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**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: **Olufemi Elias**

Date Filed: **19 April 2017**

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public Redacted Version

RADOVAN KARADZIC'S REPLY BRIEF

Office of the Prosecutor:
Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic
Peter Robinson
Kate Gibson

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I. INTRODUCTION

1. The Prosecution's *Response Brief* ("RB") is a formidable attempt to salvage a flawed trial and rehabilitate an unsound judgement. Its efforts to explain away the errors identified in President Karadzic's *Opening Brief* ("OB"), however, are unconvincing. This *Reply Brief* explains why.

II. THE TRIAL WAS UNFAIR

1. President Karadzic's testimony

2. The *Response Brief* follows a pattern. When it has a weak position on the law, the Prosecution re-frames the issue to avoid an assessment of the legal error. This misdirection is unhelpful. The Appeals Chamber proceeds first by determining if an error of law has been made. Absent an error of law, the ground of appeal is dismissed. If an error of law is demonstrated, the Appeals Chamber goes on to determine the effect of that error on the proceedings.[1]

3. The Prosecution has a weak position on the law on Ground 1. Its discussion of the law is just two paragraphs long. First, it asserts: "U.S. courts that directly considered the matter have held that unrepresented defendants have no right to testify in narrative form; judges retain discretion to require question-answer testimony."[2] However, in the cases cited, the judges required the self-represented accused to question himself. In no case did the court require a self-represented accused to be questioned by counsel.[3] When a self-represented defendant in the U.S. was led to believe that he could not testify without being questioned by counsel, it was reversible error.[4]

4. Second, the Prosecution claims that there is "no meaningful distinction between the two modes of testimony".[5] That is not what it said before the Trial Chamber:

> Permitting the Accused to testify by way of a largely uncontrolled narrative is virtually certain to fuel the Accused's well-established propensities to elicit irrelevant evidence, mischaracterize the trial record, and otherwise waste courtroom time…[Q]uestion-and-answer testimony will…facilitate the ability of the Prosecution and the Chamber to intervene to ensure the Accused's testimony remains focused on relevant issues and to correct any mischaracterizations of the trial record.[6]

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[1] *Ngirabatware AJ,* paras. 8-9.
[2] *RB*, para. 14.
[3] In President Karadzic's case, the Trial Chamber said: "Accordingly, the Chamber grants the Prosecution's request and instructs, number 1, the accused to testify in question-and answer form, and, number 2, his legal advisor to put questions to him during his own testimony." T45935-36.
[4] *United States v Ly.*
[5] *RB*, para. 15.
[6] *OTP Form of Testimony Submission*, para. 8.

5. The difference between narrative testimony and testimony in response to questions was significant enough for the Prosecution to file submissions on the issue, and for the Trial Chamber to restrict the mode of testimony. The Prosecution's claim, raised for the first time on appeal, that it makes no difference, rings hollow. The difference is that President Karadzic had the right to self-representation throughout his trial—a right that could only be restricted to the minimum extent necessary.[7]

6. The Prosecution urges the Appeals Chamber to require an accused to have informed the Trial Chamber why he decided not to testify. It cites no authority, or practice. In *Galic*, the Trial Chamber ordered the accused to testify before an expert witness. The accused did not testify. On appeal, the Appeals Chamber entertained the merits.[8] General Galic was not required to demonstrate that the order was the reason for his decision.

7. Likewise, in *New Jersey v Portash*, the U.S. Supreme Court reversed a trial court's ruling that an accused's immunized testimony could be used against him if he testified, without requiring that the accused identify on the record that this was his reason for not having testified.[9]

8. President Karadzic had the right to delay his decision whether to testify after receiving the Trial Chamber's ruling that he must be questioned by a lawyer, and even had the right to change his mind. The Prosecution's speculation as to the reason that President Karadzic decided not to testify is just that.[10]

9. In arguing that President Karadzic kept the Chamber "in the dark" on this issue, the Prosecution is essentially asserting that the Trial Chamber ordered a self-represented accused to testify by answering questions posed by counsel, without appreciating that this had any implications for his self-representation.[11] It ignores the fact that President Karadzic's Legal Advisor explicitly told the Trial Chamber in open court: "you have

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[7] *Milosevic Self-Representation Appeals Decision*, paras. 13-17.
[8] *Galic AJ*, paras. 17-23.
[9] *New Jersey v Portash*, 440 U.S. 450 (1979).
[10] President Karadzic's timing in announcing his decision, during oral arguments on whether he would be allowed to consult with the lawyer during his testimony, highly suggests a link between the mode of testimony and his decision not to testify. (T47541)
[11] *RB*, para. 13.

essentially imposed me as his counsel for the purpose of questioning him during his examination".[12] Given this statement, and the importance placed by the Tribunal on respecting the right to self-representation and to ensuring a self-represented accused's full exercise of the right to a fair trial, no serious argument can be made that this issue was lost on the Trial Chamber. The Trial Chamber's legal error in failing to balance the significance of restricting President Karadzic's fundamental right, against a valid justification for curtailing it, cannot be so easily be dismissed.

10. Nor was President Karadzic required to seek a second ruling on the form of his testimony,[13] or certification to appeal,[14] to preserve the issue for appellate review. Having led the Trial Chamber into error, the Prosecution should not blame President Karadzic when its ill-conceived motion is reviewed on appeal.

[12] T47536.
[13] *Blaskic AJ*, para. 224.
[14] The Appeals Chamber has upheld denial of certification to appeal in comparable circumstances regarding an accused's testimony; *Galic AJ,* para. 25.

2. Site Visit

11. The Prosecution's suggestion that the Chamber neither gathered evidence nor entertained submissions during the site visits[15] is a fiction.

12. The Prosecution made submissions at numerous locations, and gave evidence that lines of sight were no longer present due to changes since the events, and that other changes had been made since the war.[16] Third parties encountered during the site visit gave evidence.[17] Even if the Chamber had not intended to receive evidence or submissions,[18] this changed once the site visits commenced.

13. This was not an example of judges being subjected to information to which they are regularly exposed.[19] The site visit was part of the trial, with the Trial Chamber acting *locus in quo*.[20] Extending that logic, information obtained while an accused is absent from court could freely be used by the Trial Chamber. The Appeals Chamber has specifically ruled to the contrary.[21]

14. [REDACTED],[22] [REDACTED][23] [REDACTED]

15. The Prosecution's effort to distinguish *Snyder v Massachusetts* fares no better. It claims that the U.S. Supreme Court held that a "view is not a trial nor any part of a trial".[24] But that decision turned on the fact that the jury was simply shown the scene.[25] When the trial judge observed, *in situ,* that one of three gasoline pumps was not present at the time of the incident, the Supreme Court found that to be a "blunder".[26] When considering the Prosecution's statements in this case, the site visits to Sarajevo and Srebrenica were rife with "blunders".

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[15] *RB,* para. 19.
[16] *OB,* fn. 36.
[17] *OB,* paras. 20-21.
[18] "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." *ICTY Manual of Developed Practices,* p. 120, para. 50.
[19] *RB,* para. 19.
[20] [REDACTED]
[21] *Karemera Presence Appeals Decision*, para. 15.
[22] [REDACTED]
[23] [REDACTED]
[24] *RB*, para. 21.
[25] *Snyder v Massachusetts*, p. 109.
[26] *Id,* p. 118.

16. Both the Trial Chamber and the Prosecution seek to justify the infringement on President Karadzic's right to be present due to "security concerns".[27] The entirety of the information provided to the Trial Chamber was the following:

> allowing the Accused to be present during a site visit on the territory of BiH would jeopardise the security and safety of all persons involved, including the Accused.[28]

No details were provided as to specific risks, how they could be eliminated or reduced, or whether some areas posed less risk than others. Significantly, none were solicited. A reasonable Trial Chamber would never have found these vague submissions sufficient to tip the balance in favour of the site visits, to the detriment of the accused's right to be present.

17. The Prosecution also fails to address the alternative—that if security concerns prohibited President Karadzic's presence at the site visits, they should not be held at all.[29] It could not be seriously suggested that if a security situation prevented a self-represented accused from being brought to court one day, the trial should proceed in his absence.

18. The fact that "no ICTY accused has ever attended a site visit" is irrelevant.[30] The Prosecution can point to no case in which a Trial Chamber was seized with a request by a self-represented accused to be present,[31] and then held a site visit in his absence. [REDACTED].[32]

19. This error impacted the judgement.[33] The site visits were designed to "get a tri-dimensional and first-hand impression"[34] and "assist its determination of the charges in the Indictment."[35] They encompassed Sarajevo and Srebrenica, the principal locations for which the Trial Chamber found President Karadzic criminally responsible. They were

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[27] *RB*, para. 25.
[28] *Registry Site Visit Submission*, para. 3.
[29] [REDACTED]
[30] *RB*, para. 20.
[31] *Site Visit Submission*, para. 2; *Second Site Visit Submission*, para. 2; *Srebrenica Site Visit Submission*, para. 5.
[32] [REDACTED]
[33] *RB*, para. 27.
[34] *Site Visit Decision*, para. 12. Because a Trial Chamber is not expected or required to set forth its "impressions" in its *Judgement*, it is necessarily difficult to quantify the site visits' impact.
[35] *Judgement*, para. 6175.

justified, in part, because they would assist the Trial Chamber in its "fact-finding".[36] The site visits were deemed important enough to consume two weeks trial time and to spend tens of thousands of Euros in travel expenses and salary.

20. The suggestion that the Judges would have "dutifully disregard[ed]" any information improperly received, yet presumably retained the "first-hand impressions" they properly obtained[37] is unrealistic. The Prosecution's submissions and evidence were designed to influence the very "first-hand impression" the Trial Chamber was seeking. The two cannot now reasonably be divorced.

[36] *Site Visit Order*, para. 5.
[37] *RB*, para. 19.

3-5. Defects in the Indictment

21. The Prosecution is correct that the 26 incidents for which President Karadzic was convicted of **extermination** are listed among the 62 killing incidents in the indictment schedules.[38] The Prosecution never explains how President Karadzic was expected to know which of the 62 incidents were charged as extermination.

22. The defences presented at trial do not "apply equally to murder and extermination".[39] Extermination is not synonymous with murder. Most significantly, an additional element of "killing on a large scale" is required.[40] The Appeals Chamber should find that the failure to specify which acts constituted extermination was a defect in the indictment.

23. The Prosecution does not contend that this defect was cured. Rather it claims that President Karadzic was not prejudiced.[41] For example, President Karadzic's arguments on the status of those killed in Bijeljina were general, and pertained to all the victims.[42] Had he known that the Bijeljina killings were charged as extermination, he would have been in a position to make more specific arguments as to the respective civilian status and combatant status of the 48 victims that militated against a finding of extermination. There was a factual basis for such an argument.[43] Therefore, President Karadzic has shown that his defence to the extermination charge was materially impaired.

24. The Prosecution does not dispute that the indictment failed to specify which displacements constituted **deportation** and which constituted forcible transfer.[44] The Appeals Chamber should find that the indictment was defective.

25. The Prosecution now claims to have cured the defect in its Pre-Trial Brief.[45] Notably, the Prosecution's written response to the defective indictment motion at trial never cited the pre-trial submissions it now relies upon as providing adequate notice.[46]

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[38] *RB*, para. 31.
[39] *RB*, para. 32.
[40] *Lukic AJ*, para. 536.
[41] *RB*, para. 32.
[42] *Defence Final Brief*, para. 1388.
[43] *Wilcoxson Article*.
[44] *RB*, para. 33.
[45] *Id.*
[46] *OTP Defects Response*, paras. 11-12; *c.f. RB*, fn. 102.

Those pre-trial submissions did not provide clear and consistent information as to which incidents were alleged as deportation.[47] Even now, reading those references in the *Response Brief* leaves President Karadzic puzzled as to how he was supposed to know from that information which incidents were charged as deportation.[48] The Prosecution's claim that the defect was cured is also contradicted by the Trial Chamber's confusion, expressed during closing arguments, as to what was charged as deportation, and the Prosecution's obtuse explanation.[49]

26. President Karadzic guessed in his *Final Trial Brief* that deportation was being alleged in relation to two incidents in Kozluk and Bosanski Novi.[50] His guesswork was wrong by four.[51] His defence was materially impaired because he never had the opportunity to argue or demonstrate that the element of crossing state borders was not satisfied as to those incidents.

27. Although the Prosecution points to language in **Count 11** that alleges that threats were made,[52] it failed to specify any act or conduct that constituted those threats. No notice of the dates, locations, form of threats, or who was responsible for making them was provided. The Prosecution attempts to distinguish the jurisprudence cited by President Karadzic,[53] but offers no jurisprudence of its own that has upheld an indictment that fails to specify the operative statements or threats which constitute an element of the crime. The Appeals Chamber should find that the indictment was defective.

28. The Prosecution's pre-trial submissions did not provide clear and consistent information to cure the defect. Its Pre-Trial Brief pointed to the very threats it now says President Karadzic should have known were not the operative threats.[54] Nowhere is it indicated that placing UN personnel at strategic locations constituted a threat—a position

[47] *Djordjevic AJ*, para. 576.
[48] *RB*, fn. 102.
[49] T48071-72.
[50] *Defence Final Brief*, paras. 2803-08.
[51] *Judgement*, para. 2466.
[52] *RB*, para. 35.
[53] *Id.*
[54] Compare *RB*, para. 36 with *OTP Pre-Trial Brief*, para. 245.

it now takes to sustain the conviction on Count 11.[55] The Appeals Chamber should find that the Prosecution failed to cure the defect in the indictment.

29. President Karadzic's defence was materially impaired because, during the Prosecution case, he laboured under the misapprehension that the operative threats were his pre-detention statements.[56] He had no notice, for example, that placement of UN personnel at strategic locations was a "threat". With such notice he could have elicited evidence from General Milovanovic that when President Karadzic approved the decision to distribute UN personnel to various locations within Republika Srpska,[57] he was not informed that the prisoners would be used as human shields.[58]

[55] *RB*, paras. 482-83.
[56] *OTP Hostage Taking Appeal Brief*, para. 12.
[57] P2137, para. 8.
[58] T25721-22.

6. Disclosure Violations

30. The Prosecution was found to have violated its disclosure obligations 82 times. It expresses no remorse or regret. The Prosecution has failed to heed the Appeals Chamber's admonitions, expressed on multiple occasions over the past decade, that:

- "The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations",[59]
- "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,"[60]
- "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,"[61]
- "The Appeals Chamber 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."[62]

31. The Prosecution's attitude is that unless an accused finds a "smoking gun" in the rubble of its disclosure violations, he is entitled to no remedy. This has led to the impunity that drips from the pages of its *Response*. Unless the Appeals Chamber calls the Prosecution to order with deeds, and not mere words,[63] a fair trial at international courts will be a platitude and not a reality.

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[59] *Krstic AJ*, para. 215.
[60] *Kordic AJ*, paras. 242-43.
[61] *Lukic Disclosure Appeals Decision*, para. 23.
[62] *Mugenzi Rule 68 Appeals Decision*, para. 40.
[63] The Prosecution characterises these statements as "dicta" and notes that in each case the Appeals Chamber refused the requested relief. *RB*, para. 47.

32. The Prosecution concedes that the Trial Chamber had the power, one way or the other, to reduce the **scope of the indictment**.[64] But it claims no unfairness resulted from a trial polluted by 82 violations involving hundreds of thousands of pages of disclosure.[65] The Trial Chamber itself recognised that "the scope of the Indictment and the high profile of the Accused conjointly contributed to the unprecedented nature of this case".[66] The Prosecution's protestations of good faith[67] are proof that it was the unmanageable scope of the indictment, and not intentional concealing of evidence, that caused its repeatedly late disclosure. This could have been reduced or avoided if the Prosecution had not insisted on such a vast case.

33. The Prosecution's reliance on prejudice to avoid the consequences of its disclosure violations[68] runs counter to the admonition that the prejudice requirement cannot serve to isolate disclosure violations to the detriment of a fair trial.[69] The Trial Chamber consistently isolated the violations by requiring President Karadzic to show that he was prevented from using a particular document with a particular witness.

34. The Prosecution ascribes the **delay** resulting from adjournments to President Karadzic's requests for more time to review material;[70] the perpetrator blaming the victim. President Karadzic needed more time to prepare precisely because of the Prosecution's violations.

35. The Prosecution claims that President Karadzic was not prejudiced in his **preparation** by receiving 552,828 pages of disclosure after the trial began.[71] No sensible argument can be made that a party suffers no disadvantage by having to read over half-a-million pages of material during trial, while spending six hours per day in court, rather

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[64] *RB*, para. 43.
[65] *RB*, para. 41.
[66] *Judgement*, para.6. It also said: "The 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. *22nd-26th Violation Decision*, para. 43.
[67] *RB*, para. 51.
[68] *RB*, para. 45.
[69] *Kordic AJ*, para. 242.
[70] *RB*, para. 55.
[71] *RB*, para. 56.

than pre-trial when there is time for trial strategies to be developed. This disadvantage has been recognised as a form of prejudice.[72]

36. The Prosecution also claims that President Karadzic was not prejudiced when receiving **witness statements** after the witness had already testified.[73] Taking this argument to its logical conclusion, Rule 66(A)(ii), which requires disclosure of witness statements prior to trial, is meaningless. The Prosecution can violate that Rule at will, leaving it to the accused to show what different questions he would have asked the witness, what different answers he would have received, and arguing that any prejudice is speculative.

37. The Prosecution's arguments concerning the **three examples** of witnesses whose statements were disclosed after they completed their testimony demonstrates that it can circumvent every showing of potential prejudice by claiming that the statement was incomplete,[74] not entirely inconsistent,[75] or hearsay.[76][REDACTED]. What the Prosecution fails to acknowledge is that it had an obligation to disclose each statement years before the witnesses testified and that it violated that obligation. It caused the damage, and can now only speculate that the Trial Chamber would have been unpersuaded by the withheld evidence.

38. The Prosecution's disclosure violations, which resulted from its insistence on proceeding on an unmanageable indictment, were so repeated, pervasive, and voluminous that a fair trial became impossible.

[72] *Furundzija Decision*, para. 19.
[73] *RB*, para. 60.
[74] *RB*, para. 62.
[75] *RB*, para. 63.
[76] *RB*, para. 65.

7. Adjudicated Facts

39. The Appeals Chamber has never faced a "constitutional" challenge to adjudicated facts.[77] While it has pronounced on aspects of the doctrine,[78] the Appeals Chamber has never been asked to decide upon its overall legality *vis-a-vis* the rights of the accused. Therefore, the "cogent reasons" standard urged by the Prosecution[79] does not apply.

40. In any event, the recent practice of taking judicial notice of thousands of adjudicated facts in a single case provides cogent reasons for the Appeals Chamber to re-examine its jurisprudence, which was made in the context of a limited number of adjudicated facts.[80]

41. The Prosecution's defence of the "constitutionality" of adjudicated facts, in the face of claims that it violates Article 21(3)'s right to "be presumed innocent until proved guilty", parrots the Appeals Chamber's statement that

> Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution…the effect is only to relieve the Prosecution of it's initial burden to produce evidence on the point.[81]

42. This division of the burden of proof into two separate components—the burden of production and the burden of persuasion—is a fallacy. Taking the Appeals Chamber's statement to its logical conclusion, a Trial Chamber could order the Defence to present its entire case before the Prosecution, reasoning that such an order only would shift the burden of production to the defence—the burden of persuasion would remain with the Prosecution.

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[77] *Mladic Adjudicated Facts Appeals Decision,* Partially Dissenting Opinion of Judge Patrick Robinson, para. 107.
[78] *Karemera Judicial Notice Appeals Decision*, para. 42; *Popovic AJ*, para. 620; *Mladic Adjudicated Facts Appeals Decision,* para. 81; *D. Milosevic Adjudicated Facts Appeals Decision,* paras. 16-17.
[79] *RB*, para. 68.
[80] When Rule 94(B) was added to the rules at the 18th Plenary, its purpose was stated as "to enable the Trial Chamber to manage the case more efficiently (…) with full respect for the rights of the accused."(emphasis added) http://www.icty.org/sid/7652. The *D, Milosevic* case involved 126 facts, *S. Milosevic* case involved 482 facts, and the *Krajisnik* case involved 620 facts. *D. Milosevic Adjudicated Facts Appeals Decision; Milosevic Adjudicated Facts Appeals Decision,* pp. 2-3.
[81] *Karemera Judicial Notice Appeals Decision*, para. 42, cited in *RB*, para. 68.

43. An accused is entitled to defend himself by legitimately challenging the Prosecution to prove each aspect of its case. This cannot be done if the burden of production has been shifted to the accused. Shifting the burden of production thus allows the Prosecution to automatically meet its burden of persuasion.

44. That adjudicated facts are limited to facts other than acts and conduct of the accused is immaterial. The Prosecution's burden to prove the crimes charged is not limited to proving the acts, conduct, and mental state of the accused.[82] Judicial notice of adjudicated facts other than acts and conduct of the accused relieves the Prosecution of proving the *actus reus* elements of the offenses.

45. The principle that a party asserting a fact has the burden of proving it, rather than the party that denies it, extends across jurisdictions and reaches back to antiquity: "*Ei qui affirmat non ei qui negat incumbit probatio*"[83] is an "ancient rule founded on considerations of good sense and it should not be departed from without strong reasons."[84]

46. The Trial Chamber's acceptance of adjudicated facts over Defence evidence that rebutted those facts also rendered its practice unconstitutional *as applied*. The Prosecution claims that Tribunal practice supports the Trial Chamber's approach.[85] In no judgement it cites did the Trial Chamber accept an adjudicated fact alone over evidence offered to rebut it. Our Trial Chamber is the first and only to have rejected Defence evidence in favour of an adjudicated fact on the ground that the Defence evidence was not credible. The Prosecution disregards the *Mladic* Trial Chamber decision, which has held expressly to the contrary.[86]

47. The impact of taking judicial notice of 2379 adjudicated facts on the fairness of the trial is not limited to findings based solely upon adjudicated facts.[87] These errors can be remedied only by ordering a new, and fair, trial.

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[82] *OB*, para. 128.
[83] The proof lies upon him who affirms, not upon him who denies
[84] *Constantine Steamship*, p. 174. Taken from Digest of Justinian, 22.3.2 quoting Paulus, 'On the Edict' Book LXIX: 2nd Century AD.
[85] *RB*, para. 71.
[86] *Mladic Adjudicated Facts Rebuttal Decision*, para. 15.
[87] *Contra RB*, paras. 73-74. *See OB*, paras. 247, 255 (Ground 16).

8-9. Prosecution 92 *bis* witnesses

48. There is no precedent for enabling Defence interviews of 148 Prosecution witnesses whose evidence was admitted without cross-examination under Rule *92 bis*. More importantly, however, there is no precedent for admitting evidence of 148 Prosecution witnesses without cross-examination.

49. The Prosecution's incredulity at President Karadzic's assertion of a right to examine "each and every " 92 *bis* witness,[88] is a bi-product of there being 148. Had the Prosecution applied to admit the written evidence of 20 witnesses, no arguments could be made about the practicality of interviewing "each and every" witness. President Karadzic should not be penalised for the Prosecution's choice to admit so much written evidence.

50. Like the Prosecution's declaration that it was ready for trial when it had not disclosed exculpatory evidence,[89] convincing the Trial Chamber to admit a massive amount of written evidence gathered over 14 years without giving the Defence the time to interview the witnesses was unfair.

51. When a Trial Chamber admits written evidence without cross-examination under Rule *92 bis*, it impacts the accused's right "to examine, or have examined, the witnesses against him".[90] President Karadzic sought to minimise that impact by interviewing the witnesses and then seeking to convince the Trial Chamber that admitting their written evidence was inappropriate, requesting that they should be called for cross-examination, or seeking to admit information favourable to the Defence in a written supplement.

52. Allowing these interviews would have struck a fair balance between Rule 92 *bis'* purpose to reduce court time and Article 21(4)(e)'s purpose to promote the reliability of factual findings by ensuring that evidence is tested.

53. The Trial Chamber had an obligation to "provide every practicable facility it is capable of granting under the rules and the Statute when faced with a request by a party

[88] *RB*, para. 77.
[89] T8908.
[90] ICTY Article 21(4)(e).

for assistance in presenting its case".[91] As Rule 92 *bis* witnesses were not the property of the Prosecution, President Karadzic had an equal right to interview them.[92] The Prosecution cannot justify the Trial Chamber 's failure to give the Defence time to interview those witnesses who were willing to be interviewed. Likewise, the Prosecution provides no reason why the Trial Chamber should not have compelled those witnesses who were excused from coming to The Hague to give live testimony from submitting to an interview by the Defence.

54. Legitimate forensic purposes for interviewing Rule *92 bis* witnesses include convincing the Trial Chamber that admitting the witness' written evidence was inappropriate, that s/he should be called for cross-examination, or that information favourable to the Defence should be admitted in a written supplement.[93]

55. The Prosecution claims that President Karadzic fails to point to a single piece of supposedly "unsafe" Rule 92 *bis* evidence or attempt to explain how an interview would expose this.[94] During the trial's late stages, President Karadzic was finally able to interview Prosecution Rule 92 *bis* witness KDZ486. During that interview, KDZ486 signed a supplemental statement recanting his prior testimony.[95] This prompted the Prosecution to withdraw his testimony.[96] This demonstrates that denying President Karadzic the right to question Rule 92 *bis* witnesses rendered the evidence unsafe.

[91] *Tadic AJ*, para. 52.
[92] *Mrksic Interview Appeals Decision*, para. 15.
[93] *Halilovic Subpoena Appeals Decision*, para. 12; *Krstic Subpoena Appeals Decision*, paras. 9-10.
[94] *RB*, para. 81.
[95] D2261.
[96] *KDZ486 Decision.*

10. Ferid Spahic

56. The Prosecution's argument that Spahic lacked direct knowledge or was not personally acquainted with President Karadzic,[97] goes to the weight of Spahic's proposed evidence, not its admissibility. Claiming that President Karadzic made "no effort to call Spahic as a Defence witness" is meritless.[98] Once the Trial Chamber denied President Karadzic's motion to call Spahic for cross-examination,[99] it was not possible to transform him into a Defence witness.[100]

57. Nothing in the Prosecution response addresses the fact that the Trial Chamber found that Scheduled Incident A.14.2 was proven **solely** due to Ferid Spahic's 92 *bis* evidence, attributing responsibility for that incident to President Karadzic.[101] At the same time, the Trial Chamber excluded Spahic's evidence that President Karadzic was not responsible.

58. The importance of Spahic's testimony on this incident should not be underestimated. He told the Defence that President Karadzic had ordered that no one be killed in Visegrad, that he tried to prevent the commission of crimes, and if President Karadzic had authority over the perpetrators, the 15 June 1992 killings would never have happened.[102] No reasonable Trial Chamber would have turned its back on this evidence, let alone proceeded to attribute responsibility to President Karadzic for these very killings solely on the witness' prior statement. This was manifestly unfair.

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[97] *RB*, para. 84.
[98] *RB*, para. 86.
[99] *92 bis Decision—Spahic*.
[100] *Hadzic Recall Decision*, para. 11.
[101] *Judgement* paras. 1080-89, 1093.
[102] *92 bis Motion—Spahic*, paras. 4-7.

11-12. Defence 92 *bis* evidence

59. The Prosecution claims that President Karadzic's Rule 92 *bis* motions were **untimely**. These motions followed directly from adverse decisions, after President Karadzic filed his witness list, on allocation of time for the Defence case, [103] protective measures,[104] subpoenas,[105] video-link testimony,[106] and assignment of counsel.[107] This left President Karadzic with no choice but to abandon his plan to present all witnesses *viva voce* to maximize the weight of their evidence.[108] As all of the witnesses were already on the Defence witness list, it was simply a matter of moving them from the *viva voce* column to the Rule 92 *bis* column.

60. The Prosecution's claim that President Karadzic "failed to use the full complement of hours he was allotted",[109] disregards the well-known reason for this. President Karadzic had set aside 16 hours for his testimony as the last Defence witness.[110] Following the Trial Chamber's imposition of counsel during his testimony, he decided not to testify.[111] There was no time to organise other Defence witnesses to fill the remaining 16 hours.

61. The Prosecution's contention that the Chamber was reasonable in refusing to admit Rule 92 *bis* statements because they had not been **attested** to by a certifying officer[112] ignores the fact that, unlike for Prosecution witnesses, the Registry declined to certify Defence witnesses statements until the Chamber decided to admit them.[113]

62. In its attempt to downplay the affected evidence's **impact**, the Prosecution argues repeatedly that the excluded 92 *bis* evidence was (i) duplicative of that reasonably

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[103] *Defence Case Decision*, paras. 1, 14.
[104] *Protective Measures Decision—Defence 1; Protective Measure Decision—KW194.*
[105] *Subpoena Decision—Mijic; Subpoena Decision—Tomovic*; *Subpoena Decision—Kalinic.*
[106] *Video-Link Decision—Jovicinac.*
[107] *Banovic Decision.*
[108] *65 ter Submission*, para. 25.
[109] *RB*, para. 93.
[110] T45188. He used 308 of the allotted 325 hours. *RB*, para. 93, fn. 332
[111] T45935-36.
[112] *RB*, para. 96.
[113] *Denadija Reconsideration Motion*, para. 5.

rejected by the Trial Chamber;[114] or (ii) inculpatory and did not assist President Karadzic's case.[115] Neither argument is persuasive.

63. The Prosecution is correct that the excluded evidence of these 12 witnesses was cumulative of evidence from 32 other witnesses. But the Trial Chamber rejected evidence of those 32 witnesses as unreliable, self-serving, or inconsistent with Prosecution evidence.[116] Admitting corroborating Rule 92 *bis* evidence could have rectified each of these perceived weaknesses.[117]

64. For example, Milutin Vujicic's evidence that the Aladza Mosque in Foca was destroyed because the Muslims used it to conduct hostilities,[118] was rejected as "evasive" and because his answers on cross-examination were "unconvincing".[119] The Chamber then found that although President Karadzic argued that certain mosques were used for military purposes in Foca, "this evidence was unreliable and further *there was no other indication* that the mosques were used for military purposes."[120] Milos Tomovic's excluded Rule 92 *bis* evidence was the other indication.[121] The suggestion that his evidence would have had no impact given it duplicated evidence rejected at trial[122] is unsustainable.

65. Moreover, the suggestion that the statements are required to be wholly exonerating to have any impact, is misplaced. [123] For example, Ranko Mijic's admissions concerning violence in Omarska does not diminish the significance of his testimony that the guards were so out-of-control that even the camp commander had no authority.[124] The aspects of the statements concerning responsibility for crimes were much more relevant to President Karadzic's defence than denying that the crimes occurred.

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[114] *RB*, paras. 98, 106-7, 113, 117.
[115] *RB*, paras. 101, 103-4, 110, 113, 118, 121.
[116] *RB*, para. 97.
[117] *Musema TJ*, para. 42.
[118] D2767, paras. 22, 24.
[119] *Judgement*, para. 927.
[120] *Judgement*, para. 2554 (emphasis added).
[121] 1D26391,paras. 12, 25-26.
[122] *RB*, para. 98.
[123] *e.g., RB*, para. 114.
[124] 1D9634,pp. 21-22, 32-34.

66. Indeed, the Prosecution regularly called evidence that was exculpatory in part.[125] This neither prevented its admission, nor the Trial Chamber's reliance on it.

[125] T13672; [REDACTED]; T18631;[REDACTED]; T25270; T25596.

13. Pero Rendic and Branko Basara

67. The Appeals Chamber should find that the Trial Chamber erred when refusing to admit the evidence of two Defence 92 *bis* witnesses because they were not shown to be unavailable. The Prosecution does not dispute the error; it simply ignores it. Its arguments that the evidence would not have been admitted under 92 *bis* in any event, or was unimportant,[126] are undermined by its contrary position at trial.[127] Basara's evidence was reliable[128]—not only did the Prosecution [REDACTED],[129] but the evidence sought to be tendered was his testimony as a Prosecution witness at another trial.[130]

[126] *RB*, paras. 123-24.
[127] *92 bis Response—Basara*, para. 5; *92 bis Response—Rendic*, para. 6.
[128] *Contra RB*, para. 124.
[129] [REDACTED].
[130] 65*ter* #22059.

14. Borivoje Jakovljevic

68. The Prosecution is mistaken. [REDACTED][131][REDACTED][132] If the Trial Chamber needed more details, it should have ordered its own medical examination,[133] not deprived President Karadzic of relevant evidence it had found was probative in President Karadzic's case.[134]

69. The Prosecution's attempt to paint Jakovljevic's testimony as insignificant because it did not "directly contradict" Momir Nikolic's "unequivocal account" is without merit.[135] The slim evidence of President Karadzic's involvement in the Srebrenica events rests on the Nikolic's uncorroborated evidence.[136] Excluding evidence due to insufficient medical information from a witness that could contradict Nikolic's testimony about who ordered the execution of the prisoners from Srebrenica, and therefore call into question the wisdom of relying on Nikolic's uncorroborated testimony, was an abuse of discretion.

[131] [REDACTED]
[132] [REDACTED]
[133] *92 quater Motion—Jakovljevic*, para. 6.
[134] *92 quater Motion—Jakovljevic*, para. 7.
[135] *RB*, para. 136.
[136] *See* Ground 40.

15. Rajko Koprivica

70. The Prosecution points to no other occasion at the ICTY (or any other tribunal) where a witness' interview transcript was deemed "inadmissible" for inconsistent or evasive answers. On the one occasion where a Trial Chamber declined to admit prior testimony under Rule 92 *bis* on reliability grounds, the Appeals Chamber swiftly reversed.[137]

71. The Prosecution's claim that admitting Koprivica's evidence would have had no impact on the *Judgement*[138] is belied by the Trial Chamber's own finding that "the subject matter of the Transcript is sufficiently relevant to these proceedings for the purpose of admission in that it relates to events in Vogosca, a municipality covered by the Indictment."[139] President Karadzic was convicted for crimes committed at the instance of local authorities in Vogosca Municipality. Koprivica was Municipality President, the highest local authority.

[137] *Karemera Adjudicated Facts Appeals Decision*, para. 15.
[138] *RB*, para. 140.
[139] *92 quater Decision—Koprivica*, para. 14.

16. Cumulative Prejudice

72. By judicially noticing 2379 adjudicated facts and admitting written evidence of 148 Prosecution witnesses, the Trial Chamber relieved the Prosecution of having to prove a vast portion of its case during trial.[140] A great percentage of the "crime-base" evidence was in a form that President Karadzic could not question.

73. The Prosecution claims that President Karadzic cannot show concrete prejudice from this huge advantage awarded to the Prosecution.[141] Here's how President Karadzic was prejudiced:

- He couldn't elicit evidence that the description of the "crime-base" events was inaccurate or exaggerated.
- He couldn't elicit evidence that the perpetrators were not his subordinates.
- He couldn't elicit evidence that the local authorities, his subordinates, did not participate in the crimes, or actively tried to prevent them.
- It was impossible to rebut a vast number of adjudicated facts and written evidence by producing affirmative Defence evidence with the limited time and resources available.
- The Trial Chamber used the crime-base evidence to conclude that there was a pattern of conduct throughout the Municipalities that must have resulted from national policies.[142]
- The Trial Chamber used that conclusion to find that President Karadzic's efforts to prevent crimes, and his statements and orders calling for obedience to international law and respect for civilians, were not genuine.[143]

[140] The Prosecution called 198 witnesses at trial. Conservatively estimating that the 2379 adjudicated facts represented findings from the evidence of 50 witnesses, when added to the 148 Rule 92 *bis* witnesses, the Prosecution was relieved of calling another 198 witnesses, or 50% of its case.
[141] *RB*, para. 147.
[142] *Judgement*, paras. 2444, 2472, 2475, 2846, 3441-45.
[143] *Judgement*, paras. 2850, 3095.

- As a result, the Trial Chamber convicted President Karadzic of membership in a JCE whose objective was to create a homogeneous Serb state by forcibly displacing Muslims and Croats.[144]
- Had President Karadzic been able to cross-examine the crime-base witnesses, or to adequately investigate and produce evidence to rebut the facts represented by the 2379 adjudicated facts and 148 witnesses, this result may well have been different.

74. Taking judicial notice of an excessive number of adjudicated facts may cause prejudice to an accused.[145] That is precisely what happened here.

[144] *Judgement*, paras. 3440, 3447.
[145] *Mladic Adjudicated Facts Appeals Decision*, para. 24.

17. Delayed disclosure

75. The Prosecution is wrong that the *Bagosora* Appeals Chamber "le[ft] open the possibility that that Rule 69(C)'s strict terms might be disregarded where it was 'necessary for the protection of witnesses'".[146] The phrase "necessary for the protection of witnesses" was not used in that context. The paragraph reads as follows:

> Furthermore, the Appeals Chamber does not consider that, as stated by the Trial Chamber, such disregard for the explicit provision of the Rules *was necessary for the protection of witnesses*. It notes that in the previous witness protection decision in the Nsengiyumva case prior to the joinder, the Trial Chamber had ordered the temporary redaction of identifying information until witnesses were brought under the protection of the Tribunal, but had nonetheless required that the Defence be provided with unredacted witnesses statements "within sufficient time prior to the trial in order to allow the Defence a sufficient amount of time to prepare itself". At no point did the Trial Chamber indicate that any problems had arisen from this previous arrangement justifying a more restrictive disclosure schedule.[147]

76. Nothing in this paragraph leaves open the possibility of Rule 69(C)'s terms being "disregarded" in any circumstance. The Appeals Chamber explicitly rejects the Trial Chamber's attempts to justify late disclosure on this basis. Moreover, in the paragraph prior, the Appeals Chamber stated in unequivocal terms that:

> [w]hile 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, the Appeals Chamber recalls that this discretion is still constrained by the scope of the Rules. In this regard, it notes that 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"[148]

77. In granting delayed disclosure for KDZ492, KDZ531, and KDZ532, the Trial Chamber erred in law. The Prosecution's attempt to find some grey in the Appeals Chamber's black and white ruling does not stand scrutiny.

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[146] *RB*, para. 150.
[147] *Bagosora AJ*, para. 84 (emphasis added).
[148] *Bagosora AJ*, para. 83 (emphasis in original).

78. The assertion that President Karadzic was not prejudiced by the Trial Chamber's error also fails.[149] The documents President Karadzic confronted these witnesses with were documents he obtained from the Prosecution. It was no substitute for a proper defence investigation.

[149] *RB*, para. 154.

18. Protective Measures

Defence Witnesses

79. Labelling Defence witness claims as "speculative" cannot dismiss the disparity between protective measures granted to Prosecution witnesses and denied to Defence witnesses.[150] The Defence witness who feared criminal prosecution was, in fact, later prosecuted.[151]

80. That many protective measures for Prosecution witnesses were continued from other cases[152] does not help the Prosecution. It simply shows that the Trial Chamber's refusal to grant protective measures to Defence witnesses contravened not only its own practice, but the practice of other Chambers.

81. While the Prosecution is correct that many of its witnesses had multiple reasons for seeking protective measures,[153] those reasons were not significantly different from those expressed by the Defence witnesses. [REDACTED][154] [REDACTED].[155] [REDACTED].[156] These concerns were as "speculative" as those disregarded for Defence witnesses.

82. The Prosecution's claim that President Karadzic should have subpoenaed the witnesses[157] is also without merit. After protective measures were denied to Defence witnesses, President Karadzic moved to admit their evidence under Rule 92*bis*.[158]

83. The impact of the losing KW392, for example, cannot be dismissed.[159] President Karadzic was convicted of crimes at Cavarine Detention Camp.[160] KW392 supervised that very camp.

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[150] *RB*, para. 161.
[151] *OB*, fn. 409.
[152] *RB*, para. 162.
[153] *RB*, para. 163. Counsel apologises for minimising, and thus misrepresenting, the extent of reasons for protective measures offered by Prosecution witnesses. This error resulted from a misunderstanding between Counsel and a defence team member as to what was to be included in Annex E.
[154] [REDACTED]
[155] [REDACTED]
[156] [REDACTED]
[157] *RB*, para. 165.
[158] *See* Grounds 11-12.
[159] *Contra RB*, paras. 166-68.
[160] Scheduled Incident C23.1.

Prosecution Witnesses

84. [REDACTED].[161][REDACTED][162] [REDACTED].

85. [REDACTED][163] [REDACTED][164]

[161] [REDACTED].
[162] [REDACTED].
[163] [REDACTED]
[164] [REDACTED].

19. Defence subpoenas

86. In none of the four decisions challenged under this ground did the Trial Chamber give any consideration to whether the prospective witness could provide evidence that was more credible, or more direct, or more probative, or more compelling, or more expeditious to present, or more corroborative of a greater number of aspects of the record. If the evidence could come from somewhere else, the subpoena was denied. None of the Prosecution's submissions engage with this central unfairness.

87. The Trial Chamber and Prosecution treat the existence of alternative evidence as a binary consideration; namely, if the information is obtainable through other means, the request for a subpoena must be rejected. The Appeals Chamber's approach in *Halilovic* was far more nuanced; the alternate availability of the evidence was one of two considerations to which a Trial Chamber can have regard, with the overall focus not being "on the usefulness of the information to the applicant but on its overall necessity in ensuring the trial is informed and fair."[165]

88. Significantly, the Appeals Chamber was explicit that:

> the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them.[166]

89. Thus, the Appeals Chamber recognised that factors such as the directness and credibility of the prospective evidence, and the witness' role and position, would inform the Trial Chamber's decision. In this case, those factors were disregarded. This was the legal error identified, which the Prosecution does not address.

90. The error in the Prosecution's approach is belied by its statement that "there is nothing unique in Tomovic's ethnic cleansing denials".[167] Although Tomovic was uniquely placed to provide evidence of a lack of a policy to expel Muslims in Foca,

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[165] *Halilovic Subpoena Appeals Decision,* para. 7.
[166] *Id,* para. 6.
[167] *RB*, para. 180.

nothing in the Appeals Chamber's rulings require the testimony to be "unique" for a subpoena to be issued.

91. The Trial Chamber found that "Danilusko Kajtez admitted to killing 12 individuals in Manjaca in November 1992 but was released as a result of pressure exerted on the Military Court",[168] without hearing Judge Forca's evidence that his decision to release Kajtez was not a result of pressure.[169] Likewise, the Trial Chamber accepted the Prosecution's case that "the perpetrators of the killings of at least 77 men at Velagići School on 1 June 1992 were arrested but returned to their units without being tried" as a result of "pressure",[170] without hearing Tomasevic's evidence that his decision to release two of the accused in this case was not a result of pressure.[171]

92. These were the men whose individual conduct relied upon by the Trial Chamber to find a policy not to prosecute crimes against non-Serbs.[172] The error, and impact on the *Judgement*, is apparent.

93. The Prosecution does not argue that the decision not to subpoena Tomovic had no impact, nor could such an argument be credible. Tomovic was the only witness who said that the Aladza mosque and other mosques in Foca were abused for military purposes by Muslim forces, and were destroyed during the fighting, after Serbs had suffered causalities from those positions.[173] The Trial Chamber's finding concerning Foca that "there was no other indication that mosques were used for military purposes"[174] demonstrates the error, and impact, of denying a subpoena for him.

94. The Trial Chamber erred in excluding Milankovic's evidence that his battalion was never ordered to fire at civilians, and never engaged in disproportionate or indiscriminate shelling, whilst making findings to the contrary. This led to a trial that was not "informed and fair".[175]

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[168] *Judgement*, para. 3416.
[169] *Subpoena Motion—Forca*, para. 6.
[170] *Judgement*, para. 3416.
[171] 1D9195.
[172] *Judgement*, para. 3425.
[173] 1D26391, paras. 12, 25-26.
[174] *Judgement*, para. 2554.
[175] *Halilovic Subpoena Appeals Decision*, para. 7.

20. General Mladic

95. The Prosecution's argument is fundamentally inconsistent. General Mladic's prospective testimony was so insignificant that its exclusion made no difference in President Karadzic's trial,[176] yet so important that the mere exposure to any bit of it by a Prosecution team member would cause its case against General Mladic to collapse.[177] The two positions are irreconcilable.

96. The Prosecution exaggerates the difficulties it would have faced. When it wanted to interview General Manojlo Milovanovic during a recess in the *Stanisic and Simatovic* trial, it readily undertook to "avoid and abstain from any contact with the Stanisic/Simatovic team on the results of that. Not one word. A firm Chinese wall."[178]

97. A Trial Chamber's findings of fact are only as good as the evidence it hears. By refusing to hear General Mladic's evidence, and then finding that he informed President Karadzic about the Srebrenica events on 13 July 1995, shortly before President Karadzic spoke to Miroslav Deronjic,[179] that he laid out a plan to indiscriminately shell Sarajevo at a meeting between 20-28 May 1992,[180] and that he and President Karadzic formulated a plan to expel Bosnian Muslims and Croats from a homogeneous Serb state,[181] the Trial Chamber deprived President Karadzic from presenting exculpatory first-hand evidence in his favour on each finding.

98. The claim that the Trial Chamber would not have believed General Mladic[182] is untenable. If a credibility finding can be made without hearing a witness, there is no point to holding a trial. And if the self-serving nature of testimony is grounds to discredit a witness, what does that say about Momir Nikolic, upon whose self-serving, plea-bargained-for testimony President Karadzic's conviction for genocide in Srebrenica rests?[183]

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[176] *RB*, paras. 196-201.
[177] *RB*, paras. 190-93.
[178] *Stanisic & Simatovic*, T4363.
[179] *Judgement*, paras. 5769, 5804. *See* Ground 40.
[180] *Judgement*, paras. 4023, 4721. *See* Grounds 36-37.
[181] *Judgement*, paras .3266-73. *See* Ground 28.
[182] *RB*, para. 196.
[183] *See* Ground 40.

99. The Prosecution would not have been prejudiced by General Mladic's testimony. By the time General Mladic's appeared in President Karadzic's case, the Prosecution had had 18 years since his indictment to collect evidence against him. It had already called its last witness in his trial.[184] No breach of immunity exists where events before the witness testifies are undeniably the source for the evidence presented.[185] Tolimir, Beara, and Popovic, whose cases were pending on appeal, testified for President Karadzic with no adverse impact on their cases.

100. The Prosecution has failed to provide a legitimate justification for the Trial Chamber refusing to compel General Mladic to answer questions at President Karadzic's trial and then convicting President Karadzic based on inferences that General Mladic could have refuted.

[184] *Mladic* T20715.
[185] *United States v Lipkis*, p. 1450. The Prosecution's is wrong that in the U.S., only the Prosecution can grant immunity (*RB*, para.194). *United States v Straub*.

21. Predrag Banovic

101. Banovic did face a risk of violating his plea agreement and facing new charges at the ICTY.[186] In his statement, he disavowed factual elements of that very plea agreement.[187] He also acknowledged being present as a reserve police officer in the Hambarine area—events not covered by his plea agreement and for which he might be prosecuted in Bosnia.[188]

102. The Prosecution argues that assigning counsel to witnesses with self-incrimination concerns is not mandatory,[189] but fails to provide any justification for the Trial Chamber's refusal to assign counsel to Banovic. There was none. The Chamber's blind adherence to the literal terms of the Registrar's *Directive on the Assignment of Defence Counsel* was an error.

103. President Karadzic did not waive his right to raise the issue on appeal.[190] The Trial Chamber denied Banovic's request for counsel.[191] A party is not required to seek a duplicate order made at the request of one of its witnesses.

104. Nor was President Karadzic required to subpoena Banovic.[192] As his testimony did not go to the acts and conduct of the accused, President Karadzic sought its admission under Rule 92 *bis*.[193] The Trial Chamber denied that motion because Banovic was not likely to certify his statement without the assignment of counsel, thus completing the circle.[194]

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[186] *RB*, para. 204.
[187] 1D9620, paras. 2-8.
[188] *Id*, para. 5. *See* Scheduled Incident A10.2.
[189] *RB*, para. 203. Ironically, in the [REDACTED] decisions it cites, the witnesses were each assigned counsel. [REDACTED].
[190] *RB*, para. 202.
[191] T45428-29.
[192] *RB*, para. 202.
[193] *92 bis Motion—Banovic*.
[194] *92 bis Decision—Defence*, para. 68.

22. Intercepts

105. Having reviewed the *Response Brief* and the authorities contained therein, President Karadzic withdraws this ground of appeal.

23. War Correspondents

106. The Prosecution is correct that the *Brdjanin* decision contains the phrase "[w]ar correspondents are of course free to testify before the International Tribunal".[195] The next sentence reads: "The present decision concerns **only** the case where a war correspondent, having been requested to testify, refuses to do so."[196]

107. *Brdjanin* involved the privilege's assertion, not its waiver.[197] The Appeals Chamber never pronounced on whether war correspondents were free to testify without a waiver of the privilege by their news organisations. The privilege's assertion was expressly supported by the war correspondent's news organisation, the Wall Street Journal.[198] The language quoted by the Prosecution was *dicta*, and not subject to the "cogent reasons" standard.

108. That the ICRC has an absolute privilege, rather than the qualified privilege enjoyed by war correspondents, has no effect upon the issue of waiver. Absolute privilege means that the holder cannot be compelled to provide information under any circumstances, while qualified privilege means that the privilege may yield when the information is significant to the case and not available from any other source.[199] The Prosecution fails to explain why the *Simic* decision's rationale—that an employee cannot waive the ICRC's privilege—would not also apply to qualified privileges.[200]

109. The Prosecution has cited no decision where a journalist, or war correspondent, was entitled to waive the privilege. In an analogous case of qualified privilege, involving a human rights worker, the SCSL was presented with a situation where the witness objected to divulging his sources, but the witness' organisation did not. The Trial Chamber adopted the witness' organisation's position and required the witness to divulge his sources.[201]

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[195] *Brdjanin War Correspondents Appeals Decision*, para. 30, cited in *RB*, para. 214.
[196] *Id*, not cited in *RB* (emphasis added).
[197] A lawyer may assert the lawyer-client privilege but only the client can waive it.
[198] *Brdjanin War Correspondents Appeals Decision*, para. 11.
[199] *Id*, para. 50.
[200] *RB*, para. 217.
[201] *Brima Privilege Decision*, paras. 18, 20.

110. The Prosecution claim that the public interest aspect of the war correspondent privilege distinguishes it from other privileges[202] is similarly misplaced. Without public interest, there would be no privilege. The public interest of other privileges, such as legal professional privilege, has also been recognized by the ICTY.[203] It is irrelevant to the issue of who has the right to waive the privilege.

111. Further, the Prosecution's speculation that the press organizations would probably have waived the privilege[204] is also misguided. Once a privilege's existence is established, the burden is on the party calling the witness to demonstrate its waiver.[205] The Prosecution had the opportunity to seek waivers from the news organisations when each war correspondent appeared, but failed to do so.

112. Notably, the Prosecution does not contest the importance of the war correspondents' testimony to the findings in the *Judgement*.[206]

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[202] *RB*, para. 219.
[203] *i.e. Gotovina Defence Team Decision*, para. 37.
[204] *RB*, para. 220.
[205] *FDIC v Ogden* .
[206] *RB*, para. 220, *Contra, OB*, para. 394.

24. Parliamentary Privilege

113. President Karadzic has not waived his right to argue on appeal that the Trial Chamber erred in using his statements before the Bosnian and Republika Srpska Assemblies against him in its *Judgement*.[207]

114. The Prosecution is correct that President Karadzic agreed to admit Assembly session transcripts. It was only when Assembly President Momcilo Krajisnik came to testify late in the Defence case that the issue of whether a person's statements made before Parliament could be used against him in an international criminal proceeding came to President Karadzic's attention.[208]

115. The Trial Chamber's ruling on this question, although made in connection with Krajisnik's testimony, was unequivocal: "[w]hile immunities and privileges may protect parliamentary statements in domestic jurisdictions, this [does not apply] in international criminal proceedings".[209] There is no reason to believe it would have come to a different conclusion had President Karadzic raised it in the context of his own statements.

116. Under these circumstances, the Appeals Chamber may exercise its discretion to entertain the issue. It has done so in the past, particularly when the accused was self-represented.[210] It should do so in this case, not just because President Karadzic was self-represented, but because his statements before the Assemblies were an important basis for many findings,[211] the Prosecution had a full opportunity to engage with the issue on appeal,[212] and the issue of whether a person's statements before Parliament may be used against him is one of general importance and likely to arise in future cases.[213]

117. The Prosecution claims, correctly, that President Karadzic was not a Member of Parliament,[214] but fails to refute the contention, supported by decisions in multiple

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[207] *RB*, para. 221.
[208] T43092.
[209] T43150.
[210] *Tolimir AJ*, paras. 183-84; *Krajisnik AJ*, para. 651.
[211] *OB*, para. 404
[212] *RB*, para. 223
[213] *Brdjanin Appeals Dismissal Decision*, p. 3; *Krnojelac AJ*, paras. 6-7; *Limaj AJ*, para. 8; *Mrksic AJ*, paras. 10, 232.
[214] *RB*, para. 223.

jurisdictions, that Parliamentary privilege extends to persons who take part in parliamentary activities, including witnesses, civil servants, experts, and petitioners.[215]

118. The Prosecution's argument that domestic public official immunities have not been recognised before international courts[216] is inapposite. The cases it cites all involve immunity from prosecution rather than evidentiary privilege. International criminal courts recognize evidentiary privileges such as legal professional privilege,[217] war correspondent privilege,[218] doctor-patient privilege,[219] and clergy-penitent privilege.[220] The same rationale—to encourage persons to speak freely—also applies to statements made in Parliament.

119. The Appeals Chamber should consider whether statements made in Parliament can be used in an international criminal case against the speaker, and should answer that question in the negative. It should reverse President Karadzic's convictions based upon his membership in the overarching JCE and his conviction for genocide at Srebrenica,[221] and order a new, and fair, trial.

[215] *OB*, para. 399; *Gagliano v Canada; RCMP v Canada.*
[216] *RB*, para. 223.
[217] MICT Rule 119.
[218] *Brdjanin War Correspondents Appeals Decision.*
[219] ICC Rule 73(3).
[220] *Id.*
[221] *OB*, para. 403.

25. Tu quoque

120. The excluded evidence challenged under this ground could have been used for reasons other than mounting a *tu quoque* defence.[222] The fact that the evidence also concerned attacks against Serbs, did not transform it into inadmissible *tu quoque* evidence.

121. Statements that the excluded evidence "would not impact the Chamber's findings"[223] are speculative. For example, Sikiras' evidence that Bosnian Muslims carried out attacks on Serbs in Velesici[224] provided a military justification for General Mladic's shelling order that the Trial Chamber's found to be indiscriminate and disproportionate.[225]

122. Moreover, claiming that the excluded statements duplicated other evidence[226] not only ignores the importance of corroborating evidence to an accused's case,[227] but undermines the Prosecution's central argument. If the Trial Chamber had already admitted similar evidence, a determination must have already been made that the evidence was relevant to something other than a *tu quoque* defence.

[222] *Prlic Tu Quoque Decision*, para. 80. *Contra RB*, para. 225.
[223] *RB*, para. 235.
[224] 1D20319.
[225] *Judgement*, para. 4681.
[226] *RB*, para. 227.
[227] *OB*, para. 321.

26. General Miletic

123. The Trial Chamber found that in addition to issuing Directive 7, President Karadzic took steps to restrict humanitarian aid to Srebrenica.[228] This led to his conviction for forcible transfer and contributed to the finding that he shared the common purpose to eliminate Srebrenica's Muslims.[229] Those findings are directly challenged in Grounds 38 and 39.

124. General Miletic drafted Directive 7.[230] He was also involved in the convoy approval procedure,[231] signing seven notifications for humanitarian convoys in May and June 1995.[232] His Trial Chamber found that he played a pivotal role in the plan to forcibly remove the Bosnian Muslims from Srebrenica.[233] As such he was in a unique position to exonerate President Karadzic on the issues relating to humanitarian aid and membership in a common plan to forcibly remove the Muslims from Srebrenica, and could have done so if allowed to testify.[234]

125. The Trial Chamber further found that President Karadzic was constantly kept abreast of Srebrenica events including the execution of prisoners.[235] This contributed to his conviction for extermination and murder and led to the finding that he shared the JCE's common purpose to execute the prisoners.[236] Those findings are directly challenged in Ground 40.

126. General Miletic was amongst the Main Staff's most knowledgeable members when it came to the ongoing operations.[237] General Miletic forwarded information to President Karadzic to enable him to take informed decisions.[238] He provided daily Main Staff reports,[239] a central instrument for updating the President.[240] The updates General

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[228] *Judgement*, paras. 5799-5800.
[229] *Id*, para. 5814.
[230] *Popovic TJ*, para. 1649.
[231] *Id*, para. 1642.
[232] *Id*, para. 1660.
[233] *Popovic TJ*, para. 1716.
[234] [REDACTED]; *Miletic 65 ter Summary*.
[235] *Judgement*, para. 5801.
[236] *Id*, para. 5814.
[237] *Popovic TJ*, para.1639.
[238] *Id*, para.1713.
[239] *Id*, para.1635.

Miletic provided were comprehensive and included details on transporting civilians from Srebrenica, and taking prisoners.[241] As such General Miletic was in a unique position to exonerate President Karadzic on the issues relating to President Karadzic's knowledge of the execution of prisoners and his membership in a common plan to eliminate the Muslims from Srebrenica by killing the men, and could have done so if allowed to testify.[242]

127. The Trial Chamber further found that President Karadzic had the intent to destroy Srebrenica's Muslims and based that finding on his role in closing the corridor opened for the column leaving Srebrenica. It convicted him for genocide.[243] Those findings are directly challenged in Ground 41.

128. General Miletic played a significant role in monitoring the column and the corridor.[244] He denied a request to open the corridor,[245] and later ordered an investigation into its opening.[246] As such General Miletic was in a unique position to exonerate President Karadzic on the issues relating to President Karadzic's role in the corridor and his alleged intent to destroy Srebrenica's Muslims, and could have done so if allowed to testify.[247]

129. The Prosecution's claim that General Miletic's testimony lacked probative value and would have had no impact on the judgement is without merit.[248] In fact, next to President Karadzic and General Mladic, whose evidence the Trial Chamber also prevented,[249] General Miletic was one of the most important defence witnesses on Srebrenica-related issues.

130. The Prosecution argues that even if General Miletic's evidence had been probative when subpoenaed, its probative value was reduced when the Trial Chamber had

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[240] *Id,* para. 1638.
[241] *Id,* para. 1714.
[242] [REDACTED]; *Miletic 65 ter Summary.*
[243] *Judgement*, para. 5830.
[244] *Popovic TJ,* para. 1668
[245] *Id,* para. 1677.
[246] *Id,* para. 1680.
[247] [REDACTED]; *Miletic 65 ter Summary.*
[248] *RB*, para. 241.
[249] *See* Grounds 1 and 20.

heard similar evidence.[250] But President Karadzic's other witnesses on these issues were disbelieved.[251]

131. That the Trial Chamber would not have believed General Miletic[252] is pure speculation. If a credibility finding can be made without hearing a witness, there is no point to holding a trial.

[250] *RB*, para. 238.
[251] *Judgement*, paras.5762, 5766, 5783.
[252] *RB*, para. 241: Compare "Miletic's conviction for his involvement in forcibly transferring Srebrenica Muslims and the finding that he told others to withhold relevant information from the Tribunal limit the credibility of his proposed evidence" with *RB*, para. 409 "Karadzic's challenges to [Momir] Nikolic's credibility…should be dismissed." Nikolic was convicted of the same events as General Miletic and admitted lying about relevant information to the Tribunal. *M. Nikolic SJ*, para. 156.

27. Disqualification

132. President Karadzic did not waive his right to appeal [REDACTED].[253] The case cited by the Prosecution held only that "the Appeals Chamber **could** find that the Appellant has waived his right to raise the matter now."[254] The Appeals Chamber went on to consider the issue.[255] It has since been the Appeals Chamber's practice to treat the issue of bias as a special circumstance allowing it to address the merits.[256]

133. [REDACTED].[257] [REDACTED].

134. [REDACTED].[258] President Karadzic does not contend, [REDACTED], that the Judge should be recused from the entire case, but contends that the Judge should not have participated in deliberations concerning [REDACTED][259]

135. [REDACTED].[260][REDACTED][261] [REDACTED].[262][REDACTED][263]

136. The error is not rendered harmless because the two remaining Judges credited [REDACTED] evidence.[264] It is unknown to what extent comments by [REDACTED] may have affected the deliberations, and President Karadzic is entitled to a judgment by three impartial judges, not two.[265]

[253] [REDACTED]
[254] (emphasis added).
[255] *Furundzija AJ*, paras. 173-75.
[256] *Sainovic AJ*, para. 182.
[257] [REDACTED].
[258] *RB*, para. 250.
[259] *OB*, paras. 454-56.
[260] [REDACTED]
[261] [REDACTED]
[262] [REDACTED]
[263] [REDACTED]
[264] [REDACTED]
[265] *Seselj Disqualification Decision*, para. 14; *Karemera Disqualification Appeals Decision*, para. 68.

III. THE MUNICIPALITIES

28. Overarching JCE

137. The Prosecution does not dispute that its case against President Karadzic in the Municipalities was a circumstantial one. It offered no direct evidence of a plan to permanently remove non-Serbs. As such, the Trial Chamber's conclusion could only be based on an inference. In order for the Trial Chamber to infer President Karadzic's guilt, this inference was required to be the only reasonable explanation for the events in the Municipalities.

138. President Karadzic does not dispute that the Trial Chamber made the findings that the Prosecution recites at length. The issue is whether the Trial Chamber drew an inference that, even if reasonable, was not the only one available. In focusing on the "swathes" of evidence[266] and "entire sections"[267] of the *Judgement*, the Prosecution fails to demonstrate why the alternative inference proffered by President Karadzic was safely excluded. In reality, it was not.

139. The Prosecution has impugned President Karadzic's submissions because they "ignore" other evidence considered by the Trial Chamber, and challenge only a "handful" of counter-examples.[268] This is not a valid criticism. It is not an appellant's role to find error in every aspect of the Trial Chamber's reasoning. Not every link in a chain built by a Trial Chamber must be broken in order to destabilise the ultimate conclusion.

140. The Trial Chamber's approach to evidence was **selective**. During the 31 March 1995 Supreme Council meeting, Krajisnik referred to a policy of the Bosnian Serb leadership, "as President Karadzic said…not to ethnically cleanse".[269] Downplaying this evidence, the Prosecution accuses President Karadzic of asking the Appeals Chamber to overturn swathes of the Judgement based on "an isolated assessment of 13 words".[270] In a case where the Trial Chamber inferred that the accused possessed the intention to forcibly

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[266] *RB*, para. 268.
[267] *RB*, para. 262.
[268] *RB*, paras. 261-66.
[269] *OB*, para. 476.
[270] *RB*, para. 268.

remove ethnic minorities, this transcript shows him having set in place a policy not to do so.[271] If ever a piece of evidence warranted overturning swathes of a Judgement, this would be it.

141. Regardless, the Prosecution is wrong to assert that the remainder of this discussion "plainly reveals the BSL promoting the continued forced displacement of non-Serbs".[272] The Trial Chamber acknowledges Krajisnik's preceding statement that "the Muslims want to go from our territory, then we enable them to leave our area, without coercion, because we do not have the right to do that".[273] There is no promoting forced displacement, rather the opposite.

142. Contrary to the Trial Chamber's inference, the discussion of "rotten apple" had nothing to do with the presence of minorities. It was a discussion of maps, and reflected that the Muslims' territorial claim that a narrow strip of territory be added to its territory in the Bihac pocket area would make the Krajina look like a rotten apple.

143. The Prosecution cannot explain the inconsistency between the apparent "rotten apple" description of Krajina at the 42nd Assembly, and President Karadzic's contemporaneous order in July 1994 to the Municipal authorities in Prijedor to protect non-Serbs.[274] Most non-Serbs left Prijedor in 1992 (despite evidence that the leadership urged all citizens to remain).[275] This does not change the fact that there had been incidents in mid-1994 "of individuals attacking non-Serbs and their property".[276] President Karadzic's order was a reaction to these incidents. That this order protected fewer people than it would have in 1992, does not circumvent the inconsistency between his conduct, and the Trial Chamber's interpretation of his words.

144. President Karadzic's calls to respect human rights and international conventions cannot be swept aside due to subsequent (or contemporaneous) events.[277] It was not the only reasonable inference from the fact that Bosnian Muslims or Croats were being

[271] P3149, p. 66.
[272] *RB*, para. 268 (emphasis added).
[273] *Judgement*, para. 2773.
[274] *Id*, para. 3403.
[275] T20868.
[276] *Judgement*, para. 3403.
[277] *RB*, para. 267.

mistreated that President Karadzic was making statements he did not mean. Other reasonable inferences, such as President Karadzic's lack of control over events on the ground, were not properly excluded.

145. The Prosecution's own interpretation of President Karadzic's statement that "we must not put pressure to have people displaced" does not engage with the error raised;[278] that the Trial Chamber ascribed a criminal intent to statements made at the same meeting in June 1992, without reference to exculpatory evidence.[279] A party to an appeal cannot erase an error by conducting the analysis the Trial Chamber failed to perform. Other findings that President Karadzic's referred to agreements to allow refugees to return to "feign compliance" with international law,[280] ignores evidence that agreements were in fact reached.[281]

146. President Karadzic did not argue that the Trial Chamber ignored the 65 exculpatory statements and conversations. The Chamber's "side-step" was to wrongly discount them due to a **disjuncture** which did not exist, and which the Prosecution cannot establish.

147. The disjuncture finding was not limited to the take-over of power,[282] but was a repeated theme, infecting findings throughout the *Judgement*, including those relating to pre-war conduct.[283]

148. In October 1991, President Karadzic made a speech in which he said he was not threatening Bosnian Muslims.[284] The Trial Chamber rejected this interpretation, in part, because "in multiple intercepted conversations in September and October 1991, the Accused discussed how he would warn the Bosnian Muslims that if they persisted with their policies relating to the independence of BiH, this course of action would lead to extreme bloodshed."[285] Even when the Trial Chamber did not use the term "disjuncture",

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[278] *RB*, para. 269.
[279] *OB*, para. 477.
[280] *RB*, para. 269.
[281] P1479, pp. 16-18.
[282] *RB*, para. 274.
[283] *Judgement*, paras. 2707-08, 2715, 2847, 2852-53, 3094-05, 3484.
[284] *Id*, para. 2707.
[285] *Judgement*, para. 2808.

it consistently rejected benign interpretations of public pronouncements by malign interpretations of private conversations.

149. The Prosecution's example that President Karadzic and the Serbs wanted to "let everything go to fucking hell and that we take the express way" is a useful one.[286] At the same meeting, President Karadzic said that Serbs should not be the aggressors, and should "seek nothing that belongs to somebody else".[287] These statements are discounted because "he and the Serbs wanted to 'let everything go to fucking hell'".[288]

150. When read in context, President Karadzic is advocating the opposite.[289] He refers to the AKR President Vojislav Kupresanin, [290] who had threatened to secede from BiH,[291] and with whom he had a terse exchange days earlier.[292] President Karadzic notes that "Vojo" wants everything to go to fucking hell and expresses sympathy with this position. However, he states that "but, we need to find a balance between that power and the zest, reason and tactfulness in order to achieve our goal." He continues that "so I do not share Vojo's opinion that this is so bad".[293] President Karadzic does not "want to let everything go to fucking hell".[294] He is noting that one path would let things go to hell—but—they need to take another path.

151. The Trial Chamber paints this as another "disjunctive"; President Karadzic wanted to let everything go to fucking hell "but was cautious about the way in which this would be portrayed at an international level".[295] In reality, it is nothing of the sort.

152. President Karadzic never asserted that the Trial Chamber found that *every* public statement was inconsistent with forced displacement, and *every* private statement championed its occurrence.[296] Rather, President Karadzic challenged the Chamber's failure to identify a pattern of exculpatory statements made in public, and inculpatory

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[286] *RB*, para. 275.
[287] *Judgement*, para. 3024.
[288] *Id.*
[289] P12, p. 26.
[290] P12, p. 24; T43462; D4011, para.1.
[291] D424.
[292] D4012; T43463; D4011, paras. 10, 12; T43464; D4011, para. 29.
[293] P12, p. 26.
[294] *Judgement*, para. 3024.
[295] *RB*, para. 275, citing *Judgement*, para. 3084.
[296] *Judgement*, para. 274.

statements made in private. The Prosecution has no answer to the fact that many of President Karadzic's statements and orders that indicate that he never favoured ethnic homogeneity were confidential, and those for which he was most vilified by the Trial Chamber were made in public.[297]

153. President Karadzic did not argue that all of his **Assembly pronouncements** were instructions.[298] The error was the Trial Chamber's inconsistent treatment of exculpatory Assembly statements as being "for public consumption",[299] while lauding statements in this forum as reflecting the "officially sanctioned and disseminated" objectives of the Bosnian Serb leadership, to which deputies would show "a high level of response and adherence".[300] How the deputies knew which statements to ignore, and which to follow, is never explained.

154. The Prosecution's example of the 26th Assembly session is useful. President Karadzic said: "Serbs who committed crimes should be tried".[301] The Prosecution characterises this statement as President Karadzic "advising the Assembly that he would not permit proposed international war crimes prosecutions".[302] The two ideas are wholly separate.

155. Moreover, the Trial Chamber did not dismiss this statement because President Karadzic was not issuing "instructions".[303] Rather, the Trial Chamber quoted President Karadzic as saying: "the UN could present evidence of war crimes, but that it was for the RS to investigate and prosecute matters itself, and that their army could never have committed crime." In reality, President Karadzic then clarified "the army never committed any crime, and only an individual could have done that", and stated "we could not swear there are no crimes".[304] This was not a statement either ignoring crimes or advocating impunity. Read it context, it was the opposite.

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[297] *OB*, para. 498.
[298] *RB*, paras. 277, 281.
[299] *Judgement*, para. 3056.
[300] *Id*, paras. 2944, 2951.
[301] *Judgement*, para. 3356.
[302] *RB*, para. 278.
[303] *Id.*
[304] P1367, pp. 107-08.

156. The Trial Chamber selectively interpreted the evidence. The Prosecution, in turn, mischaracterised the Trial Chamber. The deference normally given to finders of fact cannot be afforded in the present case.

157. The suggestion that a statement from President Karadzic to **UN officials** that "ethnic cleansing was necessary"[305] or a professed aim to redistribute the population and remove large numbers of Muslims,[306] would not be reported to UNHQ because "they already knew", [307] is simply not reasonable and goes against the most basic principles of human rights monitoring and reporting.

158. Notwithstanding, the Prosecution does not engage with the error raised; that President Karadzic was found to be both "remarkably candid" with international representatives, but also "created a false narrative" at meetings with these same representatives. Simply stating that these findings are not inconsistent does not assist.[308] Particularly when, in reality, the Trial Chamber consistently found that exculpatory statements were "false" and inculpatory statements were "candid", demonstrating the far-reaching impact of its erroneous "disjuncture" theory on its reasoning.

159. President Karadzic highlighted the three Municipalities for which the Trial Chamber made findings of "**strategic importance**".[309] Other findings to which the Prosecution points often do little more than describe the remaining 17 Municipalities,[310] rather than identify a finding of their strategic importance.

160. The suggestion that a Municipality's inclusion in one of the Strategic Goals renders it of "strategic importance" is undermined by the inclusion of non-Indictment municipalities in these goals. Strategic Goal 4, for example, stating that the left bank of the Neretva river had to belong to East Herzegovina,[311] concerned municipalities such as Nevesinje, Ljubinje, and Gacko, none of which are among the 20.

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[305] *Judgement*, para. 2757.
[306] *Judgement*, para. 2726.
[307] *RB*, para. 282.
[308] *RB*, para. 284.
[309] *OB*, para. 516.
[310] *RB*, para. 298.
[311] P1379, p. 14-15; P956, p. 7.

161. The Trial Chamber's link between the 20 Municipalities and their "strategic importance" is also undermined by the importance placed by the leadership on non-Indictment municipalities, such as Petrovac, Krupa, Kupres, Doboj, and Drvar.[312] Petrovac municipality, for example, was considered to be very valuable for its military-strategic and economic importance to the Republika Srpska as a whole.[313] The Petrovac local authorities did not force the non-Serb population to leave the municipality, but rather protected the non-Serbs and ordered investigation of crimes against them.[314]

162. Regardless, the Prosecution does not dispute that the Trial Chamber found that the crimes in the minority of the Municipalities, rather than the lack of crimes in the majority of municipalities, reflected President Karadzic's objectives. The Trial Chamber's logic--finding a rule to be proven by exception--remains flawed. Of the 80 municipalities in the Republika Srpska, displacement was found in 17. In no legal or common sense, could this be characterised as "systematic".[315]

[312] P988, p. 68.
[313] P1385, p. 105.
[314] D1327; D1328; D1336; D1338; D1341; D1343; D1345; D1347.
[315] *Judgement*, paras. 3441, 3445, 3447.

29. JCE III

163. In seeking to downplay the relevance of domestic jurisprudence at the ICTY,[316] the Prosecution ignores the profound connection between English joint enterprise foreseeability and the JCEIII doctrine at the Tribunal. The principles of JCEIII itself, and the very words that define it, are grounded in English law.[317] The concepts of joint enterprise,[318] acts in furtherance of a common criminal design,[319] and the foreseeability standard[320] are all derived from English law. No other jurisdiction mirrors the discrete and precise language used by the ICTY so closely.

164. The Prosecution minimizes the role of these legal principles on the JCEIII jurisprudence.[321] The Appeals Chamber relied expressly on the leading English case of *Powell*[322] in support of the doctrine of JCEIII, with Judge Shahabuddeen quoting from it at length,[323] as well as from other English cases.[324] Now that *Powell* has been reversed on this specific point by *Jogee*[325] it is inapposite for the Prosecution to claim that the Appeals Chamber, having relied on English law as support for JCEIII, can disregard that the law on this precise issue has now been corrected.

165. The reluctance of other international tribunals to apply JCEIII liability[326] provides additional reasons to re-examine the scope of this doctrine in light of *Jogee*. In reversing over 30 years of jurisprudence, the U.K. Supreme Court took a courageous decision to ensure that criminal responsibility was imposed only on the guilty. The Appeals Chamber has the power to make that same courageous choice.

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[316] *RB* paras. 293, 295-96.
[317] *OB*, paras. 527-29.
[318] *e.g., Tadic AJ*, para. 227(ii), *R v Powell*, p. 26[F].
[319] *e.g., Tadic AJ*, para. 193, *Archbold* 2014, 33-65.
[320] *e.g., Tadic AJ*, para. 228, *R v Powell*, p. 8, [D].
[321] *RB*, para. 297.
[322] *R v Powell*.
[323] *Krajisnik AJ*, Separate Opinion of Judge Shahabuddeen, para. 33.
[324] *Id*, para 34; *Tadic AJ*, fn. 240, para. 224, fn. 287.
[325] *Jogee* paras. 52-59, 74-75.
[326] *OB*, para. 542.

30. Persecution

166. A Trial Chamber cannot convict an accused for a crime not charged in the indictment. Arguments as to whether or not President Karadzic's defence was "materially impaired" are irrelevant.[327]

167. Each victim of forcible transfer in the Municipalities, at some point, left his or her home. This could have occurred hours, days, months, or years before the act of forcible transfer. By the Prosecution's logic, a combatant who left his home for the last time in March 1991 to join the Patriotic League, captured in late May 1992 fighting for the ABiH, detained in Susica Camp, transferred to the Batkovici camp, then exchanged in December 1995, would still have been "forcibly transferred from his home". The Indictment's wording would be rendered meaningless.

168. President Karadzic is not "incorrect" that the indictment distinguished and separated crimes committed against persons in their homes, and crimes committed against persons in detention.[328] The Prosecution drew a distinction between "detention facilities" and "other places" in Schedules A and B. Forcible transfer "from their homes" could not have included persons in detention. The Trial Chamber erred in convicting President Karadzic for a crime with which he was not charged.

[327] *RB*, para. 303.
[328] *RB*, fn. 1147.

31. Untested Evidence

169. Adjudicated facts judicially noticed under Rule 94(B) are as much untested as evidence admitted under Rule *92 bis*. The Appeals Chamber has noted that both rules are procedural mechanisms adopted largely for the same purpose.[329] There would be no reason to limit adjudicated facts to those "not involving the acts and conduct of the accused" if they were not considered "untested" evidence in the same manner as statements under Rule 92 *bis*.

170. The "applicable regime enabling parties to challenge adjudicated facts at trial"[330] is no different between adjudicated facts and Rule 92 *bis* evidence. Even though the Defence may introduce evidence contrary to that of a Rule 92 *bis* witness, Rule 92 *bis* evidence is still considered "untested". The same holds true for adjudicated facts admitted under Rule 94(B), which the Defence may rebut. The Prosecution points to no case in which the Appeals Chamber has ruled that a finding that rests solely on an adjudicated fact was sufficient in the face of a challenge. The Appeals Chamber should hold that adjudicated facts are untested evidence.

171. The Prosecution's table of corroborative evidence for the impugned findings misses the point. Had the Trial Chamber relied on that evidence for its findings it would have cited to it in the supporting footnotes. The mere existence of other evidence in the record does not change the fact that the Chamber relied on untested evidence. And findings as to a pattern of criminal conduct in a Municipality, cannot substitute for evidence as to whether a specific Scheduled Incident occurred or the perpetrators' identity.

172. The Prosecution makes no effort to distinguish the Appeals Chamber's decision in *Djordjevic*, as opposed to that in *Popovic*, to reverse findings on scheduled incidents when they are erroneous.[331] Since findings on many scheduled incidents were based upon untested evidence, those findings must be reversed.

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[329] *Karemera Judicial Notice Appeals Decision*, paras. 50-51.
[330] *RB*, para. 305.
[331] *Compare OB*, paras. 562-67 with *RB*, para. 311.

IV. SARAJEVO

33. LOAC Issues

173. The Prosecution claims that the Trial Chamber "properly relied on the evidence of international observers and local victims" to find that the SRK **indiscriminately** targeted civilians.[332] But an attack is only impermissible when the attacker shelled a target "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."[333] The victims and observers upon whom the Trial Chamber relied were not in a position to know the military advantage that was anticipated.

174. For example, when confronted with evidence of ABiH positions in civilian areas, victims consistently testified that they knew nothing about them.[334] Likewise, international observers relied upon by the Trial Chamber to assess the "nature of shelling in Sarajevo", [335] acknowledged that they were unaware of ABiH military positions,[336] and admitted that the ABiH used civilian objects for military purposes.[337]

175. General Wilson, on whom the Trial Chamber "particularly relied" to find that the bombardment of Sarajevo was unrelated to "any conflict on the confrontation line" with "no military value" in the targets selected,[338] admitted he was not able to observe firing positions,[339] and that it was possible that there were more weapons in the city that he did not know about.[340] The Trial Chamber erred in relying on impressions of international observers, removed from the front lines and with imperfect information, to determine an attack's military advantage.

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[332] *RB*, para. 514.
[333] AP I, Article 51(5)(b).
[334] T1908, T1924, T1928, T1964, T1976, T5435, T6709-10, T6776, T8767, T9983, T9986, T9989.
[335] *Judgement*, paras. 3988-90, 4029-30, 4003, 4546.
[336] P1029, para. 44; T7291.
[337] T3943, T5891-92, T6841-42, T6882, T8063
[338] *RB*, para. 326.
[339] P1029, para. 44.
[340] T3942.

176. In discarding evidence of commanders launching the attacks, in favour of evidence of international observers and victims, the Trial Chamber failed to apply the "wide margin of discretion" afforded to belligerents.[341] It never even considered the legitimacy of the attacks from their perspective. It viewed Sarajevo through the wrong lens.

177. The Trial Chamber also erred in failing to consider that shells landing far from military targets may have been aimed at **mobile targets**. The Prosecution argues that the shelling in incidents G1 and G2 could not have been directed at mobile targets because it included areas of Sarajevo "other than those where the ABiH operated" and "nowhere near the ABiH's military operation".[342] It failed to exclude, however, that mobile mortars could have been employed in those areas. This is the holding of *Gotovina*. Where the Prosecution fails to prove that "outlying impacts" landing "far from military targets" were not aimed at mobile mortars, known to be employed by the enemy, its evidence is insufficient.[343]

178. Concerning **proportionality**, the fact that the VRS had "overwhelming superiority in heavy weapons" to make "responses more extreme"[344] or that civilian structures were "extensively damaged and destroyed"[345] is not determinative. The Trial Chamber was required to take another step, and analyse whether the shelling in question violated the proportionality principle. Was collateral damage excessive in relation to the military advantage anticipated? Repeating the Trial Chamber's findings that the shelling was disproportionate, or even "directed against civilians", does not address the Trial Chamber's failure to take this critical step.[346] It relied on evidence of extensive attacks to find that attacks were disproportionate.[347] That was the wrong test.

[341] *Blaskic TJ*, para. 180.
[342] *RB*, para. 320.
[343] *Gotovina AJ*, para. 63.
[344] *Judgement*, para. 3988.
[345] *Judgement*, paras. 4053-55.
[346] *RB*, para. 324.
[347] *Judgement*, paras. 4997, 4053-55.

179. That the Trial Chamber did not base its disproportionality findings solely on its erroneous conflation of "extensive" and "excessive" damage[348], or discussed the heavy weapon supremacy in other parts of the *Judgement*,[349] does not reduce the impact of its error. Not every aspect of a Trial Chamber's reasoning is required to be flawed to warrant appellate intervention.

[348] *RB*, paras. 326, 330.
[349] *RB*, para. 327.

34. Markale I

180. It is common "ground" that the location from which a projectile was fired cannot be determined from crater analysis unless the angle of descent is known.[350] The parties also have the same "angle" on the method of calculating the angle of descent—by measuring it from the hole in the ground made by the projectile.[351]

181. The UN experts found that in extracting the projectile from the crater at the Markale market without measuring the angle of descent, the first UN team unavoidably disturbed the integrity of the crater for any purpose that followed.[352] The hole made by the projectile was necessarily changed by the act of removing the projectile, disturbing and redistributing the gravel and dirt in and around the hole.[353]

182. This was recognised by the second UN team that came onto the scene. Captain Verdy saw no point in trying to measure the angle of descent of the new hole that was left after the projectile removal process.[354] Likewise, when the final UN expert team arrived on the scene several days later, Grande and Dubant, saw no point in measuring the new and different hole that was in place.[355] While the other two members, Hamill and Khan, did measure the hole, they agreed that the measurements were of no value in determining the angle of descent.[356]

183. To illustrate the point, compare the hole made by a hypothetical projectile in figure 1, below, with the hole left after the projectile was removed in figure 2. The angle of descent measured from the two holes are different due to the hole in figure 1 being changed to that in figure 2 by the shifting of gravel and dirt during the removal process.

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[350] T5983.
[351] *RB*, para. 336.
[352] P1441, p. 17.
[353] After the explosion, a Frebat officer used a knife to dig the tail fin out of the crater. T7700. 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. P1441, pp. 40-41.
[354] P1441, p. 16.
[355] *Id*, p. 27 (Grande), p. 29 (Dubant).
[356] *Id*, p. 23.

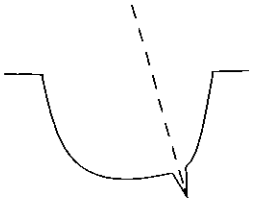

Figure 1

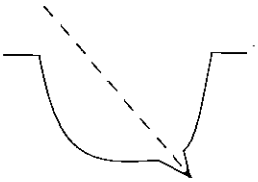

Figure 2

184. This demonstrates the "hole" in the Prosecution's argument. That the estimates of Zecevic, Hamill, Khan, and to some extent Russell, were approximately the same,[357] is not unexpected. While the Trial Chamber was "struck" by the similarities in those measurements, its conclusion is "cratered" by what it overlooked—they were all measuring the same hole, but they were not measuring the same hole as that made by the projectile. As a result, President Karadzic's conviction for this incident is unsafe.

[357] *RB*, para. 338.

36-37. Sarajevo JCE

185. The Prosecution's new theory, that the **meeting** could have occurred on 20 May before President Karadzic left for Lisbon,[358] contradicts the position it took at trial. In its *Final Trial Brief*, the Prosecution refers to the meeting as occurring "days later" than 19 May.[359] "Days later" President Karadzic was in Lisbon.[360]

186. In any event, the new theory is unsustainable on the evidence. On 20 May, Mladic wrote in his diary that Plavsic should be pulled out of Sarajevo.[361] [REDACTED], [362] [REDACTED].[363] [REDACTED],

187. The meeting's impact was not limited to Scheduled Incident G1.[364] The Trial Chamber relied upon President Karadzic's approval of the bombardment more broadly in support of the "Accused's contribution to the Sarajevo JCE", and his "support for Mladic and the SRK".[365] The Trial Chamber's reasoning cannot remain intact without the central event around which it turns.

188. On the issue of President Karadzic's **knowledge**, regardless of the number of internationals expressing concern to President Karadzic about VRS targets,[366] or how credible they were at trial,[367] the Trial Chamber erred in failing to consider how President Karadzic reasonably viewed their complaints in light of the contrary information he repeatedly received from his own Army that they were only firing when fired upon, and targeting legitimate military objectives. [368]

189. While, as the Prosecution points out, some sources within the Bosnian Serb structures occasionally "informed or discussed with Karadzic the SRK targeting of

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[358] *RB*, para. 367.
[359] *OTP Final Brief*, paras. 638-39.
[360] *Judgement*, para. 4026, fn. 13380.
[361] [REDACTED].
[362] [REDACTED].
[363] [REDACTED]
[364] *RB*, paras. 363-65.
[365] *Judgement*, paras. 4023, 4721.
[366] *RB*, para. 350.
[367] *RB*, para. 353.
[368] *Judgement*, paras. 4592-94, 4602, P2332, p. 6; D4511. *See also Judgement*, paras. 4785, 4814, 4821, 4831, 4841, 4945, P1274, p. 2, D2331, para. 10.

civilians",[369] and "at times he did not deny Bosnian Serbs had shelled civilian areas",[370] these were isolated incidents. The SRK's Chief of Artillery Colonel Manojlovic, reported that "the precision of shooting was greatly influenced by the defects and shortcomings in the training process, as well as by an inadequate level of skilfulness".[371] Not every civilian casualty was a result of deliberate targeting as part of a campaign to terrorise. Where President Karadzic believed that attacks had been disproportionate, he expressly disapproved of them.[372]

190. A reasonable Trial Chamber would have assessed President Karadzic's state of mind in light of the totality of information he was receiving and the way in which he reasonably viewed its sources. In only looking at half the story, the Trial Chamber was in error.

191. The Prosecution discounts President Karadzic's **orders to protect civilians** as motivated by pressure from the international community or political gain, or being few and far between, without follow-up.[373] However, it failed to produce a single document in which President Karadzic ordered, approved, or ever favoured indiscriminate or disproportionate shelling, or targeting civilians. Many confidential orders prohibiting targeting civilians were admitted at trial.[374] The argument that the Defence should have produced more examples is inconsistent with the Prosecution's burden of proof.

192. According to the Trial Chamber, "Directive 1" was the basis of the military offensive which led to incidents G1 and G2 at the war's beginning.[375] Directive 1 was a confidential document, so was not issued for propaganda purposes. It was issued before any international pressure concerning shelling. Neither the Prosecution nor the Trial Chamber[376] explained why President Karadzic would order in Directive 1 that

[369] *RB*, para. 354.
[370] *RB*, para. 362.
[371] *Judgement*, para. 4001.
[372] *Judgement*, paras. 4817, 4825, 4827, 4837.
[373] *RB*, paras. 57-58, 360-61.
[374] *OB*, Annex N.
[375] *Judgement*, para. 4041.
[376] *Judgement*, para. 4041.

"maltreating of civilian unarmed population is strictly forbidden and prisoners must be treated pursuant to Geneva Convention"[377] unless it was genuine.

193. The Prosecution schizophrenically paints President Karadzic as being simultaneously frank and secretive about the JCE.[378] If the plan to terrorise Sarajevo's civilian population was indeed being implemented in the open, why would President Karadzic's "approval" to massively bombard Sarajevo have been given in a secret meeting,[379] and why would he "deny, deflect, or otherwise absolve the SRK order's responsibility" for attacking civilians?[380]

194. Even if President Karadzic issued an order to protect civilians following pressure from international actors, as claimed by the Prosecution,[381] this does not change the character (or outcome). To make this argument, the Prosecution would have needed to establish that "politically motivated orders" were somehow ignored by the VRS or were otherwise ineffective. No such evidence exists.

195. That President Karadzic failed to "follow up" is inconsistent with the evidence.[382] The Prosecution ignores President Karadzic's speech before the Assembly:

> [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. [383]

196. The "damned if you do, damned if you don't" approach taken by the Prosecution and Trial Chamber made it impossible to come to any conclusion other than that President Karadzic shared the common purpose to terrorise civilians in Sarajevo. By ignoring the reasonable inference that President Karadzic meant what he said, the Trial Chamber erred.

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[377] D0232, p. 5.
[378] *RB*, para. 362.
[379] *RB*, para. 363.
[380] *RB*, para. 347.
[381] *RB*, paras. 357-58, 361.
[382] *RB*, paras. 358-60.
[383] *Judgement*, para. 4841.

V. SREBRENICA

38-39. Forcible Transfer

197. The Prosecution concedes, by its silence, that the Trial Chamber failed to provide a reasoned opinion on President Karadzic's contention that, although he signed **Directive 7**, he was not aware of the sentence in the body of a 13-page, single-spaced document that called for creating an unbearable situation for Srebrenica's inhabitants. Instead, the Prosecution provides an argument for the Appeals Chamber to consider when making its own determination.[384]

198. The facts set forth by the Prosecution do not establish that President Karadzic had read the document's fine print. For example:

- President Karadzic statement to the Assembly that he "examined" and "approved" the Directive[385] was actually "I have examined, approved and signed seven directives…"[386]
- While President Karadzic referred to Directive 7 when discussing the Srebrenica events with Robert Djurdjevic on 14 July 1995,[387] he never associated it with making life unbearable for the civilian population. In fact, he complained to Djurdjevic that Vice President Koljevic was having to spend more time negotiating passage for UNHCR trucks with the VRS than with the UN,[388] and was disappointed that Koljevic was unable to travel to Srebrenica to re-assure the civilians of proper treatment.[389] Djurdjevic testified that both Koljevic and President Karadzic favoured allowing the largest possible quantities of humanitarian aid to be delivered in an unhindered way.[390]

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[384] *RB*, paras. 374-77. It would have been more helpful to the Appeals Chamber had the Prosecution forthrightly conceded the lack of reasoned opinion. See *Defence RB*, para. 61.
[385] *RB*, para. 374.
[386] P1415, p. 84.
[387] *RB*, para. 374.
[388] P4515, p. 11.
[389] T25934.
[390] T25946.

- Directive 7 was a comprehensive document containing instructions to six different Army Corps deployed throughout Republika Srpska, as well as the Air Force and Military School. Contrary to the Prosecution's argument, making life unbearable for Srebrenica's inhabitants was not one of its main ingredients, not having its own heading or separate paragraph.[391] If it was, the topic would have been discussed on other occasions, yet the Prosecution has no trace of that.[392]
- The Prosecution's refers to President Karadzic's order for the *Krivaja 95* operation,[393] but omits that in that order, he demanded the VRS abide by the Geneva Conventions "in all dealings with prisoners of war and the civilian population."[394] This is further evidence that he was not aware of the offensive language in Directive 7.

199. The Trial Chamber erred in concluding that Directive 7 demonstrated President Karadzic's membership in a common plan to forcibly transfer civilians from Srebrenica.

200. The Prosecution's efforts to defend the Trial Chamber's erroneous conclusions concerning President Karadzic's involvement in **restricting humanitarian aid** to Srebrenica[395] are likewise unpersuasive.

- The State Committee was not created to tighten, rather than ease, passage of convoys.[396] Prior to its creation, President Karadzic had complained to the VRS that his orders regarding free passage of UN convoys[397] were not being respected.[398] The Committee approved over a hundred different humanitarian convoys to deliver goods to Srebrenica in the period March through July 1995.[399] On 13 June 1995, President Karadzic re-enforced the Committee's power

[391] P838, bottom of p. 10.
[392] *RB*, para. 377.
[393] *RB*, para. 376.
[394] P4481, p. 5.
[395] *RB*, paras. 380-83.
[396] *RB*, paras. 380-81.
[397] *e.g.* D43; D104; D105; D690; P2812.
[398] D701; D2166; D2172; D3521; P4968.
[399] D2068; D2115; D2116; D2117; D2118; D2119; D2120; D3287; D3957; P839; P4452.

Committee by ordering the VRS to immediately give "a positive opinion" to the Committee's decisions.[400]

- The Prosecution got its statistics wrong.[401] Exhibit P2443, referred to by the Prosecution in footnote 1619 does not say that 772 convoys were planned for June 1995, but that 772 mt (metric tons) of humanitarian aid was expected in Srebrenica, and that 230 mt was delivered.[402] The same exhibit also states that "UNHCR aid deliveries to the eastern enclaves were generally good in April 1995 when some 82% of the food target was met. UNHCR was also successful in gaining fairly regular access to the enclaves in early May [...] Access to Srebrenica and Zepa was, however, unhindered."[403] The VRS subsequently approved at least **556 mt** of humanitarian aid for Srebrenica in June 1995.[404]

201. The Prosecution's defence of the Trial Chamber's sinister spin to **three orders** issued by President Karadzic on 11 July[405] also makes no sense.

- If he intended to expel the Muslims permanently, what was the purpose of the language that "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"?[406]
- The Prosecution dismisses provisions in President Karadzic's orders such as these as "boilerplate language".[407] It ignores the fact that many of these orders were "strictly confidential" and not for dissemination to anyone other than those expected to execute those orders.[408] Adding "boilerplate" language to such orders would have been pointless.

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[400] P832.
[401] *RB*, para. 382.
[402] P2443, p. 6.
[403] P2443, p. 2.
[404] 231 mt on 2 June 1995 (P4452); 181 mt on 12 June 1995 (D2117); 144 mt on 19 June 1995 (D2118).
[405] *RB*, para. 385.
[406] D2055.
[407] *RB*, para. 386.
[408] P2994, paras. 3-4.

- The Prosecution claims that "the Chamber did not rely directly on the third order in assessing Karadzic's intent to forcibly remove."[409] However, the Trial Chamber explicitly found that this order "had the practical effect of limiting international access to the enclave".[410] That was untrue.[411]

202. Finally, the Prosecution claims that **President Karadzic's interview** with *El Pais* demonstrates that he knew the Muslims had been forcibly removed from Srebrenica.[412] The Prosecution selects part of the interview and takes it out of context. In fact, President Karadzic stated during that interview that "whoever wishes to stay can do so", "as for ethnic cleansing, it has never been part of our policy", and "there is some intimidation by terrorist elements, by extreme Serbs [...] but the authorities protect our citizens regardless of whether they are Muslims or Croats".[413]

[409] *RB*, para. 389.
[410] *Judgement*, para. 5817.
[411] *OB*, paras. 683-84.
[412] *RB*, para. 391.
[413] P2564, pp. 4-5.

40. Killings

203. The Prosecution frequently criticises President Karadzic for repeating his trial arguments on appeal.[414] But that is what one would expect an innocent person to do. President Karadzic's account has been the same from the beginning. He had no knowledge that the prisoners from Srebrenica would be, were being, or had been executed.[415]

204. The Trial Chamber inferred that President Karadzic shared the common purpose of executing the prisoners from his intercepted conversation with Miroslav Deronjic on the evening of 13 July. It interpreted President Karadzic's statement that the "goods" should be placed in the warehouse "somewhere else" as an order to move the prisoners to Zvornik where they would be executed.

205. The Prosecution fails to point to anything in the **text of the conversation** that would point to Zvornik as the place where the prisoners should be taken. It never explains how Deronjic was supposed to know that the term "somewhere else" referred to Zvornik.[416] Instead it argues that the fact that the prisoners ended up in Zvornik must mean that President Karadzic ordered it.[417]

206. While the Prosecution repeats the finding in the *Judgement* that President Karadzic's **use of code** supports the inference that he was speaking about executing the prisoners,[418] it fails to explain how the inference proffered by President Karadzic—that it was unwise to discuss the location of prisoners on unsecured lines[419]—was an unreasonable one. [REDACTED].[420] And if the Srebrenica conspirators had an agreed-upon code for the prisoners "marked for death" to be referred to as "parcels", [421] President Karadzic was obviously not in on it, as he referred to the prisoners as "goods".[422]

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[414] *RB*, paras. 396, 401, 409, 412, 435, 437.
[415] T982-86; T28878-80; T47838-39.
[416] *OB*, para. 711.
[417] *RB*, para. 400.
[418] *Id.*
[419] *OB*, para. 721
[420] [REDACTED].
[421] *RB*, para. 400.
[422] Compare "paket" in P5070 and P5074 with "roba" in President Karadzic's conversation, P6692.

207. The Prosecution also fails to come to grips with the Trial Chamber error[423] in finding that Prosecution witnesses Srbislav Davidovic and Milenko Katanic **corroborated** 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."[424] As the Prosecution's discussion of Davidovic's[425] and Katanic's[426] evidence shows, Deronjic never told either man, or said to anyone as far as they knew, that Karadzic had ordered the prisoners to be transferred to Zvornik. The only evidence that Deronjic allegedly said that came from Momir Nikolic's uncorroborated testimony.[427]

208. The Prosecution's claim that Beara's statement to KDZ320 that he had an order from "**two Presidents**" to "get rid of" the Muslim detainees corroborates Nikolic,[428] ignores that KDZ320, who was in the best position to know, testified that he did not believe Beara was referring to President Karadzic, or if he was, that he was not telling the truth.[429] And who was the other President? The Prosecution never answers that.

209. That Momir Nikolic knew Deronjic, was present in his office on the night of 13 July, and was centrally involved in the Srebrenica events,[430] does not corroborate the words he attributed to Deronjic that constitute the only evidence that President Karadzic ordered the prisoners to be taken to Zvornik.

210. While the Prosecution urges the Appeals Chamber to disregard the evidence of the third person present during the Deronjic-Beara conversation—Zvornik Police Chief Vasic—that he also understood that President Karadzic ordered the prisoners to be taken

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[423] *OB*, para. 698.
[424] *Judgement*, para. 5712, citing 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."
[425] *RB*, para. 404.
[426] *Id*, para. 405. That Katanic thought Deronjic was assisted by Karadzic to relocate the prisoners from Bratunac does not speak to whether Karadzic ordered them taken to Zvornik or Batkovici. President Karadzic said they should be taken "somewhere else" and not kept in Bratunac.
[427] *Judgement*, para. 5312.
[428] *RB*, para. 406.
[429] T28084, T28086: "[I]t was possible that the monologue and the tone of this person probably could suggest that he was trying to impress upon the others that this was something that was a binding order."
[430] *RB*, para. 407.

to Batkovici,[431] it provides no explanation for his absence from the proceedings. Vasic had direct knowledge of a critical element of the Prosecution case. The Appeals Chamber is entitled to draw a negative inference from [REDACTED].[432]

211. No reasonable Trial Chamber would have made such a finding on Momir Nikolic's **uncorroborated testimony**. Trial Chambers have expressly refused to rely on the uncorroborated testimony of a plea-bargaining accomplice on facts critical to an accused's responsibility.[433] The Prosecution refuses to engage with that jurisprudence, preferring to label it as involving "case-specific issues" and in "different circumstances".[434] Yet the Prosecution fails to point to a single case in international jurisprudence where an accused was convicted solely on uncorroborated evidence of a plea-bargaining accomplice. It was unreasonable and unsafe to convict President Karadzic for the Srebrenica killings on such evidence.

212. The Prosecution's efforts to demonstrate that it was unreasonable to infer that President Karadzic intended the prisoners be taken to **Batkovici** are unconvincing. There is no document or testimony showing that he knew the prisoners had been taken to Zvornik—no VRS report, no intercepted conversation, and no testimony from any of the many people who encountered President Karadzic during that period. Therefore, the Prosecution's claim that President Karadzic never objected to the prisoners being taken to Zvornik,[435] or that he never told anyone the prisoners had been taken to Batkovici, misses the point. He never told anyone the prisoners had been taken to Zvornik either. He simply did not know the prisoners' fate.

213. The references to Batkovici by Beara, Tolimir, and General Mladic during the 13-14 July period, and the expectations of [REDACTED], Mane Duric, and General Radinovic[436] support the inference that Batkovici was the place where prisoners captured in the Srebrenica area would be normally taken.[437] The Prosecution's showing that the

[431] *RB*, para. 419.
[432] *Graves v United States*, p. 121.
[433] *OB*, paras. 715-17.
[434] *RB*, paras. 410, 444.
[435] *RB*, para. 413.
[436] *OB*, paras. 705-10.
[437] *OB*, para. 711.

VRS instead sent the prisoners to Zvornik[438] does not explain how Deronjic could have possibly understood President Karadzic to mean Zvornik when he said that the "goods" were to be placed in the "warehouses" not "over there" (Bratunac) but "somewhere else", much less that this was the only reasonable inference.

214. The Prosecution's discussion of President Karadzic's **subsequent acts** fail to appreciate that after-the-fact knowledge of the Kravica warehouse incident would not support the Chamber's finding that Karadzic contemporaneously shared the JCE's common purpose to eliminate the Muslims by killing the men. The Prosecution does not distinguish between acts which show that President Karadzic had ordered the prisoners taken to Zvornik to be killed (and thus been part of the common purpose to kill the prisoners), and acts which show he may have learned of the killings at the Kravica warehouse after-the-fact. The evidence it cites largely goes to the latter point.[439]

215. Had President Karadzic ordered the prisoners taken to Zvornik to be executed, and intended to facilitate burials by his **declaration of war**,[440] that declaration would have extended to Zvornik municipality. The fact that it was limited to the Srebrenica area shows that President Karadzic had neither the knowledge that the prisoners had been moved to Zvornik nor the intent to facilitate burials.

216. The Prosecution claims that President Karadzic "received **reports** confirming implementation of the killing operation"[441] but, despite its access to hundreds of such reports, is unable to point to even a single written report in which the killing was even alluded to. There were none. The Prosecution's argument that because later reports made no mention of prisoners, President Karadzic must have known they were killed is speculative, and not the only inference to be drawn. There would also be no reports about prisoners had they been transferred to Batkovici, which was in the zone of the Eastern Bosnia Corps.

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[438] *RB*, paras. 414-19.
[439] *RB*, paras. 422 (declaration of war in Srebrenica area facilitated burial of prisoners); paras. 427, 431-34 (meetings w/Deronjic, Kovac, and Bajagic who allegedly told him of Kravica killings). These are discussed in Grounds 42-43.
[440] *RB*, para. 422.
[441] *RB*, para. 427.

217. President Karadzic's **acts and statements** after his 13 July conversation with Deronjic are consistent with his position that he did not order the prisoners to be killed. The Prosecution fails to explain why President Karadzic would have sought to publicly take credit for the Srebrenica operation if he was aware that the prisoners had been executed.[442]

218. Contrary to the Prosecution's argument,[443] President Karadzic's 17 July interview with **David Frost** confirms that he had no knowledge that the prisoners had been executed. When Frost asked him about "15,000 men missing, unaccounted for, from Srebrenica—that you have got them somewhere," President Karadzic immediately thought of the 15,000 Muslim men in the column, not the 2,000+ prisoners that had been captured. He answered that many of those people would reach Muslim territory "today, even tomorrow" and that they would soon be accounted for.[444] Had he known that those prisoners had been executed, it would be foolish and counterintuitive to claim that people he knew to be dead would be showing up today and tomorrow.

219. And the Prosecution's claims that President Karadzic denied internationals **access** to the Srebrenica and Bratunac area[445] are untrue. The request for access by the ICRC to the Srebrenica-Bratunac area was granted in late July, immediately after Mazowiecki's letter.[446] UN access to Republika Srpska had already been curtailed due to the NATO bombing in May 1995.[447] While those who had concealed the executions from President Karadzic would also be expected to conceal them from the ICRC, the Prosecution has shown no evidence that President Karadzic refused them access to those areas.

220. Nothing in the Prosecution's response comes close to establishing beyond reasonable doubt that President Karadzic ordered the prisoners to be taken to Zvornik to be killed. Its effort to dress up the Trial Chamber's finding cannot mask the fact that it was based solely upon an interpretation of incomplete notes of a cryptic conversation.

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[442] *RB*, para. 437.
[443] *RB*, para. 440.
[444] P5235, pp. 2-3.
[445] *RB*, paras. 441-42.
[446] *RB*, para. 443; P2284, para. 409.
[447] *Judgement*, para. 5983.

The Trial Chamber's reliance on Momir Nikolic's uncorroborated testimony to support its interpretation was not only unwise and unsafe; it was an injustice.

41. Genocide

221. The Trial Chamber first found that President Karadzic ordered the Srebrenica prisoners to be taken to Zvornik to be killed based on an inference from a cryptic telephone conversation. That was an error.[448] The Trial Chamber then magnified its error by disregarding President Karadzic acts that saved UN local staff in Srebrenica from execution, and finding President Karadzic had genocidal intent based on an inference that he ordered or favoured closing a corridor for safe passage.

222. The Prosecution first fails to defend the Trial Chamber's erroneous reasons for disregarding President Karadzic's order to release **UN local staff**,[449] and instead offers a different theory, raised for the first time.[450] Theories may abound, but the Trial Chamber was required to demonstrate that there was no reasonable inference consistent with innocence.[451] It was indeed a reasonable inference that President Karadzic's order to release UN local staff was inconsistent with intent to destroy the Bosnian Muslims. No reasonable Trial Chamber could have disregarded this order and found the opposite--that President Karadzic intended that every able-bodied Bosnian Muslim male from Srebrenica be killed.[452]

223. The Prosecution misconstrues President Karadzic's position concerning his knowledge of the opening of the **corridor**.[453] He never denied that he knew that a corridor had been opened,[454] but denied that he was opposed to opening the corridor.[455]

224. The Prosecution then fails to show how the inference that President Karadzic opposed opening the corridor, and ordered it closed, was the only reasonable inference available.[456] Although President Karadzic knew of the opening of the corridor some two hours after it opened,[457] the corridor remained open for the agreed-upon time of 24 hours,

[448] Ground 40, above.
[449] *OB*, paras. 750-52.
[450] *RB*, para. 451.
[451] *Delalic AJ*, para. 458.
[452] *Judgement*, para. 5830.
[453] Contra *RB*, para. 453.
[454] *Judgement*, fn. 18688.
[455] T47945.
[456] *RB*, para. 453.
[457] *Judgement*, para. 5472.

plus an additional two hours.[458] The Chamber's finding that President Karadzic ordered, or even favoured, closing the corridor, was not the only reasonable inference.[459]

225. Likewise, the Prosecution fails to refute President Karadzic's argument that the Chamber erred in finding that the only reasonable inference from his comments at the Assembly session in August 1995 was that he opposed opening the corridor and hence wanted every Muslim killed.[460] President Karadzic's position, also taken at trial, that he was referring to the VRS' military tactics and not the killing of civilians,[461] is borne out by reading his full remarks, which criticised the VRS for allowing soldiers to escape and regroup by diverting its resources to Zepa.

226. The Prosecution ignores President Karadzic's point in his *Opening Brief* that if being opposed to opening the corridor established genocidal intent, why wasn't General Krstic, who opposed opening the corridor, found to have genocidal intent?[462]

227. The Prosecution also fails to engage with the ICTY and ICTR jurisprudence in which similar inferences drawn by Trial Chambers were found to be unreasonable.[463] Contrary to the Prosecution's argument,[464] jurisprudence in which the Appeals Chamber has reviewed and reversed inferences made by other Trial Chambers provide a framework in which to determine whether this Trial Chamber was reasonable in finding that genocidal intent was the only inference to be drawn from President Karadzic's actions and statements about the corridor. And when prominent scholars are unconvinced by the Chamber's genocidal intent finding,[465] it should be a cause for concern to the Appeals Chamber and a reason for heightened scrutiny.

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[458] *Judgement*, para. 5470. The Prosecution's claim that an inference should be drawn from the fact that President Karadzic never ordered the corridor to remain open, *RB*, para. 453, is devoid of any evidence that at the time the corridor was finally closed, 26 hours after it opened, and 24 hours after President Karadzic learned it was open, any Bosnian Muslims remained on the Serb side of the confrontation line.
[459] *OB*, paras. 754-57.
[460] *RB*, para. 452.
[461] T47945, *OB*, paras. 758-62.
[462] *OB*, para. 763.
[463] *OB*, paras. 756-57, 764-70.
[464] *RB*, para. 455.
[465] *OB*, para. 771.

228. For all of these reasons, the Prosecution's claim that the Trial Chamber drew the only reasonable inference when finding that President Karadzic had genocidal intent is unconvincing. President Karadzic should never have been convicted of genocide.

229. Nor can President Karadzic be convicted of **aiding and abetting** genocide, should the Appeals Chamber reverse the JCE genocide finding. The Prosecution has pointed to no evidence whatsoever that President Karadzic knew of General Mladic, Colonel Beara, or Lt. Colonel Popovic's genocidal intent. It acknowledges that President Karadzic had no contact with Beara and Popovic at all.[466] Its claim that President Karadzic could have learned of General Mladic's genocidal intent from a telephone call on 13 July in the presence of three Americans[467] or from Kovac, who denied even discussing Srebrenica events with President Karadzic,[468] is pure speculation without a scintilla of evidentiary basis.[469] The Trial Chamber itself made no such findings.

230. The Prosecution tries to build a picture of a substantial contribution from a variety of findings, most challenged herein, including the fact President Karadzic was the "only person" with the power to prevent the movement of the detainees to Zvornik.[470] The requisite findings for aiding and abetting by omission are missing from the Judgement. There is no finding, for example, that in failing to intervene President Karadzic was aware of the "encouraging" effect this omission would have on the crimes.[471] Nor does the Prosecution point to comparable cases in which an accused so removed from the crimes was found liable for having substantially contributed to them by omission. There are none. [472]

231. Finally, it is useful to step back and examine President Karadzic's genocide conviction in perspective. After 22 years, with thousands of highly trained NATO, UN, Bosnian Government, Dutch Government, NGOs, and ICTY personnel investigating, tens of thousands of documents collected, millions of Euros spent, and a crack team of

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[466] *RB*, para. 460.
[467] *Judgement*, para. 5768.
[468] *Judgement*, para. 5781.
[469] *RB*, para. 460. See *Krstic AJ*, para. 98.
[470] *RB*, para. 459.
[471] *Muvunyi TJ*, para. 472.
[472] *Brdjanin AJ*, para. 275; *Mpambara TJ*, para. 22.

lawyers desperate to nail the most high profile accused still alive for the worst massacre in Europe since WWII, all they can come up with is one line from a cryptic intercepted conversation with Deronjic and fragments of an Assembly speech about closing the corridor.

232. There is one explanation for this. President Karadzic had no knowledge that prisoners from Srebrenica would be, were being, or had been killed. President Karadzic is not guilty. His conviction for genocide is wrong.

42-43. Superior Responsibility

233. President Karadzic was found liable as a superior for failing to punish the perpetrators of seven enumerated killing events on 13 July.[473] The Prosecution cites to no evidence whatsoever that he knew, or had reason to know, of any killings other than those at Kravica Warehouse. The killings occurred at different times and places and involved different perpetrators from different units. Merely repeating the *Judgement* that knowledge of the Kravica Warehouse killings "was sufficiently alarming information to justify inquiring into the possibility of other crimes"[474] does not explain how President Karadzic can be liable for crimes he had no reason to know about.

234. Neither the Trial Chamber nor the Prosecution cited authority for the proposition that an accused may be liable under Article 7(3) for failing to punish crimes that he had no reason to know about. Considerable authority to the contrary exists.[475]

> Whatever information is said to have been relevant to establishing the state of mind of the accused, the superior must be shown to have acquired it and known of it at the time relevant to the charges. The information may not simply be shown to have been "out there" and available in some form short of establishing that the commander actually acquired it. Any other standard falls short of recognized customary international law.[476]

235. If a superior can be held responsible for all crimes that might be uncovered by an investigation, regardless of his reason to know of those crimes at the time, superior responsibility would become a form of strict liability. Therefore, at the outset, the Appeals Chamber should vacate the finding that President Karadzic is liable as a superior for all killings other than those at the Kravica Warehouse.

236. The conclusion that Deronjic and Kovac informed President Karadzic of the Kravica Warehouse killings was made without any evidence to that effect. While the Prosecution now joins the speculation that Deronjic and Kovac told President Karadzic about the incident, and in a way that provided sufficiently alarming information that

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[473] Listed in *Judgement*, para. 5837.
[474] *RB*, para. 466.
[475] *Ndindilyimana AJ*, para. 396; *Bizimungu AJ*, paras. 146, 252; *Oric AJ*, paras. 59-60.
[476] *Mettraux Treatise*, p. 217.

Republika Srpska's President needed to intervene,[477] no reasonable Trial Chamber could have concluded that this was the only reasonable inference available on the evidence.

237. The Prosecution's rebuttal of the other reasonable inference that the information provided to President Karadzic about the Kravica Warehouse incident may have been presented to President Karadzic in a way that was not sufficiently alarming,[478] ignores the evidence that; (1) Ljubislav Simic did not know what Deronjic had told President Karadzic about the incident, or even if President Karadzic was the person in Pale whom he had told;[479] (2) Tomislav Kovac had not seen any bodies when passing the Kravica Warehouse;[480] and (3) the incident was seen at the time as a spontaneous response to an escape attempt by the prisoners.[481]

238. With respect to genocide, the Prosecution claims that Article 7(3) does not require that the superior be aware of the subordinates' intent to destroy, but that it is sufficient that the superior has information—albeit general—which alerts him to the risk of his subordinates perpetrating killings with the intent to destroy.[482] However, the ICTR Appeals Chamber has held, citing the same paragraph of the *Krnojelac* judgement relied upon by the Prosecution, that "in the case of specific intent crimes such as genocide…this requires proof that the superior was aware of the criminal intent of the subordinate."[483]

239. Under either standard, even if President Karadzic were told of the Kravica Warehouse killings, he would not be alerted to the risk that those killings were committed with the intent to destroy. It is undisputed that the killing started after an escape attempt in which a prisoner killed one guard and injured another.[484] The Prosecution never explains how President Karadzic could have believed that those killings were committed with the intent to destroy the Bosnian Muslims as such.

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[477] *RB*, paras. 468-69, 473.
[478] *RB*, para. 470-71.
[479] T37310.
[480] T42778-79.
[481] T24413; T24506; D3115, para. 40; D3126, para. 59; D3398, para. 79.
[482] *RB*, para. 476.
[483] *Karemera AJ*, para. 307.
[484] *Judgement*, para. 5228.

240. By refusing to engage with the jurisprudence,[485] the Prosecution ignores that the Appeals Chamber, and another Trial Chamber, composed of reasonable Judges, found in other cases that knowledge of the Kravica Warehouse killings, or even other murders, did not equate to knowledge that those killings were committed with genocidal intent.[486] It provides no reason why that was not a reasonable inference in President Karadzic's case.

241. Finally, the Prosecution's assertion that the Chamber's superior responsibility findings would also be a sufficient basis to enter an Article 7(3) conviction for the crimes (including genocide) that occurred after 13 July,[487] is incorrect. Reversal on Grounds 40 and/or 41 would undermine the Trial Chamber's findings on *mens rea* and would not allow the Appeals Chamber to enter a conviction for genocide under Article 7(3).[488]

[485] *RB*, para. 478.
[486] *Popovic TJ*, paras. 1588-89 2100; *Blagojevic AJ*, para. 123.
[487] *RB*, fn. 2028.
[488] *Gotovina AJ*, para. 156.

VI. HOSTAGE TAKING

44-45. Hostages JCE

242. To establish hostage-taking, the Prosecution must prove a **threat** to kill, injure or continue to detain, in order to obtain a concession or gain an advantage. This is the "essential feature" of hostage-taking.[489]

243. Three types of threats were relied upon by the Trial Chamber: (1) placing the detainees in strategic locations;[490] (2) President Karadzic's own statements;[491] and (3) statements of others.[492]

244. The Trial Chamber concluded that detaining UN personnel at strategic locations was "tantamount" to a threat to harm UN personnel, [493] Unable to locate the actual threat in the Trial Chamber's findings, the Prosecution argues that "Karadzic's order to use the prisoners as human shields obviously involves the communication of intention to harm".[494] This is unpersuasive

245. The Prosecution fails to show how transporting a detainee to "locations of military significance" communicates a threat of harm. Pushing a person in front of an oncoming train places that person at a high risk of harm, but it is not a threat.

246. As to President Karadzic's own statements, the Prosecution claims that the Trial Chamber "properly" interpreted President Karadzic's statement that any attempt by the major powers to use force to liberate the detained UN personnel would "end in catastrophe" and would "be a slaughter".[495] But the Trial Chamber did not accurate quote President Karadzic. Referring to the "major powers", President Karadzic actually said: "any attempt to liberate them **by force** would end in catastrophe. It would be a slaughter."[496]

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[489] *Judgement*, para. 468.
[490] *Judgement*, paras. 5966, 5969.
[491] *Judgement*, paras. 5967-69
[492] *Judgement*, paras. 5970-72.
[493] *Judgement*, fn. 20437. It also never charged this conduct as a threat. See Ground 5.
[494] *RB*, para. 483 (emphasis added).
[495] *RB*, paras. 484-85, referencing *Judgement*, para. 5967.
[496] D1056 (emphasis added).

247. When the idea of "force" by the major powers is re-inserted, the slaughter is far more likely to refer to the military battle than killing the detainees. A "proper" interpretation of President Karadzic's statement would never have omitted the key phrase "by force".

248. This interpretation is corroborated by President Karadzic's next words--ignored by both the Trial Chamber the Prosecution--that "this has to be solved by political means".[497] He "welcomed statements from NATO and the five-nation Contact Group backing a diplomatic solution to the confrontation", calling it "a very encouraging and important sign for us".[498] Read in context, President Karadzic is advocating that the "slaughter" and "catastrophe" of a military battle must be avoided. It was not a threat to slaughter the detainees. No reasonable Trial Chamber was entitled to draw that inference. The Trial Chamber's finding that President Karadzic's own statements were "tantamount" to threats[499] is "tantamount" to error.

249. As to statements of others, the Prosecution points to no evidence that President Karadzic had actual knowledge of any of those statements. Its position would impute knowledge to President Karadzic of all private conversations of an unspecified number of close subordinates, concerning any event during the war, even in the absence of any evidence to suggest knowledge on his part.[500] This cannot be the standard by which criminal culpability is ascribed. The lack of evidence that President Karadzic knew of the threats of others made it unreasonable to hold him responsible for those threats.

250. Should the Appeals Chamber find that no express or implied threats of death or injury can be attributed to President Karadzic, all that remains are his statements that UN personnel would continue to be detained. President Karadzic's position is that it is not a crime to threaten to continue to detain persons who are **lawfully detained**.

251. The Prosecution, in essence, agrees. It argues that it is the threat that must be unlawful under IHL, rather than the detention itself.[501] Either way, if President Karadzic

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[497] *Id.*
[498] *Id.*
[499] *Judgement*, para. 5969.
[500] *RB*, para. 486.
[501] *RB*, para. 488.

believed that UN personnel were lawfully detained, the threats to continue to detain them were not unlawful under IHL.

252. Contrary to the Prosecution's argument,[502] the lawfulness of detention cannot depend on the detainee's treatment. A perpetrator would still be guilty of hostage-taking if he detained UN personnel and conditioned their release upon an act by a third party, yet treated the UN personnel well in detention. Mistreating a detained person is a separate crime and has nothing to do with hostage-taking.

253. The Trial Chamber erred in relying on President Karadzic's threats of continued detention.[503] The Appeals Chamber should reverse President Karadzic's conviction for hostage-taking.

[502] *RB*, para. 489.
[503] *Judgement*, para. 5984.

46. Reprisals

254. Having reviewed the *Response Brief* and the authorities contained therein, President Karadzic withdraws this ground of appeal.

VII. SENTENCING

47-50. Mitigating Circumstances

255. ICTY Rule 101(B)(ii) provides that the Trial Chamber shall take into account "any mitigating circumstances". A Trial Chamber is obliged to take recognised mitigating circumstances into account. It retains the discretion as to what weight to give to those mitigating circumstances.[504]

256. The Prosecution fails to explain why the Trial Chamber did not breach this rule when it refused to even consider President Karadzic's **good conduct during the war, lack of preparation for war,** and **difficulties in exercising command**. Its arguments[505] go to the weight to be afforded to those circumstances in sentencing, but not whether it was error to refuse to consider them at all.

257. The Prosecution's contention that a breach of an agreement not to prosecute does not give rise to a **violation of rights**[506] is contradicted by jurisprudence concerning breach of such agreements.[507] The delay occasioned by its disclosure violations were no more President Karadzic's own fault,[508] than the delay in *Nyiramasuhuko* was the fault of the accused there. While, as the Prosecution points out, the delay was shorter,[509] the reason for the delay was the same—unjustified prosecution violation of its disclosure obligations. The length of the delay is relevant to the amount of credit in any sentencing reduction, but cannot excuse the Trial Chamber's failure to recognise it as a mitigating circumstance altogether.

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[504] *Delalic AJ,* para. 777.
[505] *RB,* para. 498.
[506] *RB*, para. 494.
[507] *Santobello v New York*, p .262.
[508] *RB*, para. 496.
[509] *Id.*

VIII. CONCLUSION

258. These are the final written words from President Karadzic in his case. They are written 25 years, to the day, after war broke out in Bosnia and Herzegovina. On this occasion, it is appropriate to look back to the beginning of international criminal justice.

259. In his opening statement at Nuremberg, Prosecutor Robert Jackson said:

> We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[510]

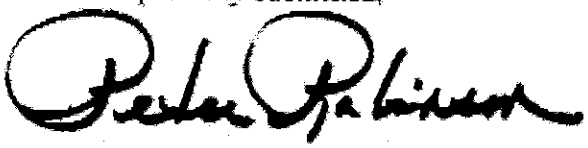
260. President Karadzic's trial did not live up to these aspirations. The errors highlighted in this appeal led to a trial that was unfair, and findings that were untrue.

261. It would be easy for the Appeals Chamber to want to overlook these errors and declare the project of bringing Radovan Karadzic to justice a success. To order a new trial or vacate the convictions in this high-profile case will take enormous judicial courage.

262. President Karadzic respectfully urges the Appeals Chamber to do what is right and just, rather than what is expected and expedient. The Trial Chamber's *Judgement* should be **REVERSED**.

Word count: 21,710.

Respectfully submitted,



PETER ROBINSON
Counsel for Radovan Karadzic

[510] IMT, 1947. pp. 98-102, available at https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/

**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: **Olufemi Elias**

Date Filed: **13 April 2017**

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public Redacted Version

ANNEX TO RADOVAN KARADZIC'S REPLY BRIEF

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RADOVAN KARADZIC'S GLOSSARY

Pleadings, Orders, Decisions, etc. from Prosecutor v Karadzic

65 ter Submission	*Defence Submission pursuant to Rule 65 ter and Related Motions* (27 August 2012)
92 bis Decision—Defence	*Decision on Accused's Motions for Admission of Evidence pursuant to Rule 92 bis* (18 March 2014)
92 bis Decision—Spahic	*Decision on Accused's Motion to Call Witness Ferid Spahic for Cross-Examination* (6 April 2011)
92 bis Motion—Banovic	*Motion to Admit Testimony of Predrag Banovic pursuant to Rule 92 bis* (11 February 2014)
92 bis Motion—Spahic	*Motion to Call Witness Spahic for Cross Examination* (2 March 2011)
92 bis Response—Basara	*Prosecution Response to Motion to Admit Testimony of Branko Basara pursuant to Rule 92bis* (11 February 2014)
92 bis Response—Rendic	*Prosecution Response to Motion to Admit the Testimony of Pero Rendic pursuant to Rule 92bis* (14 January 2014)
92 quater Decision—Koprivica	*Decision on Accused's Motion for Admission of Statement of Rajko Koprivica pursuant to Rule 92 quater* (3 October 2012)
92 quater Motion—Jakovljevic	*Motion to Admit Testimony of Borivoje Jakovljevic Pursuant to Rule 92 quater* (21 January 2014)
Banovic Decision	*Oral Decision on Assignment of Counsel to Predrag Banovic* (16 January 2014) T45428-29
Defence Case Decision	*Decision on Time Allocated to the Accused for the Presentation of his Case* (19 September 2012)
Defence Final Brief	*Defence Final Trial Brief*, (29 August 2014)
Denadija Reconsideration Motion	*Motion for Reconsideration of Decision Denying Admission of Statement of Dusan Denadija*, (8 April 2015)
Holbrooke Agreement Appeals Decision	*Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal of Trial Chamber Decision on Alleged Holbrooke Agreement* (12 October 2009)
KDZ486 Decision	*Decision on Motion for Reconsideration and*

	Request to Withdraw Evidence of KDZ486 (23 October 2013)
Miletic 65 ter Summary	*Supplemental Rule 65 ter Summary...for General Radivoje Miletic* (18 June 2013)
[REDACTED]	
OTP Defects Response	*Prosecution Response to Motion for Relief from Defects in the Indictment* (11 September 2014)
OTP Final Brief	*Prosecution Submission of Final Trial Brief* (29 August 2014)
OTP Form of Testimony Submission	*Prosecution Submission on Form of Karadzic's Testimony* (8 January 2014)
OTP Hostage Taking Appeal Brief	*Prosecutor v Karadzic*, No. IT-95-5/18-AR73.9, *Prosecution Response to Appeal from Denial of Judgement of Acquittal for Hostage Taking* (6 August 2012)
OTP Pre-Trial Brief	*Prosecution's Submission pursuant to Rule 65 ter(E)(i)-(iii)* (18 May 2009)
[REDACTED]	
Protective Measures Decision—Defence 1	*Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543* (1 November 2012)
Protective Measure Decision—KW194	*Decision on Accused's Motion For Protective Measures for Witness KW194* (12 November 2012)
Registry Site Visit Submission	*Registry's Submission Pursuant to Rule 33(B) on the Presence of the Accused during the Site Visit* (14 January 2011)
[REDACTED]	
Second Site Visit Submission	*Second Submission on Site Visit* (13 December 2010)
Site Visit Decision	*Decision on Site Visit* (28 January 2011)
Site Visit Order	*Order on Submissions for a Site Visit* (15 November 2010)
Site Visit Submission	*Submission on Site Visit* (6 October 2010)
Srebrenica Site Visit Submission	*Defence Submission on Srebrenica Site Visit* (31 January 2012)
Subpoena Decision—Kalinic	*Decision on Accused's Motion to Subpoena Dragan Kalinic* (18 December 2013)
Subpoena Decision—Mijic	*Decision on Accused's Motion to Subpoena Ranko Mijic* (11 January 2013)
Subpoena Decision—Mladic	*Decision on Accused's Motion to Subpoena Ratko Mladic* (11 December 2013)
Subpoena Decision—Tomovic	*Decision on Accused's Motion to Subpoena Milos Tomovic* (28 January 2013)

Subpoena Motion—Forca	*Motion for Subpoena to Srdan Forca* (6 December 2013)
Video-Link Decision—Jovicinac	*Decision on Motion for Video-Conference Link Testimony for Srboljub Jovicinac* (27 January 2014)

MICT authorities

Ngirabatware AJ	*Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014)

Other ICTY authorities

Blagojevic AJ	*Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007)
Blaskic AJ	*Prosecutor v Blaskic*, No IT-95-14-A, *Judgement* (29 July 2004)
Blaskic TJ	*Prosecutor v Blaskic*, No IT-95-14-T, *Judgement* (3 March 2000)
Brdjanin Appeals Dismissal Decision	*Prosecutor v Brdjanin*, No. IT-98-36-A, *Decision on Motion to Dismiss Ground I of the Prosecutor's Appeal* (5 May 2005)
Brdjanin War Correspondents Appeals Decision	*Prosecutor v Brdjanin*, No. IT-99-36-AR73.9, *Decision on Interlocutory Appeal* (11 December 2002)
Djordjevic AJ	*Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014)
Furundzija AJ	*Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000)
Furundzija Decision	*Prosecutor v Furundzija*, No. IT-95-17/1-T, *Decision* (16 July 1998)
Galic AJ	*Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006)
[REDACTED]	
Gotovina AJ	*Prosecutor v. Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012)
Gotovina Defence Team Decision	*Prosecutor v Gotovina et al*, IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia*, (12 March 2010)
Hadzic Recall Decision	*Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion to Strike DGH-080 from the Defence's Rule 65 ter (G) list*...(8 June 2015)
Halilovic Subpoena Appeals Decision	*Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004)
Kordic AJ	*Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004)
Krajisnik AJ	*Prosecutor v Krajisnik*, No. IT-00-39-A, *Judgement* (17 March 2009)
Krnojelac AJ	*Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003)

Krstic AJ	*Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004)
Krstic Subpoena Appeals Decision	*Prosecutor v. Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003)
Limaj AJ	*Prosecutor v. Limaj et al*, No. IT-03-66-A, *Judgement* (27 September 2007)
Lukic AJ	*Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012)
Lukic Disclosure Appeals Decision	*Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011)
Milosevic Adjudicated Facts Appeals Decision	*Prosecutor v Milosevic*, No. IT-02-54-AR73.5, *Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 October 2003)
Milosevic Self-Representation Appeals Decision	*Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004)
D. Milosevic Adjudicated Facts Appeals Decision	*Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts* (26 June 2007)
D. Milosevic Adjudicated Facts Decision	*Prosecutor v. Dragomir Milošević*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts* (10 April 2007)
Mladic Adjudicated Facts Appeals Decision	*Prosecutor v Mladic*, No. IT-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013)
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Other Abbreviations

ABiH	Army of Bosnia and Herzegovina
AP	Additional Protocols to the Geneva Conventions
BiH	Bosnia and Herzegovina
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
JCE	Joint Criminal Enterprise
LOAC	Law of Armed Conflict
SCSL	Special Court for Sierra Leone
SRK	Sarajevo Romanija Corps
UN	United Nations
UNHQ	United Nations headquarters
VRS	Army of Republika Srpska

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D105	Radovan Karadzic Order to Military to Stop Military Offensive Activities, dated 7 May 1993
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D1336	Minutes of the Bosanski Petrovac Municipal Assembly Crisis Staff Meeting held on 29 May 1992, no. KS-23/92, 1 June 1992
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P832	Order of the President of the Republic of Srpska of 13 June 1995
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P956	Transcript from the 16th session of the Republika Srpska Assembly, dated 12 May 1992
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P1029	ICTY Witness Statement of WILSON, John, dated 26 March 2009
P1274	SRT Video Clip Depicting an Interview of KARADZIC, Radovan at Pale (end time 01:37:8)
P1367	Transcript from the 26th session of the Republika Srpska Assembly, dated 02 April 1993
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P1441	UNPROFOR investigation report concerning the Sarajevo market explosion of 5 February 1994
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P5070	PUBLIC REDACTED Version of Intercept dated 14 July 1995, at 21:02 hours
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1D9620	Witness Statement of Predrag BANOVIC
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