruttore).

La sentenza del giudice istruttore, pronunciata in confronto di un militare, contiene, in aggiunta ai requisiti formali stabiliti dal codice di procedura penale, le indicazioni del grado che il militare riveste e del corpo o della nave a cui appartiene.

Art. 347.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 348.

(Impugnazione della sentenza istruttoria).

Contro la sentenza del giudice istruttore, che dichiara non doversi procedere, ovvero dichiara la competenza di un tribunale militare di bordo, il procuratore militare del Re Imperatore può proporre ricorso al tribunale supremo militare.
Può ricorrere al tribunale supremo militare l'imputato, per il quale la sentenza del giudice istruttore dichiara non doversi procedere per insufficienza di prove, o per concessione del perdono giudiziale, o in applicazione dell'articolo 210, ovvero dichiara la competenza di un tribunale militare di bordo.
Se trattasi di sentenza di proscioglimento, il ricorso è ammesso per i motivi indicati nell'articolo 387; e, se trattasi di sentenza che dichiara la competenza di un tribunale militare di bordo, limitatamente al motivo dell'incompetenza di questo tribunale.
Il ricorso è proposto, a pena di decadenza, nel termine di cinque giorni, decorrenti, per il procuratore militare del Re Imperatore, dalla comunicazione del deposito in cancelleria dell'originale della sentenza, e, per l'imputato, dalla notificazione della sentenza stessa.

Art. 349.

(Assenza dell'imputato).

((Se l'imputato non si è potuto arrestare, o è evaso prima della sentenza di rinvio a giudizio, questa è notificata nei modi stabiliti dal Codice di procedura penale; e se l'imputato appartiene a un corpo o a una nave, è posta all'ordine del giorno del corpo o della nave, al quale effetto essa è trasmessa al comandante dell'uno o dell'altra)).

CAPO III
Della istruzione sommaria

Art. 350.

(Casi in cui si procede con istruzione sommaria).

Fuori dei casi preveduti dal primo comma dell'articolo 324, il procuratore militare del Re Imperatore procede con istruzione sommaria, quando si verificano le circostanze di fatto e le condizioni enunciate nell'articolo 389 del codice di procedura penale.
In ogni altro caso, il procuratore militare del Re Imperatore può richiedere l'istruzione formale o procedere con istruzione sommaria. ***((9))***

AGGIORNAMENTO (9)
La Corte Costituzionale, con sentenza 21 - 26 aprile 1971, n. 83 (in G.U. 1a s.s. 28/4/1971, n. 106), ha dichiarato l'illegittimità costituzionale del comma 2 del presente articolo.

Art. 351.

(Richiesta di proscioglimento e sentenza del giudice istruttore).

Il procuratore militare del Re Imperatore, se ritiene che non si debba procedere, anche solo per taluno fra più coimputati, o se ritiene che la cognizione del fatto appartiene a un tribunale militare di bordo, trasmette gli atti al giudice istruttore, con le opportune richieste.
Il giudice istruttore, se accoglie tali richieste, pronuncia sentenza, con cui dichiara non doversi procedere, ovvero ordina la trasmissione degli atti all'Autorità competente; altrimenti dispone che l'istruzione sia proseguita in via formale contro tutti gli imputati.
Per la sentenza del giudice istruttore, si applicano, secondo i casi, le disposizioni degli articoli 344 a 349.

Art. 352.

(Requisiti formali della richiesta di citazione a giudizio).

La richiesta del procuratore militare del Re Imperatore per la citazione di un militare a giudizio contiene, in aggiunta ai requisiti formali stabiliti dal codice di procedura penale, le indicazioni del grado che il militare riveste e del corpo o della nave a cui appartiene.

CAPO IV
Della riapertura dell'istruzione

Art. 353.

(Riapertura dell'istruzione e procedimento relativo).

La riapertura della istruzione è ammessa nei casi stabiliti dal codice di procedura penale, ed è regolata dalle disposizioni del codice stesso.

TITOLO QUINTO
DEL GIUDIZIO
CAPO I
Degli atti preliminari al giudizio
Sezione I
Degli atti preliminari al giudizio nei procedimenti con istruzione formale

Art. 354.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 355.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 356.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 357.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 358.

(Fissazione del dibattimento e notificazione dell'avviso relativo).

11 presidente fissa il giorno e l'ora del dibattimento.
L'avviso del giorno e dell'ora fissati per il dibattimento è notificato all'imputato e al difensore. Se l'imputato non è detenuto, la notificazione gli è fatta nei modi stabiliti, per la citazione dei testimoni, dagli articoli 298 e 299.
11 termine per comparire non può essere minore di cinque giorni, osservate le disposizioni dell'articolo 183 del codice di procedura penale.

SEZIONE II
Degli atti preliminari al giudizio nei procedimenti con istruzione sommaria

Art. 359.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 360.

(Requisiti del decreto di citazione. Nullità. Notificazione).

Il decreto di citazione a giudizio contiene:
1° le generalità dell'imputato, con le indicazioni prescritte dall'articolo 352 e le altre atte a identificarlo;
2° la indicazione del luogo, del giorno e dell'ora della comparizione, e l'avvertimento all'imputato che, non comparendo, sarà giudicato in contumacia;
3° la data e la sottoscrizione del presidente e del cancelliere.
Per il termine a comparire si applica la disposizione dell'ultimo comma dell'articolo 358.
Il decreto di citazione è nullo, se non è stato preceduto dalla notificazione della richiesta del pubblico ministero, e nei casi indicati nell'articolo 412 del codice di procedura penale.
Il decreto di citazione è notificato nei modi stabiliti dall'articolo 298.

Sezione III
Disposizioni comuni ai procedimenti con istruzione formale e ai procedimenti con istruzione sommaria

Art. 361.

(Liste testimoniali e riduzione di esse; richiamo di documenti,citazione di periti ed altri atti preliminari. Sanatoria di nullità).

Nei procedimenti davanti ai tribunali militari, con istruzione formale o sommaria, si osservano, in quanto sono applicabili, le disposizioni dei due ultimi commi dell'articolo 406 e quelle degli articoli 410, 413, 414, 415, 416, 417, 418, 419, 421 e 422 del codice di procedura penale.
Il presidente deve ridurre le liste testimoniali sovrabbondanti, e deve eliminare le testimonianze inammissibili per legge o non pertinenti direttamente all'oggetto del giudizio.

Art. 362.

(Esame di testimoni prossimi a partire in navigazione).

Quando sia necessario procedere all'esame di un testimonio prossimo a partire in navigazione, il presidente, sull'istanza delle parti o anche d'ufficio, può disporre che la deposizione sia ricevuta anche prima dell'apertura del dibattimento, delegando all'uopo il giudice istruttore del tribunale militare o l'Autorità giudiziaria ordinaria.
La deposizione, in questo caso, è ricevuta con giuramento.

Art. 363.

(Notificazione all'imputato estraneo alle forze armate della Stato; citazione di testimoni, periti, interpreti e consulenti tecnici).

Le notificazioni all'imputato estraneo alle forze armate dello Stato, che non sia detenuto, sono eseguite nei modi stabiliti dal codice di procedura penale, salvo che questo codice disponga altrimenti.
Per la citazione di testimoni, periti, interpreti o consulenti tecnici, per il giudizio, si osservano le disposizioni degli articoli 298 e 299.

CAPO II
Del dibattimento e della sentenza

Art. 364.

(Applicazione delle norme del codice di procedura penale).

Nei procedimenti davanti ai tribunali militari, per le udienze, per gli atti del dibattimento e per la sentenza, si osservano le disposizioni del codice di procedura penale relative al giudizio davanti ai tribunali, con le modificazioni e aggiunte stabilite dalle sezioni seguenti.
Si applica altresì la disposizione del penultimo comma dell'articolo 356 di questo codice.

Sezione I
Del dibattimento

Art. 365.

(Comparizione dell'imputato).

Alla udienza dei tribunali militari, l'imputato deve comparire personalmente. *((37))*
In nessun caso l'imputato può chiedere o consentire che il dibattimento avvenga in sua assenza. *((37))*
Se l'imputato si assenta nel corso del dibattimento, si applicano le disposizioni degli articoli 427, 428 e 429 del codice di procedura penale.

AGGIORNAMENTO (37)
La Corte Costituzionale, con sentenza 6 - 15 luglio 1994, n. 301 (in G.U. 1a s.s. 20/7/1994, n. 30), ha dichiarato l'illegittimità costituzionale dei commi 1 e 2 del presente articolo.

Art. 366.

(Rinvio del dibattimento a tempo indeterminato).

Nel caso di rinvio del dibattimento a tempo indeterminato, il nuovo dibattimento è richiesto e stabilito e la citazione è eseguita secondo le disposizioni del capo primo di questo titolo.
In conseguenza del provvedimento che rinvia il dibattimento, il giudice può valersi di tutte le facoltà e il pubblico ministero e le parti private possono esercitare tutti i diritti a essi spettanti nel corso degli atti preliminari al giudizio, eccettuati quei diritti per i quali siasi già verificata la decadenza. Gli atti preveduti dagli articoli 415, 416 e 417 del codice di procedura penale e la dichiarazione preveduta dall'articolo 357 di questo codice rimangono validi rispetto al nuovo dibattimento, se le parti non li rinnovano.

Art. 367.

(Reati commessi in udienza; giudizio immediato).

Quando è commesso un reato all'udienza di un tribunale militare, si procede a norma dell'articolo 435 del codice di procedura penale.
Si osservano le disposizioni dell'articolo 436 del codice di procedura penale, oltre che nei casi indicati nell'articolo stesso, anche quando:
1° il reato è punibile con la pena della reclusione militare superiore nel minimo a cinque anni o nel massimo a dieci anni, o con una pena militare più grave;
2° il reato è commesso all'udienza del tribunale supremo militare.

Art. 368.

(Decisione sulle eccezioni di nullità verificatesi nella istruzione).

Le eccezioni di nullità proposte nel termine stabilito dall'articolo 357 sono trattate e decise nel dibattimento, subito dopo compiute per la prima volta le formalità per la sua apertura, salvo che il tribunale ritenga opportuno differire la discussione o rinviare la decisione alla chiusura del dibattimento, insieme con la sentenza di merito.

Art. 369.

(Letture permesse di deposizioni testimoniali).

Oltre le deposizioni testimoniali indicate nell'articolo 462 del codice di procedura penale, possono essere lette al dibattimento anche le deposizioni ricevute a norma dell'articolo 362 di questo codice.

Sezione II
Della sentenza

Art. 370.

(Deliberazione della sentenza).

Nel deliberare la sentenza, il giudice relatore riferisce distintamente sulle questioni indicate nel primo comma dell'articolo 473 del codice di procedura penale.
Il presidente raccoglie i voti, cominciando dal giudice relatore e proseguendo dal giudice meno elevato in grado, o, a parità di grado, dal giudice meno anziano.
Il dispositivo della sentenza è firmato dal presidente e dal giudice relatore, e, dopo la lettura, è unito agli atti.

Art. 371.

(Requisiti formali della sentenza).

Oltre i requisiti formali richiesti dall'articolo 474 del codice di procedura penale, la sentenza contiene:
1° il nome, il cognome e il grado dei giudici che l'hanno deliberata, e l'indicazione dell'arma o corpo a cui appartengono;
2° la indicazione del grado dell'imputato militare e del corpo o della nave a cui appartiene.

Art. 372.

(Decisione di astenersi dal pronunciare condanna).

Il giudice, quando si astiene dal pronunciare condanna a norma dell'articolo 210, dichiara, con sentenza, non doversi procedere, enunciando la causa nel

dispositivo.

Art. 373.

(Risarcimento del danno).

Con la sentenza di condanna, l'imputato è condannato alle restituzioni e al risarcimento dei danni cagionati dal reato. ***((22))***
Il giudizio di liquidazione del danno è promosso davanti al giudice civile competente. ***((22))***
Nel giudizio per il risarcimento e la liquidazione del danno, promosso o proseguito dopo che la sentenza di condanna penale è divenuta irrevocabile questa ha autorità di cosa giudicata quanto alla sussistenza del fatto e al titolo del risarcimento. Tuttavia, il giudice civile può conoscere anche degli effetti dannosi posteriori alla sentenza.
Rimane impregiudicata la questione, se, a norma delle leggi civili, la persona civilmente responsabile debba rispondere per l'imputato del danno cagionato dal reato.

AGGIORNAMENTO (22)
La Corte Costituzionale, con sentenza 22 febbraio - 3 marzo 1989, n. 78 (in G.U. 1a s.s. 8/3/1989, n. 10), ha dichiarato l'illegittimità costituzionale del comma 1 del presente articolo e, in applicazione dell'art. 27 della legge 11 marzo 1953, n. 87, l'illegittimità costituzionale del comma 2 del presente articolo "nella parte in cui non prevede che, dinanzi al giudice civile competente, venga proposta la domanda relativa alle restituzioni ed al risarcimento del danno".

Sezione III
Del processo verbale di dibattimento

Art. 374.

(Contenuto del processo verbale di dibattimento e norme per la sua compilazione).

Il processo verbale del dibattimento è compilato secondo le norme stabilite dal codice di procedura penale, e, oltre le enunciazioni da questo prescritte, deve con tenere la menzione:
1° del grado dei giudici effettivi o supplenti che hanno deliberato la sentenza, e dell'arma o corpo a cui appartengono;
2° del grado dell'imputato e del corpo o della nave a cui appartiene;
3° della lettura del dispositivo della sentenza e della osservanza delle relative formalità.
Le dichiarazioni dell'imputato e le deposizioni dei testimoni sono riassunte nel processo verbale secondo le disposizioni date dal presidente, o in quanto sia richiesto da una delle parti.

CAPO III
Dei giudizi speciali

Art. 375.

(Del giudizio in contumacia, del giudizio direttissimo e del giudizio per decreto).

Per i procedimenti davanti ai tribunali militari, il giudizio direttissimo, il giudizio per decreto e il giudizio in contumacia sono ammessi nei casi indicati negli articoli seguenti e secondo le norme da essi stabilite.

Sezione I
Del giudizio in contumacia

Art. 376.

(Applicazione delle norme del codice di procedura penale).

Per il giudizio in contumacia davanti ai tribunali militari, si osservano le disposizioni del codice di procedura penale, relative al giudizio contumaciale davanti ai tribunali, salve le disposizioni dell'articolo 349 di questo codice e quelle degli articoli seguenti.

Art. 377.

(Reati per i quali non si procede al giudizio in contumacia).

Non si procede al giudizio in contumacia per i reati di diserzione e di mancanza alla chiamata, salvo che vi sia concorso di altro delitto, o che ne sia cessata la permanenza, o che sia diversamente ordinato dal procuratore generale militare del Re Imperatore. ***((27))***

AGGIORNAMENTO (27)
La Corte Costituzionale, con sentenza 9 - 22 ottobre 1990, n. 469 (in G.U. 1a s.s. 31/10/1990, n. 43), ha dichiarato l'illegittimità costituzionale del presente articolo.

Art. 378.

(Notificazione delle sentenze contumaciali. Ricorso).

Quando si è proceduto in contumacia, la sentenza è notificata all'imputato nei modi stabiliti per la

notificazione delle sentenze di rinvio a giudizio, ed è soggetta alle impugnazioni stabilite per le sentenze pronunciate in contraddittorio.
Il ricorso per annullamento al tribunale supremo militare può proporsi anche per il motivo dell'illegale dichiarazione della contumacia.

Sezione II
Del giudizio direttissimo

Art. 379.

(Casi e procedura del giudizio direttissimo).

Quando una persona è stata arrestata nella flagranza di un reato di competenza dei tribunali militari, il procuratore militare del Re Imperatore, a disposizione del quale l'arrestato è stato posto à termini dell'articolo 308, dopo averlo sommariamente interrogato, se ritiene di dover procedere e se non sono necessarie speciali indagini, può farlo subito condurre in stato d'arresto davanti al tribunale militare, se questo siede in udienza; altrimenti, dopo aver disposto perché l'arresto sia mantenuto, può farlo presentare a una udienza prossima, non oltre il decimo giorno dall'arresto. Se non è possibile provvedere in tal modo, il procuratore militare del Re Imperatore procede con le forme ordinarie, osservata la disposizione dell'articolo 312.

Art. 380.

(Atti del giudizio direttissimo).

Nel giudizio direttissimo, se l'imputata non sceglie subito un difensore, questi è nominato dal pubblico ministero nel primo atto del procedimento, e, se ciò non è avvenuto, dal presidente prima dell'apertura del dibattimento. I testimoni possono, a cura del pubblico ministero, essere citati anche oralmente dai messi giudiziari militari o da un ufficiale giudiziario o da un agente di polizia giudiziaria.
Il pubblico ministero e l'imputato possono presentare nel dibattimento testimoni senza citazione.
Se l'imputato ne fa domanda, il giudice, quando lo ritiene necessario, può accordargli un termine massimo improrogabile di cinque giorni per preparare la difesa. In questo caso, il dibattimento, con ordinanza del presidente, da notificarsi all'imputato, è fissato per la udienza immediatamente successiva alla scadenza del termine. Nel frattempo, l'imputato rimane in stato di arresto.

Art. 381.

(Sostituzione del procedimento ordinario al giudizio direttissimo).

Chiuso il dibattimento, il tribunale può disporre che si proceda con istruzione formale.
Se il giudizio direttissimo risulta promosso fuori delle circostanze prevedute dall'articolo 379, il giudice, anche all'inizio del dibattimento, ordina che gli atti siano trasmessi al pubblico ministero, perché proceda con le forme ordinarie.
In entrambi i casi preveduti dai commi precedenti, il tribunale ordina la liberazione dell'arrestato, se la legge non consente il mandato di cattura.
I provvedimenti indicati nei commi precedenti sono dati con ordinanza.

Sezione III
Del giudizio per decreto

Art. 382.

(Casi del giudizio per decreto).

Nei procedimenti per reati militari, per i quali la legge stabilisce la pena della reclusione militare non superiore nel massimo a un anno, il pubblico ministero, se in seguito all'esame degli atti e alle investigazioni che reputa necessarie, ritiene che all'imputato possa essere inflitta detta pena in misura non superiore a sei mesi, può chiedere al presidente del tribunale militare che pronunci la condanna con decreto, senza procedere al dibattimento.
La disposizione del comma precedente si applica anche:
1° nei procedimenti per i delitti indicati nei numeri 1° e 7° dell'articolo 264, per i quali la legge stabilisce una pena pecuniaria, sempreché il pubblico ministero ritenga che all'imputato possa essere inflitta detta pena in misura non superiore a lire cinquecento;
2° nei procedimenti per i reati indicati nel numero 3° dell'articolo 264, per i quali la legge stabilisce una pena detentiva non superiore nel massimo a due anni, ovvero una pena pecuniaria, sempreché il pubblico ministero ritenga che all'imputato possa essere inflitta una pena detentiva in misura non superiore a un anno, ovvero una pena pecuniaria in misura non superiore a lire cinquecento;
3° in ogni altro caso espressamente preveduto dalla legge.
Il procedimento per decreto non è ammesso nei casi indicati nel terzo comma dell'articolo 506 del codice di procedura penale.

Art. 383.

(Poteri del presidente o del giudice relatore delegato).

Nei casi preveduti dai due primi commi dell'articolo precedente, il presidente, o il giudice relatore da lui delegato, se accoglie la richiesta del pubblico ministero, pronuncia la condanna con decreto, senza procedere al dibattimento. Con il decreto di condanna, il presidente, o il giudice relatore da lui delegato, applica la pena in misura non eccedente il limite stabilito dalla legge per la richiesta del pubblico ministero, pone a carico del condannato le spese del procedimento, e ordina, occorrendo, la confisca o la restituzione delle cose sequestrate.
Può anche disporre, quando la legge lo consente, la sospensione condizionale della pena e la non menzione della condanna nel certificato penale rilasciato a istanza privata.
Se il presidente, o il giudice relatore delegato, non accoglie la richiesta, restituisce gli atti al pubblico ministero, perché l'azione penale sia proseguita nei modi ordinari.

Art. 384.

(Requisiti formali del decreto penale. Opposizione).

Il decreto di condanna contiene;
1° il nome, il cognome e il grado del presidente, o del giudice relatore, che lo emette;
2° le generalità dell'imputato, e, se questi è militare, l'indicazione del grado che riveste e del corpo o della nave a cui appartiene;
3° l'enunciazione del fatto, del titolo del reato e delle circostanze che formano oggetto dell'imputazione;
4° l'indicazione sommaria delle richieste del pubblico ministero;
5° la concisa esposizione dei motivi di fatto e di diritto su cui è fondata la decisione;
6° il dispositivo, con l'indicazione degli articoli di legge applicati;
7° la data e la sottoscrizione del presidente, o del giudice relatore, e del cancelliere.
Copia del decreto, insieme, quando è il caso, con il precetto menzionato nell'articolo 586 del codice di procedura penale, è notificata all'imputato, nei modi stabiliti dall'articolo 347 di questo codice, con avvertimento che ha facoltà di proporre opposizione nel termine di dieci giorni dalla notificazione, se trattasi di condanna a pena pecuniaria, e di trenta giorni, se trattasi di condanna a pena detentiva.
Trascorso questo termine, senza che sia stata proposta opposizione, il decreto diventa senz'altro esecutivo.

Art. 385.

(Procedimento relativo all'opposizione).

L'opposizione è proposta dall'interessato, personalmente o per mezzo di procuratore speciale, mediante dichiarazione ricevuta nella cancelleria del tribunale presso cui è in corso il procedimento, ovvero nella cancelleria di altro tribunale militare o nella cancelleria di una pretura, che ne cura l'immediata comunicazione al tribunale competente.
Nella dichiarazione di opposizione deve essere chiesto il dibattimento e devono essere indicati specificamente, a pena d'inammissibilità, i motivi dell'opposizione. Si osservano nel resto, in quanto sono applicabili, le disposizioni degli articoli 197 e 198 del codice di procedura penale.
Se l'opposizione è stata fatta fuori termine, o è stata proposta da chi non ne aveva il diritto, o è priva delle indicazioni prescritte, o se queste non sono specifiche, il presidente o il giudice, che ha emesso il decreto, dichiara, con ordinanza, inammissibile l'opposizione, e pone a carico del condannato le spese ulteriori. Contro questa ordinanza, l'opponente può ricorrere, nel termine di tre giorni dalla notificazione di essa, al tribunale supremo militare, per i motivi indicati nell'articolo 387.
Fuori dei casi preveduti dal comma precedente, il presidente emette il decreto di citazione per il dibattimento.
Per la notificazione dell'ordinanza preveduta dal terzo comma e del decreto di citazione, per la nomina del difensore e per gli altri atti preliminari al dibattimento, si osservano le disposizioni dell'articolo 354.
Si osservano altresì le disposizioni degli articoli 508 e 510 del codice di procedura penale, sostituito al pretore il tribunale militare.

Art. 386.

(Denuncia del decreto penale al tribunale supremo militare, per annullamento).

Il procuratore generale militare del Re Imperatore, quando abbia notizia che è stata pronunciata condanna per decreto fuori dei casi stabiliti dalla legge, può, prima che sia intervenuta una causa estintiva del reato, denunciare il decreto stesso per annullamento al tribunale supremo militare. Questo provvede in camera di consiglio, e, se pronuncia la revoca del decreto, ordina la trasmissione degli atti al procuratore militare del Re Imperatore competente, per la prosecuzione del procedimento nei modi ordinari.

CAPO IV
Del ricorso per annullamento
Sezione I
Dei casi nei quali si può ricorrere

Art. 387.

(Motivi di ricorso contro le sentenze dei tribunali militari).

Salvo che la legge disponga altrimenti, il ricorso per annullamento al tribunale supremo militare può proporsi dal pubblico ministero e dall'imputato per i motivi seguenti:
1° inosservanza o erronea applicazione dello legge penale o di altre norme giuridiche, di cui si deve tener conto nell'applicazione della legge penale;
2° esercizio da parte del giudice di una potestà riservata dalla legge a organi legislativi o amministrativi, ovvero non consentita ai pubblici poteri;
3° inosservanza delle norme processuali stabilite a pena di nullità, di inammissibilità o di decadenza.
Il ricorso, oltre che nei casi e con gli effetti determinati da particolari disposizioni, può essere proposto contro le sentenze pronunciate nel giudizio.
Il ricorso è inammissibile, se è proposto per motivi non consentiti dalla legge o manifestamente infondati.

Art. 388.

(Ricorso dell'imputato).

Oltre che nei casi preveduti dall'articolo 526 del codice di procedura penale, l'imputato può ricorrere anche contro la sentenza con cui il giudice dichiara di astenersi dal pronunciare condanna a termini dell'articolo 210 di questo codice.

Art. 389.

(Termine per la presentazione del ricorso).

Il procuratore militare del Re Imperatore e l'imputato possono proporre ricorso per annullamento al tribunale supremo militare, a pena di decadenza, nei tre giorni successivi a quello della pronuncia della sentenza.
Quando si è proceduto in contumacia, il termine è, per l'imputato, di dieci giorni, a decorrere da quello della notificazione della sentenza.

Sezione II
Del ricorso, del procedimento relativo e della sentenza

Art. 390.

((ARTICOLO ABROGATO DAL D.LGS. DEL CAPO PROVVISORIO DELLO STATO 20 AGOSTO 1947, N. 1103))

Art. 391.

(Notificazione del ricorso del pubblico ministero all'imputato).

Il ricorso proposto dal procuratore militare del Re Imperatore è notificato, a pena di decadenza, all'imputato detenuto, entro tre giorni dalla dichiarazione, per mezzo del cancelliere.
All'atto della consegna della copia, il cancelliere invita il detenuto a scegliere il difensore per il procedimento davanti al tribunale supremo militare con avvertimento che, se non lo sceglie, gli sarà nominato dal presidente dello stesso tribunale.
Di tutto deve compilarsi processo verbale.

((Se l'imputato non è detenuto il cancelliere deve disporre, a pena di decadenza, la notificazione di copia della dichiarazione di ricorso entro tre giorni dalla sua data)).

Art. 392.

(Presentazione e sottoscrizione dei motivi di ricorso).

I motivi del ricorso possono enunciarsi nello stesso atto della dichiarazione; altrimenti devono presentarsi per iscritto, con atto sottoscritto da chi ha proposto l'impugnazione o dal difensore del ricorrente nel giudizio davanti al tribunale militare, nel termine di giorni dieci dall'avvenuta notificazione del deposito della sentenza impugnata nella cancelleria. Il cancelliere appone all'atto la data del ricevimento, con la sua sottoscrizione, e lo trasmette immediatamente, con tutti gli atti della causa, al procuratore generale militare del Re Imperatore.
Se i motivi sono stati presentati in termine, possono esserne aggiunti altri, entro cinque giorni dalla notificazione dell'avviso indicato nell'articolo 393, dal procuratore generale militare del Re Imperatore o dal difensore, nominato, per il giudizio davanti al tribunale supremo militare, fra gli avvocati iscritti nell'albo speciale della corte di cassazione.
Si applicano le disposizioni del secondo e del terzo comma dell'articolo 201 del codice di procedura penale.
I termini indicati in questo articolo sono stabiliti a pena di decadenza.

Art. 393.

(Avviso al difensore).

Il cancelliere del tribunale supremo militare avvisa il difensore che, durante il termine di cinque giorni dalla notificazione dell'avviso, può esaminare nella cancelleria gli atti e i documenti, estrarne copia e presentare nuovi documenti. Di questo avviso il cancelliere dà immediata comunicazione al procuratore generale militare del Re Imperatore, per gli effetti indicati nel secondo comma dell'articolo precedente.

Art. 394.

(Fissazione dell'udienza e conseguenti provvedimenti).

Decorso il termine stabilito dall'articolo precedente, il presidente del tribunale supremo militare fissa l'udienza e designa il relatore.
Il cancelliere comunica immediatamente gli atti al procuratore generale militare del Re Imperatore, e notifica al difensore l'avviso del giorno e dell'ora stabiliti per la udienza.
Non più tardi del quinto giorno precedente a quello della udienza, il difensore può presentare memorie a svolgimento dei motivi di ricorso già presentati.

Art. 395.

(Deliberazione e sentenza).

Per la deliberazione della sentenza del tribunale supremo militare, si osservano le disposizioni dell'articolo 370, sostituito il consigliere relatore al giudice relatore.
La sentenza è sottoscritta dal presidente, dal relatore e dal cancelliere. Il dispositivo è letto dal presidente, o da un giudice militare da esso delegato, in pubblica udienza, con l'assistenza dei giudici che in quella udienza compongono il tribunale, del rappresentante del pubblico ministero e del cancelliere.

Art. 396.

(Annullamento senza rinvio).

Ferme le altre disposizioni dell'articolo 539 del codice di procedura penale, il tribunale supremo militare pronuncia l'annullamento senza rinvio anche se il reato non è di competenza del giudice militare. In questo caso, ordina che gli atti siano trasmessi alla Autorità competente.

Art. 397.

(Annullamento con rinvio).

Ferme in ogni altra parte, in quanto applicabili, le disposizioni dell'articolo 543 del codice di procedura penale, se, a seguito di annullamento di una sentenza di un tribunale militare, si deve rinnovare il giudizio, questo è rinviato ad altro tribunale militare.
Il tribunale supremo militare può anche ordinare il rinvio del giudizio allo stesso tribunale; ma in questo caso il tribunale di rinvio deve essere composto con giudici diversi da quelli che pronunciarono la sentenza annullata.

Art. 398.

(Esclusione della sanzione pecuniaria in caso di inammissibilità o rigetto del ricorso).

Nel caso in cui il tribunale supremo militare dichiari inammissibile o rigetti il ricorso presentato dalla parte privata, non si applica la sanzione pecuniaria stabilita dall'articolo 549 del codice di procedura penale.

Art. 399.

(Limite dell'applicazione della pena nel giudizio di rinvio).

Quando una sentenza di condanna a pena diversa dalla pena di morte sia annullata su ricorso dell'imputato, il tribunale militare di rinvio può infliggere una pena più grave di quella applicata con la sentenza annullata, ma non può pronunciare condanna alla pena di morte.

SEZIONE III
Del ricorso straordinario contro le sentenze del tribunale supremo militare

Art. 400.

(Casi di ricorso. Presentazione dei motivi).

Contro la sentenza, con la quale il tribunale supremo militare rigetta, in tutto o in parte, il ricorso proposto contro una sentenza di condanna, il procuratore generale militare del Re Imperatore e il condannato possono proporre ricorso per cassazione, per incompetenza o eccesso di potere.
Il ricorso può essere proposto in ogni tempo, prima che la pena sia estinta.

Il ricorso non ha effetto sospensivo; ma, se è stata inflitta la pena di morte, la sospensione della esecuzione può essere ordinata dal Ministro della giustizia. I motivi di ricorso possono essere enunciati nello stesso atto della dichiarazione; altrimenti devono essere presentati, a pena di decadenza, nei dieci giorni successivi alla notificazione dell'avviso del deposito degli atti nella cancelleria della corte di cassazione.

CAPO V
Della revisione

Art. 401.

(Norma generale).

Le sentenze dei tribunali militari sono sottoposte a revisione nei casi e in conformità del capo terzo, titolo terzo, libro terzo, del codice di procedura penale, sostituito un giudice del tribunale supremo militare al consigliere delegato, e salve le modificazioni seguenti:
1° la richiesta di promuovere il procedimento di revisione emana dal Ministro da cui dipende il militare condannato, ovvero, se il condannato non è un militare, da quello da cui dipende il comando della forza armata, presso cui è costituito il tribunale che pronunciò la condanna; ed è trasmessa al procuratore generale militare del Re Imperatore;
2° l'istanza è promossa davanti al tribunale supremo militare, il quale, se ammette la revisione, annulla la sentenza di condanna, ordinando, ove occorra, il rinvio a nuovo giudizio davanti ad altro tribunale militare.

TITOLO SESTO
DELLA ESECUZIONE
CAPO I
Disposizioni generali

Art. 402.

(Applicazione delle norme del codice di procedura penale).

Salvo quanto è stabilito da questo titolo, per la esecuzione delle sentenze dei tribunali militari si osservano, in quanto applicabili, le disposizioni del libro quarto del codice di procedura penale, sostituito al Ministro della giustizia il Ministro da cui dipende il militare condannato, o, se il condannato non è un militare, il Ministro da cui dipende il comando della forza armata, presso cui è costituito il tribunale che pronunciò la condanna. ***((26))***

AGGIORNAMENTO (26)
La Corte Costituzionale, con sentenza 23 - 31 maggio 1990, n. 274 (in G.U. 1a s.s. 6/6/1990, n. 23), ha dichiarato "l'illegittimità costituzionale dell'art. 402 del codice penale militare di pace, nella parte in cui attribuisce al Ministro da cui dipende il militare condannato e non al Tribunale militare di sorveglianza il potere di differire l'esecuzione della pena ai sensi del primo comma dell'art. 147, n. 1 del codice penale".

Art. 403.

(Pluralità di condanne per il medesimo fatto).

Agli effetti del ragguaglio delle pene, à termini dell'articolo 579 del codice di procedura penale, nel caso di più sentenze di condanna divenute irrevocabili, pronunciate contro la stessa persona per il medesimo fatto, la pena della reclusione militare è equiparata a quella della reclusione.

CAPO II
Disposizioni speciali

Art. 404.

(Esecuzione della condanna alla pena di morte).

La condanna alla pena di morte è eseguita a cura dell'Autorità militare e secondo le norme dei regolamenti militari approvati con decreto Reale.
Alla esecuzione intervengono, oltre il rappresentante del pubblico ministero e il cancelliere, anche un ufficiale medico, nonché un cappellano militare o un ministro del culto professato dal condannato, se questi lo richiede.

Art. 405.

(Esecuzione di pene detentive inflitte dal giudice militare).

I regolamenti militari approvati con decreto Reale stabiliscono i modi di esecuzione delle sentenze di condanna a pene detentive, pronunciate dai tribunali militari, secondo che il condannato sia libero o detenuto, si trovi in servizio alle armi o in congedo, sia militare di truppa, sottufficiale o ufficiale, si trovi nel territorio dello Stato, sia imbarcato su navi militari, o appartenga a forze armate spedite all'estero.
I regolamenti stessi stabiliscono i modi di esecuzione nel caso che la condanna abbia per effetto la degradazione.

Art. 406.

(Esecuzione di pene detentive inflitte dal giudice ordinario).

Le sentenze di condanna a pene detentive, pronunciate dall'Autorità giudiziaria ordinaria contro militari in servizio permanente alle armi, le quali non importino la interdizione perpetua dai pubblici uffici, sono eseguite a cura dell'Autorità giudiziaria militare, a richiesta del procuratore del Re Imperatore o del pretore, diretta al procuratore militare del Re Imperatore presso il tribunale militare del luogo nel quale trovasi il detenuto, o il corpo a cui il condannato appartiene, o il dipartimento al quale è ascritta la nave su cui il condannato è imbarcato.
Insieme con la richiesta, sono trasmessi copia della sentenza di condanna, copia del provvedimento di sostituzione di pena a norma dell'articolo 63, e l'ordine di traduzione dal carcere giudiziario, ove eventualmente il condannato sia detenuto.
Il procuratore militare del Re Imperatore designa lo stabilimento penale militare, in cui il condannato deve essere tradotto per scontarvi la pena, e il comandante del corpo dispone per l'invio del condannato allo stabilimento designato.

Art. 407.

(Sostituzione di pene).

Se con la sentenza non è stata disposta la sostituzione della pena a norma degli articoli 27, 63, 64 e 65, provvede successivamente il pubblico ministero, d'ufficio o a richiesta del condannato.
Il provvedimento è notificato al condannato, a pena di nullità.
Quando l'interessato dichiara di opporsi al provvedimento dato dal pubblico ministero, si osservano le norme stabilite per gli incidenti di esecuzione.

Art. 408.

(Identificazione delle persone arrestate per esecuzione di pena).

Se viene arrestata una persona per esecuzione di una pena militare, o perché sia evasa mentre scontava una pena militare, e sorge dubbio sulla identità della medesima, il procuratore militare del Re Imperatore del luogo dell'arresto la interroga, e compie ogni altra indagine utile per la identificazione. Quando riconosce che l'arrestato non è il condannato, ne ordina immediatamente la liberazione; se la identità è dubbia, ne rimette l'accertamento al tribunale militare competente per gli incidenti di esecuzione.
Il procuratore militare del Re Imperatore, per gli atti preveduti dal comma precedente, può delegare il pretore del luogo dove è avvenuto l'arresto.
Si osservano le disposizioni degli articoli 583, 630 e 631 del codice di procedura penale, relative al procedimento per gli incidenti di esecuzione. Tuttavia, nel caso preveduto dal secondo comma dell'articolo 630 di detto codice, il tribunale militare, per l'interrogatorio del detenuto, può delegare anche un giudice del tribunale militare del luogo.

Art. 409.

((Tribunale e Ufficio militare di sorveglianza))

((Per le funzioni e i provvedimenti del Tribunale militare di sorveglianza, del presidente e dell'Ufficio militare di sorveglianza, si applicano le disposizioni del presente codice e, in quanto compatibili, quelle dell'ordinamento penitenziario comune.
La pena della reclusione militare è espiata negli stabilimenti militari di pena, secondo le modalità previste dal codice dell'ordinamento militare; il magistrato militare di sorveglianza esercita la vigilanza sull'osservanza delle relative norme e sull'esecuzione della pena militare detentiva)).

Art. 410.

(Esecuzione di pene pecuniarie).

Le sentenze di condanna a pene pecuniarie, pronunciate dai tribunali militari in applicazione del codice penale o di leggi speciali, sono eseguite a norma del codice di procedura penale, in quanto la legge penale militare non disponga altrimenti; e il procuratore militare del Re Imperatore provvede, ove occorra, alla conversione della pena pecuniaria in pena detentiva.

Art. 411.

(Esecuzione di pene accessorie).

La degradazione, la rimozione, la sospensione dal grado e la sospensione dall'impiego sono eseguite dalla Autorità militare nei modi stabiliti dalle leggi speciali e dai regolamenti militari approvati con decreto Reale.
Il pubblico ministero provvede per l'annotazione nella scheda del casellario giudiziale delle pene ac-

cessorie, che, a norma del codice penale e della legge penale militare, conseguono a una condanna, e di quelle applicate provvisoriamente.

Art. 412.

(Riabilitazione).

Il tribunale supremo militare, a domanda della persona riabilitata a norma della legge penale comune, può ordinare, con decisione in camera di consiglio, previe le conclusioni del procuratore generale militare del Re Imperatore e a seguito degli accertamenti che ritenga necessari, che gli effetti dell'ottenuta riabilitazione siano estesi alle pene militari accessorie e a ogni altro effetto penale militare della sentenza.
La decisione può essere pronunciata altresì a seguito di richiesta di ufficio del procuratore generale militare del Re Imperatore.
Si osservano, in quanto applicabili, le disposizioni degli articoli 598, 599 e 600 del codice di procedura penale, sostituito il tribunale supremo militare alla corte d'appello e il procuratore generale militare del Re Imperatore al procuratore generale.
La decisione del tribunale supremo militare non è soggetta a impugnazione.

CAPO III
Dei provvedimenti patrimoniali relativi alle cose sequestrate per il procedimento penale

Art. 413.

(Contestazione sulla proprietà delle cose sequestrate. Competenza del giudice ordinario).

In caso di contestazione circa la proprietà delle cose sequestrate, la decisione per la restituzione di esse appartiene all'Autorità giudiziaria ordinaria.

CAPO IV
Esecuzione delle misure di sicurezza

Art. 414.

(Applicazione delle norme del codice di procedura penale).

Per la esecuzione delle misure di sicurezza, si osservano, in quanto applicabili, le disposizioni del codice di procedura penale, sostituito al ricorso alla corte d'appello e al consigliere delegato di questa, rispettivamente, il ricorso al tribunale supremo militare e il consigliere relatore del tribunale supremo militare.
È escluso il ricorso per revisione.

TITOLO SETTIMO
DELLA PROCEDURA DEI TRIBUNALI MILITARI DI BORDO

Art. 415.

(Istruzione preliminare).

Quando è commesso un reato di competenza dei tribunali militari di bordo, il comandante della nave a cui appartiene il colpevole incarica un ufficiale dipendente di procedere agli atti della istruzione preliminare, secondo le disposizioni degli articoli 301 e 303, in quanto siano applicabili.
La designazione di detto ufficiale spetta al comandante indicato nell'ultimo comma dell'articolo 277, se più sono i colpevoli e appartenenti a navi diverse, ovvero se trattasi di alcuno dei reati indicati nell'articolo 278, non commesso a bordo di una nave militare.
L'ufficiale suindicato ha le facoltà, che la legge attribuisce agli ufficiali di polizia giudiziaria.

Art. 416.

(Atti di polizia giudiziaria in territorio estero).

Quando sia necessario procedere in territorio estero a ispezioni, perquisizioni o arresti in case private o stabilimenti civili, l'ufficiale incaricato della istruzione ne informa il comandante, il quale, per l'esecuzione, si rivolge alle Autorità locali e al Regio console italiano, qualora ivi si trovi, chiedendo, se lo ritiene opportuno, di assistervi.
Se il territorio estero è occupato militarmente, l'ufficiale procede direttamente agli atti indicati nel comma precedente.

Art. 417.

(Decisione del comandante sui risultati della istruzione preliminare).

Compiuti gli atti della istruzione preliminare, l'ufficiale incaricato di assumerli li rimette, insieme con i documenti e le cose sequestrate, al comandante dal quale è stato designato.
Sui risultati dell'istruzione decide il comandante della nave, se questa è isolata, e, in ogni altro caso, il comandante superiore indicato nell'ultimo comma dell'articolo 277.

Art. 418.

(Ordine di archiviazione degli atti o dichiarazione d'incompetenza).

Il comandante, che, in base al risultati dell'istruzione preliminare, ritiene che non si debba procedere per la manifesta infondatezza della denuncia o del rapporto, ordina l'archiviazione degli atti, e, qualora l'imputato sia in stato di arresto, la liberazione di esso.
Se il comandante ritiene che la competenza spetta a una Autorità giudiziaria diversa dal tribunale militare di bordo, ordina la trasmissione degli atti all'Autorità competente, a disposizione della quale trattiene l'imputato, qualora questi sia in stato di arresto.

Art. 419.

(Rinvio diretto a giudizio).

Il comandante, che, in base ai risultati dell'istruzione preliminare, ritiene che, per la flagranza del reato, o per la confessione dell'imputato, o per altra circostanza, la prova appare evidente, senza che occorra un'ulteriore istruzione, ordina, con decreto, che l'imputato sia tradotto direttamente al giudizio del tribunale, eccetto che si tratti di reato punibile con la pena di morte o con quella dell'ergastolo o con una pena detentiva superiore nel massimo a dieci anni.
Con lo stesso decreto di rinvio a giudizio, il comandante ordina l'arresto dell'imputato, se questi non è già detenuto, e provvede alla nomina degli ufficiali incaricati delle funzioni di pubblico ministero e di segretario, con le norme stabilite dalla legge di ordinamento giudiziario militare.

Art. 420.

(Ordine di procedere alla istruzione).

Fuori dei casi indicati nei due articoli precedenti, il comandante ordina che si proceda alla istruzione a norma delle disposizioni degli articoli seguenti, e provvede alla designazione degli ufficiali per esercitare le funzioni di pubblico ministero e di segretario.
L'ufficiale incaricato delle funzioni di segretario esercita anche le funzioni di cancelliere.

Art. 421.

(Atti della istruzione).

L'ufficiale incaricato delle funzioni di pubblico ministero compie tutti gli atti, che nella istruzione formale, per i procedimenti davanti ai tribunali militari territoriali, sono di competenza del giudice istruttore, osservate le disposizioni del capo secondo del titolo quarto di questo libro.
Spetta però al comandante indicato nell'ultimo comma dell'articolo 277 di provvedere all'emissione, alla sospensione, alla revoca o alla conversione dei mandati di cattura, di comparizione e di accompagnamento, alla scarcerazione dell'imputato, alla concessione della libertà provvisoria e all'applicazione delle sanzioni contro i testimoni non comparsi e contro i periti o interpreti non comparsi o negligenti.

Art. 422.

(Atti da compiersi in territorio estero).

Quando occorra di emettere mandato di comparizione, di accompagnamento o di cattura o decreto di citazione, di procedere a esami di testimoni o ad altri atti di istruzione da eseguirsi in territorio estero, il comandante, a richiesta dell'ufficiale che procede alla istruzione, ne fa domanda al Ministro della marina, se la nave non si trova dislocata all'estero, o, in caso diverso, si rivolge egli stesso, per l'esecuzione, alle competenti Autorità straniere, direttamente, o per mezzo del Regio console, se ivi si trova.
Allo stesso comandante spetta anche, a richiesta dell'ufficiale che procede all'istruzione, di chiedere l'arresto e la estradizione di un imputato, che si trovi in territorio estero, rivolgendosi al Ministro della marina, perché richieda i provvedimenti di competenza del Ministro della giustizia.

Art. 423.

(Chiusura della istruzione).

Compiuta l'istruzione, l'ufficiale che vi ha proceduto trasmette gli atti al comandante indicato nell'ultimo comma dell'articolo 277.
Se il comandante ritiene che la procedura è incompleta, ordina una più ampia istruzione, indicando specificamente gli atti che ritiene necessari.
In caso diverso, il comandante decide mediante sentenza, osservate, in quanto applicabili, le norme degli articoli 342, 343, 344, 345, 346, 347 e 349.

Art. 424.

(Inoppugnabilità delle sentenze istruttorie).

Contro la sentenza del comandante, che pronuncia sui risultati dell'istruzione, non è ammessa alcuna

impugnazione.

Art. 425.

(Riapertura della istruzione).

Per la riapertura della istruzione, si osserva la disposizione dell'articolo 353.
La competenza spetta al giudice istruttore del tribunale militare territoriale, al quale, giusta le norme del regolamento giudiziario militare, sono stati rimessi gli atti del procedimento, a seguito della sentenza del comandante.

Art. 426.

(Atti preliminari al giudizio).

Per gli atti preliminari al giudizio, si osservano, in quanto applicabili, le disposizioni delle sezioni prima e terza del capo primo del titolo quinto di questo libro. Tuttavia, le attribuzioni ivi conferite al presidente del tribunale sono demandate al comandante che ha pronunciato la sentenza o il decreto di rinvio a giudizio.

Art. 427.

(Dibattimento; sentenza; processo verbale di dibattimento).

Per il dibattimento, la sentenza e il processo verbale di dibattimento, si osservano, in quanto applicabili, le disposizioni del capo secondo del titolo quinto di questo libro, sostituito al cancelliere il segretario.
Alle deliberazioni del tribunale militare di bordo assiste il segretario, cui spetta redigere le sentenze e le ordinanze.

Art. 428.

(Esecuzione delle sentenze; sospensione; proposte di grazia).

Il comandante indicato nell'ultimo comma dell'articolo 277 provvede alla esecuzione della sentenza, osservate le norme dei regolamenti indicati negli articoli 404 e 405 e le disposizioni seguenti:
1° la condanna alla pena di morte non può essere eseguita, se non dopo ricevute le istruzioni del Ministro della marina;
2° la condanna alla pena di morte e la condanna alla degradazione sono eseguite a bordo della nave a cui appartiene il condannato, o della nave sulla quale si è svolto il giudizio, o, in caso d'impedimento, sopra altra nave designata dal comandante predetto.
Il comandante indicato nel comma precedente, per ragioni di giustizia o di disciplina militare, può sospendere la esecuzione di qualunque sentenza di condanna, e proporre il condono o la commutazione della pena inflitta, trasmettendo le relative proposte al Ministro della marina.

Art. 429.

(Giudizio in contumacia).

Per il giudizio in contumacia, si osservano le disposizioni degli articoli 376 a 378.

Art. 430.

(Ricorso per annullamento).

Fuori del caso preveduto dall'articolo precedente, contro le sentenze dei tribunali militari di bordo non è ammesso ricorso per annullamento al tribunale supremo militare, se non per motivo di incompetenza o di illegittima costituzione del collegio giudicante; e salvo il caso di condanna alla pena di morte o a pena detentiva in misura superiore a dieci anni, pronunciata a bordo di una nave che non si trovi dislocata all'estero.
Nei casi in cui il ricorso è ammesso, il comandante indicato nell'ultimo comma dell'articolo 277 trasmette gli atti al tribunale supremo militare. Si osservano le disposizioni degli articoli 389, 390, 391 e 392.
Qualora, a seguito di annullamento della sentenza, il giudizio debba essere rinnovato, il tribunale supremo militare designa il tribunale militare competente, al quale rimette gli atti.

Art. 431.

(Revisione).

Le sentenze dei tribunali militari di bordo sono soggette a revisione nei casi e nei modi stabiliti dall'articolo 401.
Se la revisione è ammessa, il tribunale supremo militare rimette gli atti a un tribunale militare territoriale.

Art. 432.

(Sostituzione di pene e revoca della sospensione condizionale della pena).

Per la sostituzione di pene a norma dell'articolo

407, per la revoca della sospensione condizionale della pena e per ogni altro provvedimento relativo all'esecuzione, è competente il tribunale militare territoriale, al quale, a seguito della sentenza, sono stati rimessi gli atti del procedimento, giusta le norme del regolamento giudiziario militare.

TITOLO OTTAVO
DELLA ESTRADIZIONE

Art. 433.

(Estradizione dall'estero).

Se occorre chiedere a uno Stato estero la estradizione di un imputato o di un condannato, per un procedimento di competenza del giudice militare, il procuratore generale militare del Re Imperatore ne fa richiesta al Ministro della giustizia, trasmettendogli gli atti e i documenti necessari.
Se trattasi di imputato o condannato militare, il procuratore generale militare del Re Imperatore informa della richiesta fatta il Ministro da cui il militare dipende.

Dato a Roma, addì 20 febbraio 1941-XIX

VITTORIO EMANUELE

MUSSOLINI.

CODICE PENALE MILITARE DI GUERRA
LIBRO PRIMO
DELLA LEGGE PENALE MILITARE DI GUERRA, IN GENERALE
TITOLO PRIMO
DELLA LEGGE PENALE MILITARE DI GUERRA E DELLA SUA APPLICAZIONE
CODICE PENALE MILITARE DI GUERRA

Art. 1.

(Nozione della legge penale militare di guerra).

La legge penale militare di guerra comprende, oltre questo codice, ogni altra legge speciale, o provvedimento che abbia valore di legge, in materia penale militare attinente alla guerra.

Art. 2.

(Pubblicazione delle leggi di guerra quando le forze armate dello Stato si trovano all'estero).

Le leggi di guerra, emanate quando le forze armate dello Stato si trovano all'estero, sono pubblicate nei modi stabiliti da esse, o, in mancanza, dal comandante delle forze medesime; e divengono immediatamente obbligatorie, salvo che le leggi stesse dispongano diversamente.

Art. 3.

(Legge penale militare di guerra in relazione al tempo).

La legge penale militare di guerra si applica per i reati da essa preveduti, commessi, in tutto o in parte, dal momento della dichiarazione dello stato di guerra fino a quello della sua cessazione.

Art. 4.

(Legge penale militare di guerra in relazione ai luoghi).
La legge penale militare di guerra si applica, per i reati da essa preveduti, quando essi siano commessi nei luoghi che sono in stato di guerra o sono considerati tali.
Nondimeno, durante lo stato di guerra, la legge penale militare di guerra si applica, per i reati da essa preveduti, anche se commessi in luoghi che non sono in stato di guerra o non sono considerati tali:
1° quando sia espressamente disposto dalla legge;
2° quando dai reati medesimi possa derivare un nocumento alle operazioni militari di guerra o ai servizi relativi, ovvero alla condotta della guerra in generale.

Art. 5.

((ARTICOLO ABROGATO DALLA L. 18 MARZO 2003, N. 42))

Art. 6.

(Legge penale militare di guerra in relazione alle persone).

La legge penale militare di guerra si applica ai militari appartenenti ad armi, corpi, navi, aeromobili o servizi in generale, destinati a operazioni di guerra, ancorché il reato sia commesso in luogo che non si trovi in stato di guerra.
Nei luoghi in stato di guerra i militari sono considerati permanentemente in servizio.

Art. 7.

(Nozione della qualità di «militare»).

Il presente codice comprende:
1° sotto la denominazione di militari, quelli del Regio esercito, della Regia marina, della Regia aeronautica, della Regia guardia di finanza, della Milizia volontaria per la sicurezza nazionale, del Corpo di polizia dell'Africa italiana, i militarizzati e ogni altra persona che a norma di legge acquista la qualità di militare, gli assimilati, ancorché di rango, ai militari, e le persone appartenenti a corpi o reparti volontari autorizzati a prendere parte alla guerra;
2° sotto la denominazione di forze armate dello Stato, le forze militari suindicate.
Le disposizioni della legge penale militare, riflettenti le violazioni della disciplina militare, si estendono agli assimilati, sia per le violazioni commesse nei rapporti fra loro, sia per quelle commesse verso i militari e i militarizzati, o da questi verso di loro. Le stesse norme si osservano rispetto ai corpi o reparti volontari indicati nel comma precedente.

Art. 8.

(Riunione di navi o di aeromobili; forze terrestri distaccate).

L'applicazione della legge penale militare di guerra può, con decreto Reale, ordinarsi, anche in tempo di pace, per una riunione di navi o di aeromobili, ovvero di forze terrestri distaccate per qualsiasi operazione militare o di polizia.

Art. 9.

(((Corpi di spedizione all'estero)))

((Sino alla entrata in vigore di una nuova legge organica sulla materia penale militare, sono soggetti alla legge penale militare di guerra, ancorché in tempo di pace, i corpi di spedizione all'estero per operazioni militari armate, dal momento in cui si inizia il passaggio dei confini dello Stato o dal momento dell'imbarco in nave o aeromobile ovvero, per gli equipaggi di questi, dal momento in cui è ad essi comunicata la destinazione alla spedizione.
Limitatamente ai fatti connessi con le operazioni all'estero di cui al primo comma, la legge penale militare di guerra si applica anche al personale militare di comando e controllo e di supporto del corpo di spedizione che resta nel territorio nazionale o che si trova nel territorio di altri paesi, dal momento in cui è ad esso comunicata l'assegnazione a dette funzioni, per i fatti commessi a causa o in occasione del servizio)).

Art. 10.

((ARTICOLO ABROGATO DALLA L. 18 MARZO 2003, N. 42))

Art. 11.

(Mobilitazione delle forze armate dello Stato).

La mobilitazione generale o parziale delle forze armate dello Stato importa, per i reati militari commessi dagli appartenenti alle forze mobilitate, l'applicazione della legge penale militare di guerra.

Art. 12.

(Prigionieri di guerra in potere o in custodia dello Stato italiano).

I prigionieri di guerra, che si trovano in potere o in custodia dello Stato italiano, sono soggetti alla legge penale militare di guerra in vigore per i militari italiani, salvo che sia altrimenti disposto dalla legge o dalle convenzioni internazionali.

Art. 13.

(Reati commessi da militari nemici contro le leggi e gli usi della guerra).

Le disposizioni del titolo quarto, libro terzo, di questo codice, relative ai reati contro le leggi e gli usi della guerra, si applicano anche ai militari e a ogni altra persona appartenente alle forze armate nemiche, quando alcuno di tali reati sia commesso a danno dello stato italiano o di un cittadino italiano, ovvero di uno Stato alleato o di un suddito di questo.

Art. 14.

(Persone estranee alle forze armate dello Stato).

Oltre i casi espressamente enunciati nella legge, la legge penale militare di guerra si applica alle persone estranee alle forze armate dello Stato, che commettono alcuno dei fatti preveduti dagli articoli 138, 139, 140, 141 e 142.

Art. 15.

(Militari di Stati alleati o associati nella guerra).

Agli effetti della legge penale militare di guerra, i reati commessi da militari italiani o da persone estranee alle forze armate dello Stato italiano a danno di militari o delle forze armate di uno Stato alleato sono considerati come se fossero commessi a danno di militari o delle forze armate dello Stato italiano. La osservanza di questa norma è subordinata alla condizione che lo Stato alleato garantisca parità di tutela penale ai militari italiani e alle forze armate dello Stato italiano.

((Agli effetti delle disposizioni del presente codice, sotto la denominazione di Stato alleato si intende compreso anche lo Stato associato nelle operazioni belliche o partecipante alla stessa spedizione o campagna)).

Art. 16.

(Reati commessi da prigionieri di guerra italiani, o da altri militari italiani all'estero).

Salve le disposizioni degli articoli precedenti, la legge penale militare di guerra si applica per i reati commessi da militari italiani prigionieri di guerra presso il nemico a danno di altri militari italiani o dello Stato italiano; e, in caso di mobilitazione generale, anche per i reati commessi in territorio estero da ogni altro militare italiano.

TITOLO SECONDO
((COMANDANTE SUPREMO))

Art. 17.

(((Comandante supremo)))

((COMMA ABROGATO DALLA L. 31 GENNAIO 2002, N. 6)).

((COMMA ABROGATO DALLA L. 31 GENNAIO 2002, N. 6)).

((COMMA ABROGATO DALLA L. 31 GENNAIO 2002, N. 6)).

Agli effetti della legge penale militare, è comandante supremo chi è investito del comando di tutte le forze operanti.

Art. 18.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

Art. 19.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

Art. 20.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

TITOLO TERZO
DELLA CESSAZIONE DELL'APPLICAZIONE DELLA LEGGE PENALE MILITARE DI GUERRA

Art. 21.

(Armistizio).

L'armistizio non sospende l'applicazione della legge penale militare di guerra e l'esercizio della giurisdizione militare di guerra, salvo che con decreto Reale sia diversamente disposto.

Art. 22.

(Cessazione dell'applicazione della legge penale militare di guerra).

Con la cessazione dello stato di guerra cessano l'applicazione della legge penale militare di guerra e l'esercizio della giurisdizione militare di guerra, salvo che la legge disponga altrimenti.
Per gli appartenenti ai corpi nazionali che si trovano all'estero, l'applicazione della legge penale militare di guerra cessa dal momento in cui i corpi stessi rientrano nel territorio dello Stato.

Art. 23.

(Ultrattività della legge penale militare di guerra).

Per i reati preveduti dalla legge penale militare di guerra, commessi durante lo stato di guerra, si applicano sempre le sanzioni penali stabilite dalla legge suindicata, sebbene il procedimento penale sia iniziato dopo la cessazione dello stato di guerra, e ancorché la legge penale militare di pace o la legge penale comune non preveda il fatto come reato o contenga disposizioni più favorevoli per il reo.

Art. 24.

(Prigionieri di guerra in potere o in custodia dello Stato italiano).

Anche dopo la cessazione dello stato di guerra, i prigionieri di guerra in potere o in custodia dello Stato italiano sono soggetti alla legge penale militare di guerra per i reati da questa preveduti, fino al momento dell'avvenuto rimpatrio.
Per quanto concerne la condizione dei prigionieri di guerra, che alla data della cessazione dello stato di guerra si trovino sottoposti a procedimento penale, ovvero in espiazione di pena, si applicano le convenzioni internazionali.

LIBRO SECONDO
DEI REATI E DELLE PENE MILITARI IN GENERALE
TITOLO PRIMO
DISPOSIZIONI GENERALI

Art. 25.

(Luogo di esecuzione della pena di morte).

Durante lo stato di guerra, la pena di morte è eseguita nel luogo determinato dal comando dell'unità, presso cui è costituito il tribunale che pronunciò la sentenza; salvo che la legge disponga altrimenti. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 26.

(Diminuzione di pena per gravi lesioni riportate o per atti di valore militare).

Nel caso di gravi lesioni personali riportate dall'imputato in fatti d'armi o in servizi di guerra, o di atti di valore compiuti nelle stesse circostanze, la pena stabilita per il reato commesso può essere diminuita nel modo seguente:
1° alla pena di morte con degradazione e a quella dell'ergastolo può sostituirsi la reclusione da dieci a venti anni; ***((38a))***
2° alla pena di morte mediante fucilazione nel petto può sostituirsi la reclusione militare da sei a quindici anni; ***((38a))***
3° le altre pene possono essere diminuite da un terzo a due terzi.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 27.

(Pubblicazione della sentenza di condanna).

Salvo che il giudice disponga altrimenti, le sentenze di condanna alla pena di morte o all'ergastolo, pronunciate dai tribunali militari di guerra per i reati di tradimento, di spionaggio o di diserzione al nemico o in presenza del nemico, sono pubblicate per estratto mediante affissione, oltre che nei luoghi indicati nel codice penale militare di pace, anche nel comune in cui il militare ebbe l'ultima residenza o dimora. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 28.

(Potere del comandante di condonare le pene).

Durante lo stato di guerra, il comandante supremo ha il potere di condonare, mediante provvedimenti individuali, le pene detentive non superiori a un anno e le pene pecuniarie, inflitte dai tribunali militari di guerra.
Lo stesso potere spetta, durante lo stato di guerra, al comandante di un corpo di spedizione all'estero per operazioni militari in regioni fuori d'Europa.
Il condono della pena si ha come non conceduto, se, durante lo stato di guerra, il condannato commette un delitto non colposo, per il quale la legge stabilisce una pena detentiva o un'altra più grave.

TITOLO SECONDO
DEL DIFFERIMENTO DELLA ESECUZIONE DELLE PENE DETENTIVE E ACCESSORIE

Art. 29.

(Pene detentive).

Salva la disposizione dell'articolo 32, è differita la esecuzione delle pene detentive di durata non superiore a dieci anni, inflitte, da qualunque giudice e per qualsiasi reato, a militari appartenenti al momento del commesso reato, o successivamente destinati, a reparti mobilitati.
Il Ministro da cui dipende il militare condannato, o il comandante supremo quando trattasi di militare da esso dipendente, può, sentito il procuratore generale militare del Re Imperatore, ordinare che sia differita la esecuzione delle pene detentive temporanee di qualsiasi durata, inflitte ai militari, anche se non ricorrono le condizioni indicate nel comma precedente.
Durante lo stato di guerra, il differimento dell'esecuzione della pena a norma dei commi precedenti non impedisce il differimento della esecuzione delle pene inflitte con successive condanne.

Art. 30.

(Sospensione dall'impiego e sospensione dal grado).

Nei casi in cui, a norma dell'articolo precedente, è differita la esecuzione della pena detentiva, è differita anche l'esecuzione delle pene accessorie della sospensione dall'impiego e della sospensione dal grado.

Art. 31.

(Degradazione).

Il militare incorso nella degradazione per effetto di una condanna a pena detentiva, la cui esecuzione è stata differita a norma dell'articolo 29, continua, per tutto il tempo in cui la pena non è eseguita, a prestare servizio militare, e la degradazione produce, per tale periodo, gli effetti della rimozione.

Art. 32.

(Condizioni ostative al differimento della esecuzione della pena).

Il differimento della esecuzione della pena non può essere ordinato, o, se già ordinato, è revocato:
1° se il condannato ha cessato, per qualsiasi ragione, dal prestare servizio militare, ovvero è divenuto permanentemente inabile ai servizi di guerra, tranne che la inabilità dipenda da lesioni personali riportate o da infermità contratte in fatti d'armi o in servizi di guerra;
2° se è accertata la nullità dell'arruolamento del condannato.

Art. 33.

(Detrazione dalla durata della pena del periodo trascorso in speciali reparti combattenti).

Per i condannati a una pena detentiva, di cui la esecuzione è stata differita, il tempo trascorso in speciali reparti combattenti, ai quali, a causa della loro particolare condizione, siano stati assegnati, si detrae dalla durata della pena inflitta.

Art. 34.

(Differimento della esecuzione della pena per le persone estranee alle forze armate dello Stato).

Quando dal comandante supremo sia riconosciuta la necessità della presenza o la insostituibilità di una persona estranea alle forze armate dello Stato nel servizio che essa adempie presso stabilimenti o corpi sul piede di guerra, ai quali è addetta, il comandante stesso, sentito il procuratore generale militare del Re Imperatore, può disporre che sia differita la esecuzione delle pene detentive temporanee inflitte alla persona suindicata.
La stessa facoltà può essere esercitata dai comandanti in capo delle forze marittime o aeree, nei limiti dei rispettivi comandi.

Art. 35.

(Differimento della esecuzione della pena in rapporto alla estinzione di essa).

Il periodo, durante il quale la esecuzione della pena rimane differita a norma degli articoli precedenti, non è computato agli effetti della estinzione della pena stessa per decorso del tempo.

Art. 36.

(Cessazione dello stato di guerra: esecuzione della pena).

Salve le disposizioni del titolo terzo di questo libro, alla cessazione dello stato di guerra sono eseguite le pene detentive e le pene accessorie della sospensione dal grado e della sospensione dall'impiego, la cui esecuzione è stata differita a norma degli articoli

precedenti, e ha effetto altresì l'incapacità di appartenere alle forze armate dello Stato inerente alla degradazione derivata da condanna a pena detentiva, la cui esecuzione è stata differita.

Art. 37.

(Esecuzione: sostituzione di pene. Prigionieri di guerra nemici).

Quando, in applicazione degli articoli precedenti, la sentenza di condanna debba eseguirsi durante o dopo lo stato di guerra, per la esecuzione si osservano le disposizioni del codice penale militare di pace sulla sostituzione delle pene.
Per i condannati che siano prigionieri di guerra, si applicano le disposizioni dell'articolo 166.

TITOLO TERZO
DI CASI SPECIALI DI ESTINZIONE DEL REATO

Art. 38.

(Effetto derivante dalla condotta del condannato).

Alla data della cessazione dello stato di guerra, qualora il condannato alla pena della reclusione militare per un tempo non superiore a tre anni, la cui esecuzione sia stata differita a norma degli articoli 29 e 34, non abbia, posteriormente alla condanna, commesso un delitto e non sia più volte incorso in gravissime punizioni disciplinari, il reato è estinto.
In tal caso, non ha luogo la esecuzione della pena principale e cessano gli effetti penali della condanna.

Art. 39.

(Condanna per reati preveduti dalla legge penale comune).

Le disposizioni dell'articolo precedente si applicano anche relativamente alle condanne a pene detentive non superiori a due anni, inflitte per reati preveduti dalla legge penale comune.

Art. 40.

(Effetto derivante dal compimento di atti di valore).

Anche prima della cessazione dello stato di guerra, qualora il condannato a una pena, la cui esecuzione sia stata differita a norma degli articoli 29 e 34, abbia conseguito, per atti di valore personale compiuti, posteriormente alla condanna, in fatti d'armi o in servizi di guerra, una promozione per merito di guerra o una ricompensa al valore, il reato è estinto, e si applica la disposizione del secondo comma dell'articolo 38.

Art. 41.

(Concorso di pene in caso di revoca del differimento).

Nel caso che sia revocato il differimento della esecuzione di pene inflitte con più sentenze di condanna, si applicano le disposizioni sul concorso delle pene.

TITOLO QUARTO
DELLA RIABILITAZIONE DI GUERRA

Art. 42.

(Promozione per merito di guerra o ricompensa al valore).

I militari, che, per atti di valore personale compiuti in fatti d'armi o in servizi di guerra, abbiano conseguito una promozione per merito di guerra o una ricompensa al valore, possono ottenere la riabilitazione, anche se non sono trascorsi i termini stabiliti dalla legge penale comune.
Se i militari stessi hanno conseguito più promozioni per merito di guerra o più ricompense al valore, non si applicano le disposizioni dell'ultimo comma dell'articolo 179 del codice penale.

Art. 43.

(Partecipazione alla guerra con fedeltà e onore).

Per i militari, che, pur non avendo conseguito alcuna delle attestazioni di merito o di valore indicate nell'articolo precedente, abbiano adempiuto con fedeltà e onore i loro doveri nelle operazioni o in servizi di guerra, i termini stabiliti dalla legge per la concessione della riabilitazione sono computati, ragguagliandosi a un anno ogni trimestre di campagna compiuto, o soltanto iniziato.

Art. 44.

(Incapacità derivanti da decisioni di proscioglimento).

Nel caso di incapacità derivanti da decisioni di proscioglimento, i militari che si trovano nelle condizioni indicate nell'articolo 42 sono dispensati dalla

osservanza del termine stabilito dalla legge agli effetti della estinzione delle incapacità medesime.
Per i militari che si trovano nelle condizioni indicate nell'articolo 43, il termine stesso è ridotto alla metà.

Art. 45.

(Invalidi di guerra).

Le disposizioni degli articoli 42 e 44, concernenti i militari che hanno conseguito una promozione per merito di guerra o una ricompensa al valore, si applicano altresi' ai militari, che abbiano adempiuto con fedeltà e onore i loro doveri nelle operazioni o in servizi di guerra e siano stati dichiarati invalidi, con diritto a pensione privilegiata di guerra, per una delle lesioni o infermità indicate nella legge sulle pensioni di guerra.

Art. 46.

(Esclusione dalla riabilitazione di guerra).

Sono esclusi dalla riabilitazione di guerra i militari condannati per alcuno dei reati di tradimento, spionaggio, abbandono di posto in presenza del nemico, diserzione, mutilazione volontaria o infermità procurata per sottrarsi all'obbligo del servizio militare, commessi durante lo stato di guerra.

LIBRO TERZO
DEI REATI MILITARI, IN PARTICOLARE
TITOLO PRIMO
DISPOSIZIONI GENERALI

Art. 47.

(Applicazione delle norme del codice penale militare di pace; aumento di pena ***((. Reato militare ai fini del codice penale militare di guerra))***).
Nei casi non preveduti da questo codice, si applicano le disposizioni del codice penale militare di pace, concernenti i reati militari in particolare. Tuttavia, le pene detentive temporanee, stabilite dal codice penale militare di pace, si applicano con l'aumento da un sesto a un terzo, estensibile fino alla metà nei casi gravi; salvo quando l'aumento sia specificamente disposto da questo codice.

((Costituisce altresì reato militare ai fini del presente codice, ogni altra violazione della legge penale commessa dall'appartenente alle Forze armate con abuso dei poteri o violazione dei doveri inerenti allo stato di militare, o in luogo militare, e prevista come delitto contro:
1) la personalità dello Stato;
2) la pubblica amministrazione;
3) l'amministrazione della giustizia;
4) l'ordine pubblico;
5) l'incolumità pubblica;
6) la fede pubblica;
7) la moralità pubblica e il buon costume;
8) la persona;
9) il patrimonio.
Costituisce inoltre reato militare ogni altra violazione della legge penale commessa dall'appartenente alle Forze armate in luogo militare o a causa del servizio militare, in offesa del servizio militare o dell'amministrazione militare o di altro militare o di appartenente alla popolazione civile che si trova nei territori di operazioni all'estero.
Costituisce infine reato militare ogni altra violazione della legge penale prevista quale delitto in materia di controllo delle armi, munizioni ed esplosivi e di produzione, uso e traffico illecito di sostanze stupefacenti o psicotrope, commessa dall'appartenente alle Forze armate in luogo militare)).

TITOLO SECONDO
DEI REATI CONTRO LA FEDELTÀ E LA DIFESA MILITARE
CAPO I
Del tradimento

Art. 48.

(Attentato od offesa al luogotenente generale del Re Imperatore).

Il militare, che commette alcuno dei delitti di attentato od offesa contro il luogotenente generale del Re Imperatore, durante la luogotenenza e lo stato di guerra, è punito secondo le norme seguenti:
1° con la morte con degradazione, nel caso di attentato alla vita, alla incolumità o alla libertà personale; ***((38a))***
2° con la reclusione da cinque a dieci anni, in ogni altro caso di offesa alla libertà; e con la reclusione militare da quattro a dieci anni nel caso di offesa all'onore o al prestigio.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena

massima prevista dal codice penale".

Art. 49.

(Reati contro il comandante supremo).

Il militare, che attenta alla vita, alla incolumità o alla libertà personale del comandante supremo, è punito con la morte con degradazione. ***((38a))***
In ogni altro caso di offesa, si applicano le pene stabilite per il reato d'insubordinazione dal codice penale militare di pace, aumentata la pena detentiva temporanea dalla metà a due terzi.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 50.

(Abbandono del corpo per combattere contro lo Stato).

Il militare, che, per combattere contro lo Stato, abbandona il corpo, la nave o l'aeromobile, è punito con la morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 51.

(Aiuto al nemico).

Il militare, che commette un fatto diretto a favorire le operazioni militari del nemico ovvero a nuocere altrimenti alle operazioni delle forze armate dello Stato italiano, è punito con la morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 52.

(Nocumento alle operazioni militari).

Il militare, che, fuori dei casi preveduti dall'articolo precedente, impedisce od ostacola lo svolgimento di attività inerenti alla preparazione o alla difesa militare, è punito, se dal fatto è derivato nocumento alle operazioni di guerra dello Stato italiano, con la reclusione non inferiore a dieci anni.

Art. 53.

(Servizio di pilota o guida per il nemico).
Il cittadino e ogni persona al servizio dello Stato, che assume il servizio di pilota o di guida di una nave nemica, di un aeromobile nemico o di qualsiasi altra forza militare nemica, è punito con la morte mediante fucilazione nella schiena. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 54.

(Intelligenze o corrispondenza con il nemico).

Il militare, che, per favorire il nemico, tiene con esso intelligenze o corrispondenza, è punito con la morte con degradazione. ***((38a))***
Se le intelligenze o la corrispondenza non hanno prodotto danno, la pena può essere diminuita.
Se trattasi di offerta di servizi al nemico, ancorché non accettata, la pena è della reclusione non inferiore a quindici anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 55.

(Agevolazione colposa).

Il militare che, per colpa, ha reso possibile, o soltanto agevolato la esecuzione del reato preveduto dal primo comma dell'articolo precedente, è punito, se dal fatto

può derivare danno alla situazione politica o militare dello Stato italiano, con la reclusione militare da tre a dieci anni.

Art. 56.

(Comunicazione illecita con il nemico, senza il fine di favorirlo).

Il militare, che, senza il fine di favorire il nemico, ma senza autorizzazione o contro il divieto dei regolamenti o dei superiori, entra in comunicazione o corrispondenza con una o più persone delle forze armate nemiche o della popolazione dei luoghi appartenenti allo Stato nemico, è punito con la reclusione da uno a sette anni; e, se trattasi di fatto abituale o, comunque, se ricorrono circostanze di particolare gravità, con la reclusione non inferiore a dieci anni.

Art. 57.

(Rapporti di guerra infedeli, reticenti o manchevoli).

Il militare incaricato di una ricognizione, che fa rapporti non veritieri o reticenti, è punito, se dal fatto è derivato un nocumento alle operazioni militari, con la morte con degradazione. ***((38a))***
Se per colpa sono fatti rapporti inesatti o manchevoli, e da essi è derivato il nocumento indicato nel comma precedente, si applica la reclusione militare da tre a quindici anni.
Se dal fatto non è derivato nocumento, la pena è della reclusione da uno a cinque anni, nel caso preveduto dal primo comma, e della reclusione militare fino a un anno, nel caso preveduto dal secondo comma.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 58.

(Aiuto al nemico nei suoi disegni politici).

Nei luoghi del territorio dello Stato invasi od occupati dal nemico, chiunque favorisce i disegni politici del nemico sul territorio invaso od occupato, ovvero commette un fatto diretto a menomare la fedeltà dei cittadini verso lo Stato italiano, è punito con la reclusione da dieci a venti anni.

CAPO II
Dello spionaggio militare e della rivelazione di segreti militari

Art. 59.

(Spionaggio militare).

È punito con la morte con degradazione il militare, che, per favorire il nemico, si procura o tenta di procurarsi documenti, oggetti o notizie, che possono compromettere la sicurezza di una piazza, di un forte o posto militare, di una nave militare o da trasporto, di un aeromobile militare o da trasporto, di un arsenale o altro stabilimento militare, ovvero di zone di adunata, di azione o stazione delle forze armate terrestri, marittime o aeree, o comunque delle forze armate dello Stato; anche senza essersi introdotto nei luoghi suindicati. ***((38a))***
La stessa pena si applica al militare, che, per procurarsi documenti, oggetti o notizie in favore del nemico, si introduce in alcuno dei luoghi indicati nel comma precedente.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 60.

(Militare che si introduce travestito in luoghi d'interesse militare).

Il militare, che si introduce travestito in alcuno dei luoghi indicati nel primo comma dell'articolo precedente, è punito con l'ergastolo.
Se il colpevole prova che il suo travestimento aveva uno scopo diverso da quello di favorire il nemico, la pena è della reclusione militare da uno a quattro anni.

Art. 61.

(Militare nemico che si introduce travestito in luoghi d'interesse militare).

Il militare delle forze armate nemiche o qualsiasi altra persona al servizio dello Stato nemico, che s'introduce travestito in alcuno dei luoghi indicati nel primo comma dell'articolo 59, è punito con la morte mediante fucilazione nel petto.

Se il colpevole, per travestirsi, ha indossato una uniforme militare italiana, la pena è della morte mediante fucilazione nella schiena. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 62.

(Aiuto o informazioni a spie o ad altri agenti nemici).
Chiunque dà o procura ricovero, aiuto o informazioni a una spia o ad altro agente nemico, è punito con la morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 63.

(Persona sorpresa in prossimità di posti militari o che segue le operazioni militari).

Chiunque, nei luoghi in stato di guerra, è trovato, senza giustificato motivo, in prossimità di posti militari, trinceramenti o accampamenti, è punito con la reclusione militare da sei mesi a tre anni.
La stessa pena si applica a chiunque, senza autorizzazione, segue le operazioni militari.

Art. 64.

(Esibizione, pubblicazione, vendita o distribuzione di cose militari).

Chiunque, senza l'autorizzazione dell'Autorità militare, esibisce, espone, pubblica, vende o distribuisce fotografie, disegni, modelli o schizzi di cose concernenti la forza, la preparazione o la difesa militare, ovvero delle posizioni delle forze armate dello Stato italiano o di uno Stato alleato, è punito, se dal fatto può derivare il nocumento enunciato nel primo comma dell'articolo 59, con la reclusione militare da uno a cinque anni.

Art. 65.

(Porto od uso di macchine fotografiche).

Chiunque, nella zona delle operazioni militari, senza permesso dell'Autorità competente, porta o usa macchine fotografiche di qualsiasi specie, è punito con la reclusione militare fino a un anno.

Art. 66.

(Rivelazione di segreti militari al nemico).

Il militare, che rivela al nemico, in tutto o in parte, lo stato o la situazione delle forze armate terrestri, marittime o aeree, il piano di una operazione o spedizione, gli accampamenti o le posizioni, i segnali di qualunque natura, i luoghi di rifornimento, lo stato delle provvigioni in armi, munizioni, combustibili, viveri o denari; o, in generale, comunica al nemico documenti, oggetti o notizie, che possono produrre il nocumento enunciato nel primo comma dell'articolo 59, o comunque favorire le operazioni delle forze armate nemiche, ovvero nuocere alle operazioni militari dello Stato italiano, è punito con la morte con degradazione. ***((38a))***
Se dal fatto non può derivare il vantaggio o il nocumento enunciato nel comma precedente, si applica l'ergastolo.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 67.

(Procacciamento di notizie segrete, senza il fine di favorire il nemico).

Il militare, che, senza il fine di favorire il nemico, si procura, senza l'autorizzazione dell'Autorità competente, notizie concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segrete, ovvero compie atti diretti a procurarsele, è punito con la reclusione militare non inferiore a cinque anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice pe-

nale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 68.

(Rivelazione di segreti militari, senza il fine di favorire il nemico).

Il militare, che, senza il fine di favorire il nemico, comunica o, comunque, rivela documenti, oggetti o notizie, concernenti la forza, la preparazione o la difesa militare dello Stato e che devono rimanere segreti, è punito con la reclusione militare non inferiore a dieci anni.
Se il colpevole era, per ragione di ufficio o di servizio, in possesso dei documenti o degli oggetti o a cognizione delle notizie, la pena è della reclusione militare non inferiore a quindici anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 69.

(Militare che ottiene le notizie indicate nell'articolo precedente).

Le pene stabilite dall'articolo precedente si applicano anche al militare, che ottiene le notizie o la consegna degli oggetti o documenti in esso indicati.

Art. 70.

(Istigazione od offerta per commettere spionaggio o rivelazione di segreti militari).

Il militare, che istiga altri a commettere alcuno dei reati preveduti dagli articoli 59, 62 e 66, ovvero si offre per commetterlo, è punito, per ciò solo, con la reclusione non inferiore a quindici anni.
Se l'istigazione o l'offerta si riferisce al reato preveduto dall'articolo 68, la pena è della reclusione da cinque a quindici anni.

Art. 71.

(Agevolazione colposa).

Il militare, che, avendo, per ragione di ufficio o di servizio, la custodia o il possesso delle cose indicate negli articoli 59, 66, 67 e 68, ovvero, per lo stesso motivo, essendo a cognizione delle notizie ivi enunciate, ha reso possibile, o soltanto agevolato, per colpa, la esecuzione di alcuno dei reati preveduti dagli articoli stessi, è punito con la reclusione militare da tre a dieci anni.

CAPO III
Della illecita raccolta, pubblicazione e diffusione di notizie militari

Art. 72.

(Procacciamento di notizie riservate).

Fuori dei casi preveduti dall'articolo 59, chiunque si procura notizie concernenti la forza, la preparazione o la difesa militare, la dislocazione o i movimenti delle forze armate, il loro stato sanitario, la disciplina o le operazioni militari, e ogni altra notizia che, non essendo segreta, ha tuttavia carattere riservato, per esserne stata vietata la divulgazione dall'Autorità competente, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da due a dieci anni.

Art. 73.

(Diffusione di notizie riservate).

Chiunque diffonde o comunica alcuna delle notizie indicate nell'articolo precedente è punito con la reclusione militare da cinque a venti anni.
Se il fatto ha compromesso la preparazione o la difesa militare dello Stato, si applica la reclusione militare non inferiore a quindici anni.

Art. 74.

(Agevolazione colposa).

Chiunque, essendo, per ragione di ufficio o di servizio, a cognizione delle notizie indicate nell'articolo 72, ha reso possibile o soltanto agevolato, per colpa, la esecuzione del reato ivi preveduto, è punito con la reclusione militare da sei mesi a cinque anni.

Art. 75.

(Diffusione di particolari notizie d'interesse militare).

È punito con la reclusione militare da due a sei anni chiunque, fuori del caso indicato nell'articolo 73, pubblica, mediante la stampa o altro mezzo di diffusione, notizie non comunicate o non autorizzate dal Governo o dai comandi militari, e concernenti:
1° il numero dei feriti, morti o prigionieri;
2° le nomine o i mutamenti nei comandi militari;
3° le previsioni sulle operazioni militari terrestri, marittime o aeree;
4° gli avvenimenti, che abbiano relazione con le operazioni militari, o con la condotta della guerra in generale.

Art. 76.

((ARTICOLO ABROGATO DALLA L. 18 MARZO 2003, N. 42))

Art. 77.

(Divulgazione di notizie false sull'ordine pubblico o su altre cose di pubblico interesse).

Fuori dei casi preveduti dall'articolo 265 del codice penale, chiunque diffonde o comunica, sull'ordine pubblico, sulla economia nazionale o su altre cose di pubblico interesse, notizie non conformi a verità, che possono turbare la pubblica tranquillità o altrimenti danneggiare pubblici interessi, è punito con la reclusione militare da sei mesi a tre anni.
La pena è della reclusione militare da uno a cinque anni, se il fatto è commesso con il fine di nuocere alla pubblica tranquillità o ai pubblici interessi.

Art. 78.

(Comunicazione di notizie mediante corrispondenza).

Chiunque, nei luoghi in stato di guerra, spedisce corrispondenze per qualsiasi destinazione, contenenti alcuna delle notizie indicate negli articoli 72, 75 e 77, è punito, per ciò solo, indipendentemente dall'avvenuta consegna al destinatario, con la reclusione militare fino a un anno.

Art. 79.

(Notizie sulle operazioni militari degli Stati belligeranti).

Quando negli articoli precedenti si fa riferimento a notizie concernenti le operazioni militari, si intendono per tali le operazioni, sia dello Stato italiano, sia degli altri Stati belligeranti, ancorché nemici.

Art. 80.

((ARTICOLO ABROGATO DALLA L. 18 MARZO 2003, N. 42))

Art. 81.

(Reati commessi in luoghi che non sono in stato di guerra).

Fuori del caso indicato nell'articolo 78, le disposizioni degli articoli precedenti si applicano anche quando i reati da essi preveduti siano commessi in luoghi che non sono in stato di guerra.

CAPO IV
Disposizioni comuni ai capi precedenti

Art. 82.

(Fine di favorire lo Stato italiano).

Per i reati preveduti dai capi precedenti, la punibilità non è esclusa, se il colpevole ha agito con il fine di favorire lo Stato italiano. Tuttavia, la pena può essere diminuita.

Art. 83.

(Omesso rapporto).

Il militare, che, avendo notizia di alcuno dei reati preveduti dai capi precedenti e per il quale la legge stabilisce la pena della reclusione o della reclusione militare non inferiore nel massimo a cinque anni, o una pena più grave, non ne fa immediatamente rapporto ai superiori, è punito con la reclusione militare da sei mesi a tre anni.
Se il colpevole è un ufficiale, si applica la reclusione militare da due a quattro anni.

Art. 84.

(Parificazione degli Stati alleati).

Le pene stabilite dagli articoli 50 e seguenti si applicano anche quando il reato è commesso a danno di uno Stato alleato con lo Stato italiano.

CAPO V
Dell'arruolamento illecito di guerra

Art. 85.

(Nozione del reato; sanzione penale).

Chiunque induce un militare a passare al nemico, ovvero gliene facilita i mezzi, è punito con la morte con degradazione. ***((38a))***
La stessa pena si applica a chiunque arruola o arma, per il nemico o per insorgere contro lo Stato italiano, qualunque persona, ancorché estranea alle forze armate dello Stato.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

CAPO VI
Del disfattismo militare

Art. 86.

((ARTICOLO ABROGATO DALLA L. 18 MARZO 2003, N. 42))

Art. 87.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

Art. 88.

(Omessa consegna di manifesti o altre cose, diffusi dal nemico).

È punito con la reclusione militare fino a un anno chiunque, avendo raccolto manifesti, manoscritti, stampati o altri oggetti lanciati, o comunque diffusi, dal nemico, o essendone comunque venuto in possesso, non ne fa immediata consegna ai suoi superiori, se militare, ovvero ai carabinieri Reali o ad altra pubblica Autorità.

CAPO VII
Della sedizione militare

Art. 89.

(Accordo di militari per commettere reati contro la fedeltà o la difesa militare).

Se più militari si accordano per commettere alcuno dei reati di attentato alla vita, all'incolumità o alla libertà personale o di offesa alla libertà, preveduti dagli articoli 48 e 49, ovvero alcuno dei reati preveduti dagli articoli 50, 51, 59, 66 e 86, ciascuno di essi è punito, per ciò solo, con la reclusione non inferiore a cinque anni.
Non è punibile il militare, che recede dall'accordo prima che sia cominciata la esecuzione del reato per cui l'accordo è intervenuto, e anteriormente all'arresto ovvero al procedimento.
Le disposizioni di questo articolo si applicano anche nel caso di accordo di più militari per commettere alcuno dei reati di attentato alla vita, all'incolumità o alla libertà personale, indicati nell'articolo 77 del codice penale militare di pace.

Art. 90.

(Omesso rapporto).

Il militare, che, avendo avuto notizia del reato preveduto dal primo comma dell'articolo precedente, omette o ritarda di farne rapporto ai superiori, è punito con la reclusione militare da sei mesi a due anni.
Se il colpevole è un ufficiale, la pena è aumentata.

CAPO VIII
Della illecita navigazione aerea

Art. 91.

(Sorvolo arbitrario del territorio dello Stato. Inottemperanza agli ordini dell'Autorità militare).

Chiunque, senza autorizzazione, con qualsiasi apparecchio o mezzo di locomozione aerea, vola o s'innalza sul territorio dello Stato, è punito con la reclusione militare da sei mesi a tre anni.
La pena è aumentate, da un terzo alla metà, se il colpevole non obbedisce alla intimazione di discendere, o a qualsiasi altro ordine dell'Autorità militare.

CAPO IX
Della comunicazione all'estero d'invenzioni interessanti la difesa militare

Art. 92.

(Nozione del reato; sanzione penale).

Chiunque, senza autorizzazione dell'Autorità competente, comunica o tenta di comunicare all'estero, direttamente o indirettamente, per qualsiasi motivo e sotto qualsiasi forma, invenzioni, ancorché non

brevettate, che concernono materiale bellico, o interessano comunque la difesa militare, è punito con la reclusione militare da uno a dieci anni.
La stessa pena si applica a chi agevola la comunicazione all'estero.
Chiunque non usa tutti i mezzi di cui può disporre, per impedire la comunicazione all'estero, è punito con la reclusione militare fino a cinque anni.
Se il colpevole di alcuno dei fatti suindicati è lo stesso autore o titolare dell'invenzione o persona in essa comunque interessata, la reclusione militare non è inferiore a due anni.
Se la comunicazione all'estero è avvenuta o è stata agevolata per colpa, si applica la reclusione militare fino a tre anni.

CAPO X
Della violazione di ordinanze o di altri provvedimenti militari

Art. 93.

(Nozione del reato; sanzione penale).

È punito con la reclusione militare fino a due anni, se il fatto non costituisce un più grave reato, chiunque non osserva le ordinanze emanate o, in generale, i provvedimenti adottati dalla Autorità militare per assicurare la difesa militare, e, specialmente, per regolare nei luoghi in stato di guerra:
1° l'accesso, la circolazione, il transito o il soggiorno;
2° la polizia ferroviaria;
3° i modi di protezione contro incursioni aeree nemiche;
4° le segnalazioni diurne o notturne;
5° il possesso di colombi viaggiatori;
6° l'uso di apparecchi telefonici, telegrafici, radiotelefonici, radiotelegrafici, aeronautici e simili;
7° l'esercizio della caccia o della pesca.

TITOLO TERZO
DEI REATI CONTRO IL SERVIZIO IN GUERRA
CAPO I
Della violazione di doveri inerenti al comando

Art. 94.

(Abbandono del comando).

Il comandante, che, senza giustificato motivo, abbandona o cede il comando durante il combattimento o in presenza del nemico, ovvero in circostanze tali da compromettere la sicurezza di forze militari, è punito con la morte mediante fucilazione nel petto. ***((38a))***
Se il fatto è commesso in qualsiasi altra circostanza di pericolo, il comandante è punito con la reclusione militare non inferiore a quindici anni.
Se il fatto è commesso fuori delle circostanze indicate nei commi precedenti, si applica la reclusione militare fino a due anni.
La condanna importa la rimozione.
Agli effetti della legge penale militare, il reato s'intende commesso durante il combattimento, se il fatto che lo costituisce è commesso mentre l'azione bellica si svolge, o quando essa sta per cominciare. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 95.

(Inottemperanza all'ordine di non attaccare il nemico).

Il comandante, che, fuori del caso di necessità, attacca il nemico contro l'ordine espresso del suo superiore, è punito con la morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 96.

(Inosservanza di speciali doveri inerenti al comando).

È punito con la reclusione militare da uno a sette anni il comandante di un corpo di truppa ovvero di una o più navi militari o di uno o più aeromobili militari:
1° che, senza speciali istruzioni contrarie, o senza giustificato motivo, omette di attaccare il nemico o evita il combattimento, ovvero non presta il necessario soccorso ad altra truppa o nave militare, o ad altro aeromobile militare, che si trovi in combattimento o sia inseguito dal nemico;
2° che, senza essere obbligato da speciali istruzioni o, comunque, senza giustificato motivo, sospende l'inseguimento o la caccia di un nemico battuto o di navi militari o mercantili, ovvero di aeromobili militari o

civili, in fuga;
3° che, senza giustificato motivo, omette di soccorrere una o più navi ovvero uno o più aeromobili, che abbiano bisogno di assistenza in caso di pericolo, o rifiuta a navi della marina mercantile nazionale o alleata o ad aeromobili nazionali o alleati l'assistenza, o la protezione, che sia in grado di dare.
La condanna importa la rimozione.

Art. 97.

(Comandante che si lascia sorprendere dal nemico).

Il comandante, che, per colpa, si lascia sorprendere dal nemico, è punito con la reclusione militare da uno a cinque anni.
La condanna importa la rimozione.

Art. 98.

(Omissione di provvedimenti per la difesa militare).

Il comandante, che, per colpa, omette di provvedere ai mezzi necessari alla difesa del forte, della piazza, dell'opera, del posto, della nave o dell'aeromobile, di cui ha il comando, ovvero trascura di porli in stato di resistere al nemico, è punito con la reclusione militare fino a tre anni.
La reclusione militare è da uno a cinque anni, se dal fatto è derivato danno al servizio militare.
La condanna importa la rimozione.

Art. 99.

(Circostanze aggravanti).

Nei casi preveduti dai due articoli precedenti, si applica la reclusione militare:
1° da due a sette anni, se dal fatto è derivata l'impossibilità di eseguire un'operazione di guerra, di attaccare il nemico o di resistere ad esso;
2° da quindici a ventiquattro anni, se dal fatto è derivata la perdita del forte, della piazza, dell'opera, del posto, della nave o dell'aeromobile.
La condanna importa la rimozione.

Art. 100.

(Omessa esecuzione di un incarico).

Il comandante, che, senza giustificato motivo, non esegue un ordine di operazione militare o, comunque, un incarico affidatogli, è punito con la morte mediante fucilazione nel petto. ***((38a))***
Se nel fatto ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, si applica la reclusione militare non inferiore a cinque anni.
Se l'ordine o l'incarico non è eseguito per colpa, la pena è della reclusione militare da uno a sette anni.
La condanna importa la rimozione.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 101.

(Inosservanza di istruzioni ricevute).

È punito con la reclusione militare fino a cinque anni il militare incaricato di una spedizione o di una missione, che non ottempera, senza giustificato motivo, alle istruzioni ricevute, se il fatto ha pregiudicato l'esito della spedizione o della missione.
Se l'incarico è stato male eseguito per colpa, si applica la reclusione militare fino a tre anni.

Art. 102.

(Omissione di cautele nella custodia di documenti, carte di bordo e simili).

Il comandante, che, nel caso di cattura o di resa, non usa tutte le cautele necessarie per sottrarre al nemico un piego ricevuto con la condizione di aprirlo in tempo o in luogo determinato, ovvero per impedire che cadano in potere del nemico le carte di bordo o altri documenti, che possono facilitare al nemico il modo di meglio difendersi o di maggiormente nuocere, è punito con la reclusione militare da due a otto anni.

CAPO II
Della resa

Art. 103.

(Resa).

È punito con la morte mediante fucilazione nel petto il comandante, che cede il forte, la piazza, l'opera, il posto, l'aeromobile, o ammaina la bandiera della nave, o, comunque, dà il segnale della resa, senza avere esaurito i mezzi estremi di difesa o di resistenza e senza aver fatto quanto gli era imposto dal dovere e

dall'onore. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 104.

(Resa colposa).

Il comandante, che, omettendo, per colpa, di provvedere ai mezzi necessari alla difesa o alla resistenza contro il nemico, ha cagionato la resa, è punito con la reclusione militare non inferiore a quindici anni.
Se ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è diminuita.

Art. 105.

(Resa avvenuta a causa di rivolta o di altri reati).

Se la resa è avvenuta per causa di disobbedienza, di ammutinamento o di rivolta, il comandante e gli ufficiali, che non hanno fatto uso dei mezzi di cui potevano disporre, per costringere i loro dipendenti a compiere il proprio dovere, sono puniti, per ciò solo, con la reclusione militare fino a tre anni; ferme le disposizioni dell'articolo 138 del codice penale militare di pace.

Art. 106.

(Resa in campo aperto).

È punito con la morte mediante fucilazione nel petto il comandante di un corpo o reparto di truppa, che, in campo aperto, capitola o si arrende, senza aver fatto quanto gli era imposto dal dovere e dall'onore. ***((38a))***
Se nel fatto ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è della reclusione militare da due a quindici anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 107.

(Violata solidarietà in caso di resa).

Il comandante, che, nel caso di resa, separa la sorte propria o degli ufficiali da quella degli altri militari, è punito con la morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

CAPO III
Della codardia

Art. 108.

(Manifestazioni arbitrarie per arrendersi).

Il militare, che, durante il combattimento, senza ordine del comandante, ammaina la bandiera o dà altrimenti il segnale di arrendersi o di cessare il fuoco, è punito con la morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 109.

(Incitamento alla resa).

Il militare, che, durante il combattimento, senza ordine del comandante, incita a cessare il fuoco o ad ammainare la bandiera, o comunque alla resa, è punito con la reclusione militare non inferiore a dieci anni.

Art. 110.

(Manifestazioni di codardia).

Il militare, che, durante il combattimento o in caso di grave pericolo, compie atti che possono incutere lo spavento o produrre il disordine nelle truppe o negli

equipaggi, è punito con la reclusione militare da sei mesi a cinque anni. Se lo spavento o il disordine si produce, la reclusione militare è da tre a dieci anni.
La condanna importa la rimozione.

Art. 111.

(Circostanza aggravante).

Nei casi preveduti dai due articoli precedenti, se dal fatto è derivato nocumento al buon esito del combattimento o alla resistenza delle truppe o degli equipaggi, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 112.

(Sbandamento e altri fatti illeciti durante il combattimento).

È punito con la morte mediante fucilazione nel petto il militare, che, durante il combattimento: ***((38a))***
1° si sbanda o comunque si allontana, ovvero eccita altri ad allontanarsi;
2° si sottrae al combattimento, mettendosi in stato di ubriachezza, mutilandosi, procurandosi infermità o imperfezioni, o simulandole; ovvero compiendo altri atti o usando altri modi fraudolenti;
3° getta o deteriora le armi o le munizioni;
4° rifiuta di marciare contro il nemico o di compiere un servizio o altra operazione di guerra; ovvero non fa tutta la possibile difesa, o si arrende al nemico, senza avere esaurito gli estremi mezzi di resistenza.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 113.

(Fatti collettivi).

Se alcuno dei fatti preveduti dagli articoli precedenti è commesso da più militari riuniti, la pena di morte si applica soltanto a quelli che hanno determinato il fatto, e gli altri sono puniti con la reclusione militare non inferiore a dieci anni. ***((38a))***
La condanna importa la rimozione.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 114.

(Omesso impedimento di sbandamento o di altri fatti di codardia).

Il militare, che, per timore di un pericolo o altro inescusabile motivo, non usa ogni mezzo possibile per impedire la esecuzione di alcuno dei fatti preveduti dall'articolo 112, che si commette in sua presenza, è punito con la reclusione militare non inferiore a cinque anni.

Art. 115.

(Mutilazione o simulazione di infermità).

Fuori dei casi preveduti dal numero 2° dell'articolo 112, i reati di mutilazione o simulazione di infermità, commessi durante lo stato di guerra, sono puniti secondo le disposizioni degli articoli 157 a 163 del codice penale militare di pace, con l'aumento dalla metà a due terzi delle pene ivi stabilite.
Le stesse disposizioni si applicano agli iscritti di leva e ai militari in congedo, che commettono i fatti costituenti i reati suindicati nello stato di leva o di congedo, ancorché posteriormente non si verifichi la loro chiamata in servizio alle armi.
I militari in congedo assoluto, che, durante il congedo, commettono uno dei fatti indicati nel primo comma, sono puniti con le stesse pene, se sono chiamati in servizio alle armi.

Art. 116.

(Fraudolenta esclusione da reparti o enti mobilitati).

Chiunque, con abuso di autorità, con false attestazioni o con altri mezzi fraudolenti, procura indebitamente a un militare, idoneo alle fatiche di guerra, la non assegnazione ai reparti o enti mobilitati della sua arma, del suo corpo o della sua specialità, è punito con la reclusione militare da uno a cinque anni.

La pena è:
1° della reclusione militare da tre a cinque anni, se il colpevole è pubblico ufficiale, medico, chirurgo o altro esercente una professione sanitaria;
2° della reclusione militare da cinque a dieci anni, se il colpevole è un ufficiale.
Il militare, che, con alcuno dei mezzi indicati nel primo comma, ottiene indebitamente di non essere assegnato ai reparti o enti mobilitati della sua arma, del suo corpo o della sua specialità, è punito con la reclusione militare da tre a cinque anni.

Art. 117.

(Fraudolenta esonerazione dal servizio alle armi).

Chiunque, avendo, per ragione del suo ufficio, facoltà di fare richiesta di temporanea esonerazione dal servizio alle armi di militari in congedo richiamati, ovvero di rilasciare dichiarazioni che a detta esonerazione si riferiscono, attesta falsamente circostanze di fatto, che possono dare motivo alla esonerazione stessa, è punito con la reclusione militare da uno a cinque anni.
La stessa pena si applica a chiunque, avendo obbligo di dimettere i militari che fruiscono di esonerarione temporanea, o di denunciare la cessazione delle condizioni che avevano dato motivo alla esonerazione, omette di farlo nel tempo stabilito.
Il militare, che fruisce della esonerazione temporanea ottenuta con mezzi illeciti, è punito, per il solo fatto della esonerazione, con la reclusione militare da tre a cinque anni.

Art. 118.

(Violazione, a causa di codardia, dei doveri militari).

Il militare, che, per timore di un pericolo personale, viola alcuno dei doveri attinenti al servizio o alla disciplina, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare fino a due anni.

CAPO IV
Dell'abbandono di posto e della violazione di consegna

Art. 119.

(Abbandono del posto durante il combattimento).

Il militare, che, durante il combattimento, abbandona il posto, è punito con la morte mediante fucilazione nel petto. ***((38a))***
Se al fatto hanno preso parte più militari, si applicano le disposizioni dell'articolo 113.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 120.

(Comandante che non tiene il posto di combattimento).

È punito con la morte mediante fucilazione nel petto il comandante, che non tiene la nave o l'aeromobile al posto di combattimento assegnatogli. ***((38a))***
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a dodici anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 121.

(Separazione dal capo).

Il comandante di una frazione qualunque delle forze navali o aeree, che si separa dal suo capo, o che, costretto da forza maggiore o da altro giustificato motivo a separarsi, omette di riunirsi al suo capo nel più breve tempo possibile, è punito con la reclusione militare non inferiore a cinque anni.
Si applica la pena di morte mediante fucilazione nel petto, se il fatto è commesso durante il combattimento o in presenza del nemico. ***((38a))***
Se il fatto è commesso per colpa, la pena è della reclusione militare fino a cinque anni.
Le stesse pene si applicano a ogni altro militare, che cagiona alcuno dei fatti indicati nei commi precedenti.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 122.

(Abbandono di convoglio).

Il comandante della scorta di un convoglio, che lo abbandona, è punito con la reclusione militare da sette a quindici anni.
Se, a causa del fatto, il convoglio o parte di esso è caduto in potere del nemico, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 123.

(Separazione dal convoglio).

Il comandante della scorta di un convoglio, che rimane, per colpa, separato da tutto il convoglio o da parte di esso, è punito con la reclusione militare da sei mesi a tre anni.

Art. 124.

(Abbandono di posto o violata consegna da parte di militari di sentinella, vedetta o scolta).

Il militare, che, essendo di sentinella, vedetta o scolta, abbandona il posto o viola la consegna, è punito con la reclusione militare da uno a dieci anni.
Se il fatto è commesso in presenza del nemico, la pena è della reclusione militare non inferiore a quindici anni; e, se ha inoltre compromesso la sicurezza del posto, della nave, dell'aeromobile, ovvero di militari, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***
Le disposizioni dei commi precedenti si applicano altresì':
1° ai militari e agli agenti della forza pubblica, che sono dislocati lungo le linee ferroviarie, telegrafiche, telefoniche o altre vie di comunicazione o di trasporto, per la tutela di esse;
2° ai militari, che compongono la scorta di qualsiasi mezzo di trasporto terrestre, marittimo o aereo, con consegne determinate.
Il militare, che, essendo di sentinella, vedetta o scolta, si addormenta, è punito con la reclusione militare da uno a sette anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 125.

(Abbandono di posto o violata consegna da parte di militari di guardia o di servizio).

Fuori dei casi indicati nell'articolo precedente, il militare, che abbandona il posto dove si trova di guardia o di servizio, ovvero viola la consegna avuta, è punito con la reclusione militare da uno a sette anni.
Se il fatto è commesso in presenza del nemico, la reclusione militare è da sette a dieci anni; e, se ha inoltre compromesso la sicurezza del posto, della nave o dell'aeromobile, ovvero di militari, si applica la reclusione militare non inferiore a quindici anni.

Art. 126.

(Omesso raggiungimento del posto).

Il militare, che, senza giustificato motivo, non raggiunge, in caso di allarme o di chiamata a raccolta, il posto di combattimento, è punito con la reclusione militare da cinque a dieci anni; e, se l'assenza perdura durante il combattimento, con la morte mediante fucilazione nel petto. ***((38a))***
Fuori delle circostanze prevedute dal comma precedente, il militare, che, senza giustificato motivo, non raggiunge il posto in caso di allarme o di chiamata a raccolta, è punito con la reclusione militare da uno a tre anni; e, se il fatto è commesso in presenza del nemico, con la reclusione militare da tre a sette anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 127.

(Procurata evasione di un prigioniero di guerra. Colpa del custode).

Il militare incaricato della scorta, vigilanza o custodia di un prigioniero di guerra, che ne procura o facilita la evasione, è punito con la reclusione militare da

cinque a dieci anni.
Se la evasione del prigioniero di guerra avviene per colpa del militare incaricato della scorta, vigilanza o custodia, la pena è della reclusione militare da sei mesi a due anni.

Art. 128.

(Abbandono della nave o dell'aeromobile).

Il pilota, che abbandona la nave militare o la nave di un convoglio sotto scorta o direzione militare, da lui condotti, è punito con la reclusione da due a sette anni.
Se il fatto è commesso in caso di pericolo, la reclusione è da cinque a quindici anni; e, se è commesso in presenza del nemico, la pena è dell'ergastolo.
Le disposizioni dei commi precedenti si applicano anche a chi esercita, relativamente a un aeromobile militare, funzioni analoghe a quelle del pilota marittimo.

CAPO V
Della violazione di corrispondenze militari

Art. 129.

(Apertura, soppressione, falsificazione, alterazione od omessa consegna di ordini o dispacci).

Il militare, che indebitamente apre, sopprime, falsifica o non consegna un ordine scritto o un dispaccio qualsiasi, che era incaricato di portare, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da tre a dieci anni.
La stessa pena si applica al militare incaricato del servizio di comunicazioni telegrafiche, radiotelegrafiche, telefoniche e simili, che sopprime, trascrive infedelmente o comunque falsifica un ordine o un dispaccio inerente al servizio.
Se il fatto ha compromesso la sicurezza dello Stato o di una parte delle forze armate terrestri, marittime o aeree, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 130.

(Omessa distruzione di ordini o dispacci in caso di pericolo di cattura).

Il militare, che, trovandosi in pericolo di cadere in potere del nemico, omette di distruggere un ordine scritto o un dispaccio, che era incaricato di portare, è punito con la reclusione militare da uno a sette anni.

Art. 131.

(Smarrimento colposo di ordini o dispacci).

Il militare, che, per colpa, smarrisce un ordine scritto o un dispaccio qualsiasi, che era incaricato di portare, è punito con la reclusione militare da uno a sette anni.

Art. 132.

(Circostanze attenuanti).

Nei casi preveduti dai due articoli precedenti, se ricorrono particolari circostanze, che attenuano la responsabilità del colpevole, la pena è diminuita da un terzo a due terzi.

Art. 133.

(Rivelazione del contenuto di ordini o dispacci).

Il militare incaricato del servizio di comunicazioni telegrafiche, radiotelegrafiche, telefoniche e simili, che rivela il contenuto di un ordine o di un dispaccio inerente al servizio, affidatogli per la trasmissione, per la ricezione o per il recapito, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da uno a cinque anni; e, se trattasi di un segreto attinente al servizio, con la reclusione militare da cinque a dieci anni.

CAPO VI
Del reato di ubriachezza

Art. 134.

(Ubriachezza procurata per sottrarsi a un servizio).

Fuori del caso preveduto dal numero 2° dell'articolo 112, il militare, che, per sottrarsi all'adempimento di un servizio, si pone in tale stato di ubriachezza, da escludere o menomare la sua capacità di prestarlo, è punito con la reclusione militare da tre a sette anni.
Se trattasi di un servizio in presenza del nemico, si applica la reclusione militare non inferiore a sette anni.

Se il fatto è commesso da militare comandante di un reparto o preposto a un servizio o capo di posto, la pena è aumentata.
La condanna importa la rimozione.

Art. 135.

(Ubriachezza in servizio).

Il militare, che, comandato per qualsiasi servizio, si pone, ancorché per colpa, in tale stato di ubriachezza, da escludere o menomare la sua capacità di prestarlo, è punito con la reclusione militare fino a tre anni.
Se trattasi di un servizio in presenza del nemico, si applica la reclusione militare non inferiore a cinque anni.
Se il fatto è commesso da militare comandante di un reparto o preposto a un servizio o capo di posto, la pena è aumentata.
La condanna importa la rimozione.

Art. 136.

(Ubriachezza fuori del servizio).

Fuori delle circostanze prevedute dagli articoli precedenti, il militare, che è colto in stato di ubriachezza, è punito con la reclusione militare fino a un anno.

Art. 137.

(Alterazione psichica determinata dall'uso di sostanze stupefacenti).

Agli effetti delle disposizioni degli articoli precedenti, allo stato di ubriachezza è equiparato lo stato di alterazione psichica determinato dall'azione di sostanze stupefacenti.

CAPO VII
Dei reati contro militari in servizio

Art. 138.

(Forzata consegna).

Il militare, che in qualsiasi modo forza una consegna, è punito con la reclusione militare da tre a sette anni.
Se il fatto è commesso con armi, ovvero da tre o più persone riunite, o se ne è derivato grave danno, la pena è aumentata.
Se il fatto è commesso durante il combattimento o, comunque, in presenza del nemico, la reclusione militare è da cinque a quindici anni; e, se la consegna aveva inoltre per oggetto la sicurezza di una parte delle forze armate terrestri, marittime o aeree, di una fortezza assediata o di un posto militare, e il fatto l'ha compromessa, ovvero ha impedito un'operazione militare, si applica la pena di morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 139.

(Resistenza, minaccia o ingiuria a sentinella, vedetta o scolta).

Il militare, che non ottempera all'ingiunzione fatta da una sentinella, vedetta o scolta, nella esecuzione di una consegna ricevuta, è punito con la reclusione militare da uno a tre anni.
Si applica la reclusione militare da due a cinque anni al militare, che minaccia o ingiuria una sentinella, vedetta o scolta.

Art. 140.

(Violenza a sentinella, vedetta o scolta).

Il militare, che usa violenza a una sentinella, vedetta o scolta, è punito con la reclusione militare da cinque a dieci anni.
Se la violenza è commessa con armi o da più persone riunite, si applica la reclusione militare non inferiore a quindici anni; e, se il fatto ha compromesso la sicurezza del posto, della nave o dell'aeromobile, la pena è della morte mediante fucilazione nel petto. ***((38a))***
Nei casi indicati nei commi precedenti, se il fatto costituisce un più grave reato preveduto dalla legge penale comune, si applicano le pene da questa stabilite. Tuttavia, la pena detentiva temporanea è aumentata.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 141.

(Offese a persone in servizi speciali).

Le disposizioni dei tre articoli precedenti e quelle dell'articolo 143 del codice penale militare di pace, relative al reato di resistenza alla forza armata, si applicano anche nel caso in cui alcuno dei fatti ivi preveduti sia commesso contro:
1° i militari e gli agenti della forza pubblica, che sono dislocati lungo le linee ferroviarie, telegrafiche, telefoniche o altre vie di comunicazione o di trasporto, per la tutela di esse;
2° i militari, che compongono la scorta di qualsiasi mezzo di trasporto terrestre, marittimo o aereo, con consegne determinate.

Art. 142.

(Impedimento a portatori di ordini militari).

Il militare, che, con violenza o inganno, ferma o trattiene militari o altre persone, imbarcazioni, aeromobili o in generale, veicoli, spediti con ordini o dispacci riflettenti il servizio militare, ovvero sottrae dispacci o ne impedisce altrimenti la trasmissione, è punito con la reclusione militare da dieci a venti anni.
Se il fatto ha compromesso la sicurezza dello Stato o di una parte delle forze armate terrestri, marittime o aeree, la pena è della morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

CAPO VIII
Dei reati di assenza dal servizio
SEZIONE I
Della diserzione

Art. 143.

(Diserzione al nemico).

Il militare, che passa al nemico, o che, a fine di passare al nemico, abbandona, in presenza di questo, il corpo, la nave o l'aeromobile, è punito con la morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 144.

(Diserzione in presenza del nemico).

Il militare, che, appartenendo a un reparto in presenza del nemico, o essendo comandato a eseguire opere militari in presenza del nemico, si allontana, senza autorizzazione, dal reparto o dal posto di lavoro, è considerato immediatamente disertore, ed è punito con la morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 145.

(Mancata presentazione o mancato ritorno al reparto o al posto di lavoro, in presenza del nemico).

Commette il reato di diserzione, ed è punito con la morte mediante fucilazione nel petto, il militare: ***((38a))***
1° che, essendo destinato a un reparto in presenza del nemico, non lo raggiunge, senza giusto motivo, nei due giorni successivi a quello prefisso;
2° che, appartenendo a un reparto in presenza del nemico, e, trovandosi legittimamente assente, non vi ritorna, senza giusto motivo, nei due giorni successivi a quello prefisso.
Le stesse disposizioni si applicano al militare, che, comandato a eseguire opere militari in presenza del nemico, non raggiunge il posto di lavoro o non vi ritorna, senza giusto motivo, nei due giorni successivi a quello prefisso.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 146.

(Diserzione fuori della presenza del nemico).

Fuori dei casi preveduti dagli articoli precedenti, commette il reato di diserzione, ed è punito con la re-

clusione militare non inferiore a cinque anni, tenuto conto della durata dell'assenza, il militare:
1° che, essendo in servizio alle armi, si allontana senza autorizzazione dal reparto e ne rimane assente per un giorno;
2° che, essendo in servizio alle armi e trovandosi legittimamente assente, non si presenta, senza giusto motivo, nei due giorni successivi a quello prefisso.
La condanna importa la rimozione. ***((6a))***

AGGIORNAMENTO (6a)
Il D.P.R. 11 luglio 1959, n. 460 ha disposto (con l'art. 1, comma 1, lettera e)) che "È concessa amnistia [...] per i reati di assenza dal servizio, preveduti dagli articoli 146 e 147, prima, parte, e 151 del Codice penale militare di guerra, commessi dall'8 settembre 1943 al 15 aprile 1946, se il militare si è presentato nel termine previsto dall'art. 15 del decreto Presidenziale 22 giugno 1946, n. 4, ovvero se la classe di appartenenza è stata collocata in congedo". Ha inoltre disposto (con l'art. 15, comma 1) che "Salvo quanto disposto dall'art. 1, lettere a) ed e), l'amnistia e l'indulto hanno efficacia per i reati commessi lino a tutto il 23 ottobre 1958".

Art. 147.

(Diserzione reiterata).

La pena stabilita dall'articolo precedente è aumentata da un terzo alla metà per il militare, che, durante lo stato di guerra, commette per la seconda volta il reato di diserzione.
Si applica la pena di morte mediante fucilazione nel petto al militare, che, durante lo stato di guerra, commette per la terza volta il reato di diserzione. (6a) ***((38a))***

AGGIORNAMENTO (6a)
Il D.P.R. 11 luglio 1959, n. 460 ha disposto (con l'art. 1, comma 1, lettera e)) che "È concessa amnistia [...] per i reati di assenza dal servizio, preveduti dagli articoli 146 e 147, prima, parte, e 151 del Codice penale militare di guerra, commessi dall'8 settembre 1943 al 15 aprile 1946, se il militare si è presentato nel termine previsto dall'art. 15 del decreto Presidenziale 22 giugno 1946, n. 4, ovvero se la classe di appartenenza è stata collocata in congedo". Ha inoltre disposto (con l'art. 15, comma 1) che "Salvo quanto disposto dall'art. 1, lettere a) ed e), l'amnistia e l'indulto hanno efficacia per i reati commessi lino a tutto il 23 ottobre 1958".

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 148.

(Circostanza aggravante: passaggio all'estero).

Se il colpevole, per sottrarsi all'obbligo del servizio militare, si reca all'estero, la pena stabilita dall'articolo 146 è aumentata.

Art. 149.

(Circostanza aggravante: diserzione previo accordo).

La pena stabilita dall'articolo 146 è aumentata da un terzo alla metà, quando la diserzione sia commessa da tre o più militari, previo accordo.
Si applica la pena di morte mediante fucilazione nel petto a coloro che hanno promosso od organizzato la diserzione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 150.

(Diserzione immediata).

Le pene stabilite dagli articoli 146, 147, 148 e 149 si applicano altresì nei casi di diserzione immediata, preveduti dall'articolo 149 del codice penale militare di pace.
Nel caso preveduto dal numero 5° dell'articolo 149 del codice penale militare di pace, le pene indicate nel comma precedente, si applicano altresì alla persona che si sostituisce al militare disertore. Tuttavia, la pena può essere diminuita.

Sezione II
Della mancanza alla chiamata

Art. 151.

(Nozione del reato; sanzione penale).
Nel caso di mobilitazione, o durante lo stato di guerra, l'iscritto di leva arruolato o il militare in congedo,

che, senza giusto motivo, non si presenta alle armi nei due giorni successivi a quello prefisso, è punito con la reclusione militare non inferiore a due anni, tenuto conto della durata dell'assenza.
La condanna importa la rimozione. ***((6a))***

AGGIORNAMENTO (6a)
Il D.P.R. 11 luglio 1959, n. 460 ha disposto (con l'art. 1, comma 1, lettera e)) che "È concessa amnistia [...] per i reati di assenza dal servizio, preveduti dagli articoli 146 e 147, prima, parte, e 151 del Codice penale militare di guerra, commessi dall'8 settembre 1943 al 15 aprile 1946, se il militare si è presentato nel termine previsto dall'art. 15 del decreto Presidenziale 22 giugno 1946, n. 4, ovvero se la classe di appartenenza è stata collocata in congedo".
Ha inoltre disposto (con l'art. 15, comma 1) che "Salvo quanto disposto dall'art. 1, lettere a) ed e), l'amnistia e l'indulto hanno efficacia per i reati commessi lino a tutto il 23 ottobre 1958".

Art. 152.

(Circostanza aggravante: passaggio all'estero).

Nel caso preveduto dall'articolo precedente, se il colpevole, per sottrarsi all'obbligo del servizio militare, si reca all'estero, la pena è aumentata da un terzo alla metà.

Art. 153.

(Iscritto di leva o militare in congedo che si fa sostituire).

L'iscritto di leva arruolato o il militare in congedo, che, chiamato in servizio alle armi in alcuno dei casi indicati nell'articolo 151, non si presenta, facendosi sostituire, è considerato immediatamente mancante alla chiamata, ed è punito con la pena stabilita dall'articolo stesso, aumentata dalla metà a due terzi.

Art. 154.

(Persona che sostituisce l'iscritto di leva o il militare in congedo chiamato alle armi).

Nel caso preveduto dall'articolo precedente, colui che si sostituisce alla persona chiamata in servizio alle armi è punito con la pena ivi stabilita. Tuttavia, la pena può essere diminuita.

Sezione III
Disposizioni comuni alle sezioni precedenti

Art. 155.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

Art. 156.

(Circostanza attenuante).

Nei casi preveduti dalle sezioni precedenti, le pene stabilite per i reati di diserzione e di mancanza alla chiamata possono essere diminuite, se il colpevole si costituisce prima che siano trascorsi dieci giorni di assenza.

CAPO IX
Dell'abbandono di ufficio

Art. 157.

(Allontanamento dalla residenza).

Nel territorio delle operazioni militari, i funzionari, gli impiegati civili e i salariati dello Stato, gli amministratori, i funzionari, gli impiegati e i salariati delle provincie, dei comuni, delle istituzioni pubbliche di beneficenza e di ogni altro istituto o stabilimento pubblico, i notai, i medici, i farmacisti e ogni altra persona esercente una professione o un'arte sanitaria, che si allontanano dalla loro residenza, senza l'autorizzazione dell'Autorità militare, sono puniti con la reclusione militare fino a due anni.
Se il fatto è commesso da tre o più persone, previo accordo, la pena è aumentata da un terzo alla metà.
Le disposizioni dei commi precedenti non si applicano relativamente ai Prefetti.

CAPO X
Del danneggiamento di opere o altre cose militari

Art. 158.

(Distruzione o sabotaggio di opere o altre cose militari).

È punito con la reclusione non inferiore a quindici anni chiunque, nei luoghi in stato di guerra:
1° rimuove, distrugge o rende inservibili, in tutto o in parte, anche temporaneamente, navi, aeromobili, convogli, strade, stabilimenti, depositi, macchinari o altri ordigni di guerra, linee o apparecchi telegrafici, radiotelegrafici o telefonici e simili, ovvero lavori o altre opere di difesa militare, chiusure, recinti e simili,

costruiti per uno scopo militare, o ad esso destinati;
2° getta o rende inservibili, in tutto o in parte, o deteriora le armi o le munizioni.
Si applica la pena di morte con degradazione, se il fatto ha compromesso la preparazione o la efficienza bellica dello Stato, ovvero le operazioni militari. ***((38a))***
Se il fatto è commesso per colpa, si applica la reclusione militare da uno a dieci anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 159.

(Rimozione, distruzione od omissione di segnali, cartelli e simili).

Chiunque, nei luoghi in stato di guerra, rimuove, distrugge o rende inservibili, in tutto o in parte, anche temporaneamente, o fa mancare i segnali, cartelli o apparecchi collocati per la sicurezza delle linee o vie terrestri, marittime o aeree di comunicazione o trasporto, o destinati, in generale, a un pubblico servizio, è punito con la reclusione militare da due a dieci anni.

Art. 160.

(Uccisione, danneggiamento o dispersione di animali adibiti come mezzo militare di comunicazione).

Chiunque uccide o deteriora colombi viaggiatori o altri animali adibiti al servizio militare di comunicazione, o ne cagiona la dispersione, o in qualsiasi altro modo interrompe il servizio militare di comunicazione o di segnalazione eseguito con tali mezzi, è punito con la reclusione militare da uno a sette anni.
Se il fatto è commesso per colpa, si applica la reclusione militare fino a un anno.

Art. 161.

(Distruzione, danneggiamento o ritardata navigazione di navi mercantili o di aeromobili civili).

Chiunque distrugge o rende inservibili, in tutto o in parte, anche temporaneamente, navi mercantili o aeromobili civili, comunque destinati ai trasporti o alle pubbliche comunicazioni, ovvero ne ritarda la navigazione, è punito con la reclusione militare non inferiore a un anno; e, se dal fatto è derivato pericolo per la vita delle persone, con la reclusione militare non inferiore a cinque anni.
Se il fatto è commesso per colpa, la reclusione militare è da uno a sette anni.
Se il fatto è commesso durante il viaggio della nave o dell'aeromobile, ovvero all'estero, le pene suindicate sono aumentate.
Se il colpevole è l'armatore o il capitano o altra persona dell'equipaggio, le pene medesime sono aumentate dalla metà a due terzi.

CAPO XI
Dell'inadempimento e della frode in forniture militari

Art. 162.

(Inadempimento di contratti di forniture militari).

Chiunque, non adempiendo gli obblighi che gli derivano da un contratto di fornitura o di appalto, fa mancare, in tutto o in parte, cose od opere destinate ai bisogni delle forze armate dello Stato, è punito con la reclusione da cinque a quindici anni.
Se la fornitura è soltanto ritardata, si applica la reclusione da tre a dieci anni.
Se il fatto è commesso per colpa, si applica la reclusione militare da uno a sette anni.
Le stesse disposizioni si applicano ai subfornitori, ai mediatori e ai rappresentanti dei fornitori, allorché essi, violando i loro obblighi contrattuali, hanno cagionato l'inadempimento del contratto di fornitura.

Art. 163.

(Frode in forniture, militari).

Chiunque commette frode nella specie, qualità o quantità delle cose od opere indicate nell'articolo precedente, è punito con la reclusione non inferiore a quindici anni.
Se dalla frode è derivato grave nocumento alla salute dei combattenti ovvero alle operazioni militari, la pena è dell'ergastolo; e, se ricorrono inoltre circostanze di particolare gravità, della morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena

massima prevista dal codice penale".

CAPO XII
Disposizioni relative all'uso dell'uniforme e dei distintivi militari

Art. 164.

(Uso indebito dell'uniforme e dei distintivi militari).

Chiunque abusivamente porta in pubblico l'uniforme o i segni distintivi di grado delle forze armate dello Stato italiano, è punito con la reclusione militare fino a un anno.
Se il colpevole è un militare, si applica la reclusione militare da sei mesi a due anni.

TITOLO QUARTO
DEI REATI CONTRO LE LEGGI E GLI USI DELLA GUERRA
CAPO I
Disposizioni generali

Art. 165.

(Applicazione della legge penale militare di guerra in relazione ai conflitti armati)

Le disposizioni del presente titolo si applicano in ogni caso di conflitto armato, indipendentemente dalla dichiarazione dello stato di guerra.

((Ai fini della legge penale militare di guerra, per conflitto armato si intende il conflitto in cui una almeno delle parti fa uso militarmente organizzato e prolungato delle armi nei confronti di un'altra per lo svolgimento di operazioni belliche.
In attesa dell'emanazione di una normativa che disciplini organicamente la materia, le disposizioni del presente titolo si applicano alle operazioni militari armate svolte all'estero dalle forze armate italiane)).

Art. 166.

(Esecuzione delle condanne contro militari nemici).

La esecuzione delle condanne pronunciate da tribunali militari di guerra italiani contro militari nemici o altre persone appartenenti alle forze armate nemiche, ovvero contro abitanti del territorio dello Stato nemico occupato dalle forze armate italiane, non è differita à termini dell'articolo 29, salvo che sia diversamente disposto con accordi fra lo Stato italiano e lo Stato a cui appartengono i condannati.
Ove le condanne debbano eseguirsi, nella esecuzione si osservano le norme stabilite dal codice penale militare di pace sulla sostituzione delle pene; sostituendo per i militari le pene militari alle comuni, e per i non militari le pene comuni alle militari.

CAPO II
Degli atti illegittimi o arbitrari di ostilità

Art. 167.

(Atti di ostilità commessi da persone diverse dai legittimi belligeranti).

Chiunque compie atti di guerra contro lo Stato italiano o a danno delle sue forze armate od opere o cose militari, senza avere la qualità di legittimo belligerante, è punito, se il fatto non è preveduto come reato da una speciale disposizione di legge, con la pena di morte mediante fucilazione nel petto. ***((38a))***
Se ricorrono particolari circostanze, che attenuano l'entità del fatto o la responsabilità del colpevole, si applica la reclusione militare non inferiore a cinque anni.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 168.

(Prolungamento arbitrario delle ostilità).

Il comandante, che, fuori dei casi di necessaria reazione o, comunque, senza giustificato motivo, prolunga le ostilità, dopo aver ricevuto comunicazione ufficiale di una sospensione d'armi, di un armistizio o della conclusione della pace, è punito con la reclusione militare non inferiore a dieci anni.

Art. 169.

(Omissione di provvedere alla cessazione delle ostilità).

Il comandante, che, avendo ricevuto comunicazione ufficiale di una sospensione d'armi, di un armistizio o della conclusione della pace, omette per colpa, di disporre prontamente che le forze militari dipendenti

dal suo comando cessino dalle ostilità, è punito, per ciò solo, con la reclusione militare da uno a dieci anni.

Art. 170.

(Violazione della sospensione d'armi o dell'armistizio).

Il comandante, che, fuori dei casi di necessaria reazione o, comunque, senza giustificato motivo, commette, durante la sospensione d'armi o l'armistizio, atti di ostilità contro il nemico, con il quale fu stipulata la sospensione d'armi o l'armistizio, è punito con la reclusione militare non inferiore a dieci anni.
La pena è della morte mediante fucilazione nel petto, se gli atti hanno esposto lo Stato alla ripresa delle ostilità. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 171.

(Passaggio arbitrario delle linee dell'armistizio).

Chiunque, senza autorizzazione, passa o tenta di passare le linee dell'armistizio, è punito con la reclusione militare da uno a cinque anni.

Art. 172.

(Atti ostili contro uno Stato neutrale o alleato).

Il comandante, che, senza l'autorizzazione del Governo, o fuori dei casi di necessità, compie atti ostili contro uno Stato neutrale o alleato, è punito con la reclusione militare da tre a dieci anni.
Se gli atti ostili sono tali da esporre lo Stato italiano o i suoi cittadini ovunque residenti, o chiunque goda della protezione delle leggi dello Stato, al pericolo di rappresaglie o di ritorsioni la pena è della reclusione militare da cinque a dodici anni. Se segue la rottura delle relazioni diplomatiche, o se avvengono le ritorsioni o le rappresaglie, la pena è della reclusione militare da sette a quindici anni.
Se gli atti sono tali da esporre lo Stato italiano al pericolo di una guerra, si applica la reclusione militare non inferiore a dodici anni.
Se, per effetto degli atti ostili, la guerra avviene, ovvero è derivato incendio o devastazione o la morte di una o più persone, la pena è della morte mediante fucilazione nel petto. ***((38a))***
La condanna importa la rimozione.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 173.

(Eccesso colposo).

Nei casi indicati dagli articoli 168, 170 e 172, se il comandante eccede colposamente i limiti della autorizzazione o della necessità, alla pena di morte è sostituita la reclusione militare non inferiore a cinque anni, e le altre pene sono diminuite da un terzo a due terzi; ferma la pena accessoria della rimozione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

CAPO III
Degli atti illeciti di guerra
Sezione I
Dell'abuso dei mezzi per nuocere al nemico

Art. 174.

(Comandante che ordina o autorizza l'uso di mezzi di guerra vietati).

Il comandante di una forza militare, che, per nuocere al nemico, ordina o autorizza l'uso di alcuno dei mezzi o dei modi di guerra vietati dalla legge o dalle convenzioni internazionali, o comunque contrari all'onore militare, è punito con la reclusione non inferiore a cinque anni, salvo che il fatto sia preveduto come reato da una speciale disposizione di legge.
Se dal fatto è derivata strage, si applica la reclusione non inferiore a dieci anni.

Art. 175.

(Uso di mezzi di guerra vietati, da parte di persona diversa dal comandante).

Le pene stabilite dall'articolo precedente si applicano

anche a chiunque, per nuocere al nemico, adopera mezzi o usa modi vietati dalla legge o dalle convenzioni internazionali, o comunque contrari all'onore militare. Tuttavia, la pena può essere diminuita.

Art. 176.

(Rappresaglie ordinate fuori dei casi preveduti dalla legge).

Il comandante, che ordina di eseguire atti di ostilità a titolo di rappresaglia fuori dei casi in cui questa è consentita dalla legge o dalle convenzioni internazionali, o non ne ordina la cessazione quando ha ricevuto comunicazione ufficiale che l'avversario ha dato riparazione del fatto illecito, è punito con la reclusione militare da tre a dieci anni.

Art. 177.

(Violenza proditoria. Resa a discrezione).

Chiunque, violando la legge o le convenzioni internazionali, usa proditoriamente violenza a una persona appartenente allo Stato nemico, è punito con la reclusione da uno a quindici anni, se dal fatto è derivata una lesione personale, e con l'ergastolo, se dal fatto è derivata la morte.
Le stesse pene si applicano, se la violenza è usata, ancorché non proditoriamente, sopra la persona di un nemico, che si sia arreso a discrezione.

Art. 178.

(Comandante che omette il preavviso in caso di bombardamento).

È punito con la reclusione militare fino a tre anni il comandante delle forze di investimento, che, fuori del caso di necessità delle operazioni militari, omette, prima di cominciare il bombardamento, di fare quanto è possibile per darne comunicazione alle Autorità della piazza nemica, a norma della legge o delle convenzioni internazionali.

Art. 179.

(Comandante che omette di adottare provvedimenti per la protezione di edifici, luoghi e cose che devono essere rispettati).

È punito con la reclusione militare fino a tre anni il comandante delle forze d'investimento, che omette di adottare i provvedimenti preveduti dalla legge o dalle convenzioni internazionali per assicurare il rispetto:
1° degli ospedali e di ogni altro edificio o luogo di ricovero o cura di infermi o feriti, di formazioni sanitarie mobili o di stabilimenti fissi per il servizio sanitario, di navi-ospedale, di navi ospedaliere, di aeromobili sanitari addetti al servizio militare, di monumenti storici o di edifici destinati alle scienze, alle arti, alla beneficenza o all'esercizio di un culto, quando essi non siano in pari tempo adoperati a fini militari e siano designati mediante i segni distintivi preveduti dalle convenzioni internazionali o, comunque, preventivamente comunicati al nemico, e facilmente visibili anche a grande distanza e a quota elevata;
2° dei beni degli Stati neutrali e delle sedi delle loro rappresentanze diplomatiche o consolari, quando non vengano usati a fini militari e siano individuati dalla loro bandiera nazionale, visibile anche a grande distanza e a quota elevata.
La stessa pena si applica al comandante della piazza investita, che omette di designare gli ospedali, i luoghi, i monumenti e gli edifici predetti mediante segni visibili, comunicati al comandante delle forze assedianti a norma della legge o delle convenzioni internazionali.

Art. 180.

(Uso indebito di segni e distintivi di protezione e di bandiere).

È punito con la reclusione militare fino a sette anni chiunque usa indebitamente:
1° i segni distintivi legalmente adottati per assicurare il rispetto e la protezione degli ospedali, dei luoghi, delle formazioni, degli stabilimenti, dei monumenti, degli edifici e dei beni, indicati nell'articolo precedente;
2° i segni distintivi della Croce Rossa, delle altre associazioni di soccorso autorizzate, delle navi-ospedale, delle navi ospedaliere o delle rispettive imbarcazioni, e degli aeromobili sanitari adibiti al servizio militare;
3° i distintivi internazionali di protezione;
4° la bandiera parlamentare.
La stessa pena si applica a chiunque usa indebitamente bandiere, insegne o uniformi militari diverse da quelle nazionali.

Art. 181.

(Vilipendio dei distintivi di protezione).

Chiunque vilipende i distintivi internazionali di protezione è punito con la reclusione militare fino a tre anni.

Art. 182.

(Costringimento di sudditi nemici a partecipare alle operazioni militari o a favorirle).

Il militare, che, nel territorio dello Stato nemico occupato dalle forze armate dello Stato italiano, o in qualsiasi altro luogo, costringe un suddito nemico a partecipare ad azioni di guerra contro il proprio paese, ovvero a favorirne in qualsiasi modo l'esecuzione, è punito con la reclusione militare non inferiore a tre anni.
La disposizione del comma precedente non si applica, se il fatto è commesso contro sudditi nemici, che possiedono in pari tempo la nazionalità italiana, o che, comunque, siano soggetti agli obblighi del servizio militare, a norma della legge sulla cittadinanza.

Art. 183.

((ARTICOLO ABROGATO DALLA L. 31 GENNAIO 2002, N. 6))

Art. 184.

(Violazione di salvaguardia o di salvacondotto).

Chiunque, senza giustificato motivo, usa violenza contro persona protetta da salvaguardia o da salvacondotto, oppure arbitrariamente s'introduce in alcuno dei luoghi protetti da salvaguardia, è punito con la reclusione militare fino a tre anni.
Agli effetti, della legge penale militare, i militari in servizio di salvaguardia sono considerati sentinelle.

Art. 184-bis

(((Cattura di ostaggi)))

((Il militare che viola i divieti della cattura di ostaggi previsti dalle norme sui conflitti armati internazionali è punito con la reclusione militare da due a dieci anni.
La stessa pena si applica al militare che minaccia di ferire o di uccidere una persona non in armi o non in atteggiamento ostile, catturata o fermata per cause non estranee alla guerra, al fine di costringere alla consegna di persone o cose.
Se la violenza è attuata si applica l'articolo 185)).

Sezione II
Degli atti illeciti contro persone private nemiche o a danno di beni nemici

Art. 185.

(Violenza di militari italiani contro privati nemici o di abitanti dei territori occupati contro militari italiani).

Il militare, che, senza necessità o, comunque, senza giustificato motivo, per cause non estranee alla guerra, usa violenza contro privati nemici, che non prendono parte alle operazioni militari, è punito con la reclusione militare ***((fino a cinque anni))***.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale gravissima o grave, si applicano le pene stabilite dal codice penale. Tuttavia, la pena detentiva temporanea può essere aumentata.
Le stesse pene si applicano agli abitanti del territorio dello Stato nemico occupato dalle forze armate dello Stato italiano, i quali usano violenza contro alcuna delle persone a esse appartenenti.

Art. 185-bis.

(Altre offese contro persone protette dalle convenzioni internazionali)

Salvo che il fatto costituisca più grave reato, il militare che, per cause non estranee alla guerra, compie atti di tortura o altri trattamenti inumani, trasferimenti illegali, ovvero altre condotte vietategli dalle convenzioni internazionali, inclusi gli esperimenti biologici o i trattamenti medici non giustificati dallo stato di salute, in danno di prigionieri di guerra o di civili o di altre persone protette dalle convenzioni internazionali medesime, è punito con la reclusione militare ***((da due))*** a cinque anni.

Art. 186.

(Saccheggio).

Chiunque commette un fatto diretto a portare il saccheggio in città o altri luoghi, ancorché presi di assalto, è punito con la morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 187.

(Incendio, distruzione o grave danneggiamento in paese nemico).

Chiunque, in paese nemico, senza essere costretto dalla necessità delle operazioni militari, appicca il fuoco a una casa o a un edificio, o con qualsiasi altro mezzo li distrugge, è punito con la reclusione non inferiore a quindici anni.
Se dal fatto è derivata la morte di una o più persone, si applica la pena di morte con degradazione. ***((38a))***
Le stesse disposizioni si applicano nel caso d'incendio o distruzione o grave danneggiamento di monumenti storici, di opere d'arte o scientifiche, ovvero di stabilimenti destinati ai culti, alla beneficenza, alla istruzione, alle arti o alle scienze, ancorché appartenenti allo Stato nemico.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 188.

(Busca).

Il militare o altra persona al servizio o al seguito delle forze armate dello Stato, che, dandosi alla busca, s'impossessa, senza necessità o autorizzazione, di viveri, oggetti di vestiario o equipaggiamento, ovvero se li fa consegnare, è punito con la reclusione militare fino a cinque anni.
Se il fatto è commesso in riunione di due o più persone, la pena è aumentata da un terzo alla metà.
Se è usata violenza, si applica la reclusione militare da uno a otto anni.

Art. 189.

(Omesso impedimento della busca).

L'ufficiale o il sottufficiale, che non adopera tutti i mezzi di cui può disporre per impedire il fatto preveduto dall'articolo precedente, è punito con la reclusione militare fino a un anno.

CAPO IV
Della violazione dei doveri verso infermi, feriti, naufraghi o morti e verso il personale sanitario

Art. 190.

(Omessa assistenza verso militari infermi, feriti o naufraghi).

È punito con la reclusione militare da uno a dieci anni il militare addetto al servizio sanitario, che, durante o dopo il combattimento, omette di prestare la sua assistenza ai militari, o alle altre persone regolarmente al seguito delle forze armate belligeranti, che siano infermi, feriti o naufraghi, ancorché nemici.
Se alcuno dei fatti suindicati è commesso per colpa, la pena è della reclusione militare fino a sette anni.

Art. 191.

(Uso delle armi contro ambulanze, ospedali, navi o aeromobili sanitari o contro il personale addettovi).

Chiunque fa uso delle armi contro ambulanze, ospedali, formazioni mobili sanitarie, stabilimenti fissi per il servizio sanitario, navi-ospedale, navi ospedaliere o rispettive imbarcazioni, aeromobili sanitari addetti al servizio militare e ogni altro luogo di ricovero o cura di infermi o feriti, ovvero contro il personale addettovi, quando a norma della legge o delle convenzioni internazionali devono considerarsi rispettati e protetti, è punito, se il fatto non costituisce un più grave reato, con la pena della reclusione militare non inferiore a dieci anni.

Art. 192.

(Maltrattamenti verso infermi, feriti o naufraghi).

Chiunque usa maltrattamenti contro infermi, feriti o naufraghi, ancorché nemici, è punito con la reclusione non inferiore a cinque anni.
Se i maltrattamenti sono gravi, o trattasi di sevizie, la reclusione non è inferiore a dieci anni; e, se il fatto è inoltre commesso da un incaricato del trasporto o dell'assistenza dell'infermo, del ferito o del naufrago, si applica l'ergastolo.
Si applica la pena di morte con degradazione, se dal fatto è derivata la morte dell'infermo, del ferito o del naufrago. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 193.

(Spoliazione d'infermi, feriti o naufraghi).

Chiunque spoglia infermi, feriti o naufraghi, ancorché nemici, ovvero sottrae a essi denaro o altri oggetti, è punito con la reclusione da cinque a dieci anni.
Se il fatto è commesso con violenza contro la persona, la reclusione non è inferiore a dieci anni.
Se il colpevole è un incaricato del trasporto o della assistenza dell'infermo, ferito o naufrago, si applica:
1° la reclusione non inferiore a quindici anni, nel caso preveduto dal primo comma;
2° l'ergastolo, nel caso preveduto dal secondo comma.
Si applica la pena di morte con degradazione, se dal fatto è derivata la morte dell'infermo, del ferito o del naufrago. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 194.

(Violenza contro le persone addette al servizio sanitario e i ministri del culto).

Fuori del caso preveduto dall'articolo 191, chiunque usa violenza contro alcuna delle persone regolarmente addette al servizio sanitario, quando a norma della legge o delle convenzioni internazionali devono essere rispettate e protette, è punito con la reclusione da cinque a quindici anni.
La stessa pena si applica, se il fatto è commesso contro alcuno dei ministri del culto addetti alle forze armate.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale gravissima, si applicano le corrispondenti pene stabilite dal codice penale.
Tuttavia, la pena detentiva temporanea è aumentata.

Art. 195.

(Omesso rilascio di persone addette al servizio sanitario o di ministri del culto).

Chiunque, violando la legge o le convenzioni internazionali, non consegna o non rilascia, o comunque trattiene alcuna delle persone indicate nell'articolo precedente, quando esse hanno cessato di esercitare le loro funzioni negli ospedali, nelle ambulanze o in altri luoghi dove prestavano servizio, è punito con la reclusione militare da uno a cinque anni.

Art. 196.

(Mutilazione, vilipendio o sottrazione di cadavere).

Chiunque mutila o deturpa il cadavere di un militare caduto in guerra, o commette sopra di esso atti di vilipendio, o, comunque, atti di brutalità o di oscenità, ovvero sottrae per intero o in parte il cadavere, è punito con la reclusione non inferiore a dieci anni.

Art. 197.

(Spoliazione di cadavere o sottrazione di denaro o di altri oggetti).

Chiunque, sul campo di battaglia e a fine di trarne profitto, spoglia un cadavere, o sottrae di dosso al cadavere denaro od oggetti preziosi, è punito con la reclusione da cinque a quindici anni.
Se il fatto è commesso da più persone riunite, la pena è aumentata da un terzo alla metà.

Art. 198.

(Arbitrario disconoscimento della qualità di legittimo belligerante).

Il comandante, che, non usando verso i legittimi belligeranti nemici caduti in suo potere, ovvero infermi, feriti o naufraghi, il trattamento preveduto dalla legge o dalle convenzioni internazionali, cagiona grave danno alle persone suindicate, ovvero determina l'uso di rappresaglie, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare non inferiore a tre anni.

CAPO V
Dei prigionieri di guerra
Sezione I
Dei reati dei prigionieri di guerra nemici

Art. 199.

(Disobbedienza).

Il prigioniero di guerra, di qualsiasi grado, che non obbedisce agli ordini di un militare dello Stato italiano, ancorché non graduato, incaricato di scortarlo, sorvegliarlo o custodirlo, è punito con la reclusione

militare fino a un anno.
Si applica la reclusione fino a cinque anni, se il fatto è commesso in circostanze di grave pericolo.

Art. 200.

(Violenza o minaccia contro militari dello Stato italiano).

Il prigioniero di guerra, che usa violenza o minaccia contro un militare dello Stato italiano, è punito con la reclusione militare da uno a cinque anni; e, se il militare suindicato è incaricato di scortarlo, sorvegliarlo o custodirlo, con la reclusione militare da tre a sette anni.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione personale gravissima o grave, si applicano le corrispondenti pene stabilite dal codice penale.
Tuttavia, la pena detentiva temporanea è aumentata.
Se, nei casi preveduti dai commi precedenti, la violenza o la minaccia è commessa da tre o più persone riunite, la pena è aumentata.

Art. 201.

(Disobbedienza od offesa al prigioniero di guerra preposto alla disciplina).

Le disposizioni degli articoli precedenti si applicano anche se alcuno dei fatti ivi preveduti è commesso da un prigioniero di guerra contro il prigioniero di guerra preposto dall'Autorità militare italiana alla disciplina del drappello o reparto di prigionieri di guerra, al quale il colpevole appartiene.

Art. 202.

(Atti di ribellione collettiva).

Sono puniti con la reclusione militare da dieci a venti anni i prigionieri di guerra, che, riuniti in numero di sei o più:
1° prendono arbitrariamente le armi e rifiutano, omettono o ritardano di obbedire all'ordine di deporle, dato da un superiore;
2° abbandonandosi a eccessi o ad atti violenti, rifiutano, omettono o ritardano di obbedire alla intimazione di disperdersi o di rientrare nell'ordine, fatta da un superiore.
Si applica la pena di morte mediante fucilazione nel petto a coloro che hanno promosso, organizzato o diretto la ribellione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 203.

(Atti di indisciplina collettiva).

Fuori dei casi indicati nell'articolo precedente, sono puniti con la reclusione militare da tre a dieci anni i prigionieri di guerra, che, riuniti in numero di sei o più:
1° rifiutano, omettono o ritardano di obbedire a un ordine di un superiore;
2° persistono nel presentare, a voce o per iscritto, una domanda, un esposto o un reclamo.
Si applica la reclusione militare da dieci a venti anni a coloro che hanno promosso, organizzato o diretto il fatto.
Se il fatto ha carattere di particolare gravità per il numero dei colpevoli o per i motivi che lo hanno determinato, ovvero se è commesso in circostanze di pericolo, o a bordo di una nave o di un aeromobile, le pene suddette sono aumentate dalla metà a due terzi.
Se il colpevole cede alla prima intimazione, si applica la reclusione militare da sei mesi a tre anni; tranne che abbia promosso, organizzato o diretto il fatto, nel quale caso la pena è della reclusione militare da due a sette anni.

Art. 204.

(Provocazione).

Se alcuno dei reati preveduti dai due articoli precedenti è commesso nello stato d'ira determinato da un fatto ingiusto del superiore, consistente in una violenza, ovvero in una minaccia o ingiuria grave, e immediatamente dopo di essa, alla pena di morte è sostituita la reclusione militare non inferiore a quindici anni, e le altre pene sono diminuite da un terzo alla metà. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 205.

(Denominazione di «superiore»).

Agli effetti dei tre articoli precedenti, sotto la denominazione di superiore s'intende qualsiasi militare dello Stato italiano, ancorché non rivestito di un grado, incaricato della scorta, sorveglianza o custodia del prigioniero di guerra, nonché il prigioniero di guerra preposto dall'Autorità militare italiana alla disciplina di un drappello o reparto di prigionieri di guerra, relativamente ai prigionieri appartenenti al drappello o reparto.

Art. 206.

(Accordo per commettere atti di ribellione o di indisciplina collettiva. Recesso).

Quando sei o più prigionieri di guerra si accordano per commettere alcuno dei reati preveduti dagli articoli 202 e 203, coloro che partecipano all'accordo sono puniti, se il reato non è commesso, con la pena stabilita per il reato stesso, diminuita da un terzo alla metà.
Non è punibile il prigioniero di guerra, che recede dall'accordo prima che sia commesso il reato per cui l'accordo è intervenuto, e anteriormente all'arresto ovvero al procedimento.

Art. 207.

(Manifestazione sediziosa).

Il prigioniero di guerra, che, comunicando con più prigionieri di guerra, insinua il malcontento contro l'Autorità militare italiana per l'applicazione del regime dei prigionieri di guerra, è punito con la reclusione militare fino a due anni.

Art. 208.

(Ripresa delle armi contro la data fede).

Il prigioniero di guerra, che, liberato sulla parola d'onore di non partecipare più oltre alle ostilità, riprende le armi contro lo Stato italiano o alcuno degli Stati suoi alleati, è punito con la morte mediante fucilazione nel petto. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Sezione II
Dei reati contro i prigionieri di guerra

Art. 209.

(Sevizie o maltrattamenti).

Il militare incaricato della scorta, vigilanza o custodia di prigionieri di guerra, che, abusando di questa sua qualità, commette, per qualsiasi motivo, sevizie o maltrattamenti verso un prigioniero di guerra, è punito, se il fatto non costituisce un più grave reato, con la reclusione militare da due a dieci anni.

Art. 210.

(Vilipendio).

Il militare, che vilipende un prigioniero di guerra, in sua presenza e per questa sua qualità, è punito con la reclusione militare fino a tre anni.

Art. 211.

(Violenza, minaccia o ingiuria, in generale).

Fuori dei casi preveduti dai due articoli precedenti, il militare, che usa violenza o minaccia o commette ingiuria contro un prigioniero di guerra, è punito con le stesse pene, che la legge stabilisce per tali fatti quando sono commessi da un militare contro un suo inferiore.
La stessa disposizione si applica relativamente al prigioniero di guerra preposto dall'Autorità militare italiana alla disciplina del drappello o reparto di prigionieri, quando egli commette alcuno dei fatti suindicati contro un prigioniero di guerra del drappello o reparto.

Art. 212.

(Costringimento a dare informazioni o a compiere lavori vietati).

È punito con la reclusione militare da due a sette anni chiunque usa violenza o minaccia verso uno o più prigionieri di guerra:
1° per costringerli a dare informazioni, che possano compromettere gli interessi della loro patria, ovvero delle forze armate a cui appartengono;

2° per costringerli a lavori, che abbiano diretto rapporto con le operazioni della guerra, o che, comunque, siano specificamente vietati dalla legge o dalle convenzioni internazionali.
Se la violenza consiste nell'omicidio, ancorché tentato o preterintenzionale, o in una lesione gravissima o grave, si applicano le corrispondenti pene del codice penale. Tuttavia, la pena detentiva temporanea può essere aumentata.

Art. 213.

(Violazione della libertà di religione o di culto).

Ferma l'applicazione delle misure d'ordine prescritte dalla Autorità militare, chiunque arbitrariamente impedisce o turba o comunque limita la libertà di religione o di culto dei prigionieri di guerra, è punito con la reclusione militare fino a un anno.
La stessa pena si applica a chiunque offende la religione professata da un prigioniero di guerra, mediante vilipendio di questa, in sua presenza.

Art. 214.

(Sottrazione di denaro o di altri oggetti).

Il militare, che, a fine di trarne profitto per sé o per altri, sottrae denaro o altri oggetti a un prigioniero di guerra, è punito con la reclusione fino a cinque anni; e, se il militare suindicato è incaricato di scortarlo, sorvegliarlo o custodirlo, con la reclusione militare da tre a sette anni.

Sezione III
Dei reati dei militari italiani prigionieri di guerra

Art. 215.

(Applicazione della legge penale militare di guerra. Aumento di pena per reati contro superiori).

I militari dello Stato italiano, che, durante la loro prigionia di guerra, commettono un reato preveduto dalla legge penale militare italiana, sono puniti a norma della legge penale militare di guerra.
Tuttavia, se trattasi di disobbedienza, ovvero d'ingiuria, minaccia o violenza contro i superiori in grado delle forze armate dello Stato italiano, anche essi prigionieri di guerra, la pena temporanea detentiva è aumentata da un sesto a un terzo.

Art. 216.

(Informazioni al nemico).

Il prigioniero di guerra italiano, che, cedendo alle istigazioni o lusinghe del nemico, gli fornisce notizie circa la forza, le posizioni o le condizioni delle forze armate cui egli appartiene, è punito con la reclusione militare da tre a dieci anni, salvo che il fatto costituisca un più grave reato.

Art. 217.

(Liberazione sulla promessa di non partecipare alle ostilità).

Il prigioniero di guerra italiano, che, impegnando la parola d'onore di non partecipare più oltre alle ostilità, ottiene dal nemico di essere liberato dalla prigionia di guerra, è punito con la reclusione militare da tre a cinque anni.

Art. 218.

(Omessa presentazione all'Autorità militare).

Il militare, che, comunque liberato dalla prigionia di guerra, non si presenta, senza giusto motivo, a un'Autorità militare italiana nei tre giorni successivi a quello in cui è entrato nel territorio dello Stato o nel territorio occupato dalle forze armate italiane, è punito con la reclusione militare fino a cinque anni.

Sezione IV
Degli ostaggi

Art. 219.

(Parificazione degli ostaggi ai prigionieri di guerra).

Agli effetti della legge penale militare, gli ostaggi sono equiparati ai prigionieri di guerra.

CAPO VI
Dei reati concernenti le requisizioni, contribuzioni e prestazioni militari

Art. 220.

(Distrazione, occultamento o distruzione di cose requisibili).

Chiunque, in previsione di un ordine di requisizione, o dopo che l'ordine legale gli è stato intimato, distrae od occulta una o più cose requisibili, è punito con la reclusione militare fino a tre anni; e, se le distrugge o sopprime con la reclusione militare da tre a dieci anni.

Art. 221.

(Inadempienza dell'ordine militare di requisizione di cose).

Chiunque, ancorché in paese nemico, omette o rifiuta, senza giustificato motivo, di adempiere gli obblighi legalmente impostigli dall'Autorità militare per la requisizione di cose mobili ovvero di immobili, occorrenti alle forze armate dello Stato, è punito con la reclusione militare fino a tre anni.

Art. 222.

(Inottemperanza alla richiesta militare di prestazioni personali).

Chiunque, ancorché in paese nemico, omette o rifiuta, senza giustificato motivo, di prestare la propria attività professionale, o, comunque, la propria opera personale, legalmente richiesta dall'Autorità militare per servizi occorrenti alle forze armate dello Stato, è punito con la reclusione militare fino a tre anni.

Art. 223.

(Omissione o rifiuto di atti di ufficio).

Il pubblico ufficiale o l'incaricato di un pubblico servizio, che, nel territorio dello Stato o in paese nemico, legalmente richiesto, omette o rifiuta atti del proprio ufficio o servizio, o, comunque, di coadiuvare l'Autorità militare in ciò che ha attinenza con la requisizione, la prestazione o la contribuzione di guerra, è punito con la reclusione militare fino a cinque anni.

Art. 224.

(Requisizioni, prestazioni o contribuzioni arbitrarie o eccessive).

Il militare, che, nel territorio dello Stato o in paese nemico, senza autorizzazione o senza necessità, o violando le norme stabilite dalla legge o dalle convenzioni internazionali, impone requisizioni o prestazioni, o leva contribuzioni di guerra, avvero eccede nella esecuzione dell'incarico ricevuto, è punito con la reclusione militare fino a cinque anni.
Se il fatto è commesso a fine di lucro, ovvero con violenza o minaccia, la pena è della reclusione non inferiore a cinque anni.
Se con la violenza o la minaccia concorre il fine di lucro, la pena è della morte con degradazione. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 225.

(Contribuzioni posteriori alla conclusione della pace).

Le pene stabilite dall'articolo precedente si applicano anche al comandante, che, dopo avere ricevuto comunicazione ufficiale della conclusione della pace, leva una contribuzione di guerra nel territorio dello Stato con il quale la pace è conchiusa, ovvero impone il pagamento di contribuzioni non ancora soddisfatte.

Art. 226.

(Abuso nelle requisizioni di alloggi per militari).

Il militare, che, in occasione di alloggio militare, usa violenza o minaccia per costringere colui che è tenuto all'alloggio a dargli più di ciò che è dovuto, ovvero a tollerare che egli se ne impossessi o, comunque, ne usufruisca, è punito, per ciò solo, con la reclusione militare da uno a cinque anni.

CAPO VII
Dell'abuso delle prede belliche

Art. 227.

(Appropriazione della preda).

Chiunque si appropria una cosa costituente preda bellica, della quale abbia il possesso, è punito con la reclusione militare da uno a sette anni.
Se il fatto è commesso su cose costituenti preda bellica e trovate abbandonate, la pena è della reclusione militare fino a un anno.***((1))***

AGGIORNAMENTO (1)
Il D. Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 2, comma 1) che "Fino ad un anno dopo la cessazione dello stato di guerra rimangono in vigore le disposizioni degli articoli 227, 228 e 229 del Codice penale militare di guerra."

Art. 228.

(Acquisto o ritenzione della preda).

Fuori del caso di concorso nei reati preveduti dall'articolo precedente, chiunque, per procurare a sé o ad altri un profitto, acquista, riceve od occulta o, a qualsiasi titolo, ritiene cose costituenti preda bellica, senza che abbiano legittimamente cessato di appartenere all'amministrazione militare italiana, è punito con la reclusione militare fino a cinque anni.
Se le cose anzidette, che hanno formato oggetto dell'acquisto, dell'occultamento o della ritenzione, sono state trovate abbandonate, la pena è della reclusione militare fino a due anni. ***((1))***

AGGIORNAMENTO (1)
Il D. Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 2, comma 1) che "Fino ad un anno dopo la cessazione dello stato di guerra rimangono in vigore le disposizioni degli articoli 227, 228 e 229 del Codice penale militare di guerra."

Art. 229.

(Distruzione o deterioramento della preda).

Chiunque distrugge, disperde, deteriora o rende, in tutto o in parte, inservibili cose costituenti preda bellica, è punito con la reclusione militare da uno a sette anni. ***((1))***

AGGIORNAMENTO (1)
Il D. Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 2, comma 1) che "Fino ad un anno dopo la cessazione dello stato di guerra rimangono in vigore le disposizioni degli articoli 227, 228 e 229 del Codice penale militare di guerra."

CAPO VIII
Disposizioni speciali

Art. 230.

(Omesso impedimento di determinati reati militari).

Ferme in ogni altro caso le disposizioni del secondo comma dell'articolo 40 del codice penale e quelle dell'articolo 138 del codice penale militare di pace, il militare, che, per timore di un pericolo o per altro inescusabile motivo, non usa ogni mezzo possibile per impedire la esecuzione di alcuno dei reati preveduti dagli articoli 186, 187, 192, 193, 202 e 203, è punito:
1° con la reclusione non inferiore a dieci anni, se per il reato la legge stabilisce la pena di morte con degradazione o quella dell'ergastolo; ***((38a))***
2° negli altri casi, con la pena stabilita per il reato, diminuita dalla metà a due terzi.
Se il colpevole è il più elevato in grado, o, a parità di grado, superiore in comando o più anziano, si applica la pena dalla legge stabilita per il reato, di cui non è stata impedita l'esecuzione. Nondimeno, il giudice può diminuire la pena.
Agli effetti delle disposizioni dei commi precedenti, ai fini della determinazione della pena stabilita per i reati in essi indicati, non si ha riguardo a quella che la legge stabilisce per i capi, promotori od organizzatori del reato o per coloro che hanno diretto gli atti di ribellione o di indisciplina collettiva.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

LIBRO QUARTO
DELLA PROCEDURA PENALE MILITARE DI GUERRA
TITOLO PRIMO
DELLA GIURISDIZIONE MILITARE DI GUERRA

Art. 231.

(Momento iniziale).

Lo stato di guerra ha per effetto l'esercizio della giurisdizione militare di guerra relativamente ai reati a essa soggetti, che siano commessi dopo la dichiarazione dello stato di guerra; o anche prima, se, al momento della dichiarazione stessa, il procedimento penale non sia stato ancora iniziato o sia tuttora pendente.

Art. 232.

(Limiti della giurisdizione militare di guerra).

Ai tribunali militari di guerra appartiene la cognizione:
1° dei reati militari da chiunque commessi nei territori in stato di guerra o considerati tali;
2° dei reati preveduti dalla legge penale comune, commessi da militari nei territori indicati nel numero precedente;
3° dei reati militari da chiunque commessi fuori dei territori indicati nel numero 1°, quando da essi possa derivare un nocumento alle operazioni militari di guerra o ai servizi relativi, ovvero alla condotta della

guerra in generale;
4° di qualunque reato commesso da prigionieri di guerra in potere o in custodia dello Stato italiano;
5° dei reati contro le leggi e gli usi della guerra commessi dagli appartenenti alle forze armate nemiche.
Ai tribunali militari di guerra appartiene altresì la cognizione di qualunque reato commesso nei territori delle operazioni militari o considerati tali:
1° dalle persone estranee alle forze armate dello Stato, che per qualsiasi titolo si trovino in rapporti, anche indiretti, di servizio, impiego, prestazione di opera, somministrazioni, forniture, requisizioni e simili con le forze armate suddette;
2° da chiunque sia addetto al privato servizio delle persone indicate nel numero precedente, e da ogni altra persona, che, con una mansione qualunque, si trovi al seguito delle forze armate dello Stato a norma della legge o dei regolamenti approvati con decreto Reale.

Art. 233.

(Rimessione all'Autorità giudiziaria ordinaria dei procedimenti per reati comuni).

Nei casi preveduti dal numero 2° del primo comma e dal secondo comma dell'articolo precedente, il giudice militare può, per ragioni di convenienza, ordinare, con provvedimento insindacabile, la rimessione all'Autorità giudiziaria ordinaria dei procedimenti per reati preveduti dalla legge penale comune.

Art. 234.

(Concorso della qualità di militare con altra qualità).

Nel concorso della qualità di militare con qualsiasi altra, di cui sia rivestito l'imputato, la prima soltanto vale a determinare la giurisdizione, quando trattasi di reati soggetti alla giurisdizione militare di guerra.

Art. 235.

(Occupazione militare).

Nei territori dello Stato nemico occupati dalle forze armate dello Stato italiano, appartiene ai tribunali militari di guerra la cognizione dei reati preveduti dalla legge penale militare e dalla legge penale comune italiana, commessi dagli abitanti del territorio occupato a danno delle forze armate di occupazione o delle persone ad esse appartenenti, o da esse dipendenti per essere al loro servizio o al loro seguito, ovvero commessi da queste persone a danno degli abitanti del territorio occupato. Nel caso di concorso delle persone suindicate e degli abitanti del territorio occupato in uno stesso reato o in reati connessi, la cognizione dei reati per tutti gli imputati spetta ai tribunali militari di guerra.
Le stesse disposizioni si applicano, quando le forze armate dello Stato italiano si trovano in territorio estero occupato militarmente per motivi diversi da quello di guerra.

Art. 236.

(Corpi di operazione nel territorio di uno Stato alleato).

Quando un corpo nazionale di operazione si trova nel territorio dello Stato alleato, ovvero quando un corpo di operazione dello Stato alleato si trova nel territorio dello Stato italiano, si osservano le norme seguenti, salvo che sia diversamente disposto con accordi fra i due Stati:
1° sono soggette esclusivamente alla giurisdizione militare dei rispettivi corpi di operazione le persone appartenenti ai detti corpi o da essi dipendenti, qualunque sia il territorio dove i corpi si trovano o la nazionalità degli imputati;
2° nel caso di concorso, in uno o più reati, di persone soggette alla giurisdizione militare, la competenza spetta, rispettivamente, al tribunale militare dello Stato a cui l'imputato appartiene;
3° spetta esclusivamente ai tribunali dello Stato alleato la cognizione dei reati commessi da persone estranee alle forze armate dello Stato italiano, che, nel territorio dello Stato alleato, commettono atti in danno delle forze medesime; e spetta esclusivamente ai tribunali dello Stato italiano la cognizione dei reati commessi da persone estranee alle forze armate dello Stato alleato, che, nel territorio dello Stato italiano, commettono atti in danno delle forze stesse.

Art. 237.

(Transito o soggiorno dei corpi nazionali di spedizione in territorio estero).

Le disposizioni dell'articolo precedente si applicano anche nel caso di transito o soggiorno di un corpo nazionale di spedizione in territorio estero, salvo che sia diversamente disposto con accordi fra lo Stato italiano e lo Stato estero.

Art. 238.

(Corpi di spedizione in paesi di capitolazioni).

Nei paesi nei quali hanno vigore le capitolazioni, la giurisdizione militare inerente al corpo di spedizione o a navi militari o aeromobili militari è sostituita in ogni caso alla giurisdizione consolare.

Art. 239.

(Reati commessi in territorio estero).

Fuori dei casi indicati negli articoli precedenti, i reati militari, da chiunque commessi, durante la guerra, in territorio estero, sono soggetti alla giurisdizione militare italiana di guerra, sebbene all'estero sia intervenuta sentenza del giudice straniero; osservata, per la richiesta, la disposizione dell'articolo 18 del codice penale militare di pace.

TITOLO SECONDO
DISPOSIZIONI GENERALI PER LA PROCEDURA PENALE MILITARE DI GUERRA
CAPO I
Del procedimento penale, in generale

Art. 240.

(Obbligatorietà del procedimento penale).

Nessuno può essere punito per un reato, se non in seguito a un procedimento penale nelle forme stabilite dalla legge, salvo che la legge stessa disponga altrimenti.

Art. 241.

((ARTICOLO ABROGATO DALLA L. 13 OTTOBRE 1994, N. 589))

Art. 242.

(Perdita di nave militare o di aeromobile militare).

Nel caso di perdita di una nave militare o di un aeromobile militare, non può iniziarsi procedimento penale, se non a richiesta del comandante supremo.
Il comandante supremo ha facoltà di disporre che il procedimento sia rinviato a dopo la cessazione dello stato di guerra.

Art. 243.

(Sospensione del procedimento penale).

Durante lo stato di guerra, è sospeso, dopo l'interrogatorio dell'imputato, il procedimento penale per i reati di renitenza alla leva, di diserzione e di mancanza alla chiamata, nei confronti di persone appartenenti al momento del commesso reato, o successivamente destinate, a reparti mobilitati; salvo che sia diversamente disposto dal Ministro competente, ovvero dal comandante della grande unità, presso cui è costituito il tribunale militare di guerra, o da un comandante a lui superiore.
La sospensione del procedimento non può essere disposta:
1° se il reato importa l'applicazione della pena di morte; ***((38a))***
2° se altra persona è imputata di concorso in detti reati o di favoreggiamento, e deve restare in stato di custodia preventiva;
3° se contro l'imputato si procede anche per altro reato, diverso da quello di alienazione di effetti di vestiario o di equipaggiamento militare.
La sospensione è revocata, se l'imputato cessa di prestare servizio presso reparti mobilitati.
Le disposizioni precedenti si applicano anche relativamente ai procedimenti penali a carico di renitenti, mancanti o disertori, che rimpatriano volontariamente o sono estradati.
La sospensione del procedimento non impedisce l'esecuzione degli atti urgenti. (1)

AGGIORNAMENTO (1)
Il D.Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 7, commi 1 e 2) che "I procedimenti, che alla data di cessazione dello stato di guerra risultano sospesi a norma dell'art. 243 del Codice penale militare di guerra, possono rimanere sospesi fino ad un anno dopo la suddetta data, anche se si sia verificata la circostanza preveduta dal terzo comma del predetto articolo. Tuttavia la sospensione può essere revocata a richiesta dell'imputato."

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 244.

(Applicazione delle norme della procedura penale di pace).

Durante lo stato di guerra, si osservano, per quanto è possibile, le disposizioni concernenti la procedura

penale militare di pace, se da questo codice non è diversamente stabilito.

CAPO II
Dell'azione penale

Art. 245.

(Inizio dell'azione penale per i procedimenti di competenza dei tribunali militari di guerra).

L'azione penale è iniziata ed esercitata in seguito a disposizione del comandante dell'unità, presso cui è costituito il tribunale militare di guerra competente.
Il comandante dell'unità, presso cui è costituito il tribunale militare di guerra, può delegare temporaneamente al pubblico ministero il potere di iniziare l'azione penale, fuori del caso di procedimenti contro militari, militarizzati o assimilati rivestiti di grado o rango superiore a quello di capitano.
L'azione penale è iniziata per disposizione del comandante supremo:
1° se il colpevole è un ufficiale generale o un ufficiale di grado corrispondente;
2° se trattasi di alcuno dei reati preveduti dal titolo quarto del libro terzo.
Durante l'istruzione, i comandanti indicati in questo articolo possono, rispettivamente, disporre che l'esercizio dell'azione penale sia sospeso o revocato.
Ferme le disposizioni del numero 1° del terzo comma di questo articolo e quelle degli articoli 17 e 28, le attribuzioni che questo codice conferisce al comandante supremo possono essere da questo delegate a un ufficiale di grado non inferiore a generale di corpo d'armata o corrispondente.

Art. 246.

(Procedimento per reati commessi fuori del territorio in stato di guerra).

Nei casi preveduti dal numero 2° del secondo comma dell'articolo 4, ai fini dell'applicazione della legge penale militare di guerra, si procede davanti ai tribunali militari di guerra, salva contraria disposizione del Ministro della forza armata, alla quale appartiene il comando dell'unità, presso cui è costituito il tribunale militare competente.

Art. 247.

(Autonomia dell'azione penale).

Salvo che la legge disponga altrimenti, l'esercizio dell'azione penale non è subordinato a richiesta, a istanza o a qualsiasi autorizzazione a procedere; ferma la facoltà dei capi militari, nei casi espressamente indicati dalla legge, di richiedere il procedimento penale ovvero di applicare punizioni disciplinari.

Art. 248.

(Azione penale contro comandanti in guerra o contro colpevoli di reati contro le leggi e gli usi della guerra).

L'azione penale contro comandanti, per atti commessi nell'esercizio del comando durante lo stato di guerra, non può essere iniziata, dopo la cessazione dello stato di guerra, se non a richiesta del Ministro da cui il comandante dipendeva, o, se più sono i comandanti e appartengono a forze armate diverse, del Ministro da cui dipendeva l'imputato più elevato in grado, o, a parità di grado, quello superiore in comando o più anziano.
La stessa disposizione si applica relativamente all'azione penale per i reati indicati nell'articolo 165. In tali casi, se l'imputato è estraneo alle forze armate dello Stato, la richiesta è fatta dal Ministro della giustizia.

Art. 249.

(Azione penale contro persone delle forze armate nemiche).

Per i reati contro le leggi e gli usi della guerra, preveduti dal titolo quarto del libro terzo, commessi nel territorio dello Stato italiano a danno di qualunque persona, ovvero all'estero a danno delle forze armate dello Stato italiano o degli appartenenti a esse, da militari o da altre persone appartenenti alle forze nemiche, l'azione penale può promuoversi o proseguirsi, ancorché per gli stessi reati sia già intervenuta sentenza di un giudice straniero; salvo quanto dispongono le convenzioni internazionali.

Art. 250.

(Azione civile).

Nei procedimenti penali davanti ai tribunali militari di guerra, l'esercizio dell'azione civile non è ammesso nemmeno se trattasi di procedimenti per reati, che in tempo di pace sono soggetti alla giurisdizione ordinaria.

CAPO III
Della competenza

Art. 251.

(Tribunali militari di guerra d'armata, di corpo d'armata e di piazza forte).

Qualunque sia il luogo del commesso reato, e salva la disposizione dell'ultimo comma, ai tribunali militari di guerra d'armata, di corpo d'armata e di piazza forte appartiene, rispettivamente, la cognizione:
1° dei reati commessi da militari dei corpi o servizi mobilitati, direttamente dipendenti dal comando dell'unità, presso cui è costituito ciascuno dei tribunali suindicati;
2° dei reati commessi da persone estranee alle forze armate dello Stato, che si trovano al servizio o al seguito di esse, presso i corpi o servizi suddetti.
La dipendenza è determinata dalla destinazione, ancorché temporanea, ad alcuno dei corpi o servizi medesimi, e decorre dalla data di detta destinazione.
Le disposizioni precedenti regolano anche la competenza dei tribunali di unità mobilitate maggiori o minori di un corpo d'armata, che possono costituirsi secondo le disposizioni relative all'ordinamento giudiziario militare.
La cognizione dei reati commessi da ufficiali dei corpi o servizi mobilitati dipendenti dai corpi d'armata che fanno parte di una armata, appartiene ai tribunali militari di guerra d'armata.

Art. 252.

(Tribunali militari territoriali di guerra).
Ai tribunali militari territoriali di guerra appartiene la cognizione:
1° dei reati commessi da militari non appartenenti ai corpi o servizi indicati nell'articolo precedente;
2° dei reati commessi da persone estranee alle forze armate dello Stato, non comprese nel numero 2° del primo comma dell'articolo precedente, e per i quali esse sono sottoposte alla giurisdizione militare di guerra;
3° dei reati commessi dai prigionieri di guerra nemici durante la prigionia;
4° dei reati contro le leggi e gli usi della guerra, commessi da militari o da altre persone appartenenti alle forze armate nemiche;
5° dei reati commessi dai prigionieri di guerra italiani durante la loro prigionia presso il nemico, e del reato preveduto dall'articolo 218.

Art. 253.

(Norme di competenza territoriale).

Nei casi indicati nei numeri 1°, 2°, 3° e 4° dell'articolo precedente, la competenza appartiene al tribunale militare territoriale di guerra del luogo del commesso reato, o, se questo non è conosciuto, al tribunale militare territoriale di guerra del luogo in cui l'imputato si è costituito o è stato arrestato.
Se il luogo del commesso reato non è noto e l'imputato non si è costituito e non è stato arrestato; è competente il tribunale militare presso cui fu emesso mandato od ordine di cattura o di comparizione.
Nei casi indicati nel numero 5° dell'articolo precedente, la competenza appartiene al tribunale militare territoriale di guerra del luogo dove è stabilito il centro di raccolta dei prigionieri rimpatriati, o, in mancanza di questo, dove il prigioniero si costituì o fu arrestato.
Nel caso preveduto dal comma precedente, se l'imputato non si è costituito e non è stato arrestato, è competente il tribunale militare presso cui fu emesso mandato od ordine di cattura o di comparizione.

Art. 254.

(Reati di assenza dal servizio in guerra).

La cognizione dei reati di assenza dal servizio in guerra appartiene al tribunale militare territoriale di guerra del luogo dove fu eseguito l'arresto o avvenne la presentazione dell'imputato.

Art. 255.

(Reati commessi in territorio estero).

Per i reati soggetti alla giurisdizione militare di guerra, commessi in territorio estero, quando, a norma di legge, la competenza appartiene ai tribunali militari di guerra costituiti nel territorio dello Stato, è competente il tribunale militare territoriale di guerra del luogo in cui segui' la consegna, l'arresto o la presentazione dell'imputato; ferme le disposizioni del terzo comma dell'articolo 253.
Se l'imputato non è stato consegnato o arrestato, e non si è costituito, si applica la disposizione del secondo comma dell'articolo 253.

Art. 256.

(Attribuzione ai tribunali militari territoriali ordinari della competenza spettante ai tribunali militari di guerra).

Nei casi preveduti dai tre articoli precedenti, se l'arresto, la consegna, la costituzione o la presentazione avviene in territorio non in stato di guerra, la compe-

tenza appartiene al tribunale militare territoriale ordinario avente giurisdizione sul territorio medesimo. Questo procede con le forme stabilite per i tribunali militari di guerra, ed è, a ogni effetto, considerato come tale.
Salvo che la legge disponga altrimenti, la disposizione del comma precedente si applica anche per tutti i procedimenti relativi a reati soggetti alla giurisdizione militare di guerra, commessi in luoghi nei quali non sono istituiti tribunali militari di guerra.

Art. 257.

(Connessione di procedimenti).

Nel caso di connessione fra procedimenti di competenza di più tribunali militari di guerra, il tribunale supremo militare, ove non ritenga necessario o utile separare i procedimenti nell'interesse della giustizia o del servizio o della disciplina militare, designa il tribunale militare di guerra per la cognizione del reato o dei reati. Tuttavia, in nessun caso può essere designato un tribunale militare di guerra diverso da quelli territoriali, per la cognizione di reati soggetti alla competenza di questi ultimi.
Nel caso di connessione fra procedimenti di competenza di tribunali militari di guerra e procedimenti di competenza di altri tribunali militari, il tribunale supremo militare, ove non ritenga necessario o utile separare i procedimenti per i motivi indicati nel comma precedente, designa un tribunale militare non di guerra, per la cognizione del reato o dei reati.

Art. 258.

(Piazza forte investita dal nemico).

Se una piazza forte è investita dal nemico, il tribunale militare di guerra della piazza è competente a conoscere di tutti i reati, da chiunque commessi nel raggio di azione della piazza, ancorché il reato, per la dipendenza o qualità dell'imputato, ovvero per altre circostanze, sia soggetto alla competenza di un tribunale diverso.

Art. 259.

(Reati commessi fuori dei luoghi in stato di guerra).

La cognizione dei reati di inadempimento o di frode in forniture militari o di qualsiasi altro reato soggetto alla giurisdizione militare di guerra, commessi in luoghi che non sono in stato di guerra, appartiene al tribunale militare del luogo del commesso reato. Questo procede con le forme stabilite per i tribunali militari di guerra, ed è, a ogni effetto, considerato come tale.

Art. 260.

(Occupazione militare).

Nei casi di occupazione di territori dello Stato nemico, e, in generale, di occupazione militare, preveduti dall'articolo 235, la cognizione dei reati ivi indicati, da chiunque commessi, appartiene ai tribunali militari di guerra costituiti presso i comandi delle unità mobilitate di occupazione, secondo le rispettive circoscrizioni territoriali.

Art. 261.

(Perdita di nave militare o di aeromobile militare).

Quando si verifichi la perdita di una nave militare o di un aeromobile militare, se il comandante supremo non dispone che il procedimento sia rinviato alla cessazione dello stato di guerra, il tribunale supremo militare designa il tribunale militare di guerra che deve conoscere del reato.

Art. 262.

(Tribunali militari di guerra di bordo).

Le norme di competenza, stabilite per i tribunali militari di bordo dal codice penale militare di pace, si osservano anche durante lo stato di guerra relativamente ai tribunali militari di guerra di bordo.

Art. 263.

(Conflitti di giurisdizione e di competenza).

Sui conflitti fra l'Autorità giudiziaria ordinaria e l'Autorità giudiziaria militare di guerra decide la corte di cassazione.
Sui conflitti fra tribunali militari di guerra e altri tribunali militari, o fra più tribunali militari di guerra, decide il tribunale supremo militare.

Art. 264.

(Rimessione dei procedimenti penali all'Autorità giudiziaria ordinaria).

Sono devoluti all'Autorità giudiziaria ordinaria, qualunque sia lo stato della istruzione o del giudizio, tut-

ti i procedimenti penali, che, alla data della cessazione dello stato di guerra, si trovano pendenti davanti ai tribunali militari di guerra, per reati soggetti alla giurisdizione militare soltanto durante lo stato di guerra e commessi nel territorio dello Stato.
La disposizione del comma precedente non si applica per i procedimenti pendenti, nei quali il giudice militare abbia già pronunciato sentenza nel giudizio o decreto penale di condanna. In questi casi, si applicano le disposizioni dell'articolo 299.

Art. 265.

(Rimessione dei procedimenti penali ai tribunali militari ordinari).

I procedimenti penali, che, alla data della cessazione dello stato di guerra, si trovano pendenti davanti ai tribunali militari di guerra del territorio dello Stato, in confronto di persone o per reati soggetti, in tempo di pace, alla giurisdizione militare, sono rimessi, qualunque sia lo stato della istruzione o del giudizio, ai tribunali militari ordinari.

Art. 266.

(Rimessione dei procedimenti penali a giudici speciali).

I procedimenti penali pendenti, alla cessazione dello stato di guerra, davanti ai tribunali militari di guerra, in confronto di persone, che in tempo di pace sono soggette a una giurisdizione speciale, sono devoluti a questa giurisdizione.
La disposizione del comma precedente non si applica nei casi indicati nel secondo comma dell'articolo 264, osservate, per la competenza, le disposizioni dell'articolo 299.

TITOLO TERZO
DISPOSIZIONI SPECIALI
CAPO I
Della istruzione
Sezione I
Degli atti preliminari all'istruzione

Art. 267.

(Procedimenti contro prigionieri di guerra italiani rimpatriati).

Nel caso di procedimento penale contro prigionieri di guerra italiani rimpatriati, per reati commessi durante la prigionia presso il nemico, gli atti preliminari all'istruzione sono, quando è possibile, assunti dall'ufficio speciale, che sia istituito presso i centri di raccolta dei prigionieri o altrove.

Art. 268.

(Atti di polizia giudiziaria in terrltorib estero occupato).

Se in territorio estero occupato dalle forze armate dello Stato italiano occorre procedere a ispezioni, perquisizioni o arresti in case private o stabilimenti pubblici, l'ufficiale di polizia giudiziaria italiano vi procede direttamente.

Art. 269.

(Rimessione degli atti al comandante).

Compiuti gli atti preliminari alla istruzione, l'ufficiale di polizia giudiziaria, o l'ufficio indicato nell'articolo 267, che li ha assunti, li rimette al comandante della unità, presso cui è costituito il tribunale militare di guerra competente, o al comandante supremo nei casi indicati nel terzo comma dell'articolo 245, avvertendo dell'invio il comando del corpo, della nave o dell'aeromobile, da cui dipende l'imputato.
Anche il procuratore militare del Re Imperatore, nei casi per i quali non sia intervenuta delega a norma del secondo comma dell'articolo 245, rimette al comandante gli atti direttamente assunti.

Art. 270.

(Decisione del comandante).

Nei casi per i quali non sia intervenuta delega a norma del secondo comma dell'articolo 245, il comandante dell'unità, presso cui è costituito il tribunale, o il comandante supremo nei casi indicati nel terzo comma dell'articolo stesso, esamina gli atti, e, sentito il pubblico ministero, decide se sia da promuoversi l'azione penale. In caso affermativo, il pubblico ministero determina se sia da procedersi con istruzione formale ovvero con istruzione sommaria.

Sezione II
Della istruzione formale

Art. 271.

(Norma generale).

Quando si procede con istruzione formale, gli atti

preliminari all'istruzione sono dal pubblico ministero inviati, con le sue richieste, al giudice istruttore, il quale procede all'istruzione formale secondo le norme della procedura penale militare di pace, salve le disposizioni degli articoli seguenti.

Art. 272.

(Emissione dei mandati).

Deve essere emesso mandato di cattura contro l'imputato di reato per il quale la legge stabilisce la pena di morte. ***((38a))***
In ogni altro caso, può essere emesso mandato di cattura o di comparizione.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 273.

(Libertà provvisoria).

Nei procedimenti per i reati indicati nel primo comma dell'articolo precedente, l'imputato non può essere ammesso alla libertà provvisoria.
Negli altri casi, la libertà provvisoria può essere conceduta, previe conclusioni conformi del pubblico ministero.
Con l'ordinanza del giudice istruttore, che concede la libertà provvisoria, o con altra successiva, l'imputato, se è estraneo alle forze armate dello Stato, può essere sottoposto a cauzione o malleveria o ad altri obblighi, a norma del codice di procedura penale.
La libertà provvisoria può concedersi anche d'ufficio e in ogni stato della istruzione, ma non oltre la chiusura di questa.

Art. 274.

(Prigionieri di guerra).

Le norme stabilite dagli articoli precedenti per i militari si applicano anche per i prigionieri di guerra sottoposti a procedimento penale; salvo l'adempimento di obblighi speciali eventualmente imposti dalla legge o dalle convenzioni internazionali, ovvero dai regolamenti sulla prigionia di guerra.

Art. 275.

(Testi impediti di comparire in giudizio).

Il giudice istruttore riceve e con giuramento la deposizione del testimonio, che egli ritenga non possa comparire in giudizio per ragione di ufficio, servizio, distanza, infermità o per altro grave motivo.

Art. 276.

(Atti d'istruzione in territorio estero occupato).

Quando, in territorio estero occupato dalle forze armate dello Stato italiano, occorra procedere all'esame di testimoni o ad altri atti processuali, il giudice istruttore vi procede direttamente.

Art. 277.

(Chiusura della istruzione formale. Riapertura).

Esaurita l'istruzione formale, il giudice istruttore comunica gli atti al pubblico ministero; e questi presenta le sue requisitorie al giudice istruttore, il quale decide, osservate le disposizioni del codice penale militare di pace.
Le sentenze di proscioglimento sono comunicate al comandante dell'unità, presso cui è costituito il tribunale. Il comandante può, nel termine di sessanta giorni dalla ricevuta comunicazione, promuovere la riapertura della istruzione, con richiesta scritta al giudice che ha pronunciato la sentenza.

Sezione III
Della istruzione sommaria

Art. 278.

(Applicazione delle norme del codice penale militare di pace).

L'istruzione sommaria può essere disposta, qualunque sia la pena dalla legge stabilita per il reato.***((1))***
Nell'istruzione sommaria si osservano le disposizioni del codice penale militare di pace e, in quanto applicabili, quelle della sezione precedente.

AGGIORNAMENTO (1)
Il D. Lgs. Luogotenenziale 21 marzo 1946, n. 144 ha disposto (con l'art. 9, comma 1) che "Per tutti i procedimenti per reati commessi durante lo stato di guerra e punibili ai termini della legge penale militare di guerra, continua ad avere vigore il disposto dell'art. 278, primo comma, del Codice penale militare di

guerra."

CAPO II
Del giudizio

Art. 279.

(Applicazione delle norme del codice penale militare di pace).

Il giudizio si svolge e si compie secondo le norme della procedura penale militare di pace, salve le disposizioni degli articoli seguenti.
La lettura delle deposizioni testimoniali, oltre che nei casi indicati nell'articolo 369 del codice penale militare di pace, è consentita anche per quelle ricevute a norma dell'articolo 275 e del secondo comma dell'articolo 280 di questo codice.

Art. 280.

(Facoltà del presidente del tribunale).

Il presidente del tribunale militare di guerra può, se ricorrono particolari ragioni di urgenza, abbreviare i termini, che, nel periodo degli atti preliminari al giudizio, sono stabiliti dal codice penale militare di pace per l'esame degli atti del procedimento o per altri oggetti.
Il presidente, se ritiene che un testimonio non possa comparire in giudizio senza danno al servizio ed esso non sia stato esaminato a norma dell'articolo 275, può richiedere il giudice istruttore, perché ne riceva la deposizione con giuramento.

Art. 281.

(Reati commessi all'udienza di un tribunale militare in territorio nemico occupato).

Ferme in ogni caso le disposizioni dell'articolo 367 del codice penale militare di pace, quando, nel territorio dello Stato nemico occupato dalle forze armate dello Stato italiano, sia commesso, alla udienza di un tribunale militare, un reato da un prigioniero di guerra ovvero da alcuno degli abitanti del territorio occupato, si procede al giudizio immediato.

Art. 282.

(Menzioni speciali nel processo verbale di dibattimento).

Quando, davanti ai tribunali militari di guerra diversi da quelli territoriali, non sia possibile, per le necessità dei servizi di guerra, l'osservanza di alcuna fra le norme concernenti la procedura del giudizio, il processo verbale del dibattimento deve farne espressa menzione.

CAPO III
Disposizioni speciali per i tribunali militari di guerra straordinari

Art. 283.

(Casi di convocazione; competenza).

Il tribunale militare di guerra straordinario è competente a conoscere dei reati, per i quali la legge stabilisce la pena di morte, quando l'imputato sia stato arrestato in flagranza e il comandante, competente a costituirlo a norma della legge relativa all'ordinamento giudiziario militare, ne abbia deciso la convocazione, per la necessità di un giudizio immediato, a scopa di esemplarità. ***((38a))***
La competenza del tribunale militare di guerra straordinario è limitata alla cognizione del reato, per il quale è convocato.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 284.

(Revoca della convocazione).

Se occorrono altri elementi di prova del reato, oltre quelli, che, a norma di legge, consentono la convocazione dei tribunale militare di guerra straordinario, il pubblico ministero li assume direttamente; e, se risultano escluse le condizioni richieste per la convocazione del tribunale straordinario, il comandante che lo ha convocato revoca l'ordine di convocazione, e si procede nei modi ordinari.

Art. 285.

(Giudizio e sentenza).

Convocato il tribunale militare di guerra straordinario e raccolta, in quanto possibile, la truppa sotto le armi, il presidente e i giudici prendono posto davanti a essa, e prestano giuramento con la formula stabi-

lita dalla legge relativa all'ordinamento giudiziario militare.
L'imputato è assistito da un difensore.
Il presidente interroga l'imputato sulle sue generalità e gli contesta il reato che forma oggetto della imputazione; indi la discussione procede nell'ordine e con le norme stabiliti per ogni altro tribunale militare di guerra.
Chiuso il dibattimento, allontanato l'imputato e ritiratisi il pubblico ministero e il difensore, il tribunale delibera la sentenza. Redatta e sottoscritta questa, l'imputato è ricondotto davanti al tribunale per udirne la lettura, che è fatta dal presidente.

CAPO IV
Procedimenti davanti ai tribunali militari di guerra di bordo

Art. 286.

(Istruzione e giudizio).

Nei procedimenti davanti ai tribunali militari di guerra di bordo, si osservano le disposizioni del codice penale militare di pace per i tribunali militari di bordo.

CAPO V
Del ricorso per annullamento

Art. 287.

(Inoppugnabilità della sentenza del giudice istruttore).

Nei procedimenti penali davanti ai tribunali militari di guerra, non è ammesso ricorso per annullamento contro la sentenza del giudice istruttore, che pronuncia sui risultati dell'istruzione.

Art. 288.

(Sentenze dei tribunali militari di guerra).

Contro le sentenze dei tribunali militari di guerra d'armata, di corpo d'armata, di piazza forte, di bordo e straordinari non è ammessa alcuna impugnazione.
Contro le sentenze dei tribunali militari territoriali di guerra è ammesso il ricorso al tribunale supremo militare, che funziona, in questo caso, quale tribunale supremo militare di guerra, osservate le disposizioni del codice penale militare di pace.

Art. 289.

(Inammissibilità del ricorso straordinario alla corte di cassazione).

In nessun caso può proporsi ricorso per annullamento alla corte di cassazione contro le sentenze dei tribunali militari di guerra.

CAPO VI
Della esecuzione

Art. 290.

(Eseguibilità della condanna alla pena di morte).

La sentenza di condanna alla pena di morte, pronunciata nel territorio dello Stato dai tribunali militari di guerra, compresi quelli di bordo, diviene esecutiva dopo trascorse ventiquattro ore dalla pronuncia, e, se è stato presentato ricorso per annullamento nei casi in cui il ricorso stesso è ammissibile, dopo trascorse ventiquattro ore dalla notificazione al condannato della sentenza di rigetto del ricorso.
È immediatamente esecutiva la sentenza di condanna alla pena di morte pronunciata all'estero dai tribunali militari di guerra costituiti presso i corpi di spedizione, nonché dai tribunali militari di guerra di bordo, all'estero o all'interno, e dai tribunali militari di guerra straordinari.
Se il condannato alla pena di morte è un prigioniero di guerra, si osservano le disposizioni delle convenzioni internazionali. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 291.

(Esame delle sentenze da parte del comandante).

La sentenza di condanna alla pena di morte, immediatamente esecutiva o divenuta tale, è sottoposta all'esame del comandante dell'unità, presso cui è costituito il tribunale. ***((38a))***
Se il comandante ritiene che ricorrono circostanze rilevanti per il condono o la commutazione della pena, ne fa formale proposta, che trasmette al comandante supremo; altrimenti dichiara che non intende avvalersi della facoltà suindicata e rimette gli atti al

pubblico ministero, il quale provvede alla esecuzione della sentenza.
Le disposizioni di questo articolo non si applicano relativamente alle sentenze pronunciate dai tribunali militari di guerra straordinari.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 292.

(Rinvio della esecuzione).

La esecuzione di una sentenza di condanna alla pena di morte può essere sospesa per disposizione del comandante indicato nel primo comma dell'articolo precedente, o del comandante supremo, ove sia presentata domanda di grazia dal condannato, dai suoi congiunti o dal difensore. ***((38a))***
La esecuzione è differita:
1° quando il condannato si trovi in stato di grave infermità di mente o di corpo;
2° quando la persona condannata sia una donna incinta.

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 293.

(Esecuzione di sentenze di condanna per il reato di inottemperanza all'ordine di non attaccare il nemico).

La sentenza di condanna alla pena di morte, pronunciata contro il colpevole del reato preveduto dall'articolo 95, non può essere eseguita, se non dopo ricevute le disposizioni del Ministro da cui dipende il condannato. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 294.

(Divieto di esecuzione della pena di morte in territorio estero).

Nel territorio di uno Stato estero, fuori dei luoghi occupati dalle forze armate dello Stato italiano, non possono eseguirsi sentenze di condanna alla pena di morte. ***((38a))***

AGGIORNAMENTO (38a)
La L. 13 ottobre 1994, n. 589 ha disposto (con l'art. 1, comma 1) che "Per i delitti previsti dal codice penale militare di guerra e dalle leggi militari di guerra, la pena di morte è abolita ed è sostituita dalla pena massima prevista dal codice penale".

Art. 295.

(Esecuzione di sentenze dei tribunali militari di guerra soppressi).

Se il tribunale militare di guerra, che ha emanato la sentenza da eseguirsi, è soppresso, il tribunale supremo militare designa un altro tribunale militare per i provvedimenti da adottare in sede di esecuzione.

Art. 296.

(Esecuzione di sentenze di condanna nel territorio dello Stato nemico).
Nel territorio dello Stato nemico occupato dalle forze armate dello Stato italiano, l'Autorità giudiziaria militare provvede all'esecuzione delle sentenze di condanna e alla eventuale conversione delle pene pecuniarie in pene detentive, ancorché il condannato sia estraneo alle forze armate dello Stato; salvo che dal comandante del corpo di occupazione sia diversamente disposto.

CAPO VII
Dei procedimenti penali al momento della cessazione dello stato di guerra

Art. 297.

(Procedimenti penali definiti).

Cessato lo stato di guerra e disciolti i tribunali militari di guerra, i rispettivi procuratori militari del Re Imperatore, secondo le norme stabilite dal regolamento giudiziario militare, rimettono gli atti dei procedimenti penali irrevocabilmente definiti al procuratore generale militare del Re Imperatore, che

ne ordina il deposito presso la cancelleria del tribunale supremo militare.

Art. 298.

(Procedimenti penali pendenti, di competenza del giudice ordinario o di giudici speciali).

I procedimenti penali pendenti davanti ai tribunali militari di guerra, di competenza dell'Autorità giudiziaria ordinaria o di un giudice speciale, à termini degli articoli 264 e 266, sono rimessi dai procuratori militari del Re Imperatore al procuratore generale presso la corte d'appello del rispettivo distretto o ai competenti uffici delle giurisdizioni speciali, i quali provvedono per l'ulteriore corso del procedimento, secondo le norme della competenza ordinaria.
Nei procedimenti stessi rimangono validi gli atti d'istruzione compiuti dall'Autorità giudiziaria militare, fatta eccezione per le requisitorie finali e i provvedimenti di rinvio a giudizio.

Art. 299.

(Procedimenti penali pendenti, di competenza dei tribunali militari: norme di competenza).

I procedimenti penali, pendenti davanti ai tribunali militari di guerra e la cui cognizione appartiene all'Autorità giudiziaria militare a termini degli articoli 264, comma secondo, e 265, sono rimessi ai procuratori militari del Re Imperatore presso i tribunali militari non di guerra, osservate le norme seguenti:
1° se i procedimenti sono contro militari appartenenti a corpi non disciolti, essi sono rimessi al procuratore militare del Re Imperatore presso il tribunale militare nella cui circoscrizione territoriale il corpo ha la sua sede;
2° se i procedimenti sono contro militari appartenenti a corpi disciolti, essi sono rimessi al procuratore militare del Re Imperatore presso il tribunale militare del luogo del commesso reato, o, se detto luogo non è noto, di quello in cui ha sede il corpo dal quale derivava il corpo disciolto;
3° se i procedimenti concernono reati commessi in territorio estero, essi sono rimessi al procuratore militare del Re Imperatore presso il tribunale militare più vicino alla sede del tribunale militare di guerra.
Se sorgono divergenze o difficoltà, il tribunale supremo militare designa il tribunale militare che deve giudicare.

Art. 300.

(Procedimenti penali pendenti, di competenza dei tribunali militari; norme di procedura per la prosecuzione e la definizione).
Nei casi preveduti dall'articolo precedente:
1° se la istruzione non è compiuta, essa prosegue secondo le norme della procedura penale militare di pace; ma restano validi gli atti compiuti durante lo stato di guerra;
2° se è stato già disposto il rinvio a giudizio davanti al tribunale militare di guerra, a questo s'intende sostituito il tribunale militare competente a norma dell'articolo precedente.

Dato a Roma, addì 20 febbraio 1941-XIX

VITTORIO EMANUELE

MUSSOLINI

APPROFONDIMENTO 77

Costituzione del Tribunale Militare Internazionale

Articolo 1.

In applicazione dell'accordo firmato l'8 agosto 1945 dal Governo degli Stati Uniti d'America, dal Governo provvisorio della Repubblica francese, dal Governo del Regno Unito di Gran Bretagna e Irlanda del Nord e dal Governo dell'Unione delle Repubbliche Socialiste Sovietiche, sarà istituito un Tribunale Militare Internazionale (qui di seguito denominato «il Tribunale») per il giusto e rapido giudizio e punizione della grande guerra criminali dell'Asse europeo.

Articolo 2.

Il tribunale è composto di quattro membri, ciascuno con un supplente. Ciascuno dei firmatari nomina un membro e un supplente. I supplenti presenziano, per quanto possibile, a tutte le sessioni del Tribunale. In caso di malattia di un membro del Tribunale o di impedimento, per qualsiasi altra causa, all'esercizio delle sue funzioni, il suo supplente ne fa le veci.

Articolo 3.

Né il Tribunale, né i suoi membri, né i loro supplenti possono essere impugnati dall'accusa, né dagli imputati o dai loro difensori. Ciascun firmatario può sostituire i suoi membri del Tribunale o il suo supplente per motivi di salute o per altri buoni motivi, salvo che nel corso di un processo non può aver luogo alcuna sostituzione se non per mezzo di un supplente.

Articolo 4

a) La presenza di tutti e quattro i membri del Tribunale o del supplente di ogni membro assente è necessaria per costituire il quorum.

b) I membri del Tribunale, prima dell'inizio di ogni processo, si accordano tra loro sulla scelta di un Presidente nel loro numero, e il Presidente rimane in carica durante il processo, o come può essere altrimenti convenuto con un voto di non meno di tre membri. Si concorda il principio della rotazione della presidenza per i processi successivi. Tuttavia, se una sessione del Tribunale ha luogo sul territorio di uno dei quattro firmatari, la presidenza è esercitata dal rappresentante di tale firmatario in seno al Tribunale.

c) Salvo quanto sopra, il Tribunale delibera a maggioranza e, nel caso in cui i voti siano equamente divisi, il voto del Presidente è decisivo, fermo restando che le condanne e le condanne siano inflitte solo con il voto favorevole di almeno tre membri del Tribunale.

Articolo 5.

In caso di necessità e a seconda del numero delle questioni da giudicare, possono essere istituiti altri Tribunali; e l'istituzione, le funzioni e la procedura di ciascun Tribunale saranno identiche e saranno disciplinate dal presente Statuto.

II. COMPETENZA GIURISDIZIONALE E PRINCIPI GENERALI

Articolo 6.

Il Tribunale istituito dall'Accordo di cui all'articolo 1 del presente Accordo, per giudicare e punire i principali criminali di guerra dei paesi europei dell'Asse, avrà il potere di giudicare e punire le persone che, agendo nell'interesse dei paesi europei dell'Asse, sia come individui che come membri di organizzazioni, hanno commesso uno dei seguenti crimini.

I seguenti atti, o uno qualsiasi di essi, sono reati che rientrano nella giurisdizione del Tribunale per i quali vi sarà responsabilità individuale:

(a) CRIMINI CONTRO LA PACE: vale a dire, pianificazione, preparazione, inizio o conduzione di una guerra di aggressione, o di una guerra in violazione di trattati, accordi o assicurazioni internazionali, o partecipazione a un piano comune o a una cospirazione per la realizzazione di uno qualsiasi dei suddetti provvedimenti;

(b) CRIMINI DI GUERRA: vale a dire, violazioni delle leggi o delle consuetudini di guerra. Tali violazioni includono, a titolo esemplificativo ma non esaustivo, l'omicidio, il maltrattamento o la deportazione ai lavori forzati o per qualsiasi altro scopo della popolazione civile di o nei territori occupati, l'omicidio o il maltrattamento di prigionieri di guerra o di persone in mare, l'uccisione di ostaggi, il saccheggio di proprietà pubbliche o private, la distruzione indiscriminata di città, paesi o villaggi. o devastazioni non giustificate da necessità militari;

(c) CRIMINI CONTRO L'UMANITÀ: vale a dire, omicidio, sterminio, riduzione in schiavitù, deportazione e altri atti disumani commessi contro qualsiasi popolazione civile, prima o durante la guerra; o persecuzioni per motivi politici, razziali o religiosi in esecuzione o in connessione con qualsiasi reato che rientri nella giurisdizione del Tribunale, in violazione o meno della legge nazionale del paese in cui è stato perpetrato.

I leader, gli organizzatori, gli istigatori e i complici che partecipano alla formulazione o all'esecuzione di un piano comune o di una cospirazione per commettere uno qualsiasi dei crimini di cui sopra sono responsabili di tutti gli atti compiuti da qualsiasi persona in esecuzione di tale piano.

Articolo 7.

La posizione ufficiale degli imputati, sia come capi di Stato che come funzionari responsabili nei dipartimenti governativi, non deve essere considerata come

una liberazione dalla responsabilità o come un'attenuante della pena.

Articolo 8.

Il fatto che l'imputato abbia agito in esecuzione di un ordine del suo governo o di un superiore non lo esonera da responsabilità, ma può essere considerato come attenuante della pena se il tribunale stabilisce che la giustizia lo richiede.

Articolo 9.

Al processo di un singolo membro di un gruppo o di un'organizzazione, il Tribunale può dichiarare (in relazione a qualsiasi atto per il quale l'individuo può essere condannato) che il gruppo o l'organizzazione di cui l'individuo era membro era un'organizzazione criminale.

Dopo aver ricevuto l'atto d'accusa, il Tribunale comunicherà che l'accusa intende chiedere al Tribunale di fare tale dichiarazione e ogni membro dell'organizzazione avrà il diritto di chiedere al Tribunale l'autorizzazione ad essere ascoltato dal Tribunale sulla questione del carattere criminale dell'organizzazione. Il tribunale ha il potere di accogliere o respingere la domanda. Se la domanda è accolta, il tribunale può stabilire in che modo i ricorrenti devono essere rappresentati e sentiti.

Articolo 10.

Nei casi in cui un gruppo o un'organizzazione sia dichiarata criminale dal Tribunale, l'autorità nazionale competente di ogni Firmatario avrà il diritto di portare in giudizio una persona per la sua appartenenza dinanzi a tribunali nazionali, militari o di occupazione. In ogni caso, la natura criminale del gruppo o dell'organizzazione è considerata provata e non deve essere messa in discussione.

Articolo 11.

Ogni persona condannata dal Tribunale può essere accusata dinanzi a un tribunale nazionale, militare o di occupazione, di cui all'articolo 10 della presente Carta, di un reato diverso dall'appartenenza a un gruppo o a un'organizzazione criminale e tale tribunale può, dopo averla condannata, infliggergli una pena indipendente e aggiuntiva rispetto alla pena inflitta dal Tribunale per la partecipazione alle attività criminali di tale gruppo o organizzazione.

Articolo 12.

Il Tribunale ha il diritto di avviare un procedimento contro una persona accusata dei reati di cui all'articolo 6 della presente Carta in sua assenza, se non è stata trovata o se il Tribunale, per qualsiasi motivo, ritiene necessario, nell'interesse della giustizia, condurre l'udienza in sua assenza.

Articolo 13.

Il Tribunale stabilisce il regolamento di procedura. Tali norme non sono in contrasto con le disposizioni della presente Carta.

III. COMMISSIONE PER L'INCHIESTA E IL PERSEGUIMENTO DEI PRINCIPALI CRIMINALI DI GUERRA

Articolo 14.

Ciascun firmatario nominerà un procuratore capo per l'indagine delle accuse contro i principali criminali di guerra e per il loro perseguimento.

I procuratori capo agiscono in qualità di comitato per i seguenti scopi:

a) concordare un piano di lavoro individuale di ciascuno dei procuratori capo e del suo personale;

b) stabilire la designazione definitiva dei principali criminali di guerra che devono essere giudicati dal Tribunale;

c) approvare l'atto d'accusa e i documenti da presentare con esso;

d) depositare l'atto d'accusa e i documenti che lo accompagnano presso il Tribunale;

e) redigere e raccomandare al Tribunale, per approvazione, il progetto di regolamento di procedura, previsto dall'articolo 13 della presente Carta. Il Tribunale ha il potere di accettare, con o senza emendamenti, o di respingere le norme così raccomandate.

Il Comitato delibera in tutte le materie di cui sopra a maggioranza e nomina un Presidente secondo quanto opportuno e secondo il principio della rotazione: fermo restando che, se vi è un'equa divisione dei voti per quanto riguarda la designazione di un imputato da giudicare dal Tribunale, o i reati di cui sarà accusato, sarà adottata la proposta che è stata fatta dalla parte che ha proposto di processare il particolare imputato o di preferire le accuse particolari contro di lui.

Articolo 15.

I procuratori capo, individualmente e in collaborazione tra loro, svolgono anche i seguenti compiti:

a) l'indagine, la raccolta e la produzione di tutte le prove necessarie, prima o durante il processo;

b) la preparazione dell'atto d'accusa per l'approvazione da parte del Comitato in conformità con il paragrafo (c) dell'articolo 14 del presente documento;

c) l'esame preliminare di tutti i testimoni necessari e di tutti gli imputati;

d) agire in qualità di pubblico ministero nel processo;

e) designare rappresentanti per l'espletamento dei compiti loro assegnati;
f) occuparsi di tutte le altre questioni che ritengano loro necessarie ai fini della preparazione e dello svolgimento del processo.
Resta inteso che nessun testimone o convenuto trattenuto dal firmatario potrà essere sottratto al possesso di quest'ultimo senza il suo consenso.

IV. PROCESSO EQUO PER GLI IMPUTATI

Articolo 16.

Al fine di garantire un processo equo per gli imputati, deve essere seguita la seguente procedura:
(a) L'atto d'accusa deve includere tutti i dettagli che specificano in dettaglio le accuse contro gli imputati. Una copia dell'atto d'accusa e di tutti i documenti depositati con l'atto d'accusa, tradotti in una lingua a lui comprensibile, deve essere fornita all'imputato in un tempo ragionevole prima del processo.
(b) Durante l'esame preliminare o il processo di un imputato, egli avrà il diritto di fornire qualsiasi spiegazione pertinente alle accuse mosse contro di lui.
(c) L'esame preliminare dell'imputato e del suo processo deve essere condotto o tradotto in una lingua che l'imputato comprende.
(d) L'imputato ha il diritto di difendersi dinanzi al Tribunale o di avvalersi dell'assistenza di un avvocato.
(e) L'imputato ha il diritto, tramite se stesso o tramite il suo avvocato, di presentare prove al processo a sostegno della sua difesa e di controinterrogare qualsiasi testimone chiamato dall'accusa.

V. POTERI DEL TRIBUNALE E SVOLGIMENTO DEL PROCESSO

Articolo 17.

Il Tribunale ha il potere di
a) convocare i testimoni al processo e richiedere la loro presenza e la loro deposizione e porre loro domande
(b) interrogare qualsiasi imputato,
c) esigere la produzione di documenti e altro materiale probatorio;
d) prestare giuramento ai testimoni;
e) nominare funzionari per l'esecuzione di qualsiasi compito designato dal Tribunale, compreso il potere di far assumere prove su commissione.

Articolo 18.

Il Tribunale decide
(a) limitare il processo strettamente ad una rapida udienza dei casi sollevati dalle accuse;
(b) adottare misure rigorose per prevenire qualsiasi azione che possa causare un ragionevole ritardo ed escludere questioni e dichiarazioni irrilevanti di qualsiasi tipo;
(c) trattare sommariamente qualsiasi contumacia, imponendo una punizione adeguata, compresa l'esclusione di qualsiasi imputato o del suo difensore da alcuni o tutti gli ulteriori procedimenti, ma senza pregiudicare la determinazione delle accuse.

Articolo 19.

Il tribunale non è vincolato dalle norme tecniche in materia di prove. Essa adotta e applica nella misura più ampia possibile una procedura rapida e non tecnica e ammette tutti gli elementi di prova che ritiene probatori.

Articolo 20.

Il tribunale può esigere di essere informato della natura delle prove prima della loro iscrizione, in modo da poterne pronunciarsi sulla loro pertinenza.

Articolo 21.

Il Tribunale non esige la prova di fatti notori, ma ne prende atto giudizialmente. Prenderà anche atto giudizialmente dei documenti e dei rapporti ufficiali governativi delle Nazioni Unite, compresi gli atti e i documenti dei comitati istituiti nei vari paesi alleati per l'indagine dei crimini di guerra, e dei registri e delle conclusioni dei tribunali militari o di altro tipo di una qualsiasi delle Nazioni Unite.

Articolo 22.

La sede permanente del Tribunale è a Berlino. Le prime riunioni dei membri del Tribunale e dei procuratori capo si terranno a Berlino in un luogo designato dal Consiglio di controllo per la Germania. Il primo processo si terrà a Norimberga, e tutti i processi successivi si terranno nei luoghi che il Tribunale deciderà.

Articolo 23.

Uno o più procuratori capo possono partecipare all'azione penale in ciascun processo. La funzione di procuratore capo può essere esercitata da lui personalmente o da una o più persone da lui autorizzate.
La funzione di difensore di un convenuto può essere esercitata, su richiesta di quest'ultimo, da qualsiasi avvocato professionalmente qualificato a condurre cause dinanzi ai tribunali del proprio paese, o da qualsiasi altra persona che possa essere appositamente autorizzata a tal fine dal Tribunale.

Articolo 24.

Il procedimento del Processo si svolgerà nel seguente modo:

(a) L'atto d'accusa deve essere letto in tribunale.
(b) Il Tribunale chiederà a ciascun convenuto se si dichiara «colpevole» o «non colpevole».
(c) L'accusa deve fare una dichiarazione di apertura.
(d) Il Tribunale chiederà all'accusa e alla difesa quali prove (se ve ne sono) desiderano presentare al Tribunale, e il Tribunale si pronuncerà sull'ammissibilità di tali prove.
(e) Saranno esaminati i testimoni dell'accusa e successivamente i testimoni della difesa. In seguito, le prove contrarie che il Tribunale riterrà ammissibili saranno richieste dall'accusa o dalla difesa.
f) Il Tribunale può porre qualsiasi domanda a qualsiasi testimone e a qualsiasi imputato, in qualsiasi momento.
(g) L'accusa e la difesa interrogheranno e potranno controinterrogare tutti i testimoni e gli imputati che deporranno.
(h) La difesa si rivolge al tribunale.
(i) L'accusa si rivolge al tribunale.
j) Ciascun convenuto può rendere una dichiarazione al Tribunale.
k) Il Tribunale emette la sentenza e pronuncia la sentenza.

Articolo 25.
Tutti i documenti ufficiali devono essere prodotti e tutti i procedimenti giudiziari devono essere condotti in inglese, francese e russo, e nella lingua del convenuto. Gran parte del verbale e del procedimento può anche essere tradotta nella lingua di qualsiasi paese in cui si riunisce il Tribunale, come il Tribunale si riunisce, come il Tribunale ritiene opportuno nell'interesse della giustizia e dell'opinione pubblica.

VI. SENTENZA E SENTENZA

Articolo 26.
La sentenza del Tribunale sulla colpevolezza o l'innocenza di un imputato deve essere motivata ed è definitiva e non soggetta a revisione.

Articolo 27.
Il Tribunale avrà il diritto di infliggere all'imputato la condanna, la morte o qualsiasi altra punizione che sarà da esso ritenuta giusta.

Articolo 28.
Oltre alle pene da esso inflitte, il Tribunale ha il diritto di privare il condannato di qualsiasi bene rubato e di ordinarne la consegna al Consiglio di controllo per la Germania.

Articolo 29.
In caso di colpevolezza, le pene devono essere eseguite in conformità con le ordinanze del Consiglio di controllo per la Germania, che può in qualsiasi momento ridurre o modificare in altro modo le pene, ma non può aumentarne la gravità. Se il Consiglio di controllo per la Germania, dopo che un imputato è stato condannato e condannato, scopre nuove prove che, a suo parere, fonderebbero una nuova accusa contro di lui, il Consiglio riferirà di conseguenza al Comitato istituito ai sensi dell'articolo 14 del presente documento, per l'azione che riterrà opportuna, tenuto conto degli interessi della giustizia.

VII. SPESE

Articolo 30.
Le spese del Tribunale e dei Processi saranno imputate dai Firmatari ai fondi stanziati per il mantenimento del Consiglio di Controllo della Germania.

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