**THE MECHANISM FOR
INTERNATIONAL CRIMINAL TRIBUNALS**

No. MICT-13-55-A

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron**
Judge William Hussein Sekule
Judge Vagn Prusse Joensen
Judge Jose Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana

Registrar: **Mr John Hocking**

Date Filed: **23 December 2016**

THE PROSECUTOR

v.

RADOVAN KARADZIC

Revised Public Redacted Version

RADOVAN KARADZIC'S APPEAL BRIEF

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I. INTRODUCTION

1. President Radovan Karadzic made his initial appearance on 31 July 2008, invoking his right to self-representation.[1] The Pre-Trial Judge entered a not guilty plea on 29 August 2008.[2] Trial began on 27 October 2009,[3] and ended on 7 October 2014.[4] On 24 March 2016, the Trial Chamber convicted President Karadzic of ten counts of genocide, crimes against humanity, and war crimes, acquitted him of one count of genocide, and sentenced him to 40 years imprisonment.[5] This is his appeal.

2. President Karadzic recognises that an appeal is not a trial *de novo*. He has limited his appeal to alleging errors of law by the Trial Chamber that, individually or cumulatively invalidate the judgement, and errors of fact that have occasioned a miscarriage of justice. He understands the standard of review for errors of law to involve the Appeals Chamber determining whether the Trial Chamber made an error in law, and, where necessary, applying the correct legal standard.[6] As his conviction rests on circumstantial evidence, the relevant standard of review for the errors of fact he has raised is whether a reasonable Trial Chamber could have found the inference consistent with his guilt to be the only reasonable inference it could draw from the evidence.[7]

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[1] T2. The full citations for the footnotes in this brief are found in the Glossary, attached as Annex A. The footnotes and Glossary are hyperlinked. For the confidential version of the brief, they are hyperlinked to documents located in folders provided to the Appeals Chamber and Office of the Prosecutor on a CD. For the public redacted version of the brief, the hyperlinks are to public sources, where available. For trial transcripts of witness testimony given in open session, the Glossary also includes a hyperlink to the video of the trial, with a citation to the time that the relevant testimony appears on the video.
[2] T32-33.
[3] T513.
[4] T48099.
[5] *Judgement.*
[6] *Ngirabatware AJ*, para. 9.
[7] *Stakic AJ*, para. 219; *Delalic AJ*, para. 458; *Nchamihigo AJ*, para. 80; *Ntagerura AJ*, para. 306

II. THE TRIAL WAS UNFAIR

1. The Trial Chamber violated President Karadzic's right to self-representation by requiring him to be questioned by counsel when testifying

In Brief

Ruling:	***President Karadzic must be questioned by counsel when testifying.***
Error:	***This violated his right to self-representation***
Impact:	***Trial Chamber convicted President Karadzic without hearing his testimony.***

3. President Karadzic represented himself throughout his trial. Acting upon a Prosecution motion[8] after President Karadzic had advised the Trial Chamber that he planned to testify in narrative form,[9] the Trial Chamber ordered President Karadzic to testify by answering questions put to him by his legal advisor. It reasoned that:

> The question-and-answer format, which is the standard procedure for the examination of witnesses before the Tribunal, has been applied in this case throughout. The Chamber considers that this form generally produces structured and focused testimony, facilitates the ability of the cross-examining party to raise timely objections where appropriate, and assists the Chamber in exercising control over the proceedings, therefore making the presentation of evidence effective for the ascertainment of the truth and avoiding unnecessary consumption of court time. In this light, the accused has failed to substantiate his contention that narrative testimony would be more effective and time-saving than the standard question-and-answer form. The Chamber can see no reason for departing from the well-established practice when it comes to the accused's testimony.[10]

[8] *OTP Form of Testimony Submission*.
[9] *Order of Witnesses Submission*, para. 3.
[10] T45935.

4. President Karadzic's legal advisor told the Trial Chamber: "you have essentially imposed me as his counsel for the purpose of questioning him during his examination."[11] President Karadzic declined to testify under those conditions.[12]

5. The Trial Chamber violated President Karadzic's right to self-representation by requiring him to be questioned by a lawyer when testifying.

6. The right to represent oneself is enshrined in Article 21 of the ICTY Statute and is "an indispensable cornerstone of justice."[13] In *Milosevic*, the Appeals Chamber found that although this right is not absolute, it is only subject to "some limitations", and any restrictions must be limited to the minimum extent necessary.[14] While the Appeals Chamber confirmed that Milosevic's right to self-representation could be curtailed for substantial and persistent obstruction in the expeditious conduct of the trial, it found that prohibiting Milosevic from questioning witnesses when he was healthy enough to do so was an excessive restriction.[15]

7. The same error infects the Trial Chamber's ruling here. The Trial Chamber made no attempt to balance the significance of restricting President Karadzic's fundamental right, against a valid justification for curtailing it. It made no finding, for example, that President Karadzic's testimony, if given in narrative form, would substantially disrupt the trial. In fact, narrative testimony would have expedited the trial since the testimony would only be interpreted once, rather the double interpretation of the English question and B/C/S answer.

8. The Trial Chamber failed to recognize that any restriction on this right must be limited to the minimum extent necessary. It imposed counsel on President Karadzic on nothing more than the question-and-answer format being "standard practice".[16] This was insufficient, and an error of law.

9. The Trial Chamber also failed to distinguish between the testimony of a self-represented accused and the testimony of other witnesses. The rules governing the testimony of witnesses cannot be mechanically extended to cover the testimony of the

[11] T47536.
[12] T47541.
[13] *Milosevic Self-Representation Appeals Decision*, para. 11.
[14] *Id*, paras. 13, 17.
[15] *Id*, paras. 17-19.
[16] T45935.

accused.[17] A Trial Chamber's discretion to determine the mode of interrogating witnesses is subject to its obligation to respect the rights of the accused and to avoid any unreasonable interference with his right to testify.[18]

10. The concept of a self-represented accused giving narrative testimony is not a novel one. In the United States "a *pro se* criminal defendant may testify in narrative form, he does not require an attorney's assistance."[19] Long-standing Canadian jurisprudence also endorses narrative testimony from a self-represented accused.[20]

11. The balancing act between the fundamental nature of the right to self-representation and its appropriate restrictions is also performed in domestic practice. In *Commonwealth v. Conefrey*, the Massachusetts Supreme Court held the trial court violated the accused's right to self-representation when it required a counsel to cross-examine a witness in his stead. The court's belief that the victim could be intimidated or might respond untruthfully if questioned by the accused was not sufficient to justify the restriction. A new trial was ordered.[21]

12. The Trial Chamber's decision prohibiting narrative testimony forced President Karadzic to choose between his right to self-representation and his right to testify. It is error to force an accused to choose between two fundamental rights.[22]

13. In the *Blagojevic* case, the accused, represented by assigned counsel, declined to testify if questioned by his counsel, with whom he had fallen out. The Appeals Chamber held that it was the accused's unjustified and unilateral refusal to communicate with his assigned counsel that caused his failure to testify, rather than any unjustified restriction imposed by the Trial Chamber.[23]

14. In dissent, Judge Shahabuddeen concluded that the Trial Chamber erred in not permitting the accused to give his evidence on his own and then breached the accused's fundamental right to a fair trial by convicting him without his having had an opportunity

[17] *Kvocka AJ*, para. 127.
[18] *Galic AJ*, paras. 18, 22.
[19] *United States v Ly*, p. 10.
[20] *R. v. Schell*.
[21] *Commonwealth v. Conefrey*, p. 1391.
[22] *United States v Midgett*.
[23] *Blagojevic AJ*, paras. 27-28.

to tell his own story. He observed that "to require the acceptance of counsel is to imprison a man in his privileges and call it the Constitution".[24]

15. President Karadzic's situation is more compelling than Blagojevic's, given that he had asserted his right to self-representation. Where an accused elects this course, concerns about the fairness of the proceedings are heightened, and a Chamber must be particularly attentive to its duty to ensure that the trial be fair.[25]

16. In *Rock v. Arkansas*, the U.S. Supreme Court noted that the opportunity to testify is a corollary to the right to self-representation, holding:

> [E]ven more fundamental to a personal defense than the right of self representation…is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense. .. is incomplete if he may not present himself as a witness."[26]

17. As pointed out by Judge Shahabuddeen, an accused's right to appear as a witness in his own defence and to have the opportunity to tell his story is central to a fair trial. The accused's testimony is critical to the Trial Chamber's overall analysis of the evidence. The Trial Chamber's error went to the heart of the fair trial guarantee, and meant that it convicted President Karadzic without hearing from him. As Judge Shahabuddeen suggested in *Blagojevic*, the only remedy for the Trial Chamber's error is to order a new trial.[27]

[24] *Blagojevic AJ, Partially Dissenting Opinion of Judge Shahabuddeen*, paras. 6, 8-10.
[25] *Milosevic Defence Case Appeals Decision*, para. 19.
[26] *Rock v. Arkansas*, p. 52.
[27] See also *United States v Ly*.

2. The Trial Chamber erred in conducting a site visit in President Karadzic's absence

In Brief

Ruling: ***Site Visits to Sarajevo and Srebrenica would take place in the absence of the accused.***

Error: ***Violated right to be present and self-representation when Chamber received information from third parties and submissions from lawyers during the site visit.***

Impact: ***Affected Trial Chamber's overall assessment of Sarajevo and Srebrenica events.***

18. The Trial Chamber conducted site visits in Sarajevo and Srebrenica in President Karadzic's absence. It rejected his requests to be present,[28] reasoning that his participating in the site visits was neither necessary nor appropriate as the purpose of the visits would not be to gather evidence or receive submissions from the parties.[29]

19. The official minutes reveal that during the eight days of site visits in President Karadzic's absence, the Trial Chamber gathered evidence and frequently entertained submissions.

20. In Sarajevo, the Trial Chamber heard from a sniping incident victim's parents,[30] the owner of a house from which snipers fired,[31] the chief repairman at a shelling incident location,[32] the owner of a house involved in a shelling incident,[33] the priest of a church

[28] *Site Visit Order*, paras. 5–6.
[29] *Site Visit Decision*, paras. 5-6; *Second Site Visit Decision*, para. 7.
[30] *Registry Minutes Sarajevo*, p. 12, location 30.
[31] *Id*, p. 13, location 35.
[32] *Id*, p. 14, location 37.
[33] *Id*, p. 18, location 52.

used in a sniping incident,[34] and the owner of property under which the Sarajevo tunnel was built.[35]

21. A Prosecution Trial Attorney frequently gave evidence about how crime scenes had been altered since the events,[36] and both parties' representatives made submissions at virtually all locations.[37] In Srebrenica, another 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.[38]

22. The Trial Chamber violated President Karadzic's right to be tried in his presence and his right to self-representation by conducting these site visits in his absence.

23. Article 21(4) of the ICTY Statute provides that "…the accused shall be entitled to the following minimum guarantees, in full equality: …(d) to be tried in his presence and to defend himself in person or through legal assistance of his own choosing."

24. An accused's right to be present at trial is a fundamental human right,[39] and one of the most basic and common precepts of a fair criminal trial,[40] extending to the entirety of the trial proceedings.[41] [REDACTED][42] The ICTY' *Manual of Developed Practices* states "if the purpose of the site visit is to take evidence, the accused should be present as he has a right to be present at his or her own trial."[43] The Special Court for Sierra Leone

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[34] *Id*, p. 23, location 66.
[35] *Id*, p. 25, location 72.
[36] *Id*, p. 8, location 18 ("According to the Prosecution, the building under construction below the Cemetery did not exist during the conflict, it was a parking lot at the time."); p. 9, location 20: (According to the Prosecution, …the part of the building, without visible pockmarks at the time of the site visit, was destroyed during the conflict and had to be rebuilt"); p. 9, location 21 ("The Prosecution explained that everything in the area was paved over, the roof over the market was placed after the conflict, and a memorial was erected at the back."), p. 9, location 22: ("According to the Prosecution, the small green low railing currently seen is not the original green railing that was present at that time. This is a new railing."); p. 10, location 24: ("The Prosecution noted that…the building has been re-built."); p. 11, location 26: ("According to the Prosecution, the Building has been completely renovated since the war."); p. 13, location 35: ("The Prosecution contended that there is no line of sight along the direction of fire any longer because of the big building that's been built overlooking the location."); p. 21, location 58: ("According to the Prosecution, the houses observed around the location were built after the war.").
[37] Annex B contains a list of the submissions made during the site visit as reflected in the minutes.
[38] *Registry Minutes Srebrenica*, pp. 8-17.
[39] ICCPR Article 14(3)(d); ECHR Article 6(3)(c).
[40] *Zigiranyirazo Appeal Decision*, para. 11.
[41] *Lewis v United States*, p. 372; Canadian Criminal Code, s. 650(1); *UK Criminal Practice Directions*, para. 14E.1.
[42] [REDACTED]
[43] *ICTY Manual on Developed Practices*, p. 120, para. 50.

has also held that a site visit may only take place in the presence of the accused or with an express waiver of the right to be present.[44]

25. National jurisdictions have consistently found that a site visit, or jury view, is an integral part of the trial for which the accused must be present. In the United Kingdom, it was held that "the presence of the accused is a necessary requirement throughout a criminal trial… [and] a view is part of a criminal trial." The court explained that "…he may be able to point out either to his own legal adviser or to the magistrates, if they will permit, some important matter of which either his legal adviser is ignorant or about which the magistrates are making a mistake."[45]

26. In the United States, "any kind of presentation to the jury or the judge to help the fact-finder determine what the truth is and assimilate and understand the evidence is itself evidence,"[46] and a site visit's "inevitable effect is that of evidence, no matter what label the judge may choose to give it."[47] The accused's right to be present at a site visit has also been upheld in Canada, [48] Hong Kong,[49] and Australia.[50]

27. In the United States, convictions were reversed when an accused was not present during the Prosecution's opening statement[51] or closing argument.[52] A submission in the absence of the accused is an even greater violation when the accused is self-represented. President Karadzic had the right to be the one to make Defence submissions during the site visits and to respond to Prosecution submissions. By refusing his request to be present, the Trial Chamber denied him the opportunity to make those submissions. Therefore, holding site visits in the absence of President Karadzic also violated his right to self-representation.

28. Although the Trial Chamber opined, "the presence of the Accused during a site visit would jeopardise the safety of all persons involved, including that of the Accused,"[53] President Karadzic's rights should not have been so lightly dismissed. In the United

[44] *Brima Site Visit Decision*, para. 20.
[45] *R v Ely*.
[46] *Lillie v US*.
[47] *Snyder v Massachusetts*, p.121.
[48] *Tanguay v R.*
[49] *R v Edmond*.
[50] *Tangahai v R*, para. 24; *Jamal v R*, para. 35.
[51] *Pierce v State*, p. 831.
[52] *Wilson v State*, p. 560; *Tiller v State*, p. 431.
[53] *Site Visit Decision*, para. 8.

States, where all reasonable steps necessary to protect the accused's right to be present, such as the presence of armed guards, were not taken, failing to allow the accused to be present at a jury view was error.[54]

29. Proceeding in the accused's absence where reasonable alternatives exist is error.[55] The Trial Chamber failed to explore whether security measures could have allowed the site visits to safely take place. If these measures were not available, the site visits should not have taken place at all.[56] At the very least, gathering evidence and making submissions should never have occurred.

30. The Trial Chamber ordered the site visits after finding that it would be assisted in its fact-finding by conducting the visits.[57] The site visits encompassed Sarajevo and Srebrenica, the principal locations for which the Trial Chamber found President Karadzic criminally responsible. The observations made during the site visit undoubtedly affected the Trial Chamber's overall assessment of the events, and its findings in the judgement. The only adequate remedy for these violations is a new, and fair, trial.

[54] *People v Mallory*, p. 683.
[55] *J. Stanisic Appeals Decision on Presence*, para. 19; *Zigiranyirazo Appeals Decision*, paras. 18-22.
[56] [REDACTED] *Kupreskic TJ*, para. 19.
[57] *Site Visit Order*, para. 5.

3-5. The Trial Chamber erred in convicting President Karadzic on Counts Four, Seven, and Eleven where the Indictment was defective

In Brief

Ruling:	***Counts Four, Seven, and Eleven were sufficiently pled.***
Error:	***President Karadzic didn't know which incidents were charged as extermination (as opposed to murder), deportation (as opposed to forcible transfer) and which threats formed the basis for hostage taking.***
Impact:	***Convictions on Counts Four, Seven, and Eleven invalidated by inadequate notice.***

Count Four

31. The Trial Chamber convicted President Karadzic of extermination in Count Four based on 26 separate scheduled incidents.[58] Until he read the judgement, President Karadzic didn't know that he was charged with extermination based upon these incidents.

32. The charges against President Karadzic ranged from the killing of one man in Zvornik in 1992[59] to the killing of approximately 7000 men in Srebrenica in 1995. The Prosecution's failure to specify, either in the indictment, or its pre-trial brief, which of the 83 scheduled killing incidents constituted extermination, made the indictment defective. President Karadzic had no notice of "the nature and cause of the charges against him".[60]

33. President Karadzic raised this issue at trial, [61] but the Trial Chamber declined to order the Prosecution to specify the acts that constituted extermination.[62] President Karadzic filed his closing brief without knowing which killing incidents were alleged to constitute this crime.

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[58] *Judgement*, para. 2461.
[59] Scheduled Incident B20.4.
[60] ICTY Statute, Article 21(4)(a).
[61] *Defective Indictment Motion*, paras. 22-23.
[62] *Defective Indictment Decision*.

34. Had he known, for example, that the extermination charge included the killing of 45 persons in Bijeljina on 1-2 April 1992, he could have challenged whether the victims were civilians or whether some had been taking an active part in the hostilities. Exhibits introduced during the trial suggested that many victims died in the fighting there during those days.[63]

35. Therefore, Count Four was defective by failing to adequately specify the acts of extermination. This defect can only be remedied by vacating President Karadzic's conviction under Count Four.

Count Seven

36. The deportation charge in Count Seven was defective because it failed to specify the incidents of alleged population transfer that involved displacement across a State border. President Karadzic was left to guess at which instances of population transfer constituted deportation and which constituted forcible transfer.

37. Deportation and forcible transfer are not synonymous. Deportation requires proving forced movement beyond State borders.[64] Thus, in charging forcible transfer in tandem with deportation, the Prosecution was obligated not to plead the charges in a synonymous way.

38. The Prosecution not only failed to separate the charges in the Indictment, but its final trial brief conflated the charges under a single heading of "forcible removal".[65] The division remained unclear to the Trial Chamber through the closing arguments.[66]

39. An accused cannot be convicted of deportation based on pleading general patterns of acts or for events not pled in the indictment.[67] In *Kordic*, an indictment charging deportation and forcible transfer was defective where it made broad references to forced movement operations without specifying acts, dates or locations.[68] In *Sainovic,* the Trial Chamber erred in convicting on deportation and forcible transfer in two villages that were not specified in the indictment.[69]

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[63] P6214; D3142.
[64] *Krstic TJ,* paras. 521-22.
[65] *OTP Final Brief,* fn. 2915.
[66] T48034-35.
[67] *Djordjevic AJ,* paras. 598-99.
[68] *Kordic AJ,* paras. 155-63.
[69] *Sainovic AJ,* para. 263.

40. President Karadzic raised this issue at trial,[70] but the Trial Chamber declined to order the Prosecution to specify the acts of deportation.[71] President Karadzic filed his closing brief by guessing that two incidents amounted to deportation.[72] The Trial Chamber convicted him of deportation on six incidents.[73]

41. Count Seven was defective by failing to adequately specify the acts of deportation, as opposed to forcible transfer. This defect can only be remedied by vacating President Karadzic's conviction under Count Seven.

Count Eleven

42. Count Eleven was defective because it failed to inform President Karadzic of a material fact--the operative threats for hostage taking. The use of a threat to kill, injure or continue to detain prisoners is an element of hostage taking.[74]

43. Count Eleven differs from the other counts because it charges President Karadzic with responsibility for a handful of specific acts in a small area within a narrow time frame. President Karadzic is alleged to have a direct connection to these acts. It cannot be said that the "sheer scale of the alleged crimes" made it impracticable to provide a high degree of specificity.[75] For Count Eleven, the Prosecution was required to be far more specific than for the other counts.

44. Prosecutors are required to specify the operative verbal conduct alleged to constitute an element of the crime. In *Muvunyi*, imprecisely charging an oral statement, when that statement was a material element of the crimes, made the charge of inciting genocide defective.[76] In *Kanyarukiga*, the indictment was defective for failing to plead the specific facts of a conversation in which the accused was said to have planned attacks.[77] In *Nahimana*, the indictment was defective for not specifying when an oral incitement to genocide took place.[78]

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[70] *Defective Indictment Motion*, para. 26.
[71] *Defective Indictment Decision*.
[72] *Defence Final Brief*, para. 2801.
[73] *Judgement*, para. 2466.
[74] *Judgement*, para. 468.
[75] *Sainovic AJ*, para. 233.
[76] *Muvunyi AJ*, para. 121.
[77] *Kanyarukiga AJ*, para. 76.
[78] *Nahimana AJ*, para. 405.

45. President Karadzic's indictment was defective by failing to specify the operative threats. This defect became apparent during the motion for judgement of acquittal, when the Prosecution disavowed President Karadzic's suggestion that his own pre-detention statements were alleged to be the operative threats.[79] The Prosecution informed him for the first time in its response brief that "the operative threats for Count 11 purposes are not the Accused's pre-detention warnings that he would treat UN personnel as enemies if NATO conducted air strikes, but rather the post-detention threats against UN personnel."[80]

46. The Trial Chamber rejected President Karadzic's request for further specificity.[81] Then, in its judgement, it relied upon threats made by third persons, as well as threats allegedly made by President Karadzic,[82] that were not specified in the indictment.

47. The defect prejudiced President Karadzic, as he didn't know what specific threats he was charged with. His conviction on Count Eleven should be reversed.

[79] *Hostage Taking Appeal Brief*, para. 40.
[80] *OTP Hostage Taking Appeal Brief*, para. 12.
[81] *Defective Indictment Decision*.
[82] *Judgement*, paras. 5871-72, 5874-76, 5880, 5890, 5894-95, 5899, 5902, 5914-15, 5917, 5944, 5961.

6. The Trial Chamber's failure to limit the scope of the trial and remedy the Prosecution's disclosure violations made the trial unfair

In Brief

Ruling: ***In a series of decisions, Trial Chamber declined to reduce scope of Prosecution case or provide a remedy for disclosure violations.***

Error: ***The breadth of the case caused the disclosure violations, which the Chamber failed to remedy, resulting in President Karadzic not having the information he needed for his Defence.***

Impact: ***Depriving President Karadzic of the opportunity to understand and appraise the Prosecution case, and to utilize withheld material when examining witnesses, denied him a fair trial.***

Scope of the Trial

48. The Prosecution's extensive disclosure violations, the Trial Chamber's unprecedented judicial notice of 2379 adjudicated facts, and the wholesale admission of written evidence of 148 Prosecution witnesses, caused the most problems in the trial. These problems arose because the Prosecution insisted on charging President Karadzic under all possible modes of liability for hundreds of events spanning a five-year period throughout the length and breadth of Bosnia. The Trial Chamber erred in repeatedly rejecting President Karadzic's pleas to reduce the trial's unmanageable scope.

49. The first error came when the Trial Chamber declined to reduce the scope of the trial by approving only part of the proposed indictment.[83] The Trial Chamber "concur[red]

[83] *Amendment of Indictment Decision*, paras. 20-22.

with the Prosecution that Rule 50 is not the appropriate mechanism to achieve any such reduction."[84]

50. Ironically, two years later, the Prosecution took the opposite position. In *Mladic*, with a virtually identical indictment, the Prosecution argued that a Trial Chamber had the power to order the trial to proceed on only one component of the indictment. It proposed an amended indictment suggesting just what it had told our Trial Chamber it lacked the power to do—separating one component from the others.[85]

51. The Prosecution argued: "It is open to the Trial Chamber to use its general power to sever the Indictment, quite apart from the Rules… Severing the indictment and conducting separate trials is fully consonant with these aims."[86] The Prosecution's position in *Mladic* was correct.

52. Rule 50(A)(i)(c) provides that an amendment to an indictment sought after the assignment of a case to a Trial Chamber requires leave from that Chamber. Nothing in the text of Rule 50, or the jurisprudence interpreting it, limits the nature or scope of the alterations to the indictment that may be approved or rejected. As suggested by the Prosecution in *Mladic*, Rule 54 also provided a basis for the Trial Chamber to have streamlined the amended indictment. The Trial Chamber erred in concluding that it lacked the power to approve an amended indictment limited to one or more components of the Prosecution case.

53. The Trial Chamber's second error came when it refused to use its powers under Rule 73 *bis* to reduce the scope of the Prosecution's case.

54. Rule 73 *bis* was amended in 2006 after the Tribunal found that "calls for the prosecution to reduce its lengthy cases have been less than satisfactory…"[87] The Rule provides four ways in which the Trial Chamber can reduce the scope of the trial: (i) invite the Prosecution to reduce the number of counts; (ii) fix the number of crime sites; (iii) fix the number of incidents; and (iv) direct the Prosecution to select the number of counts

[84] *Id*, para. 39.
[85] *Mladic Amendment Motion.*
[86] *Id*, paras. 21-22.
[87] *13th Annual Report*, para. 10.

upon which to proceed.[88] It will only be in "very exceptional circumstances that a case cannot be reduced within the terms of Rule 73 *bis*."[89]

55. The Trial Chamber indicated that it was "gravely concerned about the scope of the Prosecution's case and the potential effect that this will have on the fair and expeditious conduct of the trial".[90] However, after inviting the Prosecution to propose ways in which the trial's scope could be reduced,[91] and stating its disappointment with the Prosecution's proposal, the Trial Chamber declined to order the Prosecution to reduce its case beyond eliminating the few municipalities it had proposed. In fact, it granted more hours for the Prosecution to present its case (300) than the Prosecution had requested (251).[92]

56. The Trial Chamber squandered an opportunity to reduce the scope of the trial and avoid the unmanageable and unfair proceedings that followed. The Trial Chamber could have fixed the number of crime sites and incidents at a lower, but still representative, number under Rule 73 *bis* (D), or could have directed the Prosecution to select three counts—which would have allowed the Prosecution to proceed on one component during the trial. (i.e. Counts 2, 6, and 8 for Srebrenica or Counts 3,9, and 10 for Sarajevo, or Counts 3, 6, and 8 for the municipalities).

57. The Prosecution in *Mladic* represented that ten Sarajevo scheduled incidents could be eliminated under Rule 73 *bis* (D),[93] yet the Trial Chamber in our case refused to remove even those incidents.[94]

58. The judges were aware of the dangers of proceeding to trial on an indictment too wide in scope. Judge Bonomy had written: "the number of counts, crimes charged, and crime sites are all critical factors in determining the length of the trial. The main reason for war crimes trials lasting so long is the scale of the indictments."[95] Judge Kwon had written in 2007, after participating in the *Milosevic* trial:

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[88] *Milutinovic 73 bis Decision*, para. 6.
[89] *J. Stanisic 73 bis Decision*, para. 11.
[90] *73 bis Decision*, para. 5.
[91] *73 bis Order*.
[92] *73 bis Decision*, paras. 3, 5-7.
[93] *Mladic 73 bis Motion.*
[94] *Sarajevo Striking Decision*.
[95] *Bonomy Article*, p. 52.

> …the greatest challenge currently facing the judges of the ICTY is the sheer enormity of the cases before them…it is incumbent on the Office of the Prosecutor to give up its reluctance to take the lead in reducing the size of its own cases.[96]

59. Gideon Boas, the Legal Officer who worked with Judges Kwon and Bonomy on the *Milosevic* trial, concluded:

> A valuable lesson to be learned from this experience is that the prosecution should exercise restraint and common sense in its approach to such strategic issues and, where the prosecution fails to do this, courts should use a heavy hand to control the scope of proceedings so that they are manageably fair and expeditious.[97]

60. The Trial Chamber erred in holding that it lacked the power to approve an amended indictment limited to one or more components and abused its discretion by failing to use its powers under Rule 73 *bis* to significantly reduce the scope of the trial. This set the stage for the unfair trial that followed.

Failure to Remedy Disclosure Violations

61. The Trial Chamber repeatedly failed in its duty to ensure that President Karadzic had the disclosure to which he was entitled and to provide a meaningful remedy for the Prosecution's repeated disclosure violations.

62. The Trial Chamber first erred by declining, at the outset of the case,[98] and again before the trial began,[99] to impose consequences when the Prosecution violated its disclosure obligations. Those violations continued unabated after the trial began.

63. All witness statements were ordered to be disclosed by 7 May 2009. More than a year later, between June and December 2010, the Prosecution disclosed 388 witness statements, some of which had been in its possession for 10-15 years. The Trial Chamber repeatedly found that the Prosecution had violated Rules 66(A)(ii) and 68, but declined to exclude any evidence or to even require the Prosecution to certify that it had complied with its obligations.[100]

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[96] *Kwon Article*, p. 375.
[97] *Boas Book*, p. 278; See also *Higgins Article*.
[98] *Disclosure Modalities Decision*.
[99] *Disclosure Deadlines Decision*, paras. 14-15.
[100] *2nd Motion Decision*, paras. 12-18; *3rd-6th Motion Decision*, paras. 28-32, 39-43; *7th-8th Motion Decision*, paras. 17-21; *9th-10th Motion Decision*, paras. 17-21; *11th-15th Motion Decision*, paras. 45-46; *18th-21st Motion Decision*, paras. 34-36, 42-44; *22nd-26th Motion Decision*, paras. 27-28; *27th Motion Decision*, para. 14; *29th Motion Decision*, paras. 15-16.

64. Between September and November 2010, the Prosecution disclosed approximately 20,000 pages of material, much of it exculpatory, which it had obtained in January 2010 from searches conducted in Serbia. Although the Trial Chamber adjourned the trial for five weeks for President Karadzic to review the material, and found that the Prosecution had violated its obligation to disclose exculpatory material as soon as practicable, it declined to impose a sanction or remedy.[101]

65. As its failure to disclose large amounts of exculpatory material began to become apparent, the Prosecution revealed that it had not disclosed exculpatory evidence before trial and was only searching for exculpatory material "proximate to the witness' testimony".[102] The Trial Chamber found this approach incompatible with the duty to disclose exculpatory material as soon as practicable. It held that searching for and disclosing exculpatory material should have begun in earnest when President Karadzic was transferred to the Tribunal.[103]

66. Significantly, the Trial Chamber recognised that:

> The Prosecution represented that it was ready for trial in 2009, but apparently ensuring that it had fully complied with the dead-lines set by the Pre-Trial Judge for disclosure was not fully reflected in that assertion.[104]
>
> [T]he sheer volume of material to be disclosed is related to the size and complexity of this case, which is largely of [the Prosecution's] own creation. Indeed, the Chamber urged the Prosecution, in the pre-trial stage, to seriously consider reducing the scope of the Indictment or indeed to divide the case into separate pieces. While the Prosecution did select certain crime sites and incidents for which it would not bring evidence at trial, this did not constitute a major reduction in the overall size of the case.[105]

67. The Trial Chamber found that "it has become clear that the Prosecution has not acted in accordance with the Chamber's previous urging" concerning the disclosure of exculpatory evidence.[106]

68. The disclosure violations continued. On 31 January, 28 February, and again on 31 March 2011, some 18 months after the trial had begun, the Prosecution disclosed

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[101] *17th Motion Decision*, paras. 20, 22; *22nd-26th Motion Decision*, para. 41; *17 bis Motion Decision*, para. 21.
[102] *OTP 23rd-24th Motion Response*, para. 8.
[103] *OTP Disclosure Reconsideration Decision*, paras. 11-12.
[104] T8908.
[105] *22nd-26th Motion Decision*, para. 43.
[106] *OTP Disclosure Reconsideration Decision*, para. 10.

another 75,500 pages and 379 hours of videotaped witness interviews.[107] By mid-May 2011, the Prosecution had acknowledged disclosing some 269,550 pages of exculpatory material since the trial began in October 2009.[108]

69. The Trial Chamber found that "the pattern of disclosure violations by the Prosecution has continued" and "it demonstrates an underlying failure by the Prosecution to give adequate weight to the importance of its disclosure obligations under the Rules and to heed the repeated calls by the Chamber to improve its disclosure practices."[109]

70. The Trial Chamber, from time to time, requested a report from the Prosecution on its efforts to ensure that it had complied with its disclosure requirements.[110] The Prosecution dutifully filed its reports,[111] but the violations continued. The Trial Chamber refused to provide a remedy.[112] It rejected requests to exclude evidence,[113] require certification by the Prosecution,[114] issue warnings and sanctions,[115] appoint a special master,[116] order access to the Prosecution database,[117] order a reduction in the scope of the case,[118] hold an evidentiary hearing,[119] or recall Prosecution witnesses.[120]

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[107] *4th Suspension Motion*; *5th Suspension Motion*; *47th Motion Decision*.
[108] Calculated from Prosecution monthly reports from October 2009 until May 2011.
[109] *4th Suspension Decision*, paras. 10-13; *5th Suspension Decision*, para. 9.
[110] *3rd-6th Motion Decision*, para. 47; *49th-50th Motion Decision*, para. 54; *77th-78th Motion Decision*, para. 23; *85th Motion Decision*, para. 21; *93rd Motion Decision*, para. 20; *94th Motion Decision*, para. 16.
[111] *OTP August 2010 Report*; *OTP October 2010 Report*; *OTP July 2011 Report*; *OTP March 2013 Report*; T35542-45 (19 March 2013);*OTP February 2014 Report*; [REDACTED]; *OTP 94th Motion Report*.
[112] *37th-42nd Motion Decision*, paras. 26, 29, 35; *43rd-45th Motion Decision*, paras. 32-35.
[113] *29th Motion Decision*, paras. 15-16; *32nd-36th Motion Decision*, paras. 21-22; *46th Motion Decision*, para. 9; *48th Motion Decision*, para. 12; *51st-52nd Motion Decision*, para. 18; *56th Motion Decision*; *58th Motion Decision*; *65th Motion Decision*, para. 25; *69th Motion Decision*; *77th-78th Motion Decision*, paras.18-19, 21;[REDACTED]; *91st Motion Decision*, paras. 16-18; *95th Motion Decision*, para. 11; *96th Motion Decision*, para. 8.
[114] *11th-15th Motion Decision*, para. 46; *7th-8th Motion Decision*, para. 18; *94th Motion Decision*, para. 15.
[115] *49th-50th Motion Decision*, para. 50; *74th Motion Decision*, para. 12.
[116] *7th Suspension Motion* paras. 12-18; *49th-50th Motion Decision*, para. 50; *51st-52nd Motion Decision*, para. 18; *53rd-54th Motion Decision*, para. 16; *55th Motion Decision*, para. 13.
[117] *77th-78th Motion Decision*, para. 22; *79th Motion Decision*; *80th-81st Motion Decision*, para. 17; *82nd Motion Decision*, paras. 19-21; *84th Motion Decision*, paras. 14-15; *85th Motion Decision*, paras. 21-23; *86th Motion Decision*; *87th Motion Decision*, para. 14; *88th Motion Decision*, paras. 10-11; *91st Motion Decision*, paras. 16-18.
[118] *53rd-54th Motion Decision*, para. 16; *55th Motion Decision*, para. 13.
[119] *53rd-54th Motion Decision*, para. 16; *93rd Motion Decision*, paras. 17-18; *98th-99th Motion Decision*, paras. 13, 18; *100th Motion Decision*, para. 18.
[120] *Sarajevo Recall Decision*, paras. 10-20; *65th Motion Decision*, para. 25; *Municipalities Recall Decision*, paras. 13-24; *67th-68th Motion Decision*, paras. 30, 33-35; *72nd Motion Decision*, para. 11; *75th Motion Decision*; *76th Motion Decision*;[REDACTED]; *94th Motion Decision*, para. 15.

71. When the Prosecution's case ended, and again when the Defence case ended, President Karadzic argued that the cumulative effect of those violations had made a fair trial impossible and requested a new trial.[121] The Trial Chamber held that because President Karadzic had not demonstrated that he had been prejudiced by the violations, neither a sanction nor a remedy was warranted.[122]

72. Rule 68 *bis* provides:

> The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

73. The Trial Chamber erred in failing to take adequate measures to remedy the violations, despite finding on 82 separate occasions during and after the trial that the Prosecution had violated its disclosure obligations. Other ICTY and ICTR Chambers have required Prosecution certifications,[123] excluded evidence,[124] issued warnings and reprimands to the Prosecution,[125] and ordered witnesses recalled,[126] in cases involving much less serious violations of the Prosecution's obligations.

74. Had the Trial Chamber taken these steps, the violations could have been curtailed or eliminated. Instead, its inaction created a climate of impunity in which the Prosecution could conclude that it would suffer no consequences for violating its disclosure obligations.

75. Former U.S. Court of Appeals Chief Judge Alex Kozinski has linked the continuing violations of prosecutors' disclosure obligations to the failure of courts to punish violations when they occur. Judge Kozinski observed: "[s]ome prosecutors don't care about [their duty to disclose exculpatory evidence] because courts don't make them care." He further stated that:

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[121] *New Trial Motion*; *Second New Trial Motion*.
[122] *New Trial Decision*, paras. 17, 19; *Second New Trial Decision*, paras. 15, 17.
[123] *Bizimungu Recall Decision*, p. 6; *Nshogoza Disclosure Order*.
[124] *Nyiramasuhuko Disclosure Decision*; *Bizimungu Disclosure Decision*; [REDACTED].
[125] *Seselj Disclosure Decision*; *Haradinaj Sanctions Decision*, reconsidered in *Haradinaj Reconsideration Decision*, paras. 40-41; *Rutaganda Review Decision*, para. 37; *Karemera Exclusion Decision*; *Karemera Witness T Decision*; *Karemera RPF Decision*, para. 17; *Karemera Rule 68 Decision*, para. 27; *Ntawukulilyayo Disclosure Decision*, para. 34.
[126] *Oric Rule 68 Decision*; *Delic Rule 68 Decision*; *Lukic Disclosure Decision*, para. 18; *Nyiramasuhuko Recall Decision*; *Ndindiliyimana Disclosure Decision*, para. 63.

76. When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.[127]

77. On 82 occasions in this case, the Trial Chamber acknowledged, and promptly excused, the Prosecution's disclosure violations. A more documented pattern of disclosure violations is difficult to imagine. If that was not error, then international prosecutors simply have *carte blanche* to violate the rules.

78. The ICTY and ICTR Appeals Chamber have, for over a decade, warned that violating the Prosecution's disclosure obligations was a serious matter.

79. In the *Krstic* case, the Appeals Chamber said:

> The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.[128]

80. In the *Kordic and Cerkez* case, the Appeals Chamber said:

> The Appeals Chamber reiterates that the onus on the Prosecution to enforce the rules rigorously to the best of its ability is not a secondary obligation, and is as important as the obligation to prosecute… It is clearly required, however, notwithstanding the practical difficulties encountered by the Prosecution, that evidence of an exculpatory nature must also be disclosed to the defence forthwith.[129]

81. In the *Lukic & Lukic* case, the Appeals Chamber said:

> The Appeals Chamber emphasizes its concern at the failure of the Prosecution to meet its fundamental duty to disclose *prima facie* exculpatory material… The Appeals Chamber reminds the Prosecution of the paramount importance of its disclosure obligations and expects the Prosecution to undertake the necessary steps to prevent such disclosure violations from occurring in the future.[130]

82. In the *Mugenzi & Mugiraneza* case at the ICTR the Appeals Chamber said:

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[127] *United States v. Olsen*, p. 626.
[128] *Krstic AJ*, para. 215.
[129] *Kordic AJ*, paras. 242-43.
[130] *Lukic Disclosure Appeals Decision*, para. 23.

> The Appeals Chamber nonetheless firmly emphasizes that the prosecution's disclosure obligation is as important as its obligation to prosecute, and exhorts the Prosecution to act in good faith and in full compliance with its positive and continuous disclosure obligations. The Appeals Chamber also underscores that any further violations of the prosecution's disclosure obligation under Rule 68 of the Rules could lead to appropriate sanctions, if warranted in the circumstances.[131]

83. The Appeals Chamber later repeated in that same case:

> It is clear that the Prosecution's repeated violations of its obligations under Rule 68 of the Rules in this case negatively impacted the conduct of the proceedings and prejudiced the interests of justice. The Appeals Chamber therefore firmly reminds the prosecution of the fundamental importance of its positive and continuous obligation to disclose exculpatory material under Rule 68 of the Rules.[132]

84. The Appeals Chamber should demonstrate that these were not mere platitudes. The Trial Chamber's inadequate response to these violations resulted in the Prosecution's continuing to violate its disclosure obligations and ultimately an unfair trial.

Failure to Correctly Assess Prejudice

85. In addition to its failure to remedy disclosure violations, the Trial Chamber erred in its findings, made in virtually every decision, that President Karadzic had not demonstrated that he been prejudiced by the violations. The "prejudice" requirement cannot serve to isolate disclosure violations to the detriment of a fair trial.[133]

86. The Trial Chamber failed to consider that the undue delay in the trial resulting from the Prosecution's disclosure violations prejudiced President Karadzic. Adjournments caused by late disclosure of exculpatory material delayed the trial by 14 weeks.[134] In the *Nyiramasuhuko* case, the Prosecution's disclosure violations delayed the start of the trial by "several months".[135] The delays in the length of pre-trial detention as a result of, *inter alia*, the Prosecution's disclosure violations constituted prejudice *per se*.[136] The same is the case here.

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[131] *Mugenzi Rule 68 Appeals Decision*, para. 40.
[132] *Mugenzi AJ*, para, 63.
[133] *Kordic AJ*, para. 242.
[134] *17th Motion Decision*, para. 7 (one week); *26th Motion Oral Decision* (one month); *4th Suspension Decision* (six weeks); *5th Suspension Decision* (two weeks); *47th Motion Decision*, para. 24 (one week).
[135] *Niyiramasuhuko AJ*, para. 372.
[136] *Id*, para. 388.

87. The Trial Chamber also erred in placing the burden on the Defence to demonstrate prejudice. On numerous occasions when it found the Prosecution to have violated its disclosure obligations, the Trial Chamber found that President Karadzic had not met his burden to demonstrate prejudice.[137] The Trial Chamber required President Karadzic to establish that the disclosure violations materially impaired his ability to present his defence.

88. The Defence's burden is as follows:

> To establish that the Prosecution is in breach of its disclosure obligations, the defence 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 and control of the Prosecution.[138]

89. The Appeals Chamber has stated:

> If the defence satisfies the Chamber that the prosecution has failed to comply with its…obligations, **the chamber must examine** whether the defence has been prejudiced by that failure before considering whether a remedy is appropriate.[139]

90. Imposing a requirement that President Karadzic demonstrate prejudice was erroneous. The Trial Chamber was required to independently examine whether prejudice existed.

91. In an analogous situation, if an accused raises a defect in the indictment for the first time on appeal, he bears the burden to show that the defect materially impaired his ability to prepare his defence. Where an accused raises the lack of notice at trial, the burden rests on the Prosecution to demonstrate on appeal that the accused's ability to prepare a defence was not materially impaired.[140]

92. The same standard must be applied to disclosure violations, which, like defective indictments, constitute a failure by the Prosecution for which an accused should not be burdened or penalized. President Karadzic raised these disclosure violations at trial. The Prosecution failed to show that the disclosure violations did not materially impair President Karadzic's ability to prepare his defence.

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[137] *See for example*, *Second New Trial Decision*, para. 15; *7th-8th Motion Decision*, para. 17; *87th Motion Decision*, para. 14.
[138] *Ngirabatware Disclosure Appeals Decision*, para. 13; *Mugenzi AJ*, para. 39.
[139] *Ngirabatware Disclosure Appeals Decision*, para. 13 (emphasis added).
[140] *Ngirabatware AJ*, para. 33.

93. The Prosecution's decision to declare itself ready for trial without having complied with its disclosure obligations resulted in is disclosing 552,828 pages of exculpatory material, or 78% of the total exculpatory material, after the trial began.[141] While the Prosecution had years to study this material, it deprived President Karadzic of the ability to read the material before trial, and develop a coherent defence strategy in light of the exculpatory material.

94. In *R. v. Ward*, the Prosecution's disclosure violations were remedied by a new trial. The Court explained that:

> relevant evidence of help to the accused is not limited to evidence which will obviously advance the accused case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution has gathered, and from which the prosecution have made their own selection of evidence to be led…
>
> Non−disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence…The failures to disclose on the part of the prosecution which we have found to exist were of such an order that collectively, and in some cases individually, they constituted material irregularities in the course of the trial.[142]

95. Similarly, the Prosecution's disclosure violations in this case deprived President Karadzic of the opportunity to understand the Prosecution's case before the trial began.[143] The Trial Chamber erred in placing the burden on him to show more. The Prosecution failed to discharge its burden to show that it had not materially impaired President Karadzic's defence preparation by depriving him of 78% of the exculpatory material before trial.

96. Further prejudice arose from the disruption of the trial. President Karadzic did not have time to completely review this disclosure, and the time he did dedicate to its review disrupted his preparation and conduct of other aspects of the trial, which remained on-going.

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[141] See Annex C. A small percentage of this material (estimated at less than 10%) came into the Prosecution's possession during the trial, or were duplicates of material previously disclosed, and therefore do not represent a disclosure violation.
[142] *R v. Ward*, p. 642.
[143] *Zahar Article*, p. 237.

97. In *United States v. Gil*, the court held that the Prosecutor's disclosure violation on the eve of trial so impaired the accused's right to a fair trial that a new trial was required. In that case, the Prosecution delivered 2,700 pages of material to defence on the day before the trial was to begin. The Court held that:

> When such disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.

98. The Court explained that relevant exculpatory evidence within the massive disclosure might understandably be missed when provided on the eve of trial.[144]

99. *Gil* bears striking resemblance to the present case, in which disclosure was often made *during* trial, and frequently contained thousands more pages of potentially exculpatory material. In *Gil*, it was enough to defeat equality of arms that the accused, even on one occasion, diverted precious time and resources to evaluate exculpatory evidence. In President Karadzic's case, the Prosecution's systematic late disclosures further defeated his right to a fair trial. The Prosecution failed to discharge its burden to show that having to review hundreds of thousands of pages of exculpatory material during trial did not materially impair President Karadzic's defence.

100. Finally, 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. On more than 79 occasions, disclosure violations prevented President Karadzic from confronting Prosecution witnesses with relevant exculpatory material or prior statements.[145] The Trial Chamber relied repeatedly upon many of these witnesses, such as David Harland, Momir Nikolic, Herbert Okun, and General John Wilson, in making findings adverse to President Karadzic.

101. Confronting a witness with a prior inconsistent statement, or documents detailing benefits received from the Prosecution, or material that otherwise contradicted their evidence, often exposes lack of credibility. It can also affect demeanour by destabilising

[144] *United States v Gil*, p. 106.
[145] See Annex D.

the witness, causing them to provide incredible explanations in an effort to reconcile the evidence, making additional inconsistent statements, or becoming aggressive, evasive, or even, dramatically, to admit that they had not told the truth.

102. Three examples illustrate this point:

103. [REDACTED].[146]

104. [REDACTED].[147]

105. [REDACTED].[148]

106. A second example involves Ambassador Herbert Okun. Again, the Prosecution failed to disclose its first interview in which Ambassador Okun expressed doubts over whether President Karadzic had control over those who were committing the crimes during February-May 1992. At trial, he testified that President Karadzic had full control of the troops.[149]

107. The Trial Chamber found that the Prosecution had again violated its disclosure obligations, but limited its remedy to not considering Ambassador Okun's evidence on the issue of President Karadzic's control.[150] This missed the point. Had President Karadzic had this interview when cross-examining Ambassador Okun, he may well have destabilised him, discredited him more generally, and led the Trial Chamber to assign less or no probative value to all evidence given by him. Instead, the Trial Chamber relied heavily on Ambassador Okun's evidence in determining that President Karadzic was a member of the JCEs to expel non-Serbs from the municipalities and to terrorise the citizens of Sarajevo, which, in Okun's opinion, could only be divided by a "wall of fire".[151]

108. A third example involves Vitomir Zepinic, a witness the Prosecution listed, but did not call, and who the Defence called as a witness. Again, the Prosecution violated its disclosure obligations by failing to disclose its first interview with Zepinic. In that

[146] [REDACTED].
[147] [REDACTED].
[148] *Niyitegeka AJ*, para. 33.
[149] *100th Motion*.
[150] *100th Motion Decision*, para. 17.
[151] *Judgement*, paras. 2662, 2740, 2823, 3543, 4660, 4675, 4813, 4853-54, 4894, 4908, 4929.

interview, Zepinic described his first-hand knowledge of Bosnian Muslims killing their own civilians in a marketplace explosion to prompt international intervention.[152]

109. The Trial Chamber again found the Prosecution had violated its disclosure obligations, but held that no prejudice existed because the information was of marginal probative value.[153] Yet it went on to find that there was insufficient evidence that Bosnian Muslims had killed their own civilians,[154] and used that finding to bolster its conclusions that Bosnian Serbs were responsible for all shelling incidents.

110. The Trial Chamber accepted Zepinic as a credible witness.[155] Had the Prosecution disclosed the interview when required, President Karadzic would have had the opportunity to elicit first-hand evidence that Bosnian Muslims were killing other Bosnian Muslims to prompt international intervention, raising reasonable doubt about whether Bosnian Serbs were responsible for the other shelling incidents.

111. The Prosecution failed to discharge its burden to show that the late-disclosed material did not prejudice President Karadzic. The Trial Chamber erred in finding that President Karadzic had not been prejudiced by the Prosecution's disclosure violations during his case.

Conclusion

112. The Trial Chamber's refusal to limit the scope of the trial and to take adequate steps to remedy the Prosecution's repeated disclosure violations led to an unmanageable and unfair trial. While, as shown in the examples above, these errors led to specific findings in the judgement that were unsafe, the violations were so pervasive that only a new, and fair, trial can remedy the Trial Chamber's errors.

[152] *105th Motion*.
[153] *104th-105th Motion Decision*, para. 33.
[154] *Judgement*, paras. 4515-19.
[155] *Judgement*, paras. 2823, 2981.

7. The Trial Chamber erred in taking judicial notice of adjudicated facts

In Brief

Ruling:	***Trial Chamber took judicial notice of 2379 adjudicated facts, relied on many of them to make adverse findings, and gave greater weight to adjudicated facts than evidence brought by the Defence to rebut them.***
Error:	***This violated the presumption of innocence and shifted the burden of proof to the Defence.***
Impact:	***Rendered the trial unfair by requiring the Defence to divert resources to rebut adjudicated facts and by making adverse findings based on adjudicated facts.***

113. In five decisions, the Trial Chamber took judicial notice of 2379 adjudicated facts[156] repeatedly rejecting President Karadzic's contention that taking judicial notice of adjudicated facts violated the presumption of innocence and impermissibly shifted the burden of proof.[157]

114. The Trial Chamber relied upon hundreds of adjudicated facts to support its findings. In 67 instances, adjudicated facts were the sole source for factual findings in the Prosecution's favour.[158] In 35 instances, the Trial Chamber ascribed greater weight to the adjudicated facts than Defence evidence offered to rebut them.[159]

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[156] *Adjudicated Facts Decision I*; *Adjudicated Facts Decision II*; *Adjudicated Facts Decision III*; *Adjudicated Facts Decision IV*; *Adjudicated Facts Decision V*.
[157] *Adjudicated Facts Decision I*, para. 35-36, 38; *Adjudicated Facts Decision II*, para. 53; *Adjudicated Facts Decision III*, para. 61-62; *Adjudicated Facts Decision IV*, para. 97; *Adjudicated Facts Decision V*, para. 55.
[158] *Judgement*, paras. 618, 620, 624, 630, 651, 653, 671, 767, 855, 857, 859-65, 868-69, 871-74, 876, 883, 889, 892-95, 902, 913, 915-17, 920, 922, 985, 1049, 1070-71, 1120, 1195, 1203, 1269, 1271, 1276, 1374, 1400, 1429, 1447, 1450, 1454-55, 1477, 1541, 1582, 1604, 1619, 1631, 1764, 1777-78, 1910, 1973, 2731, 3672.
[159] *Judgement*, paras. 28, 630, 857, 859-60, 862, 864-65, 876, 892, 895, 902, 913, 916, 922, 985, 1071, 1120, 1195, 1269, 1374, 1400, 1429, 1447, 1450, 1477, 1582, 1604, 1619, 1631, 1764, 1777-78, 1910, 2731, 3672.

115. The Trial Chamber (i) violated the presumption of innocence and relieved the Prosecution of its burden of proof by taking judicial notice of adjudicated facts; (ii) erred in taking judicial notice of an excessive number of adjudicated facts; and (iii) erred in requiring Defence evidence to be "credible" to rebut the presumption established by an adjudicated fact.

Constitutionality

116. Although several Appeals Chamber decisions have considered judicial notice of adjudicated facts, as recently noted by former ICTY Judge Patrick Robinson, the "constitutionality" of the practice as a whole has never been challenged.[160] This is that challenge.

117. An accused at the ICTY benefits from the presumption of innocence enshrined in Article 21(3) of the Statute and in human rights instruments.[161] An essential component of the presumption of innocence is that the Prosecution has the burden to prove each element beyond a reasonable doubt. This burden never shifts to the accused.

118. Judicial notice of facts of common knowledge has formed part of the ICTY framework since 1994. Rule 94(A) provides that "[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."

119. Judicial notice of adjudicated facts was added in 1998. Rule 94(B) provides:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

120. As acknowledged by Judge Kwon, "taking judicial notice of adjudicated facts is a new creation of international criminal procedure that does not exist in either common law or civil law national systems."[162]

121. At first, Rule 94(B) was interpreted to only apply to facts that were not in reasonable dispute.[163] However, in 2003, the Appeals Chamber held that Rule 94(B)'s

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[160] *Mladic Adjudicated Facts Appeals Decision*, Partially Dissenting Opinion of Judge Patrick Robinson, para. 107.
[161] *See for example*, ICCPR, Article 14(2); ECHR, Article 6(2).
[162] *Kwon Article*, p. 369.
[163] *Simic Judicial Notice Decision*, p. 4; *Sikirica Judicial Notice Decision*, p.5; *Milosevic Adjudicated Facts Decision*, p. 4.

permissive language, as opposed to Rule 94(A)'s mandatory language, created a "well-founded presumption for the accuracy" of an adjudicated fact.[164]

122. One commentator has noted: "It is almost impossible to extract any principle or test from the Appeals Chamber's three-page ruling."[165] Judge David Hunt, in a strong dissent, pointed out that it was:

> inappropriate to impose rebuttable presumptions of fact in favour of the prosecution, which carries the onus of proof in relation to that fact. A basic right of the accused enshrined in the Tribunal's Statute is that he or she is innocent until proven guilty by the prosecution. Proof by way of presumptions of fact such as will be permitted by the majority decision offends against that basic right.[166]

123. The *Milosevic* decision opened a crack in a door that the Prosecution pushed wide open by seeking to admit hundreds of adjudicated facts on disputed issues. Four years later, in another *Milosevic* case, that of General Dragomir, the Appeals Chamber addressed the argument posited by Judge Hunt, stating that: "judicial notice of adjudicated facts does not shift the ultimate burden of persuasion, which remains with the Prosecution."[167]

124. The distinction between the burden of production and burden of persuasion[168] is a fallacy. As pointed out by one commentator:

> Inasmuch as the burden of persuasion involves the production of evidence with which to persuade, it seems idle to talk of any distinction in meaning between the duty of persuasion and the duty of producing evidence. If the thrust of the distinction is at the effect of evidence on the trier of fact, then in both instances the aim in adducing evidence is to persuade. There does not seem therefore to be a valid distinction between the two.[169]

125. Lessening the burden of production lessened the Prosecution's overall burden of proof to President Karadzic's detriment. For example, taking judicial notice that 120 non-Serb civilians were killed by Serb Forces on 5 August 1992 in Hrastova Glavica [170] relieved the Prosecution of its burden to prove part of the *actus reus* of extermination, murder and persecution. Whether expressed as "production" or "persuasion", the effect

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[164] *Milosevic Adjudicated Facts Appeals Decision*, p. 4.
[165] *Boas Book*, p. 51.
[166] *Milosevic Adjudicated Facts Appeals Decision*, Dissenting Opinion of Judge David Hunt para. 14.
[167] *D. Milosevic Adjudicated Facts Appeals Decision*, para. 16.
[168] This distinction was first made in *Karemera Judicial Notice Appeals Decision*, para. 48.
[169] *Dlamini Article*, pp. 74-75.
[170] AF1220-22; Scheduled Incident B15.3.

was the same—the onus shifted to the Defence to elicit affirmative evidence to rebut these facts. This shift violated traditional and well-established notions of the presumption of innocence.

126. Judge Robinson has noted "the failure of the Defence to rebut the presumption of the accuracy of an adjudicated fact will result in the acceptance of that fact by the Trial Chamber, thereby contributing to the discharge by the Prosecution of its ultimate burden of proving its case beyond a reasonable doubt."[171]

127. In the *Dragomir Milosevic* decision, the Appeals Chamber applied another meaningless distinction—that shifting the burden to the Defence didn't violate the presumption of innocence where the adjudicated facts did not relate to the acts, conduct, and mental state of the accused.[172] The presumption of innocence requires the Prosecution to prove each element of the offence beyond a reasonable doubt. This includes whether the crime charged was in fact committed, as well as who committed it.

128. The Prosecution's burden to prove the crimes charged is not limited to proving the acts, conduct, and mental state of the accused. By shifting the burden to establish, for example, that the murder of 120 non-Serb civilians by Serb Forces on 5 August 1992 in Hrastova Glavica did not occur, or was committed by persons other than forces commanded by President Karadzic, the Trial Chamber relieved the Prosecution of proving an essential element of the *actus reus* of the crimes charged in the indictment.

129. The Appeals Chamber's rationale for limiting judicial notice of adjudicated facts to those other than the acts, conduct, and mental state of the accused was as follows:

> [T]here are two reasons warranting complete exclusion of this category of facts. First…such exclusion strikes a balance between the procedural rights of the accused and the interests of expediency. Secondly…there is a reliability concern associated with facts adjudicated in other cases which bear on the actions, omissions, or mental state of an individual who was not on trial, as defendants in those cases have less incentive to contest those facts and might even choose to allow blame to fall on another.[173]

130. However, this ignores the reality that the Defence in earlier cases also had little incentive to contest that the crime was committed because they focused their limited

[171] *Defence Case Appeals Decision*, Dissenting Opinion of Judge Patrick Robinson, para. 6.
[172] *D. Milosevic Adjudicated Facts Appeals Decision*, paras. 16-17, citing *Karemera Judicial Notice Appeals Decision*, para.50.
[173] *Mladic Adjudicated Facts Appeals Decision*, para. 80.

resources on claims that organs for which they were not responsible may have committed the crimes. The *Brdjanin* and *Krajisnik* cases, for example, from which some 900 facts are drawn, are replete with arguments that the military, rather than the civilian authorities, committed the crimes,[174] [REDACTED][175] As President and Commander-in-Chief of the Bosnian Serb Army, President Karadzic was charged with responsibility for Republika Srpska's military **and** civilian organs.

131. Taking judicial notice of adjudicated facts from those cases which found the crimes to have been committed, and identified the perpetrators, by name or organ, is as unsafe as taking judicial notice of facts going to the acts, conduct, and mental state of the accused.

132. Taking judicial notice of adjudicated facts also runs afoul, and is in direct contradiction with, the oft-cited principle that two Trial Chambers, each acting reasonably, are entitled to reach different conclusions on the same evidence.[176] By taking judicial notice of adjudicated facts from earlier judgements, a Trial Chamber deprives the accused of the possibility that had it heard the evidence itself, the Trial Chamber may have come to a different conclusion than the Chamber in the earlier case.

133. Judge Robinson has always been concerned with the validity of Rule 94(B) and "how unusual and dangerous it is".[177] Likewise, former ICTY Judge Wald has written that Rule 94(B) raises serious questions about fairness to the second set of accused who were not before the Court in the first trial.[178] Eugene O'Sullivan notes: "a review of the guiding principles and reasoning set out in the case law [for judicial notice of adjudicated facts] raises serious questions about whether the rights of the accused are fully and properly protected."[179]

134. Those concerns are well founded. Taking judicial notice of adjudicated facts violates two fundamental concepts enshrined in the ICTY Statute: the presumption of innocence and the burden of proof. Thus, it is "unconstitutional".

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[174] *Brdjanin TJ*, para. 372;[REDACTED]; *Krajisnik TJ*, paras. 644, 1083; [REDACTED].
[175] [REDACTED].
[176] *Popovic AJ*, para. 1677.
[177] *Mladic Adjudicated Facts Appeals Decision*, Partially Dissenting Opinion of Judge Patrick Robinson, para. 101.
[178] *Wald Article I*, p. 111.
[179] *O'Sullivan Article*, p. 526.

Number of Adjudicated Facts

135. Even putting its constitutionality aside, taking judicial notice of so many adjudicated facts (2379), in and of itself, and in combination with admitting written evidence of 148 witnesses without cross- examination, violated President Karadzic's right to a fair trial. This argument is presented in Ground 16.

Rebutting Adjudicated Facts

136. The Trial Chamber, in any event, shifted the burden of production **and** persuasion to President Karadzic. Even where President Karadzic introduced evidence to rebut an adjudicated fact, the Trial Chamber preferred the adjudicated fact, finding President Karadzic's evidence not "credible".[180]

137. Imposing an additional "credibility" requirement on Defence evidence that the Trial Chamber had admitted into evidence was error. Once the Defence evidence had satisfied Rule 89(C)'s relevance and probative value requirements, and was admitted, the presumption was rebutted. It was then for the Prosecution to introduce evidence to support the now challenged fact:

> As facts in themselves cannot be weighed against contradicting evidence, in order to strike a balance, the obvious way is to allow the proposing party to submit evidence in relation to the now challenged fact, which can then be weighed against the contradicting evidence.[181]

138. The ICTR Appeals Chamber has stated in *dicta* that "the defence may then put the point into question by introducing *reliable and credible* evidence to the contrary."[182] However, it later clarified:

> The requirement that the evidence be "reliable and credible" must be understood in its proper context, through the lens of the general standard for admission of evidence at trial set out in Rule 89(C) of the Rules: "[a] Chamber may admit any relevant evidence which it deems to have probative value". Only evidence that is reliable and credible may be considered to have probative value.[183]

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[180] *Judgement*, paras. 28, 630, 857, 859-60, 862, 864-65, 876, 892, 895, 902, 913, 916, 922, 985, 1071, 1120, 1195, 1269, 1374, 1400, 1429, 1447, 1450, 1477, 1582, 1604, 1619, 1631, 1764, 1777-78, 1910, 2731, 3672.
[181] *Mladic Adjudicated Facts Rebuttal Decision*, para. 15.
[182] *Karemera Judicial Notice Appeals Decision*, para. 42 (emphasis added).
[183] *Karemera Adjudicated Facts Appeals Decision*, para. 14.

139. Therefore, once the Trial Chamber had admitted Defence evidence, that evidence was sufficiently reliable and credible to rebut the adjudicated fact. The Prosecution must then introduce evidence in rebuttal.

140. The Trial Chamber erred in weighing the credibility of Defence evidence against the adjudicated fact. In doing so, it indeed shifted the burden of persuasion to President Karadzic, requiring him not only to produce evidence rebutting the adjudicated fact, but also to persuade the Trial Chamber that his evidence was credible.

141. Therefore, even if the Appeals Chamber were to uphold the constitutionality of this process, and find no error in taking judicial notice of 2379 adjudicated facts, it should find that the Trial Chamber erred in relying on adjudicated facts for which contrary evidence had been admitted.

8-9. The Trial Chamber erred in refusing to enable President Karadzic to interview Prosecution Rule 92 *bis* witnesses

In Brief

Ruling:	***Defence not given time to interview Prosecution 92 bis witnesses before admission of their evidence or to compel unwilling witnesses to be interviewed.***
Error:	***Failed to assist the Defence in the preparation of its case and violated principle of equality of arms.***
Impact:	***Evidence from these Rule 92 bis witnesses formed basis of conviction for Municipalities incidents and JCE findings.***

142. Before the evidence at trial began, the Trial Chamber admitted written evidence of 148 Prosecution witnesses without cross-examination under Rule 92 *bis*.[184] The Trial Chamber erred in refusing President Karadzic's requests[185] to interview these witnesses before deciding to admit their evidence.[186]

143. During the trial, the Defence interviewed some Prosecution Rule 92 *bis* witnesses. Supplemental statements from seven of them were admitted.[187] However, many Prosecution Rule 92 *bis* witnesses refused to be interviewed by the Defence. The Trial Chamber rejected President Karadzic's request to compel interviews with eight of those witnesses[188] as he had not established that information from these witnesses would

[184] *92 bis Decision—Sarajevo Municipalities; 92 bis Decision—Hostages; 92 bis Decision—Experts*; *92 bis Decision—Municipalities; 92 bis Decision—Srebrenica; 92 bis Decision—Delayed Disclosure*; *92 bis Decision—Sarajevo; 92 bis Decision—ARK*.
[185] *92 bis Extension Motion; 92 bis Response*.
[186] *92 bis Scheduling Order*, para. 4.
[187] D1 (Vincentius Egbers); D306 (Gunnar Westlund); D1271 (Anda Gotovac); D2247 (Witness KDZ612); D2257 (Witness KDZ407); D2262 (Mile Janjic); D2263 (Milorad Bircakovic); D2264 (Ostoja Stanisic).
[188] *92 bis Subpoena Motion*.

materially assist his case and that the information was not available through other witnesses.[189]

144. Where a Trial Chamber admits Prosecution evidence under Rule 92 *bis* without requiring the witness to appear for cross-examination, principles of fairness and equality of arms require that the Trial Chamber take all steps necessary, when requested, to facilitate the Defence to interview that witness.

145. Witnesses are the property of neither the Prosecution nor the Defence. Both sides must have an equal right to interview them.[190] A Chamber "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case…"[191] The Trial Chamber violated these principles when it refused to provide adequate time for Defence interviews before deciding the motions and to compel Prosecution's Rule 92 *bis* witnesses to submit to an interview by the Defence.

146. The seminal case concerning opposing party witnesses interviews is *Halilovic*. There, the Defence sought a subpoena to compel three Prosecution *viva voce* witnesses to be interviewed before their testimony. The ICTY Appeals Chamber first held that where the information will, in any event, be presented at trial during that witness's examination-in-chief, resort to a subpoena is unnecessary.[192] The Appeals Chamber then stated:

> Where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate expectation of interviewing such witness in order to obtain this information and thereby better prepare a case for its client. To deprive this expecting party of such ability would hand an unfair advantage to the opposing party, which would be able to block its opponent's ability to interview crucial witnesses simply by placing them on its witness list.[193]

It held that if that is found to be the case, then subpoenas should be issued.[194]

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[189] *92 bis Subpoena Decision*, paras. 14, 17.
[190] *Mrskic Interview Appeals Decision*, para. 15.
[191] *Tadic AJ*, para. 52.
[192] *Halilovic Subpoena Appeals Decision*, para. 10.
[193] *Id*, para. 12.
[194] *Id*, para. 15

147. For a Rule 92 *bis* witness whose evidence is admitted without cross-examination, the Defence never has the opportunity to question the witness at trial. Therefore, the Defence should be allowed to interview the witness without limitation.

148. In *Krstic*, the ICTY Appeals Chamber held that it was reasonable to issue a subpoena to require witnesses to be interviewed by the Defence in the situation where the Defence was unaware of the precise nature of the evidence the prospective witnesses can give and where the Defence was unable to obtain their cooperation by speaking to the witnesses.[195]

149. In that situation, the Defence need only show that a good chance exists that the prospective witness will be able to give information that will materially assist it in its case, on clearly identified relevant issues.[196] Such a showing had been made in *Krstic* where the witnesses had given statements to the Prosecution indicating that they had knowledge of issues relevant to the appeal.[197] The same situation existed in President Karadzic's case, where each Rule 92 *bis* witness had given a statement to the Prosecution and the Trial Chamber had found that they had knowledge of issues relevant to the trial by admitting their statements.

150. The imposition on the witnesses in submitting to an interview in their hometowns, after having been excused from giving live testimony in The Hague, would have been minimal. It would not have been disproportionate considering the impact on President Karadzic's fair trial rights resulting from his inability to interview these witnesses.

151. The Trial Chamber's actions also violated the principle of equality of arms, which goes to the heart of the fair trial guarantee.[198] Each witness submitted to an interview by the Prosecution during the 11-14 years that the Prosecution had to investigate the case. The Prosecution's power, time, and resources in conducting these interviews far exceeded that of the Defence. By refusing to facilitate Defence interviews of these same witnesses, the Trial Chamber failed to equalize the scales of justice.

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[195] *Krstic Subpoena Appeals Decision*, para. 9.
[196] *Id*, para. 10.
[197] *Id*, para. 18.
[198] *Tadic AJ*, para 44.

152. Any delay in the trial from allowing the Defence the time to conduct interviews stemmed from the exceedingly large number of witnesses whose evidence the Prosecution sought to admit under Rule 92 *bis*. If the delay was unacceptable, the proper remedy was to decline to admit the evidence, not to admit one-sided statements.

153. The Trial Chamber relied solely upon Rule 92 *bis* evidence when making findings on many facts.[199] These findings are not only unfair, but are unsafe, given the lack of opportunity provided to the Defence to interview the witnesses upon whose evidence those findings are based. The findings led to President Karadzic's conviction for Scheduled Incidents A7.1-A7.2, A10.1-A10.8, A12.1-A12.2, A12.4, A14.2, B1.1, B1.4, B2.1, B5.1, B10.1, B13.1, B13.3, B15.1, B15.4, B20.4, C1.2, C2.1, C7.2, C10.2, C15.1, C15.3, C20.3-C20.7, C21.3, C22.3, C22.5, C25.3, C27.3, C27.5, C27.6, D20, and E1.1, E8.1-E8.2, E13.1, deportation from Kozluk in Zvornik Municipality, as well as to inferring President Karadzic's intention to expel Bosnian Muslims and Croats from the municipalities from a finding of a pattern of crimes.

154. The Trial Chamber's admitting and relying on untested and one-sided Rule 92 *bis* evidence made the trial an unfair one. The remedy for this error should be a new, and fair, trial.

[199] *Judgement*, paras. 649-55, 659-60, 801, 804, [REDACTED],811, 813-17, 822, 853, [REDACTED], 953, 969-70, 1013-14, 1048, 1067-68, 1081-89, 1093, 1185-86, 1196, 1240, 1242, 1262, 1264-69, 1274, 1276, 1318-20, 1324-28, 1331-33, 1341-46, 1348-49, 1361, 1397, 1400, 1407, 1413-15, 1426, 1429, 1444-45, 1464, 1481, 1514-15, 1517-22, 1525-29, [REDACTED], 1619, 1634, [REDACTED], 1652-57, 1670-77, 1680-92, 1696-1715, 1760, 1762-64, 1780-81, 1799-1803, 1805, 1808-15, 1827-30, 1855-59, 1861, 1863-71, 1873-77, 1883, 1885, 1954-60, 1963-65, 1971, 1973, 2005-09, 2011, 2021-24, 2061, 2084-86, 2154-55, 2157-58, 2264, 5004, 5200, 5203, 5205, 5387-91, 5481, 5486.

10. The Trial Chamber erred in refusing to call Prosecution Rule 92 *bis* witness Ferid Spahic for cross-examination

In Brief

Ruling:	***Prosecution Rule 92 bis Witness Ferid Spahic would not be called for cross-examination because his exculpatory information was not based upon personal observation.***
Error:	***Denied President Karadzic the benefit of the witness' exculpatory information; witness' lack of personal knowledge went to weight, not admissibility***
Impact:	***Findings on Scheduled Incident A14.2 and control over paramilitaries made in the absence of Spahic's exculpatory evidence***

155. After having admitted Prosecution witness Ferid Spahic's written evidence,[200] the Trial Chamber denied President Karadzic's motion to call Spahic for cross-examination. Spahic had told the Defence team that he believed that President Karadzic had ordered that no one be killed in Visegrad, had tried to prevent paramilitary groups from committing crimes, and that if President Karadzic had authority over these people at that time, the 15 June 1992 killings would never have happened.[201]

[200] *92 bis Decision—Municipalities*, para. 47 (1)(a).
[201] *92 bis Motion—Spahic*, paras. 4-7.

Ferid Spahic

156. The Trial Chamber reasoned that the information "at best consist[s] of the witness' personal opinion, based on no first-hand knowledge, rather than evidence based on facts," and that President Karadzic would have the opportunity to elicit the information through other witnesses.[202]

157. No other witnesses testified to the events in Visegrad or the 15 June 1992 killings. Yet the Trial Chamber convicted President Karadzic of persecution and murder for Scheduled Incident A14.2 solely upon Spahic's evidence.[203] It also found, contrary to Spahic's proposed testimony, that President Karadzic had authority over and supported the paramilitary groups operating in the Eastern Bosnia area.[204]

158. The Trial Chamber erred in refusing to call Spahic for cross-examination because he lacked personal knowledge of President Karadzic's orders or control over those committing the crimes. Rule 92 *bis* (A)(ii)(c) 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." When determining whether to admit a statement without cross-examination, a Trial Chamber must consider whether the cross-examination in the prior proceedings adequately dealt with the issues relevant to the

[202] *92 bis Decision—Spahic*, para. 13.
[203] *Judgement*, paras. 1081-89, 1093.
[204] *Judgement*, para. 3236.

Defence in the current proceedings.[205] Spahic's evidence in the prior proceedings contained no reference to President Karadzic's orders or control over those who committed crimes in Visegrad.

159. Throughout the trial, the Trial Chamber admitted evidence about which witnesses had no direct personal knowledge, but was derived from observing the surrounding events. For example, it admitted Harland's evidence that President Karadzic pulled the spigot of terror in Sarajevo,[206] and Okun's testimony that the movement of the population couldn't come about except by forcible means.[207]

160. By refusing to admit, and then weigh, Spahic's exculpatory testimony, the Trial Chamber abused its discretion and deprived President Karadzic of evidence that created a reasonable doubt about his responsibility for Scheduled Incident A14.2 and control over paramilitaries.

161. The Trial Chamber's approach stands in contrast to that adopted in *Mladic.* At the Prosecution's request, the Trial Chamber admitted supplemental Rule 92 *bis* evidence offered by the non-calling party, and treated the portions of that evidence dealing with the opinions and conclusions as matters going to weight, and not admissibility.[208]

162. The Trial Chamber's refusal to call Ferid Spahic for cross-examination was part of a pattern of double standards it employed throughout the trial when admitting Prosecution evidence and excluding Defence evidence.[209] This resulted in a one-sided, and unfair trial. The Appeals Chamber should order a new, and fair, trial.

[205] *Sikirica 92 bis Decision*, para. 4.
[206] P820, para.39.
[207] P776, pp. 211-12.
[208] *Mladic 92 bis Decision*, paras. 6, 9.
[209] See Grounds 11-12, 18.

11-12. The Trial Chamber erred in excluding Defence Rule 92 *bis* evidence

In Brief

Ruling:	***Request to convert twelve Defence viva voce witnesses to Rule 92 bis witnesses denied as untimely***
Error:	***Trial Chamber employed a double standard, was unreasonable in requiring Defence to foresee conditions rendering witnesses unavailable, and failed to consider lack of prejudice***
Impact:	***Excluded evidence was relevant to key findings on Sarajevo and Municipalities crimes.***

Introduction

163. The Trial Chamber refused to admit the written evidence of four Sarajevo witnesses who had refused to testify after being denied protective measures.[210] The Chamber reasoned that (i) the Defence should have anticipated their refusal to testify without protective measures and moved to admit their evidence before the beginning of its case; and (ii) the witnesses were unlikely to verify their statements.[211]

164. The Trial Chamber also refused to admit the written evidence of eight municipalities witnesses,[212] reasoning that (i) President Karadzic should have anticipated that the witnesses would have refused to testify and moved to admit their evidence before the beginning of his case,[213] or for Count One witnesses, should have moved to admit their evidence when filing his supplemental witness list;[214] and (ii) the witnesses who refused to testify were unlikely to verify their statements.[215]

[210] Milos Jovanovic (KW194), Pavle Marjanovic (KW299), Goran Radijelac (KW402), and Dragan Vucetic (KW543)
[211] *92 bis Decision—Defence Sarajevo,* paras. 9, 11.
[212] Milos Tomovic, Ranko Mijic, Nikola Tomasevic, Dragan Kalinic, Srboljub Jovicinac, Bozidar Popovic, Predrag Banovic, Mladen Zoric
[213] *92 bis Decision--Defence,* paras. 43, 60-61
[214] *Id*, paras. 62, 65-66, pertaining to Predrag Banovic
[215] *Id*, paras. 44, 68.

165. The Trial Chamber erred in (i) failing to consider the lack of prejudice to the Prosecution; (ii) requiring President Karadzic to have anticipated that eight of the witnesses would eventually refuse to testify; (iii) speculating that witnesses would refuse to verify their statements; and (iv) failing to account for the reinstatement of Count One. As a result, the Trial Chamber violated President Karadzic's right to a fair trial and his right to equality of arms.

Relevant procedural background

166. On 26 April 2012, the Trial Chamber issued a scheduling order requiring President Karadzic to file Rule 92 *bis* motions by 27 August 2012.[216]

167. On 27 August 2012, President Karadzic informed the Trial Chamber that he preferred to present his witnesses *viva voce* to maximize the weight of their evidence. He reserved the right to file Rule 92 *bis* motions after the deadline if the Trial Chamber imposed time limitations, or he learned that a witness was not readily available to testify in person.[217]

168. On 1 October 2013, following the Trial Chamber's refusal to grant protective measures to four Sarajevo-component witnesses,[218] and their subsequent refusal to testify *viva voce*, President Karadzic moved to admit their statements under Rule 92 *bis*.[219]

169. On 6 November 2013, the Trial Chamber denied the motion. It held that President Karadzic should have anticipated the Trial Chamber would deny protective measures and filed his motion before the deadline. It also held that it the witnesses were unlikely to agree to verify their statements.[220]

170. Between 29 January and 14 February 2014, following the Trial Chamber's refusal to issue subpoenas to compel the testimony of four municipalities witnesses,[221] its refusal to allow a witness to testify by video link,[222] its refusal to assign counsel to a witness,[223] another witness' refusal to testify without a safe conduct order, and the need to

[216] *Scheduling Order—Defence Case*, para. 25.
[217] *65 ter Submission*, paras. 11-12.
[218] *Protective Measures Decision—Defence I*; *Protective Measures Decision--KW194*.
[219] *92 bis Motion—Sarajevo*.
[220] *92 bis Decision—Defence Sarajevo*.
[221] *Subpoena Decision—Mijic*; *Subpoena Decision—Tomovic*; *Subpoena Decision--Tomasevic*; *Subpoena Decision—Kalinic*.
[222] *Video-Link Decision—Jovicinac*.
[223] *Banovic Decision*.

have additional witnesses to defend against Count One, President Karadzic moved to admit their evidence under Rule 92 *bis*.[224]

171. On 18 March 2014, the Trial Chamber denied the motions because they were not filed by the applicable deadlines and/or the witnesses were unlikely to agree to verify their statements.[225]

172. In doing so, the Trial Chamber committed a number of errors.

The errors that undermine the exclusion of evidence

173. First, the Trial Chamber failed to consider whether the timing of the requests had prejudiced the Prosecution. The Prosecution never claimed there was prejudice, and none can be discerned. During trial, on 82 occasions, the Prosecution disclosed Rule 66(A)(ii) and Rule 68 material well after the deadlines set by the Trial Chamber. On each occasion, the Trial Chamber required President Karadzic to demonstrate prejudice before considering a remedy. Ultimately, no Prosecution evidence was excluded.

174. A Trial Chamber has "abused its discretion warranting intervention" when it applies a double standard to evidence offered by the Prosecution and the Defence.[226] By excluding the evidence of these 12 witnesses, the Trial Chamber imposed a double standard that violated the Article 21(4)(e)'s guarantee for an accused to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him, as well as President Karadzic's right to a fair trial and to equality of arms.[227]

175. The principles applicable when varying a witness list demonstrate the Trial Chamber's error.[228] If 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.

176. Second, the Trial Chamber erred in requiring President Karadzic to anticipate that the witnesses would eventually refuse to testify. This was not only unreasonable, but was inconsistent with the Trial Chamber's own established practice. When a Prosecution

[224] *92 bis Motion--Tomovic*; *92 bis Motion--Mijic*; *92 bis Motion—Tomasevic; 92 bis Motion--Kalinic*; *92 bis Motion--Banovic*; *92 bis Motion—Popovic; 92 bis Motion—Jovicinac; 92 bis Motion—Zoric*.
[225] *92 bis Decision—Defence*.
[226] *Prlic Evidence Appeals Decision*, para. 44.
[227] *Nahimana AJ*, para. 251.
[228] *Milutinovic Decision--Wesley Clark*, para. 5; *Milutinovic Decision--Phillips & Byrnes*, paras. 7, 18; *Limaj 92 bis Decision*, paras. 4-5; *Nyiramasuhuko Variance Decision*, para. 18.

witness refused to testify, the Trial Chamber admitted his testimony under Rule 92 *bis* despite the motion being filed after the deadline.[229] Applying a different standard to President Karadzic again violated his right to a fair trial and to equality of arms.

177. The Trial Chamber's decision also required clairvoyance that was simply unreasonable. For the Sarajevo witnesses, it required President Karadzic to anticipate 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.[230] For the municipalities witnesses, it required President Karadzic to anticipate that (i) the witnesses would refuse to testify; and (ii) the Trial Chamber would refuse to subpoena four of them, refuse a video link for another (who had testified by video link in an earlier trial), and refuse to assign counsel to another witness.

178. The Trial Chamber was also unreasonable in retroactively requiring President Karadzic to have interviewed all potential Defence witnesses between the end of the Prosecution case on 25 May 2012 and the 27 August 2012 deadline for the filing Rule 92 *bis* motions.[231] President Karadzic indicated that Defence witness interviews would take until March 2013. He based this timeframe on the specific and realistic estimate of 40 witness interviews per month.[232] The Trial Chamber set 27 August as the deadline to file Rule 92 *bis* motions; it never set a deadline for President Karadzic to complete his defence witness interviews.[233] Given the large number of witnesses required to answer the Prosecution's case and rebut the 2379 adjudicated facts, a 27 August deadline would have been impossible.

179. In addition, a critical factor in deciding whether to offer written evidence is whether it is cumulative of other evidence presented at the trial.[234] The Trial Chamber was unreasonable in failing to give President Karadzic the flexibility to offer written evidence from witnesses on his list after seeing which evidence he had managed to bring, as well as the number of hours he had used in the presentation of his Defence case. Moreover, the Trial Chamber repeatedly instructed President Karadzic to seek subpoenas only when

[229] *92 bis Decision—Tupajic*.
[230] *92 bis Decision—Defence Sarajevo*, para. 9.
[231] *Id*, para. 9; *92 bis Decision--Defence*, paras. 43, 60-61.
[232] *Defence Case Submission*, para. 14.
[233] *Scheduling Order-Defence Case*, paras. 22, 25.
[234] Rule 92 bis (A)(i)(a).

necessary.[235] He cannot then be disadvantaged for seeking to admit the written evidence of some of those witnesses, rather than requesting a subpoena for their appearance.[236]

180. Third, the Trial Chamber erred in speculating that a number of the Defence witnesses in question were unlikely to verify their statements.[237] Its dismissal of President Karadzic's request on this basis was inconsistent with its prior practice of allowing Prosecution witness statements to be verified after-the-fact.[238] It was also incompatible with its obligation to "provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case".[239]

181. This obligation could have easily been met. The Trial Chamber could have provisionally admitted the Defence witness statements, allowing the Registry to assign a Presiding Officer to determine each witness' willingness to verify his or her statement. Faced with a formal request by a Tribunal official, and with the knowledge that they would not have to travel to The Hague and give public testimony, the witnesses may well have done so. If they refused, they could have been compelled under Rule 54.[240]

182. Fourth, the Trial Chamber erred in failing to adequately consider the impact of Count One's reinstatement during the Defence case. At the original deadline for filing Rule 92 *bis* motions, the trial was proceeding without Count One. After that charge was reinstated, the Trial Chamber never imposed a deadline for filing Rule 92 *bis* motions for new witnesses.[241]

183. When he filed his supplemental witness list, President Karadzic requested an additional 100 hours to defend against Count One.[242] The Trial Chamber authorised 25.[243] Therefore, President Karadzic had no notice at the time he filed his supplemental witness list that he would have to present some evidence in writing.

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[235] See, *for example*. *Subpoena Decision—Mijic*, para. 11; *Subpoena Decision—Abdic*, para. 14; *Subpoena Decision—Ambassador Hall*, para. 21.
[236] Witnesses Tomovic, Banovic, Jovicinac, Popovic, and Zoric.
[237] *92 bis Decision--Defence Sarajevo*, para. 11; *92 bis Decision—Defence*, paras. 44, 68.
[238] *92 bis Decision—Municipalities*, para. 47(1)(c); *92 bis Decision--Sarajevo*, para. 76(C); *92 bis Decision--Srebrenica*, para. 67(B)(4); *92 bis Decision–Hostages*, para. 30.
[239] *Tadic AJ*, para. 52.
[240] *Chea and Samphan AJ*, paras. 147-48.
[241] *Severance Decision*, para. 25(d).
[242] *65 ter Supplemental Submission*, para. 2.
[243] *Defence Case Extension Decision*, para. 12.

184. The Trial Chamber was unreasonable when it retroactively held that the deadline for the supplemental witness list was also a deadline for Rule 92 *bis* motions and in reusing to admit written statements of witnesses from municipalities in which genocide was alleged.[244]

The affected evidence

185. Excluding these 12 Defence witnesses not only denied President Karadzic a fair trial and equality of arms, but unfairly excluded evidence that was contrary to the Trial Chamber's findings.[245] Significantly, the Trial Chamber relied on secondhand evidence of the words and actions of a number of the excluded witnesses to make findings adverse to President Karadzic. Their excluded evidence cast doubt on these findings.

186. For example, the Trial Chamber excluded evidence from **Milos Tomovic**, 1st Battalion Commander in Foca, that calls several findings into question.[246] Tomovic stated that war in Foca broke out after Bosnian Muslims shelled and torched Serb areas;[247] that the Serbs did not shell Muslim areas with heavy artillery because they did not possess it;[248] that no one was expelled; and that many Muslims stayed in Foca until the end of the war because the local authorities had guaranteed their safety.[249] Tomovic's evidence also included information that the Serbian forces in Foca were instructed to act according to the Geneva Conventions;[250] that Serb authorities did not tolerate paramilitaries;[251] and that the authorities did everything they could to prevent looting and destruction of property, regardless of the owner's nationality.[252]

187. Tomovic further stated that it was not the Muslim civilians who sought refuge in the JNA barracks in Ustikolina, but the heavily armed Green Berets who attacked the JNA barracks to seize weapons and use them against Serbs.[253] He further said that the Aladza

[244] *92 bis Decision--Defence*, paras. 62,65-66 pertaining to Banovic.
[245] *Judgement*, paras. 927-28, 934 (Tomovic), 1410, 1429-30 (Popovic), 1805 (Banovic), 1913 (Zoric), 1763-64, 1774, 2470, 2527 (Mijic), 2870-71, 2895, 2898 (Kalinic), 3414-16, 3425 (Tomasevic, Jovincac), 4107-08 (Radijelac), 4497, 4648, 4650 (Jovanovic, Marjanovic, Radijelac, Vucetic).
[246] *Judgement*, paras. 855, 857, 859, 861-862, 925, 927-31, 933-34.
[247] 1D26391, paras. 7, 10, 23 *versus Judgement*, paras. 855, 857.
[248] 1D26391, para. 9 *versus Judgement*, para. 855.
[249] 1D26391, paras. 5-6 *versus Judgement*, paras. 859, 861-62, 929, 931, 933-34.
[250] 1D26391, para. 16 *versus Judgement*, paras. 859, 861-62, 929, 931, 933-34.
[251] 1D26391, para. 22.
[252] 1D26391, para. 24 *versus Judgement*, paras. 857, 859, 861.
[253] 1D26391, paras. 13-14 *versus Judgement*, para. 930.

mosque and other mosques in Foca were abused for military purposes by Muslims forces and were destroyed during the fighting, after Serbs had suffered casualties from those positions.[254]

188. Having excluded this evidence, the Trial Chamber then concluded that although "the Accused argued that certain mosques were used for military purposes in Foca…this evidence was unreliable and further that *there was no other indication* that the mosques were used for military purposes."[255] The Trial Chamber had previously excluded precisely that other indication.

189. **Bozidar Popovic** was Manjaca camp commander. After excluding his evidence, the Trial Chamber referred to Popovic fourteen times in the judgement, finding *inter alia* that he ordered detainee death certificates falsified,[256] and that he told the released detainees if they were ever captured, they would be killed instantly.[257]

190. However, contrary to the Trial Chamber's findings, Popovic stated that that he tried to regulate the work of the camp's security organs with full respect for international and humanitarian law;[258] that the Manjaca authorities regularly received orders, instructions, appeals and guidelines from RS State organs to respect IHL, to treat prisoners humanely, and to cooperate with the ICRC;[259] that there had been no plan, order, or instruction to subject prisoners to mistreatment;[260] and that the task of Manjaca's security officers was to identify persons under 18 or over 60, or others arrested without good cause, to immediately release them.[261]

191. Popovic also stated that the authorities never hid the existence camp's existence; that humanitarian organisations and news media were given frequent and unhindered access to the camp from the very beginning, even though the media deliberately presented a false picture of the situation in Manjaca;[262] that during their visits, ICRC delegates met with prisoners without the presence of guards; that prisoners sent and received letters

[254] 1D26391, paras. 12, 25-26 *versus Judgement,* paras. 925, 927-28.
[255] *Judgement,* para. 2554 (emphasis added).
[256] *Judgement,* paras. 1426 and 1429.
[257] *Judgement,* para. 1407.
[258] 1D9596, para. 7 *versus Judgement.* paras. 1395-96, 1399, 1410.
[259] 1D9596, paras. 13, 48 *versus Judgement.* paras. 1405, 1410.
[260] 1D9596, para. 14 *versus Judgement.* para. 1410.
[261] 1D9596, paras. 17-19 *versus Judgement,* paras. 1379-80.
[262] 1D9596, paras. 11-12, 20-21 *versus Judgement,* paras. 1402, 1404.

freely;[263] that crimes were reported by camp personnel, and persons responsible for beating and killing detainees were prosecuted;[264] that more than 8,000 medical examinations were conducted in dispensary staffed by detained doctors and other medical staff;[265] and that there was no policy to deny medicine to detainees.[266]

192. Had the Trial Chamber not excluded his evidence, Popovic could have also rebutted or corrected adjudicated facts 567,[267] 568,[268] 569,[269] 572,[270] 573,[271] 576,[272] and 593.[273]

193. Similarly, the Trial Chamber excluded the evidence of **Predrag Banovic**, a Keraterm Camp guard, who had information that cast doubt upon several findings. According to Banovic, the conflict in Prijedor began after the Muslim paramilitaries killed three Serbian soldiers who were carrying food to Ljubija in the Hambarine sector;[274] and Keraterm was established to detain military-aged men who posed a threat to Serbian civilians.[275]

194. Banovic also had information that the guards never received instructions from their superiors to mistreat detainees, that his commanders did not approve maltreating detainees, which usually occurred in their absence, and that they could stop large groups that came from outside and abused detainees.[276] His excluded evidence could have corroborated other Defence evidence that Scheduled Incident B.15.1 resulted from an escape attempt by detainees, which the Chamber dismissed as speculative and hearsay.[277]

[263] 1D9596, paras. 23 *versus Judgement*, paras. 1391, 1409.
[264] 1D9596, paras. 45-46 *versus Judgement*, paras. 1395, 1399, 1410, 1427-28, 1430.
[265] 1D9596, paras. 24 *versus Judgement*, para. 1390.
[266] 1D9596, para. 39 *versus Judgement*, paras. 1390, 1410.
[267] 1D9596, para. 35 *versus Judgement*, para. 1392.
[268] 1D9596, para. 36 *versus Judgement*, para. 1393.
[269] 1D9596, para. 37 *versus Judgement*, para. 1387.
[270] 1D9596, para. 39 *versus Judgement*, para. 1390.
[271] 1D9596, paras. 40-46 *versus Judgement*, para. 1399.
[272] 1D9596, paras. 40-46 *versus Judgement*, para. 1399.
[273] 1D9596, para. 29 *versus Judgement*, para. 1426.
[274] 1D9620, para. 5 *versus Judgement*, para. 1665.
[275] 1D9620, para. 7 *versus Judgement*, paras. 1794-95.
[276] 1D9620, para. 9.
[277] *Judgement*, para. 1813.

195. Finally, Banovic had information to rebut or correct adjudicated facts 1196,[278] 1197,[279] 1199,[280] 1200,[281] 1201,[282] 1202,[283] 1203,[284] 1205,[285] 1213,[286] 1214,[287] and 1217.[288]

196. The Trial Chamber also excluded evidence of **Mladen Zoric**, the local ICRC representative in Prijedor. Zoric stated that he provided humanitarian aid, food, clothes and medicines to Trnopolje,[289] which was an open camp where non-Serbs took shelter for their own safety;[290] that no inhumane conduct or human rights violation took place there; [291] and that President Karadzic never supported and/or facilitated withholding information or conveying false information to the international community, NGOs and the media about alleged crimes against non-Serbs in Prijedor, investigation centres and the Trnopolje camp.[292]

197. Significantly, Zoric also stated that he never heard that non-Serbs were under pressure to move out of Prijedor.[293] After excluding this evidence, the Trial Chamber then discussed the Prijedor ICRC's role in the population's movement.[294]

198. The Trial Chamber also erred in excluding the evidence of **Ranko Mijic**, former Prijedor Police Department Criminal Department Chief, who was in charge of police investigators at Omarska Camp. According to Mijic, his investigators conducted interrogations at Omarska to ascertain the detainee's involvement in crimes and to submit criminal reports against those responsible.[295] These crimes included the murder of a Serb

[278] 1D9620, paras. 8, 11 *versus Judgement*, para. 1794.
[279] 1D9620, para. 12 *versus Judgement*, para. 1793.
[280] 1D9620, para. 13 *versus Judgement*, paras. 1796-97.
[281] 1D9620, para. 14 *versus Judgement*, para. 1797.
[282] 1D9620, para. 15 *versus Judgement*, para. 1797.
[283] 1D9620, para. 16 *versus Judgement*, para. 1798.
[284] 1D9620, para. 17 *versus Judgement*, para. 1798.
[285] 1D9620, para 18 *versus Judgement*, para 1799.
[286] 1D9620, para. 19 *versus Judgement*, para. 1803.
[287] 1D9620, para. 20 *versus Judgement*, para. 1802.
[288] 1D9620, para. 21 *versus Judgement*, para. 1808.
[289] 1D26796, paras. 5-6 *versus Judgement*, paras. 1822-23.
[290] 1D26796, para. 7 *versus Judgement*, para. 1819.
[291] 1D26796, para. 6 *versus Judgement*, paras. 1824-32.
[292] 1D26796, para. 9.
[293] 1D26796, para. 11 *versus Judgement*, paras. 1897-1913.
[294] *Judgement*, paras. 1901, 1907.
[295] 1D9634, pp. 18, 22, 56 *versus Judgement*, para. 1749.

policeman, the attack on the JNA members at the Hambarine checkpoint, the attack on the military column in Jakupovici near Kozarac, and the attack on Prijedor town itself.[296]

199. According to Mijic, many people were released from Omarska after being cleared by his investigators;[297] almost every morning he warned the interrogators not to mistreat anyone;[298] he warned the camp commander to stop guards from physically abusing prisoners, but the guards were so out of control that even the camp commander had no authority over them;[299] he never saw guards carrying baseball bats or metal pipes, and was unaware of any prisoners dying during the interrogations;[300] no one was tied up during interrogation; that no objects were used during interrogations; and he never saw blood stains on the wall or on the floor in the interrogation rooms.[301]

200. The Trial Chamber also excluded the evidence of former RS Minister of Health **Dragan Kalinic**. Kalinic stated that the Serbs accepted the Cutileiro peace plan to avoid war even though it envisaged Bosnia as an independent state;[302] that it was not the position of the Serbian leadership that they couldn't live with Muslims and Croats;[303] that the population moved because of war activities; and the authorities or the government never ethnically cleansed non-Serbs in an organised way.[304]

201. Significantly, according to Kalinic, in his speech in the Assembly in May 1992 he was referring to the BiH Army and Muslim paramilitary units in Sarajevo, as well as Izetbegovic's war mongering, and not calling for crimes to be committed against Muslims.[305]

202. The Trial Chamber also excluded the evidence of VRS Military Court Judge **Nikola Tomasevic**. Tomasevic had information that there was no national policy or pressure from State structures not to enforce the law when the victims of crimes were non-

[296] 1D9634, pp. 16-17, 22, 46 *versus Judgement,* paras. 1613, 1616, 1665.
[297] 1D9634, pp. 27, 46 *versus Judgement,* para. 1749.
[298] 1D9634, pp. 31-32, 48 *versus Judgement,* paras. 1757, 1763-64, 1774.
[299] 1D9634, pp. 21-22, 32-34 *versus Judgement,* paras 1757, 1763-64, 1774.
[300] 1D9634, p. 36 *versus Judgement,* paras. 1763-64, 1774.
[301] 1D9634, p. 53 *versus Judgement,* paras. 1763-64, 1774.
[302] 1D9199, pp. 6, 70 *versus Judgement,* paras. 2654, 2670, 2707–15, 2839–56, 2896, 2898, 2941–51, 2991, 3435, 3436, 3463, 3477, 3486.
[303] 1D9199, pp. 47-48 *versus Judgement,* paras. 2670-72, 2708, 2711, 2716-73, 2839–56, 2895-96, 2898, 2948, 3435, 3439-40, 3463, 3485-87.
[304] 1D9199, pp. 39, 44, 46-47 *versus Judgement,* paras. 2846, 2850, 2852, 3363, 3444-45, 3463.
[305] 1D9199, pp. 74, 76-77 *versus Judgement,* paras. 2870-71.

Serbs; that war crimes were a priority,[306] and that many Serbs were convicted for crimes against non-Serbs.[307]

203. Significantly, Tomasevic stated that decisions he made to release persons accused of murders of non-Serbs were not based upon any policy to condone crimes;[308] that his decision to release two accused in a prosecution for killings in Velagici on 1 June 1992 was based on the Prosecutor's indication that it was not possible to proceed against the two accused while ten other accused were at large;[309] and that his decision to release Miladin and Obrenko Sugic for murders of Bosnian Muslims was based upon their lack of mental capacity.[310]

204. The Chamber further erred in excluding the evidence of former Military Prosecutor **Srboljub Jovicinac**. Jovicinac stated that no civilian or military authority exerted influence on the Prosecutor's Office or asked that criminal reports be filed based on ethnic or religious affiliation;[311] that the Military Prosecutor never discriminated based on religious or ethnic affiliation of either the accused or the victims; and that criminal reports were filed against Serbs charged with crimes against non-Serbs.[312]

205. Former SRK artillery battalion commander **Goran Radijelac** stated that his unit strictly respected each ceasefire and that General Morillon congratulated them for their proper and disciplined conduct;[313] that ABiH fired from civilian features, such as residential buildings;[314] that his superior command ordered them not to shell civilian targets on several occasions; and that his unit strictly adhered to those orders.[315] His evidence addressed the allegations that the SRK was responsible for the Scheduled Incident G-5, and that the modified air bomb in the Scheduled Incident G-13 was fired at a legitimate military target.[316]

[306] 1D9195, p. 32 *versus Judgement,* paras. 3413-15, 3422, 3425.
[307] 1D9195, pp. 63, 65 *versus Judgement,* paras. 3413-15, 3422, 3425.
[308] 1D9195, pp. 49-50, 60 *versus Judgement,* paras, 3412, 3416, 3425, 3494, 3501.
[309] 1D9195, pp. 59-60 *versus Judgement,* paras. 3413-15, 3425.
[310] 1D9195, pp. 72-74 *versus Judgement,* paras. 3413-15, 3425.
[311] 1D9686, paras. 10, 12, 20 *versus Judgement,* paras. 3412, 3416, 3425, 3494, 3501.
[312] 1D9686, paras. 12, 20 *versus Judgement,* paras. 3413-15, 3422, 3425.
[313] 1D6188, para. 11 *versus Judgement,* paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[314] 1D6188, paras. 13, 15 *versus Judgement,* paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[315] 1D6188, para. 16 *versus Judgement,* paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[316] 1D6188, paras 18-19 *versus Judgement* paras 4088-94, 4103-09, 4445-48, 4451-57.

206. Former Mrkovici policeman and SRK mortar squad signalsman **Pavle Marjanovic** stated that his unit fired only at trenches on the confrontation line and that neither members of his unit nor the superior command intended to target or terrorise civilians;[317] that his unit was never given an oral or written order from the superior command or the civilian authorities to attack civilians;[318] that orders and instructions from the superior command were to only open fire on visible targets and in response to enemy fire;[319] and that no mortar attacks against civilian settlements took place.[320]

207. Former SRK armoured battalion company commander **Milos Jovanovic** stated that the Bosnian Muslim forces in Sarajevo had about 80,000 well-armed soldiers; that the opposing Muslim units targeted Serb areas with artillery and mortars from residential areas; that he never received an order from his superior officer to fire at civilian targets, nor did he issue orders to his subordinates to target civilians and civilian objects.[321] He stated that he his troops complied with IHL, but the Muslims carried out attacks almost daily and portrayed their killed soldiers as civilians.[322]

208. SRK 4th Infantry Battalion Commander **Dragan Vucetic** stated that the ABiH fired from civilian buildings, and falsely claimed their own acts as Serb attacks on civilians in Sarajevo;[323] that the VRS never opened fire on the trams because of civilians there;[324] that neither he nor his subordinates targeted civilians; and that he was never ordered to fire at civilians, nor did he issue any such orders.[325]

Conclusion

209. This was not peripheral evidence. It was not excluded for its irrelevance, or its cumulative nature, or its insignificance to the charges. Its exclusion was on a far more

[317] 1D28689, para. 11 *versus Judgement*, paras. 3849-51, 3855-57, 3859-60, 3862-63, 3865-66, 3874-77, 3881-84, 3887-90, 3968-73, 4497-4502, 4579-87, 4596-4606.
[318] 1D28689, para. 13 *versus Judgement*, paras. 3849-51, 3855-57, 3859-60, 3862-63, 3865-66, 3874-77, 3881-84, 3887-90, 3968-73, 4497-4502, 4579-87, 4596-4606.
[319] 1D28689, para. 14 *versus Judgement*, paras. 3849-51, 3855-57, 3859-60, 3862-63, 3865-66, 3874-77, 3881-84, 3887-90, 3968-73, 4497-4502, 4579-87, 4596-4606.
[320] 1D28689, para. 16 *versus Judgement*, paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[321] 1D21121, paras. 4, 7, 17 *versus Judgement*, paras. 3968-73, 4497-4502, 4579-87, 4596-4606
[322] 1D21121, paras. 13-14, 19 *versus Judgement*, paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[323] 1D26799, paras. 4, 6-7, 9-10, 14-16, 24, 30 *versus Judgement*, paras. 3968-73, 4497-4502, 4579-87, 4596-4606.
[324] 1D26799, para. 11 *versus Judgement*, paras 3645-46, 3670-76, 3681-84, 3686-96, 3701-04.
[325] 1D26799, paras. 19-20, 23 *versus Judgement*, paras. 3968-73, 4497-4502, 4579-87, 4596-4606.

technical basis, and an erroneous one at that. The result was that the Trial Chamber closed its eyes to relevant evidence that casts doubt on numerous adverse findings.

210. The remedy should be to order a new, fair trial, at which President Karadzic would have the opportunity to present a full defence to the charges against him.

13. The Trial Chamber erred in refusing to admit written evidence from Pero Rendic and Branko Basara

In Brief

Ruling:	***Refused to admit evidence of two Defence witnesses under Rule 92 bis because the witnesses were not shown to be unavailable.***
Error:	***Availability is irrelevant under Rule 92 bis unless the witnesses are to be called for cross-examination.***
Impact:	***Excluded evidence that was contrary to findings on Omarska and Sanski Most events.***

211. The Trial Chamber erred in refusing to admit evidence of Pero Rendic and Branko Basara under Rule 92 *bis* and by requiring that President Karadzic demonstrate that the witnesses were unavailable.

Branko Basara

212. The Trial Chamber declined to admit the evidence because the witnesses, who had illnesses, but whose testimony was offered under Rule 92 *bis*, were not shown to be

unavailable to testify.[326] Since their evidence did not go to the acts and conduct of the accused, the Trial Chamber erred in refusing to admit it on the grounds that the witnesses were unavailable. The availability or unavailability of a witness whose evidence is offered under Rule 92 *bis* is irrelevant unless the Chamber determines that the witness should be called for cross-examination.

213. In *Nizeyimana*, the Prosecution sought to admit a witness' statement under Rule 92 *bis*. The Trial Chamber denied the motion, holding, as our Trial Chamber did here, that the Prosecution had not submitted a satisfactory reason for the witness' inability to testify in person. The Appeals Chamber found this was an error, as nothing in Rule 92 *bis* requires that the witness was unavailable.[327]

214. The Trial Chamber in *Tolimir* confronted a similar situation. The Prosecution sought to admit prior testimony under Rule 92 *quater*. The Trial Chamber initially denied the motion because the witness was not shown to be unavailable. However, when the Prosecution removed any references to the acts and conduct of the accused, the Trial Chamber reconsidered its decision and admitted the evidence under Rule 92 *bis*.[328] The witness' availability was no longer an issue.

215. In *Mladic*, the Prosecution first sought to admit testimony under Rule 92 *quater*. It later re-filed its motion under Rule 92 *bis* and withdrew its Rule 92 *quater* request, as the evidence did not go to the acts and conduct of the accused. Again, the Trial Chamber admitted the testimony without regard to the witness' availability.[329]

216. ICTY Judges have consistently looked to the substance of evidence offered under Rule 92 *bis*, rather than the witness' availability. Indeed, the Trial Chamber in this case admitted the evidence of 148 Prosecution witnesses without requiring the Prosecution to make any showing concerning the witness' availability.[330]

217. The double standard employed by the Trial Chamber in admitting evidence of 148 Prosecution Rule 92 *bis* witnesses without any showing of unavailability, while

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[326] *92 bis Decision—Rendic*, para. 9; *92 bis Decision—Basara*, paras 4, 6.
[327] *Nizeyimana, 92 bis Appeals Decision*, paras. 26, 29-30.
[328] *Tolimir 92 bis Decision*, paras. 20, 23.
[329] *Mladic 92 bis Decision—OTP*, paras. 10-13.
[330] *92 bis Decision—Sarajevo Municipalities; 92 bis Decision—Hostages; 92 bis Decision—Experts*; *92 bis Decision—Municipalities; 92 bis Decision—Srebrenica; 92 bis Decision--Delayed Disclosure*; *92 bis Decision—Sarajevo; 92 bis Decision—ARK*.

refusing to admit evidence of two Defence witnesses because they were not shown to be unavailable, is emblematic of the unfairness of the trial.

218. The exclusion of this evidence also made several findings of the Trial Chamber unsafe.

219. Rendic, former 43rd Motorised Brigade logistics chief, who prepared food for the soldiers and detainees in Omarska, stated that he always prepared the same meal for Army members and detainees;[331] that supply difficulties did not affect the relative provision of food to soldiers versus detainees;[332] that thermoses were the same for the Army and detainees, and were always washed and sterilized before the food was sent; [333] that the same water was used for everyone;[334] and that difficult conditions in Omarska and Prijedor were not created intentionally, but that there was a general shortage of basic food and hygiene supplies.[335]

220. The Chamber excluded the evidence of Branko Basara, and then referred to his conduct in the judgement twelve times, mostly in a context adverse to President Karadzic. Colonel Basara, former 6th Krajina Brigade Commander, stated that in April 1992, the parties agreed to carry out divisions in Sanski Most municipality, including the division of the MUP;[336] that around 400 Muslim Green Berets had a training centre near Sanski Most; that Muslim forces were present in Mahala and Hrustovo;[337] and that most of the 6th Krajina Brigade behaved humanely towards captured and wounded enemy, as well as the civilian population, as required by IHL.[338]

221. Basara also stated that after the incident in Hrustovo, those who killed Muslim civilians were arrested and turned over to the police.[339] Another incident happened at Vrhpolje Bridge, where a paramilitary unit intercepted civilians travelling to Sanski Most and killed some 18 people who had not given up their weapons. On that occasion the perpetrators run into the forest before the police or the army could apprehend them.[340]

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[331] 1D9537, pp. 6, 14 *versus Judgement*, paras. 1754-55, 1774.
[332] 1D9537, p. 15 *versus Judgement*, paras. 1754-55, 1774.
[333] 1D9537, pp. 16-17 *versus Judgement*, paras. 1754-55, 1774.
[334] 1D9537, p. 39 *versus Judgement*, paras. 1754-55, 1774.
[335] 1D9537, pp. 20-22 *versus Judgement*, paras. 1754-55, 1774.
[336] 65 *ter* #22059, pp. 24-27 *versus Judgement*, paras. 1930-40.
[337] 65 *ter* #22059, pp. 111-114 *versus Judgement*, paras. 1924, 1944-46.
[338] 65 *ter* #22059, p. 40 *versus Judgement*, paras. 1924, 1926-27, 1945, 1951. 2020-24, 2039.
[339] 65 *ter* #22059, pp. 40-41 *versus Judgement*, paras. 1946, 1963-65.
[340] 65 *ter* #22059, pp. 41-45 *versus Judgement*, paras. 1952-60.

According to Basara, the shelling of Mahala occurred after two mortars opened fire at the units that had started to confiscate illegal weapons, that the population was given three hours to leave Mahala, that nobody who did not wish to fight was harmed and that the units withdrew from Mahala after combat operations.[341] Finally, Basara stated that he ordered people to guard the mosques, but during the night armed groups would disarm the guards and knock down the mosques, and that he did everything in his power to prevent paramilitary groups from terrorising the population.[342]

222. The Appeals Chamber should order a new, and fair, trial at which the evidence of Rendic and Basara could be admitted.

[341] 65 *ter* #22059, pp. 48-51 *versus Judgement*, paras. 1944-45, 1948.
[342] 65 *ter* #22059, pp. 56-57, 62 *versus Judgement*, paras. 2026-31.

14. The Trial Chamber erred in refusing to admit the written evidence of Borivoje Jakovljevic

In Brief

Ruling:	***Refused to order medical examination of Defence Rule 92 quater witness whose unavailability it questioned***
Error:	***Trial Chamber should have ordered medical examination where witness declined to provide information it required.***
Impact:	***Excluded evidence would have contradicted evidence of Momir Nikolic, whose credibility was central to Count 2 and the Srebrenica-related convictions on Counts 3-6 and 8***

223. The Trial Chamber erred in denying President Karadzic's motion to admit the written evidence of Borivoje Jakovljevic under Rule 92 *quater* without first ordering an independent medical examination of the witness.

224. Borivoje Jakovljevic was a military policeman in the Bratunac Brigade who provided close protection to General Mladic in Konjevic Polje on 13 July 1995.[343] In the *Blagojevic* trial, he testified that—contrary to Momir Nikolic's testimony—Mladic and Nikolic never spoke at Konjevic Polje on 13 July 1995 nor did Mladic make a hand signal as claimed by Nikolic.[344]

225. The Trial Chamber denied President Karadzic's Rule 92 *bis* motion to admit Jakovljevic's testimony because it related to the acts and conduct of General Mladic, a person proximate to the accused,[345] President Karadzic then sought to bring Jakovljevic to testify. Jakovljevic declined, explaining that he had undergone surgery for a brain tumor

[343] *92 quater motion—Jakovljevic*, para. 2.
[344] *Id*, para. 3.
[345] *92 bis Decision—Defence Srebrenica*, para. 18.

and no longer recalled the events in question.[346] Jakovljevic voluntarily provided a letter from his doctor [REDACTED].[347]

226. President Karadzic then moved to admit Jakovljevic's evidence under Rule 92 *quater*. After the Trial Chamber requested additional medical documentation, the witness advised that he was not willing to retrieve additional medical records at his own expense, but was willing to undergo an medical examination at the Chamber's expense.[348] The Trial Chamber thereafter declined to order a medical examination and denied the motion, holding that it was not convinced that the witness was unavailable.[349]

227. First, the Trial Chamber erred in finding that Jakovljevic's recent brain tumour surgery, [REDACTED], was insufficient to make him unavailable under Rule 92 *quater*.[350]

228. Second, it erred in refusing to order and fund an independent medical examination to definitively determine whether Jakovljevic's condition rendered him unavailable.

229. As an indigent accused, President Karadzic had neither the financial means to fund an examination, nor the legal means to compel the witness to undergo one. The Trial Chamber had both. In the *Tadic* case, the Appeals Chamber held that a Chamber "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case…"[351]

230. The Trial Chamber used its power under Rule 54 to arrest witnesses who failed to appear for the Prosecution.[352] It erred in refusing to use its power under that same rule to order Jakovljevic's medical examination if it was not satisfied that his brain surgery rendered him unavailable.

231. The Trial Chamber's decision also violated the principle of equality of arms found in Article 21(4)(b) of the Statute. That Article provides that an accused "shall be entitled…to have adequate time and facilities for the preparation of his defence…"[353]

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[346] 92 *quater motion—Jakovljevic*, para. 4.
[347] *Id*, para. 5;[REDACTED}.
[348] *92 quater Decision—Jakovljevic*, paras. 3,5.
[349] *Id*, para. 7.
[350] *Hadzic 92 quater Decision*, paras. 29, 41, 95, 99; *Mladic 92 quater Decision*, para. 5.
[351] *Tadic AJ*, para. 52.
[352] *Zecevic Contempt Order*; *Tupajic Contempt Order*.
[353] *Prlic Prosecution Case Appeals Decision*, para. 14.

Were Jakovljevic a Prosecution witness, the Prosecution had a budget to fund an independent medical examination and admit the evidence under Rule 92 *quater*. Therefore, the Trial Chamber violated the principle of equality of arms by refusing to put the Defence in the same position as the Prosecution.

232. The Trial Chamber's failure to admit Jakovljevic's evidence led it to make findings that credited Momir Nikolic's evidence that General Mladic had indicated on the afternoon of 13 July 1995 that the Srebrenica prisoners were to be killed.[354] The error in excluding Jakovljevic's evidence directly impacted these findings, as well as findings on Momir Nikolic's credibility. Nikolic's uncorroborated evidence was pivotal to the Trial Chamber's finding that President Karadzic ordered the prisoners to be transported to Zvornik to be killed.[355]

233. The Appeals Chamber should order a new, and fair, trial, at which Jakovljevic's evidence could be admitted.

[354] *Judgement*, paras. 5170, 5707.
[355] *Judgement*, paras. 5805, 5818. See Ground 40.

15. The Trial Chamber erred in refusing to admit the written evidence of deceased witness Rajko Koprivica

In Brief

Ruling:	***Refused to admit transcript of Prosecution interview of deceased Defence witness under Rule 92 quater on grounds that witness was untruthful.***
Error:	***Reliability of substance of interview should have gone to weight, not admissibility, of evidence.***
Impact:	***Excluded evidence relevant to findings on Vogosca Municipality and President Karadzic's participation in overarching JCE.***

234. The Trial Chamber erred in denying President Karadzic's motion to admit, under Rule 92 *quater*, the Prosecution's recorded interview of Vogosca Municipality President Rajko Koprivica. The Chamber held that "numerous inconsistencies…as well as the level of evasiveness demonstrated by the Witness… seriously undermine the reliability of the Transcript."[356]

235. The Trial Chamber erred in assessing the evidence's reliability with reference to its contents, rather than the circumstances of its production. Any perceived evasiveness or inconsistencies should not have prevented admission and were only relevant to the weight of the evidence once admitted. Trial Chambers have regularly admitted statements in other cases, despite purporting to identify comparable inconsistencies.[357]

236. The circumstances in which the transcript was made and recorded in this case provided compelling *indicia* of reliability. The transcript was a verbatim record. The witness was advised of his rights against self-incrimination and given an opportunity to correct or add anything.[358] Most importantly, the interview was conducted by the

[356] *Rule 92 quater Decision—Koprivica*, para. 16.
[357] *Milutinovic 92 miluater Decision*, para. 10; *Popovic 92 quater Decision*, para. 31.
[358] *44th Motion*, Annex A, pp. 1, 3.

Prosecution, which fully probed and tested the witness' evidence in a manner functionally equivalent to cross-examination.

237. Moreover, during trial, the Trial Chamber repeatedly admitted, at the Prosecution's request, not only verbatim interview transcripts that the Prosecution conducted using exactly the same methodology, in similar circumstances,[359] but also 72 Prosecution witness statements that were not recorded verbatim and for which evasiveness or inconsistencies would not even be apparent.[360]

238. The unfairness of excluding a Prosecution interview of a witness who provided exculpatory information, when offered by the Defence, while admitting many Prosecution interviews and statements at which the Defence was not even present, when offered by the Prosecution, is apparent.

239. Although it excluded Koprivica's evidence, the Chamber referred to him 21 times in the judgement, even quoting him twice as allegedly saying that "Muslims were simply going to disappear"[361] without offering President Karadzic a fair opportunity to rebut these allegations.

240. The Trial Chamber made factual findings concerning events in Vogosca municipality and President Karadzic's responsibility for them without considering that Koprivica stated that President Karadzic did everything he could to avoid the war;[362] in the Muslim village of Svrake, many high caliber weapons were found and Koprivica himself saw three 120mm mortars there[363] no one from Svarke was mistreated;[364] and Prosecution witness Eset Muracevic was arrested when he was transporting 120 mm missiles stolen from the *Pretis* factory.[365]

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[359] P2, P3, P248.
[360] P41, P42, P46, P47, P49, P50, [REDACTED], P52, [REDACTED], P56, P58, P62, P64, P70, P71, P84, [REDACTED], P104, [REDACTED], P118, P119, P125, P126, P127, P128, P129, P130, P131, P132, P133, P152, P241, P391, P392, P393, P394, P395, P396, P397, P398, P399, P400, P401, P402, P403, P404, P405, [REDACTED], P418, P470, P472, P474, [REDACTED], P488, P490, P495, P496, P497, P498, P499, P500, [REDACTED], P687.
[361] *Judgement*, paras. 2362, 2516.
[362] Annex A to *44th Motion*, p. 81 *versus Judgement*, paras. 2654, 2670, 2707–15, 2839–56, 2896, 2898, 2941–51, 2991, 3435-36, 3463, 3477, 3486.
[363] Annex A to *44th Motion*, pp. 102, 124 *versus Judgement*, paras. 2371, 2380-82, 2384.
[364] Annex A to *44th Motion*, p. 102 *versus Judgement*, paras. 2391, 2394-2408, 2410, 2411-34.
[365] Annex A to *44th Motion*, p. 130 *versus Judgement*, paras. 2371, 2380-82, 2391, 2394-2408, 2410, 2414, 2417-18, 2421, 2423-24, 2428, 2435-36, 2438.

241. Koprivica's evidence was also directly relevant to the credibility of Prosecution witness Muracevic, upon whom the Trial Chamber relied for events in Svrake, detention facilities in Vogosca, and movement of the population from Vogosca and appropriation of property.[366]

242. The Appeals Chamber should order a new, and fair, trial, and which Koprivica's evidence could be considered.

[366] Including Scheduled Incidents B19.1 and C26.1 and 26.3.

16. The excessive number of adjudicated facts and Rule 92 *bis* evidence violated the presumption of innocence and shifted the burden of proof

In Brief

Ruling: ***Taking judicial notice of 2379 adjudicated facts and admitting the evidence of 148 Rule 92 bis witnesses did not render the trial unfair.***

Error: ***Cumulative effect of so much untested evidence shifted burden of proof to the Defence and resulted in an unfair trial***

Impact: ***Trial rendered unfair by required diversion of Defence resources to rebutting this mountain of untested evidence.***

243. The Trial Chamber's unprecedented admission of adjudicated facts and written evidence buried President Karadzic in an avalanche of incriminating evidence before the trial even started. Taking judicial notice of 2379 adjudicated facts, admitting the written evidence of 148 witnesses without cross-examination, and telling President Karadzic that he benefitted from the presumption of innocence and had no burden of proof was the judicial version of an article in *The Onion*.

244. Never in the history of this Tribunal, or any other court, has an accused had to rebut so many facts presumed to be true.

245. Even if taking judicial notice of adjudicated facts, or admitting written evidence, does not violate the right of an accused to a fair trial, the cumulative effect of taking judicial notice of *thousands* of adjudicated facts, and admitting *hundreds* of prior statements and testimony turned the trial upside down. Confronting this mountain of Prosecution evidence required President Karadzic to prepare and present a massive Defence case to rebut the adjudicated facts and prior statements. This violated his

fundamental right to the presumption of innocence[367] and to have the burden of proof rest squarely upon the Prosecution.[368]

246. The 2379 adjudicated facts represent the testimony of hundreds of witnesses. When added to the 148 witnesses that the Prosecution did not have to call because their evidence was admitted without cross-examination, the Prosecution was relieved of having to present the testimony of a large number of witnesses.

247. Had this evidence been presented *viva voce*, President Karadzic would have had another 18 months or so, to prepare and challenge it. Then, he would have had an additional 18 months to present evidence in defence.[369] This would have afforded him sufficient time and resources to rebut the evidence. Instead, the evidence was simply dumped into the trial record with no allocation of additional time or resources to allow President Karadzic to meet it.

248. The ICTY Appeals Chamber has stated "Chambers ought to take a cautious approach in exercising their discretion to take judicial notice of adjudicated facts in order to ensure the right of the accused to a fair trial."[370]

249. In *Milosevic,* the Trial Chamber recognised the possibility that taking judicial notice of a large number of facts might put an unreasonable burden on an accused who wishes to rebut them, and that the rebuttal process may take excessive time and resources, thus frustrating, rather than promoting, judicial economy. The Chamber held that it must "exclude those facts which, when taken together, will result in such a large number as to compromise the principle of a fair and expeditious trial." [371]

250. The concern in *Milosevic* was that taking judicial notice of approximately 200 facts could place too heavy a burden on the Accused to produce rebuttal evidence.[372] The number of adjudicated facts judicially noticed in this trial was more than ten times greater than in *Milosevic*.

251. In *Krajisnik* it was held that "the Prosecution should keep its request for adjudicated facts to a manageable size" to avoid the "severe risk of oppression" of its

[367] ICTY Statute, Article 21(3).
[368] ICTY Rule 87(A); *McDermott Treatise*, p. 45.
[369] See *Defence Case Decision,* para. 12, granting President Karadzic the same number of hours for his defence case as granted to the Prosecution.
[370] *Mladic Adjudicated Facts Appeals Decision,* para. 24.
[371] *Milosevic Adjudicated Facts Final Decision,* para. 12.
[372] *Id*, paras. 11-12.

requests on the Defence.[373] In *Mejakic*, the Trial Chamber only took judicial notice of 114 out of 252 proposed adjudicated facts, noting that a Chamber should take into account whether the large number of facts would compromise the principle of a fair trial, meaning that attempts by the accused to rebut them may absorb considerable time and resources.[374] In *Stanisic and Simatovic*, the Trial Chamber found that "although the Prosecution seeks judicial notice to be taken of a large amount of facts (392), in the context of the whole trial, they are still of a manageable size".[375] The same cannot be said of the 2379 adjudicated facts in this case.

252. Judge Kwon has noted the possibility that taking judicial notice may "place too big a burden on the Accused in the production of rebuttal evidence, especially where the prosecution seeks judicial notice of a large number of adjudicated facts."[376]

253. At the beginning of the trial, President Karadzic moved for a stay of proceedings contending that a trial at which the presumption of innocence had been vitiated and the burden of proof shifted to the Defence by taking judicial notice of so many adjudicated facts was inherently unfair.[377]

254. The Trial Chamber held that it was premature to determine to what extent the adjudicated facts and evidence admitted without cross-examination would affect the final judgement.[378] This missed the point. Admission of so much untested evidence changed the entire dynamic of the trial.

255. Admitting a large volume of facts obligated the Defence to expend scarce resources investigating and rebutting those facts, while simultaneously relieving the better-resourced Prosecution of this burden. This in turn allowed the Prosecution to devote its resources to other trial issues and created a further imbalance in the equality of arms.

256. Apart from the logistics involved in rebutting so much material, evidence that should have been tested for credibility became facts presumed to be true. Instead of requiring the Prosecution to convince it of the credibility of these thousands of pieces of evidence, the Trial Chamber required President Karadzic to convince it that he had

[373] *Krajisnik Adjudicated Facts Decision*, para. 22.
[374] *Mejakic Adjudicated Facts Decision*, p. 3, fn 7.
[375] *J. Stanisic Adjudicated Facts Decision*, para. 64.
[376] *Kwon Article*, p. 371.
[377] *Stay of Proceedings Motion*.
[378] *Stay of Proceedings Decision*, para. 6.

rebutted each fact with credible evidence of his own. The Trial Chamber failed to appreciate how admitting so much evidence through judicial notice and Rule 92 *bis* and *quater* impacted the fairness of the trial.

257. In other contexts, the ICTY has recognised that although a decision may not be erroneous or prejudicial on its own, the cumulative effect of similar decisions may be so.

258. The Trial Chamber itself recognised that cumulative prejudice could occur from multiple disclosure violations even if individual violations cause no prejudice.[379] Similarly, the cumulative effects of defects in an indictment may operate to deny the accused of his right to a fair trial by hindering the preparation of a proper defence.[380]

259. A review of the *Judgement* demonstrates that the Trial Chamber violated the presumption of innocence and shifted the burden of proof to President Karadzic. It relied on hundreds of adjudicated facts and written evidence of more than 100 Prosecution witnesses. It often preferred this untested evidence to the *viva voce* evidence presented by the Defence.[381]

260. Therefore, the Trial Chamber denied President Karadzic a fair trial by cumulatively taking judicial notice of an excessive number of adjudicated facts and admitting an excessive amount of Rule 92 *bis* and *quater* evidence without cross-examination. The Appeals Chamber should order a new, manageable, and fair, trial.

[379] *18th-21st Motion Decision*, para. 43; *22nd-26th Motion Decision*, para. 41.
[380] *Bagosora Evidence Appeals Decision*, para. 26.
[381] See Ground 7.

17. The Trial Chamber erred in delaying disclosure of the identities and statements of Prosecution witnesses

In Brief

Ruling:	***Delayed disclosure of identity and statements of three Prosecution [REDACTED] witnesses until well after the trial began.***
Error:	***Rule 69(A) prohibited delayed disclosure after commencement of the trial.***
Impact:	***Allegations of common plan to create homogenous State were supported by evidence that [REDACTED]. This could not be effectively defended due to insufficient preparation time for cross-examination.***

261. The Trial Chamber erred in ordering that the identities and statements of three Prosecution [REDACTED] witnesses be withheld until after the beginning of the trial, in violation of Rule 69(C). The mid-trial disclosure meant that President Karadzic had no notice before trial that [REDACTED] would be an issue in his case. Thus, he was impaired in his ability to prepare a defence to this aspect of the Prosecution case.[382]

262. On 5 June 2009, the Trial Chamber delayed disclosure of the identities and statements of Witness KDZ531 and KDZ532 until 30 days before their testimony.[383] On 17 June 2009, the Prosecution notified the Trial Chamber of protective measures for, *inter alia*, Witness KDZ492 that had been granted in a previous case and applied *mutatis mutandis*, including delayed disclosure of the witness' identity and statements until 30 days before the witness' testimony.[384] On 25 March 2010, just before the Prosecution's

[382] The identities and statements of other Prosecution witnesses also were not disclosed until after the beginning of the trial. They are not included in this appeal because President Karadzic does not contend that he was prejudiced by the Trial Chamber's error as to them.
[383] *Delayed Disclosure Decision*.
[384] *OTP Protective Measures Notice*.

case began, the Trial Chamber declined to modify the protective measures for Witness KDZ492.[385]

263. The identity and statements of all three witnesses were not disclosed to President Karadzic until well after the trial began.[386]

> The delayed disclosure orders violated Rule 69(C), which provided:
>
> 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 prosecution and the defence.[387]

264. In *Bagosora*, the ICTR Appeals Chamber held that the Trial Chamber lacked authority to delay disclosure of a witness' identity and statements after the trial began. It held that Rule 69(C)'s plain language made the order *ultra vires*.[388]

265. When confronted with this precedent, the Trial Chamber sought to distinguish it on the grounds that the Appeals Chamber found that exceptional circumstances for the delayed disclosure did not exist in the *Bagosora* case.[389] This misinterpreted the holding in *Bagosora*. The exceptional circumstances criteria applied to the timing of disclosure under Rule 69(A), but in no event could disclosure be delayed after the trial began:

> While a Trial Chamber has discretion pursuant to Rule 69(A) of the Rules regarding the ordering of protective measures where it has established the existence of exceptional circumstances… this discretion is still constrained by the scope of the Rules…At the time of the decision, Rule 69(C) of the Rules provided that "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 prosecution and the defence."[390]

266. The Trial Chamber also sought to distinguish *Bagosora* because it involved augmenting existing protective measures rather than protective measures which had been imposed from the outset.[391] This is a distinction without a difference. Rule 69(C) and the *Bagosora* decision interpreting it are clear—disclosing a witness' identity cannot be delayed until after the trial commences.

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[385] *Protective Measures Reconsideration Decision*.
[386] [REDACTED]
[387] The rule was later amended on 28 August 2012 to delete the "prior to trial" requirement (emphasis added).
[388] *Bagosora AJ*, paras. 80-85.
[389] *66th Motion Decision*, para. 18.
[390] *Bagosora AJ*, para. 83 (emphasis added).
[391] *66th Motion Decision*, para. 18.

267. The *Bagosora* decision appears to be inconsistent with a prior *Seselj* ruling that allowed for delayed disclosure past the beginning of the trial.[392] However, the majority of the judges on the *Bagosora* appeal also decided the *Seselj* appeal. Therefore, it must be concluded that *Bagosora* overruled *Seselj* to the extent that *Seselj* allowed for delayed disclosure after the trial began.

268. The Trial Chamber's error in authorising delayed disclosure prejudiced President Karadzic. Instead of being able to prepare for these witnesses in the pre-trial period, he was forced to prepare for them on the fly in the midst of trial, when his resources were already stretched to the breaking point.

269. The Trial Chamber's error in authorising delayed disclosure of the identities of Witnesses KDZ492, KDZ531, and KDZ532 also prejudiced President Karadzic because [REDACTED]. Had President Karadzic known their identities and the subject of their testimony before trial, he could have [REDACTED].

270. By not having this information before trial, President Karadzic lost the ability to do this kind of preparation, which was impossible once the trial was on-going. This was compounded by the volume of disclosure President Karadzic was receiving throughout the trial that should have been provided to him before the trial started [393] As a result, he was unable to effectively confront the Prosecution witnesses with [REDACTED].

271. The Appeals Chamber in *Bagosora* held that the error in extending delayed disclosure beyond the beginning of the trial did not prejudice the appellant because he was ultimately successful in impeaching much of the Prosecution's evidence against him.[394] President Karadzic did not enjoy the same success. In its judgement, the Trial Chamber found that [REDACTED],[395] and [REDACTED].[396] [REDACTED].[397]

272. [REDACTED].[398]

273. Because the Trial Chamber erred in delaying disclosure of the identity and statements of these witnesses until well after the trial began, and thereby prejudiced President Karadzic, the Appeals Chamber should order a new, and fair, trial.

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[392] *Seselj Delayed Disclosure Appeals Decision*, para. 15.
[393] See Ground 6.
[394] *Bagosora AJ*, para. 86.
[395] [REDACTED]
[396] [REDACTED].
[397] [REDACTED]
[398] [REDACTED}.

18. The Trial Chamber erred in denying protective measures for Defence witnesses and granting protective measures for Prosecution witnesses

In Brief

Ruling:	***Denied Defence protective measures for four witnesses based on inadequate justification. Granted Prosecution protective measures for State and [REDACTED] employees under Rule 70.***
Error:	***Employed wrong test and impermissible double standard when denying Defence protective measures. Prosecution protective measures under Rule 70 were unjustified and violated right to public trial.***
Impact:	***Made key findings on Municipalities and Sarajevo issues without hearing from Defence witnesses who refused to testify without protective measures and based on Prosecution evidence not subject to public scrutiny.***

274. The Trial Chamber erred in applying a double standard by refusing to grant protective measures for Defence witnesses, when it had granted Prosecution requests in similar situations. The Trial Chamber also violated President Karadzic's right to a public trial when granting unjustified protective measures to five other Prosecution witnesses.

Defence Witnesses

275. The Trial Chamber found "no objectively grounded risk to the security or welfare" of witnesses who (i) owned property in the Bosnian Muslim area of Sarajevo,[399] (ii) was a well known military commander whose home had been destroyed and mother and sister harassed after the war, [400] and (iii) frequently travelled to Sarajevo for a business with mostly Bosnian Muslim customers, and feared losing the majority of this business,

[399] *Protective Measures Decision—Defence I*, para. 13.
[400] *Id.*

and being physically and verbally harassed.[401] It also found that (iv) the fears of a witness under investigation in Bosnia for war crimes of the increased likelihood of being charged--and his testimony being used against him--were speculative and unrelated to any risk to his security or welfare.[402]

276. In assessing requests for protective measures for Defence witnesses, the Trial Chamber applied an unduly narrow definition of a witness' "fear". By only granting protective measures for defence witnesses who feared for their or their families' security and welfare, the Chamber excluded other legitimate bases, such as property damage, economic harm, and prosecution. In doing so, the Trial Chamber applied a double standard.

277. In denying protective measures for Defence Witness KW299, the Trial Chamber held that fearing damage to property was not a valid ground for protective measures.[403] [REDACTED].[404] [REDACTED].[405]

278. The Trial Chamber denied a request for Defence Witness KW402 to testify under a pseudonym, finding that the prospect of financial loss and physical and verbal abuse from customers was insufficient.[406], [REDACTED],[407] [REDACTED].[408]

279. In denying protective measures for Defence Witness KW392, the Trial Chamber erred when finding that the increased likelihood of prosecution was "unrelated to any risk to his security or welfare".[409] Requiring a witness to face the possibility of criminal charges and having his testimony used against him was unreasonable.

280. In addition to applying an unreasonable standard for the type of harm raised by defence witnesses, the Trial Chamber also applied a double standard in assessing these witnesses' fears. [REDACTED]. This was not the standard applied to Defence witness requests.

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[401] *Protective Measures Decision—KW402*, para. 8.
[402] *Protective Measures Decision—KW392*, para. 7.
[403] *Protective Measures Decision—Defence I*, para. 13.
[404] *Protective Measures Decision;* [REDACTED]
[405] [REDACTED].
[406] *Protective Measures Decision—KW402*, para. 8.
[407] [REDACTED]
[408] [REDACTED].
[409] *Protective Measures Decision—KW392*, para. 7. The witness was later indicted in Bosnia, [REDACTED]

281. Defence Witness KW543 explained that, during the war, he had been a battalion commander between 1992 and 1993. After the Dayton Agreement was signed, his home had been destroyed, and his family forced to flee. He had been denounced in the Muslim media as a war criminal, and was unable to visit the ruins of his former home without a police escort. Attempts by his mother and sister to return were met with curses and insults by neighbours, who mentioned the witness in this context.[410] The Trial Chamber found that these threats were not "objective".[411]

282. In stark contrast, the Trial Chamber continued protective measures for Prosecution Witnesses [REDACTED].[412]

283. This double standard violated Article 21(4)(e) of the Statute which guarantees the right of an accused to obtain the attendance of witnesses on his behalf under the same conditions as witnesses against him, and the principle of equality of arms, and created an unfair trial.[413]

284. The Defence witnesses who refused to testify after requests for protective measures were denied had information that contradicted evidence relied upon by the Trial Chamber to make findings adverse to President Karadzic.

285. Witness KW392, a former 2nd Romanija Motorised Brigade member and Cavarine Detention Camp supervisor, stated that the Muslim villages in Sokolac, including Kaljina and Zljebovi, had started arming themselves since 1991, which proved true later when they attacked Serbian villages;[414] that no paramilitary formations stayed in Sokolac; [415] that Slavisa Vajner Cica school (Scheduled Incident C23.2) served as a detention facility only for a week, after which the detainees were transferred to Cavarine; that during this period he was bringing food to the detainees held there;[416] that at Cavarine (Scheduled Incident C23.1), the detainees walked freely in the corridor and guards were

[410] *Protective Measures Motion–KW543*.
[411] *Protective Measures Decision—Defence I*, para. 13.
[412] See Annex E.
[413] *Prlic Evidence Appeals Decision*, para. 44; *Nahimana AJ*, para. 251, as discussed in Grounds 11-12.
[414] 1D7049, para. 4 *versus Judgement*, paras. 1055-56, 1072-74.
[415] 1D7049, para. 3 *versus Judgement*, para. 1049.
[416] 1D7049, para. 7 *versus Judgement*, para. 1070.

not allowed to interrogate, mistreat, or abuse the detainees in any way;[417] and that the detainees at Cavarine had all actively participated in the war.[418]

286. Witness KW392 also stated that there was no electricity or water at Cavarine because there was no electricity in the entire village; that the detainees and guards all slept on the floor and ate the same food; that water was constantly replenished and natural light and airing the premises was ensured; and that for safety, detainees relieved themselves in the basement in plastic buckets, which were regularly changed and cleaned.[419]

287. The impact of the evidence of Witness KW299, Witness KW402, and Witness KW543 on the judgement is discussed under Grounds 11-12.

288. Granting protective measures for Defence witnesses KW299, KW392, KW402, and KW543 would have been consistent with the Trial Chamber's practice during the Prosecution case. In denying these protective measures, the Trial Chamber employed a double standard, and excluded exculpatory evidence that casts doubt on its findings.

Prosecution Witnesses

289. President Karadzic repeatedly objected to hearing Witness KDZ240's testimony in closed session. [REDACTED].[420]

290. [REDACTED],[421] [REDACTED].[422]

291. These decisions violated President Karadzic's right under Article 21(2) to a fair and public hearing.

292. Article 20(1) of the Statute requires that proceedings be conducted "with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses".[423] The priority ascribed to the rights of the accused is confirmed by Rule 75(A), which allows a Chamber to order protective measures, "provided that [they] are consistent with the rights of the accused."[424] The rights of the accused is the primary consideration, and the need to protect victims and witnesses is a secondary one.[425]

[417] 1D7049, paras. 8, 10, 13, 15 *versus Judgement*, para. 1071.
[418] 1D7049, paras. 8, 17 *versus Judgement*, para. 1071.
[419] 1D7049, paras. 11-12, 14 *versus Judgement*, para. 1071.
[420] [REDACTED]; [REDACTED]; [REDACTED]
[421] [REDACTED]
[422] [REDACTED]
[423] (emphasis added).
[424] *Milosevic Second Protective Measures Decision*, para. 4.
[425] *Musema AJ*, para. 68.

293. Courts have regularly emphasised the importance of public testimony. The ECtHR has held that protective measures must be "strictly necessary".[426] The public character of a trial "protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By making the administration of justice transparent, publicity contributes to the achievement of…a fair trial."[427]

294. Former ICTY Judge Wald has observed that "overly liberal grants of witness protection measures - including closed sessions - threaten the goals of the Tribunal, namely, the keeping of accurate historical records and the fair treatment of accused war criminals. At a certain point, a trial in which witness identities are freely withheld from the public is no longer a public trial."[428]

295. Hearing testimony in closed session is the most extreme protective measure and should only be resorted to in cases where no less restrictive protective measure can adequately address the concern or where "some other very exceptional circumstance" exists.[429] This is because public scrutiny acts as a fundamental safeguard against false or misleading evidence in three principal ways. First, the threat of public scrutiny is a deterrent to witnesses who may otherwise consider giving false or misleading evidence. Second, it compels witnesses to carefully consider the accuracy of their testimony and as a falsehood revealed by the public could undermine both their credibility as a witness and their personal integrity. Third, where a witness has given false or misleading evidence, whether intentionally or otherwise, by knowing the witnesses' identity, members of the public can identify these falsehoods and by supplying counter-evidence to the Tribunal. In short, openess in court proceedings causes "all trial participants to perform their duties more conscientiously…"[430]

296. These safeguards were not present during Witness KDZ240's testimony. He testified entirely in closed session under a Rule 70 agreement [REDACTED].

297. While Rule 70 protections are important to safeguard the interests of States that cooperate with the Tribunal, "this deference to States' interests does not go so far as to

[426] *PS v Germany* (2003), para. 23
[427] *Werner v Austria*, para. 62.
[428] *Wald Article II, p.* 239.
[429] *Milosevic Second Protective Measures Decision,* para. 6.
[430] *Delalic Protective Measures Decision,* para. 34.

supersede a Trial Chamber's authority to maintain control over the fair and expeditious conduct of the trial."[431] Rule 70(G) allows a Trial Chamber to refuse to hear a Rule 70 witness when the conditions of the witness' testimony would result in substantial unfairness to the trial and would outweigh the testimony's probative value.[432] This provides an important safeguard where a third party and the Prosecution agree on conditions that may infringe on the rights of an accused to a fair and public trial.

298. [REDACTED]. In *Milosevic*, the Trial Chamber rejected the Prosecution's request for closed session testimony due to security concerns for a humanitarian organisation's personnel. It held that the risk that a perception that the organisation's mandate would be compromised stemming from public disclosure that a former staff member had testified in the trial was insufficient to justify testimony being heard entirely in closed session.[433]

299. In addition, Witness KDZ240's particular circumstances made closed session testimony wholly unnecessary. [REDACTED],[434] [REDACTED].[435]

300. [REDACTED] [436] was misplaced. [REDACTED]. UN personnel and journalists have testified at the Tribunal for two decades with no damage to their impartiality or safety.

301. Similarly, four [REDACTED] witnesses testified with pseudonyms under a Rule 70 agreement between the Prosecution and the [REDACTED] Government. Thirty UN military personnel from twelve States testified for the Prosecution and none requested a pseudonym.[437] [REDACTED] was the only State to insist that its witnesses testify anonymously.

302. To justify its request, the [REDACTED] government made the vague assertion [REDACTED].[438] [REDACTED]. In reality, these concerns did not justify withholding the witnesses' identity from the public. They could have been heard in private session if they arose. In fact, they did not.

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[431] *Milutinovic Wesley Clark Appeals Decision*, para. 18.
[432] *Id.*
[433] *Milosevic Humanitarian Organisation Decision*, p. 5.
[434] [REDACTED]
[435] [REDACTED]; [REDACTED].
[436] [REDACTED].
[437] [REDACTED]
[438] [REDACTED]

303. The [REDACTED] Government's justification for protective measures fell well below even the lowest, most permissive objective standard. Shielding these witnesses' identities deprived President Karadzic of the right inherent in a public trial and the attendant safeguards that would allow witnesses to come forward with information that contradicted this testimony. The conditions of the Prosecution witness testimony resulted in substantial unfairness to President Karadzic.[439]

304. The Trial Chamber thus erred [REDACTED]. The Trial Chamber then relied upon this testimony to make key factual findings such as crimes committed in [REDACTED],[440] [REDACTED],[441][REDACTED],[442] and [REDACTED],[443] as well as [REDACTED].[444]

305. As a result of these errors, the Appeals Chamber should order a new, and fair, trial.

[439] *Milutinovic Wesley Clark Appeals Decision*, para. 18.
[440] [REDACTED]
[441] [REDACTED]
[442] [REDACTED]
[443] [REDACTED]
[444] [REDACTED]

19. The Trial Chamber erred in refusing to subpoena four Defence witnesses

In Brief

Ruling:	***Denied subpoenas to four Defence witnesses.***
Error:	***In finding that other persons could testify to the same events, the Trial Chamber ignored the unique position of the witnesses and the need for corroboration.***
Impact:	***Made key findings on Municipalities and Sarajevo issues without hearing from Defence witnesses who refused to testify without subpoenas.***

306. The Trial Chamber erred in denying subpoenas to four Defence witnesses because their evidence was unnecessary, then making findings against President Karadzic on issues that their evidence could have addressed.

(i) Major Dragos Milankovic

307. The Trial Chamber declined to subpoena Major Dragos Milankovic, former armoured battalion commander for the 1st Sarajevo Brigade. It held that the evidence was available through other means because there must have been members of Milankovic's battalion who were operating in the same zone at the relevant time.[445]

308. Major Milankovic had information that his battalion had orders not to fire at civilians, did not in fact fire at civilians, and never engaged in indiscriminate or disproportionate shelling. Milankovic was also able to identify legitimate military targets near the locations that were the subject of incidents G4, G5, and G7.[446]

[445] *Subpoena Decision—Milankovic* paras. 13-14.
[446] *Subpoena Motion—Milankovic*, paras. 5, 7-9.

309. The Trial Chamber rejected the testimony of other Defence witnesses, and found that the SRK and Major Milankovic's battalion engaged in indiscriminate and disproportionate attacks on civilians in Sarajevo, including incidents G4, G5, and G7.[447]

(ii) Commander Milos Tomovic

310. The Trial Chamber declined to subpoena Commander Milos Tomovic, Commander of the 1st Battalion in Foca. It held that the subpoena was not necessary because other witnesses from the 1st Battalion could testify about the takeover of Foca and the destruction of the Aladza mosque, and that President Karadzic had failed to exhaust "all other means" of obtaining this evidence.[448]

311. The Trial Chamber disbelieved the other Defence witnesses from Foca and found that the Foca authorities expelled Muslims and that the Aladza mosque was destroyed despite their being no military necessity.[449] The impact of Tomovic's excluded evidence on the judgement is discussed under Grounds 11-12.

(iii-iv) Srdan Forca and Nikola Tomasevic

312. The Trial Chamber denied subpoenas for Military Judges Srdan Forca and Nikola Tomasevic. It held that their evidence would be similar to other Defence witnesses who testified about investigation and prosecution in military courts, and that documentary evidence from the case files could be used instead. [450]

313. Judge Forca adjudicated several cases against Serbs accused of crimes committed against non-Serbs, and had direct knowledge of those cases and related documents. He was therefore in a position to contradict Prosecution Witness KDZ492's evidence about the military judiciary. Significantly, Judge Forca rendered decisions in the *Kajtez*, *Gvozden*, *Stankovic*, and *Djordjevic* cases, cited by the Prosecution as evidence that President Karadzic's tolerated crimes against non-Serbs. Judge Forca could speak directly to whether these decisions excused crimes against non-Serbs or were issued

[447] *Judgement*, paras. 4084-87, 4105, 4107-08, 4159, 4163-63, 4497, 4647-50.
[448] *Subpoena Decision—Tomovic*, paras. 13-14.
[449] *Judgement*, paras. 927-28, 934.
[450] *Subpoena Decision—Tomasevic*, paras. 12-13; *Subpoena Decision—Forca*, paras. 11-12.

because of any policy of President Karadzic.[451] The impact of Judge Tomasevic's excluded evidence on the judgement is discussed under Grounds 11-12.

314. Having excluded Judges Forca and Tomasevic's evidence, the Trial Chamber then found that there was a policy not to punish Serbs for crimes against non-Serbs and that judges like Tomasevic and Forca released Serbs under pressure in furtherance of this policy.[452]

The legal error

315. The Trial Chamber erred in applying an unduly restrictive interpretation of the forensic purpose requirement for subpoenas and disregarded the focus placed in *Halilovic*[453] and *Krstic*[454] on the subpoena's importance in ensuring a fair trial.

316. In *Halilovic*, the Appeals Chamber quashed a decision refusing to grant a Defence request for a subpoena finding that the Trial Chamber had erred in failing to examine "whether the Defence has presented reasons for the need to interview these witnesses that went beyond the need to prepare a more effective cross-examination."[455] The Trial Chamber in our case relied on *dicta* from *Halilovic* that cautioned against using the court's coercive powers to facilitate routine litigation duties of the moving party. It used it to frustrate the very situation in which the Appeals Chamber had said a Trial Chamber should "not hesitate" in granting subpoenas—obtaining affirmative Defence evidence.[456]

317. For example, the Trial Chamber denied subpoenas because the evidence was similar to that already in the record.[457] This incorrectly applied the *Halilovic* standard, as the proposed Defence evidence went beyond that which had been already elicited.[458]

318. The Trial Chamber's reliance on *dicta* from *Krstic* was also erroneous. *Krstic* held that subpoenas should not be issued when the Defence seeks to interview a person

[451] *Subpoena Motion—Forca*, paras. 6-9.
[452] *Judgement*, paras. 3412-3416, 3422, 3425, 3494, 35011.
[453] *Halilovic Subpoena Appeals Decision*, paras. 6, 7, 10.
[454] *Krstic Subpoena Appeals Decision*, paras. 10-11.
[455] *Halilovic Subpoena Appeals Decision*, para. 15.
[456] *Id*, para. 10.
[457] *See, for example*, *Subpoena Decision—Forca*, para. 11; *Subpoena Decision--Tomasevic*, paras. 12-13.
[458] *Subpoena Motion—Forca*, para. 6; *Subpoena Motion—Tomasevic*, para. 6, citing 1D9195, pp.56-60, 72-74.

merely to discover whether he has any information that may assist the Defence.[459] This was not the case for President Karadzic's motions, which sought subpoenas based on specific and identified exculpatory information.[460]

319. The Trial Chamber also erred in preventing the Defence from presenting corroborating evidence.

320. In the *Delalic* case, the Trial Chamber relied on U.S. jurisprudence that information will materially assist the Defence where "there is a strong indication that...it will play an important role in uncovering admissible evidence, aiding witness preparation, *corroborating testimony*, or *assisting impeachment or rebuttal*."[461] Thus, information similar or even duplicative of evidence that has already been heard may have a legitimate forensic purpose.

321. Corroborative testimony is important to buttress the credibility of the Defence case on a particular issue. By failing to assess the witness' evidence for its potential to materially support or impeach other existing evidence, the Trial Chamber deprived President Karadzic from presenting evidence that had the ability to impact the judgement.

322. The Trial Chamber also failed to consider the importance of the credibility of the evidence in question. The *Krstic* and *Halilovic* cases held that an applicant for a subpoena may need to present information about factors such as the positions held by the prospective witness during to the events, the witness' opportunity to observe the events, any statement the witness has made to the Prosecution or to others about the events,[462] and any relationship that the witness may have had with the accused.[463] These cases envision that the Trial Chamber conduct an assessment not only of the witness' direct knowledge of the events in question, but of the relative credibility of this evidence. The Trial Chamber's reasoning skipped this step. By focusing on the fact that other people may be able to provide "comparable information",[464] the Trial Chamber ascribed no weight to credibility.

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[459] *Krstic Subpoena Appeals Decision*, para. 11.
[460] *Subpoena Motion—Milankovic*, paras. 5-7; *Subpoena Motion—Tomovic*, paras. 5-11; *Subpoena Motion—Forca*, paras. 5-10; *Subpoena Motion—Tomasevic*, paras. 6-10.
[461] *Delalic Disclosure Decision*, para. 7 (emphasis added).
[462] *Krstic Subpoena Appeals Decision*, para. 11; *Halilovic Subpoena Appeals Decision*, para. 6.
[463] *Id.*
[464] *Subpoena Decision—Milankovic*, para.14; *See also Subpoena Decision—Tomovic*, para. 14; *Subpoena Decision—Forca*, para. 12; *Subpoena Decision—Tomasevic*, paras. 12-13.

323. The decisions also ignore the value of direct evidence. In denying the motion to subpoena Nikola Tomasevic, the Trial Chamber held "while Tomasevic would be able to testify about the reasons why he ordered the release of Serbs in two specific cases to which he was assigned in the Banja Luka Military Court, he is by no means the only person who could testify about those cases."[465] However, Tomasevic was best placed to testify to his own rationale for the releasing the prisoners in question.

324. Similarly, the Trial Chamber denied the request to subpoena Milos Tomovic, although as Battalion Commander, Tomovic was uniquely positioned to provide evidence on the relevant events. While a lower-ranking soldier may have provided similar testimony about the events, Tomovic had information about the reasons for those events—namely, that they were not part of a policy of ethnic cleansing. The Trial Chamber's requirement that the Defence "should have investigated further whether any of the former members of Tomovic's Battalion or of the VRS deployed in the relevant area could provide *comparable* information"[466] demonstrates its unduly burdensome interpretation of its necessity requirement.

325. The Trial Chamber employed the same flawed logic in rejecting the request to subpoena Dragos Milankovic. Specifically, the Trial Chamber held that the subpoena did not meet the necessity threshold because "there must have been other members in Milankovic's battalion who were operating in the relevant zone of responsibility at the relevant time." The Trial Chamber failed to give adequate weight to the fact that the battalion in question was under Milankovic's command, and the area in question fell within his zone of responsibility.[467]

326. By failing to assess the witnesses' unique position as an independent factor in the necessity calculus, the Trial Chamber repeatedly prevented President Karadzic from presenting the most probative evidence to support his own defence, thus violating his right under Article 21(4)(e) "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[465] *Subpoena Decision—Tomasevic*, para. 11.
[466] *Subpoena Decision—Tomovic*, para. 14.
[467] *Subpoena Decision--Milankovic*, para. 14.

327. Judges must sometimes intervene to ensure that "the defendant has sufficient means to collect information necessary for the presentation of an effective defence".[468] Witnesses who held positions of authority during the war--such as Judges Tomasevic and Forca and Commanders Milankovic and Tomovic--may be reluctant to be seen as cooperating with the Defence, rather than the Prosecution. The court's ability to subpoena witnesses exists to circumvent this very difficulty.

328. By refusing to issue subpoenas to the four Defence witnesses, the Trial Chamber failed to provide adequate assistance to President Karadzic to present his defence and failed to consider evidence that contradicted its findings. The Appeals Chamber should order a new, and fair trial, at which the witnesses could be heard.

[468] *Halilovic Subpoena Appeals Decision*, para. 10.

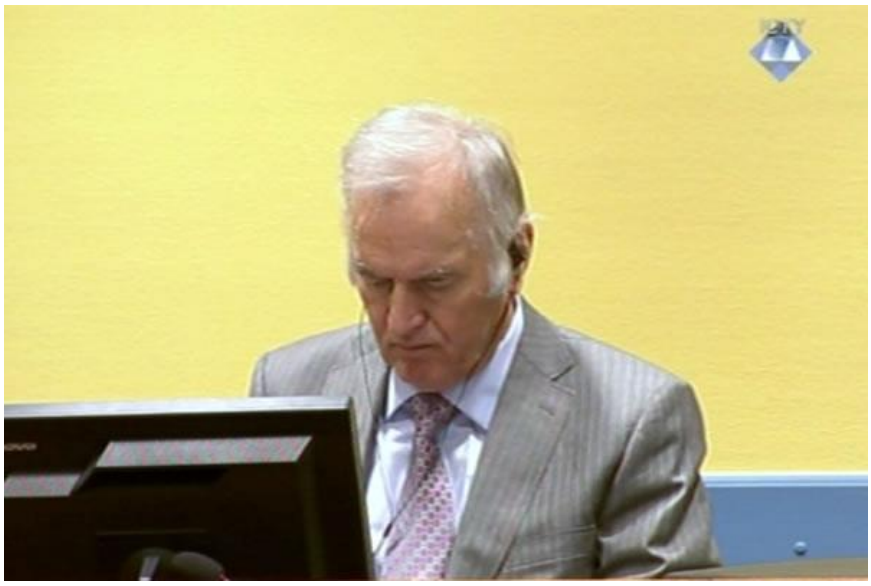
20. The Trial Chamber erred in refusing to compel General Mladic to answer President Karadzic's questions

In Brief

Ruling:	***General Mladic would not be compelled to answer Defence questions because of his right against self-incrimination.***
Error:	***Since Rule 90(E) prohibited use of General Mladic' answers in his own trial, the Chamber deprived President Karadzic of critical evidence without adequate justification.***
Impact:	***The Trial Chamber convicted President Karadzic without having heard key evidence relevant to Municipalities, Sarajevo, and Srebrenica JCE findings.***

329. The Trial Chamber subpoenaed General Ratko Mladic as a Defence witness, finding that he was "uniquely positioned" to give evidence regarding the information he passed or did not pass to President Karadzic about many events alleged in the indictment.[469] However, when General Mladic appeared, the Trial Chamber refused to compel him to answer questions.[470]

[469] *Subpoena Decision—Mladic*, paras. 20, 22.
[470] T46052.



General Ratko Mladic

330. The Trial Chamber erred when finding that General Mladic's right against self-incrimination outweighed President Karadzic's right to a fair trial when the protections provided to General Mladic under Rule 90(E) prohibited the direct or indirect use of his testimony against him.

331. The questions put to General Mladic were:

(i) [D]id you ever inform me either orally or in writing that the prisoners from Srebrenica would be, were being, or had been executed?[471]

(ii) [T]he two of us, did we ever come to an agreement or have agreement or understanding that the citizens of Sarajevo would be subjected to terror by shelling and sniping -- or sniping?

(iii) [W]hat were the reasons for the shelling or sniping by our army against Sarajevo?

(iv) [A]mongst the two of us, or the leadership in general, was there an agreement or an understanding to expel the Muslims and Croats residing in the Serb-controlled areas?

332. General Mladic declined to answer each question, invoking his right against self-incrimination. His counsel indicated he would invoke this right to all further questions.[472]

[471] T46051.
[472] T46052.

333. After each answer, the Trial Chamber ruled that "[e]xercising its discretion, the Chamber has decided not to compel the witness to answer this question, despite the protection afforded by Rule 90(E), in light of his right against self-incrimination as an accused whose trial is pending before the Tribunal."[473] The Trial Chamber then excused General Mladic.[474]

334. Rule 90(E) provides that:

> A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.

335. The ICTY Appeals Chamber held, in an appeal by General Tolimir in this case, that Rule 90(E) prohibits both the direct and indirect use of compelled testimony against the witness, and therefore provides an adequate safeguard for a witness who is concurrently defending his own criminal case at the Tribunal.[475]

336. The Trial Chamber's sparse reasoning appears to indicate that it considered General Mladic's rights as an accused whose trial was pending to outweigh President Karadzic's right to General Mladic's evidence. However, by compelling General Mladic's testimony, the Trial Chamber could have accommodated both rights. President Karadzic could have had the benefit of General Mladic's evidence, and no detriment could have inured to General Mladic's case because his answers could not be used against him, directly or indirectly.

337. The Appeals Chamber's decision concerning General Tolimir surveyed regional and national jurisprudence that provided similar protection. It noted Canadian Supreme Court decisions holding:

> providing that the preponderant purpose of subpoenaing such persons to testify is not to obtain self-incriminating information for subsequent use against them, persons separately charged with an offence are compellable as witnesses at the preliminary inquiries and criminal trials of other persons charged with the same offence, as they would be entitled to the available immunity from the subsequent use against them of any self-incriminating information emerging in those proceedings.[476]

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[473] T46052-53.
[474] T46055.
[475] *Subpoena Appeals Decision—Tolimir*, paras. 43, 45.
[476] *Id*, fn. 93.

338. The Appeals Chamber also referred to United States jurisprudence, such as *Kastigar*, which allows for witnesses to be compelled to testify with a promise that their answers would not be used against them directly or indirectly.[477] Courts in the United States have been confronted with whether to compel the testimony of a person, like General Mladic, who faced charges for the same crime as the accused. In *United States v. Childs*, an accused was properly compelled to testify as a witness at a co-accused's separate trial where his testimony could not be used against him at his own trial.[478]

339. The protection against use of the testimony in U.S. law, identical to that contained in Rule 90(E), is so strong that an accused may even be compelled to testify before a grand jury about his case while his own appeal is pending.[479]

340. Once any detriment to General Mladic was removed by compelling him to answer with the accompanying guarantees against the use of his evidence in his own case, President Karadzic's need for General Mladic's exculpatory evidence outweighed whatever interest General Mladic may have had in declining to answer.

341. General Mladic was the person who could most definitively and authoritatively speak to the critical issue of whether President Karadzic was informed that prisoners from Srebrenica would be, were being, or had been executed. By refusing to hear General Mladic's evidence, and then finding that President Karadzic had this knowledge,[480] the Trial Chamber denied President Karadzic a fair trial.

342. Similarly, General Mladic was the person who could most definitively and authoritatively speak to the critical issue of whether the shelling and sniping of Sarajevo was directed at civilians, and was part of a campaign of terror. By refusing to hear General Mladic's evidence, and then finding that President Karadzic was part of a JCE with General Mladic to unlawfully attack and inflict terror on civilians in Sarajevo,[481] the Trial Chamber denied President Karadzic a fair trial.

343. Likewise, General Mladic was the person who could most definitively and authoritatively speak to the critical issue of whether there was an agreement or an

[477] *Id*, para. 39.
[478] *United States v Childs*, pp. 557, 560.
[479] *United States v. Schwimmer*, p. 23.
[480] *Judgement*, paras. 5805-14, 5818-21.
[481] *Judgement*, paras. 4891, 4928

understanding to expel the Muslims and Croats residing in the Serb-controlled areas. By refusing to hear General Mladic's evidence, and then finding that President Karadzic was part of a JCE with General Mladic to expel Muslims and Croats,[482] the Trial Chamber denied President Karadzic a fair trial.

344. There may well be situations, such as questions that would reveal the details of the witness' defence strategy, or questions that were of little benefit to the accused, where a witness' interest in refusing to answer might reasonably outweigh the accused's interest in the witness' evidence. However, the Trial Chamber's blanket refusal to compel General Mladic to answer the questions asked by President Karadzic, which went to the heart of his case, was unreasonable, and erroneous.

345. The Trial Chamber's findings that would have been affected by General Mladic's testimony included President Karadzic's responsibility for Counts 1-10. The Appeals Chamber should order a new, and fair, trial, at which General Mladic's evidence can be heard.

[482] *Judgement*, paras. 3437, 3439-40, 3447, 3464-65.

21. The Trial Chamber erred in refusing to assign counsel to Defence Witness Predrag Banovic

In Brief

Ruling:	***Defence witness who feared self-incrimination refused assigned counsel because he was not an accused, suspect, or detained.***
Error:	***Indigent witness with legitimate self-incrimination concerns was entitled to assigned counsel.***
Impact:	***Trial Chamber made findings on events at Keraterm Camp without hearing the contrary evidence of the Defence witness.***

346. The Trial Chamber refused to assign counsel to Defence Witness Predrag Banovic, a former guard at Keraterm Camp, who had pled guilty to persecution at the ICTY in 2003 and had been sentenced to 8 years imprisonment.[483] Banovic had completed his sentence,[484] but his plea agreement did not provide for immunity from prosecution in the State courts.[485] Banovic requested that the Trial Chamber assign him counsel for his testimony in this case.[486]

347. The Trial Chamber said that:

> The Chamber has considered Article 5 of the directive on the assignment of counsel, which provides for the assignment of counsel to three categories of individuals: i.e., suspects, accused persons, and any persons detained under the authority of the Tribunal. Banovic was released in 2008 and is therefore no longer covered by Article 5 of the directive. The Chamber sees no exceptional circumstances warranting that the Chamber order the Registrar to assign counsel to Banovic for the purpose of his testimony in these proceedings.[487]

[483] *Banovic SJ*.
[484] *Banovic Enforcement Decision*.
[485] *Banovic Plea Agreement*.
[486] T45428.
[487] T45428-29.

Banovic thereafter refused to testify.[488]

348. The Trial Chamber's reasoning was flawed. It relied on Article 5 of the *Directive on the Assignment of Defence Counsel*, an administrative regulation of the Registrar, as governing the circumstances under which a witness was entitled to assignment of counsel. By relying Article 5 in that manner, the Trial Chamber violated the United Nations' own *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. Guideline 8 states "the circumstances in which it may be appropriate to provide legal aid to witnesses include, but are not limited to, situations in which…the witness is at risk of incriminating himself or herself."

349. ICC Chambers have regularly assigned counsel to witnesses facing a danger of self-incrimination even if they are not suspects, accused, or detained.[489] Similarly, in civil law jurisdictions such as Germany, and in common law jurisdictions like the United States, when the risk of self-incrimination becomes apparent, a witness is entitled to assigned counsel whether or not a suspect, accused, or detained.[490]

350. In this case, Banovic faced a real danger that his trial testimony could be used either to revoke his plea agreement with the ICTY Prosecution, or to prosecute him in State court. An assigned counsel could have assisted him in navigating these dangers. The Trial Chamber erred when refusing to provide Banovic with assigned counsel, depriving President Karadzic of his testimony. The Trial Chamber went on to make findings against President Karadzic on issues related to Keraterm Camp about which Banovic would have testified.[491]

351. The Appeals Chamber should order a new, and fair, trial at which Banovic can be assigned counsel and testify.

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[488] *92 bis Motion—Banovic*, para. 2.
[489] *Katanga Decision*, para. 53; *Ruto Decision*, para. 10; *Bemba Decision*, para. 4; *Ruto Decision II*, para. 5; *Bemba Decision II*, para. 18; *Gbagbo Decision*, para. 49. *See also* ICC Rule 74(10); ECCC Rule 28(9).
[490] *German Criminal Code* §68(b)(2); *U.S. Court Rules*, §210.20.20(c); *California Rules of Court*, rule 5.548(a).
[491] The impact of excluding Banovic's evidence is discussed more fully in Grounds 11-12.

22. The Trial Chamber erred in admitting evidence of illegally intercepted telephone conversations

In Brief

Ruling:	***Illegally intercepted telephone conversations would not be excluded despite violations of the Bosnian Constitution and Law on Internal Affairs***
Error:	***Conversations illegally obtained by authorities of one ethnic group against the leaders of another ethnic group should have been excluded under Rule 95 as antithetical to the integrity of the trial.***
Impact:	***Illegally intercepted evidence formed the core of findings of President Karadzic's mens rea for overarching JCE.***

352. While preaching ethnic unity and a multi-ethnic State, the Bosnian Muslims clandestinely violated the Bosnian Constitution and Law on Internal Affairs by misusing State organs to illegally intercept telephone conversations of leaders of other ethnic groups. This duplicity violated not only the law, but also internationally recognised privacy rights.

353. The Trial Chamber denied President Karadzic's motions to exclude evidence obtained from these illegally intercepted telephone conversations[492] on the ground that he "fail[ed] to demonstrate how the admission of evidence allegedly obtained in contravention of Bosnian domestic law by Bosnian authorities would be so grave so as to result in damaging the integrity of the proceedings before the Chamber."[493]

354. The intentional violation of President Karadzic's constitutional and human rights in the context of the impending ethnic conflict in the region was antithetical to the

[492] *Intercepts Motion I*; *Intercepts Motion II*. The motions applied to conversations intercepted before 6 April 1992. President Karadzic did not challenge the right to intercept communications during a state of war.
[493] *Intercepts Decision*, para. 10; *Intercepts Reconsideration Decision*, para. 6.

integrity of the proceedings and damaging to the ICTY's purpose of reconciliation in the region through justice.

355. The illegal interception of private telephone conversations in this case involved a violation of domestic law that touched the very core of the ethnic conflict in the former Yugoslavia. The Trial Chamber's admission and reliance on this evidence damaged the integrity of the proceedings, as it amounted to the ICTY adopting and using, for its own purposes, the fruits of one ethnic group's illegal machinations against another. Further, the domestic constitutional violation was not a mere procedural violation, but a substantive violation of President Karadzic's human right to privacy that the Trial Chamber had a duty to respect and protect.

356. Amendment 69(4) to the Bosnian Constitution provided that "only by law and *based on a court order* is it possible to regulate the departure from the principle of inviolability of confidentiality of a letter and other means of communications, should it be deemed necessary for conducting criminal proceedings, or it being an issue of the country's security."[494]

357. Article 39 of the Bosnian Law on Internal Affairs authorised the Secretary of the Republic, when essential for the conduct of criminal proceedings or for the security of the country and in keeping with the law, to suspend the principle that the confidentiality of communications is inviolable. However, the Secretary of the Republic was required to inform the Presidency of the measures undertaken.[495]

358. On 8 April and again on 23 August 1991, Alija Delimustafic, the Bosnian Muslim party's Minister of the Interior, authorised intercepting the conversations of President Karadzic and others. [REDACTED].[496]

359. Deputy Interior Minister Momcilo Mandic testified that SDS party leaders' conversations were intercepted at the behest of SDA party members, and that only SDA activists worked at the listening posts. All the material went directly to SDA and HDZ party leaders.[497]

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[494] *SRBiH Constitution Amendment* (emphasis added).
[495] *SRBiH Law on Internal Affairs.*
[496] [REDACTED]
[497] T4853-55.

Momcilo Mandic

360. Many illegally intercepted conversations were admitted during the trial and relied upon by the Trial Chamber to make findings adverse to President Karadzic.[498]

> ICTY Rule 95 provides that:
>
> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

361. Rule 95 has its genesis in a desire to protect internationally recognised human rights from the beginning of the ICTY's existence. When the statute was being drafted, representatives of seven States wrote a letter to the Secretary-General stating that the Tribunal's rules of procedure and evidence should be based on international human rights and humanitarian law principles, as well as norms and standards of due process and procedural fairness.[499]

362. The Trial Chamber erred in treating the violation of President Karadzic's human right to privacy as a mere procedural violation rather than as a violation of a substantive human right. Privacy is a fundamental human right enshrined in the ICCPR and the ECHR,[500] and in domestic legislation worldwide. The right to privacy is explicitly

[498] *Judgement*, paras. 844, 2641-49, 2658, 2677-81, 2683-89, 2691, 2693, 2696, 2699, 2708-12, 2716, 2720, 2774, 2780, 2821, 2905, 2907, 2910-13, 2915, 2917-18, 2925, 2933, 2943, 2955-56, 2958, 2968-69, 2971, 2994, 3005-08, 3010, 3012-15, 3021, 3169, 3259, 4673, 4895-99, 5474.
[499] U.N. Doc. A/47/920, S/25512 (Apr. 5, 1993), Annex, Section. III (2).
[500] ICCPR, Article 17; ECHR Article 8.

protected by the constitutions of many countries.[501] The courts of numerous other countries, such as Canada,[502] India,[503] and Ireland,[504] have implicitly recognised this right. Each has also instituted legal protections against unrestricted wiretapping. The laws in domestic jurisdictions across the globe prohibit governments from violating the right to privacy of their citizens.

363. Although not bound by domestic law, the ICTY is obliged to respect internationally recognised human rights, including the right to privacy. When that right is violated by the intentional disregard of constitutional provisions, subversion of government resources, and as part of a strategic political agenda regarding ethnic conflict, it cannot be characterised as a mere procedural violation. Rather, it is a substantive violation of President Karadzic's rights, which the Tribunal is bound to respect and protect. To do otherwise is to jeopardise the integrity of the proceedings.

364. Domestic and regional courts have consistently found that protection from illegal governmental electronic surveillance is an important aspect of the right to privacy indispensable to a free society. The Canadian Supreme Court has noted: "One can scarcely imagine a State activity more dangerous to individual privacy than electronic surveillance."[505] Likewise, the ECtHR has emphasised: "Tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise."[506] The ECtHR has also reasoned: "A system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it."[507]

365. While not every domestic law violation would result in the exclusion of evidence at the Tribunal, a survey of Rule 95's application indicates that admitting evidence gathered in systematic and deliberate violation of provisions of the law intended to protect an individual's right to privacy would be "antithetical to, and would seriously damage the integrity of the proceedings."

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[501] See Annex G for a list of constitutional provisions.
[502] *Hunter v. Southam Inc*.
[503] *PUCL v India*.
[504] *Kennedy & Arnold v Ireland.*
[505] *R. v. Duarte*, p. 43.
[506] *Amann v. Switzerland*, (citing *Kopp v. Switzerland*), para. 56.
[507] *Rotaru v. Romania*, para. 59.

366. Evidence obtained in violation of the accused's human rights has been excluded under Rule 95. The Trial Chamber in *Prlic* noted that the accused's right to silence is a human right recognised by both the ICCPR and ECHR, and ruled that admitting the evidence "would seriously infringe the Accused Praljak's right to a fair trial."[508] In *Mrksic* the Trial Chamber confirmed that it would not have admitted evidence obtained in violation of the accused's rights against self-incrimination had the Prosecution sought its admission, even though the Tribunal played no role in the violations.[509]

367. The same principles preclude reliance on the intercepted recordings. While the Trial Chamber appears to have relied on the fact that domestic authorities, rather than Tribunal representatives, committed the violation, *Mrskic* holds that this distinction is inappropriate in considering the admissibility of illegally obtained evidence.

368. The ICTR has also recognised Rule 95's role in protecting the accused's human rights. The *Bagosora* and *Karemera* Trial Chambers quoted the *Delalic* observation that "it is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being 'antithetical to, and would seriously damage, the integrity of the proceedings.'"[510] The *Zigiranyirazo* Trial Chamber clarified that when even an uncertainty about whether the accused's human rights were violated arises, the evidence must be excluded.[511] The *Kajelijeli* Trial Chamber excluded a statement taken from an accused in violation of a court order even though the Prosecution committed the violation unintentionally.[512]

369. By admitting the intercepted conversations in this case, the Trial Chamber acted contrary to these established principles. No uncertainty about the violation of President Karadzic's right to privacy exists; it was unequivocally and intentionally violated. This violation of the fundamental right to privacy requires excluding the evidence as "antithetical to, and would seriously damage, the integrity of the proceedings."

370. In *Brdjanin*, the Trial Chamber admitted some of the same intercepts at issue here, holding that their admission did not violate Rule 95. The Trial Chamber concluded that it was "neither practical nor possible to notify the Presidency of the intercepts. It

[508] *Prlic Exclusion Decision*, paras. 17, 22.
[509] *Mrskic Exclusion Decision*, paras. 22, 24, 29.
[510] *Bagosora Exclusion Decision*, para 21; *Karemera Exclusion Decision II*, para. 25.
[511] *Zigiranyirazo Exclusion Decision*, para 13.
[512] *Kajelijeli Contempt Decision*, paras. 14-15.

would not have made any sense at all to notify the entire Presidency when this would have undoubtedly thwarted the attempt to establish what was going on and neutralized the entire raison d'etre of the proposed exercise."[513]

371. However, the Trial Chamber in *Brdjanin* only dealt with the violation of the Law on Internal Affairs. The violation of the Bosnian Constitution by intercepting conversations without a court order was never called to the Trial Chamber's attention. Therefore, the Trial Chamber declined to exclude evidence based upon what appeared to be a mere procedural violation, when in fact the interceptions violated the Bosnian Constitution itself.

372. *Brdjanin* also concerned different facts. Unlike in the present case, the *Brdjanin* Trial Chamber was not presented with evidence that the Bosnian Muslims had hijacked State institutions and concealed the interceptions from their colleagues who were members of other ethnic groups. The Appeals Chamber is not bound by the Trial Chamber's finding in *Brdjanin*, and the decision is distinguishable for these reasons.

373. In *Stanisic & Zupljanin*, the Trial Chamber denied a Rule 95 motion to exclude recorded telephone conversations on the basis that even if they had been obtained illegally, the accused did not show that the illegality had "rise[n] to the level that it would seriously damage the integrity of the proceedings."[514]

374. As in *Brdjanin*, the *Stanisic & Zupljanin* Trial Chamber had not been presented with evidence that the interceptions violated the Bosnian Constitution nor that they were undertaken deliberately by one ethic group outside established organs of the Ministry of Interior. Therefore, the decision, like that in *Brdjanin*, is distinguishable from President Karadzic's case.

375. In *Haraqija*, the Appeals Chamber held that recording conversations in violation of domestic law did not require exclusion under Rule 95. In that case, however, one party to the conversation was aware that it was being recorded, and the authorities were acting in "good faith" to protect their informant by listening for signs of danger. The Appeals

[513] *Brdjanin Intercepts Decision*, para. 63.
[514] *M. Stanisic Intercepts Decision*, para. 21.

Chamber reasoned that when the authorities are acting in good faith to protect a witness, admitting the evidence does not violate Rule 95.[515]

376. In President Karadzic's case, the authorities intercepted conversations between two people who were both unaware of the recording, and intentionally circumvented the law and right to privacy to obtain information to benefit one ethnic group. Admitting evidence obtained by a purposeful subversion of the law and individual privacy rights is antithetical to justice.

377. In *Naletilic*, the Appeals Chamber rejected the exclusion of evidence under Rule 95 where the ICTY Prosecutor executed a search warrant without the help of local officials, allegedly violating national sovereignty. However, the accused had failed to argue that the Prosecutor's violation of national sovereignty affected the reliability of the evidence or the integrity of the proceedings.[516] The decision, therefore, only stands for the proposition that the Tribunal will not find a violation to be antithetical to justice without a showing that it affects the integrity of the proceedings. Here, President Karadzic has shown that relying on evidence obtained by violating a fundamental human right damages the integrity of the proceedings.

378. Additionally, in *Naletilic*, the violation at issue was merely procedural in that the Prosecution failed to obtain State consent before executing a valid warrant.[517] The *Naletilic* decision therefore does not address the issue of a substantive violation of the accused's rights under his own Constitution. In contrast, the BiH Ministry of the Interior did not have a valid warrant or court order to intercept President Karadzic's conversations.

379. Therefore, decisions that have declined to exclude illegally obtained evidence under Rule 95 are inapposite.

380. The illegal electronic interception of telephone conversations in this case strikes directly at the core of the ethnic conflict in the former Yugoslavia. This was not an isolated procedural violation devoid of ethnic motivation, or even an incidental occurrence of members of one ethnic group intercepting the communications of another. The unconstitutional and illegal interceptions were conducted to exploit the machinery of State

[515] *Haraqija AJ*, para. 28.
[516] *Naletilic AJ*, para. 238.
[517] *Id*, para. 235.

institutions for the benefit of the Bosnian Muslims violating the privacy of Bosnian Serb citizens. Shortly thereafter, the region exploded into ethnic conflict between these groups.

381. This conduct is prohibited under the domestic law of many countries, such as the United States, where the Supreme Court reasoned that because electronic surveillance infringes on an individual's right to privacy, a high-ranking official with political accountability must be the authority to approve an invasion of privacy. The Court held that when authorities other than those designated by law authorise a wiretap application, any evidence obtained as a result must be excluded at trial. [518] The Ministry of the Interior's failure to obtain a court order or notify the Presidency similarly violated important procedural safeguards on the right to privacy, so that admitting evidence from the Ministry's unauthorised wiretap, which was not reported to the appropriate political authorities, is antithetical to the integrity of the proceedings.

382. The ICTY represents the gold standard for fairness to the courts and the public in the former Yugoslavia. The Trial Chamber's admission of the intercepted conversations fell below that standard and endorsed the counterproductive message that illegal violations of one ethnic group's privacy by the authorities of another ethnic group in power is condoned.

383. The illegally intercepted conversations permeated the Trial Chamber's judgement on the existence of an overarching JCE and President Karadzic's shared intent to expel Bosnian Muslims and Croats.[519] The Appeals Chamber should order a new, fair trial at which the illegally intercepted conversations are excluded.

[518] *United States v. Giordano*, p. 508.
[519] See footnote 498, *infra*.

23. The Trial Chamber erred in admitting the testimony of war correspondents without a valid waiver of the privilege

In Brief

Ruling:	***War correspondent privilege was validly waived by the individual correspondents.***
Error:	***The privilege could only be waived by the news organisation employing the war correspondent and there was no such waiver.***
Impact:	***War Correspondent testimony key to findings of overarching and Sarajevo JCEs.***

384. The Trial Chamber erred in denying President Karadzic's motions to exclude the testimony of war correspondents based upon his contention that an individual correspondent is not the holder of the war correspondent privilege.[520] The Trial Chamber maintained that "the privilege enjoyed by war correspondents is a matter which is for them personally to exercise or not."[521]

385. A qualified privilege for war correspondents exists at the ICTY. Under that privilege, a war correspondent may not be compelled to testify unless the party calling the correspondent demonstrates that the correspondent will give evidence that is direct and important to the core issues of the case and the evidence sought cannot reasonably be obtained elsewhere.[522]

386. War correspondents are journalists.[523] Given the responsibilities and liabilities that news organisations assume regarding the management and disclosure of its materials,

[520] *War Correspondents Motion*; *War Correspondents Motion—Van Lynden*; T9749-50 (Martin Bell); T10067 (Jeremy Bowen); T21033 (Ed Vulliamy); T24910 (Robert Block).
[521] *War Correspondents Decision*, para. 3; *War Correspondents Decision--van Lynden*, para. 5.
[522] *Brdjanin War Correspondents Appeals Decision*, para. 50.
[523] *ICRC Protocols Commentary* to AP I, Article 79.

a United States Court of Appeals has concluded that the news organisation is the holder of the journalists' privilege, rather than the journalist.[524]

Aernout van Lynden
War Correspondent—Sky News

387. News organisations own the material collected or observed by their journalists and therefore control disclosure of that material under copyright and intellectual property principles.[525] In addition, news organisations may incur civil liability for disclosure of confidential material by their journalists,[526] as well as for libelous statements made by them.[527] This legal responsibility reflects the principle that the news organisation, and not the individual journalist, controls the disclosure of information obtained by the journalist and holds any privilege relating to this information.

388. The principles of employment and agency law also support the news organisation being the holder of the privilege. Most employment contracts and handbooks for news organisations require that any employee contacted by a regulatory or law enforcement authority promptly contact his or her supervisor, who will then alert the company's General Counsel.[528] As agents of the news organisation, journalists cannot,

[524] *United States v. Cuthbertson*, p. 147.
[525] *See for example, Scripps Code of Conduct*, p. 37.
[526] *Cohen v. Cowles Media*.
[527] *Armstrong v Times Newspapers*.
[528] *News Corp. Standards*, p. 5; *Time Warner Standards*, p. 2.

under the terms of their employment, waive the privilege of confidentiality when the waiver implicates the news organisation.

389. This principle is also reflected in the corporate attorney-client privilege, which addresses whom may waive the privilege on the corporation's behalf. "The privilege…can be asserted and waived only by a responsible person acting for the organisation for this purpose."[529] Given the liability implications of waiving the privilege, only top management may control the disclosure of corporate information on the corporation's behalf—not corporate employees. The same logic applies to the war correspondent privilege; given the liability implications for the employing news organisation, the journalist (as a corporate employee/agent) cannot waive the privilege for the news organisation (the corporation/principal).

390. In *Simic*, the Prosecution sought to present the testimony of an interpreter who had worked for the ICRC during the relevant events. The ICRC argued that his proposed evidence belonged to the ICRC, and "whether or not the evidence can be disclosed cannot depend on the wishes of a former employee".[530] The Trial Chamber agreed that the ICRC had the right to insist on the non-disclosure of information relating to the work of the ICRC.[531] As a result, the interpreter did not testify.[532]

391. The primary basis for the ICRC's privilege is that compelling ICRC employees to testify would jeopardise the ICRC's mandate by endangering its employees through the perception that ICRC personnel can be forced to become witnesses against those with whom they come in contact. Thus, the ICRC is the only entity capable of determining when to waive the privilege in keeping with that mandate.

392. The same interests apply to war correspondents.[533] Many international instruments set forth the significant public interest served by war correspondents.[534] The Geneva Conventions include provisions designed to protect war correspondents, recognising that they are "a group whose presence in areas of conflict is valued."[535] Like ICRC employees, war correspondents as a group would be endangered through the

[529] *Restatement—Lawyers*, comment j.
[530] *Simic ICRC Decision*, paras. 9-10.
[531] *Id*, para. 73.
[532] *Id*, p. 29.
[533] *See Berman Article*, pp. 265-68.
[534] *See Brdjanin War Correspondents Appeals Decision*, paras. 35–38.
[535] AP I, Article 79.

perception that they can be forced to become witnesses against their interviewees.[536] Therefore, like the ICRC, the news organisations, and not the individual war correspondents, are best placed to determine when to waive the privilege so as not to jeopardise the organisations' mandate and ability to operate in war zones and to ensure that any waiver is consonant with its duties and liabilities.

393. The Trial Chamber erred in holding that the five retired war correspondents who testified for the Prosecution in this case could validly waive the war correspondent privilege and in refusing to exclude their testimony.[537]

394. The Trial Chamber heavily relied on the evidence of war correspondents when finding that a JCE to terrorise civilians in Sarajevo existed and that President Karadzic shared the intent to terrorise them, and that President Karadzic had the intent to expel Bosnian Muslims and Croats as part of the overarching JCE.[538] Because these findings permeated the judgement and were essential to the Trial Chamber's findings, the Appeals Chamber should order a new, fair trial, at which the war correspondents' testimony would be excluded, absent a valid waiver of that privilege.

[536] *Brdjanin War Correspondents Appeals Decision*, para. 43.
[537] See *Khan Article*, p. 562.
[538] *Judgement*, paras. 1035, 1640, 1786, 2703, 2797, 3386, 3657, 3996, 4032, 4045, 4514, 4532, 4534, 4568, 4599, 4662, 4753, 4849.

24. The Trial Chamber erred in refusing to recognise the parliamentary privilege

In Brief

Ruling:	***Parliamentary privilege does not apply in international criminal proceedings.***
Error:	***Parliamentary privilege is a rule of customary international law that extends to those appearing before national and regional Parliaments.***
Impact:	***Trial Chamber used President Karadzic's statements before BiH and RS Parliaments to establish his mens rea for the overarching and Srebrenica JCEs.***

395. The Trial Chamber erred when it held that "while immunities and privileges may protect parliamentary statements in domestic jurisdictions, this [does not apply] in international criminal proceedings",[539] and thereafter used his statements in the BiH and RS Assemblies to make adverse findings.

396. Under the doctrine of parliamentary privilege, statements made in Parliament by a Member or, a person appearing before Parliament, cannot be used against that person in a civil or criminal action.[540] The proceedings of a legislative body "are absolutely privileged and words spoken in the course of a proceeding in Parliament can neither form the basis of nor support either a civil action or a criminal prosecution".[541]

397. General principles of law recognised by civilised nations are to be derived from existing legal systems, in particular, national systems of law.[542] If a principle "is found to have been accepted generally as a fundamental rule of justice by most nations in their

[539] T43150.
[540] *Stockdale v Hansard*; *Bradlaugh v Gossett*.
[541] *Stopforth v Gover*; *Stockdale v. Hansard*, p. 1156.
[542] *Jurists Committee Report*, p.335 (per Lord Phillimore and de La Pradelle).

municipal law, its declaration as a rule of international law would seem to be fully justified".[543] The Trial Chamber was required to apply this source of law.[544]

398. A survey of the main legal systems of the world, contained in Annex H, reveals that parliamentary privilege is a general principle of law recognised by civilised nations.[545]

399. Parliamentary privilege extends to persons who take part in parliamentary activities, thus to Members of Parliament and officials, such as witnesses, civil servants, experts, and petitioners.[546] Parliamentary privilege protects "parliamentary activity as such, rather than just the elected parliamentarians".[547]

400. Parliamentary privilege promotes the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.[548] A representative discharging the public trust should enjoy the fullest liberty of speech and be protected from resentment of those offended by whom the exercise of that liberty.[549]

401. In the United States, the speech or debate clause precludes judicial inquiry into a Congressman's motivation for giving a speech on the House floor, even when the speech is alleged to be part of a criminal conspiracy.[550] In Canada, a witness appearing before a commission of public inquiry could not be cross-examined on evidence he had previously given to a parliamentary committee.[551] A Royal Canadian Mounted Police officer's testimony before a parliamentary committee could not be used against her in an internal Code of Conduct investigation.[552] Throughout the Commonwealth, parliamentary privilege has been considered necessary to the discharge of the legislative function.[553]

402. President Karadzic participated in Bosnian Assembly sessions as SDS party Preisdent, and in Republika Srpska Assembly sessions as Republika Srpska President. The

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[543] *Hostages Case*, p.1235.
[544] *Secretary-General's Report*, para. 58; ICJ Statute, Article 38(1).
[545] *See European Parliament 1993 Paper*, *European Parliament Center 2001 Paper*; *European Parliament 2005 Paper*; *European Parliament 2012 Paper*; *Council of Europe Report*.
[546] *Council of Europe Report*, para. 59; see also *Gagliano v Canada*, paras 72, 77, 78 and 83; *Prebble v.TV NZ*, p. 7.
[547] *A. v. United Kingdom*, para. 85; *George v. Canada*, para. 70.
[548] *A. v. United Kingdom*, para. 77.
[549] *Tenney v. Brandhove*, p. 367; *Prebble v.TV NZ*, p. 7.
[550] *United States v. Johnson*, pp. 173-185.
[551] *Gagliano v Canada*.
[552] *RCMP v Canada*.
[553] *Stockdale v. Hansard*, p. 1191.

Trial Chamber erred when it found that the parliamentary privilege did not apply in international criminal proceedings and in using President Karadzic's statements before the Assemblies against him in its judgement.

403. These statements permeated the Trial Chamber's findings on the existence of an overarching JCE and President Karadzic's responsibility, as well as its finding that he had genocidal intent relating to Srebrenica.[554]

404. These findings include that President Karadzic:

- denigrated Muslims and Croats, portrayed them as the Serbs' historical enemies, and exacerbated ethnic tensions;[555]
- intended to threaten the Muslims against pursuing independence knowing that a potential conflict would result in thousands of deaths, the destruction of property, and the displacement of people;[556]
- promoted the idea that the Serbs could not live together with Muslims and Croats and formed the foundation for the separation of the three people;[557]
- spoke against Muslims being allowed to stay in Bosnian Serb claimed territory;[558]
- endorsed the territorial acquisitions which had been achieved militarily, and viewed them as a means of creating their own State which they would not relinquish;[559]
- promoted the implementation of the Strategic Goals emphasising the importance of the separation of the national communities;[560]
- advocated and worked towards a territorial re-organisation and the creation of parallel and separate institutions, and military and police structures, which could gain or retain control of desired areas;[561]

[554] *Judgement* paras. 46, 2596, 2600, 2654, 2668, 2670, 2672, 2692, 2697, 2707-08, 2710-11, 2715, 2755, 2768, 2770, 2772, 2777, 2787, 2789, 2802, 2804-05, 2809, 2811, 2816, 2828, 2710, 2839, 2845, 2855,, 2858-62, 2882, 2887, 2895-97, 2899, 2901, 2932, 2945, 2963, 2978, 3042, 3063, 3069-70, 3091, 3096, 3376, 3378-81, 3412, 3425, 3485, 4661, 4663-64, 4666-67, 4718-19, 4735, 4902, 4911, 4919, 5791, 5989-90.
[555] *Judgement*, paras 2596, 2668, 2670, 2755.
[556] *Judgement*, paras 2600, 2692, 2697, 2707-08.
[557] *Judgement*, paras 2672, 2755, 2768, 2770, 2802, 2804, 3485.
[558] *Judgement*, paras 2711, 2770, 2772, 2787, 2802, 2805, 2809, 2811, 2816, 3091.
[559] *Judgement*, paras 2772, 2787, 2845.
[560] *Judgement*, paras 2858-62, 2895-97, 2899.
[561] *Judgement*, paras 2710, 2839, 2963, 2978, 3042.

- justified the territorial and political objectives of a separate Serb State by portraying the Serbs as victims;[562]
- emphasised that he wanted to create a "new reality" on the ground as a means of securing international recognition for RS;[563]
- minimized the extent of criminal activity committed by Serb Forces in the municipalities;[564]
- had influence and authority over the courts, but they failed to investigate and prosecute criminal offences committed against non-Serbs;[565] and
- had the intent to destroy a substantial part of the Bosnian Muslim group in Srebrenica.[566]

405. The Appeals Chamber should order a new, and fair trial, where statements made before Parliament could not be used against President Karadzic.

[562] *Judgement*, paras 2715, 3063.
[563] *Judgement*, paras 2777, 3069-3070, 3096.
[564] *Judgement*, paras 3376, 3378-81.
[565] *Judgement*, paras 3412, 3425.
[566] *Judgement*, paras 5917, 5830.

25. The Trial Chamber erred in excluding Defence evidence under the *tu quoque* principle

In Brief

Ruling:	***Excluded evidence of five Defence witnesses on tu quoque grounds.***
Error:	***Evidence was admissible for legitimate purpose of demonstrating location of legitimate targets in Sarajevo and a motive for revenge in Hadzici.***
Impact:	***Trial Chamber's findings on Sarajevo and Hadzici crimes, and existence of the overarching and Sarajevo JCEs were made without consideration of relevant evidence.***

406. The Trial Chamber erred in excluding relevant evidence that civilian facilities in Sarajevo were used by the ABiH for military purposes on the incorrect basis that President Karadzic was relying on *tu quoque* evidence.

407. *Tu quoque* is a claim that breaches of IHL, being committed by the enemy, justify similar breaches by a belligerent. It is not a legitimate defence,[567] and President Karadzic never purported to rely on it.

(i) Branislav Dukic

408. The Trial Chamber excluded the evidence of Defence Witness Branislav Dukic reasoning that as his evidence "concerned, almost entirely, crimes committed against the Serbs", and that his evidence about the ABiH's positions and military activity was "minimal and general in nature."[568]

409. Having excluded Dukic's evidence that the ABiH turned public facilities, enterprises, hospitals, residential buildings, and even kindergartens in Sarajevo into

[567] *Kunarac AJ*, para. 87.
[568] T30518-19.

artillery and sniping strongholds,[569] and that the VRS was firing at military targets, the Trial Chamber then found that the Serbs continuously targeted civilians in Sarajevo by sniper fire no matter where they were,[570] and that VRS fire was disproportionate and indiscriminate.[571]

410. The Trial Chamber excluded Dukic's evidence that the ABiH had artillery positions within the hospital grounds,[572] and then found that that the hospitals in Sarajevo were not used for military purposes by the ABiH.[573] The Trial Chamber excluded Dukic's testimony in which he could have precisely described all ABiH military positions in Hrasnica,[574] and then found that all ABiH-related locations in Hrasnica were far from the site of Scheduled Shelling Incident G10.[575]

411. The Trial Chamber further excluded Dukic's evidence that ABiH in Sarajevo had at its disposal a large variety of heavy artillery weapons,[576] and then found that majority of the ABiH's arsenal in Sarajevo consisted of small arms and mortars with small quantities of artillery weapons.[577]

(ii) Goran Sikiras

412. The Trial Chamber also excluded portions of Defence Witness Goran Sikiras' evidence. Sikiras had information about, *inter alia*, the May 1992 attacks launched by the Bosnian Muslims on Serbs in the Velesici area of Sarajevo.[578] The Trial Chamber held that this evidence "is not relevant to the charges in the indictment" and that "it will not admit detailed *tu quoque* evidence under the guise of relevance to this trial."[579] It went on to conclude that in May 1992 General Mladic ordered indiscriminate and disproportionate shelling of Muslim civilians in Velesici because no Serbs were there,[580] and that the goal

[569] 1D6403 paras 3, 38, 41.
[570] *Judgement* para 3621.
[571] *Judgement*, para 3988-97.
[572] 1D6403 paras 3, 38.
[573] *Judgement*, para 4543.
[574] 1D6403, para 40.
[575] *Judgement*, para 4415.
[576] 1D6403.
[577] *Judgement*, para 3986.
[578] 1D20319, pp. 4-7
[579] T30687-88.
[580] *Judgement*, paras 4028, 4035, 4053-54, 4169, 4681, 4722.

of the blockade of Sarajevo was to put the pressure on the Muslim authorities and the population in Sarajevo rather than to protect the Serbian civilian population.[581]

Goran Sikiras

(iii-iv) Nenad Kecmanovic and Milan Mandic

413. The Trial Chamber excluded portions of the evidence of Defence Witnesses Nenad Kecmanovic and Milan Mandic. According to Kecmanovic, the *Zagreb* and *Europa* Hotels in Sarajevo were converted into prisons where Serbian civilians were detained and abused.[582] Mandic stated that Serbs were detained and abused in the Privredna Banka building in Dobrinja II, and other camps for Serbs in Sarajevo.[583] The Trial Chamber held that the evidence "relate[d] to crimes committed against Bosnian Serbs and will not be admitted on the grounds that it is irrelevant."[584]

[581] *Judgement*, paras 4567-76.
[582] 1D7351 paras 45-46.
[583] 1D6814, paras. 13-14.
[584] T32696; T39083-84.

Nenad Kecmanovic

414. The excluded evidence corroborated the evidence of other VRS witnesses that one of the main goals of the VRS in Sarajevo was to defend and protect their families and Serb territories from the ABiH attacks,[585] rather then to terrorise the Muslim population in Sarajevo.[586] Had VRS soldiers not done so, their families would have met the same fate as Mandic's family. Mandic could have testified that Muslim forces attacked his neighbourhood several times, and arrested, tortured, and/or killed local Serbs as soon as it was left unprotected.[587]

(v) Vitomir Banduka

415. According to Defence Witness Vitomir Banduka, Serbs in Hadzici municipality were denied freedom of movement, arrested, and imprisoned in various locations including an elementary school, while others were killed in an armed attack on 25 May 1992 in Kasetici village,[588] The Trial Chamber excluded this evidence because it referred to detention facilities established by Muslim authorities or to crimes committed against Serbs, which were irrelevant.[589]

[585] *Judgement*, paras 4569-76.
[586] *Judgement*, para 4605.
[587] 1D6814, paras. 13-14.
[588] 1D6708, paras. 59-60, 62-63, 72-75, 77-78.
[589] T33424-25.

Vitomir Banduka

416. As is the case with Kecmanovic and Mandic's excluded evidence, the excluded parts of Banduka's statement supported the defence case that the VRS intended to protect the Serb population, rather then to terrorise non-Serbs, and that crimes in Hadzici were motivated by local citizens taking revenge.[590] The Chamber went on to conclude that the crimes in Hadzici had been organised and planned by a JCE that included President Karadzic.[591]

Tu quoque principles

417. Evidence of crimes allegedly committed by other parties to the conflict is not *per se* inadmissible as *tu quoque* evidence. The admissibility of evidence of crimes committed by adversaries depends on the purpose for which the evidence is being adduced.[592] When the purpose of the evidence is to refute the Prosecution's allegations against the accused, the evidence is relevant and admissible.[593]

418. In *Prlic*, the Trial Chamber held:

> [I]t may be legitimate to present exhibits proving the other side's attacks upon the civilian population of an accused's camp if they go to refute, for example, allegations of a widespread or systematic attacks perpetrated upon a civilian population, allegations of the existence of a plan of concerted attack upon several

[590] 1D6708.
[591] *Judgement*, paras. 2088-2115.
[592] *Kupreskic Tu Quoque Decision*, p. 5; *Sluiter Treatise*, p. 590.
[593] *Kunarac AJ*, para. 88; *Hadzihasanovic Tu Quoque Decision*, p. 4.

> villages or perhaps to explain the behavior of the accused, or even to provide information on the organisation and activities of the BH Army or the HVO. However, it is important in this instance that such evidence addresses places appropriately defined. In other words, it is the responsibility of the party seeking to produce such evidence to explain, for each exhibit, what the exact link is, particularly geographic and temporal, to the alleged crimes in the municipalities of the Indictment and/or to the alleged responsibility of the Accused for these crimes, whether the commission of these crimes is alleged within or outside the context of a joint criminal enterprise.[594]

419. Essentially, the Tribunal's approach to *tu quoque* evidence reflects a broader principle that evidence may be admissible for one purpose, but inadmissible for another. The existence of one legitimate purpose is sufficient to make the evidence admissible, limited to that purpose. Examples include *Strugar*--allowing evidence of prior shelling incidents to prove the accused's *mens rea* for the acts charged in the indictment,[595] and *Popovic*--admitting a statement of a third party to assess contradictions between the statement and other testimony.[596]

420. In *Kupreskic*, the Trial Chamber referred to the *High Command* case heard before the US Military Tribunal at Nuremberg as "categorically" rejecting the *tu quoque* defence.[597] Nonetheless, that Military Tribunal considered the evidence invoked to support a *tu quoque* defence otherwise relevant:

> It is no defense in the view of this Tribunal to assert that international crimes were committed by an adversary, but as evidence given to the interpretation of what constituted accepted use of prisoners of war under International Law, such evidence is pertinent.[598]

421. At the SCSL, Judge Robertson recognised that evidence of crimes committed by an adversary may be admitted in some situations to support a defence, such as the reasonableness of force used, or necessity.[599]

422. In this case, the excluded evidence was offered for a proper purpose—to establish the existence of legitimate military targets in civilian areas, the goal of protecting Serb areas around Sarajevo, and that crimes committed at the local level were acts of

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[594] *Prlic Tu Quoque Decision*, para. 80 (emphasis in original).
[595] *Strugar Admissibility Decision*.
[596] *Popovic Exclusion Decision*, paras. 20, 22.
[597] *Kupreskic TJ*, para. 516.
[598] *High Command Case*, quoted in *Provost Treatise*, p. 229.
[599] *Norman Subpoena Appeals Decision*, Dissenting Opinion of Justice Robertson, para. 36.

revenge rather than planned and organised crimes committed at the direction of JCE members.

423. The Trial Chamber's error led it to erroneously conclude, without relevant evidence to the contrary, that the Bosnian Serbs engaged in indiscriminate attacks on civilian objects in Sarajevo and intended to inflict terror on the civilian population;[600] that President Karadzic's main objective necessarily entailed the forcible movement of the non-Serb population;[601] and that the crimes in the municipalities were committed in a systematic and organised pattern.[602] Those findings led to President Karadzic's convictions under Counts Three through Ten.

424. The Appeals Chamber should order a new, and fair, trial at which the wrongly excluded evidence can be considered.

[600] *Judgement*, paras. 4497, 4600.
[601] *Judgement*, paras. 3439-40.
[602] *Judgement*, paras. 3444-45.

26. The Trial Chamber erred in refusing to hear the testimony of General Radivoje Miletic

In Brief

Ruling:	***Refused to hear evidence of General Miletic [REDACTED]***
Error:	***Probative value of testimony was high with little or no prejudice or delay from hearing his evidence.***
Impact:	***General Miletic's evidence was directly relevant to the findings on President Karadzic's mens rea for Srebrenica.***

425. After granting a Defence subpoena for General Radivoje Miletic, VRS Chief of Administration,[603] then vacating the subpoena [REDACTED],[604] the Trial Chamber [REDACTED].[605]

426. [REDACTED] General Miletic's testimony and then making findings against President Karadzic on the matters to which General Miletic could have testified, the Trial Chamber abused its discretion.

427. A party seeking to re-open its case must demonstrate that the evidence could not have, with reasonable diligence, been identified and presented in its case-in-chief. Once those criteria are met, the Trial Chamber must weigh the probative value against the prejudice to the accused in admitting the evidence late in the proceedings.[606] In this case, the Trial Chamber [REDACTED].[607]

428. The Trial Chamber erred in its assessment of the probative value of General Miletic's evidence—making two about-faces.

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[603] *Miletic Subpoena Decision*.
[604] *Miletic Postponement Decision*, para. 11.
[605] [REDACTED]; [REDACTED].
[606] *Delalic AJ*, para 283.
[607] *Miletic Postponement Decision*, para. 11.

429. When issuing the subpoena, the Trial Chamber found that "Miletic is uniquely situated to give evidence regarding the Accused's knowledge of and/or involvement in the alleged execution of prisoners from Srebrenica."[608] [REDACTED][609] Then, in its judgement, the Trial Chamber turned around again and made findings against President Karadzic on the very *mens rea* issues to which General Miletic was able to give evidence.

430. The Trial Chamber found that President Karadzic acquired knowledge of the VRS' plan to kill the prisoners from Srebrenica sometime before his conversation with Miroslav Deronjic on 13 July at 2010 hours, during which he manifested his agreement with the plan to kill the prisoners and ordered that they be transported to Zvornik.[610]

431. General Miletic, one of President Karadzic's main interlocutors at the VRS Main Staff, and acting Deputy to General Mladic at the time of the Srebrenica events,[611] was prepared to testify that he never informed President Karadzic, either in writing or orally, that prisoners from Srebrenica would be, were being, or had been executed,[612] never saw any reference to killing prisoners from Srebrenica in any written VRS reports, and never knew of any plan to kill prisoners from Srebrenica.[613] [REDACTED] [614] and based upon his knowledge of President Karadzic, he could not imagine that he would ever favour or condone the execution of prisoners.[615]

[608] *Miletic Subpoena Decision*, para. 14.
[609] [REDACTED]
[610] *Judgement*, para. 5805.
[611] *Popovic TJ*, para. 1635.
[612] *Miletic Subpoena Motion*, para. 7.
[613] *Miletic 65 ter Summary*, p. 2, fourth para.
[614] [REDACTED]
[615] *Miletic 65 ter Summary*, p. 3, last para.

General Radivoje Miletic

432. This evidence was directly relevant to the Trial Chamber's findings of President Karadzic's knowledge of and agreement to the JCE to kill the men.

433. The Trial Chamber also found that President Karadzic opposed opening a corridor to allow men from the column which had left Srebrenica to pass to Bosnian Muslim territory, and that this demonstrated that President Karadzic shared the intent to destroy the group.[616]

434. General Miletic was privy to President Karadzic's inquiries to the VRS Main Staff about the corridor on 16 July. He never received any information or impression that President Karadzic wanted the corridor closed.[617] His testimony could thus have refuted the key element used to establish President Karadzic's genocidal intent.

435. The Trial Chamber also found that by signing Directive 7, and reducing the humanitarian aid that reached Srebrenica, President Karadzic demonstrated his intent that the Bosnian Muslims be forcibly transferred from Srebrenica.[618] General Miletic was the person in the VRS Main Staff responsible for issues relating to humanitarian aid and who drafted Directive 7. According to him, there was no plan to reduce humanitarian aid to the enclave resulting from Directive 7 or any other order of President Karadzic's, and neither

[616] *Judgement*, para. 5830.
[617] *Miletic 65 ter Summary*, p. 3, second para.; [REDACTED]
[618] *Judgement*, para. 5799.

President Karadzic nor the VRS Main Staff ever gave any orders to reduce humanitarian aid to Srebrenica after March 1995.[619]

436. Thus, General Miletic's testimony was of crucial relevance to the Trial Chamber's finding that President Karadzic participated in a JCE to eliminate the Bosnian Muslims of Srebrenica and had genocidal intent. [REDACTED].

437. [REDACTED].[620] [REDACTED]

438. [REDACTED]

439. In *Kordic*, the Appeals Chamber upheld the Trial Chamber's decision to admit the testimony of a Prosecution witness as fresh evidence after the Defence case had closed, which was based in part on "the duty to ascertain the truth of what occurred",[621] and despite necessitating rejoinder evidence.

440. In *Prlic*, the Trial Chamber permitted the Prosecution to re-open its case to admit General Mladic's notebooks after the Defence case had closed. It found that evidence which related directly to the accused's criminal responsibility was important enough to be admitted, despite delays associated with its presentation.[622] [REDACTED]

441. In *Gotovina*, the Trial Chamber allowed the Prosecution to re-open its case after the Defence case had closed because the evidence dealt with a limited and discrete set of facts and therefore the time required for hearing the proposed witnesses and for the Defence to research and re-open their cases would be limited.[623] [REDACTED].[624]

442. In *Mladic*, the Trial Chamber allowed the Prosecution to re-open its case in the midst of the Defence case to admit evidence from multiple witnesses concerning a newly discovered mass grave. It found that the actual delay in hearing the evidence and allowing time for defence preparation and its own evidence would not be "unduly long".[625] [REDACTED]

443. The *Ngirabatware* Prosecution was allowed to re-open its case after the evidence had closed. The Trial Chamber reasoned that the anticipated testimony was short and

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[619] *Miletic 65 ter Summary*, p. 2, seventh para.; [REDACTED]
[620] [REDACTED].
[621] *Kordic AJ*, para. 222.
[622] *Prlic Reopening Decision*, paras. 58-59.
[623] *Gotovina Reopening Decision*, para. 13; affirmed in *Gotovina Reopening Appeals Decision*, para. 34.
[624] [REDACTED]
[625] *Mladic Re-Opening Decision*, para. 10.

could be completed without causing any undue delays in the proceedings.[626]
[REDACTED]

444. National practice also supports President Karadzic's position [REDACTED]. In *United States v Larson*, a United States Court of Appeals found that it was reversible error to refuse to allow the Defence to re-open its case when an important witness whose testimony was unavailable during the defence case, became available before the verdict was returned. It ordered a new trial.[627]

445. [REDACTED]

446. The Appeals Chamber should order a new, and fair, trial at which General Miletic's evidence can be heard.

[626] *Ngirabatware Re-Opening Decision*, para. 27.
[627] *United States v Larson*. *See also Chea and Samphan AJ*, paras. 162-63.

27. The Trial Chamber erred when one of its judges deliberated on the credibility of a person with whom he was associated

In Brief

Finding: ***Trial Chamber relied upon Prosecution Witness [REDACTED] in its judgement.***

Error: ***[REDACTED] participation in deliberations on the evidence of [REDACTED] deprived President Karadzic of his right to an impartial Tribunal.***

Impact: ***[REDACTED] evidence was central to findings on [REDACTED] events and President Karadzic's responsibility for the overarching JCE.***

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447. [REDACTED].[628] [REDACTED].[629] [REDACTED] [630], [REDACTED].[631]

448. [REDACTED] testified as Prosecution Witness [REDACTED] in this case. At the time of his testimony, [REDACTED].[632] However, [REDACTED] participated in the Trial Chamber deliberations concerning [REDACTED] evidence. The Trial Chamber accepted [REDACTED] evidence about the events at [REDACTED] and the effect of [REDACTED]. This led to President Karadzic's conviction for those events.

[REDACTED]

449. [REDACTED] participation in the deliberations on the evidence of [REDACTED] violated President Karadzic's right to an impartial tribunal.[633]

[628] [REDACTED]
[629] [REDACTED]
[630] [REDACTED]
[631] [REDACTED]
[632] [REDACTED].
[633] President Karadzic's failure to raise this issue at trial does not preclude the Appeals Chamber from considering it on appeal. *Sainovic AJ*, para. 182.

450. Rule 15(A) provides in pertinent part: "A Judge may not sit on a trial or appeal in any case…concerning which the Judge has or has had any association which might affect his or her impartiality." [REDACTED] association with Prosecution Witness [REDACTED] was one which might affect his impartiality.

451. [REDACTED].[634] For him to then judge [REDACTED] testimony on those same events in President Karadzic's trial violated Rule 15(A).

452. An association that might affect a judge's impartiality is viewed as whether the facts would lead a reasonable observer, properly informed, to reasonably apprehend bias.[635] This reflects the judicial adage that justice "should not only be done, but should manifestly and undoubtedly be seen to be done".[636]

453. While a situation such as this has not previously arisen at the Tribunal, it has arisen in the United States, which employs the same "reasonable apprehension of bias" test.[637]

454. In the United States, where a judge has served in the matter in controversy as a lawyer in private practice, disqualification is mandatory.[638] A New York State judicial ethics advisory opinion stated, for example: "[i]f a former client of the acting judge appears as a witness in a case before the judge, the judge may preside if it is a jury case. In a non-jury case, if the judge knows of the witness's appearance in advance, the judge should offer to disqualify himself or herself."[639]

455. In *Williams v Pennsylvania*, the United States Supreme Court recently required disqualification of an appellate judge hearing a case in which he had been peripherally involved as a Prosecutor 26 years earlier, under the "appearance of bias" test. The court found that the judge might be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained earlier.[640]

456. The risk of bias is even greater when the credibility of the person with whom the judge has had an association is at issue. In *United States v Ferguson*, a person who had served as a clerk for the judge was a witness in a case. The court required disqualification,

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[634] [REDACTED]
[635] *Furundzija AJ*, para 189.
[636] *Id*, para.195.
[637] 28 U.S,C. 455(a).
[638] 28 U.S.C. 455(b)(2).
[639] *New York Ethics Opinion*.
[640] *Williams v Pennsylvania*.

as a reasonable person, informed that the judge held the witness in high esteem, would reasonably question the impartiality of the judge's credibility assessment.[641] Similarly, a court required disqualification in a case where the testimony of a friend of the judge was crucial to a finding of liability, as a reasonable observer would not think that a judge could impartially adjudicate the friend's credibility.[642] In *In re Faulkner*, the court held that a reasonable observer would reasonably question a judge's appearance of impartiality when presiding over a case in which his relative, with whom he had a close relationship and with whom he had spoken about the facts of the case, was a witness.[643] In an Australian case, a judge disqualified himself where his accountant was a witness and his credibility was to be at issue.[644]

457. All of these factors were present in the case of [REDACTED].[REDACTED], it would be difficult for a reasonable observer to imagine how [REDACTED] could dispassionately rule on [REDACTED] evidence in President Karadzic's trial.

458. The Trial Chamber had a reserve judge who participated in its deliberations. [REDACTED] should have withdrawn from the deliberations concerning [REDACTED] evidence and allowed the reserve judge to take his place. His participation in those deliberations violated President Karadzic's right to an impartial tribunal.

[641] *United States. v. Ferguson*, p. 1260.
[642] *Hadler v. Union Bank*, p. 979.
[643] *In re Faulkner*, p. 721.
[644] *Fried v National Australia Bank*, para. 65.

459. [REDACTED] testimony underpinned the Trial Chamber's findings that [REDACTED],[645] [REDACTED],[646] [REDACTED], [647] [REDACTED],[648] and President Karadzic's shared intent to expel Muslims, as evidenced, *inter alia*, by [REDACTED].[649]

460. The Appeals Chamber should vacate President Karadzic's convictions for Scheduled Incidents [REDACTED] and municipalities-related crimes in Counts 3-8 as a result of the violation of President Karadzic's right to an impartial tribunal.

[645] [REDACTED].
[646] [REDACTED].
[647] [REDACTED].
[648] [REDACTED].
[649] [REDACTED]

III. THE MUNICIPALITIES

28. The Trial Chamber erred in finding that there was a common plan to permanently remove Muslims and Croats from Serb territory to create a homogeneous entity

In Brief

Finding:	***President Karadzic was part of a common plan to permanently remove Muslims and Croats from Serb territory to create a homogenous entity.***
Error:	***Trial Chamber rejected the reasonable inference that President Karadzic sought political autonomy rather than forced displacement of Muslims and Croats.***
Impact:	***Finding of President Karadzic's responsibility for the overarching JCE was used as the basis for his conviction on Counts 3-8 for Municipalities crimes.***

461. The Trial Chamber erred in inferring that President Karadzic was a member of a joint **criminal** enterprise to permanently remove Muslims and Croats from Serb territory in Bosnia to create an ethnically homogeneous entity,[650] when another reasonable inference--that President Karadzic was a member of a joint **political** enterprise whose objective, once Bosnia left Yugoslavia, was political autonomy, not physical separation through forced displacement, was available.

462. A circumstantial case consists of evidence of a number of different circumstances that, taken in combination, point to the accused's guilt because they would usually exist in combination only because the accused did what is alleged against him. It is not sufficient that the conclusion reached is a reasonable one available from that evidence. It must be the **only** reasonable conclusion available. If another conclusion is reasonably

[650] *Judgement*, paras. 3440, 3447.

open from that evidence, and is consistent with the innocence of the accused, he must be acquitted. [651]

463. The key issue on appeal from such findings is often whether the Chamber has explained sufficiently,[652] and assessed correctly,[653] that all other possible inferences from the facts could be safely excluded as unreasonable.

464. The Trial Chamber accepted that the Bosnian Serb leadership's political objectives were not criminal.[654] No direct evidence of an official plan by the Republika Srpska leadership to permanently remove Muslims and Croats from Bosnian Serb claimed territory was found. No document was produced, nor conversation intercepted, in which President Karadzic called for the forcible removal of minority populations in the pursuit of an ethnically homogenous State. For a case where the Prosecution had unparalleled access to the accused's contemporaneous words and deeds, and in which his private conversations were recorded without his knowledge over a four-year period, this is extraordinary.

465. In fact, the Trial Chamber recognised the wealth of statements in which President Karadzic advocated for the protection of minorities, whose rights would be fully respected within each entity.[655] Much of the evidence relied upon by the Trial Chamber in support of its conclusion, such as President Karadzic's calls for Serb unity,[656] his reaction to the proposed independence of Bosnia,[657] the promulgation of the Strategic Goals[658] and Variants A/B,[659] and his references to historical grievances,[660] are all consistent with an inference that President Karadzic sought political autonomy, not physical separation.

466. However, the Trial Chamber found that that the only possible inference from President Karadzic's statements, speeches, conversations, policies and documents was that he intended physical, rather than political, separation. According to the Trial Chamber, his

[651] *Delalic AJ*, para. 458. *See also Stakic AJ*, para. 219; *Nchamihigo AJ*, para. 80; *Ntagerura AJ*, para. 306.
[652] *Bagosora AJ*, para. 572.
[653] *Bagosora AJ*, para. 604.
[654] *Judgement*, para. 3475.
[655] *See for example*, *Judgement*, paras. 2738, 2740-41, 2743-44, 2749-50.
[656] *Judgement*, paras. 2651-54.
[657] *Judgement*, paras. 2707-15.
[658] *Judgement*, paras. 2895-2903, 3439.
[659] *Judgement*, paras. 3072-96, 3439.
[660] *Judgement*, paras. 2670-73.

call for protection and inclusion of minorities was a pretence, and what he really wanted was for Muslims and Croats to be forcibly removed through the commission of crimes.

467. Even if this was a reasonable inference, it was not the only one available. The evidential record allowed for another reasonable inference consistent with innocence; that the crimes of forcible transfer and deportation were not the result of the execution of a common objective to create a homogeneous entity, but were the result of a civil war among groups with a history of unforgivable violence against each other. No reasonable Trial Chamber would have accepted that this could be safely excluded. On this basis alone, the JCE finding should be reversed.

468. The errors set out below, further warrant the Appeals Chamber's intervention:

> The Trial Chamber's selective approach to evidence disentitles it to the deference afforded to finders of fact

469. A Trial Chamber is required to carry out a holistic evaluation and weigh all the evidence taken together. The Trial Chamber's approach to the evidence of a common plan was consistently and impermissibly selective.

470. Rather than objectively assessing the evidence, the Trial Chamber methodically isolated phrases or passages and ascribed a sinister meaning to them. The Trial Chamber failed to properly assess whether the inference that President Karadzic sought only political autonomy (and not physical separation) was reasonably available. The examples below demonstrate that it was.

471. In assessing whether President Karadzic advocated separation of the population,[661] the Trial Chamber relied on his statement to the Bosnian Serb Assembly in July 1994 that Krajina would "take on an appearance of a rotten apple" if their enemy was in Krajina,[662] 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."[663] These phrases were used to support an apparent "inability to co-exist" with non-Serb civilians.[664]

[661] *Judgement*, Section IV. 3. a. (D).
[662] *Judgement*, para. 2765.
[663] *Judgement*, para. 2770.
[664] *Judgement*, paras. 2840-41, 2851, 2855.

472. Evidence cited elsewhere in the judgement demonstrates that these statements cannot reasonably be understood as being directed towards civilians.[665] In the same month, July 1994, President Karadzic ordered that municipal authorities in Prijedor (in Krajina) were "duty-bound publicly to condemn all cases of assaults on non-Serbs and to maintain law and order at any cost and bring the perpetrators of incidents to justice." President Karadzic asked for this order to be transmitted to "the public security station and the Serb army namely that they are urgently to step up protection measures for all citizens and all their property, including also the property of those who had left their homes earlier or were killed in the war."[666]

473. This explicit order gives rise to the reasonable inference that President Karadzic was referring to Muslim and Croat combatants as "rotten apples", and not civilians. The Trial Chamber, however, did not draw that inference.

474. Similarly, the Trial Chamber impugned President Karadzic's reference to having "created new realities" as reflecting the Serb right to claim new territories.[667] But in the same Assembly session, President Karadzic said: "we must create a state using all means, above all those permitted and allowed, of course, with respect for human rights and international conventions[668] [...] we have to respect the humanitarian law and we have to respect all the conventions[669]". The Trial Chamber, again, drew only the inference consistent with guilt.

475. The Trial Chamber relied upon President Karadzic advocating "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'".[670] Again, this statement is used to support an apparent "inability to co-exist" with non-Serb civilians.[671]

476. However, in the minutes of the same session, it is recorded that: "[o]ur policy is such as President Karadzic said [...] not to ethnically cleanse them."[672] This significant

[665] *Judgement*, para. 3403.
[666] D4213.
[667] *Judgement*, paras. 2772, 3070.
[668] P1403, p. 156
[669] P1403, p. 159
[670] *Judgement*, para. 2773.
[671] *Judgement*, paras. 2840-41, 2851, 2855.
[672] P3149, p. 66.

phrase, omitted from the Trial Chamber's reasoning, gives rise to the reasonable inference that President Karadzic did not want the State to assist Muslims and Croats who wished to leave Serb areas, for fear of being accused of ethnic cleansing, and remained firmly against forcible expulsions.

477. Similarly, the Trial Chamber relied on General Mladic's diary to find that at a meeting in May 1992, President Karadzic said, "then we clear the Posavina of Croats",[673] and in June 1992, he said, "the birth of a state and the creation of borders does not occur without war".[674] What is missing from the judgement is the evidence that at the same meetings in June 1992, President Karadzic said: "we must not put the pressure to have people displaced",[675] or that in July 1992 he told General Mladic that he was going to sign an agreement that "all refugees are allowed to return to their homes".[676] Indeed, he later did.[677]

478. The Trial Chamber's finding that these statements are "in stark contrast" with President Karadzic's speeches recognising that "the Serbs and the Muslims will always live in a common state, and they know […] how to live together" is, therefore, wrong.[678] In fact, when viewed as a whole (and not in selective extracts), these statements are corroborative of the body of evidence demonstrating that President Karadzic never sought a homogenous entity.

479. Cognisant of the deference to be afforded to a finder of fact, President Karadzic should not be understood as urging the Appeals Chamber to accept his interpretation of evidence over that of the Trial Chamber. Rather, these are concrete examples of the Trial Chamber's systemically selective reliance on fragments of evidence, which undermines not only its individual factual findings, but the credibility of its overall inference that there was a common criminal plan.

480. This selective reading of the evidence to ensure its most sinister interpretation was not limited to President Karadzic's speeches. The Trial Chamber relied on Prosecution Witness Branko Djeric's testimony to find that President Karadzic blocked

[673] *Judgement*, para. 2733 referring to P1478.
[674] *Judgement*, para. 2875 referring to P1478.
[675] P1478, p. 98.
[676] P1478, pp. 358-9.
[677] P1479, p. 17.
[678] *Judgement*, paras. 2734-37.

efforts to subject "war criminals" to legal procedures.[679] Absent from the judgement is Djeric's testimony that he "never perceived the rights of my people to be something to be exercised at the expense of other peoples in Bosnia-Herzegovina. I was always in favor of equality [...] I know for sure that Mr Karadzic was on the same wavelength."[680]

481. No reference is made to his testimony that the Republika Sprska leadership strived towards preserving the equality of people who remained in their original places of residence,[681] made a commitment to have all human rights be respected without exception,[682] and that the authorities insisted on implementing international conventions, and preserving everyone's right.[683]

Branko Djeric

482. Prosecution witness Milorad Davidovic, came to Republika Srpska at President Karadzic's invitation to help combat crimes against non-Serbs by paramilitaries. The Trial Chamber relied on his statement that President Karadzic avoiding conflicts between Serbs at the expense of not punishing criminal offences,[684] and that President Karadzic exerted pressure on authorities when ordering that the paramilitary group Yellow Wasps be

[679] *Judgement*, para. 3413.
[680] T27997.
[681] T28017.
[682] T28018.
[683] T28066-67.
[684] *Judgement*, para. 3413.

released.[685] Absent from the judgement is his testimony when shown President Karadzic's numerous contemporaneous orders and statements of an exculpatory nature:

> My hat is off to you, and I congratulate you on having done that...[686] You wanted people who were doing such things to be arrested. So I'm not contesting at any time the efforts that you were making in that direction[687]...I reflected about this frequently, whether you knew all this or whether you couldn't prevent it, but objectively speaking, there was great chaos…I must say that up until today or yesterday, I didn't know that you wrote so many orders and requested that legal measures be taken, and your name was always mentioned in any context. Whatever anyone did, he always claimed to have the approval of President Karadzic...I must admit that sometimes I wondered why did he invite us to come over when all that was happening and taking place?...If I had known of this support, I would have returned from Serbia to the MUP and I would have placed myself at your disposal, and you may be sure that you wouldn't be sitting here today.[688]

Milorad Davidovic

483. The Chamber relied on the evidence of three Prosecution witnesses to find that Vice President Nikola Koljevic called for the expulsion of Muslims.[689] Absent from the judgement is Koljevic's statement during a confidential meeting in July 1992, at which President Karadzic was present, where Koljevic proposed to the Bosnian Serb leadership

[685] *Judgement*, paras. 3208 and 3235.
[686] T15677.
[687] T15735.
[688] T15792-93.
[689] *Judgement*, para. 2721.

that unlike the Muslims and Croats, they build a law-abiding, rather than an ethnically clean state.[690]

484. The Trial Chamber's selective and sinister interpretation of evidence relevant to President Karadzic's intent warrants close scrutiny of the facts by the Appeals Chamber absent the deference traditionally given to a finder of fact.

President Karadzic's public and private discourse were consistent

485. The Trial Chamber acknowledged 65 separate speeches, conversations, or statements of President Karadzic that were inconsistent with the finding that he intended to accomplish physical separation from non-Serbs through forcible expulsions.[691] Together, this forms a significant body of evidence that President Karadzic consistently envisioned and advocated that there would be minorities in each entity whose rights would be fully respected. [692]

486. The Trial Chamber sidestepped this legion of evidence by painting President Karadzic's statements as disingenuous. The Trial Chamber found that there was a "disjuncture between the Accused's public statements and his private discourse in this regard."[693] According to the Trial Chamber, these statements did not allow for a reasonable inference that President Karadzic was seeking political autonomy, rather than a homogenous state.

487. This was an error. The finding of "disjuncture" was not available on the evidence.

488. The Trial Chamber's reasoning has a fundamental flaw at its core. If indeed there had been a disconnect between President Karadzic's public and his private discourse, then the Trial Chamber would have been able to point to a pattern of exculpatory statements made in public, and inculpatory statements made in private. No pattern was ever found to exist by the Trial Chamber. In fact, the Trial Chamber's own findings point away from such a trend.

[690] P1478, pp. 313-14.
[691] Those acts are listed in the table at Annex J.
[692] *For example*, *Judgement*, paras. 2738, 2740-41, 2743-44, 2749-50.
[693] *Judgement*, para. 3085. See also *Judgement*, paras. 2715, 2847, 2852-53, 3094.

489. Many of President Karadzic's statements and orders that indicate that he never favoured a homogeneous entity were strictly confidential. They were made during private telephone conversations, confidential meetings, or in confidential orders.[694] Even if one accepts the Trial Chamber's malign interpretation of the remainder of President Karadzic's statements, many of those for which he is most vilified by the Trial Chamber were made in public. Statements made in public speeches,[695] in interviews,[696] and assembly meetings[697] were ascribed a criminal meaning, and are used to support the existence of a common plan.

490. There was no attempt to provide a quantitative analysis, or even a reasoned opinion, to support the finding that President Karadzic's public statements were commendable, while private statements reflected a common criminal plan. On the Trial Chamber's own findings, they patently did not. Given that this apparent pattern forms the basis for the Trial Chamber's circumvention of the vast body of President Karadzic's exculpatory statements and speeches, it undermines the very fabric of the conviction.

491. In fact, President Karadzic's private discourse revealed the same sentiments as those expressed in public.

492. In an intercepted conversation with Mirko Ostojic on 26 October 1991, President Karadzic was asked whether Muslims will remain on Serb territory, and what rights they will be afforded. He responded: "there will also be in…that region of theirs, the Muslim one…a lot of Serbs. Well we will regulate the rights with absolute reciprocity…[F]irst of all, there will be a cultural and personal autonomy...Everybody will be able to live their own lives and there will be no obstacle whatsoever..."[698] This evidence featured nowhere in the judgement.

493. In an intercepted telephone conversation with Bozidar Vucurevic on 23 July 1991, President Karadzic stated that: "Yes, yes. The people ought to be calmed down, where we make up the majority, people should feel well…Particularly Muslims. Muslims

[694] *See for example, Judgement*, paras. 2743, 2749, 2763, 2774, 3351, 3383, 3387, 3389, 3392, 3395, 3400, 3402-03, 3405, 3409, 3418-19.
[695] *See for example, Judgement*, paras. 2636, 2640, 2652, 2655, 2658, 2665, 2675-76, 2690, 2717.
[696] *See for example, Judgement*, paras. 2638-39, 2659, 2732.
[697] *See for example, Judgement*, paras. 2655, 2668, 2707, 2718, 2732, 2747, 2755, 2765, 2770, 2772.
[698] D4517, pp. 3-4

should be told not to fear, no one has anything against you, therefore do not make drama where there is no drama."[699] This evidence featured nowhere in the judgement.

494. In another intercepted conversation with Vucurevic on 9 February 1992, President Karadzic talked about Bosnian Muslims: "take them in, let them…be not afraid of anything...In our…parts nothing will happen to them."[700] This evidence featured nowhere in the judgement.

495. In an intercepted conversation with the RS Prime Minister following Directive 4, President Karadzic stated:

> …**all Muslim civilians may stay where they are or go where they want** but armed gangs must put down their weapons...we will give amnesty to all ordinary combatants... suspected war criminals would be trialled in accordance with the law and that the international tribunal should be present and have the international institutions take part and the **civilians can stay and have no need to flee.** [701]

496. This evidence featured nowhere in the judgement.

497. A Trial Chamber is not required to refer to all evidence on the record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence". Disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[702]

498. Confidential exchanges in 1991, 1992 and 1993 in which President Karadzic stated that Muslims "have no need to flee" and that "in our parts nothing will happen to them", are directly relevant to whether there was a "disjunctive" between his public and private discourse. The Trial Chamber was not entitled to make a finding that President Karadzic spoke differently in public and in private, without considering this evidence.

499. The Trial Chamber also made inconsistent findings about the nature of the Bosnian Serb Assembly, undermining its dismissal of numerous exculpatory statements President Karadzic made there. Critically, the Trial Chamber accepted that:

> The Bosnian Serb Assembly was the formal means through which the ideology and objectives of the Accused and the Bosnian Serb leadership were officially sanctioned and disseminated. It was also one of the bodies

[699] D3149, p. 7.
[700] D3162, p. 7
[701] D3571, pp. 2-5 (emphasis added)
[702] *Kvocka AJ*, para. 23.

> used to communicate instructions down to the municipal representatives regarding these objectives.[703]

500. It was at the Bosnian Serb Assembly that "decisions were made"[704] and "conclusions taken".[705] It was used to communicate the policies of the Bosnian Serb leadership "to a municipal level".[706] President Karadzic was "the leading figure in the Bosnian Serb Assembly and insisted on the greatest discipline in following the policies of the SDS to achieve their objectives", and "the deputies in the Bosnian Serb Assembly showed a high level of response and adherence to the policies and measures which were promulgated by the Accused".[707]

501. Against this backdrop, when President Karadzic accepted the Cutileiro Agreement on 18 March 1992, which provided for the establishment of three constituent units with assurance that minorities in each unit would have their rights fully protected,[708] he instructed the Serb deputies that they had to do:

> whatever is necessary on the ground to establish the de facto situation based on justice and the law, to have good and complete control of our destinies and areas, with full respect for citizens of other nationalities. There will probably be all sorts of resettlement going on, but none of it should occur under pressure.[709]

More instructions followed a few days later, on 24 March 1992:

> We do not plan to attack anybody...Another important thing is to prevent the spreading of crisis spots in BH...Newly established municipalities must establish their organs as soon as possible...Freedom of movement would, of course, be granted, but they must not enter the area with armed forces or anything else that would threaten our territory, our municipality...Peace at any cost.[710]

502. On other occasions, President Karadzic used the Bosnian Serb Assembly to instruct the deputies that there should be "full respect for citizens of other nationalities",

[703] *Judgement*, para. 2944.
[704] *Judgement*, para. 2946.
[705] *Judgement*, para. 2947.
[706] *Judgement*, para. 2948.
[707] *Judgement*, para. 2951.
[708] *Judgement*, para. 2696; P782; D2968, paras. 10-11.
[709] D90, pp. 45-46.
[710] P961, p. 17

that "no one must be harmed, regardless of their religion, nation" and that no resettlement "should occur under pressure".[711]

503. Likewise, in other sessions, President Karadzic instructed the deputies to ensure that that Muslims and Croats had their equal rights and privileges in Republika Srpska;[712] that Bosnian Muslims not be considered second class citizens and that Republika Srpska officials should try to persuade them that they had nothing to fear;[713] and that Serbs who committed crimes should be tried.[714]

504. According to the Trial Chamber's reasoning, these statements reflected the "officially sanctioned and disseminated" objectives of the Bosnian Serb leadership, to which Bosnian Serb Assembly deputies would show "a high level of response and adherence".[715] However, the Trial Chamber then dismissed President Karadzic's exculpatory statements to the Bosnian Serb Assembly as being "often for public consumption" and including rhetoric that was to be "approached with caution".[716]

505. The Trial Chamber made two incompatible findings: (i) that the Bosnian Serb Assembly was the forum for the official dissemination of instructions to which there was a high level of adherence, and (ii) that the Bosnian Serb Assembly was a setting for statements which were often just for public consumption. This flawed logic led the Trial Chamber to disregard the exculpatory statements made by President Karadzic in this context. This was a discernible error.

506. Similarly flawed reasoning undermines the Trial Chamber's conclusion that President Karadzic was duplicitous in his dealings with the international community.[717] The Trial Chamber relied on uncorroborated evidence of UN official David Harland that President Karadzic stated 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

[711] *Judgement*, para. 3054.
[712] *Judgement*, para. 3055.
[713] *Judgement*, para. 3334.
[714] *Judgement*, para. 3356.
[715] *Judgement*, paras. 2944, 2951.
[716] *Judgement*, para. 3056.
[717] *Judgement*, paras. 2847, 2849, 3095.

had to be removed.[718] Although it was Harland's duty to take notes at meetings with President Karadzic, this statement appears nowhere in his reports.[719]

David Harland

507. Likewise, the Chamber relied upon the uncorroborated testimony of UN Colonel Abdel-Razek that President Karadzic and other Republika Srpska leaders stated in January 1993 that "ethnic cleansing was something that was necessary". Again, no such statements appeared in any of Abdel-Razek's contemporaneous reports.[720]

[718] *Judgement*, para. 2726.
[719] The Trial Chamber later acknowledged that this was Harland's own assessment of what had been said. *See Judgement*, fn. 9424.
[720] *Judgement*, para. 2757.

508. If these statements had been made and not reported, both men failed in their professional duty to report this alarming information to their superiors within the United Nations, so that immediate action could have been taken.

509. Relevantly, the Appeals Chamber has observed in a different context that although General Mladić announced that the survival of the population depended upon the ABiH's complete surrender, it was unlikely that he would disclose his genocidal intent in the presence of UNPROFOR leaders and foreign media.[721] Likewise, if President Karadzic had the intent to ethically cleanse Muslims and Croats, it is similarly unlikely that he would have disclosed it to Harland or Abdel-Razek.

510. In any event, the Trial Chamber's finding on the one hand that President Karadzic was disingenuous with his international interlocutors, and the other hand that he confessed to them his true intentions is inconsistent and unsound.

511. There was consistency between President Karadzic's public and private discourse. Calls for calm, for the protection of non-Serbs, and explicit statements prohibiting forced population transfer are common to his private conversations and public speeches. The Trial Chamber's finding of a "disjunctive" is undermined by its failure to provide a reasoned opinion, its disregard for relevant intercept evidence, its inconsistent findings about the Bosnian Serb Assembly, and its flawed approach to President Karadzic's interaction with UN officials.

The displacement of minorities was not "systematic"

512. During the war, many Muslims and Croats continued to live peacefully in Serb municipalities across Bosnia. Displacement occurred in a minority of municipalities. In the majority, there was none.[722]

513. This was powerful evidence that there was no common plan or policy for a homogeneous Serb State from which Muslims and Croats were to be universally expelled. More significantly, this evidence was also incompatible with the Trial Chamber's finding that the displacement of Muslims and Croats was "systematic" and "organised".[723]

[721] *Krstic AJ*, para. 87.
[722] *Defence Final Brief*, paras. 966-72, 979.
[723] *Judgement*, paras. 3441, 3445, 3447.

514. The Trial Chamber dismissed Defence submissions 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, and in relation to which the Chamber was tasked with entering findings, **were of strategic importance** to the Accused and the Bosnian Serb leadership and formed part of Bosnian Serb claimed territory".[724]

515. In doing so, the Trial Chamber made a factual finding without an evidentiary basis. The Trial Chamber cited to no evidence demonstrating that the 20 municipalities chosen by the Prosecution were strategically important to President Karadzic or the Bosnian Serb leadership.

516. The Trial Chamber turned its mind to this question earlier in the judgement. In its municipality-by-municipality analysis, the Trial Chamber held that three municipalities - Hazici, Ilidza and Brcko - were "strategically important".[725] No finding was made that the remaining 17 municipalities enjoyed such importance to President Karadzic or the Bosnian Serb leadership. The Trial Chamber's blanket extension of these discrete findings to all 20 municipalities selected by the Prosecution to be included in the indictment was unwarranted and unsupported by the evidential record. This finding was an error.

517. Nor does the Trial Chamber's claim that it was only "tasked with" entering findings for the charged municipalities assist. If displacement occurred in a number of municipalities, but in the majority of others the population continued to live in peace, this necessarily precludes a finding that the displacement was systematic. Results that fall outside the desired outcome should not be disregarded by shifting focus to the non-representative sample selected by the Prosecution in its indictment.

518. A reasonable Trial Chamber could not have discarded the reasonable inference that since non-Serbs were not expelled from the majority of municipalities, there was no policy to create a homogeneous entity from which non-Serbs would be expelled. The Trial Chamber explicitly concluded that there was a common plan "in light of the systematic

[724] *Judgement*, para. 3446 (emphasis added).
[725] *Judgement*, paras. 2067, 2120, 2807.

and organised manner in which the crimes were committed".[726] The lack of evidential basis for this finding further undermines President Karadzic's conviction.

Conclusion

519. Establishing President Karadzic's responsibility for crimes required crossing a narrow bridge. On one side of the bridge is President Karadzic, alleged to have acted with a common purpose to expel Muslims. On the other side of the bridge are the Muslims and Croats who fled or were expelled from Serb areas during the civil war in Bosnia.

520. The narrow bridge is the link between the purpose and the displacement. If a reasonable inference could be drawn that President Karadzic did not have the purpose to create a homogeneous entity from which Muslims and Croats were to be displaced, then President Karadzic must be acquitted.[727] JCE liability cannot attach for mere adherence to a lawful objective.[728] A purpose to have separate political entities was not criminal and was a political right.

521. The Trial Chamber was unreasonable in finding that there was a common plan to create a homogeneous entity in which non-Serbs would be expelled and in rejecting the reasonable inference that the objective was political autonomy rather than physical separation through forced displacement. President Karadzic's convictions under Counts 3 through 8 based upon events in the municipalities should therefore be reversed.

[726] *Judgement*, para. 3447.
[727] *Vasiljevic AJ*, para. 120.
[728] *Krajisnik AJ*, para. 707.

29. There are cogent reasons to hold that for JCE III liability, the extended crime must be more than a possibility

In Brief

Finding:	***President Karadzic was convicted under JCE III for Municipalities crimes based on his awareness of the "possibility" that the crimes might be committed.***
Error:	***Based upon recent UK jurisprudence, JCE III requires knowledge of more than a possibility that the crimes might be committed.***
Impact:	***JCE III was the sole basis of conviction for several Municipalities crimes under Counts 3-6.***

522. The Trial Chamber found President Karadzic individually criminally responsible for crimes outside the scope of the overarching JCE on the basis that he "acted in furtherance of the Overarching JCE with the awareness of the *possibility* that the JCE III Crimes might be committed either by members".[729]

523. There are cogent reasons for the Appeals Chamber to depart from the "possibility" standard, which it explicitly approved in an interlocutory decision in this case, [730] and find that the correct *mens rea* for JCE III liability is knowledge of the "probability or substantial likelihood" that the crimes will be committed.

524. The United Kingdom Supreme Court has recently re-examined the jurisprudential and conceptual development of joint enterprise liability, and held that the correct *mens rea* is the same as that applied to aiding, abetting and instigating.[731] This historic case places the UK alongside a growing number of States whose domestic law requires knowledge that the crime was more than a possible consequence of carrying out the common purpose. This reversal means that the JCE III *mens rea* standard applied at

[729] *Judgement*, para. 3524 (emphasis added).
[730] *JCE III Appeals Decision*.
[731] *Jogee*, paras. 8-9; 89-99.

the ICTY cannot be regarded as being "underpinned" [732] by national law in the same manner, warranting a similar review by the Appeals Chamber of the correctness of the position at the ICTY.[733]

> The adoption of JCE III liability at the Tribunals was underpinned by relevant national law

525. Of all the modes of liability through which an accused can be convicted at the international tribunals, JCE III is the most controversial.[734] While ICTY and ICTR Appeals Chambers' decisions have blazed a trail for international justice and have been widely adopted by other Tribunals, there is reluctance to follow their JCE III jurisprudence.

526. Practitioners and academics have expressed consistent discomfort at JCE III's parallels with strict liability, and the idea that accused can be held liable for crimes they did not intend, committed outside the common plan, by persons over whom they had no control. In this way, JCE III is unique in criminal law and extends liability beyond traditional conceptions of individual culpability.

527. The Appeals Chamber has held that the ICTY's position on crimes that are committed outside the common plan finds support in "both civil and common law jurisdictions."[735] In fact, the standard adopted by this Tribunal most closely resembles joint enterprise law in common law jurisdictions such as the United Kingdom--a fact unsurprising in light of common law influence upon post-WWII military courts and tribunals.[736] While decisions in *Essen Lynching* and *Borkum Island* cited in *Tadic* in support of JCE III do not articulate the legal basis for the verdicts,[737] cases such as

[732] *Tadic AJ*, para. 225.
[733] *Perova Article*, pp. 768-72.
[734] *See for example, Ambos Treatise*, p. 174; *Stewart Article*, pp. 11-19; *Badar Article*, p. 301; *Haan Article*, pp 195-97; *Mettraux Treatise*, p. 292; *O'Keefe Treatise*, p. 175; *Powles Article*, p. 6; *Cowley Article*, p. 271.
[735] *Djordjevic AJ*, para. 49.
[736] *See for example, Ohlin Article*, pp. 108-10; *Jorgensen Article*, pp. 165-66; *van Sliedregt Article*, pp.185, 202-03; *Haan Article*, p. 191; *Clarke Article*, p. 850; *Cowley Article*, p. 274; *Olasolo Article*, p. 273; *Ambos Article*, p. 168. The Italian cases cited in *Tadic* were based on Art 116 of the Italian Criminal Code which required an additional causal element: *Jain Treatise*, p.40; *Thirith Decision*, para. 82.
[737] *See for example, Thirith Decision*, paras. 79-81.

Schonfeld, *Killinger* and *Renoth* demonstrate that the British law of complicity was regarded as authoritative.[738]

528. The United Nations War Crimes Commission Law Reports note that the British doctrine of "common design" was quoted by the Judge Advocate in *Schonfeld* and that the "rules of English law regarding complicity in crimes" were "frequently quoted in war crimes trials before British Military Courts", apparently on the basis that those principles were general principles of law recognised by civilised nations.[739] The report of *Renoth* notes that the Prosecutor cited from Archbold on "principals in the second degree"--although it is "impossible to say conclusively" whether the accused were held "liable under the doctrine set out by the Prosecutor".[740] The report of *Killinger* similarly notes that terms such as "aider and abettor" and "principal in the second degree" would "have the same meanings as in the ordinary criminal law of England".[741]

529. The significant shift in joint enterprise law in England is noteworthy. That the British courts have found the threshold for the *mens rea* of joint enterprise to have been erroneous is a cogent reason for the Appeals Chamber to review and similarly depart from its previous position.[742]

> The shift: the *mens rea* required for joint enterprise is the probability or substantial likelihood that the crimes falling outside the common plan will be committed

530. In 2016, the United Kingdom Supreme Court had the opportunity in *R v Jogee* to review the correctness of the *mens rea* standard for joint enterprise. As acknowledged in *Tadic*, the position in UK law meant that an accused could be liable for crimes arising from the execution of the agreed joint enterprise, if the accused foresaw that the principal might commit those crimes "as a *possible* incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise."[743]

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[738] *Schoenfeld Case*, p. 72; *Renoth Case*, p. 77; *Killinger Case*, p. 69. On the influence of United States law, *See for example*, *Greifelt Case*, pp. 46-47; *Krupp Case*, pp. 423-24.
[739] *Schoenfeld Case*, p 72.
[740] *Renoth Case*, p. 77.
[741] *Killinger Case*, p. 69.
[742] *Aleksovski AJ*, para. 107; *Krajisnik AJ*, para. 655; *Galic AJ*, para. 117, *Djordjevic AJ*, para. 23.
[743] *Tadic AJ*, para. 224, fn. 287, (emphasis added) citing "R. v. Hyde…R. v. Anderson…R. v. Morris …Hui

531. This is no longer the standard. The Supreme Court conducted a historical re-examination of common purpose liability jurisprudence and concluded that the *mens rea* standard for joint enterprise must be the same as that applied to aiding, abetting and instigating.[744] In the United Kingdom, the requisite *mens rea* for those modes of liability--modes of "assisting or encouraging"--is "intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal".[745]

532. The Supreme Court reached this conclusion by finding that the earlier Privy Council jurisprudence on joint enterprise liability took a "wrong turn". That earlier jurisprudence held that "foresight of that possibility plus his continuation in the enterprise to commit crime A" were sufficient to hold an accused liable for "crime B".[746] The wrong turn was to erroneously conflate foresight or contemplation (plus continued participation) with authorisation,[747] and was due to an "incomplete, and in some respects erroneous, reading of the previous case law".[748]

533. Traditionally, an accused was liable for crimes that were the "probable consequence" of a JCE. This corresponds with the historical common law presumption that an accused intended the natural and probable consequences of his or her actions.[749] However, beginning in 1831 with *R v Collison*, there was a shift towards a more subjective approach – an accused was liable for further crimes committed while carrying out a JCE if those crimes were expressly or implicitly authorised "should the occasion arise" for their commission (for example, the accused "conditionally intended" the further crimes).[750] On proper reading, the Australian cases of *Johns v The Queen* and *Miller v The Queen* (referred to in *Chan Wing-Siu*) align with the *Collision* approach--for example, in *Johns*, the High Court stated there was "ample evidence" to infer that Johns "gave his assent" to not merely the robbery but also to the use of the gun if the victim resisted.[751]

Chi-Ming v. R…)."
[744] *Jogee*, paras. 8-9; 89-99.
[745] *Id*, para. 9.
[746] *Jogee*, para. 2 referring to *Chan Wing-Siu v The Queen*, *R v Powell*.
[747] *Jogee*, paras. 49, 65.
[748] *Id*, para 79
[749] *Id*, paras. 20, 73
[750] *Id*, paras. 22-23
[751] *Id*, paras. 41-45

534. The "wrong turn" was to then elide "contemplation" and "authorisation". In particular, the Supreme Court in *Jogee* stated that authorisation cannot be "automatically" inferred merely from continued participation with foresight of the possibility of the further crimes.[752]

535. This statement of principle is particularly pertinent in the present case, as the Trial Chamber's analysis of "acceptance" of the "risk" of the JCE III crimes by President Karadzic is confined to one sentence, and is based on his "continued participation" with foresight of the "possibility" of those crimes.[753] This Tribunal's jurisprudence suggesting that continued participation with foresight of only the possibility of the further crimes amounts to a sufficiently culpable acceptance of the risk[754] falls into the same error by conflating foresight with authorisation under the guise of "willingly took the risk".

536. The Supreme Court in *Jogee* held that the "wrong turn" should be rectified by reverting to the historical position that required the accused to have conditionally intended the further crimes--namely, the crimes were "within the scope" of that to which the accused gave his or her assent.[755] That standard importantly aligns with liability for aiding, abetting and counseling--modes of "assisting or encouraging"--as joint enterprise liability historically and conceptually evolved as an extension of general principles of secondary liability.[756]

537. Joint enterprise liability, like the modes of secondary liability from which it emerged, is designed to circumvent the "general requirement" of causation--in the sense that "but for" the accused's conduct, the crime would not have occurred.[757] For aiding, abetting and instigating, the absence of strict causation is compensated by the accused's *mens rea*--at the ICTY, knowledge of the probability or substantial likelihood.[758] For JCE I, the lack of strict causation is similarly compensated by the accused's shared intention. By extending joint enterprise liability to crimes that the accused did not intend but merely foresaw as a possibility, the Supreme Court in *Jogee* held that a "wrong turn" was taken by departing from general principles of secondary liability.

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[752] *Id*, para. 66.
[753] *Judgement*, para. 3522. *See also* para. 570.
[754] *See for example*, *Tolimir AJ*, para. 514.
[755] *Jogee*, para. 94.
[756] *Dyson Article*, p. 44; *R v Powell*.
[757] *Delalic TJ*, para. 398.
[758] *Dyson Article*, p. 12; *Jogee*, para. 12.

538. The majority of the High Court of Australia in *Miller; Smith; Presley*[759] recently declined to follow *Jogee*. The majority recalled that a decade ago, the Court adopted Simester's view that extended JCE liability should be conceptualised in terms of an individual having changed his or her "normative position" by "affiliating" with the JCE (rejecting the conceptual relationship between JCE and accessorial liability).[760] However, Simester's view is not supported by the doctrine's historical evolution and is subject to strong academic criticism, particularly on the basis that the view does not correspond with "how we conceive of risk-taking anywhere else in the criminal law".[761] Thus, the decision in *Jogee* should be preferred.

539. At this Tribunal, the relevant *mens rea* for aiding and abetting or instigating is, at a minimum, knowledge that one of a number of crimes would probably be--or was substantially likely to be--committed.[762] The correct *mens rea* for JCE III liability is knowledge of the probability or substantial likelihood that the crimes will be committed.

Cogent reasons exist for the Appeals Chamber to adopt the same approach

540. The Appeals Chamber is not bound to depart from previous decisions because of shifts in national law. However, the standard adopted by the ICTY most closely resembles joint enterprise law in common law jurisdictions such as the United Kingdom. JCE III's adoption by the Appeals Chamber cited its "underpinning" in national law,[763] and its continued application relies on its "support" in common law jurisdictions.[764] In light of *Jogee*, these statements merit review.

541. Moreover, just as the Supreme Court in *Jogee* found that the existing standard was "highly controversial" and not "working satisfactorily",[765] so too has the "possibility" standard been highly controversial at this Tribunal; even its architects have expressed reservations.[766] While the Appeals Chamber has added the rider that the possibility must

[759] *Miller v R*, para. 32.
[760] *Id*, paras. 33-34; *Simester Article*, p. 598-9.
[761] *Dyson Article*, pp. 132-34; *Ormerod Treatise*, pp. 229-30.
[762] *Popovic AJ*, paras. 1751, 1795.
[763] *Tadic AJ*, para. 225. *See also Ojdanic Appeals Decision*, Separate Opinion of Judge David Hunt, para. 12.
[764] *Djordjevic AJ*, para. 49.
[765] *Jogee*, para. 81.
[766] *Cassese Article*, p. 121; *Shahabuddeen Article*, pp. 202-03.

be "sufficiently substantial as to be foreseeable to the accused",[767] disagreements as to the application of JCE III continue to arise.[768]

542. The ECCC has held that JCE III was not part of customary international law at the time the crimes were committed in Cambodia[769] and is inapplicable. The SCSL has held that JCE III liability does not extend to specific intent crimes.[770] The STL has qualified the "possibility" standard by requiring that the JCE III crimes must be "generally in line with the agreed upon" crime(s),[771] and has also declined to apply JCE III to crimes requiring specific intent.[772]

543. The Court in *Jogee* held that previous policy arguments advanced in favour of extending liability to crimes merely foreseen as a possibility were "questionable".[773] Those "justifications" were primarily that criminal enterprises tend to "escalate into the commission of greater offences" for which the accused ought not to "escape" liability, and that the culpability arises from intentionally "participating in the venture with that foresight".[774]

544. The notion that intentional participation in a JCE with foresight of the further crimes is a sufficient basis for liability for those further crimes that has similarly been advanced at this Tribunal is less persuasive in light of *Jogee*.[775] The concern about JCE participants "escaping" liability is less apparent at this Tribunal where no formal hierarchy of crimes exists.[776]

545. The Supreme Court in *Jogee* noted that a *mens rea* based on foresight of a possibility is a "serious and anomalous departure" from general principle that "savours … of constructive crime" and raises questions about "fair labelling".[777] An anomaly exists between (i) the *mens rea* required for JCE III and that required for the actual crime, and

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[767] *M. Stanisic AJ*, para. 1055.
[768] *Djordjevic AJ*, Dissenting Opinion of Judge Tuzmukhamedov, paras. 64-67; *Sainovic AJ*, Partially Dissenting Opinion and Declaration of Judge Liu.
[769] *Thirith Decision*, para. 82; *Chea and Samphan AJ*, para. 807.
[770] *Taylor TJ*, para. 468.
[771] *STL Decision*, para. 241; *Ambos Treatise*, p. 143.
[772] *STL Decision*, para. 249.
[773] *Jogee, para.* 79.
[774] *Jogee*, paras. 55-56 (discussing *R v Powell)* and at para. 46 (citing *Chan Wing-Siu v The Queen*, paras. 75-77 (Sir Cooke).
[775] See, e.g. *Blaskic AJ*, para.33; See also *STL Decision*, para. 245.
[776] *Stakic AJ*, para. 375.
[777] *Jogee*, paras. 83-84. See also *Clayton v The Queen*, paras. 100-01.

(ii) the *mens rea* of the offender who actually commits the further crimes and that of the individual convicted under JCE III. While this anomaly can be addressed in sentencing,[778] the discretion to impose a lower sentence does not resolve the question of fair labelling at this Tribunal,[779] especially where a single sentence is imposed for all convictions. This anomaly has promoted strongest criticism of the application of JCE III liability to specific intent crimes.[780]

546. Similarly, while the Appeals Chamber in *Tadic* considered Article 25(3)(d) of the Rome Statute to represent a "substantially similar notion" to JCE III,[781] that provision requires "knowledge" rather than mere foreseeability. Knowledge is later construed by Article 30 as "awareness that … a consequence will occur in the ordinary course of events", a phrase in turn defined to require foresight that consequences are a virtual certainty and not a mere possibility.[782]

547. Statutory versions of extended joint enterprise liability elsewhere in the common law world, including Canada, New Zealand, and parts of Australia (the "code jurisdictions"), require knowledge that the crime was a *probable* consequence of carrying out the common purpose.[783]

548. The UK Supreme Court's fundamental shift on the *mens rea* standard of joint enterprise provides cogent reasons to depart from the "possibility" standard, and bring the ICTY in line with the correct position. It also provides a significant opportunity for this Tribunal to address the most controversial aspect of its legal legacy, and rectify the divergence in the law. The Appeals Chamber should take this opportunity, and reverse President Karadzic's JCE III convictions on Counts 3-6.

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[778] *STL Decision*, para. 245.
[779] *See for example, Jain Treatise*, p. 65.
[780] *Ambos Treatise*, p. 176; *Stewart Article*, pp. 11-19; *Badar Article*, p. 302; *Danner & Martinez Article*, p. 137; *Osiel Article*, pp. 1796-1803; *Haan Article*, pp. 200-01; *Mettraux Treatise*, pp. 259, 265; *Marsh & Ramsden Article*, pp.153-54; *Olasolo Article*, p. 284.
[781] *Tadic AJ*, para. 222. See ICC Statute, Article 25(3)(d): "knowledge of the intention of the group to commit the crime".
[782] *Lubanga AJ*, para. 447.
[783] *See for example, Criminal Code 1985* (RSC) 1985 c C-46, s 21(2) (a subjective, rather than an objective, knowledge is required: *R v Logan*; *Criminal Code Act 1899* (Queensland) s 8; *Criminal Code Act Compilation Act 1913* (Western Australia) App B s 8(1); *Crimes Act 1958* (Victoria) s 323-6; *Crimes Act 1961* (NZ) s 66(2).

30. The Trial Chamber erred when convicting President Karadzic of persecution by forcible transfer of prisoners—a crime not charged in the indictment

In Brief

Finding:	***Trial Chamber found President Karadzic responsible for persecution through forcible transfer of detainees.***
Error:	***Persecution count charged President Karadzic only with forcible transfer of Muslims and Croats "from their homes".***
Impact:	***President Karadzic was convicted under Count 3 for a crime with which he was not charged.***

549. The Trial Chamber found President Karadzic guilty of persecution by forcible transfer of, *inter alia*, persons detained in detention facilities who were the subject of prisoner exchanges.[784] However, the indictment only charged him with persecution by "forcible transfer or deportation of Bosnian Muslims and Bosnian Croats *from their homes*…"[785]

550. President Karadzic was therefore convicted for conduct not charged in the indictment. In reaching its judgement, a Trial Chamber can only convict an accused for crimes that are charged in an indictment.[786] A conviction on other charges must therefore be vacated.[787]

551. The indictment distinguished and separated crimes committed against persons in their homes (Schedule A) and crimes committed against persons in detention (Schedule B). Therefore, paragraph 60(f), with its language "*from their homes*" did not include persons in detention.

[784] *Judgement*, para. 2470, applied to persecution count in paras. 2419-21
[785] *Indictment*, para. 60(f)
[786] *Ntawukulilyayo AJ*, para. 189; *Djordjevic AJ*, para. 574.
[787] *Bagosora AJ*, paras. 186-187.

552. The Appeals Chamber should vacate that portion of President Karadzic's conviction for persecution that was based upon prisoner exchanges, and reduce his sentence.

31. The Trial Chamber erred when convicting President Karadzic of scheduled incidents based solely on untested evidence

In Brief

Finding:	***Trial Chamber relied solely on Rule 92 bis evidence and/or adjudicated facts to find that scheduled incidents had been proven.***
Error:	***Findings on scheduled incidents based solely on Rule 92 bis and/or adjudicated facts violated prohibition on convictions based upon untested evidence***
Impact:	***Convictions for 36 scheduled incidents were based solely on untested evidence and must be reversed.***

553. A conviction may not rest solely, or in a decisive manner, on the "untested" evidence of a witness whom the accused had no opportunity to examine during the investigation or trial.[788]

554. The Trial Chamber convicted President Karadzic of Scheduled Incidents A14.2, C27.3, C27.5, B20.4, B1.1, A10.3, A10.4, A10.2, A10.6, C20.5, C20.7, C22.5, B13.1, B13.3, and E11.1 based solely, or in a decisive manner, upon evidence admitted under Rule 92 *bis*.[789]

555. The Trial Chamber convicted President Karadzic of Scheduled Incidents A5.4, C10.4, C10.5 and C10.7, B15.3, and A12.4 based solely, or in a decisive manner, upon adjudicated facts.[790]

556. The Trial Chamber convicted President Karadzic of Scheduled Incidents D20, C23.1, C27.4, A7.1, A7.2, C15.1, A10.5, B15.1, C20.6 and A10.8, A10.7, A12.1, A12.2,

[788] *Djordjevic AJ*, para. 807; *Popovic AJ* para. 96.
[789] *Judgement*, paras. 1093, 1320, 1333, 1349, 1415, 1649, 1657, 1677, 1715, 1861, 1885, 2024, 2155, 2158, 5481.
[790] *Judgement*, paras. 874, 913, 917, 1778, 1973.

and C22.3 and E1.1 based solely, or in a decisive manner, on a combination of Rule 92 *bis* or *quater* evidence and adjudicated facts.[791]

557. As with Rule 92 *bis* evidence, adjudicated facts may only be judicially noticed if they do not go to the acts and conduct of the accused.[792] There would be no reason for this limitation if adjudicated facts were considered as having been tested by the accused. Adjudicated facts are thus "untested" evidence that cannot be the sole or decisive basis of a conviction.

558. Indeed, an adjudicated fact may be judicially noticed even if uncontested at the underlying trial, so long as it was not part of an explicit agreement between the parties.[793]

559. A finding based on a combination of adjudicated facts and Rule 92 *bis* and *quater* evidence must also be considered based upon untested evidence.[794] As the Appeals Chamber held in *Popovic*, "where one piece of untested evidence is being used to corroborate another piece of untested evidence, a trial chamber must exercise caution to ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence."[795]

560. In other words, 0 + 0 = 0.

561. Scheduled incidents, and not just counts, are subject to the rule of untested evidence.

562. In *Djordjevic*, the Appeals Chamber analysed whether a conviction for a scheduled incident alleging destruction of a mosque in a village was based solely and decisively on untested evidence. Although it ultimately concluded that other corroborating evidence existed, the Appeals Chamber's analysis assumed that had corroboration not been found, the conviction for the scheduled incident would have been set aside.[796] This is the correct position.

563. In *Popovic*, the Appeals Chamber held that even though a conviction for a scheduled incident involving the Kravica supermarket had been based solely upon untested evidence, the accused's convictions on the counts of the indictment were not

[791] *Judgement*, paras.1069, 1071, 1328, 1515, 1522, 1536, 1692, 1815, 1871, 1877, 1960, 1965, 2011, 5205.
[792] *Karemera Judicial Notice Appeals Decision*, para. 50.
[793] *Perisic Adjudicated Facts Decision*, para. 20.
[794] See *Haraqija AJ*, para. 65 (combination of untested evidence).
[795] *Popovic AJ*, para 1226.
[796] *Djordjevic AJ*, paras. 807-08.

based on that scheduled incident alone, but were based on several scheduled incidents. It concluded that no conviction was therefore based solely on the scheduled incident.[797]

564. The *Popovic* decision cited the Appeals Chamber judgement in *Stakic* for the proposition that a conviction for killing 77 Croats had been upheld, although the only evidence supporting the relevant finding was admitted under Rule 92 *bis* and was untested.[798] While this was correct, the question before the Appeals Chamber in *Stakic* was whether the Trial Chamber erred in relying exclusively on Rule 92 *bis* statements to prove the acts and conduct of the accused. The Appeals Chamber found that none of the evidence went to the acts and conduct of the accused.[799] This is distinguishable from the rationale relied upon in *Popovic*: that findings under individual allegations were not indispensable for any findings of the convictions.

565. The Appeals Chamber's assertion that factual findings underpinning Popovic's and Beara's convictions for the Kravica supermarket events were not indispensable to the overarching convictions, is also illogical in the face of its own reversal of Popovic's, Beara's, and Nikolic's convictions "to the extent" they related to killing six Bosnian Muslim men near Trnovo.[800] This reversal would not be necessary if individual scheduled incidents were not indispensable to conviction.

566. It is also ironic that the other allegation rejected in *Popovic* as being based upon untested evidence--that executions occurred at Cerska Valley on 13 July 1995--[801] was later conceded to be untrue by the Prosecution.[802] Thus, good reason exists for exercising caution when it comes to untested facts.

567. The Appeals Chamber has a long history of reversing convictions on individual scheduled incidents, and in sometimes reducing the sentence as a result.[803] It makes no sense to reverse convictions for scheduled incidents due to lack of notice or lack of evidence, and to refuse to reverse convictions based solely on untested evidence. An

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[797] *Popovic AJ*, paras. 103-04.
[798] citing *Stakic AJ*, para. 201(8).
[799] *Stakic AJ*, para. 202.
[800] *Popovic AJ*, para. 2110.
[801] *Popovic AJ*, para.110.
[802] *Judgement*, para. 5206.
[803] *Djordjevic AJ*, paras. 601, 606, 618, 644, 661, 667; *Sainovic AJ*, paras. 263, 452, 504; *Lukic AJ*, para. 636; *D. Milosevic AJ*, paras. 232, 293; *Martic AJ*, paras. 164,192,200; *Naletelic AJ*, paras. 35, 48, 170, 306; *Kordic AJ*, paras. 429, 450, 456, 461, 466, 469, 471, 482, 493, 495, 497, 501, 503, 517, 523-24, 529, 531, 541, 547, 551-52, 556, 582, 897-98, 904, 957.

accused whose convictions suffered from the former infirmities would be eligible for a reduction in sentence, while an accused whose convictions were based on untested evidence would not.

568. If this were indeed the rule, the Prosecution could rely solely on untested evidence of 99 scheduled incidents, and introduce live evidence on one. It would then be able to have a conviction for all 100. This is incompatible with Article 21(4)(e)'s right of an accused to examine or have examined the evidence against him.

569. Therefore, President Karadzic's convictions for the 36 scheduled incidents based on untested evidence should be set aside.

IV. SARAJEVO

33. The Trial Chamber misapplied principles of the law of armed conflict in its analysis of the shelling of Sarajevo

In Brief

Finding: ***Shelling of Sarajevo was indiscriminate and disproportionate and conducted as part of a campaign to terrorise civilians.***

Error: ***Trial Chamber evaluated shelling through the lens of observers and victims rather than reasonable military commander, failed to consider that shells may have been fired at legitimate mobile targets, and equated extensive damage with excessive use of force.***

Impact: ***Convictions under Counts 5,6, 9, and 10 based upon erroneous findings of shelling practices and purposes.***

570. In finding that shelling in Sarajevo was indiscriminate and disproportionate,[804] the Trial Chamber erred in its application of principles of the law of armed conflict. It misapplied the concept of "distinction" by (i) failing to give appropriate deference to military commanders' assessments of military objectives and instead relying on the impressions of observers or victims; and (ii) convicting President Karadzic even though the Prosecution had not disproved that the VRS was aiming at mobile targets of opportunity. The Trial Chamber also misapplied the concept of "proportionality" by equating "extensive" damage with "excessive" damage and convicting President Karadzic in the absence of a finding that the attackers shelled civilian areas knowing that it would cause excessive incidental loss.

[804] *Judgement*, paras. 4054-55, 4597.

Distinction: Assessment of military objectives

571. The Trial Chamber erred by failing to assess the existence of legitimate military objectives from the perspective of a military commander, as required by universal State practice and the very nature of *jus in bello*. Rather, it relied on impressions formed by external observers and victims. The failure to grant the deference that the law deliberately accords to military commanders led the Trial Chamber to err when finding that the shelling in Sarajevo in general was indiscriminate and disproportionate, and therefore intended to terrorise the population.

572. According to State practice, in assessing the existence of military objectives, regard must be had to the "honest judgment" of military commanders acting on the information "reasonably available" to them and "taking fully into account the urgent and difficult circumstances under which such judgments are usually made".[805] These rules leave a wide margin of discretion to belligerents.[806] The ICRC commentary reflects that determining the nature of an objective "largely relies on the judgment of soldiers who will have to apply these provisions".[807]

573. The Trial Chamber in *Galic* similarly indicated that "an object shall not be attacked when it is *not reasonable to believe, in the circumstances of the person contemplating the attack*, including the information available to the latter, that the object is being used to make an effective contribution to military action".[808] Attacks directed against civilians during armed conflict are indiscriminate only when "conducted intentionally in the knowledge, or when it was impossible not to know that civilians or civilian property were being targeted not through military necessity."[809]

574. However, in evaluating the nature of shelling in Sarajevo, the Trial Chamber relied upon general impressions of witnesses who were in Sarajevo during the conflict to conclude that there was no military value in the targets selected by the VRS.[810] The Trial Chamber relied on General Wilson's evidence that "[i]n many cases, there seemed to be

[805] *See for example, Canada Military Manual*, para. 418; *U.S. Military Manual*, para. 5.4.2.
[806] *Dormann Treatise*, p. 168.
[807] *ICRC Protocols Commentary*, p. 638 (para 2037). *See also Henderson Treatise*, pp. 54-73.
[808] *Galic TJ*, para. 51 (emphasis added).
[809] *Blaskic TJ*, para. 180.
[810] *Judgement*, para. 4497.

no military value in the targets that were selected."[811] It also relied on Pyers Tucker testimony that the VRS conducted "daily random shelling of various parts of the city" and incoming fire would land "arbitrarily around the city, [for] no military purpose".[812] The Trial Chamber was particularly persuaded by journalist Martin Bell's testimony that "the conflict in Sarajevo was one where the least distinction was made between civilians and combatants".[813] Victims' assessment of the "purely residential" nature of areas, or the lack of "barracks, police stations or factories" in a certain location also informed the Trial Chamber's conclusions.[814]

575. In relying on the impressions of observers and victims, rather than considering the actions through the lens of a reasonable commander contemplating the attack, the Trial Chamber erred in its application of the law of distinction to convict President Karadzic of Scheduled Incidents G1 and G2,[815] and in concluding that the overall shelling in Sarajevo was indiscriminate and intended to terrorise the civilian population.

Mobile targets of opportunity

576. The Trial Chamber also erred by convicting President Karadzic when the Prosecution had not disproved that shells landing far from legitimate military targets were aimed at mobile targets of opportunity in Sarajevo.

577. The Prosecution had the burden to disprove that outlying impacts could be attributable to attacks aimed at mobile targets.[816] In *Gotovina*, the ICTY Appeals Chamber found that the Trial Chamber erred in failing to adequately explain how it was able to exclude the possibility of targets of opportunity in circumstances where (i) the Trial Chamber was unable to exclude beyond a reasonable doubt the possibility that the Croatian Army could observe movement in Knin; (ii) there was credible evidence of mobile vehicular targets moving throughout Knin; and (iii) in one instance, artillery struck a police car.[817]

[811] *Judgement*, para. 3988.
[812] *Judgement*, para. 3995.
[813] *Judgement*, para. 4598.
[814] *Judgement*, paras. 4044, 4046, 4497.
[815] *Judgement*, paras. 4029, 4032, 4042, 4045
[816] *Gotovina AJ*, para. 63.
[817] *Id.*

578. The circumstances of the present case are comparable in that: (i) the VRS had observation posts around Sarajevo; (ii) the ABiH used mobile mortars; and (iii) at the time of Scheduled Incidents G1 and G2, ABiH forces were conducting a massive offensive operation throughout Sarajevo and were attacking the JNA.

579. On (i), several witnesses provided evidence about the VRS reconnaissance and observation system. General Galic testified that the VRS had approximately 15-20 people per day conducting reconnaissance in parts of Sarajevo controlled by ABiH forces.[818] General Milosevic testified that the VRS developed an around-the-clock system that included "separate observers for artillery fire, observers of infantry action, movements and maneuver, and…observers of air space".[819] Colonel Simic testified that the VRS had observation posts with artillery observers in elevated positions around Sarajevo, who "were at the post continually" working in shifts and could "easily observe any changes in their areas of observation".[820] Based on this uncontested evidence, no reasonable Trial Chamber could exclude the possibility that the VRS could observe movement of mobile mortars in Sarajevo and that artillery observers could call for fire upon spotting opportunistic mobile targets.

580. On (ii), the Trial Chamber acknowledged that the ABiH used mobile mortars.[821] Both Prosecution and Defence witnesses testified about the "shoot and scoot" strategy employed by the ABiH. Witness KDZ185 gave evidence that "ABiH mortar positions continually moved and had no fixed location".[822] General Fraser also testified that the ABiH "had mortars mounted on trucks, which were thus mobile and would be moved around the city".[823] Pyers Tucker gave evidence of an 82 mm mortar on the back of a truck being fired near the Kosevo Hospital.[824] Colonel Mole observed "the ABiH units used mobile mortars around the Kosevo Hospital" from which they "would fire one or two rounds and leave immediately".[825] Colonel Simic testified that the VRS observed the

[818] T37196.
[819] T32702.
[820] T30058.
[821] *Judgement*, para. 4501.
[822] *Judgement*, para. 4067.
[823] *Judgement*, para. 3986.
[824] *Judgement*, para. 4535.
[825] *Judgement*, para. 4535.

ABiH open fire from one position, then quickly move and fire from another position. The VRS would fire in the direction in which the mobile mortar was moving.[826]

581. On (iii), during Scheduled Incidents G1 and G2, combat operations conducted by ABiH forces were ongoing and scattered throughout the city. In Scheduled Incident G1, ABiH forces used anti-aircraft guns and mortars to attack JNA military barracks around Sarajevo in addition to VRS positions in Hadzici, Sarajevo airport, and Jewish cemetery.[827] In Scheduled Incident G2, ABiH forces began a huge offensive to "de-block" Sarajevo from the north and west, which lasted several days.[828]

582. Considering the breadth of ABiH offensive operations throughout Sarajevo coupled with the existence of opportunistic targets, it was reasonable that outlying impacts far away from legitimate military stationary targets could be attributed to VRS engagement of opportunistic mobile targets.[829] The Trial Chamber erred in finding that there was a campaign to terrorise civilians in Sarajevo, when the Prosecution had not disproved that outlying impacts could be attributable to attacks aimed at mobile targets.

Proportionality

583. The very essence of *jus in bello* proportionality is a comparison between the military advantage anticipated by a commander and the extent of anticipated damage to civilian lives or property. A conviction for launching an impermissible attack can only occur when the Prosecution has proven beyond a reasonable doubt that an attacker shelled civilian areas "in the knowledge" that it would cause incidental loss of life or injury to civilians or damage to civilian objects that was "clearly excessive in relation to the concrete and direct overall military advantage anticipated."[830]

584. The Trial Chamber erred by (i) equating "extensive" damage with "excessive" damage and (ii) convicting President Karadzic in the absence of a finding as to the requisite knowledge element.

585. On (i), the Trial Chamber erred by replacing the balancing test for proportionality with a prohibition on extensive collateral damage. While the ICRC

[826] T30056.
[827] *Judgement*, para. 4027.
[828] *Judgement*, para. 4041; D232; P998; D577; P2239.
[829] On the difficulties associated with the "on-the-spot decisions" required for "targets of opportunity", *see for example*, *Rudesill Article*, p. 536; *Agnieszka Treatise*, p. 144.
[830] ICC Statute, Article 8(2)(b)(iv); AP, Article 51(5)(b).

commentary to the Additional Protocols attempted to introduce this limitation,[831] as noted by the weight of academic commentary, the text of the Protocols does not provide any such justification.[832] The ICRC's compilation of State practice relating to "Rule 14 Proportionality in Attack" also provides no support for a prohibition of "extensive" collateral damage.[833]

586. Extensive collateral damage is not necessarily extensive. Damage to civilians or their property can "be exceedingly extensive without being excessive, simply because the military advantage anticipated is of paramount importance."[834]

587. In its proportionality analysis of Scheduled Incidents G1 and G2, the Trial Chamber concluded that, even if initially launched in response to ABiH attacks, the shelling of Sarajevo was "carried out in a disproportionate manner".[835] The Trial Chamber relied in particular on General Wilson's evidence that the VRS used "heavy artillery bombardment" and emphasised that the attacks resulted in civilians being injured or killed and civilian structures being *extensively* damaged or destroyed.[836] The Trial Chamber later stated: "[t]he Accused showed awareness that the bombardment of the city had been *extensive* and had gone too far".[837]

588. However, the Trial Chamber failed to consider the importance of protecting JNA soldiers and their families at the barracks that were attacked, as well as the importance of VRS positions in Hadzici, the Sarajevo airport and the Jewish cemetery[838] and preventing Bosnian Muslim forces from de-blocking Sarajevo from the north and west.[839] No evidence exists that the significant risk of civilian harm was clearly or discernibly excessive to the military advantage anticipated.[840]

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[831] *ICRC Protocols Commentary*, 623 (para. 1963).
[832] *Gardam Treatise*, p. 107; *Schmitt Treatise*, p. 97, fn. 38; *Rabkin Article* p. 315; *Sloane Article*, p. 316; *Fenrick Article*, p. 277, fn.17.
[833] *ICRC Proportionality Article*.
[834] *Solis Treatise*, p. 280.
[835] *Judgement*, paras. 4053-55.
[836] *Id.*
[837] *Judgement*, para. 4723.
[838] *Judgement*, paras. 4026-27.
[839] *Judgement*, para. 4041.
[840] ICC Article 8(2)(b)(iv).

589. The Trial Chamber also erroneously focused on the VRS' heavy weapon supremacy in finding that its fire was disproportionate.[841] Heavy fire itself does not violate the proportionality principle. While *jus ad bellum* proportionality requires that an attacked State's initial recourse to force must be the most narrowly tailored response possible based on the features of the aggressor's attack, *jus in bello* proportionality examines only whether the collateral damage is excessive in relation to military advantage anticipated.[842]

590. In the present case, the Trial Chamber noted "the SRK forces had an overwhelming superiority in heavy weapons" which "made their responses more extreme".[843] The Trial Chamber's reliance on this heavy weapon supremacy in finding that the fire was disproportionate was an error.[844] *Jus in bello* proportionality does not prohibit use of weapons and tactics that are far superior to the opponent.

591. Moreover, the Trial Chamber erroneously concluded that General Mladic's statement that "Sarajevo will shake with more shells fired that in the entire war so far" was an order for a disproportionate attack.[845] In fact, the casualties in Scheduled Incidents G1 and G2[846] were fewer than those suffered when NATO forces attacked Belgrade in a campaign that the ICTY Prosecutor found did not warrant opening a formal investigation.[847]

592. As to (ii) above, the Trial Chamber erred in concluding that liability could arise for "disproportionate" attacks in the absence of a finding that the attacks were launched "in the knowledge" that they would cause excessive collateral damage.[848]

593. The ICRC commentary to the Additional Protocols explains that this knowledge element will not be established by proof of recklessness; rather, it is a question of "common sense and good faith", with military commanders being granted a fairly broad

[841] *Judgement*, paras. 3984, 3986, 3988, 4497.
[842] *Cannizzaro Article*, p. 784.
[843] *Judgement*, para. 3988.
[844] *Judgement*, para. 4497.
[845] *Judgement*, para. 4053.
[846] Concerning Scheduled Incident G1, the Trial Chamber was unable to find beyond a reasonable doubt that any individuals wounded or killed were civilians (see *Judgment* para. 4033, fns. 13405-13408, para. 4039, fn. 13437). Concerning Scheduled Incident G2, the Trial Chamber found beyond a reasonable doubt that five civilians were killed and 14 were wounded. *Judgment* para 4049, fn. 13481.
[847] 10-17 civilians killed in an attack on a television station building: *ICTY NATO Report*, para. 71.
[848] AP I Article 85(3)(b); *Galic TJ*, para. 59.

margin of judgment.[849] That is confirmed by domestic jurisprudence,[850] State practice,[851] and academic commentary.[852]

594. An attack is only a criminal violation when the anticipated civilian damage is "clearly excessive" when compared to the military purpose.. The use of markedly strong modifiers is a core tenet of proportionality. Relevant jurisprudence condemns attacks which "grossly", "markedly", "manifestly", "strikingly", or "plainly" lacked proportionality.[853] This elevated threshold, nowhere acknowledged by the Trial Chamber, empowers military commanders by recognising the rightful boundaries of their discretion and places the burden of proof squarely on the Prosecution regarding the particularized targeting decision.

595. While the Trial Chamber concluded that the scheduled incidents were carried out "willfully" by the perpetrators, for "disproportionate" attacks, it did not analyse whether those who launched the attacks had knowledge that they would cause excessive collateral damage.[854]

596. For example, for Scheduled Incidents G1 and G2, the Trial Chamber concluded that, even if initially launched in response to ABiH attacks, the shelling of Sarajevo was "carried out in a disproportionate manner".[855] Later, the Trial Chamber made a global statement that "for all incidents that involved indiscriminate or disproportionate fire by the SRK, the Chamber is satisfied that the only reasonable inference that can be made is that the attacks were directed against civilians".[856]

597. In drawing this inference, the Trial Chamber failed to assess whether the Prosecution had proved beyond reasonable doubt that those launching the attacks had knowledge that these attacks would result in excessive collateral damage. Nor is there any finding to this effect. As such, the Chamber misapplied the law of proportionality.

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[849] *ICRC Protocols Commentary*, pps. 996 (para 3479), 617 (para 1934), 679 (para. 2187), 684 (para. 2210), 684 (para. 2208).
[850] *Israel Decision*, para. 57; *Fuel Tankers Case*, H4, A9.
[851] *See for example, Canada Military Manual, para. 418*; *ICTY NATO Report*, para. 50.
[852] *Wright Article*, pp. 843-4. *Sloane Article*, p. 309; *Gardam Treatise*, p.106.
[853] *Newton and May Treatise*, p. 160.
[854] *Judgement*, paras. 4626-27, despite *Defence Final Brief*, paras. 1906-29.
[855] *Judgement*, paras. 4053-55.
[856] *Judgement*, para. 4623.

Conclusion

598. By misapplying central principles of the law of armed conflict, the Trial Chamber committed numerous errors in its evaluation of the shelling in Sarajevo. These errors led the Trial Chamber to the mistaken conclusion that there was a campaign to terrorise civilians in Sarajevo through shelling and sniping and that President Karadzic shared the intent of this campaign.

599. The Trial Chamber's misapplication compounds the difficulties faced by military commanders and policymakers in planning and carrying out military operations within the bounds of the law. Should they remain undisturbed, these findings would, for example, risk imposing strict liability on commanders whose attacks resulted in extensive damage. The nature of objectives would no longer be assessed by experienced commanders acting reasonably in good faith, taking into account the information reasonably available in the prevailing circumstances, but would be characterised by reference to the impressions of observers or victims.

600. The implications of the Trial Chamber's errors are wide ranging, and significant. The Appeals Chamber should reverse President Karadzic's convictions under Counts 5, 6, 9, and 10 for crimes in Sarajevo.[857]

[857] The contribution of our legal consultant, Professor Michael Newton of Vanderbilt University Law School, to this ground of appeal is gratefully acknowledged.

34. The Trial Chamber erred when concluding that the VRS fired the shell that landed on the Markale market on 5 February 1994

In Brief

Finding:	***Based upon an angle of descent of between 55 and 65 degrees, the shell that fell on the Markale Market must have been fired by the Bosnian Serbs.***
Error:	***The angle of descent could not be reliably calculated because the crater had been disturbed before measurements had been taken.***
Impact:	***Conviction for Scheduled Incident G8 must be reversed.***

601. A majority of the Trial Chamber, Judge Baird dissenting, concluded that the VRS fired the shell that landed on the Markale market on 5 February 1994 (scheduled incident G8).

602. The Majority based its conclusion by calculating the shell's angle of descent at between 55 and 65 degrees.[858] In doing so, the Majority disregarded a plethora of evidence that the angle of descent could not reliably be calculated because the crater was disturbed before measurements could be made.

603. After the explosion, an officer from the UNPROFOR French Battalion ("Frebat") used a knife to dig the tail fin out of the crater.[859] In extracting the tail fin, he had to scrape and chip away the asphalt lip around the mouth of the crater and enlarge the actual hole formed by the penetration of the tail fin.[860] No efforts were made to calculate the shell's angle of descent before the Frebat team disturbed the crater by removing the tail fin.[861] The UN expert investigation team later stated "in extracting the tail fin

[858] *Judgement*, para. 4247.
[859] T7700.
[860] P1441, pp. 40-41.
[861] P1708, pp.1-2; T7913.

assembly from the crater, the Frebat 4 team (unavoidably) disturbed the integrity of the crater for any purpose which followed".[862]

604. A second Frebat team arrived on the scene later in the afternoon. However, its leader, Captain Verdy, did not attempt to measure the angle of descent because the previous team had disturbed the crater.[863]

605. Later that day, Major John Russell examined the crater at UNPROFOR Brigadier Ramsey's request. While noting that the cleaning process had "disturbed much of the evidence",[864] he calculated the angle of descent between 1,200 and 1,300 mils (67.5 and 73.1 degrees).[865] At 73 degrees, the shell would have been fired from ABiH territory on charges 1 and 2, in no-man's land on charge 3, and from VRS territory on charges 4-6.

John Russell

606. The next day, Dr Berko Zecevic, a former ABiH employee, proceeded to the scene. When he heard that investigators had concluded that it was impossible to determine the origin of fire, he volunteered his services, presumably believing that he could help establish that the Bosnian Serbs were responsible.[866]

[862] P1441, p. 17.
[863] P1441, p. 16.
[864] T29376.
[865] *Judgement*, para. 4186.
[866] T12158.

607. Dr Zecevic removed a few stones that had fallen into the hole made by the tail fin and then re-inserted the tail fin and tried to work out the angle of descent.[867] He calculated the angle of descent to be between 55 and 65 degrees.[868] During his testimony, Dr Zecevic acknowledged that he had not used a standard method of measuring the angle of descent.[869]

Berko Zecevic

608. On 11 February 1994, the UN appointed an expert team to conduct an investigation to determine who fired the mortar. Canadian Colonel Michel Gauthier led the investigation, directed at determining both the direction and the distance the mortar had been fired from.[870]

609. The UN expert team tried to determine the angle of descent. Two team members estimated the angle of descent when they visited the crater on 11 February 1994. John Hamill estimated 950-1100 mils (53-61 degrees), but considering that several days elapsed between the impact and the analysis and the crater had been disturbed,[871] Hamill concluded, "it is not possible to state where the round was fired from, as it could have

[867] T12159-60.
[868] T12168.
[869] T12340.
[870] P1441, p.13.
[871] P1441, p. 25.

been fired at one of a number of different charges giving a different range".[872] Major Khan estimated 1000-1100 mils (56-61 degrees)[873] and similarly noted:

> the crater analysis has been conducted seven days after the incident. The crater formed by the bomb has been tempered [sic] time and again by various personnel. The exact fuse tunnel or place where nose of the fins was buried cannot be ascertained. Therefore, it was not possible to work out accurately the angle of descent and thus the range bracket to the mortar position. However, an approximate angle of descent has been worked out from the approximate location of the fins in the crater. In view of this, the direction to the firing position can be fairly accurate and the angle of descent measured should only be taken as a guideline.[874]

610. Other team members declined to attempt to measure the angle of descent. Jose Grande was unable to give an estimate of the angle of descent because "when I arrived at the spot (6 days after the incident) the crater had been excavated and slightly enlarged as we were informed by the previous analyst teams".[875] Sergeant Dubant similarly stated that calculating the angle of descent became impossible since the hole had been re-dug to extract the tail fin.[876]

611. Another team member, Colonel Rumyantzev, did not write a separate report, but confided to his friend, Ukrainian Lieutenant Colonel Sergey Moroz, that he believed the Bosnian Serb side had not launched the mortar.[877]

> The UN investigation team collectively and officially concluded:
>
> "[B]y the time the team conducted its analyses, six days had elapsed since the explosion. It is reasonable to suspect that the crater was thoroughly excavated by the local authorities during that period. Hence the angles measured on 11 February are not beyond suspicion. To ensure accuracy, the angle must be measured when the tail fin and fuse are in the ground and this was not done on 5 February. Accordingly, it is assessed that the results measured on 11 February are not sufficiently accurate to be used as a basis for a finding".[878]

[872] P1441, p. 25.
[873] P1441, p. 17.
[874] P1441, p. 23.
[875] P1441, p. 27.
[876] P1441, p. 29.
[877] D2373, p.32.
[878] P1441, p. 19.

Colonel Michel Gauthier
Head of UN "Markale" Investigation

612. The UN investigation team concluded: "There was insufficient physical evidence to prove that one party or another fired the mortar bomb. The mortar bomb in question could have been fired by either side".[879] When appearing as a Defence witness in 2012, Colonel Gauthier testified that he had no information then that would cause him to change the findings of his investigation team.[880]

613. In 2001, the Prosecution retained an artillery expert, Richard Higgs, to review the findings in several shelling cases, including Markale. Higgs reviewed the investigators' reports. He testified that he could make no additional observations about the distance that the mortar travelled.[881] He concluded that as there was no accurate angle of descent recorded, there was no way to validly determine which side had fired the mortar.[882]

[879] P1441, p. 11.
[880] T29419.
[881] P1437, p. 11.
[882] T5983.

Richard Higgs

614. The Defence retained Dr Derek Allsop as an expert witness. Dr Allsop had taught ballistics and design of small and medium range weapons at the United Kingdom Royal Military College for 25 years. He also provided technical advice and support on small and medium range weapon systems to the United Kingdom Ministry of Defence.[883] Dr Allsop testified that it was not possible to calculate the Markale shell's angle of descent.[884]

Derek Allsop

[883] D2369, pp.1-5; T29424-26.
[884] D2372, pp.3-4, 11; T29452-53.

615. In the face of all of this evidence that the angle of descent could not be reliably calculated, the Majority calculated it anyway, saying that it was "struck by the fact that all but one of the estimated angle ranges are relatively close to each other and in fact overlap."[885] Those ranges it referred to were those calculated by two UN investigative team members, Hamill and Khan, both of whom said that the results were not reliable, and Zecevic, who worked for the Bosnian government. Hamill testified that the UN investigation team refused to accept fragments offered to them by the Bosnian government as evidence due to reliability questions.[886] The Trial Chamber found Zecevic to be mistaken on another area of his expertise—fuel air bombs.[887]

616. The Majority's calculation of the angle of descent in a criminal case requiring proof beyond a reasonable doubt, in the face of the UN's own conclusion that these estimates were not reliable enough to support a finding by a preponderance of the evidence, was inexplicable, even to Judge Baird.[888]

617. One might have been "struck" that more than 80% of bookmakers in the United Kingdom believed that voters would choose to remain in the European Union,[889] but that did not make it a fact which could be found beyond a reasonable doubt. That several persons made guesses of the angle of descent in the same general range does not turn those guesses into fact.

618. Therefore, the Majority erred when calculating an angle of descent that could simply not be calculated. Since its findings that the Bosnian Serbs fired the shell that landed on Markale market was dependent on that calculation, this finding was unsafe and must be reversed.

619. The ICTY Appeals Chamber's decision in *Galic* does not require a different result. There, the Appeals Chamber upheld a finding that the Bosnian Serbs had fired the shell. However, it did so because all the evidence before that Trial Chamber on the angle

[885] *Judgement*, para. 4247.
[886] T9681-82; T9725.
[887] *Judgement*, para. 4413, 4437, 4452, 4473, 4491.
[888] *Dissenting Opinion of Judge Baird*, paras. 6083, 6087-88, 6094.
[889] http://blogs.spectator.co.uk/2016/06/chance-brexit-plunges-time-low-17-per-cent/.

of descent was in agreement. The Appeals Chamber noted that neither party called Major Russell as a witness, so that no explanation about his calculations was available.[890]

620. In contrast, Major Russell testified as a witness in this case and explained the methods by which he examined the crater.[891] There was no evidence that the UN investigative team had rejected the measurements taken by Major Russell.[892] Therefore, unlike in the *Galic* case, the Trial Chamber had before it conflicting evidence about the angle of descent.

621. Convictions all over the world that have been based on "junk science" are being overturned as technology improves the reliability of the fact-finding process.[893] By making findings that even UN experts didn't dare to make, the Majority entered a conviction that is unreliable and unsafe.

622. The Appeals Chamber should reverse the Majority's conviction of President Karadzic for Scheduled Incident G8.

[890] *Galic AJ*, para. 328.
[891] D2364, para 22; D2366.
[892] T29411.
[893] http://www.innocenceproject.org/wp-content/uploads/2016/02/DNA_Exonerations_Forensic_Science.pdf

36-37. The Trial Chamber erred when finding that President Karadzic shared the common purpose of spreading terror among the civilian population of Sarajevo and in relying on a meeting that never occurred

In Brief

Finding: ***President Karadzic shared the common purpose to terrorise the civilian population of Sarajevo.***

Error: ***Trial Chamber failed to adopt the reasonable inference that President Karadzic believed that VRS was firing only when fired upon and at legitimate military objectives.***

Impact: ***Error in finding that President Karadzic was a member of the Sarajevo JCE requires reversal of Counts 9 and 10 and Sarajevo-related convictions under Counts 5 and 6.***

623. The Trial Chamber found that President Karadzic shared the common purpose to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling.[894] This finding was only possible after the Trial Chamber (i) relied upon a meeting that never occurred; (ii) disregarded President Karadzic's orders that civilians were not to be targeted; and (iii) failed to draw a reasonable inference consistent with innocence—that President Karadzic reasonably believed that the VRS only fired when necessary and at military objectives. These errors warrant reversal.

The Meeting

624. The Trial Chamber found that between 20 and 28 May 1992, there was a meeting between the Bosnian Serb civilian and military leadership. At this meeting General Mladic, [REDACTED], proposed to massively bomb Sarajevo, and President Karadzic offered no objections.[895]

[894] *Judgement*, para. 4891.
[895] *Judgement*, paras. 4023, 4721.

625. This meeting never took place.

626. [REDACTED].[896] [REDACTED].

627. A Trial Chamber is obliged to exercise caution when relying on the testimony of a witness who has a motive to implicate the accused,[897] and to explain why it nonetheless accepted this evidence.[898] [REDACTED].[899]

628. In fact, President Karadzic attended a peace conference in Lisbon on 20 May and did not return to Bosnia until the evening of 30 May 1992. The meeting could not have been held on 20 May before President Karadzic left because one of the participants, Biljana Plavsic, remained stuck in Sarajevo.[900] President Karadzic returned via Belgrade where he met with UN representatives on 30 May[901] and spoke to "Cedo" from Belgrade that evening.[902] President Karadzic briefed General Mladic on his Lisbon trip on 31 May after he returned.[903]

629. Although the Trial Chamber acknowledged his presence in Lisbon elsewhere in the judgement,[904] [REDACTED].

630. The Trial Chamber also ignored other directly relevant evidence. No trace of the meeting can be found in General Mladic's notebooks.[905] This omission, in light of General Mladic's fastidious recording of meetings in his notebooks, raises more than a reasonable doubt whether this meeting ever took place.

631. The Trial Chamber's conclusions about the meeting are manifestly unsafe. This meeting is at the heart of the JCE, with the Trial Chamber finding that the common plan materialised in "late May 1992".[906] It could not have "materialised" at a meeting that never took place.

President Karadzic prohibited the targeting of civilians and indiscriminate and disproportionate attacks

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[896] [REDACTED].
[897] *Popovic AJ*, para. 135.
[898] *Renzaho AJ*, para. 420.
[899] [REDACTED].
[900] P1477, p. 370.
[901] P1036.
[902] P2332, pp. 1-3.
[903] P1478, pp. 37-41.
[904] *Judgement*, para. 4026, fn, 13380.
[905] P1477; P1478.
[906] *Judgement*, paras. 4649, 4023.

632. Indications that a commander is repeatedly acting to protect the civilian population are directly relevant to whether he or she intended to murder, terrorise, or unlawfully attack civilians.

633. President Karadzic issued orders to VRS personnel prohibiting the targeting civilians, and prohibiting indiscriminate or disproportionate fire.[907] The Trial Chamber accepted that President Karadzic issued these orders, and that evidence of their existence was credible, and reliable. [908]

634. The orders included admonitions that "the shelling of civilian targets is a war crime, which is chastised with the toughest punishment",[909] and that fire was only to be opened at the order of a commander and in the presence of a strong military justification.[910]

635. Notably, these orders are corroborated by intercepted and confidential telephone conversations, also accepted as credible and reliable by the Trial Chamber, in which President Karadzic is recorded as saying "we don't want the shells landing in the city just like that. Strictly forbid them falling in the city,"[911] and that "no shell is to land on Sarajevo", and returning fire was only allowed against ABiH positions outside Sarajevo.[912]

636. The Trial Chamber relied on these orders and intercepted conversations to make adverse findings against President Karadzic concerning his level of control, knowledge of crimes, and ability to modulate the shelling.[913] When it came to determining President Karadzic's intent, however, they were disregarded. Notably, they were disregarded on the basis that they were "few and far between", were not "genuine", and that President Karadzic should have exercised his influence "more regularly and rigorously".[914] This was an error.

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[907] See Annex N for a list of these orders.
[908] *Judgement*, paras. 4754, 4756, 4766-68, 4770-71, 4776-77, 4779, 4781-83, 4785-86, 4791-92, 4795, 4818, 4827, 4836, 4856.
[909] D314; *Judgement*, para. 4779.
[910] P846; *Judgement*, paras. 4836, 4877, 4927.
[911] D4510; *Judgement*, paras. 4785, 4927.
[912] P4802; *Judgement*, paras. 4792, 4874, 4927
[913] *Judgement*, paras. 4754, 4756, 4766-68, 4770-71, 4776-77, 4779, 4781-83, 4785-86, 4791-92, 4795, 4818, 4827, 4836, 4856.
[914] *Judgement*, para. 4934.

637. First, the Trial Chamber's reasoning is incompatible with its findings that that "the chain of command between the Accused and the SRK operated as intended"[915] and the command and control system "within the SRK and the Main Staff through to the Accused, functioned well."[916] According to the Trial Chamber, orders from President Karadzic were endowed with the full force of military orders from the Supreme Commander, and would have been irrevocable, enduring, and obeyed. They would not need regular re-issue, nor would any repetition have changed their weight or rigor.

638. Second, the Trial Chamber disregarded the orders on the basis that they were motivated by President Karadzic's alleged political goals.[917] In doing so, the Trial Chamber took into account irrelevant considerations. Even had President Karadzic been motivated by political goals to achieve his objectives in Sarajevo, this does not demonstrate that he wanted civilians to be targeted.

639. Third, the Trial Chamber's assertion that the orders were not "genuine" cannot be reconciled with the Prosecution's access to private intercepted telephone conversations and confidential orders during the period in question that give no indication of a counter-message, or that many of President Karadzic's most vehement admonitions against any illegal targeting were issued in private and confidential conversations. Had a secret plan to terrorise civilians and not respect humanitarian law existed, someone likely would have written, or stated in an intercepted conversation, that it had been differently agreed.

640. By interpreting these orders in a manner consistent with its theory of culpability, the Trial Chamber made numerous errors in reasoning. No reasonable Trial Chamber could have concluded that President Karadzic had the intent to commit murder, unlawful attacks on civilians and terror in Sarajevo, given its reliance elsewhere on the credible evidence that he was dedicated to protecting civilians. The Trial Chamber erred by disregarding the very evidence that should have been central to its consideration of intent, while relying upon it elsewhere to inculpate President Karadzic.

<u>President Karadzic did not have knowledge of attacks on civilians or disproportionate or indiscriminate shelling</u>

[915] *Judgement*, para. 4764.
[916] *Judgement*, para. 4862.
[917] *Judgement*, para. 4934.

641. Three inferences could be drawn from the evidence related to Sarajevo: (i) the VRS targeted civilians at President Karadzic's direction; (ii) the VRS targeted civilians contrary to President Karadzic's direction; and (iii) the VRS did not target civilians. The Trial Chamber erred in choosing the first, when the others were also reasonable and available on the evidence before it.

642. It drew this erroneous conclusion because of a central error. The Trial Chamber's analysis of President Karadzic's contribution to the Sarajevo JCE focuses on the information that he received. The proper focus should have been much broader; namely, what President Karadzic reasonably believed in the prevailing circumstances.

643. The Trial Chamber relied heavily on the evidence of members of the international community called by the Prosecution, who testified that they or their colleagues complained to President Karadzic about the sniping and shelling of the civilian population.[918] It also relied on news reports from the international media that reported the situation in Sarajevo.[919]

644. However, the Trial Chamber failed to weigh this evidence as against its other findings that President Karadzic was also receiving consistent information, from those who he trusted far more than the international observers, that the VRS was acting lawfully.

645. The Trial Chamber accepted that President Karadzic was repeatedly told that either the VRS had not fired the offending round, or the VRS was only firing when fired upon and at military objectives,[920] and that absent use of artillery to repel attacks and offensives, the far more numerous ABiH would overrun the VRS, kill Serb civilians in the suburbs, and link up with their forces on the outer ring of Sarajevo to conquer all of Bosnia.[921]

646. The Trial Chamber itself recognised that it was impossible to determine from combat reports that the firing was indiscriminate or disproportionate.[922] It also accepted direct evidence of President Karadzic being repeatedly assured that the allegations of

[918] *Judgement*, paras. 4813-47.
[919] *Judgement*, paras. 4848-50.
[920] *Judgement*, paras. 4592-94, P2332, p. 6; D4511.
[921] *Judgement*, paras. 4785, 4814, 4821, 4828, 4831, 4841, 4845; P1274, p. 2; D2331, para 10.
[922] *Judgement*, para. 4602.

crimes were baseless when he stated, at a Bosnian Serb Assembly session in November 1994, that:

> [T]hen I call General Galic and ask him whether the members of the Corps are shooting at Sarajevo. He tells me that they are not. I ask him how does he know that and he answers that he did not issue the order. I ask him if it could be done without the order and he says it should not be like that. I tell him to check it out. It happened that he did not issue the order…[923]

647. The Trial Chamber also ignored credible and direct evidence that President Karadzic and/or the Bosnian Serb leadership considered UN and international personnel and journalists biased against their cause.[924] This evidence is directly relevant to the credence President Karadzic would have ascribed the information he was receiving from international personnel and media. This should have formed part of the Trial Chamber's reasoning.

648. Information from a source thought by an accused to lack credibility is not sufficient to give him "knowledge" of certain facts, particularly when he is receiving consistent and credible denials from sources he trusts.

649. The Trial Chamber should have considered evidence that President Karadzic received consistent information that the VRS was acting lawfully, and provided a reasoned opinion why it did not undermine its finding that he had knowledge of attacks on civilians and indiscriminate shelling. By focusing solely on information that President Karadzic received from non-insiders, and not what he reasonably believed in the circumstances, the Trial Chamber fell into error.

650. The Trial Chamber concluded that all 26 VRS witnesses, who gave sworn testimony that the VRS only fired when fired upon and only at legitimate military objectives, were lying.[925] Even if this was the case, these were the very explanations that President Karadzic consistently received during the war from the VRS when he inquired in response to complaints from the international community or when he ordered investigations.[926] If these soldiers were willing to travel to The Hague 20 years later, take

[923] *Judgement*, para. 4841
[924] *See* P3778; D698, p. 1; D115, p. 5; D3491, p. 1; D3498, p. 4; D1151, p. 5; D1057, p. 1.
[925] *Judgement*, para. 4598.
[926] T25735; T37885-88; T32736-37.

the solemn oath, and testify that they only fired when fired upon and at military objectives, it is reasonable to infer that this was the position they expressed to President Karadzic during the war.

651. The Trial Chamber's error infects other findings concerning the Sarajevo JCE. The Trial Chamber's finding that President Karadzic shared the common purpose of spreading terror among the civilian population was based in part on President Karadzic's continuous support for General Mladic.[927] President Karadzic did support General Mladic, because he reasonably believed that the VRS only fired when they were fired upon and only at military objectives in Sarajevo. President Karadzic promoted officers and lauded Sarajevo troops from the VRS[928] because he genuinely believed that they had been acting in accordance with international law under very difficult circumstances.

652. Nor did the Trial Chamber's ultimate conclusion that VRS engaged in indiscriminate or disproportionate firing on Sarajevo entitle it to find that President Karadzic shared the intent to terrorise the civilian population. Drones launched by the United States regularly kill civilians. President Obama, as the Commander-in-Chief of the US Armed Forces, is undoubtedly assured that a legitimate military objective exists for these strikes. If it turns out later that this was incorrect, it does not mean that President Obama possessed the intent to terrorise the civilian population, or to murder civilians.

653. No reasonable Trial Chamber, evaluating what President Karadzic reasonably believed in the circumstances at the time, could have concluded that President Karadzic knew that the VRS sniped and shelled the civilian population of Sarajevo or launched indiscriminate and/or disproportionate attacks on the city throughout the conflict.[929]

The Trial Chamber similarly erred in its assessment of
President Karadzic's knowledge of the Scheduled Incidents

654. The failure to adequately consider information President Karadzic received from his own sources also undermines the Trial Chamber's findings that President Karadzic was informed about the scheduled incidents.[930]

[927] *Judgement*, para. 4891(i).
[928] *Judgement*, paras. 4731-34.
[929] *Judgement*, para. 4861.
[930] *Judgement*, para. 4863.

655. For example, when considering that President Karadzic been informed about Incident G7 by UNPROFOR,[931] the Trial Chamber failed to adequately take into account that the SRK Command reported that, after checking, it was established that no fire had been opened by the SRK in Dobrinja.[932] Colonel Kosovac had investigated the incident for the SRK Command. He concluded that the SRK had not opened fire.[933] The Trial Chamber erred in failing to consider this evidence when determining President Karadzic's knowledge of this incident.

656. When considering that President Karadzic had been informed about Incident G4 by UNPROFOR,[934] the Trial Chamber failed to take into account that the SRK Command reported that no fire had been opened that day by the SRK.[935]

657. When considering that President Karadzic had been informed about Incident G8 by UNPROFOR,[936] the Trial Chamber failed to adequately take into account that the VRS, having conducted an internal investigation, determined that the SRK had not fired on the marketplace and that the explosion had been detonated at ground level.[937]

658. When considering that President Karadzic had been informed about Incident F11 by UNPROFOR,[938] the Trial Chamber failed to adequately take into account that General Mladic reported that the Muslim side staged this incident.[939]

659. The Trial Chamber only considered half of the story. A reasonable Trial Chamber would have assessed not only what international agencies and personnel told President Karadzic, but what information he received from his Army, sources which were more credible to him. Its failure to do so undermines the finding that President Karadzic knew that the VRS sniped and shelled the civilian population or launched indiscriminate and/or disproportionate attacks on the city throughout the conflict.[940] His convictions on Counts 9 and 10, and for the Sarajevo-related crimes in Counts 5 and 6, should be reversed.

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[931] *Judgement*, para. 4835.
[932] D1515.
[933] T32711-12.
[934] *Judgement*, para. 4830.
[935] D340.
[936] *Judgement*, para. 4836.
[937] T25735-36.
[938] *Judgement*, para. 4840.
[939] P867, p. 2.
[940] *Judgement*, para. 4861.

V. SREBRENICA

38-39. The Trial Chamber erred when finding that President Karadzic shared the common purpose of removing the Bosnian Muslims from Srebrenica and when relying on Directive 7

In Brief

Finding:	***President Karadzic shared the common purpose of forcibly transferring Bosnian Muslims from Srebrenica***
Error:	***Trial Chamber failed to adopt the reasonable inference that President Karadzic was unaware of and did not support restrictions on humanitarian aid and other actions which resulted in forcible transfer.***
Impact:	***Error in finding that President Karadzic was a member of JCE to remove Srebrenica population requires reversal of Srebrenica-related convictions under Counts 3 and 8.***

660. The Trial Chamber found that President Karadzic shared the common purpose of eliminating the Bosnian Muslims in Srebrenica by, *inter alia,* forcibly removing the women, children, and elderly men.[941] It based this finding on President Karadzic's issuing Directive 7 in March 1995,[942] subsequently restricting humanitarian aid to Srebrenica,[943] and establishing Bosnian Serb structures in Srebrenica on 11 July.[944]

Issuing Directive 7

661. The Trial Chamber found that on 8 March 1995, President Karadzic issued Directive 7, which included an order to the Drina Corps to "*create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica*

[941] *Judgement*, para. 5814.
[942] *Judgement*, para. 5799.
[943] *Judgement*, para. 5799.
[944] *Judgement*, para. 5800.

and Zepa". It found that this language indicated an intention to force the Bosnian Muslim population to leave the enclave.[945]

662. President Karadzic emphatically denied reading Directive 7's fine print or being aware of that sentence. The Defence case was that "President Karadzic signed Directive 7 without reading the above-quoted passage."[946] During the trial, President Karadzic established that Directive 7 bore the VRS' stamp and protocol numbers and was prepared by the VRS and not by his staff.[947] Several witnesses testified that President Karadzic frequently signed documents without reading them.[948] [REDACTED].[949]

663. The Trial Chamber failed to consider this evidence. The judgement makes no reference to President Karadzic's contention that he was unaware of the sentence in the 13 page single-spaced document that called for creating an unbearable situation for the inhabitants of Srebrenica, or the evidence offered in support. The Trial Chamber failed to take into account relevant factors, and violated President Karadzic's right to a reasoned opinion.

664. While a person may be liable in a civil action simply for having signed a document, this is not the case in a criminal prosecution where an individual's *mens rea* must be established beyond reasonable doubt.

665. In *Popovic*, the Prosecution alleged that a report signed by Colonel Pandurevic that called for the Bosnian Muslims' removal from Eastern Bosnia was indicative of his intent to forcibly transfer the population of Srebrenica. The Trial Chamber rejected that argument:

> Ultimately, responsibility for this document lies in a formal sense with Pandurevic as the signatory of the document and generally as the Commander of the Brigade from which it was produced. However, in the absence of additional information, Pandurevic raised a reasonable doubt as to whether the document was in fact written by him and thus specifically reflected his own personal views… Accordingly, for the purposes of evaluating criminal responsibility, the Trial Chamber considers the report to be an insufficient basis on which to conclude that Pandurevic possessed the necessary criminal intent to carry out the common purpose.[950]

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[945] *Judgement*, para. 5681, 5756.
[946] *Defence Final Brief*, para. 3310.
[947] D3682, para. 21.
[948] T24338; D3682, para.22; D3695, para. 233; T16042-43, T16203.
[949] [REDACTED]
[950] *Popovic TJ*, para. 2003.

666. The Trial Chamber's reliance on Directive 7 as demonstrating President Karadzic's intent to force the Bosnian Muslim population to leave the enclave was undermined by its failure to consider directly relevant evidence and to provide a reasoned opinion. No evidence exists that President Karadzic knew of the offending sentence in this Directive. His practice to sign documents without reading them, and the absence of any evidence that he ever expressed those or similar sentiments in five years of recorded public addresses and private intercepted conversations, supports the inference that he was unaware that Directive 7 contained this language.

667. The Trial Chamber erred in inferring that President Karadzic possessed the intent to remove the Muslim population of Srebrenica from his signature on Directive 7,

Restricting Humanitarian Aid

668. The Trial Chamber found that President Karadzic's 15 March 1995 order establishing a "State Committee for Cooperation with the UN and International Humanitarian Organisations" gave him control over convoys heading to Srebrenica and that he used that control to restrict humanitarian aid to the enclave.[951]

669. In reaching this conclusion, the Trial Chamber made a several fatal errors. First, it ignored uncontested evidence that the State Committee was created to **ease** restrictions in response to complaints from the international community.[952] This aligned with President Karadzic's policy that humanitarian convoys should pass without obstruction. [953]

670. This evidence was corroborated by the decision forming the committee itself, which provided that: "the Committee is hereby formed with the aim of **improving** cooperation with the United Nations and international humanitarian organisations".[954] Uncontested evidence showed that those appointed to the committee were civilians with humanitarian experience.[955]

671. President Karadzic also sent a stern letter to General Mladic complaining that a State Committee order for a UNHCR convoy to pass unimpeded had not been observed.

[951] *Judgement*, paras. 5757, 5799.
[952] P2244; P2245.
[953] T42608.
[954] P4543, Article 2 (emphasis added).
[955] P4543, p.3.

He ordered that the State Committee's order be executed immediately and that a report be submitted to him explaining the delay.[956]

672. The Trial Chamber's finding that President Karadzic used the State Committee to restrict humanitarian aid to the enclave, without considering this directly relevant evidence, was an error.

673. Second, the Trial Chamber's finding that a reduction of humanitarian aid resulted from Directive 7 is also not supported by the facts. In fact, the number of convoys for Srebrenica **increased** after Directive 7.[957] UNPROFOR reported that during March 1995, 93% of the humanitarian aid destined for Srebrenica was delivered—the highest percentage of all of the safe areas.[958] The UN reported on 26 April 1995 that "UNHCR convoy access to Gorazde and Srebrenica was basically unhindered and the humanitarian situation is reported as satisfactory."[959] Those involved in the convoy process confirmed that no policy to reduce the supply of humanitarian aid to Srebrenica as of March 1995 existed.[960]

674. The Trial Chamber recognised that although convoy approvals increased under the State Committee system, approved convoys did not all arrive in Srebrenica.[961] This is inconsistent with its finding that President Karadzic used his control over the State Committee to restrict humanitarian aid to the enclave, since the State Committee's function was to approve the convoys.

675. Likewise, that President Karadzic restricted humanitarian aid to the enclave was not the only reasonable inference available. No reasonable Trial Chamber could have excluded the possibility that obstructions to the convoys, if any, were done by VRS soldiers in lower levels of command without the knowledge or approval of the State Committee.

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[956] D3876.
[957] Compare Srebrenica columns in D3957 (March-April 1995) with D3947 (1994). The following exhibits show the convoys for Srebrenica which were approved between March and July, 1995 (in chronological order): D2173; D2115; D3272; D4841; D2126; D3273; D4842; D3265; D4844; P4190; P839; P2309; D2116; D2127; D3301; D3294; D2067; D2068; D3957; D2070; D2069; D2072; D3281; D2073; D3299; D2074; D2075; D2076; D2077; P4452; D2117; D2119; P4197; P4455; D2120; P5123; P5125.
[958] D1123, para. 7.
[959] P831, p. 8.
[960] D3245, p. 29312; T25270; D3932, para. 26; T25259-60; T25278.
[961] *Judgement*, para. 4991.

676. Moreover, even if the convoys were obstructed at the local level,[962] or items stolen from them,[963] no evidence exists that President Karadzic intended, or even knew, this. Therefore, the Trial Chamber erred in inferring that his order establishing the State Committee was part of a plan to eliminate the Bosnian Muslims in Srebrenica. The evidence does not exclude the reasonable inference that President Karadzic did nothing to prevent, obstruct, or reduce humanitarian aid to Srebrenica in 1995. In fact, the evidence outlined above demonstrates that he tried to facilitate it.

Establishing Bosnian Serb structures

677. The Trial Chamber found that President Karadzic's three orders on 11 July establishing structures in Srebrenica and relating to humanitarian aid demonstrated that he intended that the Bosnian Muslims be permanently removed from Srebrenica.[964] Examining those orders reveals the Trial Chamber's failure to adopt a reasonable inference consistent with innocence.

678. The first order appointed Miroslav Deronjic as Civilian Commissioner for the Serb Municipality of Srebrenica. It stated "the commissioner shall ensure that all civilian and military organs treat all citizens who participated in combat against the Army of Republika Srpska as prisoners of war, and ensure that the civilian population can freely choose where they will live or move to."[965]

679. This order on its face envisions that Bosnian Muslims would remain in Srebrenica. If all Bosnian Muslims were forcibly removed, there would be no one to treat as prisoners of war. The Trial Chamber's finding that General Mladic, in Deronjic's presence, later coerced the Bosnian Muslim representatives into agreeing to leave the enclave, is not indicative of President Karadzic's intent when issuing the order.[966]

680. The second order called for establishing a police station in Srebrenica.[967] The Trial Chamber never explained how this demonstrated that the removal of the Bosnian Muslims was designed to be permanent, amounting to a failure to give a reasoned opinion.

[962] *Judgement*, fn. 16825; P4142, para. 3.
[963] *Judgement*, fns. 16816-17.
[964] *Judgement*, para. 5800.
[965] D2055.
[966] *Judgement*, para. 5810.
[967] P2994.

681. The third order provided that inspections of humanitarian convoys only would occur at the entry to Republika Srpska and that once the convoy entered Republika Srpska no further inspections would be made. It further provided for patrols to escort the convoys when travelling in Republika Srpska.[968] Approvals for convoys would continue to be given by the State Committee, but prior consultation with the President was now required.[969]

682. The order stated the reasons for these changes: "the international situation and the danger that force could be employed to realize the plan for providing humanitarian aid for the affected civilians,"[970] and "considering the extreme seriousness of the military and political situation and the special political importance of humanitarian issues in this area."[971]

683. The Trial Chamber's finding that the order had the practical effect of limiting international access to the enclave[972] is not the only inference that can be drawn. Another, more reasonable, inference is that the order's purpose was to improve the passage of convoys by prohibiting multiple inspections and providing an escort between the border and the front line. The order and its timing appear to be motivated by the fact that having taken the drastic action of overrunning a UN safe area, President Karadzic wanted to make sure that there were no reasons for NATO to use force on the basis that humanitarian aid could not reach the affected people.[973]

684. The Trial Chamber's inference is rendered more unreasonable by the evidence that throughout the war, whenever President Karadzic intervened on humanitarian convoys, it was to assist the convoy in reaching its destination, rather than hindering it.[974]

685. No reasonable Trial Chamber could have found that the President Karadzic's orders to establish structures in Srebrenica and to be personally involved in convoy approvals was intended to encourage the removal of Bosnian Muslims from Srebrenica.

686. The Trial Chamber erred in inferring a nefarious motive to President Karadzic's 11 July orders and in failing to adopt the inference consistent with innocence—that the

[968] P5183, paras 4-5.
[969] P5183, para. 2.
[970] P5183, preamble.
[971] P5183, para. 8.
[972] *Judgement*, para. 5817.
[973] T47941.
[974] See the exhibits listed in Annex O.

orders were designed to protect Muslims, not expel them, and to facilitate, and not hinder, humanitarian aid to Srebrenica.

Forcible transfer facts

687. The facts relied upon by the Trial Chamber to conclude that the transfer of the Bosnian Muslims was forcible were the restrictions on humanitarian aid, the VRS' shelling of civilians in Srebrenica, and the coercive atmosphere in Potocari.[975] The Trial Chamber also placed great weight on the intercepted conversation where General Mladic said to an unidentified person, "…we'll evacuate them all—those who want to and those who don't want to."[976]

688. No oral or written report made to President Karadzic indicated that humanitarian aid was being unduly restricted, the VRS was shelling civilians, or there was a coercive atmosphere in Potocari. He was not privy to General Mladic's private conversation. As late as the evening of 13 July, he told *El Pais* that the Muslims were free to stay or go.[977] None of the *indicia* relied upon by the Trial Chamber to find that the transfer of the Bosnian Muslims was forcible was known to him.

Conclusion

689. The Trial Chamber's finding that President Karadzic shared the common purpose of removing the Bosnian Muslims from Srebrenica was not the only reasonable inference available. The evidence also supported the inference that President Karadzic did not share the goal of removing the Bosnian Muslims from Srebrenica and was unaware of the forcible nature of the transfer. The Trial Chamber's error warrants reversal of the Srebrenica-related convictions under Counts 3 and 8 for forcible transfer.

[975] *Judgement*, para. 5633.
[976] *Judgement*, para. 5637.
[977] *Judgement*, para. 5774.

40. The Trial Chamber erred when concluding that President Karadzic agreed to the killing of Bosnian Muslim males from Srebrenica and shared the common purpose of eliminating them

In Brief

Finding: ***President Karadzic shared the common purpose of eliminating the Bosnian Muslims of Srebrenica by executing prisoners.***

Error: ***Trial Chamber's interpretation of cryptic intercepted conversation based on uncorroborated testimony of plea-bargaining accomplice was unreasonable and unsafe.***

Impact: ***Error in finding that President Karadzic was a member of JCE to eliminate Muslims of Srebrenica requires reversal of conviction under Count 2 and Srebrenica-related convictions under Counts 3-6.***

690. President Radovan Karadzic stands convicted of genocide at Srebrenica. Never has a conviction for such a serious crime rested on such a shaky foundation.

691. The Trial Chamber found that President Karadzic "agreed to and embraced" the expansion of the JCE "to encompass the killing of the able-bodied men and boys", and therefore concluded "that the Accused shared the common purpose of eliminating the Bosnian Muslims in Srebrenica with the other members of the JCE." It found this to be "demonstrated by his conversation with Deronjic on the evening of 13 July as well as his subsequent actions."[978]

692. This conclusion was unsafe, unsound, and untrue.

Karadzic-Deronjic telephone conversation on 13 July

693. On 13 July 1995, at 20:10, in written notes of an intercepted conversation, Mirolsav Deronjic is noted to have told President Karadzic that there were two thousand,

[978] *Judgement*, para. 5814.

and more were expected during the night. President Karadzic is noted to have replied "all the goods must be placed inside the warehouses before twelve tomorrow…not in the warehouses over there, but somewhere else."[979]

694. No recording of this conversation exists.[980]

695. The inference from incomplete notes of this cryptic conversation constitutes the primary evidence that President Karadzic agreed to and embraced killing the men from Srebrenica. The Trial Chamber inferred that by the words "somewhere else", President Karadzic referred to Zvornik, where the men were to be killed, rather than to Batkovici Camp, where they were to be detained. However, its meaning is insufficiently clear to conclude that no alternative interpretation is possible.

696. The Zvornik-Batkovici distinction is crucial. If President Karadzic ordered the prisoners to be taken to Batkovici Camp, the usual place for taking prisoners, and a facility regularly inspected by the ICRC, there is no basis to conclude he intended that they be executed.

697. The Trial Chamber inferred that President Karadzic told Deronjic to take the prisoners to Zvornik on the basis that Deronjic told Colonel Beara later that evening that President Karadzic had instructed him that all detainees should be transferred there.[981] That evidence was based solely upon the uncorroborated testimony of Momir Nikolic, who claimed to have overheard the conversation from an adjacent room.[982]

[979] *Judgement*, para. 5772.
[980] *OTP Recording Response*, para. 10.
[981] *Judgement*, para. 5773.
[982] *Judgement*, para. 5712.

Momir Nikolic

698. The Trial Chamber did not acknowledge, or analyse, that it relied on the uncorroborated testimony of an accomplice who had made a plea agreement with the Prosecution. For the finding that "Deronjic replied that he did not want anyone to be killed in Bratunac and that he had received instructions from the Accused that all of the Bosnian Muslim men being detained in Bratunac should be transferred to Zvornik,"[983] the Trial Chamber cited to the testimony of Nikolic and two other Prosecution witnesses—Srbislav Davidovic and Milenko Katanic.[984]

699. Those two witnesses provided no evidence whatsoever that President Karadzic said that the prisoners should be taken to Zvornik.

700. Srbislav Davidovic had urged Deronjic to contact President Karadzic, but testified and that he didn't know if Deronjic had in fact spoken with President Karadzic. He testified, "I did not ask Miroslav whether he had called anyone to intervene and whether the buses left on those orders or on that intervention, but all I know is that the bus

[983] *Judgement*, para. 5712.
[984] *Judgement*, fn. 18024: "Momir Nikolic, T24677-79 (14 February 2012); D2081 (Momir Nikolic's statement of facts from Plea Agreement, 7 May 2003), para. 10. *See also* Srbislav Davidovic, T24415-16, T24452-53 (9 February 2012); Milenko Katanic, T24496 (10 February 2012); P4374 (Witness statement of Milenko Katanic dated 11 October 2011), paras. 91–93."

did leave."[985] He further testified that he was convinced that the prisoners would be taken to Batkovici.[986]

Srbislav Davidovic

701. Milenko Katanic stated "Deronjic never told me about any conversations he had with Karadzic about the fate of the Muslim prisoners held in Bratunac…I do not know if Deronjic did or did not discuss these topics with Karadzic. If Karadzic had told Deronjic that all the Muslims should be killed, as I read in a newspaper, I find it strange that he would not have told me about it."[987]

[985] T24416.
[986] T24414.
[987] P4374, para. 93.

Milenko Katanic

702. Therefore, the evidence of Srbislav Davidovic and Milenko Katanic provides no support for the conclusion that President Karadzic ordered that the prisoners be taken to Zvornik or that he had any knowledge that they were to be killed.

703. A third person was present at the Deronjic-Beara conversation—Zvornik Police Chief Dragomir Vasic.[988] [REDACTED][989] The Prosecution never called him, presumably because he later testified in the *Perisic* trial he understood that President Karadzic had ordered the prisoners to be taken to Batkovici.[990]

704. The Trial Chamber also ignored a wealth of other evidence that pointed in the direction of Batkovici.

705. In an intercepted conversation at 11:25 am on 13 July 1995, Colonel Beara himself had sent four buses, two trucks, and one trailer truck to Nova Kasaba for the transportation of captured Muslims to Batkovici.[991]

706. Prosecution Witness KDZ045 testified that General Mladic told the detainees at Nova Kasaba on the afternoon of 13 July that they would be given food and water after which "we'll see whether we send you to Krajina, to Fikret Abdic, or […] to the Batkovici camp."[992]

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[988] *Judgement*, para. 5712.
[989] [REDACTED]
[990] *Recording Motion*, para. 5, citing *Prosecutor v Perisic*, No. IT-04-81-T, T6481-82 (25 May 2009).
[991] *Judgement*, fn. 17573; D2197.
[992] *Judgement*, para. 5186.

707. General Tolimir sent a telegram to Batkovici Camp telling them to expect to receive a large number of prisoners from Srebrenica.[993]

708. [REDACTED].[994]

709. Mane Duric, Deputy Chief to Vasic at the Zvornik CSB, who saw the convoy of prisoners arriving in Zvornik on the morning of 14 July, testified that he assumed they were going to Batkovici.[995]

Mane Duric

710. Defence military expert Radovan Radinovic concluded that President Karadzic was referring to Batkovici in his conversation with Deronjic, because it was well known that prisoners from that area were to be taken there.[996]

[993] D4124, at T12934.
[994] T26195; T26278; P4563, p. 1.
[995] T35043; T35046; T35086.
[996] T41524; D3864, para. 408.

Radovan Radinovic

711. Indeed, how could Deronjic understand that the prisoners should be taken to Zvornik simply from the words "somewhere else"? The more reasonable inference was that Deronjic would understand that "somewhere else" meant Batkovici, since it was the place where prisoners were expected to be taken.

712. The testimony of a witness who has entered into a plea agreement with the Prosecution must be viewed with caution. A Chamber, when weighing the probative value of the evidence, is bound to carefully consider the totality of the circumstances in which it was tendered.[997] The incentive to please the Prosecution to obtain a reduced sentence, or early release is great. Indeed, Nikolic was so desperate to make a deal that he falsely implicated himself in certain events that, at the time, the Prosecution wrongly believed him to be involved.[998] The Trial Chamber that sentenced Nikolic found him to be evasive, not fully forthcoming, and lacking in candour.[999] After he testified in President Karadzic's case, he was in fact granted early release after serving less than 2/3 of his sentence.[1000]

[997] *Niyitegeka AJ*, para. 98; *Martic TJ*, para. 34; *Combs Treatise*, pp. 194-95; *Chlevickaite Article*, p. 686.
[998] P4385.
[999] *M. Nikolic SJ*, para. 156.
[1000] *M. Nikolic Early Release Decision* (MICT)

713. Yet the Trial Chamber in President Karadzic's case relied on Momir Nikolic's uncorroborated testimony when making the crucial finding that President Karadzic shared the intent to kill and was responsible for genocide, extermination, and murder.[1001]

714. While there is no general prohibition on a Trial Chamber's reliance on the uncorroborated testimony of a witness who may have a motive to implicate an accused, such as an accomplice,[1002] Chambers have refused to rely on the uncorroborated testimony of a plea-bargaining accomplice on facts critical to an accused's responsibility.

715. In *Blagojevic*, the Trial Chamber found that "Momir Nikolic cannot be considered a wholly credible or reliable witness and that on matters that bear directly on the knowledge of the Accused, such as what he reported to Colonel Blagojević during those meetings or was told to do, it must require corroboration for such evidence, in order to enter a finding against the Accused."[1003]

716. In *Krstic*, the Appeals Chamber declined to rely on the uncorroborated testimony of Miroslav Deronjic, also the beneficiary of a plea agreement with the Prosecution,[1004] concerning General Krstic's knowledge of the plan to execute the prisoners from Srebrenica.[1005] In *Martic*, Milan Babic, like Momir Nikolic, participated in the events charged against the accused, and pled guilty under a plea agreement. The Trial Chamber held that, as a result, his evidence required corroboration before a factual finding could be based upon it.[1006]

717. In *Muvunyi*, the Appeals Chamber held that where a witness was an accomplice whose evidence was required to be judged with caution, it was error for the Trial Chamber to rely on his uncorroborated testimony when making a critical factual finding against the accused.[1007]

[1001] The Trial Chamber also referred, in fn. 19740, to the testimony of Prosecution Witness KDZ320 that Colonel Beara had told him that the order had come from two Presidents. However, Witness KDZ320 testified that he did not know which two Presidents Beara was referring to and did "not believe for a moment" that President Karadzic had ordered any killings. Thus, this evidence is not corroborative of Nikolic's testimony. T28084.
[1002] *Ngirabatware AJ*, para. 77.
[1003] *Blagojevic TJ*, para. 472.
[1004] *Deronjic Plea Agreement*.
[1005] *Krstic AJ*, para. 94.
[1006] *Martic TJ*, para. 34.
[1007] *Muvunyi AJ*, para. 131.

718. While the Trial Chamber in our case rejected evidence of Defence Witness KW586, a bodyguard to President Izetbegovic, because it found it "unlikely that someone in KW586's position would have been privy to such high level meetings where such sensitive matters were discussed",[1008] it accepted that Nikolic, who was not even an officer, would be privy to the Deronjic-Beara discussion of an even more sensitive matter.

719. The Trial Chamber's reliance on Momir Nikolic's uncorroborated testimony to conclude that President Karadzic had ordered that the prisoners be taken to Zvornik was unreasonable. It also failed to take into account the reasonable inference suggested by the Defence that President Karadzic referred to Batkovici Camp in his conversation with Deronjic and had no intent that the prisoners be killed.[1009]

720. The danger of drawing conclusions from ambiguous language in intercepted conversations was brought home in the *Krstic* case, where the Trial Chamber interpreted a reference to "up there" as referring to the execution sites. After the Trial Chamber had inferred General Krstic's knowledge of the executions in part based upon this intercept, the Prosecution conceded on appeal that "up there" referred to the area of combat operations.[1010] Inferring that President Karadzic's use of the term "somewhere else" referred to Zvornik is equally dangerous.

721. The Trial Chamber also erred in drawing the inference that the use of code to refer to the detainees demonstrated the malign intent behind the conversation.[1011] As suggested by the Defence, an equally reasonable inference was that the use of code on unsecured lines when referring to the location of prisoners was not nefarious, but was so that the enemy would not know where the prisoners were being held and mount a rescue operation.[1012]

722. The Appeals Chamber has stated:

> [W]hen a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences.[1013]

[1008] *Judgement*, para. 4252.
[1009] T47942-43.
[1010] *Krstic AJ*, paras. 72-73.
[1011] *Judgement*, para. 5805.
[1012] T47942-43.
[1013] *Vasiljevic AJ*, para. 131.

723. Again the *Krstic* Appeals Judgement is instructive. The Trial Chamber had inferred from Colonel Beara's statement in an intercepted conversation that he needed help in "distributing 3500 parcels" that General Krstic understood that 3500 prisoners were to be killed. However, the Appeals Chamber held that "while such an inference may be drawn from this coded language, its meaning is insufficiently clear to conclude that no alternative interpretation is possible."[1014] Likewise, the inference from the Karadzic-Deronjic conversation that President Karadzic knew the prisoners were to be killed is similarly unsustainable as the only reasonable inference to be drawn from that intercept.

724. When relying on inferential reasoning, a Trial Chamber must engage more deeply with the evidentiary issues and clearly elucidate the basis for its decision.[1015] The Trial Chamber failed to recognise that its inference from the intercepted conversation that President Karadzic agreed to the expansion of the objective to encompass killing the Bosnian Muslim males was only supported by Momir Nikolic's uncorroborated evidence and contradicted by the wealth of evidence described above.

725. The numerous and fatal errors in the Trial Chamber's reasoning undermine its finding that President Karadzic told Deronjic to take the prisoners to Zvornik. No reasonable Trial Chamber would have relied on the uncorroborated hearsay testimony of an accomplice who was a beneficiary of a plea agreement with the Prosecution, to draw an inference which was not the only reasonable one available, and was inconsistent with a large body of contradictory evidence that it either ignored, or to which it failed to ascribe sufficient weight.

726. The finding that President Karadzic told Deronjic to take the prisoners to Zvornik is central to the Trial Chamber's finding that President Karadzic agreed to the killing of Bosnian Muslim males from Srebrenica. Without this, none of the other "subsequent actions" to which the Trial Chamber refers[1016] are sufficient--either individually or cumulatively--to support a finding that President Karadzic shared the intent of the expanded JCE. The errors that undermine the finding on President Karadzic's "instruction" to Deronjic warrant a reversal of President Karadzic's conviction.

[1014] *Krstic AJ*, para. 76.
[1015] *Windridge Article*.
[1016] *Judgement*, para. 5814.

727. In any event, the findings on these "subsequent actions" each suffer from legal and factual errors that also warrant their reversal.

"Subsequent Actions"

728. President Karadzic's "subsequent actions" relied upon by the Trial Chamber to find that he shared the intent of the expanded JCE to kill the men of Srebrenica were (i) disseminating false information; (ii) denying internationals access to the area; and (iii) failing to prosecute, and in fact praising, those responsible.[1017]

729. Each of these actions is predicated on the finding that President Karadzic had knowledge of the executions. No witness testified that he informed President Karadzic of the executions. No contemporaneous document was ever uncovered which informed President Karadzic of the executions. No intercepted conversation, meeting record, or even a slip of the tongue was ever found indicating President Karadzic knew of the execution of prisoners. Instead, as it had when interpreting the Karadzic-Deronjic intercepted call, the Trial Chamber relied solely upon inferences.

730. The Trial Chamber first inferred that Miroslav Deronjic must have informed President Karadzic of the Kravica warehouse killings when they met in President Karadzic's office in Pale for 30 minutes on the afternoon of 14 July. The Trial Chamber acknowledged that it had no direct evidence of what they discussed. But it had "no doubt that…they both discussed the killings at the Kravica Warehouse, and the implementation of the Accused's order to transport the detainees from Bratunac to Zvornik by midday that day."[1018]

731. No evidence was presented at the trial from either Deronjic, who is deceased, or President Karadzic, who decided not to testify. The Trial Chamber ignored President Karadzic's unsworn statement in which he denied knowledge of killings after the fall of Srebrenica.[1019]

[1017] *Judgement*, paras. 5812-13.
[1018] *Judgement*, para. 5807.
[1019] T28878.

732. The meeting with Deronjic was immediately followed by a meeting with a larger group, including Skelani Municipality President Dane Katanic, and Krajisnik. Both testified that there was no mention of the killing of men from Srebrenica.[1020]

Dane Katanic

733. Marko Milanovic of the University of Nottingham observed that:

> The whole reasoning rests on what inferences can be drawn from Karadzic's contacts with Deronjic. And while it's clear to me that a reasonable inference is that Karadzic was informed about the killings, it's not as clear that this is the ONLY such reasonable inference, which is what the beyond a reasonable doubt evidentiary standard requires. For example, the phone conversation with Deronjic could be interpreted as Karadzic's agreement with the forcible removal of the Bosniak males, but not necessarily with their extermination.[1021]

734. Milena Sterio of Cleveland-Marshall Law School, commenting on the judgement, noted that:

> If one accepts the idea that one of the most fundamental goals of international criminal justice is to secure the highest level of convictions against those who commit atrocities, and that the most significant conviction is that of genocide, then one would support the argument that the definition of genocide should be interpreted more loosely, to allow for inferences of this sort. If one thinks, on the other hand, that rule of law is the most important thing and that legal definitions should be interpreted strictly, then one may take issue with the trial chamber's liberal approach in finding a genocidal intent based on inferences.[1022]

[1020] D3561, para. 8 (Katanic); T43352 (Krajisnik).
[1021] http://www.ejiltalk.org/icty-convicts-radovan-karadzic/
[1022] https://ilg2.org/2016/03/25/radovan-karadzic-convicted-by-icty-trial-chamber/

735. Even in instances where the Trial Chamber had direct evidence from a participant in a meeting with President Karadzic during this period that they had not informed President Karadzic about any killings after the fall of Srebrenica, the Trial Chamber drew the opposite inference.[1023]

736. By making findings about the content of discussions at meetings without evidence from one of the participants, or contrary to the participants' evidence, the Trial Chamber descended from inference to speculation. No reasonable Trial Chamber could find that Deronjic, Kovac, or Bajagic informed President Karadzic of the killings on this record.

737. Relevantly, the Trial Chamber in *Krstic* inferred the accused's knowledge of the plan to execute the prisoners due to his many contemporaneous contacts with General Mladic. The Appeals Chamber reversed this finding, holding that:

> [D]espite the Trial Chamber's assertion that if General Mladic knew about the killings, then Krstic must have also known - the Trial Chamber did not actually establish, from Krstic's contacts with General Mladic during the relevant period, that Radislav Krstic in fact learned of the intention to execute the Bosnian Muslims as a result of those contacts. The Trial Chamber's assertion was without a proper evidentiary basis.[1024]

738. Similarly, in *Karemera*, the Appeals Chamber found that, without evidence of what was said, no reasonable Trial Chamber could have inferred the content of meetings between political party leaders and ministers simply from the accused's presence at those meetings.[1025] Likewise, without evidence of what was said, no reasonable Trial Chamber could have inferred the content of meetings between President Karadzic and people who had been in the Srebrenica area.

739. Additionally, no reasonable Trial Chamber could have rejected a reasonable inference consistent with innocence—that President Karadzic was not informed of the killings. This inference did not rest on speculation, but on the evidence of 28 witnesses, including President Karadzic's staff, and high-ranking officials in the army, police, security services, and Assembly, who testified that President Karadzic was not informed

[1023] Compare D3960, para. 129 with *Judgement*, paras. 5781-82 (Kovac); D3853, para. 36D with *Judgement*, para. 5783 (Bajagic).
[1024] *Krstic AJ*, para. 98.
[1025] *Karemera AJ*, paras. 649-651.

of the Srebrenica executions, as well as the lack of any documentary or electronic evidence evidencing his knowledge.[1026]

740. The Trial Chamber also ignored evidence that the perpetrators had concealed the killing from President Karadzic. In an intercepted conversation on 1 August, Colonel Beara alluded to the fact that President Karadzic might make an agreement for the inspection or exchange of prisoners, and expressed concern that they didn't have the prisoners to exchange.[1027]

741. The remaining "subsequent actions" relied upon by the Trial Chamber pre-supposed that President Karadzic had "nearly contemporaneous" knowledge of the executions. When that erroneous inference is removed, it cannot be said he disseminated false information when he denied that Bosnian Muslims had been executed.[1028] Instead, he stated what he truly believed. Indeed, his efforts to personally take credit for the Srebrenica operation and praise those involved are inexplicable if he had knowledge of the executions.[1029]

742. Even if President Karadzic later obtained knowledge of the executions, the acts of denying those events or promoting those involved do not equate to sharing the common purpose of executing the prisoners—an essential ingredient to JCE liability.

743. The Trial Chamber's conclusion that "the Accused also denied international organisations access to Srebrenica and the Bratunac and Zvornik areas,"[1030] is also unsupported and untrue. This conclusion only references paragraph 5788 of the *Judgement* that states:

> On 24 July, the Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki, wrote to the Accused directly to request access to field staff from the UN Centre for Human Rights in areas under the Accused's control. Although this request was received, Mazowiecki did not receive an answer.

744. The UN's own report on the events in Srebrenica indicated that the ICRC gained access to Batkovici Camp on 26 July and the Srebrenica-Bratunac area on 27 July.[1031]

[1026] T47949; *Defence Final Brief*, paras. 3016-3149.
[1027] [REDACTED]. [P6696]
[1028] *Judgement*, para. 5812.
[1029] *Judgement*, para. 5813; T47949-50; *Defence Final Brief*, paras. 3121-26.
[1030] *Judgement*, para. 5812; *See also* para. 5788.
[1031] P2284, para. 409.

Conclusion

745. The Trial Chamber erred in finding that President Karadzic shared the common purpose of eliminating the Bosnian Muslims in Srebrenica, and in rejecting the reasonable inference that President Karadzic had no involvement in the execution of the men from Srebrenica. President Karadzic's convictions for murder, extermination, and genocide relating to Srebrenica are a miscarriage of justice and must be reversed.

41. The Trial Chamber erred when concluding that President Karadzic had the *mens rea* for genocide

In Brief

Finding: ***President Karadzic had the intent to destroy the Bosnian Muslims of Srebrenica.***

Error: ***Trial Chamber erred in inferring genocidal intent when other reasonable inferences were available on the evidence.***

Impact: ***Error requires reversal of genocide conviction under Count 2.***

746. Should the Appeals Chamber uphold the finding that President Karadzic agreed with the killing aspect of the plan, it is a huge leap to find that he had the *mens rea* for genocide—the specific intent to destroy the Bosnian Muslim group as such. The Trial Chamber readily made that leap with the flimsiest of ropes.

747. The Appeals Chamber has stated:

> Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.[1032]

748. President Karadzic's genocidal intent was never unequivocally established.

749. The Trial Chamber found that the only reasonable inference available on the evidence was that President Karadzic shared with Mladic, Beara, and Popovic the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed.[1033] It based that finding on its mistaken evaluation of the evidence and in drawing inferences that were not the only reasonable ones.

[1032] *Krstic AJ*, para. 134.
[1033] *Judgement*, para. 5830.

750. First, the Trial Chamber erroneously discounted President Karadzic's order that the local Bosnian Muslims who worked with the UN be allowed to depart with the UN personnel.[1034] This was evidence that President Karadzic did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed.

751. The Trial Chamber found that:

> [T]he reason proffered by the Bosnian Serb Forces for separating and taking custody of the other Bosnian Muslim males in Potocari—namely that they were to be screened for involvement in war crimes—would not have applied to such staff, and the Chamber finds that this action by the Accused does not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.[1035]

752. This is nonsense. This "staff" consisted of maintenance personnel.[1036] The Trial Chamber provided no reasoning why local men assisting the UN may not have participated in war crimes in 1992-93, before they started working with the UN. There is no reason why the local staff could not have been detained for screening when the other UN personnel departed. By issuing his order, President Karadzic demonstrated that he did not intend that every able-bodied Bosnian Muslim from Srebrenica be killed. The Trial Chamber erred in failing to consider this as even a reasonable inference.

753. Second, the Trial Chamber erroneously evaluated the evidence relating to opening a corridor on 16 July near Zvornik so that Bosnian Muslims from the column that left Srebrenica could pass freely to Bosnian Muslim territory.

754. The Trial Chamber stated that "once Pandurevic reported on 16 July that he had opened a corridor to allow members of the column who had not yet been captured or surrendered to pass through, Karisik was promptly sent to investigate and the corridor was closed within a day."[1037] Since Milenko Karisik was in contact with President Karadzic about the corridor,[1038] the Trial Chamber inferred that President Karadzic wanted the corridor closed. Not so.

755. As testified to by Prosecution Witness [REDACTED], and Prosecution Expert Witness Richard Butler, the original agreement concerning the corridor was that it would

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[1034] P4390.
[1035] *Judgement*, fn. 19811.
[1036] T24684.
[1037] *Judgement*, para. 5830.
[1038] D4885.

be open for 24 hours. The VRS even extended it another two hours, after Karisik visited the forward command post.[1039] The inference that Karisik's visit had anything to do with closing the corridor is without an evidentiary basis. This proposition was never put to Karisik when he testified.

Milenko Karisik

756. In *Nyiramasuhuko*, the Appeals Chamber held that no reasonable Trial Chamber could infer from the fact that an accused had threatened a family who was killed shortly thereafter, and drove their car after their death, that he had encouraged the perpetrators to kill that family.[1040] A Trial Chamber is required to elaborate how the combination of factors relied upon necessarily leads to the conclusion of an accused's guilt.[1041] Mere coincidence is an insufficient basis to infer guilt as the only reasonable conclusion. In this case, the Trial Chamber relied upon just that. Any coincidence between Karisik's visit and closing the corridor was insufficient for the Trial Chamber to draw the inference that either President Karadzic or Karisik ordered the corridor closed or favoured its closing.

757. In *Nahimana*, the Appeals Chamber held that no reasonable Trial Chamber could have concluded from the fact that two accused collaborated together against Tutsis that they had agreed to commit genocide.[1042] Likewise, no reasonable Trial Chamber could

[1039][REDACTED]; T27878, *Judgement*, para. 5472.
[1040] *Nyiramasuhuko AJ*, para. 1510.
[1041] *Id.*
[1042] *Nahimana AJ*, para. 910.

have concluded that because Karisik went to the area of the corridor meant that he and President Karadzic had agreed to have it closed.

758. The Trial Chamber also considered that on 6 August 1995, at a Bosnian Serb Assembly session, President Karadzic expressed regret that the Bosnian Muslim males had managed to pass through Bosnian Serb lines.[1043] Again, the Trial Chamber blended oil and water.

759. The Trial Chamber cited to paragraph 5791 of the *Judgement* in support of its interpretation of President Karadzic's 6 August 1995 remarks. That paragraph quotes President Karadzic as saying:

> As you know, we achieved success in Srebrenica and Zepa, no fault can be found with the success, no objections to it, of course, a lot of stupid things were done afterwards, because many [Bosnian] Muslim soldiers were roaming the woods and that is when we sustained losses; in the action itself we did not sustain losses […] *in the end several thousand fighters did manage to get through […] we were not able to encircle the enemy and destroy them*.

760. The footnote references the Assembly session transcripts, pp. 14,17.[1044] But this is the Trial Chamber's amalgamation of two parts of President Karadzic's remarks that take them out of context.

761. The Assembly session was convened to consider President Karadzic's order removing General Mladic as VRS Chief of Staff. President Karadzic criticized the Army at length during that session on many topics. On page 14, he referred to many stupid things that were done after the fall of Srebrenica. The italicized portion of the Trial Chamber's quotation, however, appears on page 17. At that time, President Karadzic gets more specific. He says that:

> In the end several thousand fighters did manage to get through nevertheless, now the Srebrenica division was established, they were lined up at Tuzla and ordered to go back to Srebrenica. We were not able to encircle the enemy and destroy them, because we rushed into Zepa and because we had to send two Generals to Zepa to waste time for 15 days to negotiate with ruffians and thugs who fool around and waste their time.[1045]

[1043] *Judgement*, para. 5830.
[1044] *Judgement*, fn. 19681.
[1045] P1412, p. 17.

762. The Trial Chamber left out the part about Zepa, which distorts the meaning of President Karadzic's remarks. When reviewing speeches and statements, witness evidence and documentation, in search of evidence of genocidal intent, utterances must be understood in their proper context.[1046] Taken in context, President Karadzic is not complaining about opening the corridor at all, he is complaining that the VRS diverted resources to Zepa and were unable to militarily defeat the column. This is no evidence that he shared the intent that every able-bodied Muslim male from Srebrenica should be killed.

763. Even if President Karadzic had opposed opening the corridor, {REDACTED],[1047] that would have been a military decision and not evidence of the intent to destroy the Bosnian Muslims, as such. General Miletic was never even charged with genocide and General Krstic was found not to have genocidal intent.[1048] The Trial Chamber erred in drawing an inference of genocidal intent when it came to President Karadzic.

764. The jurisprudence of the ICTY and ICTR Appeals Chambers demonstrates the care that must be taken before inferring genocidal intent. In *Mugenzi*, the Trial Chamber failed to eliminate the reasonable possibility that the accused agreed to remove a prefect for political or administrative reasons rather than to further the killing of Tutsis. The genocide convictions were reversed.[1049] Likewise, our Trial Chamber failed to eliminate the possibility that President Karadzic had not been opposed to opening the corridor to allow Bosnian Muslim civilians from Srebrenica to reach Muslim territory. Its reliance on those facts to infer genocidal intent was an error.

765. In *Tolimir*, the Appeals Chamber found that no reasonable Trial Chamber could conclude that killing three leaders from Zepa after the population had been evacuated was indicative of genocidal intent, where no connection between those killings and the survival of the group was shown.[1050] Likewise, finding genocidal intent from President Karadzic's after-the-fact criticism of the VRS was not the only reasonable inference that could be drawn where no connection between the killing of fighters in combat and the crime of genocide was or could be shown.

[1046] *Krajisnik TJ*, para. 1092.
[1047] [REDACTED]
[1048] *Krstic AJ*, para. 134.
[1049] *Mugenzi AJ*, para. 91.
[1050] *Tolimir AJ*, para. 269.

766. In *Vasiljevic*, the Appeals Chamber held that when a Chamber is confronted with the task of determining whether it can infer from the acts of an accused that he or she shared the intent to commit a crime, special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences. The Appeals Chamber found that no reasonable Trial Chamber could conclude that the accused had the intent to kill seven prisoners where his acts were ambiguous and the plan to kill the prisoners emerged at the last minute.[1051] Likewise, President Karadzic's intent to destroy the Bosnian Muslims of Srebrenica cannot be reasonably inferred from ambiguous acts.

767. Moreover, even had sufficient evidence demonstrated that President Karadzic knew about the events at Srebrenica, this knowledge allowed for many reasonable inferences other than his intent to eliminate all the able-bodied men and boys. The leap between knowledge and genocidal intent is a significant one. On this point, *Krstic* is instructive. The Appeals Chamber repeatedly held that knowledge that prisoners were being executed "cannot establish that Radislav Krstic shared the intent to commit genocide."[1052]

768. Despite General Krstic's failing to take any steps to prevent the killing, and even using Drina Corps personnel and resources in killing and burying the prisoners, the Appeals Chamber refused to equate knowledge and inaction with genocidal intent. By contrast, the Trial Chamber in this case found that "despite his contemporaneous knowledge of its progress as set out above, the Accused agreed with and therefore did not intervene to halt or hinder the killing aspect of the plan to eliminate between the evening of 13 July and 17 July,"[1053] and relied on these alleged omissions to infer genocidal intent. This was insufficient.

769. Other cases demonstrate that knowledge of killings does not equate to a genocidal intent, in the absence of this intent being the only reasonable inference available on the evidence. When considering whether Drago Nikolic shared the intent to commit genocide, the Trial Chamber in *Popovic* held that despite his knowledge of and participation in the killing operation "another reasonable inference is that Nikolic's blind dedication to the Security Service led him to doggedly pursue the efficient execution of

[1051] *Vasiljevic AJ*, para. 131.
[1052] *Krstic AJ*, paras. 104, 111, 121, 129.
[1053] *Judgement*, para. 5830.

his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors. In these circumstances the stringent test for specific intent is not met."[1054] The Appeals Chamber affirmed, finding that knowledge of the scale of the atrocities did not equate to genocidal intent.[1055]

770. When considering whether Ljubomir Borovcanin shared the intent to commit genocide, the Trial Chamber held that, despite his presence at the scene of the executions at the Kravica Warehouse, there was no evidence that he was aware of the genocidal intent of others.[1056] General Pandurevic, who was found to have been aware of the executions of thousands of prisoners in his area of responsibility, but was not shown to have shared the intent to destroy.[1057]

771. The Trial Chamber's jump from knowledge to intent in our case was questioned by Professor Kai Ambos of Gottingen University, who doubted that the Trial Chamber's inference that President Karadzic shared the intent to destroy the Bosnian Muslims was the only reasonable one. Professor Ambos noted that the evidence relied upon by the Trial Chamber concerning President Karadzic's knowledge of the events at Srebrenica allowed for many reasonable inferences.[1058]

772. The Trial Chamber's conclusion that President Karadzic knew that the prisoners were being executed, even if sustained, cannot support the Trial Chamber's further leap that he shared the intent to commit genocide. The Trial Chamber erred in finding that President Karadzic shared the intent to destroy the Bosnian Muslims of Srebrenica. His conviction for genocide must be reversed.

A finding of "aiding and abetting" is not available on either the evidence or the Trial Chamber's findings

773. The Trial Chamber never found President Karadzic's contribution to the JCE to be substantial. Its finding that his contribution was "significant" falls short of the level of contribution required of an aider and abettor.[1059]

[1054] *Popovic TJ*, para.1414.
[1055] *Popovic AJ*, para. 503.
[1056] *Popovic TJ*, paras.1588-89.
[1057] *Id*, para. 2087.
[1058] http://www.ejiltalk.org/karadzics-genocidal-intent-as-the-only-reasonable-inference/.
[1059] *Tadic AJ*, para. 229. *See also Krajisnik AJ*, para. 215.

774. The acts that the Trial Chamber found to be a "significant" contribution to the JCE, do not amount to a substantial contribution.

775. President Karadzic's "order" that the prisoners be taken to Zvornik,[1060] was made after arrangements had already been made to do so by the VRS.[1061]

776. President Karadzic's 14 July declaration of a state of war was limited to Srebrenica and Skelani municipalities—no persons were killed in those municipalities thereafter. Therefore the order could not have "facilitated the smooth execution of the killing aspect of the plan to eliminate".[1062] Significantly, President Karadzic did not declare a state of war in Zvornik municipality where the killings from 14-16 July took place.

777. President Karadzic's alleged "oversight" and failure to intervene do not rise to the level of a "substantial" contribution, which requires that the failure to act must have had a substantial effect on the commission of the crime.[1063] Even under the Trial Chamber's theory, the execution of prisoners was already conceived by the VRS on the morning of 12 July and was well underway before President Karadzic's first involvement on the evening of 13 July.[1064]

778. President Karadzic's acts can be usefully contrasted with that of General Krstic. Significantly, General Krstic's substantial contribution to the genocide was by allowing Drina Corps resources to be used.[1065] President Karadzic made no resources available for the killings. Moreover, Krstic had knowledge of not only the killings, but the genocidal intent of his colleagues on the VRS Main Staff. Even if President Karadzic were found to have been aware of the killings, no evidence exists that he was aware of the genocidal intent of Mladic, Beara, or Popovic, with whom he had no contact. His alleged telephonic contact with General Mladic on 13 July, even if true, did not include any discussion of killings.[1066]

779. The substantial effect requirement is of particular importance without any element of specific direction for aiding and abetting, as it "ensures there is a sufficient

[1060] *Judgement*, para. 5818.
[1061] *Judgement*, para. 5309.
[1062] *Judgement*, para. 5819.
[1063] *Sainovic AJ*, para. 1677.
[1064] *Judgement*, paras. 5066, 5205, 5286, 5291.
[1065] *Krstic AJ*, para. 137.
[1066] *Judgement*, para. 5770.

causal link – a criminal link – between the accused and the commission of the crime before an accused's conduct may be adjudged criminal".[1067]

780. For example, despite President Milutinovic's morale-boosting speeches to officials in Kosovo, and his position on the Supreme Defence Council, where he approved decisions concerning military and police operations in Kosovo that led to widespread crimes, the Trial Chamber found that in the context of a large case with a multiplicity of players, these acts could not be said to have had a substantial effect on the commission of the crimes.[1068] The same can be said of President Karadzic's "oversight", or the alleged Zvornik "order", or the declaration of war in an unrelated area. None are sufficient to rise to the level of a "substantial effect" on the commission of crimes nor, crucially, did the Trial Chamber find that they were.

781. Therefore, President Karadzic cannot be convicted of aiding and abetting genocide.

[1067] *Taylor AJ*, para. 390; *Peterson Article*, pp. 568-72.
[1068] *Milutinovic TJ*, vol. 3, para. 281.

42-43. The Trial Chamber erred in finding President Karadzic responsible as a superior for 13 July killings

In Brief

Finding:	***President Karadzic is responsible as a superior for killings occurring on 13 July before his conversation with Deronjic***
Error:	***Trial Chamber erred in rejecting the reasonable inference that President Karadzic had not received sufficiently alarming information about those killings.***
Impact:	***Conviction under Counts 4-6 for killings on 13 July must be reversed.***

Mens Rea

782. The Trial Chamber found that President Karadzic could not be held responsible via participation in the JCE for the killings that occurred before his conversation with Deronjic on 13 July at 2010 hours.[1069] It went on to find that he failed to punish persons responsible for those killings.[1070]

783. Those killings were enumerated as:

(i) 10 Bosnian Muslim men killed in Potocari on 13 July 1995

(ii) 15 Bosnian Muslim men killed on the bank of the Jadar River

(iii) 10-15 Bosnian Muslim men killed at Sandici Meadow

(iv) 755-1,016 Bosnian Muslim men killed at Kravica Warehouse

(v) 50 Bosnian Muslim men in Bratunac town[1071]

784. To hold a superior responsible for the crimes of his subordinates, it must be established beyond reasonable doubt that: (i) there existed a superior-subordinate

[1069] *Judgement*, para. 5833.
[1070] *Judgement*, para. 5848. It did not find him responsible for failing to prevent those crimes. *Judgement*, fn. 19816. It also did not enter a separate conviction for genocide under Article 7(3). *Judgement*, para. 5850.
[1071] *Judgement*, para. 5837.

relationship between the superior and the perpetrator of the crime; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator.[1072]

785. The second element, *mens rea*, is at issue here. The Trial Chamber erred when it found that President Karadzic knew of killings that occurred on 13 July.

786. The Trial Chamber found that Miroslav Deronjic informed President Karadzic of the killings at Kravica during their meeting on 14 July. It had no evidence from either of the participants to that meeting.[1073] The Trial Chamber made no findings of what Deronjic told President Karadzic about those killings. Since the killings at Kravica were understood by Bratunac officials to have occurred after an escape attempt in which one guard was killed and another injured,[1074] even if the Trial Chamber could reasonably infer that Deronjic informed President Karadzic of the event,[1075] it was not established that he informed him of the scale of the event, its criminal nature, or that the incident would not be investigated in due course by the authorities.

787. When the superior is the President, special caution is warranted when applying the concept of superior responsibility. In the *High Command* case at Nuremburg, the Court held that:

> Modern war such as the last war, entails a large measure of de-centralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He [the President] has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must [be] a personal dereliction…It must be a personal neglect amounting to a wanton, immoral disregard of the actions of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilised nations.[1076]

[1072] *Kordic AJ*, para. 827.
[1073] *Judgement*, para. 5843.
[1074] T24413; T24506; D3398, para. 79; D3126, para. 59; D3115, para. 40.
[1075] An inference disputed in Ground 40.
[1076] *High Command Case*, p. 76.

788. The *High Command Case* also emphasised that no "presumption" of knowledge exists and that a finder of fact must "necessarily go to the evidence".[1077]

789. The Trial Chamber erred in failing to provide a reasoned opinion on the nature of the information conveyed to President Karadzic by Deronjic. It also erred in failing to provide a reasoned opinion on its failure to adopt the reasonable inference that Deronjic did not describe the incident in such a way to trigger President Karadzic's obligation to punish the perpetrators.[1078]

790. Even if President Karadzic was informed of the killings at Kravica, that was not the end of the inquiry. The Trial Chamber was also required to find that the only inference available on this evidence was that President Karadzic was provided with sufficiently alarming information to trigger his duty to punish the perpetrators.[1079] No findings were made and indeed this was not the only reasonable inference to be drawn from the fact of the Deronjic-Karadzic meeting.

791. That neither President Karadzic nor Deronjic mentioned the Kravica incident at the meeting of Srebrenica leaders that followed,[1080] and that President Karadzic never mentioned the incident to his staff,[1081] supports the inference that whatever information Deronjic gave to President Karadzic about the incident was not sufficiently alarming.

792. The Trial Chamber also found that Tomislav Kovac also shared his knowledge of the Kravica incident with President Karadzic when they met on 14 July.[1082] It made this finding despite Kovac denying that he had informed President Karadzic of the incident.[1083]

[1077] *Id*, p. 79.
[1078] *Defence Final Brief*, para. 3035. See also *Martinez Article*, pp. 640-41.
[1079] *Hadzihasanovic AJ*, para. 28.
[1080] D3561, para. 8; T43352.
[1081] D3682, para.17; T42483; D3695, para. 237; D3977, para. 21.
[1082] *Judgement*, para. 5781.
[1083] D3960, para. 129; T42856.

Tomislav Kovac

793. In any event, the only information Kovac had about the Kravica incident at the time he met with President Karadzic was that a policeman had been killed and another injured when Muslim prisoners overpowered the policemen who were guarding them, and a number of Muslim prisoners had been killed in the incident. He was not informed about the extent of the killings of Muslim prisoners.[1084]

794. Even if the Trial Chamber was entitled to infer that Kovac had reported this to President Karadzic, it is not necessarily the only inference that the information would be sufficiently alarming to warrant the President to request his subordinates to investigate with an eye towards punishing the perp§etrators of those killings.

795. Aside from the killings at Kravica, the Trial Chamber made no findings that President Karadzic, or even Miroslav Deronjic, knew about any of them.[1085] In fact, the Trial Chamber heard unchallenged evidence that Deronjic did not know of any other killings.[1086] Therefore, President Karadzic cannot be responsible for failing to punish the perpetrators.

796. The Trial Chamber's one paragraph reasoning on President Karadzic's knowledge of the 13 July killings[1087] does not satisfy the requirement that the Trial

[1084] D3960, para. 122; T42791.
[1085] *Judgement*, para. 5843.
[1086] T24494.
[1087] *Judgement*, para. 5843.

Chamber find beyond a reasonable doubt that a superior knew or had reason to know of the crimes before he can be found to be responsible for failing to punish them.

797. While high positions or authority in an organisation may indicate that persons are being informed and approve what is occurring, this is not necessarily the case.[1088] An accused's position of authority cannot lead to an automatic presumption, beyond a reasonable doubt, that he or she knew or had reason to know of the crimes for which a conviction is sought.[1089]

798. Therefore, the Trial Chamber's convictions of President Karadzic for failing to punish murder, extermination, and persecution based upon the 13 July crimes must be reversed.

Genocide

799. If the Appeals Chamber reverses President Karadzic's JCE genocide conviction, it is not open to it to enter a conviction for a failure to punish.

800. The Trial Chamber did not convict President Karadzic for failing to punish genocide. Therefore, it never found that President Karadzic knew that the 13 July crimes were committed with genocidal intent. Indeed, the spontaneous, reactionary nature of the only event that it found that he knew about, the Kravica incident, is inconsistent with the notion that the killings were perpetrated with the intent to destroy the Bosnian Muslims as such.

801. Knowledge of the commission of crime A (i.e. in this case, murder) does not suffice to find a superior guilty of crime B (in this case, genocide), where crime B has an additional element not contained in crime A (in this case, specific intent to destroy).[1090] For genocide, it must be proven that the superior was aware of the subordinates' intent to destroy.[1091]

802. Ljubomir Borovcanin's knowledge of the Kravica killings did not mean that he was aware that those killings were committed with genocidal intent.[1092] Similarly, although Blagojevic knew that some murders had occurred, absent knowledge of the mass

[1088] *Tolimir AJ*, para. 444.
[1089] *Delalic AJ*, para 313.
[1090] *Krnojelac AJ*, para. 155.
[1091] *Karemera AJ*, para. 307.
[1092] *Popovic TJ*, paras. 1588-89.

killings, no reasonable trier of fact could have found that he had knowledge of the perpetrators' genocidal intent.[1093]

803. In *Gotovina*, the Appeals Chamber considered the circumstances in which a conviction through an alternative mode of liability may be entered upon reversal of the conviction entered by a Trial Chamber. The Majority held that where the Trial Chamber's remaining factual findings would not support an alternative conviction, it would be inappropriate to "make additional inferences from the findings of the Trial Chamber and evidence on the record".[1094] In Separate Opinions, Judge Meron suggested that any additional inferences drawn from findings in the trial judgement should be "restricted" and the authority to enter convictions exercised "sparingly", while Judge Robinson suggested that no inferences should be drawn to support alternative modes of liability.

804. Therefore, if President Karadzic's JCE genocide conviction is reversed, the Trial Chamber's findings, as well as the underlying facts, are insufficient to establish President Karadzic's *mens rea* for a failure to punish.

[1093] *Blagojevic AJ*, para. 123.
[1094] *Gotovina AJ*, para. 156.

VI. HOSTAGE TAKING

44-45. The Trial Chamber erred in convicting President Karadzic of hostage taking

In Brief

Finding:	***President Karadzic made threats to kill or injure, or continue to detain UN personnel, sharing the common purpose and intent of the JCE***
Error:	***The hostages were lawfully detained, and unlawful detention is an element of hostage taking when it involves threats of continued detention.***
Impact:	***Conviction under Count 11 must be reversed.***

805. The Trial Chamber erred in finding that President Karadzic shared the common purpose and the intent to commit the crime of hostage taking.[1095] There was no evidence that he made any threats to kill or injure the prisoners or that he agreed to or contemplated that threats would be made by others. His statements implying that detention would continue did not violate the hostage taking statute because UN personnel were lawfully detained as prisoners of war. Therefore, he should have been acquitted of Count 11.

The Threats to Kill or Injure

806. President Karadzic ordered the VRS to ensure that the UN personnel were "treated properly with military respect."[1096]

807. No reasonable Trial Chamber would draw an inference that President Karadzic intended not only to detain the UN personnel but also to issue threats to injure or kill them while they were detained[1097] when, in fact, he had ordered the opposite. The Trial

[1095] *Judgement*, para. 5973.
[1096] P2137, para. 4; *Judgement*, para. 5956.
[1097] *Judgement*, para. 5969.

Chamber's failure to give sufficient weight to this directly relevant evidence, or provide a reasoned opinion as to why it did not undermine its finding, was an error.

808. In fact, the Trial Chamber heard no evidence of threats by President Karadzic to injure or kill the UN personnel. Instead, the Trial Chamber characterised some of President Karadzic's acts and statements, such as his order that UN personnel be placed at potential NATO targets, as "tantamount" to threats.[1098]

809. A "threat" necessarily involves communicating an intention to harm. The Oxford English Dictionary defines a "threat" as a "statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done". Legal dictionaries similarly define threat as requiring a communication of intent. For instance, Black's Law Dictionary defines a threat as "[a] communicated intent to inflict physical or other harm on any person or property".

810. Domestic criminal threat laws also generally require that a threat involve communicating an intention to endanger the recipient. California Penal Code section 422 provides that criminal threats can be communicated "verbally, in writing or via an electronically transmitted device". Similarly, Canadian Criminal Code section 264(1) provides that the offence of uttering threats can be committed by someone who "utters, conveys or causes any person to receive a threat". The criminal threat law in India also provides that there must be a "declaration of one's purpose or intention to work injury to the person, property or right of another with a view to restraining such person's freedom of action."[1099]

811. In failing to recognise that a threat requires communicating an intention to harm, the Trial Chamber erroneously equated President Karadzic's order to relocate UN personnel as a threat. Ordering that prisoners be held at strategic sites - even if violating provisions against human shields - did not constitute a "threat". The communication of intention to harm was missing. This error undermines the first step in the Trial Chamber's reasoning.

812. Next, the Trial Chamber assessed whether President Karadzic *intended* to issue threats against detained UN personnel. Again, without any evidence that President

[1098] *Id*.
[1099] Indian Evidence Act (1 of 1872), section 24.

Karadzic issued threats, the Trial Chamber found that given that his acts and statements were "tantamount" to threats against the UN personnel, the only reasonable inference was that he *intended* to issue them.[1100] This is not only impermissibly circular, it fails to discount the perfectly reasonable inference that President Karadzic did not threaten the detained UN personnel because he did not possess the intention to do so. The Trial Chamber's reliance on President Karadzic's statement on Bosnian Serb TV that "any attempt to liberate [the prisoners]… would be a slaughter"[1101] ignores a reasonable inference that this was not a threat to kill or injure the prisoners, but related to casualties that would be taken by forces that might be sent to liberate them.

813. Nor were the Trial Chamber's attempts to link President Karadzic to the threats made by others reasonably available on the evidence.[1102] The Trial Chamber held that President Karadzic must have known and approved the threats to kill or injure the prisoners made by General Mladic.[1103] It did not refer to any evidence that General Mladic acted on President Karadzic's instructions or reported the conversation to President Karadzic. In fact, there was no evidence that President Karadzic was even aware that the conversation between Generals Mladic and Smith occurred. It could also be reasonably inferred that General Mladic made the threats spontaneously. Likewise, there is no evidence that President Karadzic knew of any threats to the prisoners by other VRS members, let alone "approved" them. Indeed, it would have been contrary to his instruction that all VRS members must treat the UN personnel "properly with military respect."[1104]

The UN personnel were lawfully detained

814. Because the UN personnel were lawfully detained, a conviction for hostage taking could not be based upon threats of continued detention.

815. Peacekeeping operations only benefit from protection for so long as they take no active part in hostilities.[1105] The proposition that peacekeepers are not at all times *hors de*

[1100] *Judgement*, para. 5969.
[1101] *Judgement*, para. 5967.
[1102] *Judgement*, para. 5972.
[1103] *Judgement*, paras. 5970 and 5972
[1104] P2137, para. 4.
[1105] *ICRC Customary Law Treatise*, Commentary, Rule 33, p. 114.

combat has support in the jurisprudence of international criminal courts[1106] and academic commentary.[1107]

816. Article 2(2) of the Convention on the Safety of United Nations and Associated Personnel excludes from its scope "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies".[1108] An ICC Pre-Trial Chamber has also held that "personnel involved in peacekeeping missions enjoy protection from attacks unless and for such time as they take a direct part in hostilities or in combat-related activities."[1109]

817. Prosecution Witness General Rupert Smith testified that the air strikes against the Pale ammunition depot were not carried out in self-defence. By bombing the Bosnian Serbs, the UN and NATO forces were in conflict with them.[1110] Therefore, the 25-26 May air strikes constituted direct participation in hostilities.

General Rupert Smith

818. That individual UN personnel taken prisoner may not have been personally involved in the air strikes does not mean they did not become combatants. All active duty

[1106] *Abu Garda Decision*, para. 83; *See also Sesay TJ*, para. 1937 affirmed in *Sesay AJ*, para. 531.
[1107] *Greenwood Article*, pp.188-89; *Whittle Article*, paras. 865-66.
[1108] See also *Secretary-General's Bulletin*, Article 1.1.
[1109] *Abu Garda Decision*, para. 83.
[1110] T11873-74.

personnel of a military force in an armed conflict are considered to be persons taking a direct part in hostilities.[1111]

819. Indeed, Professor Greenwood, referring to the specific facts of this case, said:

> …Even if it could be argued that only the NATO air strikes and not the ground operations by UNPROFOR itself reached the level of an armed conflict, that would not be sufficient to prevent Article 2(2) from removing the protection of the Safety Convention from UNPROFOR personnel, since Article 2(2) applies to the entirety of a United Nations operation if *any* of the personnel involved operate as combatants against organized armed forces in circumstances to which the law of international armed conflict applies.[1112]

820. Therefore, the UN personnel were lawfully detained. This undermines President Karadzic's conviction for hostage taking, given that a threat of continued detention requires that the detention itself be unlawful.

821. As summarised by Clapham, Gaeta and Sassoli in their recent commentary on the Geneva Conventions:

> If…the requirement of an unlawful deprivation of liberty is forgone, a threat of continued lawful detention or internment would suffice to trigger hostage taking where any concessions are sought from a third party. For example a threat of continued lawful internment is an inevitable consequence of the negotiations in pursuance of a prisoner exchange agreement. The absurd result is that the prohibition on hostage taking would render unlawful an act otherwise 'encouraged' by humanitarian law: prisoner exchanges are an activity foreseen by, and permissible under, Article 109 GC III…Thus it is tenable neither to retain the requirement of an unlawful deprivation of liberty, nor to remove it completely from the definition of hostage taking. To resolve this conundrum, the definition proposed herein abandons the requirement of an unlawful deprivation of liberty as a prerequisite to hostage taking, but recognises that a threat of unlawful detention – levied against an individual in pursuance of concessions from a third party – could amount to hostage taking. Consequently, where a threat is made against the individual's life or well-being, or to continue/commence an unlawful deprivation of liberty, hostage taking may occur regardless of the threshold of legality of captures, seizure or detention. By contrast however, hostage taking may not occur where a threat is made – or implied – to continue a lawful deprivation of an individual's liberty, even where the circumstances may otherwise resemble hostage taking.[1113]

[1111] *ICRC Customary Law Treatise*, Vol. II: Chapter 1, Rule 3, pp. 78-86.
[1112] *Greenwood Article*, pp. 201-02.
[1113] *Clapham Commentary*, pp. 310-11.

822. Where prisoners of war are taken, it is common practice for negotiations to take place between the parties for their release or exchange. As highlighted by the *Clapham Commentary*, these negotiations necessarily contain an implied "threat", that if the negotiation is not successful, the prisoners will remain detained. Unless the threat of continued detention only violates the hostage taking prohibition when the detention is unlawful, the implied "threat" of continued detention would make all prisoner exchange negotiations, such as those involving Bowe Bergdahl and the Taliban, or the US-Iran 2016 prisoner swap,[1114] illegal.

823. Similarly, the ICRC Commentary to Article 147 of Geneva Convention IV provides that "hostages might be considered as persons *illegally* deprived of their liberty, a crime which most penal codes take cognizance of and punish."[1115]

824. Unlawful detention is also a requirement of the crime in Bosnia:

> Whoever **unlawfully** confines, keeps confined or in some other manner deprives another person of freedom of movement, or restricts it in some way, or seizes or detains and threatens to kill, to injure or to continue to detain as a hostage, with an aim to compel a State or an international intergovernmental organization, to perform or to abstain from performing any act as an explicit or implicit condition for the release of a hostage, shall be punished by imprisonment for a term of between one and ten years.[1116]

825. The Pre-Trial Chamber in our case, following earlier ICTY decisions, correctly found that "unlawful detention is indeed an element of hostage taking".[1117] The Trial Chamber, however, did not.[1118] This was an error of law. Unlawful detention is a requisite element when the hostage taking involves a threat of continued detention. Given that the UN personnel were lawfully detained, threats to continue to detain them did not amount to hostage taking.

826. The Trial Chamber erred in finding that President Karadzic shared the common purpose and intent for the crime of hostage taking. His conviction on Count 11 should be reversed.

[1114] http://www.euronews.com/2016/01/22/two-iranian-americans-back-on-us-soil-following-prisoner-exchange/.
[1115] *See also Dormann Treatise*, p. 127.
[1116] *BiH Criminal Code*, Article 191(1).
[1117] *Preliminary Motions Decision*, para. 65, citing *Blaskic TJ*, paras. 158, 187 and *Kordic TJ*, paras. 314-15, 319.
[1118] *Judgement*, para. 468.

46. The Trial Chamber erred in finding that there is an absolute prohibition of reprisals against protected persons

In Brief

Finding:	***There is an absolute prohibition on reprisals against protected persons.***
Error:	***Reprisals against protected persons are not prohibited in NIAC.***
Impact:	***Since all elements of the defence of reprisals were established, conviction under Count 11 must be reversed.***

827. The Trial Chamber erred in finding that taking UN personnel hostage cannot be justified as a lawful reprisal for the unlawful use of force by the UN in ordering an air strike on a Bosnian Serb ammunition storage facility.[1119] No "absolute" prohibition of reprisals against protected persons exists in international law in the context of non-international armed conflict (NIAC).

Classification of the conflict as NIAC

828. The Trial Chamber held that taking UN personnel hostage was "closely related to the armed conflict",[1120] but failed to make a finding on the *nature* of the conflict.[1121] Given that, as discussed below, the legality of reprisals varies as between IAC and NIAC, this was an error.

829. A conflict may be "mixed", containing elements of both IAC and NIAC, and may shift over the course of the conflict.[1122] In establishing the ICTY, the Security Council "purposefully refrained" from classifying the armed conflicts as either

[1119] *Judgement*, para. 5950.
[1120] *Judgement*, para. 5939.
[1121] *See for example*, *D. Milosevic AJ*, para. 23, where the Appeals Chamber found that the Trial Chamber should have made a finding as to the nature of the armed conflict.
[1122] *Tadic Jurisdiction Appeals Decision*, paras. 72-77.

international or internal, and "did not intend to bind the International Tribunal by a classification of the conflicts as international".[1123] The Appeals Chamber in *Tadic*, *Brdjanin* and *Celebici* considered that the conflict in Bosnia was IAC because the VRS were acting under the "overall control" of the FRY.[1124] However, these cases were concerned with the situation prevailing in 1992.

830. By July 1995, the situation had shifted. By the second half of the war, rather than exercising "overall control" of the VRS, Serbia had imposed sanctions on them.[1125] Later cases such as *Perisic* recognised that the VRS was neither *de jure* nor *de facto* subordinated to the FRY, and "the VRS was independent from the VJ". [1126] The ICJ reached the same conclusion, finding that as of July 1995, the FRY lacked "effective control" over the VRS.[1127] The ICJ distinguished between the level of the FRY's participation in military operations in BiH "in the years prior", and the level of decreased involvement in 1995.[1128]

831. As noted in *Tadic*, to the extent that the conflict had been "limited to clashes between the Bosnian government forces and the Bosnian Serb rebel forces in Bosnia Herzegovina…they had been internal (unless the direct involvement of the Federal republic of Yugoslavia (Serbia-Montenegro could be proven)."[1129] By 1995, the FRY was not directly involved in the conflict at issue, nor did the Prosecution attempt to establish that it was. The hostage taking should have been found by the Trial Chamber to have occurred in the context of NIAC.

No "absolute" prohibition of reprisals against protected persons in NIAC

832. The Trial Chamber only cited ICRC Customary IHL, Rule 146 in support of its statement that "the prohibition of reprisals against protected persons is absolute".[1130] However, as noted in the "Summary" of Rule 146, that rule applies to IAC, not NIAC.

[1123] *Tadic Jurisdiction Appeals Decision*, para. 76.
[1124] *Tadic AJ*, paras. 145-47, 162; *Brdjanin AJ*, para 256; *Deklalic AJ*, para. 50.
[1125] *Defence Final Brief*, para. 2348.[REDACTED], D2658, para. 23.
[1126] *Perisic AJ*, para. 46. See also *Perisic TJ*, paras. 2-3, 205-10, 235-37, 262-66, 1772.
[1127] *Bosnia v Serbia*, paras. 386-94, 413.
[1128] *Id*, paras. 386, 394.
[1129] *Tadic Jurisdiction Appeals Decision*, para. 72.
[1130] *Judgement*, para. 5949, fn 20405.

Rule 146 is therefore inapplicable in the context of the instant case; it is "wrong to assume" that all rules of IHL apply "to both kinds of conflict without distinction".[1131]

833. No foundation for an "absolute" prohibition of reprisals against protected persons in NIAC exists in international law.

834. First, treaty law is "silent" whether the prohibition of reprisals against protected persons extends to NIAC.[1132] The delegates negotiating AP II were unable to reach consensus on the issue.[1133] While initial drafts contained provisions on reprisals, ultimately "strong disagreements" led to adopting a draft "omitting all controversial issues, including reprisals".[1134] This contrasts with IAC, where AP I specifically bans reprisals against civilians, and the Geneva Conventions prohibit reprisals against certain classes of persons.[1135]

835. A prohibition of reprisals against protected persons in NIAC cannot be implied based on similar prohibitions in IAC, as this prohibition was deliberately omitted from AP II. In particular, a prohibition of reprisals in NIAC cannot be inferred from the "fundamental guarantees" in Article 4 of AP II, nor from Common Articles 1 or 3 of the Geneva Conventions of 1949, as the drafters "almost certainly" did not intend a prohibition, given the "neglect of the issue in 1949 and the disagreement over it in 1974-7."[1136] Therefore, Bosnia and Herzegovina's ratification of Additional Protocol I and II (in addition to the four Geneva Conventions) in 1993 does not preclude a defence of reprisals in the context of an internal armed conflict.[1137]

836. Notably, neither the Statute of this Tribunal, nor the statutes of the ICTR, SCSL or ICC, characterise reprisals as an articulated violation of the laws of armed conflict.[1138]

837. Secondly, State practice lacks uniformity and cannot support the "absolute" prohibition proclaimed by the Trial Chamber. While the military manuals of several States

[1131] *Meron Article*, pp. 229-30.
[1132] *Kalshoven Article*, p. 75; *Mitchell Article*, pp. 163-64.
[1133] *Newton Article*, p. 378.
[1134] *Bilkova Article*, pp. 44-45.
[1135] AP I, Article 51; First Geneva Convention, art 46; Second Geneva Convention, Article 47; Third Geneva Convention, Article 13; Fourth Geneva Convention, Article 33.
[1136] *Bilkova Article*, p. 55.
[1137] See *Kupreskic TJ*, para. 534.
[1138] *Newton Article*, p. 379.

prohibit reprisals against protected persons in IAC by reference to treaty law,[1139] similar prohibitions in NIAC are not present. The United States' Military Manual states that there is a greater discretion in NIAC,[1140] noting that the absence of provisions under AP II, included under AP I, may reflect the view that these restrictions do not apply in NIAC.[1141]

838. Finally, the ICTY's jurisprudence on reprisals has never held that an "absolute" prohibition on reprisals against protected persons exists. In *Martic*, the Trial Chamber held that the limitation that reprisals must respect the "laws of humanity and dictates of public conscience" meant that reprisals must "be exercised, to the extent possible, in keeping with the principle of protection of the civilian population in armed conflict and the general prohibition of targeting civilians", without reference to the category *protected persons*.[1142] The Trial Chamber in *Kupreskic* similarly accepted that there were situations in which reprisals were "considered lawful", but were restricted by "elementary considerations of humanity".[1143]

839. If the conflict is internal, the parties are not bound by prohibitions found only in the rules governing an IAC. The rules of IHL do not apply to both kinds of conflicts without distinction. If they did, there would be no need for two separate protocols whose operation is contingent on characterisation of the conflict in question.

840. Thus, the Trial Chamber erred in declaring that there is an "absolute" prohibition of reprisals against protected persons.

Taking protected persons hostage is a legitimate act of reprisal

841. The Trial Chamber erred by failing to acknowledge that taking hostages is a legitimate reprisal provided the general limitations on reprisals are followed. In NIAC, as noted above, neither treaty nor customary law has prohibited reprisals against protected persons.

842. The existence of this general principle is supported by post-WWII jurisprudence. For example, in *Holstein*, the Court held that civilians may be lawfully taken as hostages, but "while entitled to take hostages in order to bring about a cessation

[1139] See *ICRC Reprisals Commentary*. *See for example*, *U.K. Military Manual*, viii, and paras. 9.24; *Netherlands Military Manual*, para. 0424.
[1140] *U.S. Military Manual*, p.1016.
[1141] *Id*, pp. 1019-20.
[1142] *Martic TJ*, paras. 466-67.
[1143] *Kupreskic TJ*, para. 535.

of violations of the laws of war by the other party, the retaliating party is expected to treat hostages in a humane manner, which in no case may lead to putting them to death".[1144] The Judge Advocate in *Kesselring* also accepted that taking hostages as a reprisal would be permissible in certain circumstances, focusing instead on whether *killing* "an innocent person properly taken" as a hostage was a legitimate reprisal.[1145]

843. Academic commentary has noted that while treaties "have significantly changed the scope of the persons and objects that may be the subject of reprisals", they "have not altered these principles relating to recourse to reprisals in general".[1146] Thus, absent a prohibition of taking protected persons hostage as a reprisal in NIAC, the general principle applies and taking these persons hostage is a legitimate reprisal.

844. There remain strong policy reasons for retaining the general principle that hostage taking is permissible as a reprisal. Reprisals provide a mechanism to enforce the rules of international law and censure violations.[1147] An "absolute" prohibition would significantly hinder the ability of parties to NIAC to take effective measures in response to illegal acts by belligerents.[1148] An "absolute" prohibition does not align with State practice or the deliberate omission of a prohibition from AP II, and would therefore risk undermining the credibility of the Tribunal's rulings.[1149]

845. The Appeals Chamber should find that the Trial Chamber erred when holding that there is an absolute prohibition on taking reprisals against protected persons. As all of the elements of the defence of reprisals have been met,[1150] the Appeals Chamber should reverse President Karadzic's conviction on Count 11.

[1144] *Holstein Case*, pp. 28-29.
[1145] *Kesselring Case*, pp. 9, 13.
[1146] *Mitchell Article*, p. 159.
[1147] *Kwakwa Article*, pp. 74-79.
[1148] *Newton Article*, p. 367.
[1149] *Id.*
[1150] *Defence Final Brief*, paras. 2743-47.

VII. SENTENCING

47-50. The Trial Chamber erred in declining to find mitigating circumstances when sentencing President Karadzic

In Brief

Finding:	***Mitigating circumstances not found for violation of rights, good conduct during the war, lack of preparation for war, and difficulties in command.***
Error:	***Each of the above constituted valid mitigating circumstances.***
Impact:	***40-year sentence should be reduced to reflect mitigating circumstances.***

846. The Trial Chamber erred when declining to find mitigating circumstances for (i) violation of President Karadzic's rights relating to (a) the Holbrooke Agreement and (b) disclosure; (ii) his good conduct during the war; and (iii) his lack of preparation for war and difficulties in exercising command.

Violations of Rights

847. A reduction of sentence may be granted as a remedy for violations of the accused's rights.[1151]

848. The Trial Chamber erred in failing to consider the violations of President Karadzic's rights stemming from the breach of the Holbrooke Agreement.[1152] While it considered that his resignation under the Agreement was a mitigating circumstance, it found that the reasons behind his decision to step down and withdraw from public life were not relevant.[1153] This was an error. President Karadzic relied upon the agreement he had with Richard Holbrooke that he would not be prosecuted at the Tribunal if he resigned

[1151] *Nahimana AJ*, para. 1088; *Kajelijeli AJ*, paras 255, 320; *Semanza TJ*, para 580.
[1152] *Defence Final Brief*, paras. 3404-05.
[1153] *Judgement*, para. 6057.

from office and withdrew from public life. [1154] He complied with this agreement, and had a reasonable expectation that it would be honored. In prosecuting him regardless, and breaching its terms, President Karadzic's rights were violated, warranting a remedy.

849. The Trial Chamber also found that the Prosecution's violation of its disclosure obligations was not a mitigating circumstance, as President Karadzic had not been prejudiced.[1155] A person is entitled to a remedy for a violation of rights regardless of the degree of prejudice.[1156] President Karadzic was prejudiced.[1157] His trial was delayed by 14 weeks due to adjournments caused by the late disclosure of exculpatory material.[1158] Delays as a result of the Prosecution's disclosure violations constitute prejudice *per se* where an accused is detained.[1159] Unreasonable delay is a recognised ground for reduction of sentence.[1160]

850. The Trial Chamber erred in refusing to reduce President Karadzic's sentence due to the Prosecution's breach of its disclosure obligations.

Good Conduct

851. The Trial Chamber held that President Karadzic's provision of assistance to victims and his prevention of the commission of crimes during the war,[1161] was not "mitigating in any way" in light of the gravity of the crimes and his central involvement in them.[1162]

852. Article 24 of the ICTY Statute provides that "the Trial Chambers should take into account such factors as the gravity of the offence **and** the individual circumstances of the convicted person."[1163] The ICTY Appeals Chamber has held that "a Trial Chamber is obliged to take account of mitigating circumstances in imposing sentence. However, the weight to be attached is a matter within its discretion."[1164]

[1154] *Holbrooke Agreement Appeals Decision*, para. 55.
[1155] *Judgement*, para. 6063.
[1156] *Semanza Appeals Decision*, para. 125; *Rwamakuba Appeals Decision*, para. 24.
[1157] See Ground 6.
[1158] *17th Motion Decision*, para. 7 (one week); *26th Motion Oral Decision* (one month); *4th Suspension Decision* (six weeks); *5th Suspension Decision* (two weeks); *47th Motion Decision*, para. 24 (one week).
[1159] *Nyiramasuhuko AJ*, para. 388.
[1160] *Gatete AJ*, para. 287.
[1161] Documented in the table attached as Annex P.
[1162] *Judgement*, para. 6064.
[1163] (emphasis added).
[1164] *Delalic AJ*, para. 777.

853. Good conduct during the war, including the provision of assistance to victims and efforts to prevent the commission of crimes, is a valid mitigating circumstance.[1165] The Trial Chamber erred in refusing to consider President Karadzic's good conduct as a mitigating circumstance regardless of the gravity of his offence and his involvement in those crimes.

Preparation and Command

854. The Trial Chamber also held that in light of President Karadzic's authority over the military and civilian organs, it did not consider his lack of training and preparation for war to be a mitigating circumstance. It never addressed President Karadzic's related contention that the difficulties he faced in exercising command[1166] should be a mitigating factor.[1167]

855. President Karadzic was a psychiatrist and poet, with no military training. That an accused was not trained or prepared for war,[1168] and the difficulties faced by an accused in exercising command,[1169] have been recognised as mitigating circumstances. In those cases, the commanders had authority over their subordinates, as they were convicted for failing to punish their subordinates' crimes. Nevertheless, the lack of training and preparation for war, and the difficult circumstances they faced, were found to be mitigating circumstances. The Trial Chamber was entitled to balance these circumstances against President Karadzic's exercise of authority during the war when determining the sentence. It erred in refusing to recognise them at all as mitigating circumstances.

Conclusion

856. As a result of the Trial Chamber's errors, the Appeals Chamber should vacate the 40-year sentence of imprisonment and, if it upholds any convictions, impose a new sentence, taking the mitigating circumstances into account.

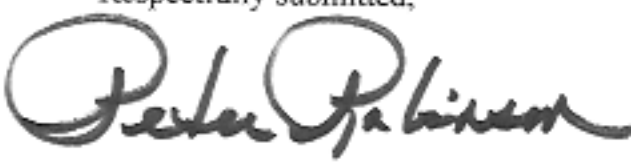
[1165] *Sikirica SJ*, paras 195, 229; *Popovic TJ*, paras.2194, 2220-22; *Krajisnik AJ*, paras.816-17, 1162-63; *Blagojevic TJ*, para.854; *Brdjanin TJ*, paras.1119, 1126; *Krstic AJ*, paras.272-73; *Obrenovic SJ*, para.134; *Kupreskic AJ*, para. 430.
[1166] Documented in the table attached as Annex Q. See also *Defence Final Brief*, para. 3417.
[1167] *Judgement*, para. 6064.
[1168] *Hadzihasanovic AJ*, paras.332-33; *Fofana AJ*, para. 498; *Fofana SJ*, para. 66.
[1169] *Delic TJ*, paras.588-89; *Hadzihasanovic TJ*, para. 2081; *Oric TJ*, paras.769-72; *Rugambarara SJ*, para. *47*.

VIII. CONCLUSION

857. The Trial Chamber's judgement should be **REVERSED**.

Word count: 67,880

Respectfully submitted,



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