UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-56-A

Date: 11 September 2018

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mparany Mamy Richard Rajohnson**
Judge Prisca Matimba Nyambe
Judge Gberdao Gustave Kam
Judge Seymor Panton
Judge Elizabeth Ibanda-Nahamya

Registrar: **Mr. Olufemi Elias**

PROSECUTOR

v

RATKO MLADIĆ

PUBLIC

DEFENCE NOTICE OF FILING OF PUBLIC REDACTED APPEAL BRIEF ON BEHALF OF RATKO MLADIĆ

The Office of the Prosecutor:
Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for Ratko Mladić:
Mr. BrankoLukić
Mr. Dragan Ivetić

1. Hereby, and upon consultation with the Prosecution as to redactions, the Defence gives notice of filing of the public redacted version of the operative Appeal Brief on behalf of Ratko Mladić, as attached.[1]

Word Count: 28.

RESPECTFULLY SUBMITTED BY:

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[1] *Prosecutor v. Ratko Mladić*, Case No.: MICT-13-56-A, Appeal Brief on behalf of Ratko Mladić, 6 August 2018.

UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-56-A
Date: 06 August 2018

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron,** Presiding
Judge Carmel Agius
Judge Liu Daqun
Judge Prisca Matimba Nyambe
Judge Seymour Panton

Registrar: **Mr. Olufemi Elias**

Date: **06 August 2018**

PROSECUTOR
v.
RATKO MLADIĆ

PUBLIC REDACTED

APPEAL BRIEF ON BEHALF OF RATKO MLADIĆ

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ABBREVIATIONS TABLE

Abbreviation	Full citation
16th Session of the Bosnian-Serb Assembly	16th Session of the Bosnian-Serb Assembly on 12 May 1992.
24th Session of the Bosnian-Serb Assembly	24th Session of the Bosnian-Serb Assembly on 8 January 1993.
ABiH	Army of Bosnia-Herzegovina.
AF(s)	Adjudicated Fact(s).
API	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
APII	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
AJ	Appeals Judgement.
Art.	Article.
BCS	Bosnian Croat Serb Language.
BiH	Bosnia and Herzegovina.
Bosnian-Serb Assembly	National Assembly of the Bosnian-Serb republic.
Brief	Appeal Brief on Behalf of Ratko Mladić.
Ch.	Chapter.
Chamber	Trial Chamber I of the ICTY, Case No. IT-09-92.
CSB / SDB / AID	Bosnian Centre for Security Services / Sector for State Security of the MUP.
DK	Drina Corps of the VRS.
Dutch MoD	Netherlands Ministry of Defence.
DutchBat	The UNPROFOR Dutch battalion in Srebrenica.
ECHR	European Convention on Human Rights.
ECtHR	European Court of Human Rights.

Fontana meeting	Meeting at the Fontana Hotel in Bratunac following the fall of Srebrenica.
GC.I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949.
GC.II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949.
GC.III	Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949.
GC.IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.
GSVRS	VRS Main Staff.
HV	Hrvatska Vojska.
IACHR	Inter-American Convention on Human Rights.
ICCPR	International Convention on Civil and Political Rights.
ICC Statute	UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, -ISBN No. 92-9227-227-6.
ICJ Statute	Statute of the International Court of Justice.
ICRC	International Committee of the Red Cross.
ICRC Commentary to AP	International Committee of the Red Cross commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.
ICTR	International Criminal Tribunal for Rwanda.
ICTY	International Criminal Tribunal for the Former Yugoslavia.
IHL	International Humanitarian Law.
IRMCT	United Nations International Residual Mechanism for Criminal Tribunals.

JCE(s)	Joint Criminal Enterprise(s).
JCE-I	The First Category of JCE.
JNA	Yugoslav People's Army.
KLA	Kosovo Liberation Army.
Krivaja-95	Military Operation of the VRS Drina Corps titled "Krivaja '95".
MAB	Modified Air Bomb.
Military Notebooks	Handwritten notebooks of Ratko Mladić. P343, P344, P345, P346, P347, P348, P349, P350, P351, P352, P353, P354, P355, P356, P357, P358, P359, P360, P361, P362, P363, P364.
MP/SO	Military Police / Security Organs.
Municipalities	Banja Luka, Bijeljina, Foca, Ilidza, Kalinovik, Kljuc, Kotor Varos, Novi Grad, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Trnovo and Vlasenica. (see Indictment, para.47)
MUP	Ministry of Internal Affairs (*Ministarsvo unutrašnjih poslova).*
NATO	North Atlantic Treaty Organization.
OJCE	Overarching Joint Criminal Enterprise.
Para.	Paragraph.
Paras.	Paragraphs.
POW/POWs	Prisoners of War.
Report of the Secretary-General	Report of the Secretary-General, U.N. Doc s/25704, 3 May 1993.
RS	Republika Srpska (Republic of Srpska).
Rule(s)	Rules of Procedure and Evidence, ICTY, IT/32/Rev.50.
Sarajevo JCE	Sarajevo Joint Criminal Enterprise.
Sch.	Schedule Incident.
Serb Forces	MUP, VRS, JNA, VJ, TO, Serbian MUP, Serbian and Bosnian Serb paramilitary forces, volunteer units, local Bosnian Serbs, members of the Bosnian Serb Political and Governmental Organs, and Sarajevo Forces.

SFRY	Socialist Federal Republic of Yugoslavia.
Statute	Statute of International Criminal Tribunal for the Former Yugoslavia established by UNSC Resolution 827 (1993).
T.	Trial transcript.
TO	Territorial Defence (*Teritorijalna odbrana*).
The Tribunal	International Criminal Tribunal for the Former Yugoslavia.
Trial Chamber	Trial Chamber I of the ICTY, Case No. IT-09-92.
UN	United Nations.
UNDU	United Nations Detention Unit.
UNMO / UNMOs	United Nations Military Observers.
UNPROFOR	United Nations Protection Forces.
UNPROFOR BH Command	United Nations Peacekeeping Force for the Former Yugoslavia, Bosnia-Herzegovina Command.
VJ	Vojska Jugoslavije – Yugoslav Army.
VRS	Vojska Srpske Republike Bosne I Herzegovine, later Vojska Republike Srpske – Army of the Republika Srpska / Bosnian-Serb Republic.

I. INTRODUCTION

A. PROCEDURAL BACKGROUND

1. Pursuant to Art.23 of the Statute of the International Residual Mechanisms for Criminal Tribunals ("IRMCT Statute") and Rule 138 of the Rules of Procedure and Evidence ("IRMCT Rules"), the Defence of General Ratko Mladić ("the Appellant") hereby files this Appeal Brief setting out its grounds of appeal against the Judgement of Trial Chamber I in the case of *Prosecutor v Ratko Mladić* rendered on 22 November 2017 ("Judgement").

2. The Trial Chamber unanimously found the Appellant guilty of Counts 2–11 on the Indictment (genocide, crimes against humanity and war crimes) pursuant to Art.7(1) of the Statute.[1] The Trial Chamber unanimously found the Appellant not guilty of Count 1, genocide in the municipalities.[2] While the Trial Chamber agreed on the not guilty verdict, Judge Orie rendered a partially dissenting opinion from the reasoning given by the majority.[3] The Appellant was sentenced to life imprisonment.[4]

3. On 22 March 2018, the Defence filed its Notice of Appeal setting forth nine grounds of appeal from the Judgement, against the Appellant's conviction and sentence. On 22 March 2018, the Prosecution filed its Notice of Appeal setting forth one ground of appeal against the Appellant's acquittal on Count 1 of the Indictment.

4. The grounds of appeal set out below are submitted on behalf of the Appellant. At the time of filing this Appeal Brief, the Appellant has still not been provided with an official translation of the Judgement in his native language, BCS. On behalf of the Appellant, notice is given that, should further errors of law or fact become apparent upon him receiving the translation and providing instrructions to Counsel, an application for a variation of the grounds of appeal pursuant to IRMCT Rule 133 will be submitted.

[1] Judgement, para.5214.
[2] Judgement, para.5214.
[3] Judgement, para.5217-5221.
[4] Judgement, para.5215.

B. OVERVIEW

B.1 STRUCTURE OF THE APPEAL BRIEF

5. The legal and factual submissions in support of the Notice of Appeal are contained herein. To assist the Appeals Chamber, alleged errors that are interlinked have been consolidated under one ground of appeal based on the count or issue to which the error pertains. However, the errors alleged in the sub-grounds should be considered individually and as separate grounds of appeal.

6. Within each ground of appeal, the sub-grounds identify the specific error of law and/or fact and set out the Appellant's submissions therein. The Appellant has identified the applicable law relevant to the alleged error, the Trial Chamber's approach, and the consequences of the error. The remedy sought for each individual error is specified, as is the remedy sought for each core ground of appeal.

7. Where errors are interlinked and share a central issue, but span across the Brief, the Appellant has identified this and provided an overview of the submissions in a single sub-ground.[5]

8. The Appellant notes that when sub-grounds have been subsumed into others, to assist the Appeals Chamber and to avoid repetition, these have been clearly identified. The Appellant has also identified when a sub-ground of appeal has been withdrawn.

9. Where illustrative examples of the Trial Chamber's errors have been provided, the Appellant submits that the number of examples are sufficient to warrant the intervention by the Appeals Chamber to review the Trial Chamber's approach throughout the Judgement.

[5] *See* sub-grounds 2-B – 2-D, 8-E.

B.2 GROUNDS OF APPEAL

10. The Appellant raises eight grounds of appeal (Grounds 1–8) against the convictions entered on Counts 2-11 by the Trial Chamber and one (Ground 9) against the life sentence imposed by the Trial Chamber.

11. Ground 1 concerns errors relating to the application or interpretation of the indictment. The Appellant submits that the alleged errors relating to 'unnamed unscheduled incidents'[6] invalidate the Trial Chamber's findings and the convictions on Counts 5, 9, 10 and 3 in whole or in part.

12. Ground 2 contains the Appellant's submissions on alleged procedural errors, in relation to: (a) adjudicated facts; (b) the legal standards applied by the Trial Chamber; (c) the admission of evidence that the Defence was unable to confront. As these alleged errors are spread throughout the grounds of appeal, the Appellant has sought to provide an overview of the submissions in these sub-grounds and identify the relevant paragraphs in the Brief where a comprehensive analysis of the specific errors is provided.

13. Ground 3 deals with errors relating to the Trial Chamber's findings on the overarching joint criminal enterprise ("OJCE"). The Appellant submits that the alleged errors of law and/or fact invalidate the Trial Chamber's findings on the *actus reus* and *mens rea* elements of JCE-I for Counts 2-11.

14. Ground 4 concerns errors relating to the Trial Chamber's findings in relation to Sarajevo. The Appellant submits that the alleged errors of law and/or fact invalidate the Trial Chamber's findings on the *actus reus* and *mens rea* elements of JCE-I and the convictions on Counts 5, 9, and 10.

15. Ground 5 relates to errors concerning the Trial Chamber's findings on the JCE in Srebrenica. The Appellant submits that the alleged errors of law and/or fact invalidate the Trial Chamber's findings on the *actus reus* and *mens rea* elements of JCE-I and the convictions on Counts 2-8.

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[6] Unscheduled incidents that the Trial Chamber considered and made findings on, but the Appellant was not put on notice of and did not form part of the Prosecution's case.

16. Ground 6 deals with errors in the Trial Chamber's findings on hostage taking. The Appellant submits that the errors of law and/or fact invalidate the Trial Chamber's findings on the *actus reus* and *mens rea* elements of JCE-I for Count 11.

17. Ground 7 concerns errors relating to modes of liability. The errors relating to the Trial Chamber's findings on the Appellant's responsibility under Art.7(1) are considered specifically in Grounds 3, 4, 5 and 6 to assist the Appeals Chamber. Ground 7 focuses on the Trial Chamber's errors in relation to Art.7(3). The Appellant submits that this mode of liability was not proved beyond reasonable doubt.

18. Ground 8 concerns errors that violated the Appellant's right to a fair trial. Sub-ground 8-E draws together all of the alleged errors in this regard and considers the cumulative effect on the Appellant's rights. The Appellant submits that, taken together, the fair trial violations constitute exceptional circumstances, rendering it appropriate for the Appeals Chamber to order a retrial under Rule 144(C) of the IRMCT Rules.

19. Ground 9 sets out the Appellant's appeal against his sentence. The Appellant submits that the Trial Chamber failed to give sufficient weight to his personal mitigation and his individual circumstances. Further, that there are compelling reasons to revisit the legal basis for the retroactive application of a life sentence under IRMCT Rule 125(A) (formally ICTY Rule 101(A)).

20. The Appellant submits that each of the errors identified invalidate the findings, and/or occasioned a miscarriage of justice. The Appellant invites the Appeals Chamber to reverse the convictions on Counts 2-11 and find him not guilty on all counts.

21. In the alternative, pursuant to IRMCT Rule 144(C), the Appellant invites the Appeals Chamber to exercise its discretion and order a retrial.

22. Should the Appeals Chamber find that the errors invalidate the Judgement only in part, the Appellant invites the Appeals Chamber to reverse the Judgement to the extent of the errors found, and/or revise the findings that relate to the basis of the convictions and reduce his sentence accordingly.

C. APPLICABLE LAW

23. The Appellant notes, to assist the Appeals Chamber, an applicable law section is contained within the individual grounds of appeal. Where appropriate, the jurisprudence identified below is recalled to avoid repetition.

C.1 THE APPELLATE STANDARD

24. The Appellant has an obligation to set out his grounds of appeal clearly, and to provide the Appeals Chamber with specific references to the alleged errors of the Trial Chamber and to the parts of the record he is using to support his case.[7]

25. Where an error of law is alleged, the party must, at least, identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[8] The Appeals Chamber may step in and find in favour of a contention that there is an error of law, even if the alleged error has no chance of resulting in an impugned decision being reversed or revised.[9] Where the Appeals Chamber finds that the Trial Chamber erred in law by applying the wrong legal standards, it is open to the Appeals Chamber to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.[10]

26. The standard of review in relation to alleged errors of fact applied by the Appeals Chamber is one of reasonableness.[11] When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[12] The Appeals Chamber will only substitute its own finding for that of a Trial Chamber when no reasonable trier of fact could have reached the original decision.[13] Only errors that occasion a miscarriage of justice will cause the Appeals

[7] *Kvočka* AJ, para.15 fn53.
[8] *Prlić* AJ, para.19 fn72.
[9] *Stanišić & Župljanin* AJ, para.18.
[10] *Ibid.*, para.19.
[11] *Prlić* AJ, para.22.
[12] *Kvočka* AJ, para.18 fn58.
[13] *Ibid.*, para.18.

Chamber to reverse a decision by a Trial Chamber.[14] The Appeals Chamber "will not lightly disturb findings by a Trial Chamber".[15]

C.2 THE TRIAL CHAMBER'S DISCRETION

27. The Appeals Chamber will only reverse a Trial Chamber's discretionary decision, where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion.[16]

C.3 THE DIFFERENCE BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE

28. The difference between direct and circumstantial evidence is that direct evidence supports the truth of an assertion, without an intervening inference, as it directly relates to the fact in issue. It is, by its very nature, probative and can, on its own merits, meet the necessary 'proof beyond a reasonable doubt' standard.[17]

29. Circumstantial evidence is evidence of facts surrounding an event or offence from which a secondary fact may be reasonably inferred.[18] The Trial Chamber can rely on circumstantial facts that are proven beyond a reasonable doubt either separately or cumulatively, to provide the basis for the finding of guilt for the mode of liability.[19] Furthermore, the Trial Chamber can rely on circumstantial evidence where direct and positive testimonies of eye-witnesses or conclusive documents are problematic or unavailable.[20] However, when relying upon circumstantial evidence, the Trial Chamber is required to undertake a more detailed analysis and provide greater reasoning for its finding than would be required for direct evidence.[21]

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[14] *Ibid.*, para.18 fn59.
[15] *Prlić* AJ, para.22.
[16] *Šainović* AJ, para.29.
[17] *Victorian Criminal Charge Book,* Judicial College of Victoria, section.3.5.2.
[18] *Brđanin* TJ, para.35.
[19] *Limaj* AJ, para.24; *Brđanin* TJ, para.35; *Halilović* AJ, para.125.
[20] *Brđanin* TJ, para.35.
[21] *Nuon Chea & Khieu Samphan* AJ, para.90.

30. When determining whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt, the same reasonableness standard to alleged errors of fact is applicable regardless of whether the finding of fact was based on direct or circumstantial evidence.[22] It is not sufficient that the Trial Chamber come to a reasonable conclusion available from the evidence. If there is another conclusion which is also reasonably open from that evidence and which is consistent with the innocence of the accused, he must be acquitted to avoid a potential violation of *in dubio pro reo*.[23] The inference on which the conviction relies, must have been the *only* reasonable one that could have been drawn from the evidence presented.[24]

31. When a Trial Chamber relies on circumstantial evidence instead of direct evidence, there is a risk that the Trial Chamber may adopt an incorrect interpretation, or make an assumption, and thereby transgress the principle of *in dubio pro reo* and fail to meet the beyond a reasonable doubt standard.

C.4 WEIGHTING OF EVIDENCE

32. A Trial Chamber has a discretion in weighing and assessing evidence.[25] It is within its discretion to evaluate inconsistencies and to consider the evidence as a whole without the need to explain it decision in every detail.[26] The Appeals Chamber may only intervene when the Trial Chamber's choice of the method of assessment or its application thereof may have occasioned a miscarriage of justice.[27]

33. An Appellant must explain why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber did.[28] This explanation is necessary for an allegation that a Trial Chamber failed to consider all relevant evidence, gave insufficient

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[22] *Stakić* AJ, paras.219-220; *Galić* AJ, para.9, fn21.
[23] *Limaj* AJ, para.21; *Čelebići* AJ, para.458; *Ntagerura* AJ, para.306; *Kordić* AJ, paras.288-290; *Naletilić* AJ, para.120; *Akayesu* TJ, para.319.
[24] *Čelebići* AJ, para.458.
[25] *Stanišić & Župljanin* AJ, para.218.
[26] *Ibid.*, para.218.
[27] *Kayishema & Ruzindana* AJ, para.119.
[28] *Brđanin* AJ, para.24; *Kunarac* AJ, para.48.

weight to certain evidence, or should have interpreted evidence in a particular manner and reached a particular conclusion.[29]

C.5 TOTALITY OF EVIDENCE

34. There is a presumption that the Trial Chamber has evaluated all the evidence presented to it, providing there is no indication that it completely disregarded any particular piece of evidence.[30] This presumption may be rebutted when evidence which is clearly relevant to a Trial Chamber's findings is not addressed in its reasoning.[31]

C.6 REASONED OPINION

35. Pursuant to Art.23(2) of the Statute and Rule 98*ter*(C) of the Rules, the Judgement shall be accompanied by a reasoned opinion. This ensures that the accused can exercise their right of appeal and that the Appeals Chamber can, pursuant to Art.25, carry out its duty to review the appeals.[32] A reasoned opinion is a component of the fair trial guarantees.[33]

36. The factual and legal findings on which a Trial Chamber relied upon to convict or acquit an accused should be set out in a clear and articulate manner.[34] A Trial Chamber is required to make findings on those facts which are essential to the determination of guilt on a particular count.[35] However, the Trial Chamber is not required to "articulate every step of its reasoning for each particular finding it makes".[36] The requirements to be met by the Trial Chamber may be higher in certain cases.[37]

37. The burden is on the Appellant to identify specific issues, factual findings or arguments he submits the Trial Chamber omitted to address and explain why this invalidates the decision.[38]

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[29] *Ibid.*
[30] *Stanišić & Župljanin* AJ, para.536; *Galić* AJ, para.256.
[31] *Stanišić & Župljanin* AJ, para.536 fn1806.
[32] *Limaj* AJ, para.81; *Kvočka* AJ, paras.23 and 286.
[33] *Furundžija* AJ, para.69.
[34] *Stanišić & Župljanin* AJ, para.137, fn463.
[35] *Ibid.*, para.137, fn465.
[36] *Brđanin* AJ, para.39.
[37] *Kvočka* AJ, para.24.
[38] *Ibid.*, para.25.

C.7 THE BURDEN AND STANDARD OF PROOF

38. In accordance with the principle of *in dubio pro reo,* an accused is presumed to be innocent until proven guilty by the Prosecution.[39] The Prosecution must satisfy the Trial Chamber that an accused is guilty beyond reasonable doubt.[40] The burden of proof remains on the Prosecution throughout the trial.[41] All facts that are material to the elements of the alleged crime must be proved beyond reasonable doubt for a finding of guilt in relation to that crime.[42]

39. Prosecution must prove all predicate facts beyond all reasonable doubt before the Trial Chamber can conclude the commission of a crime.[43] Thus, before a finding of guilt can be made beyond a reasonable doubt, the Trial Chamber must find[44]:

    i. That each element of each of the charged crimes has been proved beyond a reasonable doubt;
    ii. That each element of any charged mode of liability has been proved beyond a reasonable doubt; and
    iii. That any fact which is indispensable to or aimed at obtaining a conviction, must also be proved beyond a reasonable doubt.[45]

40. Any doubt must be resolved in favour of the accused.[46]

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[39] Statute, Art.21(3); *Stakić* AJ para.219; *Martić* AJ, paras.55-61; *Blagojević* AJ, para.226. *Milošević* AJ, paras.20-22; 230-232.
[40] *Stakić* AJ, para.219; *Martić* AJ, paras.55-61; *Blagojević* AJ, para.226. *Milošević* AJ, paras.20-22; 230-232.
[41] *Brđanin* TJ, para.22; *Gotovina* TJ, para.14.
[42] *Martić* AJ, para.55; *Milošević* AJ, para.20.
[43] *Haradinaj* TJ, para.161; *Halilović* AJ, para.125.
[44] *Blagoević* AJ, para.226.
[45] *Kayishema & Ruzindana* AJ, para.119.
[46] *Limaj* AJ, para.21; *Čelebići* AJ, para.458.

II. GROUND ONE: THE MANIFEST ERRORS MADE BY THE TRIAL CHAMBER IN THE APPLICATION/INTERPRETATION OF THE INDICTMENT RESULTED IN VIOLATIONS OF DUE PROCESS

A. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY EXPANDING THE MATERIAL CHARGES TO INCLUDE UNSCHEDULED INCIDENTS AND IMPOSING CRIMINAL LIABILITY FOR INCIDENTS THAT HAD NOT BEEN PLEADED WITH SUFFICIENT CERTAINTY

A.1 OVERVIEW

41. The Trial Chamber erred in law by considering 'unnamed unscheduled incidents'[47] *proprio motu*. The Trial Chamber erred in fact by finding that these incidents constituted crimes under Counts 5, 9, 10, and 3 and by holding the Appellant criminally responsible for them.

42. The Appellant submits that the errors invalidate the legal findings made on the unnamed unscheduled incidents and the basis for the convictions on Counts 5, 9, 10, and 3 in whole or in part.

43. The Appellant notes that he did not wave his right to raise this error as he only became aware of the unnamed unscheduled incidents when the Judgement was rendered. As such, he had no notice during the trial that the incidents would be considered by the Trial Chamber as part of the Prosecution's case.

A.2 APPLICABLE LAW

44. The accused must be informed of the charges against him and have adequate time and facilities to prepare his defence.[48] The Prosecution is obliged to plead the material facts underpinning the charges in the indictment, but not the evidence by which the material facts will be proved.[49] An indictment is defective if it fails to plead the material facts

[47] Unscheduled incidents that the Trial Chamber considered and made findings on, but the Appellant was not put on notice of and did not form part of the Prosecution's case.
[48] *Statute*, Art.21(4)(a), (b).
[49] *Kupreškić* AJ, para.88; *Kvočka* AJ, para.27.

sufficiently.[50] The prejudicial effect of a defective indictment can be remedied if the Prosecution provides an accused with clear, timely, and consistent information detailing the factual basis underpinning the charges against him.[51]

45. Challenges pertaining to defects in the indictment are normally dealt with at the pre-trial stage by the Trial Chamber or by the Appeals Chamber if an interlocutory appeal is granted under Rule 72(B)(ii) of the Rules.[52] When submissions are made at the appellate stage concerning crimes not alleged in the indictment, the issue of waiver is not applicable.[53] When a defect in the indictment is raised for the first time on appeal, it is for the appellant to show that their ability to prepare their defence was materially impaired.[54]

A.3 THE TRIAL CHAMBER AND THE PROSECUTION'S APPROACH

46. The Trial Chamber fixed the number of "crime sites or incidents of the charges" in the Rule 73*bis*(D) Decision.[55] The Prosecution was permitted to present evidence on crimes and municipalities within the scope of the Indictment to establish the required elements of the alleged crimes under Counts 1-11, providing it identified the proposed evidence in the Rule 65*ter* filings and gave an explanation of the significance of it to its case.[56]

47. With regards to crimes in Sarajevo, the Prosecution's Rule 65*ter* List stated that: "[w]hen appropriate, the Prosecution will also introduce evidence of unscheduled shelling and sniping incidents as described in the summaries below".[57] The Prosecution then identified and explained the significance of the unscheduled incidents that it intended to present evidence applicable to the charges related to Sarajevo.[58] The Appellant submits that this approach is in accordance with the Rule 73*bis*(D) Decision, and the correct approach to providing notice of an unscheduled incident.

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[50] *Kupreškić* AJ, para.114; *Kvočka* AJ, para.28.
[51] *Kupreškić* AJ, para.114.
[52] *Ibid.*, para.79.
[53] *Đorđević* AJ, para.573; *Kupreškić* AJ, para.79.
[54] *Đorđević* AJ, para.573; *Kvočka* AJ, para.35.
[55] Rule 73*bis*(D) Decision, para.14.
[56] Rule 73*bis*(D) Decision, para.12; *Mladić* Indictment Reconsideration Decision, para.11; fn33.
[57] Rule 65*ter* List, p.188.
[58] *See for example* Rule 65*ter* List: p.188; OVERGARD (p.201, para.8); HIGGS (p.213, para.7); [REDACTED]; further, P1130.

48. The Trial Chamber treated crimes not enumerated in Schedules A-G as unscheduled incidents.[59] In the Judgement, the Trial Chamber considered and made legal findings on unscheduled incidents that the Prosecution had not identified as being part of its case on Counts 5, 9, 10, and 3 ('unnamed unscheduled incidents'): (a) Count 5: Schedule E and other incidents, incidents (u)-(w);[60] Schedule F and other sniping incidents, incidents (e)-(i);[61] Schedule G and other shelling incidents, incidents (i)-(k), (m);[62] (b) Count 9: Sniping incidents (g)-(k), (n)-(o);[63] shelling incidents (d)-(g), (i)-(j);[64] (d) Count 10: the aggregate of the incidents in Counts 5 and 9;[65] (c) Count 3: Cruel and inhumane treatment, incidents (d)(ii),[66] (i)(iii),[67] (j)(ii)[68]; unlawful detentions, incidents (e)(iii),[69] (i)(iv);[70] appropriation or plunder of property, incidents (e)(i),[71] (f)(ii);[72] wanton destruction, incidents (b)(v),[73] (g)(i)(a), (g)(i)(c), (g)(iv),[74] (h).[75]

A.4 THE ERROR

49. The Trial Chamber considered and made factual findings on the aforementioned incidents that the Appellant was not put on notice of. Pursuant to the Rule 73*bis*(D) Decision, the Prosecution had to identify the unscheduled incidents it intended to rely upon in the Rule 65*ter* List. This would have constituted adequate notice that the incident formed part of the Prosecution's case, and was the approach taken for the Sarajevo incidents. The witness statements and proofing notes were insufficient to provide the Appellant with notice of the specific unscheduled incidents to which they related.[76] It would be contrary to the Rule

[59] Judgement, para.5269.
[60] Judgement, p.1610.
[61] Judgement, p.1611.
[62] Judgement, p.1612.
[63] Judgement, p.1665.
[64] Judgement, pp.1666-1667.
[65] Judgement, para.3210.
[66] Judgement, p.1697.
[67] Judgement, p.1699.
[68] Judgement, p.1699.
[69] Judgement, p.1713.
[70] Judgement, p.1715.
[71] Judgement, p.1734.
[72] Judgement, p.1736.
[73] Judgement, p.1742.
[74] Judgement, pp.1745-6.
[75] Judgement, p.1746.
[76] Brief fn.51.

73*bis*(D) Decision and to say that the incidents identified in paragraph 48 formed part of the Prosecution's case in the absence of formal notice in the Rule 65*ter* List.

50. The Trial Chamber erred by considering these unnamed unscheduled incidents were part of the Prosecution's case, and relied upon them to prove the elements of the crimes *proprio motu*. The Appellant could not present any evidence relating to these incidents or address his responsibility for them, as the Defence was unaware that the incidents formed part of the Prosecution's case. As a result, the Appellant's ability to prepare his defence in relation to these incidents was materially impaired.

A.5 CONSEQUENCES OF THE ERROR

51. The Trial Chamber made legal findings that the incidents identified in paragraph 48 constituted crimes under Counts 5, 9, 10, and 3.

A.5.1 Count 5 (murder)

52. Count 5 relates to acts of murder in Sarajevo and acts of murder in Srebrenica.[77]

53. The Trial Chamber found that unnamed unscheduled incidents of murder in Sarajevo constituted crimes against humanity: Schedule F and other sniping incidents, incidents (e)-(i); Schedule G and other shelling incidents, incidents (i)-(k), (m)-(o).[78] It further considered these incidents as part of Counts 9 and 10.

54. In Srebrenica, the incidents (u)-(w) were found to constitute crimes against humanity.[79] Additionally, the findings were used as the underlying basis for the legal findings on persecution in Count 3 (discussed below).[80]

[77] Indictment, para.64 (Schedules F-G); Indictment, para.65-66 (Schedule E).
[78] Judgement, para.3065.
[79] Judgement, para.3065.
[80] Judgement, paras.3282-3286.

A.5.2 Count 9 (terror)

55. The Trial Chamber found that the following unnamed unscheduled incidents constituted crimes of terror: Schedule F and other sniping incidents, incidents (e)-(i); Schedule G and other shelling incidents, incidents (i)-(k), (m);[81] sniping incidents (g)-(k), (n)-(o); shelling incidents (d)-(g), (i)-(j). In addition to this, the incidents of murder in the Sarajevo component of Count 5 also constituted crimes of terror.[82]

56. The impact of the Trial Chamber's reliance on these incidents to establish the elements of terror is further discussed in Ground Four.[83]

A.5.3 Count 10 (unlawful attacks)

57. The sniping and shelling unnamed unscheduled incidents in Counts 5 and 9 were found to constitute unlawful attacks on civilians pursuant to Count 10.[84]

A.5.4 Count 3 (persecution)

58. The Trial Chamber found that the following unnamed unscheduled incidents constituted the underlying acts of persecution as a crime against humanity: murder incidents (u)-(w) (Srebrenica); cruel and inhumane treatment: incidents (d)(ii) (i)(iii), (j)(ii); unlawful detentions: incidents (e)(iii), (i)(iv); appropriation or plunder of property: incidents (e)(i), (f)(ii); wanton destruction, incidents (b)(v), (g)(i)(a), (g)(i)(c), (g)(iv), (h).[85]

[81] Judgement, para.3189.
[82] Judgement, para.3189.
[83] See Brief paras.443-458; 555-564.
[84] Judgement, paras.3210, 3212.
[85] Judgement, paras.3286, 3312, 3359, 3405, 3418.

A.6 REMEDY SOUGHT

59. The Appellant was held criminally responsible for the crimes identified, which formed part of the basis for his conviction on Counts 5, 9, 10, and 3.[86] The Appellant submits that the Trial Chamber's decision to consider unnamed unscheduled incidents *proprio motu* as part of the Indictment invalidates the findings made on these incidents.

60. The Appellant invites the Appeals Chamber to: (a) reverse the findings on the crimes identified; (b) the reverse the convictions entered on Counts 5, 9, 10, and 3 in whole or in part; (c) and/or reduce his sentence accordingly.

B. [WITHDRAWN]

61. This sub-ground has been withdrawn.

[86] Judgement, paras.4921, 5130-5131; 4829, 4830, 4839, 4893; 3210-3212; 5096-5131; 4685, 4688; 5184-5193.

III. GROUND TWO: THE PROCEDURAL ERRORS MADE BY THE TRIAL CHAMBER INFECTED THE TRIAL PROCEEDINGS AND THE JUDGMENT, THEREBY PREJUDICING THE APPELLANT

A. THE TRIAL CHAMBER'S USE OF ADJUDICATED FACTS RESULTED IN AN ERROR OF LAW AND FACT

A.1 THERE ARE COMPELLING REASONS FOR THE APPEALS CHAMBER TO REVISIT *KAREMERA* TO DETERMINE WHETHER THE TRIAL CHAMBER ERRED BY TAKING JUDICIAL NOTICE OF FACTS RELATING TO THE CONDUCT OF THE APPELLANT'S 'PROXIMATE SUBORDINATES' UNDER RULE 94(B)

62. The Trial Chamber's decision to take judicial notice of facts relating to the conduct of the Appellant's proximate subordinates (defined in *Galić* as "subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know" about their conduct)[87] under Rule 94(B), contributed to findings that he significantly contributed to the JCEs through his command and control of the Serb forces to further the common criminal objective.

63. The Appellant submits that the Trial Chamber was led into discernible error by the interpretation in the *ad hoc* tribunal's jurisprudence of the facts related to the acts and conduct of the accused.

64. The Appellant submits that the ICTR Appeals Chamber's decision in *Karemera*[88] was decided *per incuriam*. The ICTY Appeals Chamber's decision in *Galić*[89] highlights a conceptual issue overlooked in *Karemera*.

65. The jurisprudence of the *ad hoc* tribunals suggests that this inadvertent oversight gives rise to compelling reasons to review *Karemera* and determine whether facts relating to the conduct of the Appellant's proximate subordinates can be judicially noticed under Rule 94(B). The Appellant asserts that this exceeds the permissible limits of Rule 94(B) and that

[87] *Galić* Rule92*bis(*C) Decision, para.16.
[88] *Karemera* Interlocutory Decision.
[89] *Galić* Rule92*bis*(C) Decision.

the Trial Chamber was led into discernible error to take judicial notice of facts containing the identity of the perpetrators. As a result, the Trial Chamber erred in fact by finding the Appellant responsible for the acts committed by his proximate subordinates on this basis.

A.1.1 Overview

66. In the Appellant's case, the Trial Chamber's decision to take judicial notice of facts that related to crimes committed by his proximate subordinates was upheld on appeal.[90] The Appeals Chamber recalled the *Karemera* test for judicial notice under Rule 94(B) stating that:

> [T]he ICTR Appeals Chamber has clarified that proposed facts relating to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and the facts related to the conduct of physical perpetrators for crimes which an accused is alleged to be criminally responsible, may be subject to judicial notice.[91]

67. The *Mladić* Appeals Chamber considered that the Trial Chamber's approach was consistent with the jurisprudence.[92] It was within a Trial Chamber's discretion "to take judicial notice of facts bearing on elements of the accused's guilt", providing they did not fall within the category of facts related to the acts, conduct, or mental state of the accused.[93] *Karemera* was cited in support of this.[94]

68. The ICTY Appeals Chamber decision in *Galić* highlights compelling reasons to revisit this formulation. The relevance of this decision lies in its assessment of the admissibility of evidence relating to the acts and conduct of the accused's proximate subordinates. The *Galić* Appeals Chamber held that it was a "short step" from a finding that acts constituting crimes were committed by an accused's proximate subordinates to a finding that the accused was responsible for these acts.[95] It found that the exercise of discretion to admit such evidence "becomes more difficult in the special and sensitive situation posed by a charge of command responsibility".[96]

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[90] *Mladić* Adjudicated Fact Appeal, paras.82-87.
[91] *Ibid.*, para.81.
[92] *Ibid.*, para.85.
[93] *Ibid.*
[94] *Ibid.*
[95] *Galić* Rule92*bis*(C) Decision, para.14.
[96] *Ibid.,* para.15.

69. *Galić* suggests that the *ad hoc* tribunal's jurisprudence may have inadvertently overlooked the relevance of the proximity of the subordinates to the accused when considering the exercise of the Trial Chamber's discretion to take judicial notice of facts pursuant to Rule 94(B). Given the absence of any guidance on determining whether to take judicial notice of facts relating to the conduct of the physical perpetrators of the crimes or JCE members other than the Appellant, discretion has been exercised to include facts relating to the acts and conduct of the Appellant's proximate subordinates.[97] However, other Trial Chambers have exercised their discretion to withhold judicial notice for facts of this nature in the interests of justice.[98] The lack of uniformity gives a further impetus to re-examine *Karemera*.

A.1.2 Applicable law

70. The assessment of whether a purported adjudicated fact could be judicially noticed under Rule 94(B) is a two-stage process. First, the Trial Chamber must determine whether the fact fulfils the admissibility requirements.[99] Second, for each fact that fulfills the requirements, the Trial Chamber must determine whether, in the exercise of its discretion, it should nonetheless withhold judicial notice on the ground that taking judicial notice of the fact in question would be contrary to the interests of justice.[100]

71. The Appellant's submissions focus on the second stage of this process – the exercise of the Trial Chamber's discretion.

A.1.3 The relevance of the Appeals Chamber's decision in Galić

72. *Galić* considered the exercise of a Trial Chamber's discretion to admit written testimonies that contained evidence of the acts and conduct of proximate subordinates to the accused under Rule 92*bis*.[101]

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[97] *See for example*, *Stanišić* Third Decision on Adjudicated Facts, para.43; *Karadžić* Third Decision on Adjudicated Facts, para.50; *Perišić* Decision on Convictions, para.19; *Popović* Decision on Adjudicated Facts, para.13.
[98] *See for example*, *Stanišić & Župljanin* Decision on Adjudicated Facts, para.39-41; *Tolimir* Decision on Adjudicated Facts, paras.27-29, 33; *Tolimir* AJ, paras.27-36; *Šešelj* Rule 94(B) Decision, para.13; *Hadzić* Decision on Adjudicated Facts, para.13, pp.4, 25, 34.
[99] *Popović* Judicial Notice Decision, para.6.
[100] *Ibid.*
[101] *Galić* Rule*92bis*(C) Decision, paras.13-21.

73. The Appeals Chamber found unanimously that exercising this discretion "becomes more difficult in the special and sensitive situation posed by a charge of command responsibility".[102] Further, that;

> [t]he jurisprudence demonstrates in cases where the crimes charged involve widespread criminal conduct by the subordinates of the accused (or those alleged to be subordinates), there is often a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them.[103]

74. The Appeals Chamber concluded that this proximity would either render the acts and conduct, which the Prosecution sought to prove by the Rule 92*bis* statements, sufficiently important to its case that it would be unfair to admit them, or that the inability to cross-examine the statement makers would in fairness preclude the use of the statement.[104] The *Galić* Appeals Chamber noted that this circumspect use of Rule 92*bis* would not unduly limit the expeditious disposal of evidence that the Rule sought to achieve.[105]

75. The Appeals Chamber recognised the inherent unfairness of admitting evidence of the acts and conduct of "immediately proximate subordinates" when an accused is charged under Art.7(3) or the evidence also goes to the elements of Art.7(1).[106] The decision considered the underlying principles guiding the exercise of discretion to admit evidence in the context of the Prosecution's case against an accused.

A.1.4 Karemera *on Rule 94(B)*

76. The *Karemera* Appeals Chamber did not consider whether judicial notice could be taken of the acts and conduct of an accused's proximate subordinates. It should have considered this and provided further guidance, given the parallels it drew with the interpretation of the evidence admissible under Rule 92*bis*.

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[102] *Ibid.*, para.14.
[103] *Ibid.*, para.14, fns.38-40.
[104] *Ibid.*, para.15.
[105] *Ibid.*, para.16.
[106] *Ibid.*

77. The Appeals Chamber considered which facts could be subject to judicial notice under Rule 94(B). It analysed the difference between (a) facts relating to the acts, conduct, and mental state of the accused and (b) facts relating to the conduct of other members of the JCE or the physical perpetrators.[107]

78. The Appeals Chamber concluded that facts relating to the acts, conduct, and mental state of the accused could not be subject to judicial notice.[108] The corresponding prohibition on the admission of witness statements containing evidence about the acts and conduct of the accused under Rule *92bis* was cited in support of this.[109] The Appeals Chamber further justified the prohibition under Rule 94(B) due to concerns about the unreliability of the fact and on the basis that it would be contrary to the accused's procedural rights.[110]

79. The Appeals Chamber held that a Trial Chamber could exercise its discretion to take judicial notice of all other facts relating to the criminal responsibility of the accused.[111] This included facts relating to the conduct of other JCE members and facts relating to the conduct of the physical perpetrators of a crime for which the accused was being held criminally responsible.[112] No guidance was provided as to the exercise of discretion in this regard.

80. The *Karemera* Appeals Chamber reiterated its view, that support existed for this interpretation of facts that could be judicially noticed, by citing the *Galić* Appeals Chamber's decision.[113] Finally in citing *Galić*, the *Karemea* Appeals Chamber concluded that the analysis of the restrictions on admitting evidence under Rule 92*bis* was "equally applicable" to Rule 94(B).[114] Despite this, the *Karemera* Appeals Chamber did not consider how a Trial Chamber should exercise its discretion in relation to facts relating to the acts and conduct of the accused's proximate subordinates. It overlooked the distinction drawn in *Galić* between facts proving the existence of a crime and facts relating the acts and conduct of the accused's proximate subordinates.

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[107] *Karemera* Interlocutory Decision, para.50, 52.
[108] *Ibid*, para.50.
[109] *Ibid.*, para.50-51. See also para.50, fn88.
[110] *Ibid.*, para.51.
[111] *Ibid.*, para.52.
[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*.

A.1.5 The significance of the Karemera *Appeals Chamber's oversight*

81. The significance of the distinction between admitting evidence under Rule *92bis* relating to the existence of crimes and evidence related to the acts and conduct of the accused's proximate subordinates was explained by the *Galić* Appeals Chamber:

> [R]ule 92*bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would easy to infer that he knew or had reason to know.[115]

82. The *Karemera* Appeals Chamber appears to have overlooked this distinction in the context of Rule 94(B). However, the ICTY Appeals Chamber in *Milošević* (composed of four out of the five judges that sat on the *Karemera* appeal) did. Citing *Karemera*, it clarified that:

> [w]hile it is possible to take judicial notice of adjudicated facts regarding the existence of crimes, the *actus reus* and *mens rea* supporting the responsibility of the accused for the crimes in question must be proved by other means than judicial notice.[116]

83. In line with the burden and standard of proof, the Prosecution would retain the burden of proving facts that were pivotal to its case on the accused's responsibility.[117] This is consistent with the distinction drawn by the *Galić* Appeals Chamber between facts that demonstrate the existence of crimes and facts that support the accused's responsibility for crimes. The judicial composition of the *Milošević* Appeals Chamber suggests that the Judges sought to clarify the intended use of Rule 94(B) by the *Karemera* Appeals Chamber.

84. The distinction in issue is substantial. Judicial notice of the existence of crimes would be insufficient to establish responsibility – it is the proximity of the subordinate to the accused that makes evidence of their acts and conduct sufficiently pivotal to the Prosecution's case.[118] The *Karemera* Appeals Chamber's reference to the burden remaining on the Prosecution to prove knowledge beyond reasonable doubt, overlooked the reality that the failure to rebut the proposed fact will inevitably strengthen the Prosecution's case in this

[115] *Galić* Rule*92bis*(C) Decision, para.16.
[116] *Milošević* Judicial Notice Appeal, para.16
[117] *Milošević* Interlocutory Decision, para.16, citing *Karemera* Interlocutory Decision 16 June 2006.
[118] See *Galić* Rule*92bis*(C) Decision, para.15-16.

context.[119] Taking judicial notice of evidence of the acts and conduct of the accused's proximate subordinates would create a rebuttable presumption that the accused was responsible for the crimes.[120] The burden on the Prosecution to prove knowledge becomes artificial, given the "short step" from a finding that the crimes were committed by the Appellant's proximate subordinates to a finding that he knew or had reason know of the crimes.[121] It assumes that an accused's case will be premised on a lack of knowledge. In circumstances where the perpetrators are disputed, the burden is on the accused to rebut the adjudicated fact.

85. Further, the *Karemera* Appeals Chamber did not address whether findings of crimes committed by the accused's proximate subordinate may rest solely, or in a decisive manner, on a judicially noticed fact.[122] There is no indication that it even considered this.[123] This has the potential to render redundant the Prosecution's burden of persuasion for the accused's responsibility for the *actus reus* of the crimes. It would result in the accused having to prove that he did not have knowledge of the crimes or that the crimes were not perpetrated by his proximate subordinates. The number of adjudicated facts is directly relevant to the fairness of this.

86. Each of these factors suggest that *Karemera* was pronounced *per incuriam* or otherwise on the basis of an incorrect legal principle. This oversight has resulted in a fragmented approach in withholding discretion to take judicial notices of facts relating to the accused's proximate subordinates in the interests of justice.[124]

87. The *Karemera* approach also creates a discord between Rule 92*bis* and Rule 94(B). A more circumspect approach is taken in relation to evidence that *cannot* form the sole basis for a conviction, than for judicially noted facts that *can* form the sole basis for a conviction for which the accused bears the burden to rebut the accuracy. Rule 94(B) can legitimately be used as a mechanism to prove the *actus reus* of the accused's responsibility without the

[119] *Karemera* Interlocutory Decision, para.49; *Mladić* Adjudicated Fact Appeal, Partial Dissenting Opinion of Judge Patrick Robinson, para.101.
[120] *See Galić* Rule*92bis*(C) Decision, para.14.
[121] *Ibid.*, para.14.
[122] *Karemera* Interlocutory Decision, paras.49-53.
[123] *Ibid.*, paras.48-53.
[124] Brief fn.97, 98.

need to call any evidence, leaving the Prosecution with the "short step" of discharging its burden in relation to knowledge.

88. By adopting the *Galić* guidance on the admission of adjudicated facts relating to the acts and conduct of the accused's proximate subordinates, the same objective threshold is applied to Rule 92*bis* and Rule 94(B). This approach is consistent with the purpose of Rule 94(B) as a procedural mechanism and with the analogous limitations to Rule 92*bis* that the *Karemera* Appeals Chamber identified.

A.1.6 The Trial Chamber's approach

89. The Indictment alleged that the Appellant implemented the objectives of the JCEs through "Serb forces", "Sarajevo forces" and "Srebrenica forces".[125] These are the Appellant's proximate subordinates. As the most senior officer in the VRS, the Indictment alleged that he significantly contributed to achieving the objectives of the JCEs primarily through his use of these forces.[126] Additionally, that the Appellant had effective control and failed to take necessary and reasonable measures to prevent the commission of crimes and/or punish the perpetrators.[127]

90. The Appeals Chamber dismissed the Appellant's appeal against the exercise of the Trial Chamber's discretion to take judicial notice of facts of the acts and conduct of his proximate subordinates.[128]

91. The Trial Chamber took judicial notice of over 2,000 facts.[129] A significant proportion of these contain evidence relating to the acts constituting crimes committed by the Appellant's alleged proximate subordinates.[130] Often the Prosecution's evidence "did not rebut the adjudicated fact" (defined by the Trial Chamber as contradicting the fact but insufficiently reliable to rebut it) and the fact was relied upon exclusively to prove this element of the crime.[131] Judicial notice of facts of this nature contributed to the Trial Chamber's findings

[125] Indictment, paras.12, 17, 22, 27.
[126] Indictment, para.13.
[127] Indictment, paras.31-34.
[128] *Mladić* Adjudicated Fact Appeal, paras.84-87.
[129] Judgement, para.5262.
[130] Prosecution Motion for Judicial Notice; *Mladić* First Decision on Adjudicated Facts; *Mladić* Second Decision Adjudicated Facts; *Mladić* Third Decision on Adjudicated Facts.
[131] *See for example*, Judgement, paras.1050, 1076, 1089, 1092, 1101, 1113, 1124, 1149.

that the Appellant significantly contributed to the JCEs through his command and control of Serb forces to further the common objective under Art.7(1) and his command responsibility under Art.7(3).[132]

92. The erroneous interpretation and application of Rule 94(B) by the Trial Chamber on the basis of *Karemera* occasioned a miscarriage of justice. Given the Appellant's status in the army and the Prosecution's case against him, evidence related to the acts and conduct of his proximate subordinates was pivotal to the Prosecution's case.[133] Facts of this nature went to the crux of the Trial Chamber's ability to establish the Appellant's responsibility.

A.1.7 Conclusion

93. The *Galić* approach does not render Rule 94(B) obsolete. Judicial notice could still be taken of facts relating to the existence of crimes. The factors relevant to the exercise of discretion to take judicial notice of facts related to the acts and conduct of the accused's proximate subordinates should be clearly articulated. This would ensure a uniform approach is taken.[134] Revisiting *Karemera* presents an opportunity to confirm the underlying legal principle, properly consider the accused's rights within the ambit of Rule 94(B) and ensure a consistent approach with Rule 92*bis*.

94. The Appellant submits that the Trial Chamber was led into discernible error by the oversight in *Karemera* and the subsequent development in the law. In these circumstances, it is desirable to reopen the issue considered in *Karemera* to: (a) proffer guidance on the exercise of judicial discretion when facts relate to the acts of the accused's proximate subordinates; and, (b) determine whether a judicially noticed fact proving an act, constituting a crime charged, was committed by the accused's proximate subordinate can be relied upon in a sole or decisive manner.

95. The Appellant invites the Appeals Chamber to articulate the correct legal standard and review the relevant legal findings of the Trial Chamber accordingly.

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[132] Brief, paras.107-108, 158-183, 498-526, 669-676; Judgement, paras.4241-4621, 4613-4687, 4743-4814, 4828-4892, 4894-4921, 4922-4989, 4990-5131.
[133] Brief, para.89.
[134] Brief, fn.97, 98.

A.2 FURTHER OR IN THE ALTERNATIVE, THE TRIAL CHAMBER ERRED IN LAW AND/OR FACT BY APPLYING A HEIGHTENED STANDARD TO REBUTTAL EVIDENCE

A.2.1 Overview

96. The Trial Chamber erred in law and/or fact by applying a heightened standard of the burden on the Appellant to produce "credible and reliable" rebuttal evidence. The legal standard applied required the Appellant to rebut the presumption of accuracy of an adjudicated fact beyond reasonable doubt.

97. The Appellant submits that these errors invalidate the Trial Chamber's decision that the presumption of accuracy had not been rebutted.

A.2.2 Applicable law

98. Taking judicial notice of an adjudicated fact under Rule 94(B) establishes a rebuttal presumption of accuracy.[135] The jurisprudence emphasises that the burden of persuasion does not shift to the Defence, only the initial burden to produce "credible and reliable evidence sufficient to bring the matter into dispute".[136] The threshold of "credible and reliable" must be read in conjunction with the general standard of admission of evidence in Rule 89(C) of the Rules.[137]

99. A judicially noticed fact may be challenged during the presentation of the Prosecution's case or by presenting evidence during the Defence case.[138]

A.2.3 The standard applied by the Trial Chamber

100. The Trial Chamber erred in law and/or fact in paragraphs 5271-5277 by applying a heightened standard of the burden on the Appellant to produce "credible and reliable" rebuttal evidence to reopen the evidentiary debate.[139]

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[135] *Karemera,* Interlocutory Decision, para.42.
[136] *Ibid.*, para.49.
[137] *Karemera* Appeal Decision, para.14-15.
[138] *Mladić* Fourth Decision on Adjudicated Facts, para.19-20.
[139] The Trial Chamber did not set out or identify the standard it intended to apply to rebuttal evidence in the Fourth Decision on Adjudicated Facts.

101. As an initial step, the Trial Chamber required evidence to be "unambiguous in its meaning" before it could be deemed contradictory evidence.[140] The Trial Chamber set out two ways in which the evidence could attain this status; the evidence had to either point to a "specific alternative scenario" or "unambiguous[ly]" demonstrate that the scenario in the adjudicated fact "must reasonably be excluded as true".[141] The Trial Chamber asserted that "merely pointing to the possibility of alternative scenarios was in itself not a sufficient ground to reopen the evidentiary debate".[142] As a subsequent step, the Trial Chamber required the evidence to be "reliable and credible".[143] If both steps were satisfied, the evidence presented could be capable of rebutting the adjudicated fact.[144] These elements will be discussed in turn.

102. The Trial Chamber did not cite any legal basis for the requirement that the evidence had to be "unambiguous" in order to qualify as contradictory evidence.[145] The Appellant notes that this additional requirement is not derived from Rule 94(B) or the jurisprudence.[146] The Trial Chamber set out two ways in which this initial step could be satisfied. First, establishing a specific alternative scenario. This required the Appellant to present evidence from which the *only* reasonable conclusion available was that the fact was inaccurate. Other conclusions that were reasonably open from that evidence were deemed insufficient.[147] This standard is analogous to the threshold applied to circumstantial evidence.[148] Second, unambiguously demonstrating that the scenario in the fact could reasonably be excluded as true. This required the Appellant to present evidence to disprove the fact. Either way, the standard applied by the Trial Chamber required the Appellant to rebut the accuracy of the judicially noticed fact beyond reasonable doubt. Contrary to Rule 94(B), the heightened standard applied by the Trial Chamber shifted the burden of production and persuasion to the Appellant.

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[140] Judgement, para.5273.
[141] Judgement, para.5273.
[142] Judgement, para.5273.
[143] Judgement, para.5273.
[144] Judgement, para.5273.
[145] Judgement, para.5273.
[146] See *Karemera* Interlocutory Decision, para.42, 49; *Karemera* Appeal Decision, para.14-15.
[147] Judgement, para.5273.
[148] *Lukić* AJ, para.149; *Stakić* AJ, para.219, fn470.

103. The need for rebuttal evidence to be "credible and reliable" is trite law.[149] This threshold must be read in light of the general standard for the admissibility of evidence contained in Rule 89(C).[150] In the context of rebuttal evidence under Rule 94(B), the ICTR Appeals Chamber in the *Karemera* Rebuttal Decision held that:

> [T]he threshold for admission of this type of rebuttal evidence is relatively low: what is required is not the definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.[151]

104. This standard is consistent with the object and purpose of Rule 94(B). It was never intended to be applied in conjunction with an additional requirement that the evidence be "unambiguous".[152] The Trial Chamber adopted a standard that is inconsistent with the Rule and the jurisprudence.

105. The Trial Chamber's approach set out in the Judgement and the practical application of it to rebuttal evidence is inconsistent with Rule 94(B) and the jurisprudence. Since there is no support for either, the Trial Chamber's approach represents unnecessary judicial creativity that could not have been predicted.

A.2.4 Consequences of the error

106. As a result of the heightened standard applied, the Trial Chamber found that the evidence presented by the Defence was insufficient to enliven the rebuttal procedure or to rebut the accuracy of the adjudicated fact. The Appellant submits that its evaluation of the evidence is erroneous as a result of the standard applied. Illustrative examples of the error across the Indictment are identified below.[153]

107. After applying the heightened standard and rejecting the rebuttal evidence presented by the Defence at trial, the Trial Chamber took judicial notice of facts relating to the identity of the perpetrators and/or the direction of fire for the following incidents of murder: (a)

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[149] *See Karemera* Interlocutory Decision, para.49.
[150] *Karemera* Appeal Decision, para.14, fn.37.
[151] *Ibid.*, para.15 [citations omitted]. See further, fn38.
[152] *Karemera* Interlocutory Decision, para.49-50; *Karemera* Appeal Decision, paras.12-15.
[153] *See further* Brief, paras.158-183, 498-526, 669-676.

Scheduled Incidents A.3.3,[154] A.6.4,[155] A.6.6,[156] A.6.7,[157] A.8.1,[158] B.1.1,[159] E.1.1,[160] E.5.1,[161] E.7.2,[162] E.10.1,[163] E.15,[164] F.11,[165] F.12,[166] F.13,[167] F.15,[168] F.16,[169] G.4,[170] G.6,[171] G.7;[172] (b) Unscheduled Incidents 24 October 1994[173] and 1 July 1995.[174] The Trial Chamber relied on the unrebutted adjudicated fact to establish that the crimes were committed by the Appellant's proximate subordinates.[175] The Trial Chamber found that all of these incidents constituted the crime of murder.[176]

108. The Trial Chamber employed the same approach to incidents relating to the crime of terror: F.1,[177] F.5,[178] F.9,[179] G.13,[180] 22 November 1994,[181] and 10 December 1994[182]. The Trial Chamber relied on the unrebutted adjudicated fact to establish that the crimes were committed by the Appellant's proximate subordinates from the origin of fire.[183] All of the acts were found to constitute crimes of terror.[184]

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[154] Judgement, paras.800-820, 820; AFs 767-768.
[155] Judgement, paras.1054-1063, 1062; AF 897.
[156] Judgement, paras.1076-1088, 1086; AFs 908, 909.
[157] Judgement, paras.1089-1091, 1091; AFs 915-918.
[158] Judgement, paras.1739-1742, 1741; AFs 1237, 1238.
[159] Judgement, paras.349-352, 352; AFs 481, 482.
[160] Judgement, paras.2676, fn11416, 2662; AF 1357.
[161] Judgement, paras.2724-2732, 2732; AFs 1560-1562, 1564.
[162] Judgement, paras.2777-2791, 2791; AFs 1583, 1584.
[163] Judgement, paras.2850-2863, 2858; AF 1622.
[164] Judgement, paras.2895-2917, 2916; AF 1506.
[165] Judgement, paras.1944-1953, 1952; AFs 2303, 2302.
[166] Judgement, paras.1954-1959, 1958; AFs 2317, 2319.
[167] Judgement, paras.1960-1964, 1963; AF 2335.
[168] Judgement, paras.1965-1969, 1969; AF 2351.
[169] Judgement, paras.1970-1974, 1973; AFs 2354, 2362.
[170] Judgement, paras.2035-2041, 2040; AFs 2386, 2391.
[171] Judgement, paras.2042-2050, 2049; AFs 2431, 2433.
[172] Judgement, paras.2051-2057, 2056; AF 2476.
[173] Judgement, paras.2001-2003, 2002; AFs 2752, 2753.
[174] Judgement, paras.2198-2201, 2201; AF 2866.
[175] Judgement, paras.820; 1063; 1088; 1091; 1742; 352; 2676; 2732; 2791; 2862; 2917; 1953; 1959; 1964; 1969; 1973; 2041; 2050; 2057; 2003l 2201.
[176] Judgement, para.3051.
[177] Judgement, paras.1915-1922, 1922; AFs 1943, 2134.
[178] Judgement, paras.1931-1937, 1935; AFs 2263, 2266.
[179] Judgement, paras.1938-1943, 1942; AFs 2283, 2275.
[180] Judgement, paras.2107-2114, 2111; AF 2555.
[181] Judgement, paras.2006-2007, 2006; AFs 2802, 2803.
[182] Judgement, paras.2008-2011, 2010; AF 2819.
[183] Judgement, paras.1922; 1937, 1943; 2007; 2011, 2111.
[184] Judgement para.3189.

109. All of the aforementioned incidents were relied upon to substantiate the evidentiary basis for the Appellant's responsibility under the OJCE.[185]

110. The Trial Chamber stated that when a fact is judicially noticed in relation to an incident, "there should not be further evidence presented in this regard".[186] Prosecution evidence was often found to be insufficiently reliable to rebut the adjudicated fact so was disregarded or the Trial Chamber relied on the adjudicated fact exclusively.[187] Therefore, even when the accuracy of the adjudicated fact was challenged through the evidence presented by the Prosecution, the Trial Chamber's approach prevented the Appellant from enlivening the evidentiary debate through cross-examination. In light of the heightened standard applied, the only way the Appellant could rebut the adjudicated fact was to disprove it beyond reasonable doubt.

111. The Appellant's inability to rebut the adjudicated facts facilitated the discharge of the Prosecution's legal burden to prove his guilt beyond reasonable doubt. The *actus reus* of the crimes supporting the Appellant's responsibility was proved by judicial notice, meaning the Prosecution was left with the "short step" to proving his *mens rea*.

112. The illustrative incidents span the entire indictment and demonstrate a systematic error in the Trial Chamber's approach to rebuttal evidence. No reasonable trier of fact has, or would have, applied the heightened standard used by the Trial Chamber. The Appellant submits that had the proper legal standard been applied, the rebuttal evidence derived from cross-examination or presented through Defence evidence would have enlivened the debate. Further, the Prosecution's evidence would have been insufficient to establish the accuracy of the fact. The Appellant submits that the adjudicated facts would have been rebutted in these circumstances.

113. The Trial Chamber's reliance on the judicially noticed facts to find the Appellant responsible for the crimes, demonstrates that the error occasioned a miscarriage of justice.

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[185] Judgement, paras.4241-4621, 4613-4687, 4743-4814, 4828-4892, 4894-4921, 4922-4989, 4990-5131.
[186] Judgement, para.2211.
[187] *See for example*, Judgement paras.1050, 1076, 1089, 1092, 1101, 1113, 1124, 1149, 1151, 1935, 1963, 2041, 2002, 2010, 2040, 2049, 2056, 2111.

A.2.5 Remedy sought

114. The Appellant invites the Appeals Chamber: (a) to articulate the correct legal standard and review the relevant factual findings made by the Trial Chamber; (b) reverse the Trial Chamber's findings that the Appellant was responsible for the incidents infected by the error; and, (c) reverse the convictions entered on Counts 2-10 in whole or in part.

B. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FAILING TO APPLY PROPER LEGAL STANDARDS

B.1 OVERVIEW

115. The Appellant notes that the purpose of this sub-ground is to consolidate the errors in this regard to assist the Appeals Chamber and to identify the prevalent nature of the Trial Chamber's erroneous approach.

116. The Appellant submits that the Trial Chamber erred in law and in fact by failing to apply the proper legal standard and effectively alleviating the Prosecution of their burden of proof. These errors will be summarised below and expanded upon in the relevant grounds of appeal to demonstrate how the error invalidates the Trial Chamber's findings on specific grounds.

B.2 APPLICABLE LAW

117. The Appellant recalls paragraph 38 regarding the Prosecution's burden and standard of proof.

B.3 OUTLINE OF THE ERRORS

118. In Ground 3, sub-ground A.2.1.1 elaborates on the Trial Chamber's error of relying exclusively on adjudicated facts to establish elements of crime where the Prosecution's evidence did not establish the alleged facts. Consequently, the Trial Chamber effectively relieved the Prosecution of their burden and shifted it to the Appellant.[188] This error forms part of the defective evidentiary approach taken by the Trial Chamber to establish the crime base of the OJCE.[189]

119. In Ground 3, sub-ground B.5.3.3 in Ground 3 notes that the Trial Chamber imposed a standard of practice to prevent or punish crimes which was unreasonably high. This heightened standard resulted from the Trial Chamber's failure to consider the restrictive

[188] Brief, paras.162-169, 180-185.
[189] Brief, para.160.

conditions imposed by the conflict on the Appellant's ability to apply justice to perpetrators of crimes.[190] As such, the Trial Chamber wrongly concluded that the Appellant significantly contributed to the OJCE by failing to prevent and/or punish crimes.[191]

120. In Ground 4, sub-ground A.4.4, the Appellant submits that the Trial Chamber erred by relying on facts which had not been proven beyond reasonable doubt to evidence its conclusion that a JCE existed in Sarajevo and that the Appellant intended to further its criminal purpose.[192]

121. In Ground 4 sub-ground A.5, the Appellant asserts that the Trial Chamber erred by conflating the standards of proof for specific intent and for wilful intent. As such, the Trial Chamber could not find beyond reasonable doubt that the attacks were committed with the primary purpose of spreading terror amongst the civilian population.[193]

122. In Ground 4 sub-ground B.3.2, the Appellant submits that the Trial Chamber relied on adjudicated facts to prove alleged facts which were indispensable to a conviction. In doing so, the Trial Chamber, first, materially impaired the Appellant from countering the case against him and, second, impermissibly entered the arena of the parties. Consequently, the Trial Chamber relieved the Prosecution of having to prove all material elements of crime beyond reasonable doubt.[194]

123. In sub-grounds A and B of Ground 6, the Appellant avers that the Trial Chamber erred by failing to make a finding on the status of UN personnel. Their status as either combatants or civilians was critical for a conviction against the Appellant. In line with the principle of *in dubio pro reo*, detained personnel must be considered to have been combatants unless otherwise proven by the Prosecution. The Appellant submits that taking combatants as hostages was not criminalized at the time of the indictment, therefore, absent a finding by the Trial Chamber on the status of UN personnel, it could not establish the crime of hostage taking beyond reasonable doubt.[195]

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[190] Brief, paras.261-263.
[191] Brief, para.267.
[192] Brief, paras.422-428.
[193] Brief, paras.443-458.
[194] Brief, paras.498-529.
[195] Brief, paras.711-733.

124. The Appellant submits, in Ground 7 and sub-ground A, that the Trial Chamber erred by failing to give a reasoned opinion in its finding on superior responsibility. As such, it failed to establish liability under Art.7(3) beyond reasonable doubt. Given that superior liability under Art.7(3) was considered an aggravating factor for sentencing, the elements thereof should have been proven beyond reasonable doubt. By failing to give a reasoned opinion, the elements of superior responsibility were not established beyond reasonable doubt.[196] As such, the Trial Chamber effectively lowered the Prosecution's burden of proof.

B.4 CONSEQUENCES OF THE ERROR

125. The Appellant submits that the errors identified demonstrate a persistently flawed approach to the establishment of the elements of crimes across the Judgement. Individually or cumulatively, the errors invalidate the findings on the Appellant's conviction.

126. The Appellant recalls that the aforementioned errors, and the impact of these on the Trial Chamber's findings, will be considered in detail in the relevant grounds.

[196] Brief, paras.762-779, 917-920.

C. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FAILING TO PROVIDE SPECIFIC REASONS FOR CONCLUSIONS MADE IN THE JUDGEMENT, ESPECIALLY FAILING TO ADDRESS EXCULPATORY EVIDENCE.

C.1 OVERVIEW

127. The Appellant notes that the purpose of this sub-ground is to consolidate the errors in this regard to assist the Appeals Chamber, and to evidence the systematic nature of the Trial Chamber's erroneous approach.

128. The Appellant submits that the Trial Chamber did not address, in its reasoning, evidence that was clearly relevant to its finding. The absence of reasoning by a Trial Chamber indicates that it either failed to consider the direct evidence contrary to its finding of liability, or gave insufficient weight to evidence relevant yet contrary to its finding. Had the appropriate weight been given to the evidence or had the Trial Chamber provided a reasoned opinion in this regard, it could not have reasonably come to the conclusion that the only reasonable inference was the guilt of the accused. The Appellant asserts that this defective methodology undermines the Trial Chamber's findings of his guilt.

129. As with sub-ground B, the errors will be summarised below, and expanded upon in the relevant grounds of appeal, to demonstrate how the error invalidates the Trial Chamber's findings on specific grounds.

C.2 APPLICABLE LAW

130. The Appellant recalls paragraphs 28-31 on the difference between direct and circumstantial evidence.

131. The Appellant recalls paragraphs 32-33 on the weighting and assessing of evidence.

132. The Appellant recalls paragraph 34 on evidence totality of evidence.

133. A Trial Chamber has discretion in weighing and assessing evidence and to evaluate discrepancies and consider the credibility of the evidence as a whole, without explaining its decision in every detail.[197]

134. For an Appellant to argue that a Trial Chamber has failed to consider all relevant evidence, gave insufficient weight to certain evidence, or should have interpreted evidence in a particular manner, it must explain how no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber did.[198]

135. When determining whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt, it is not sufficient that the Trial Chamber come to a reasonable conclusion available from the evidence. If there is another conclusion which is also reasonably open from that evidence and which is consistent with the innocence of the accused, he must be acquitted to avoid a potential violation of *in dubio pro reo*.[199] To establish a fact on which the conviction relies, the inference drawn must be the only reasonable one that could have been drawn from the evidence presented.[200]

C.3 OUTLINE OF THE ERRORS

136. With regard to the OJCE, the Trial Chamber gave insufficient, if any, weight to probative or direct evidence that was contrary to a finding that the Appellant was a member of a common criminal objective,[201] that he significantly contributed to the common criminal objective,[202] or that he possessed the requisite *mens rea*.[203] Additionally, the Trial Chamber selectively relied on fragments of evidence, which were taken out of context.[204] Had the evidence been viewed in its totality, no reasonable Trial Chamber could have concluded that the only reasonable inference was the Appellant's guilt under the OJCE.[205]

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[197] *Stanišić & Župljanin* AJ, para.218
[198] *Brađnin* AJ, para.24; *Kunarac* AJ, para.48; *Halilović* AJ, para.12; *Blagojević* AJ, para.11.
[199] *Limaj* AJ, para.21; *Čelebići* AJ, para.458; *Ntagerura* AJ, para.306; *Kordić* AJ, paras.288-290; *Naletilić* AJ, para.120; *Čelebići* TJ, para.601; *Akayesu* TJ, para.319.
[200] *Čelebići* AJ, para.458; *Krnojelac* TJ, para.67.
[201] Brief, paras.186-210.
[202] Brief, paras.211 -269.
[203] Brief, paras.294-316.
[204] Brief, paras.317-334.
[205] Brief, para.335.

137. With regard to the JCE in Sarajevo, the Trial Chamber made impermissible inferences when concluding SRK responsibility on the basis that the act originated from SRK-held territory.[206] Given the evidence of the ABiH targeting civilians to make it appear that the SRK were responsible, the inference drawn by the Trial Chamber based on circumstantial evidence was not the only reasonable conclusion.[207] Such findings were essential to establishing elements of the crimes alleged, namely the responsibility of the SRK.[208]

138. Regarding the Srebrenica JCE, The Trial Chamber gave insufficient, if any, weight to exculpatory evidence contrary to the finding that the Appellant was a member of a common criminal objective,[209] that he significantly participated therein,[210] or that he had the intention to significantly contribute to the JCE.[211]

139. In relation to the hostage-taking JCE, the Appellant submits that the Trial Chamber erred by making findings that the Appellant significantly contributed to the JCE[212] or possessed the necessary *mens rea.*[213] By failing to give adequate weight to direct evidence which contradicted unreliable circumstantial evidence and relying on the latter, the Trial Chamber erred in finding the *actus reus* and *mens rea* elements of the hostage taking JCE.[214]

C.4 CONSEQUENCES OF THE ERROR

140. The Appellant submits that the errors identified demonstrate a persistently flawed approach to the establishment of the elements of crimes across the Judgement. Had the Trial Chamber given adequate weight to the evidence before it, or given a reasoned opinion, it could not have reasonably concluded that the only reasonable inference available from the evidence was the guilt of the accused. Individually or cumulatively, the errors invalidate the findings on the Appellant's conviction.

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[206] Brief, paras.542-554.
[207] Brief, paras.548, 552.
[208] Brief, paras.542-554.
[209] Brief, paras.570-600.
[210] Brief, paras.601-643.
[211] Brief, paras.645-665.
[212] Brief, paras.741-751.
[213] Brief, paras.752-758.
[214] Brief, paras.735-759.

141. The Appellant recalls that the aforementioned errors, and the impact of these on the Trial Chamber's findings, will be considered in detail in the relevant grounds.

D. THE TRIAL CHAMBER ERRED IN LAW AND FACT BY RELYING ON EVIDENCE THAT THE DEFENCE WERE UNABLE TO TEST THROUGH CROSS-EXAMINATION AND/OR CONFRONTATION

D.1 OVERVIEW

142. The Trial Chamber erred by relying on sole and decisive hearsay to establish findings that a trier of fact must reach beyond reasonable doubt. Consequently, the Appellant was unable to subject the evidence to scrutiny.

143. These errors will be summarised below and expanded upon in the relevant grounds of appeal to demonstrate how the error invalidates the Trial Chamber's findings on specific grounds.

144. The Appellant notes that the purpose of this sub-ground is to consolidate the errors in this regard to assist the Appeals Chamber.

D.2 APPLICABLE LAW

145. Rule 92*bis* allows for the admission of written evidence that goes to the proof of matters other than the acts and conduct of the accused.[215]

146. A Trial Chamber has a discretion to rely on hearsay evidence. The weight and probative value afforded will depend on the circumstances surrounding it.[216] It can accept certain parts of the evidence and reject others.[217]

147. A conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine. This principle applies to any finding that a trier of fact must reach beyond reasonable doubt.[218] Allowing a conviction based on hearsay evidence without sufficient corroboration is contrary to the principles of fairness.[219]

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[215] Rule 92*bis*(A).
[216] *Karera* AJ, para.39; *Kalimanzira* AJ, para.96.
[217] *Lukić* AJ, para.92; *Šainović* AJ, para.294, 336, 342.
[218] *Popović* AJ para.96.
[219] *Galić* Rule92*bis*(C) Decision, fn34.

D.3 OUTLINE OF THE ERRORS

148. In Ground 3, Section A.2.1.2, the Appellant submits that the Trial Chamber relied exclusively on adjudicated facts and on witnesses admitted pursuant to Rule 92*bis* to establish incidents which form the crime base of the OJCE.[220] As such, the Trial Chamber made findings that a trier of fact must reach beyond reasonable doubt based on untested evidence and unchallengeable adjudicated facts.[221]

149. In Ground 5, Section I, the Appellant submits that the Trial Chamber erred by giving undue weight to evidence that he was unable to test. The findings formed part of the common criminal objective. As such, the conviction relies on this finding in a decisive manner.[222]

D.4 CONSEQUENCES OF THE ERROR

150. The errors illustrated above demonstrate a defective evidentiary approach taken by the Trial Chamber. Individually or cumulatively, these errors invalidate the findings of the Appellant's guilt.

151. The Appellant recalls that the aforementioned errors will be considered in detail in the relevant grounds.

[220] Brief, paras.160, 170-185.
[221] Brief, paras.160, 170-185.
[222] Brief, paras.681-694.

IV. GROUND THREE: THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FINDING THAT AN OVERARCHING JCE EXISTED AND THAT THE APPELLANT PARTICIPATED IN IT

A. THE TRIAL CHAMBER ERRED IN LAW AND FACT AND ABUSED ITS DISCRETION BY FINDING THE EXISTENCE OF AN OVERARCHING JCE.

152. The Appellant submits that the Trial Chamber erred in finding him liable as a member of the OJCE for crimes committed under Counts 2 to 11 of the Indictment.

A.1 APPLICABLE LAW

A.1.1 The legal elements of JCE-I

153. In order to find an accused criminally responsible pursuant to JCE-I liability, a Trial Chamber must determine that the following elements exist:

Actus reus:

(i). A plurality of persons participating in the realisation of a common criminal objective.[223]

(ii). A common objective which amounts to or involves the commission of a crime provided for in the Statute.[224] The element of a common objective may be inferred from persons in a criminal enterprise working together.[225]

(iii). The participation of the accused in the objective's implementation, more specifically for the Appellant, his conduct must assisted in the execution of the crimes which formed part of the common criminal objective.[226] A contribution of an accused person to the JCE need not be, as a matter of law, necessary or

[223] *Kvočka* TJ, para.307; *Haradinaj* TJ, para.138.
[224] *Stanišić & Župljanin* AJ, para.67.
[225] *Krajišnik* TJ, para.834; E. van Sliedregt (2007), pp.184-207, 197.
[226] *Tadić* AJ, para.227.

substantial but it should at least be a significant contribution to the crimes for which the accused is found responsible.[227]

Mens rea:

(iv). The JCE participants, including the Appellant, had a common state of mind, namely the state of mind of intent in relation to the statutory crime(s) through which the common objective was to be achieved.[228]

A.1.2 The appellate standard

154. The Appellant recalls paragraphs 24-26, relating to the appellate standard applied on appeal.

A.1.3 Standard of proof at Trial

155. The Appellant recalls paragraphs 38-40, for the burden and standard of proof.

A.2 THE TRIAL CHAMBER'S USE OF ADJUDICATED FACTS IN OJCE

A.2.1 Applicable law

A.2.1.1 Judicial notice of adjudicated facts

156. The Appellant recalls paragraphs 98-99 for the law relating to the use of adjudicated facts.

*A.2.1.2 Evidence admitted under Rule 92*bis

157. The Appellant recalls paragraphs 145-147 for the jurisprudence relevant to the Trial Chamber's reliance on hearsay evidence.

[227] Judgement, para.3561, fn13442.
[228] Judgement, para.3561.

A.2.2 The errors

158. The Appellant recalls Ground 2, sub-ground A.1, paragraphs 62-95. Should the Appeals Chamber find that the Trial Chamber did not err in taking judicial notice of adjudicated facts that relate to the acts and conduct of the Appellant's proximate subordinates, the Appellant submits that the Trial Chamber erred in law in its method of relying on those adjudicated facts.

159. The legal errors occurred when the Trial Chamber (a) relied solely on adjudicated facts that went to the acts and conducts of proximate subordinates of the Appellant, or (b) relied on adjudicated facts that were only corroborated by evidence admitted pursuant to Rule 92*bis*.

160. These errors led the Trial Chamber to take a defective evidentiary approach when establishing the statutory crime base through which the common objective was to be achieved. Illustrative examples of this approach include Scheduled Incidents A.4.4,[229] A.6.4,[230] A.6.6,[231] A.6.7,[232] A.7.2,[233] A.7.4,[234] A.7.5,[235] B.1.1,[236] B.1.2,[237] B.10.1,[238] B.10.2,[239] B.13.3,[240] B.13.4,[241] B.16.2,[242] C.6.1,[243] and chapters 4.2.4,[244] 4.3.6,[245] 4.5.5,[246] 4.5.6[247] and 4.8.7.[248]

161. The Appellant will demonstrate the errors through two worked examples.

A.2.2.1 Relying exclusively on adjudicated facts to establish elements of crimes

[229] Judgement, paras.887-891, 3065.
[230] Judgement, paras.1054-1063, 3065.
[231] Judgement, paras.1076-1088, 3065.
[232] Judgement, paras.1089-1091, 3065.
[233] Judgement, paras.1604-1610, 3065.
[234] Judgement, paras.1617-1626, 3065.
[235] Judgement, paras.1627-1637, 3065.
[236] Judgement, paras. 349-352, 3065.
[237] Judgement, paras.353-360, 3065.
[238] Judgement, paras.961-968, 3065.
[239] Judgement, paras.969-974, 3065.
[240] Judgement, paras.1149-1151, 3065.
[241] Judgement, paras.1152-1158, 3065.
[242] Judgement, paras.1771-1773, 3065.
[243] Judgement, paras.633-656, 3287, 3312.
[244] Judgement, paras.577-580, 3388, 3401.
[245] Judgement, paras.709-712, 3419, 3428, 3431.
[246] Judgement, paras.792-794, 3381, 3387.
[247] Judgement, paras.795-796, 3419, 3428, 3431.
[248] Judgement, paras.986-990, 3122, 3183.

162. The Appellant submits that the Trial Chamber erred in law and/or in fact by relying solely on adjudicated facts to prove the elemental requirements of the crime base.

A.2.2.1.1 Example: Scheduled Incident B.16.2

163. In Scheduled Incident B.16.2,[249] the Trial Chamber found that;

> [o]n the evening of 30 September 1992, Serb MUP officers from the SJB Vlasenica arrived at Sušica camp and, on the order of Mane Đurić, removed 140-150 non-Serb detainees in four trips. […] The MUP officers killed all the detainees.[250]

164. To reach this finding, the Trial Chamber relied on AFs1266-1268, and received evidence from RM-066 and Ewa Tabeau. This evidence, in itself, was insufficient to establish that MUP officers caused the deaths of those individuals. It merely established that certain MUP officers were present at Sušica camp and that Mane Đurić decided to transfer the detainees somewhere else due to concerns about their safety.[251]

165. The evidence alone creates no link between the deaths of 140-150 people and the perpetrators responsible for the deaths. Instead, the elements of the crimes were established by the adjudicated facts.

A.2.2.1.2 The error: the adjudicated facts could not be challenged

166. The Trial Chamber's erroneous reliance on adjudicated facts prevented the Appellant from challenging them. The Appellant notes, adjudicated facts can be challenged either through cross-examination or by leading evidence that contradicts the adjudicated fact.[252]

167. First, the Appellant submits, he was unable to challenge AFs1266-1268 through cross-examination because the Prosecution's evidence did not corroborate the facts that proved the elements of crime in Incident B.16.2. The Trial Chamber's acknowledgement of this is evident in its finding that the evidence did "not rebut the adjudicated facts"[253] (defined as

[249] Judgement, paras.1771-1773.
[250] Judgement, paras.1773, 3065.
[251] Judgement, para.1772.
[252] *Mladić* Fourth Decision on Adjudicated Facts, para.19.
[253] Judgement, para.1771.

contradicting the fact but insufficiently reliable to rebut it).[254] As such, any cross-examination of the Prosecution's witnesses could not have rebutted the adjudicated facts. Second, the Appellant recalls Ground 2, sub-ground A.2 at paragraphs 96-105 and submits that the impermissibly high standard imposed to rebut adjudicated facts prevented him from effectively challenging them.

168. The Appellant submits, the Trial Chamber erred in law and/or fact by relying exclusively on unchallengeable adjudicated facts to make findings on incidents.

A.2.2.1.3 Consequences of the error

169. To establish the elements of crime, the Trial Chamber erroneously relied on adjudicated facts that could not be challenged. The Prosecution's evidence alone did not make out the elemental requirements beyond reasonable doubt. Instead, the Appellant was required to rebut the presumption of accuracy of the adjudicated facts beyond reasonable doubt. As such, the Trial Chamber effectively relieved the Prosecution of their burden and shifted it to the Appellant. Therefore, the error invalidates the finding.

A.2.2.2 Corroborating adjudicated facts with 92bis witnesses.

170. The Appellant submits that, in other instances, he was unable to challenge the adjudicated facts because the Trial Chamber relied on witnesses admitted pursuant to Rule 92*bis* to corroborate those facts. This resulted in an error of law and/or fact.

A.2.2.2.1 Example: Scheduled Incident B.10.2

171. In Scheduled Incident B.10.2[255], the Trial Chamber found that, on 14 June 1992, 52 detainees were forced onto a bus and at least 47 of them were killed by members of the VRS military police.[256] To reach this finding, the Trial Chamber relied on AF1229 which

[254] Judgement, para.5276.
[255] Judgement, paras.969-974.
[256] Judgement, paras.974, 3065.

established part of the elemental requirements. It also received evidence from Elvir Jahic and witness RM-145[257] whose evidence was admitted pursuant to Rule 92*bis*[258].[259]

A.2.2.2.2 The error: the adjudicated fact could not be challenged

172. The Appellant recalls, adjudicated facts can be challenged either through cross-examination or by leading evidence that contradicts the adjudicated fact in its own case.[260] The Appellant submits, neither of these forms of challenge could be exercised with regard to the adjudicated fact relied on in Incident B.10.2. First, the Appellant could not cross-examine the evidence supporting the adjudicated fact because it was all admitted pursuant to Rule 92*bis*. Second, the Appellant recalls its submissions on adjudicated facts at paragraphs 96-105 and submits that the impermissibly high standard imposed to rebut adjudicated facts prevented him from effectively challenging them.

173. As such, the Trial Chamber erred in law by relying on unchallengeable adjudicated facts to establish elements of crime.

A.2.2.2.3 Consequences of the error

174. Aside from the unchallengeable adjudicated fact, the Trial Chamber relied exclusively on evidence admitted pursuant to Rule 92*bis* to establish the incident. The Appellant submits, the Trial Chamber abused its discretion by placing excessive weight on evidence that could not be cross-examined to establish the acts and conduct of his proximate subordinates.

175. The Appellant recalls, a conviction may not rest in a decisive manner on the evidence of a witness whom the accused has had no opportunity to examine. This principle applies to findings that a trier of fact must reach beyond reasonable doubt.[261] It is trite law that

[257] Judgement, para.969.
[258] Rule 65*ter* List, pp.130-131.
[259] The Trial Chamber also relied on Ewa Tabeau's evidence. She is a demographer and statistician. Her evidence will not be addressed as it relates to uncontested issues (i.e. the number of deaths) rather than the contested elements of crime (e.g. the circumstances around the deaths, the perpetrators, the dates etc…).
[260] *Mladić* Fourth Decision on Adjudicated Facts, para.19.
[261] *Popović* AJ, para.96.

evidence from 92*bis* witnesses can be relied upon to establish the context of crimes.[262] *Galić* elaborated on this point;

> [R]ule 92*bis* was primarily intended to be used to establish what has now become known as "crime-base" evidence, rather than the acts and conduct of what may be described as the accused's immediately proximate subordinates – that is, subordinates of the accused of whose conduct it would be easy to infer that he knew or had reason to know.[263]

176. The distinction highlighted by the *Galić* Appeals Chamber is significant. The existence of a crime is insufficient to establish responsibility. However, the proximity of the subordinates to the accused makes evidence of their acts and conduct sufficiently pivotal to the Prosecution's case. This is because there is a "short-step" from a finding that crimes were committed by an accused's subordinates to a finding that the accused was responsible for those acts[264].

177. The Indictment alleged that the Appellant, as the most senior officer in the VRS, implemented the common plan through Serb forces.[265] Given this formulation, evidence regarding the acts and conduct of the Appellant's forces went to the crux of the Trial Chamber's findings on the Appellant's responsibility. The subsequent burden on the Prosecution to prove the accused's knowledge of those crimes therefore became artificial.[266]

178. The Appellant submits that the Trial Chamber abused its discretion by relying solely on untested written testimonies to establish conduct of the proximate subordinates of the Appellant and to make findings which a trier of fact must reach beyond reasonable doubt.

179. Without the Trial Chamber's erroneous reliance on the adjudicated facts and on 92*bis* witnesses, the Prosecution could not have proven the elemental requirements of the crimes beyond reasonable doubt.

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[262] *Stakić* AJ, paras.200-202.
[263] *Galić* Rule92bis(C) Decision para.16.
[264] *Ibid.*, para.15.
[265] Indictment, paras.11-12.
[266] See *Galić* Rule 92*bis*(C) Decision, para.14.

A.2.3 Conclusion

180. The Appellant submits, the Trial Chamber erred in law and/or fact by; (a) relying solely on adjudicated facts that went to the acts and conduct of the immediately proximate subordinates of the Appellant and (b) relying solely on evidence admitted pursuant to Rule 92*bis* to corroborate adjudicated facts and to make findings on entire incidents.

181. Consequently, the Appellant was unable to challenge the adjudicated facts or to cross-examine witnesses who were the basis of findings that a trier of fact must reach beyond reasonable doubt.

182. The Appellant recalls the illustrative examples provided in paragraph 160 and submits, the Trial Chamber's error of law resulted in a defective evidentiary approach that occurred systematically across the municipality segments, which established the crime base for the Appellant's liability under the OJCE.

183. Consequently, the Trial Chamber's finding, that the OJCE constituted a massive ethnic cleansing campaign with the goal of permanently removing Bosnian-Muslims and Bosnian-Croats through the crimes delineated in the municipality crime base segment, is invalidated.[267]

A.2.4 Remedy sought

184. The Appellant invites the Appeals Chamber to articulate the correct legal standard and to review the relevant factual findings accordingly.

185. The Appellant invites the Appeals Chamber to reverse the findings on all crimes where this error was committed and reverse the convictions for Counts 2 to 11 to the extent to which the errors occurred.

[267] Judgement, paras.4216, 4232.

A.3 THERE DID NOT EXIST A COMMON CRIMINAL OBJECTIVE OF WHICH THE APPELLANT WAS A PART

186. The Appellant asserts that the Trial Chamber erred in finding him to be a member and participant in the OJCE.

A.3.1 Applicable law

187. The Appellant recalls the legal elements of JCE-I delineated above at paragraph 153.

188. The Appellant recalls from paragraph 34 that there is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[268] This presumption may be rebutted when evidence which is clearly relevant to the Trial Chamber's findings is not addressed in its reasoning.[269]

189. The Appellant recalls from paragraphs 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence before it[270] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[271]

190. An Appellant cannot argue that a Trial Chamber has failed to consider all relevant evidence, given insufficient weight to certain evidence, or should have interpreted evidence in a particular manner and reached a particular conclusion, without explaining why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber did.[272]

191. The Appellant recalls its submissions on the difference between direct and circumstantial evidence at paragraphs 28-31. Direct evidence supports the truth of an assertion, whereas

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[268] *Stanišić & Župljanin* AJ, para.536; *Strugar* AJ, para.24; *Limaj* AJ, para.86; *Krajišnik* AJ, para.19; *Galić* AJ, para.256.
[269] *Stanišić & Župljanin* AJ, para.536, fn1806.
[270] *Ibid.*, para.218.
[271] *Ibid.*, para.218.
[272] *Brđanin* AJ, para.24; *Kunarac* AJ, para.48; *Halilović* AJ, para.12; *Blagojević* AJ, para.11.

circumstantial evidence is evidence of facts surrounding an event or offence from which a secondary fact can be inferred.[273] The Trial Chamber can rely on circumstantial facts, separately or cumulatively, but both direct and circumstantial evidence must lead to the only reasonable conclusion available on the evidence.

192. The Appellant recalls paragraphs 35-37 that, to show an error of law due to a lack of reasoned opinion, an Appellant needs to identify the specific issues, factual findings, or arguments, which the Trial Chamber omitted to address and to explain why this omission invalidates the decision.[274]

193. Lastly, the inference drawn to establish a fact on which the conviction relies, must have been the *only* reasonable one that could have been drawn from the evidence presented.[275]

A.3.2 The Trial Chamber's approach

194. At paragraphs 4216-4240 of the Judgement, the Trial Chamber found that the OJCE contained a plurality of persons, each individually identifiable,[276] and defined the temporal and geographical scope as covering most of BiH[277] and existing from 1991 to 30 November 1995.[278]

195. In reaching this conclusion, the Trial Chamber relied on its findings in relation to the crimes relevant to the OJCE (chapters 4-8), which substantiated their findings that the Appellant significantly contributed to furthering the common criminal objective.[279]

196. The Appellant will address the errors of the Trial Chamber in turn.

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[273] *Brđanin* TJ, para.35.
[274] *Stanišić & Župljanin* AJ, fn.467.
[275] *Čelebići* AJ, para.458; *Krnojelac* TJ, para.67.
[276] Judgement, para.4216.
[277] Judgement, para.4216.
[278] Judgement, para.4232.
[279] Judgement, paras.4216-4240.

A.3.3 The errors

197. The Appellant submits that the Trial Chamber erred in fact by giving insufficient weight, if any, to exculpatory evidence that the Appellant exhibited acts and conduct in opposition to furthering the common criminal objective.

A.3.3.1 The Appellant acted to protect non-Serbs who remained in their municipalities

198. The Trial Chamber did not give sufficient, if any, weight to evidence of the Appellant's positive attitude and behaviour toward Bosnian-Muslim and Bosnian-Croat civilians. Different measures were employed to ensure the proper care of the civilian population and provide security for Bosnian-Muslim villagers during the conflict.[280] Witnesses Elvedin Pašić, Mile Ujić and Slavko Mijanović[281] testified that non-Serbs remained in their municipalities throughout the conflict.[282] Yet the Trial Chamber did not include these statements in its reasoning.[283]

199. The Trial Chamber considered witness Vinko Nikolić's evidence unreliable: that more than eight-thousand Bosnian-Muslims and Bosnian-Croats continued to live in Sanski Most during the conflict.[284] Yet, when cross-examining Nikolić, the Prosecution acknowledged the presence of over four-thousand-four-hundred Muslims remaining in Sanski Most.[285] The Trial Chamber omitted to give sufficient weight to this subsequent clarification from Nikolić. Additionally, the Appellant reported concerns to Karadžić and the MUP Minister about the commission of crimes by MUP forces in this area against the non-Serb population, calling for affirmative action to be taken.[286]

200. Further evidence provides examples where Bosnian-Muslims submitted requests to return to their villages,[287] or left their villages freely.[288] The Appellant made concerted efforts to

[280] Judgement, paras.1014, 1619, 1692, 1753; D1031, para.48; P3972; P2525, p.5.
[281] D799, para.6; D691, para.35; *E.Pašić* (T.555-556).
[282] Judgement, paras.746, 948, 952, 1716.
[283] Judgement, paras.748, 960.
[284] Judgement, para.1716; D892, para.12.
[285] *V.Nikolić* (T.31279-31280); Judgement, paras.1716, 1720.
[286] P3095 (24 September 1995); D1503 (20 October 1995).
[287] P854, p.5.
[288] P843, para.61.

take care of civilians,[289] to protect refugees from the conflict,[290] to give civilians the choice of remaining or leaving municipalities, and to allow unarmed individuals to farm the land and receive humanitarian aid.[291] Yet, the Trial Chamber failed to provide sufficient, if any, analysis as to the probative value it placed on this evidence and disregarded it completely when determining its findings.[292]

201. The Appellant submits that if sufficient weight had been given to this exculpatory evidence, no reasonable trier of fact could have concluded that the only reasonable inference was that the Appellant acted to further the common criminal objective of the OJCE.

A.3.3.2 Disregard of direct evidence in municipality analysis

202. The Trial Chamber erred by not giving direct and probative evidence sufficient, if any, weight in their reasoning. The Appellant's military notebooks contained direct evidence of the constraints experienced by the Appellant when operating in the municipalities,[293] and the protection he intended to provide Bosnian-Muslims and Bosnian-Croats.[294] Yet, the Trial Chamber relied on the Appellant's notebooks only four times in its analysis of crimes that occurred in the municipalities.[295]

A.3.3.3 Error in finding there was a common plan that the Appellant was a part of

203. To determine the first two elements of the *actus reus* of JCE-I, the Trial Chamber concluded that the only reasonable inference was that the OJCE members worked jointly, based on evidence of their interaction and cooperation, to share responsibility for crimes committed through the OJCE.[296] Yet, the Trial Chamber expanded the OJCE to include the entirety of 1991[297] and included, in their findings, the actions and speeches of politicians[298] from a period of time the Appellant was entirely absent, serving in Croatia as a member of the

[289] P439, para.64.
[290] D770, paras.16-17.
[291] D942, para.15.
[292] Judgement, paras.960, 1720.
[293] P353, pp.163, 179, 180, 192, 260, 299; P356, pp.179, 180.
[294] P353, p.330; P356, p.218; D1514; D187.
[295] Judgement, para.381, 715, 1774, 1786.
[296] Judgement, paras.3561, fn13443, 4216-4240.
[297] Judgement, para.4232.
[298] Judgement, Ch.9.2.2-9.2.5.

JNA.[299] At no point did the Trial Chamber cite evidence that the Appellant was even aware of the content of these various meetings, conversations, speeches and statements made by politicians.[300]

204. In addition, the Trial Chamber's reasoning contains inconsistent interpretations of the Appellant's interactions with OJCE members. The Trial Chamber found that the Appellant could influence the political leadership,[301] but then also refers to evidence of the Appellant continually stating he was subject to the political leadership.[302] The Trial Chamber chose specific statements from UNPROFOR personnel as the most probative examples of outside observers interpreting the Appellant and his behaviour with other OJCE members.[303] However, these statements are often in contradiction with one another. For example, the Appellant is found to have been influential over politicians, where "Karadžić could not make any military decision that Mladić did not approve."[304] Yet the Trial Chamber also quotes the Appellant's consistent statements through direct evidence that he was *subject* to the Bosnian-Serb political leadership.[305]

205. These inconsistencies in the Trial Chamber's reasoning undermine its conclusion that the Appellant acted jointly with the other members of the OJCE to implement the common criminal objective and shared the responsibility for the crimes committed through it.

A.3.3.4 Actions of a legitimate military Commander

206. The Trial Chamber erred by giving undue weight to evidence of the Appellant's role and obligations in establishing the VRS. In light of the existing jurisprudence that "one's 'routine duties' will not exculpate them"[306], the Appellant asserts that, as VRS Main Staff Commander, he conducted and directed large-scale military operations that contributed to the VRS war effort, not to the commission of VRS crimes.[307] The Appeals Chamber in *Peršić* confirmed that the VRS was not in itself a criminal organization and undertook

[299] Judgement, paras.4617-4620.
[300] Judgement, Ch.9.2.2.
[301] Judgement, para.4474.
[302] Judgement, paras. 4466, 4472-4474.
[303] Judgement, paras.4374-4395.
[304] Judgement, paras.4376, 4472.
[305] Judgement, paras.4466, 4473-4474.
[306] *Blagojević* AJ, para.189; *Stanišić & Župljanin* AJ, para.154, fn540.
[307] Defence FTB, paras.2852-2885; Chapter 9.5.3.

lawful combat activities.[308] The Appellant established, mobilized, trained, and organised VRS organs, corps, and operations consistent with his obligations, delegated to him by the President of the Republic.[309]

A.3.4 Consequences of the errors

207. The Appellant recalls the systematic and legally unsound approach of the Trial Chamber to adjudicated facts outlines at paragraphs 158-183 which invalidates the findings in the municipality crime base segment upon which the liability of the Appellant is established.

208. In addition, the Trial Chamber's disregard of direct evidence of the Appellant acting in opposition to the common criminal objective led to inferences being drawn that were inconsistent and unsupported by the totality of the evidence. This led the Trial Chamber into error when finding that the Appellant was a member and participant in the OJCE.[310]

A.3.5 Remedy sought

209. As a consequence of the error, the findings of the Appellant's guilt under JCE-I are invalidated. The element of *actus reus* cannot be considered satisfied beyond a reasonable doubt. As such, the Trial Chamber cannot conclude guilt.

210. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings of OJCE or, in the alternative, reverse the findings to the extent of the errors identified.

[308] *Perišić* AJ, para.57-69.
[309] Judgement, paras. 4244-4243, 4253, 4260, 4263, 4270, 4271, 4274, 4282-4291; P3011, Arts.173-175.
[310] Judgement, ch.9.2.14.

B. THE TRIAL CHAMBER ERRED IN LAW AND FACT AND ABUSED ITS DISCRETION BY FINDING THAT THE APPELLANT WAS A MEMBER OF THE OVERARCHING JCE AND/OR THAT HE MADE A SIGNIFICANT CONTRIBUTION TO IT.

B.1 OVERVIEW

211. The Appellant asserts that the Trial Chamber erred in fact by giving insufficient, if any, weight to evidence in direct contradiction to the finding of *actus reus* for the Appellant under JCE-I.[311]

212. The Appellant further asserts that, in the findings of *actus reus* for the OJCE, the Trial Chamber erred in law and in fact by failing to provide reasoned opinions, analysis on probative evidence, or findings based on evidence, and it held the Appellant to an impossible evidentiary standard. The cumulative effect of these errors meant that the Trial Chamber could not have considered the element satisfied beyond reasonable doubt.

B.2 APPLICABLE LAW

213. The Appellant recalls the elements of JCE I at paragraph 153. In addition, to find an accused criminally responsible pursuant to JCE-I liability, a Trial Chamber must be satisfied that the accused furthered the common criminal objective at the core of the JCE, and must characterise the accused's contribution to it.[312] The accused's contribution should be significant to the crimes for which he is held responsible. Significant contribution to the JCE requires the accused to have performed acts that, in some way, are directed to furthering the OJCE.[313]

214. The Appellant recalls Ground 2, sub-ground A.2, paragraphs 96-105 for the law relating to the use of adjudicated facts.

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[311] *Čelebići* AJ, para.458; *Kvočka* AJ, para.18.
[312] *Stanišić & Župljanin* AJ, para.136.
[313] *Tadić* AJ, para.229; *Krajišnik* AJ, paras.215, 218, 695.

215. The Appellant recalls from paragraph 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence[314] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[315]

B.2.1 The Trial Chamber's approach

216. The Trial Chamber held that the Appellant's role in the four JCEs, charged under JCE-I, reflected the totality of his conduct.[316] The Trial Chamber held that, where both individual and superior responsibility are alleged under the same count and elements of both modes are satisfied, the Trial Chamber will only enter a conviction on the basis of Art.7(1) and consider the accused's superior position as an aggravating factor in sentencing.[317]

217. The Appellant's submissions below relate to convictions found by the Trial Chamber under the mode of Art.7(1) of the Statute. The Appellant notes that modes of liability will be further considered in Ground 7.

B.3 NO EFFECTIVE COMMAND AND CONTROL OF MUP

B.3.1 The error

218. The Appellant submits that the Trial Chamber erred by failing to give sufficient, if any, weight to evidence that the Appellant lacked *de jure* and *de facto* control over MUP. The Trial Chamber relied on adjudicated facts to establish that the Appellant had command and control over MUP forces. Given the heightened standard applied to contradictory evidence[318], the Trial Chamber erred by failing to open the evidentiary debate in light of the reliable and credible evidence that contradicted the adjudicated facts.

[314] *Stanišić & Župljanin* AJ, para.218.
[315] *Ibid.*, para.218.
[316] Judgement, para.5165.
[317] Judgement, para.5165.
[318] Brief, paras.100-105.

219. The Trial Chamber found that the MUP were re-subordinated to the VRS,[319] then found the Appellant's contribution to the OJCE included ordering the VRS to "co-operate" with the MUP.[320] As part of this, he failed to prevent and punish the perpetrators of MUP.[321]

220. The establishment of the Appellant's command and control over the re-subordinated MUP forces formed the basis for the finding that he significantly contributed to furthering the common criminal objective.[322] Further, it was used as part of the evidentiary basis to support the Trial Chamber's finding that the Appellant shared the requisite *mens rea* as part of the OJCE.[323]

B.3.2 Evidence substantiating the error

221. With regards to MUP, the Trial Chamber relied on adjudicated facts to establish that the MUP forces were re-subordinated to the VRS.[324] The Appellant recalls Ground 2, sub-ground A.2, paragraphs 96-105 relating to the approach taken by the Trial Chamber to adjudicated facts, specifically the heightened standard applied. The Appellant presented reliable and credible evidence that coordinated action of MUP forces with the VRS did not involve re-subordination and that command remained with the MUP.[325] Further, the Trial Chamber acknowledged that the MUP units remained under the command of MUP officials.[326] At all times, effective control, reporting, and discipline remained with MUP command.[327] As such, the Appellant did not have effective control over the forces, including the ability to prevent and punish, as they continued operating as a separate entity that coordinated with the VRS. The Trial Chamber failed to give sufficient weight to this evidence, and conflated coordinated action with re-subornation. The Appellant submits that this evidence was sufficient to enliven the evidentiary debate and rebut the adjudicated facts.[328] No reasonable trier of fact could have concluded that the Appellant exercised

[319] Judgement, para.3794.
[320] Judgement, para.4611.
[321] Judgement, para.4611.
[322] Judgement, paras.4610-4612.
[323] Judgement, paras. 4614, 4631.
[324] Judgement, para.3794.
[325] Theunens (T.20615-20617); Kevac (T.30537-30545); Kovač (T.41921).
[326] Judgement, 3826.
[327] Theunens (T.20615-20617); Kevac (T.30537-30545); Kovač (T.41921); P05248, p.2.
[328] Brief, paras.98-99.

effective command and control over MUP, so as to establish a significant contribution to the *actus reus* finding of OJCE.

B.3.3 Consequences of the error

222. Effective command and control of MUP was a critical component to considerations of the Appellant's contribution. The Trial Chamber found that many of the crimes charged were committed by MUP forces, which were re-subordinated to the GSVRS.[329]

223. The Appellant submits, absent a proper weighting of the evidence on the military distinction between coordinated action and re-subordination, no reasonable trier of fact could have concluded that the he exercised effective command and control over MUP.

B.3.4 Remedy sought

224. Based on this fundamental error, the Appellant invites the Appeals Chamber to reverse the Trial Chamber's convictions based on JCE-I.[330] In the alternative, invites the Appeals Chamber to reverse the Trial Chamber's findings to the extent of the error identified.

[329] Judgement, paras.4410-4411.
[330] Judgement, para.4610.

B.4 LACK OF PROFESSIONAL SOLDIERS, OFFICERS AND NON-COMMISSIONED OFFICERS ('PROFESSIONAL SUBORDINATES')

B.4.1 Applicable law

225. The Appellant recalls paragraph 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence[331] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[332]

226. The Appellant recalls paragraphs 35-37 that, to show an error of law due to a lack of reasoned opinion, an Appellant needs to identify the specific issues, factual findings, or arguments, which the trial chamber omitted to address and to explain why this omission invalidates the decision.[333]

B.4.2 The error

227. The Appellant submits that the Trial Chamber erred in fact, by failing to give sufficient, if any, weight to evidence that the lack of professional subordinates significantly affected the Appellant's ability to command and control VRS soldiers.

228. The Trial Chamber found that the Appellant "possessed a high level of command and control over his subordinates."[334] Despite the Trial Chamber 'noting' there was occasional indiscipline in the VRS, they found it was not great enough to undermine the Appellant's overall ability to exercise command and control.[335] It inferred that issues of obedience existed, but were not significant enough to affect the Appellant's command and control.[336]

229. The establishment of the Appellant's command and control over his subordinates was included in the Trial Chamber's findings[337] and formed the basis for the finding that the

[331] *Stanišić & Župljanin* AJ, para.218.
[332] *Ibid.*, para.218.
[333] *Ibid.*, para.137, fn.467.
[334] Judgement, para.4391.
[335] Judgement, para.4392.
[336] Judgement, para.4393.
[337] Judgement, para.4612.

Appellant significantly contributed to furthering the common criminal objective of the OJCE.

230. The Appellant's ability to command and control VRS units was a key finding in establishing the *actus reus* of the OJCE.[338] This finding was then used as part of the evidentiary basis to support the Trial Chamber's finding that the Appellant shared the requisite *mens rea* as part of the OJCE.[339]

B.4.3 Evidence substantiating the error

B.4.3.1 Lack of professional subordinates

231. The Trial Chamber erred by failing to adequately consider the wider repercussions of a lack of professional subordinates on the Appellant's ability to instruct and ensure military combat operations were carried out within the rules and process of the VRS. Inadequately trained subordinates meant there was organisational disunity. The lack of professionally trained subordinates at lower levels affected combat operations and outcomes.[340]

232. These factors support the Appellant's submission that he and other GSVRS personnel visited commands and units as a strategy to deal with the lack of professional subordinates who would normally carry out such tasks.[341] The Trial Chamber failed to adequately consider this in their analysis of the Appellant's inspections and visits to VRS units.[342]

B.4.3.2 Cooperation with VJ

233. The lack of professional subordinates was a widespread issue that affected other areas of the Appellant's command and control. It was the primary reason why the Appellant met with VJ representatives, so he could acquire more trained personnel.[343]

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[338] Judgement, paras.4610-4612.
[339] Judgement, paras.4614, 4631.
[340] Defence FTB, paras.653-654; more specifically: P5241, pp.2-5, 8-10, 12, 14, 15; D566, p.2; D686, paras.36, 38-39; RM511 (T.5033); P338, pp.21-22, 73; D559, paras.31-32; Kovač (T.41371-41372); D939, p.9. P356, p.180; P346, pp.140-141.
[341] Defence FTB, para.662: P3029, pp.563-564; P347, p.56.
[342] Judgement, paras.4311-4321.
[343] Judgement, Ch.9.3.6; *Perišić* AJ, para.93.

234. An example of the Trial Chamber failing to include relevant evidence in its reasoning is a reference to a meeting on 8 July 1993 where the Appellant, President Karadžić, President Milošević, Jovica Stanišić and General Panić met to discuss issues between the VRS and the VJ.[344] The Trial Chamber included in its reasoning that the Appellant suggested accepting the establishment of a sabotage detachment consisting of 1,000 professional soldiers,[345] but failed to note several weaknesses noted by the Appellant, such as declining discipline within the VRS and the dismantling of the MUP.[346] This problem is referred to numerous times in the direct evidence provided in the Appellant's military notebook.[347]

B.4.4 Consequences of the error

235. The Appellant recalls, the *actus reus* of JCE-I requires the Appellant to have significantly contributed to furthering the common criminal objective of the OJCE.[348] The Appellant further notes, effective command and control is a critical component to considerations of the Appellant's contribution as Commander of the GSVRS. This is because the Trial Chamber found that many of the charged crimes were committed by members of the VRS, which were ultimately under the operational command of the GSVRS.[349]

236. The Appellant submits, absent the proper weighting of evidence, no reasonable trier of fact could have concluded that the Appellant exercised effective command and control over VRS subordinates, a significant element to the *actus reus* finding of the OJCE.

B.4.5 Remedy sought

237. Based on this fundamental error, the Appellant invites the Appeals Chamber to reverse the Trial Chamber's convictions based on the mode of liability: JCE-I.[350] In the alternative, the Appeals Chamber should reverse the Trial Chamber's findings to the extent of the errors identified.

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[344] P358, p.238; *Stanišić & Župljanin* AJ, para.536.
[345] Judgement, para.4425.
[346] Judgement, para.4425.
[347] P4583, p.39; Judgement, para.4440.
[348] Judgement, para.3561.
[349] Judgement, para.4610.
[350] *Vasiljević* AJ, para.12; *Blaškić* AJ, para.13.

B.5 KNOWLEDGE OF, INVESTIGATION AND PUNISHMENT OF CRIMES

238. The Appellant submits, the Trial Chamber erred in law and fact by failing to give sufficient, if any, weight to specific evidence, and failed to provide adequate consideration of probative evidence when reaching the finding that the Appellant, through his omission to take the appropriate steps to investigate and/or punish perpetrators of crimes, significantly contributed to furthering the common criminal objective of the OJCE.[351]

B.5.1 Applicable law

239. The Appellant recalls paragraphs 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence[352] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[353]

240. The Appellant recalls paragraphs 35-37 that, to show an error of law due to a lack of reasoned opinion, an Appellant needs to identify the specific issues, factual findings, or arguments which the Trial Chamber omitted to address, and must explain why this omission invalidates the decision.[354]

B.5.2 The Trial Chamber's approach

241. The Trial Chamber held that the Appellant's acts and omissions, in relation to investigation and punishment, were so instrumental to the commission of the crimes that without them the crimes would not have been committed as they were.[355]

242. In reaching this conclusion, the Trial Chamber considered the following factual findings:
- The Bosnian-Serb military and civilian justice system failed on many occasions to investigate crimes committed by members of the VRS and other Serb forces;

[351] Judgement, paras.4611-4612.
[352] *Stanišić & Župljanin* AJ, para.218.
[353] *Ibid.*, para.218.
[354] *Ibid.*, para.137, fn.467.
[355] Judgement, paras.4611-4612.

- The military and civilian justice system failed to arrest or punish the perpetrators of these crimes; and
- On multiple occasions in which crimes had been committed against non-Serbs by VRS members or members of other Serb forces, criminal reports were not filed, investigations were not initiated by military prosecutors or investigative judges, suspects were not arrested or detained, and, if arrested, perpetrators were unlawfully released from detention to return to their units.[356]

243. The Appellant recalls that, to be found criminally liable on the basis of JCE, it is not sufficient that he acted in furtherance of the common criminal objective; rather that he significantly contributed to the commission of crimes involved in the common criminal objective.[357] Whether specific types of conduct could or could not be considered a contribution to a JCE is a question of fact to be determined on a case-by-case basis.[358]

B.5.3 The errors

244. The Appellant submits that, cumulatively the Trial Chamber erred in its factual determination of the Appellant's contribution to the OJCE in the following ways:

(i). Knowledge

The Trial Chamber erred by not giving sufficient weight to evidence that the Appellant could not have known certain crimes had been committed.

(ii). Crimes unpunished is insufficient to find the Appellant significantly contributed

Proof that crimes occurred and went unpunished is simply not sufficient to establish a nexus between the Appellant and the requirements of significant contribution, nor to sustain a conviction under OJCE, and ultimately, responsibility for those crimes.[359]

(iii). Insufficient weight given to evidence of institutional issues, noting it was a new country

The Appellant avers that the Trial Chamber failed to give sufficient, if any, weight in its assessment of the institutional issues of the military justice system, the measures that

[356] Judgement, para.4545.
[357] *Stanišić & Župljanin* AJ, para.110, fn373.
[358] *Krajišnik* AJ, para.696; *Stanišić & Župljanin* AJ, para.110, fn375.
[359] *Haradinaj* TJ, para.161; Judgement, para.4545.

the Appellant took, and the operational realities faced by the Appellant of dealing with prosecutions during the conflict.[360]

(iv). The independence of the military justice system

The Appellant maintained an attitude that the military justice system needed to remain impartial and independent from the military.[361] This independence meant decisions about prosecutions did not involve the Appellant.

B.5.3.1 Knowledge

245. The Appellant asserts that the Trial Chamber failed to give sufficient, if any, weight to evidence that:

(i). the Appellant was unaware of crimes committed by VRS soldiers against Bosnian-Muslims and Bosnian-Croats, and

(ii). that crimes committed were not always reported to him through the VRS command combat reporting system.

B.5.3.1.1 Evidence where the Appellant had no knowledge so prevention and/or punishment of crimes was not possible

246. The Trial Chamber erred by not giving sufficient weight to evidence that the Appellant could not have known certain crimes had been committed. For example, a report by the Manjača camp's operational team to the 1KK Command of 8 July 1992 stated that a prisoner, Husein Delalović, had died of natural causes on 6 July 1992.[362] Yet, witness RM709 testified that Delalović had been shot.[363] Further, the reports received by the Appellant from Manjača did not provide any information about the commission of crimes by the VRS.[364] Another example is the evidence of murders in Zecovi where no one was

[360] Defence FTB, paras.731-732; P360, p.296.
[361] Defence FTB, para.734.
[362] Judgement, para.369.
[363] Judgement, para.369.
[364] P92; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; D1536; D1827; D2030; D2071.

informed of the crime.[365] The incident only became known after the perpetrators were arrested and indicted in 2014.[366]

247. A further example was provided when Osman Selak testified that at a meeting of high level Commanders, General Talić ordered that a report to the GSVRS be changed to report that only 80–100 Green Berets had been killed, when the real figure was 800.[367] The figure of 80 was subsequently provided in the report to the GSVRS.[368] In this instance, the Appellant was never put on notice of the real number of deaths or their nature.

248. A further example was on 4 November 1992, the 1KK falsely reported a murder as a death resulting from combat operations.[369]

B.5.3.1.2 Evidence where the Appellant or the Appellant's subordinates knew of crimes and ordered perpetrators to be prosecuted and punished

249. The Trial Chamber failed to give sufficient, if any, weight to evidence of the Appellant becoming aware of crimes committed by VRS subordinates, or ordering the incidents to be investigated and the suspects prosecuted. [370] Below are some illustrative examples.

250. Branko Basara, Brigade Commander from mid-October 1991 to late December 1992,[371] testified that four soldiers, after hearing that two soldiers had been killed during the attack in Hrustovo on 31 May 1992, carried out a crime near Kenjari.[372] According to the witness, these soldiers executed 17 out of 18 Muslim men, who had earlier approached members of the 1st Battalion and said that they wanted to join them as combatants, and who were then held by the soldiers in a house near Kenjari under the order of the Commander of the 1st Battalion, Lieutenant Ranko Brajić.[373] The witness testified that, when Brajić found out about this crime, the four soldiers were arrested and handed over for further proceedings.[374]

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[365] Defence FTB, para.940.
[366] Defence FTB, para.940.
[367] Judgement, para.1024.
[368] Judgement, para.1024.
[369] Judgement, para.4040.
[370] Judgement, paras.366, 1632, 1782.
[371] Judgement, para.133.
[372] Judgement, para.1614.
[373] Judgement, para.1614.
[374] Judgement, paras.1614, 4180.

251. Another example is when Major Velimir Dunjić, Commander of the Igman Infantry Brigade failed to report on crimes of the detachment to his superiors.[375] However, reports of misconduct reached the Appellant who immediately launched an investigation, the result of which was that Dunjić was summarily dismissed and any individual found suspected to have engaged in criminal activity was arrested and prosecuted.[376]

252. A further example was when RM-706 testified that Basara prevented killings occurring by ordering that detainees be taken to a Sanski Most police station and, in effect, saving their lives.[377] In addition, on 1 June 1992, General Galić ordered the arrest of VRS soldiers who had killed detainees.[378]

253. Additionally, when a 1KK report regarding the ICRC's visit to Manjača downplayed and gave a more benign account of ICRC complaints about conditions,[379] the Appellant took steps to order the immediate improvement of conditions, including the treatment and release of the sick and immediate termination of physical abuse.[380] When the Appellant was advised about killings in Manjača, he took affirmative action to punish the VRS perpetrators of crimes, resulting in suspension and criminal reports being filed.[381]

B.5.3.1.3 Failure to provide a reasoned opinion as to evidence cited in 9.3.10, and therefore, the evidence as a whole was not given sufficient weight

254. The Appellant submits that the Trial Chamber failed to give a reasoned opinion when it omitted analysis of exculpatory evidence in section 9.3.10, and failed to address and explain its probative value in comparison to other evidence cited in section 9.2.12. This absence of sufficient reasoning indicates that the Trial Chamber has failed to give the exculpatory evidence in section 9.3.10 sufficient weight in its findings.[382]

[375] Defence FTB, para.1305.
[376] Defence FTB, para.1305.
[377] *Ibid.,* para.1202.
[378] *Ibid.,* para.1273.
[379] D230, p.1.
[380] P2881, p.1
[381] Judgement, para.366-367.
[382] *Stanišić & Župljanin* AJ, para.137.

255. Section 9.2.12 contains the Trial Chambers' findings on the investigation and prosecution of crimes in the general liability section. Section 9.3.10 contains the Trial Chamber's findings on the Appellant's facilitation and encouragement of the commission of crimes by VRS and other Serb forces. It also found that he significantly contributed to furthering the common criminal objective by failing to take adequate steps to prevent and/or investigate such crimes, and/or to arrest or punish the perpetrators.

256. In section 9.3.10, the Trial Chamber cited evidence of VRS orders relating to military discipline and abidance with international law.[383] The Trial Chamber establishes that the Appellant, due to his titular role, had the authority to order investigations within the military justice system.[384] Based on the Trial Chamber's findings, the Appellant did, on several occasions, order investigations to be carried out, particularly in relation to war crimes or crimes against humanity.[385] The Appellant issued orders directing VRS subordinates to comply with the laws and regulations of the relevant political and military bodies, including international laws.[386]

257. Ultimately however, the Trial Chamber based their finding of JCE liability on the evidence presented in section 9.2.12.[387]

B.5.3.2 Crimes unpunished is insufficient to find that the Appellant significantly contributed

258. The Trial Chamber found that, due to an absence of evidence, the Appellant failed to order the investigation and prosecution of crimes committed by Serbians against Bosnian-Muslims or Bosnian-Croats.[388] These omissions formed part of the basis for the Trial Chamber's finding that the Appellant significantly contributed to furthering the objective of the OJCE.[389] The Appellant submits that this finding is a grossly unfair outcome in judicial proceedings as the Appellant has been convicted despite a lack of evidence on an

[383] Judgement, paras.4517-4528.
[384] Judgement, paras.4531, 4545.
[385] Judgement, para.4545.
[386] Judgement, para.4545; P474 (1992); D187 (1994).
[387] Judgement, para.4545, 4611.
[388] Judgement, paras.4545-4546, 4611.
[389] Judgement, para.4612.

essential element of the crime.[390] The ICC Appeals Chamber confirmed in *Bemba*, that the measures taken by a commander cannot be faulted merely because of shortfalls in their execution.[391]

259. In addition to this unfairness principle, the Appellant submits that the Trial Chamber erred because the Appellant's guilt was determined in the absence of proper consideration of section 9.3.10 (discussed above at paragraphs 254-257).

260. The Appellant submits that the cumulative effect of both (i) and (ii) (paragraph 244) resulted in an impermissible inference that the Appellant failed to order the investigation and prosecution of subordinates who had committed crimes.

B.5.3.3 Insufficient weight given to evidence of institutional issues, noting it was a new country

261. The Appellant avers that the Trial Chamber failed to appreciate the limitations the Appellant faced in dealing with the military justice system in a state of crisis, and the realities of the Appellant's inability to submit matters for investigation and prosecution in a conflict situation.[392]

262. The Trial Chamber held that the military justice system failed to file criminal reports[393] and prosecute VRS soldiers,[394] notwithstanding findings that the system suffered from institutional issues that inhibited its functioning[395] and that, in fact, criminal reports were filed.[396] The Trial Chamber's findings, at paragraphs 4111-4115, focus on the institutional issues of the Courts suffering from a lack of resources and conclude that proceedings before military courts continued throughout the war despite the courts reporting problems.[397] Although the Trial Chamber found that the Appellant was under a duty to take adequate steps to prevent, investigate, and/or punish crimes by members of the VRS and Serb

[390] *Kordić* AJ, para.19.
[391] *Bemba* AJ, para.180.
[392] *Bemba* AJ, para.189, Judgement, Ch.9.3.10; Defence FTB, paras.732-733; P360, p.296; *Popović* AJ, para.1931.
[393] Judgement, para.4195.
[394] Judgement, paras.4123, 4189.
[395] Judgement, para.4106.
[396] Judgement, paras.3849, 3878, 4104, 4108, 4109, 4117, 4120, 4123, 4138, 4159, 4184.
[397] Judgement, para.4114.

forces,[398] this does not mean that the Appellant was not in any way subject to limitations or impeded to a degree – a reality which the Trial Chamber ought to have given weight to in its assessment of the Appellant's actions.[399]

263. The Appellant further submits that, by failing to consider the restrictive realities of applying justice in conditions of conflict, the Trial Chamber has imposed a standard of practice upon the Appellant which was impossible to meet in the circumstances of ongoing conflict.[400]

B.5.3.4 The independence of the military justice system

264. The Appellant maintained an attitude that the military justice system needed to remain impartial and independent from the military.[401] The Trial Chamber found that, when crimes were reported, it was often the prosecutor or military court that decided not to prosecute certain crimes.[402] Yet, the Trial Chamber failed to provide an appropriate nexus between the decisions of the prosecutor's office within the independent military justice system, and the Appellant.[403] It is not sufficient, as the Trial Chamber has done, to simply juxtapose the Appellant[404] with the structure of the military justice system.[405]

265. The Appellant submits, that the above oversights of the Trial Chamber have led it into error.

B.5.4 Consequences of the error

266. The Appellant recalls, the *actus reus* of JCE-I requires the Appellant to have significantly contributed to furthering the common criminal objective.[406] The Appellant further notes, investigation, and punishment of perpetrators of crimes was a critical factor in the

[398] Judgement, para.4544.
[399] *Bemba* AJ, para.173.
[400] *Bemba* AJ, paras.138, 144, 145-146, 166-171; *Popović* AJ, para.1931.
[401] Judgement, para.4096; Defence FTB, para.734; *Bemba* AJ, para.180.
[402] Judgement, paras.4128, 4134, 4143, 4189, 4195.
[403] Judgement, paras.4116-4193.
[404] Judgement, paras.4116-4194.
[405] Judgement, paras.4095-4115.
[406] Judgement, para.3561.

determination of the Appellant's contribution because many of the charged crimes were found to be committed by members of the VRS.[407]

267. The Appellant avers that the errors identified have a material impact on the Trial Chamber's finding that the Appellant significantly contributed to furthering the objective of the OJCE. The Trial Chamber failed to give sufficient weight to evidence of the Appellant's conduct of ordering investigations and prosecutions, and failed to fully appreciate the limitations the Appellant faced during the conflict. Had the Trial Chamber provided a reasoned opinion on the available evidence, it would have found another reasonable conclusion consistent with the innocence of the Appellant. To avoid the violation of *in dubio pro reo*,[408] the Appellant must be acquitted.[409]

B.5.5 Remedy sought

268. As a consequence of the error, the finding of the Appellant's guilt under the mode of liability of JCE-I is invalidated. The element of *actus reus* and subsequently, *mens rea* cannot be considered satisfied beyond a reasonable doubt. As such, the Trial Chamber cannot conclude guilt.

269. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings of liability under the mode of OJCE or, in the alternative, reverse the findings on the errors identified.

[407] Judgement, para.4612.
[408] *Limaj* AJ, para.21; *Naletilić* AJ, para.120; *Čelebići* TJ, para.601; *Akayesu* TJ, para.319.
[409] *Čelebići* AJ, para.458; *Ntagerura* AJ, para.306.

B.6 THE TRIAL CHAMBER EMPLOYED A DEFECTIVE METHOD WHEN DETERMINING THE *MENS REA* OF THE OJCE

270. The Appellant submits that the Trial Chamber erred in law by employing a defective method that resulted in a finding of the Appellant's *mens rea* being satisfied beyond reasonable doubt. Because of this, the Trial Chamber prejudiced the Appellant in determining his requisite *mens rea.*

B.6.1 Applicable law

271. The Appellant recalls the *actus reus* and *mens rea* elements of the OJCE as defined at paragraph 153.

272. JCE is a criminal liability that rests on the concept of 'acting with a common design'. It requires proof of an awareness on the part of the defendant (*mens rea*) that his conduct contributed to the crime (*actus reus)*.[410] The common purpose links the physical perpetrators to the non-physical perpetrator and provides the basis for attributing individual criminal responsibility.[411]

273. Jurisprudence dictates that the *actus reus* determination must be established first, before considerations of *mens rea* are determined.[412]

274. To establish the *actus reus* elements, the Trial Chamber must determine the existence and scope of a common criminal purpose shared by a plurality of persons. These factors are a necessary prerequisite to determining whether the acts performed by the Appellant were related, and contributed, to the perpetration of the common criminal objective.[413]

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[410] E. van Sliedregt (2007), pp.184-207, 185.
[411] E. van Sliedregt (2007), pp.184-207, 200.
[412] *Stanišić & Simatović* AJ, paras.82, 87.
[413] *Ibid.*, para.82.

275. The Trial Chamber is then required to examine whether the Appellant's shared intent to further the common criminal objective could be inferred from his knowledge, acts, words and interactions with other individuals.[414]

276. *Šainović* clarified the distinction between *actus reus* and *mens rea* inferences drawn from the same evidence. *Šainović* determined *actus reus* elements as being the very limited, physical, and two-dimensional contributions of the individual. For example: the number of meetings he attended with superiors, his participation in and contribution to those meetings,[415] his failure to raise certain issues at the meetings, the speeches he delivered, and his general exhibition of loyalty to his superior.[416]

277. The *mens rea* analysis uses the same evidence as a basis to infer the three-dimensional aspects of the Appellant's behaviour. For example, the influence he wielded in those meetings from his words and conduct (rather than his mere physical presence), the intent behind the words used in the speech, and inferring what his knowledge would have been in relation to the crimes.[417]

278. This distinction is relevant to the error defined below.

279. The appellate standard of review is recalled from paragraphs 24-26, and 38-40.

280. The Appellant recalls paragraphs 35-37 that, to show an error of law due to a lack of reasoned opinion, an Appellant needs to identify the specific issues, factual findings, or arguments, which the trial chamber omitted to address and to explain why this omission invalidates the decision.[418]

B.6.2 The error

281. The Trial Chamber erred by making inferences of the Appellant's *mens rea* in its *actus reus* analysis.

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[414] *Ibid.*, para.82.
[415] *Šainović* TJ, V.III, para.142.
[416] *Ibid.*, para.275.
[417] *Ibid.*, para.276.
[418] *Stanišić & Župljanin* AJ, para.137, fn.467.

282. An example of this was when the Trial Chamber referred to the Appellant's speeches and interactions with others at the Bosnian-Serb Assemblies.[419] The Trial Chamber quoted:

> [w]hile Mladić did not have a right to vote or to formally make a proposal at assembly sessions, he served as an 'influential voice' and was able to make suggestions, advocate policies, and engage in discussions about those policies.[420]

283. This is then followed by a direct quote from the Appellant that he had "mulled over for a long time and discussed within the most select circle of comrades […] the strategic goals that are of substance."[421]

284. The Appellant submits that the Trial Chamber erred by inferring the Appellant's *mens rea* in its *actus reus* analysis. Whilst making an inference about the Appellant's significant contribution, the Trial Chamber used this evidence to also infer the Appellant's intent to influence the Bosnian-Serb political leadership in its decision-making,[422] to show his knowledge of the six strategic objectives which were found to embody the common criminal objective,[423] and to demonstrate the influence he wielded through his interactions with others.[424] The Appellant recalls the distinction in *Šainović* referred to above, and submits that these inferences should have only been considered in the context of the Appellant's *mens rea*.[425]

285. This process is again repeated with the Appellant's other Assembly speeches.[426]

286. A second defect in the Trial Chamber's methodology is findings of the Appellant's *mens rea* being used to substantiate its *actus reus* findings. An accused's *mens rea* can only be considered after the *actus reus* has been established.[427] Findings on *mens rea* should not exist at the stage the *actus reus* is being determined.

287. An illustrative example was when the Trial Chamber quoted;

> [E]vidence reviewed in chapter 9.3.13 [*mens rea*] that during the meeting of the Bosnian-Serb Assembly on 5 and 6 May 1993, in which the Assembly voted

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[419] Judgement, paras.4471-4473.
[420] Judgement, para.4459.
[421] Judgement, para.4460.
[422] Judgement, para.4478.
[423] Judgement, paras.4477-4478.
[424] Judgement, para.4478.
[425] *Šainović* TJ, V.III, para.276.
[426] Judgement, paras.4465, 4468, 4486, 4627, 4629, 4686.
[427] *Stanišić & Simatović* AJ, paras.82, 87.

> against the ratification of the Vance-Owen plan, Mladić forcefully demonstrated his opposition to the plan.[428]

288. The finding that the Appellant offered his suggestions to the political leadership was relied upon to demonstrate his significant contribution to furthering the common criminal objective.[429] The Trial Chamber then refers to the same Assembly speech in its *mens rea* analysis[430] and draws the inference that this was an expression of the Appellant's commitment to the common criminal objective.[431] While conclusions on both the *actus reus* and the *mens rea* can be drawn from the same evidence, the error by the Trial Chamber is the inclusion of inferences from the *mens rea* section in the *actus reus* analysis. This is in contravention of the method of assessment required for JCE-I. The Appellant submits that the Trial Chamber erred by prematurely drawing an inference of the Appellant's *mens rea*, thereby indelibly tainting the evidence when drawing an inference of the Appellant's *actus reus.*

289. This error is repeated in relation to Witness RM-802. Chapter 9.3.3 (*actus reus*) uses the findings based on the evidence of RM-802, considered in chapter 9.3.13 (*mens rea*), to substantiate its finding in relation to the Appellant's command and control of the VRS in 9.3.3 (*actus reus*).[432]

290. This error is again repeated in the findings in Chapter 9.3.10 (*actus reus*) on the Appellant's facilitation and/or encouragement of the commission of crimes by VRS. The Trial Chamber relies on its findings in Chapter 9.3.13 (*mens rea*) to find the Appellant knew crimes were committed, and that he did not take appropriate steps to investigate or punish perpetrators.[433]

B.6.3 Consequence of the error

291. The collective consequence of these errors was that, when the Trial Chamber determined the Appellant's guilt for the *mens rea* element, it had already drawn a relevant inference

[428] Judgement, paras.4465, 4477.
[429] Judgement, paras.4611-4612.
[430] Judgement, para.4628.
[431] Judgement, para.4486.
[432] Judgement, paras.4298, 4386, Ch.9.3.3.
[433] Judgement, para.4546.

from the evidence. Therefore, the evidence analysed in the *mens rea* section was indelibly tainted so that it could only lead to the conclusion of guilt.

B.6.4 Remedy sought

292. The finding of the *mens rea* element of the OJCE affects Counts 2 to 11 under which the Appellant was convicted. The method employed by the Trial Chamber in determining these elements was flawed and, as a result, findings that relate to the Appellant's requisite *mens rea* is invalid. As such, the Trial Chamber cannot conclude liability. The Appellant must be acquitted of liability for the crimes attributable to the OJCE.

293. Based on this fundamental error, the Appellant invites the Appeals Chamber to reverse the Trial Chamber's convictions under the OJCE.[434] In the alternative, the Appeals Chamber should reverse the Trial Chamber's findings to the extent of the error identified.

[434] *Vasiljević* AJ, para.12; *Blaškić* AJ, para.13.

B.7 DISREGARD OF DIRECT EVIDENCE IN THE *MENS REA* ANALYSIS OF THE JCE

294. The Appellant asserts that the Trial Chamber erred in fact by disregarding direct evidence clearly relevant to its finding. Disregard is shown when evidence which is clearly relevant is not addressed by the Chamber's reasoning.[435]

B.7.1 Applicable law

295. In order to find an accused criminally responsible pursuant to JCE-I liability, a Trial Chamber must determine that the members of the JCE, including the accused, had a common state of mind, namely intent to commit the statutory crimes through which the common objective was to be achieved.[436]

296. It is trite law that the accused is entitled, at all times, to the benefit of the doubt. [437] As such, the Prosecution must prove their case beyond all reasonable doubt. An assertion will only be found proven beyond reasonable doubt if the evidence is so strong against the Accused as to leave only a remote possibility in his favour.[438]

297. This standard is not limited solely to the ultimate question of guilt, it also applies to the underlying facts.[439] The Prosecution has to prove each element of the crime and the mode of liability, and any fact which is indispensable for the conviction, beyond a reasonable doubt.[440]

298. The Appellant recalls paragraphs 28-31: the difference between direct and circumstantial evidence. Direct evidence supports the truth of an assertion, whereas circumstantial evidence is evidence of facts surrounding an event or offence from which a secondary fact can be inferred.[441] The Trial Chamber can rely on circumstantial facts, separately or cumulatively, but both direct and circumstantial evidence must lead to the only reasonable conclusion available on the evidence.

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[435] *Kvočka* AJ, para.23.
[436] *Tadić* AJ, para.228; *Krajišnik* AJ, paras.200, 707.
[437] *Čelebići* TJ, para.601.
[438] *Čelebići* TJ, para.600.
[439] *Kupreškić* AJ, para.226; *Halilović* AJ, paras.111-125.
[440] *Halilović* AJ, para.125.
[441] *Brađnin* TJ, para.35.

B.7.2 The error

299. The Appellant avers that, the evidence relied upon by the Trial Chamber in reaching its conclusion was primarily circumstantial evidence. As demonstrated below, the Trial Chamber was faced with stronger, more direct, and conflicting evidence, thereby showing, in comparison, the circumstantial evidence to be of lower probative value.

300. It is further noted that the absence of sufficient reasoning indicates that the Trial Chamber has given insufficient weight or failed to fully consider the direct evidence which is contrary to a finding of liability as to *mens rea*.[442] In consequence, it breached the legal standard of finding the Appellant's *mens rea* established beyond reasonable doubt, which engages the principle *in dubio pro reo*.

301. The Appellant will address the errors of the Trial Chamber in turn.

B.7.2.1 The Trial Chamber's use of circumstantial evidence to prove the Appellant's mens rea for the OJCE

302. The Appellant accepts that the *mens rea* section is a summary of factors the Trial Chamber considered relevant in reaching its conclusion regarding the Appellant's intent.[443] Nevertheless, the Trial Chamber erred by not giving direct and probative evidence sufficient, if any, weight in their findings. It is accepted that the Trial Chamber is not required to refer to all evidence on the record,

> [a]s long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Disregard is shown when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[444]

303. Below are illustrative examples where the Trial Chamber used circumstantial evidence to find the Appellant's *mens rea* established beyond reasonable doubt.

[442] *Stanišić & Župljanin* AJ, paras.137-138, 218, 536.
[443] *Ibid.*, para.538.
[444] *Kvočka* AJ, para.23.

B.7.2.1.1 Statements in Autumn 1991

304. The Trial Chamber relies on statements made by the Appellant when he was posted to Knin with the 9th Corps of the JNA to infer that he had the intention to disrespect the laws of war in Croatia. The Trial Chamber uses these statements to infer the Appellant's intention to repeat similar destruction in the conflict in Bosnia.[445] One can surmise this was the reason the Trial Chamber expanded upon the OJCE of the indictment from 'at least October 1991'[446] to '1991',[447] but the Appellant is left to presume this as the Trial Chamber has neglected to provide any sound analysis for this decision.

B.7.2.1.2 Passive presence at meetings

305. The Trial Chamber references the Appellant's attendance at a meeting on 10 or 11 May 1992, during which;

> [e]veryone applauded after hearing reports that the village of Glogova had been partially destroyed, that most of it was on fire, and that the Bosnian Muslims had been evacuated by force'.[448]

306. Another example is an uncorroborated observation of an UNPROFOR officer at a Christmas celebration in Pale who observed Karadžić and other political members agreeing that the act of ethnic cleansing is necessary.[449] An astounding admission in the presence an international representative.

307. Of all the evidence available to the Trial Chamber, a third person's observation was included in their factual basis as the most probative. These observations do not indicate the Appellant's mental state, but rather, infer tacit agreement based solely on his physical presence.

[445] Judgement, para.4686.
[446] Judgement, paras.3556, 4232.
[447] Judgement, para.4610.
[448] Judgement, para.4621.
[449] Judgement, para.4626.

B.7.3 The Trial Chamber's disregard of direct evidence

308. Below are some examples of the direct and probative evidence that was disregarded by the Trial Chamber and goes to show that the Appellant's acts, conduct, and statements do not demonstrate a shared intent to further the purpose of the common criminal objective of the OJCE.

B.7.3.1 Orders toward paramilitary groups

309. The Trial Chamber failed to give sufficient weight, if any, to the Appellant's orders in relation to paramilitary groups – evidence that was in fact excluded from the *mens rea* analysis.[450] These orders are clear and direct evidence of the Appellant's approach towards rebel (including Serbian) military formations; that crimes would not be tolerated and efforts were being made to stop criminal acts being perpetrated.[451] The Appellant's approach is also supported by various meetings recorded in his military notebooks.[452] This is in direct contrast to the mental intent supposedly shared by the Appellant with the other members of the OJCE; that the Appellant intended for crimes to be committed in furthering the OJCE by these same paramilitaries.[453]

310. Further examples exist of the Appellant's resolve against criminal acts that remained consistent throughout the conflict period. On 17 August 1992, the Appellant demonstrated his intent to disband paramilitary organisations by following up his instructions to do so with the commands of the 1KK, SRK, IBK and HK.[454] A year later, on 22 May 1993, the Appellant strictly prohibited the organisation or activity along 'para-army', 'para-militia', or 'para-political lines', warning that all such groups would be arrested and eliminated, or physically liquidated in case of resistance.[455] The Appellant also reported this to President Karadžić on 20 October 1995.[456] The Appellant's consistency in such an anti-paramilitary

[450] Judgement, para.3840.
[451] Judgement, paras.3840, 4335, P356, p.233-234; P7390, p.2; P5113, p.1-2; P5112, p.1-4; P2873, p.3; P4038, p.1; P5133; P1966, p.7; P7208, p.3; P5151, p.3-6; P5119, p.1; P5248, p.2; D99, p.3; Uniparip (D891, para.5); Simić (D921, para.26-27); D792, p.4; D1996, p.1
[452] P352, pp.48, 207, 331, 338; P353, p.59, 163, 308; P354, p.48, 133, P356, pp.178, 180, 233; P360, p.150.
[453] Judgement, paras.4686-4687.
[454] Judgement, para.3847.
[455] Judgement, para.3852.
[456] Judgement, para.3853.

position negates his "shared intent" to any OJCE member who intended to include or use these paramilitary groups as tools to further the common criminal objective.

B.7.3.2 Respecting international law

311. The Trial Chamber failed to give sufficient, if any, weight to the Appellant's genuine warnings in his orders for VRS soldiers to respect the Geneva Conventions.[457] Yet, these orders are direct evidence of the Appellant's intent in relation to the behaviour of VRS soldiers under his command and was evident from the very beginning of his tenure as VRS Main Staff Commander.[458] The Trial Chamber referenced the Appellant's orders related to military discipline and abidance with international law in the *actus reus* section[459] but ultimately concluded, in its *mens rea* analysis, that there is greater amount of circumstantial evidence that proves the Appellant had the requisite *mens rea* for the OJCE. The Trial Chamber omitted to provide any reasoning as to why this direct evidence of the Appellant's intent, that VRS soldiers should not commit crimes, did not form part of an evidentiary basis that another reasonable inference existed. It is settled jurisprudence that appellate review is justified in this situation as evidence which is clearly relevant to the findings has not been addressed in the Trial Chamber's reasoning.[460]

B.7.3.3 Respecting ceasefire agreements

312. The Trial Chamber failed to give sufficient weight, if any, to direct orders of the Appellant to observe the ceasefire agreements.[461] Instead, the Trial Chamber only made findings on this evidence in relation to the Appellant's *actus reus*.[462] Yet, the Trial Chamber failed to see its direct evidentiary representation of the Appellant's *mens rea.* In addition, the direct evidence is supported by circumstantial evidence.[463]

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[457] Judgement, para.4687.
[458] P474, para.6; Andan (T.22376); Defence FTB, para.90, fn122; D1118; D961.
[459] Judgement, paras.4517-4518, 4526.
[460] *Limaj* AJ, para.86.
[461] Judgement, paras.4325-4328, 4340, 4677; D451.
[462] Judgement, Ch.9.3.3.
[463] P2198; D1505; D1506, p.2; P2198, para.41; Rose (T.6889-6892); P764, p.2; P4048, p.2; P2001, p.89; Milinčić (D783, para.25); D1508, p.2.

313. These orders indicate that the Appellant ordered his soldiers to abide by international humanitarian law, rather than further the objective of the common criminal objective, which meant contravening international law. The Appellant believes it is incumbent upon the Appeals Chamber to intervene in the Trial Chamber's *mens rea* analysis where direct evidence of probative value has not been given sufficient weight in its considerations.

B.7.4 Consequences of the error

314. The Appellant submits that, if appropriate weight was given to the direct evidence, no reasonable Trial Chamber could have concluded that the only available inference was that the Appellant shared the necessary *mens rea* to achieve the common criminal objective.

315. As a consequence of the error, the Appellant was erroneously convicted under the mode of JCE-I as part of an OJCE. The Appellant submits, had the error not been committed, no reasonable trier of fact could conclude the *mens rea* required for a conviction through a JCE to be proved beyond reasonable doubt. Further, no reasonable Trial Chamber could reasonably exclude that there was another reasonable inference available on the evidence which was consistent with the innocence of the Appellant.

B.7.5 Remedy sought

316. Based on this fundamental error in the Trial Chamber's analysis, the Appellant invites the Appeals Chamber to reverse the Trial Chamber's convictions based on the mode of liability: JCE-I[464] or, in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.

[464] *Vasiljević* AJ, para.12; *Blaškić* AJ, para.13.

B.8 IMPROPERLY IMPUTING *MENS REA* FROM BOSNIAN-SERB ASSEMBLY SPEECHES

317. The Trial Chamber erred by improperly and prejudicially relying on parts of the Appellant's speeches delivered at the 16th and 24th Sessions of the Bosnian-Serb Assembly. These selective references formed part of the evidentiary basis and ultimate conviction for the *mens era* element JCE-I.[465]

B.8.1 Applicable law

318. The Appellant recalls from paragraphs 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence[466] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[467]

319. The Appellant recalls from paragraphs 35-37 that, to show an error of law due to a lack of reasoned opinion, an Appellant needs to identify the specific issues, factual findings, or arguments, which the Trial Chamber omitted to address and to explain why this omission invalidates the decision.[468]

B.8.2 The error

320. The Appellant submits that the Trial Chamber erred in fact by selectively relying on fragments of evidence which undermine its individual factual findings and the credibility of its overall inference that the Appellant possessed and shared the intent specific to the common criminal objective of the OJCE.

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[465] Judgement, paras.4688; 4458-4478.
[466] *Stanišić & Župljanin* AJ, para.218.
[467] *Ibid.*, para.218.
[468] *Ibid.*, para.137, fn.467.

B.8.3 Assembly speeches

B.8.3.1 The 16th Session of the Bosnian-Serb Assembly

321. The Trial Chamber gave insufficient, if any, weight to statements made by the Appellant in opposition of the supposed aim of the common criminal objective of the OJCE. The Trial Chamber failed to provide a reasoned opinion as to why the sections they have specifically quoted were more important or contained a specific meaning.[469] Instead, the Trial Chamber summarised, in its findings, that two speeches in a political assembly were representative of the Appellant's commitment to the common objective and reflected his shared criminal intent.[470] Rather than objectively assessing the evidence, the Trial Chamber methodically isolated phrases or passages and ascribed a sinister meaning to them. The Trial Chamber failed to properly assess whether the inference – that the Appellant sought only legitimate military success (not permanent removal of civilians) – was reasonably available. The examples below show that it was.

322. In its general liability analysis[471], the Trial Chamber refers to one line where the Appellant warns against genocidal actions but then confuses the Appellant's reference to protecting peoples with fighting forces in "the trenches".[472] The benefit of the full context of this section of the speech reveals that the Appellant was describing military combat;

> [i]t is not important how strongly we are in favour of a certain goal or of this or that type of army, nor to what degree we have mobilized. What is important is how many of us are in the trenches. How many of us are next to our artillery pieces.[473]

323. This statement cannot reasonably be understood as being directed toward civilians.

324. Furthermore, the Trial Chamber has failed to refer to sections of the speech where the Appellant states the complete opposite of what the Bosnian-Serb politicians vote for, and warns against, what is held by the Trial Chamber to be, the shared intent between the OJCE members. [474]

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[469] Judgement, paras.4459-4461.
[470] Judgement, paras.4685-4686.
[471] Judgement, para.4625.
[472] Judgement, paras.4460-4461, 4625.
[473] P431, p.33.
[474] Judgement, paras.4458-4479.

325. The Trial Chamber has neglected to give sufficient weight to the part of the speech where the Appellant warns against war, recommends the Bosnian-Serbs should only fight if attacked first, and says that "we do not want a war against the Muslims as a people, or against the Croats as a people".[475] The Appellant submits, he is not plainly disagreeing with the interpretation of the Trial Chamber, but noting that another reasonable inference exists which is supported by evidence, namely that the Appellant did not share the required intent.[476]

326. Following Karadžić's presentation of the six strategic objectives, the Appellant challenged the Assembly not to interpret them as calls for unlawful violence against Bosnian-Muslims and Bosnian-Croats.[477] The main purpose of the Appellant's message at this Assembly was that the Bosnian-Serb politicians remain on legally sound footing by only engaging in war when attacked.[478] This interpretation is supported by further evidence.[479] The Trial Chamber, again, only drew the inference consistent with guilt.

327. Consistent with the appellate standards, there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the Appellant.

B.8.3.2 The 24th Session of the Bosnian-Serb Assembly

328. The same error is repeated by the Trial Chamber when it references the 24th Session of the Bosnian-Serb Assembly. The warning given by the Appellant is again not given sufficient, if any, weight by the Trial Chamber: "I would not like to influence the decision of the deputies, but I urge you not to appear too heated and frightening. Let us not create more damage to ourselves than necessary".[480] The Appellant not only attempts to calm the other members of the Assembly, but he also defends UNPROFOR personnel, "I ask you not to develop such climate towards the UNPROFOR, there are those who work well".[481]

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[475] P431, p.33.
[476] (Protection of civilians: D1514; D187; Tuševljak (D540, para.28); P3483; P794; P358, p.91); (Warnings in combat: D962; P5040; D1982).
[477] P431, pp.34-35.
[478] P431, p.33.
[479] P587; P5031; D66.
[480] P6921, pp.11-12.
[481] P6921, p.12.

329. In addition, the Trial Chamber chose to use the quotes of others to infer the intent of the Appellant, in the face of direct evidence from the Appellant himself. The Trial Chamber shows a consistent choice of evidence that suits its own finding of the Appellant's guilt. For example, the Trial Chamber chose to select quotes by the President of the Assembly: "Muslims should be taken out of 'Serbism' forever"[482], and by politician Vojo Kupresanin stating that "Muslims, as a nation, were a 'sect' of Turkish provenance; a communist, artificial creation which the Serbs did not accept".[483]

330. These are illustrative examples of the Trial Chamber, again, only drawing the inference consistent with the Appellant's guilt, when another reasonable inference exists.

B.8.4 Consequences of the error

331. Cognisant of the deference to be afforded to the finder of fact, the Appellant should not be understood as urging the Appeals Chamber to accept his interpretation of evidence over that of the Trial Chamber. Rather, this is a concrete example of the Trial Chamber's selective reliance on the Appellant's statements, rather than considering the evidence in its entirety.

332. The Appellant submits that the Trial Chamber has erred in selectively relying on evidence. If the evidence was given the appropriate weight and viewed in its totality, no reasonable Trial Chamber could have concluded that the only available inference was that the Appellant shared the necessary *mens rea* to achieve the common objective to remove Bosnian-Muslims and Bosnian-Croats from Serb-claimed territories.

333. As a consequence of the error, the findings for the requisite *mens rea* under JCE I are invalidated. The element of *mens rea* cannot be considered satisfied beyond reasonable doubt. As such, the Tribunal cannot conclude guilt.

[482] Judgement, para.4627
[483] Judgement, para.4627.

B.8.5 Remedy sought

334. Based on this fundamental error in the Trial Chamber's analysis, the Appellant invites the Appeals Chamber to reverse the Trial Chamber's convictions based on the mode of liability: JCE-I[484] or, in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.

C. OJCE CONCLUSION

335. In conclusion, the Appellant submits that due to the cumulative effect of the errors identified above, the Appeals Chamber should reverse the Trial Chamber's convictions, as an OJCE has not been established. In the alternative, the Appeals Chamber should reverse the findings to the extent of the errors identified.

[484] *Vasiljević* AJ, para.12; *Blaškić* AJ, para.13.

V. GROUND FOUR: THE TRIAL CHAMBER ERRED IN LAW AND FACT IN FINDING THAT A JCE EXISTED IN SARAJEVO AND THAT THE APPELLANT PARTICIPATED IN IT

A. THE TRIAL CHAMBER ERRED IN LAW AND FACT WHEN IT RELIED ON INSUFFICIENT EVIDENTIARY BASIS, DREW UNWARRANTED INFERENCES THAT WERE UNSUPPORTED BY ITS OWN FINDINGS, AND FAILED TO GIVE SUFFICIENT WEIGHT TO RELEVANT CONSIDERATIONS, TO FIND THAT THE APPELLANT SHARED THE COMMON PURPOSE OF THE SARAJEVO JCE AND HAD THE INTENT TO SPREAD TERROR AMONG THE CIVILIAN POPULATION THROUGH A CAMPAIGN OF SNIPING AND SHELLING

A.1 ICTY JURISDICTION OVER THE CRIME OF TERROR

A.1.1 Overview

336. The Trial Chamber erred by failing to give sufficient weight to the submissions made by the Appellant during the trial that there exist cogent reasons to depart from the existing jurisprudence which holds that the Tribunal has jurisdiction over the crime of terror.

337. In doing so, the Trial Chamber erred in law by finding that the Tribunal has jurisdiction over the crime of terror and convicting the Appellant of this crime. The Appellant submits that the Trial Chamber's error invalidates the conviction for the crime of terror.

338. The Appeals Chamber is invited to reverse the Appellant's conviction for this crime.

A.1.2 Applicable law

Customary International Law

339. Customary International Humanitarian Law derives from "general practice accepted as law".[485] In *North Sea Continental Shelf Cases*[486], the ICJ stated that a general practice could only be considered customary if:

(i) It was evidenced in state practice;

(ii) There was very widespread and representative participation in the convention, including by States whose interests are specifically affected; and

(iii) It is a virtually uniform practice undertaken in a manner that demonstrates a general recognition of the rule of law or legal obligation (*opinio juris).*

A.1.3 The Trial Chamber's approach

340. In response to the Appellant's submissions that the Tribunal lacks jurisdiction over the crime of terror, the Trial Chamber "confirmed that the Tribunal has jurisdiction of this crime".[487] The Trial Chamber referenced the Appeal Judgements of *Galić* and *Milošević* when making this statement.

A.1.4 The error

341. The Appellant recalls that the jurisdiction of the Tribunal to preside over the crime of terror was challenged in the Defence FTB.[488] In that submission, the Appellant did not, and does not now, challenge the finding that a prohibition against terror was part of customary international law during the indictment period. Rather, the Appellant submits that the criminalisation of terror cannot be considered part of customary international law for that period. A review of the dissenting opinions of Judges Schomburg and Liu in the *Galić*[489] and *Milošević*[490] Appeal Judgements respectively, and the jurisprudence governing customary international law provide cogent reasons for the Appeals Chamber to depart from the finding in *Galić* that the Tribunal has jurisdiction over the crime of terror.

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[485] ICJ Statute, Art.38(1)(b).
[486] *North-Sea Continental Shelf Cases*.
[487] Judgement, para.3185.
[488] Defence FTB, paras.146-151.
[489] *Galić* AJ, Ch.XXII, paras.4-24.
[490] *Milošević* AJ, Ch.XIV, paras.1-13.

342. In *Galić*, the Appeals Chamber held that the prohibition of terror against the civilian population was a part of customary international law. The Appeals Chamber also identified six states which had criminalised the prohibition against terror: Cote D'Ivoire, Czechoslovakia, Ethiopia, the Netherlands, Norway and Switzerland. Pursuant to this, the Chamber found that a breach of the prohibition against terror gave rise to individual criminal responsibility.[491]

343. In the dissenting decisions of both Judge Liu (in the *Milošević* Appeal Judgement*)* and Judge Schomburg (in the *Galić* Appeal Judgement) it is doubted that the criminalisation of terror in a manner corresponding to the prohibition of the Additional Protocols by such an extraordinarily limited number of states could be sufficient to establish the 'extensive and virtually uniform' state practice required to identify customary international law.[492] Judge Schomburg also noted, the "trend in penalising terror", identified by the majority in *Galić,* if it existed, post-dated the indictment period.[493]

344. The Appellant further notes, it is well established that to form customary international law, state practice must be both widespread and representative.[494] The Appellant submits that, in addition to the absence of a widespread practise of penalising terror during the indictment period, there is also an absence of a *representative* sample of states who have penalised terror.

345. Judge Lachs explained the requirement of representativity in his dissenting opinion in *North Sea Continental Shelf*, stating that:

> […] mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States […]. For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or – as it was once claimed – by the consensus of European States only.[495]

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[491] *Galić* AJ, para.86.
[492] *Galić* AJ, Ch.XXII, para.10; *Milošević* AJ, Ch.XIV, paras.7-8; *North-Sea Continental Shelf Cases*, para.74.
[493] *Galić* AJ, fn.297.
[494] *North-Sea Continental Shelf Cases,* para.73.
[495] *North-Sea Continental Shelf Cases*, Dissenting Opinion of Judge Lachs.

346. Notably, of the States identified by the majority in the *Galić* Appeals Judgement, not a single one is located in Asia, the Americas, or Oceania. Indeed, without the two African states, this would be, as Judge Lach described, "the consensus of European States only". Further, the only legal system represented by these states is the civil system. Not a single common law state (or any other system) has been identified.

347. The Appellant submits, in view of the concerns raised by Justices Schomburg and Liu, and taking into account the absence of a representative cohort of states, the penalisation of terror cannot be considered to have formed part of customary international law[496] during the indictment period beyond all reasonable doubt.[497] The Appellant submits that the fourth 'Tadić Condition' is therefore not satisfied, vitiating the jurisdiction of the Tribunal for the crime of terror under Art.3 of the Statute.

A.1.5 Consequences of the error

348. As a consequence of the error, the Appellant was convicted under Count 9 of the Indictment for alleged crimes over which the Tribunal does not enjoy jurisdiction; namely, the crime of terror against the civilian population of Sarajevo.

A.1.6 Remedy sought

349. The Appeals Chamber is invited to reverse the conviction for Count 9.

A.2 LACK OF SPECIFICITY AND FORESEEABILITY IN THE CRIME OF TERROR

A.2.1 Overview

350. Without prejudice to the submissions of the Appellant in paragraphs 336-349 above, the Appellant submits, the Tribunal is prohibited from exercising jurisdiction over the crime of

[496] By reference to the standard set by ICJ in *North-Sea Continental Shelf Cases*.
[497] As elucidated in *Aleksovski,* Nobilo Contempt AJ, para.38.

terror due to lack of specificity and foreseeability in the definition of terror adopted by the Tribunal.

351. The Appeals Chamber is invited to reverse the Appellant's conviction for Count 9.

A.2.2 Applicable law

Principles of specificity and foreseeability

352. In addition to the 'Tadić Conditions', the Chamber must satisfy itself that the criminal conduct in question was sufficiently defined, foreseeable, and accessible at the relevant time for it to warrant a criminal conviction.[498] This includes its general nature, its criminal character, and its approximate gravity.[499]

A.2.3 The Trial Chamber's approach

Giving definition to the crime of terror after the indictment period

353. The Trial Chamber relied upon the Appeal Judgements of *Galić* and *Milošević* when addressing its jurisdictional authority over the crime of terror.[500] Similarly, the Trial Chamber relied upon these decisions to reference the constituent elements of the crime of terror.[501]

A.2.4 The error

354. The *Galić* Trial Chamber was the first to expound on the elements of the crime of terror. The Appellant also recognises a prohibition against terror existed in customary international law prior to the indictment period but contends that no settled definition of the crime of terror was applied in such a manner as can be considered comprehensive or uniform prior to this time.

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[498] *Vasiljević* TJ, para.193.
[499] *Ibid.*, para.201.
[500] Judgement, para.3185.
[501] Judgement, para.3186, fn13184.

355. This point was noted by Justice Shahabuddeen in his separate opinion of the *Galić* Appeal Judgement, who stated that, despite elucidating the elements of the crime of terror;

> [t]he Appeals Chamber […] is not suggesting that a comprehensive definition of terror is known to customary international law; […] there is neither the required *opinio juris* nor state practice to support the view that customary international law knows of a comprehensive definition.[502]

356. Notwithstanding this limitation, the *Galić* Trial Chamber attempted to elucidate the elements of the crime,[503] concluding that the crime of terror encompassed acts of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities; undertaken with the primary purpose of spreading terror among the civilian population.[504]

357. The Appellant recalls, the *Vasiljević* Trial Judgement held that;

> [u]nder no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalising an act which had not until the present time been regarded as criminal .[505]

358. The Appellant submits, given the absence of a clear definition in customary international law, the Tribunal was not in a position to define the elements of the crime of terror. Doing so was at odds with the principle expounded in *Vasiljević.* In these circumstances the Tribunal is obliged to refrain from exercising its jurisdiction over the crime of terror.

Lack of specificity in the definition of terror

359. Further to the submissions above, the Appellant contends, the definition adopted by the Trial Chamber through the *Galić*[506] and *Milosević*[507] judgements lacks sufficient clarity to satisfy the criteria of certainty and foreseeability.

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[502] *Galić* AJ, Ch.XX, para.3.
[503] *Galić* TJ, para.100.
[504] *Ibid.*, para.133.
[505] *Vasiljević* TJ, para.196.
[506] *Galić* AJ, paras.100-104.
[507] *Milošević* AJ, para.33.

360. The Appellant notes, the crime of terror requires proof of acts or threats of violence wilfully directed against the civilian population or individual civilians not taking direct part in hostilities causing the victims to suffer grave consequences. These acts or threats must have been committed with the primary purpose of spreading terror among the civilian population.[508]

361. The *Galić* Trial and Appeals Chambers relied upon the wording of Art.51(2) of API when concluding the results requirement of the crime.[509] However, the *Milošević* Appeals Chamber clarified the results requirement of the crime, confirming "what is required […] is that the victims suffered grave consequences resulting from the acts or threats of violence"[510]. The term "grave consequences" was coined by direct reference to the third 'Tadić Condition', which states that;

> [a] violation [of rule of customary international law] must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences to the victim.[511]

362. The Appellant notes, the development of the 'Tadić Conditions' post-date the indictment period and were developed by reference to the jurisdictional power of the Tribunal rather than the definition of any particular crime. The Appellant submits that, the elements of a crime under customary international law cannot be determined by the jurisdictional requirements of a Tribunal established after the relevant period.

363. With reference to the specificity of the crime of terror, the Appellant also notes, existing jurisprudence holds that the actual infliction of terror need not result from an act or threat of violence for the crime of "terror" to have occurred.[512]

364. The Appellant recalls the dissenting opinion of Judge Liu in the *Milošević* Appeal Judgement;

> [b]y focusing on elements which are *not* part of the *actus reus*, the majority fails to specify the constitutive elements of the crime. According to [the current definition], the *actus reus* of the crime of terror may be established whenever the

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[508] *Galić* AJ, paras.100-102; *Milošević* AJ, paras.31-33, 57.
[509] *Galić* TJ, para.132.
[510] *Milošević* AJ, para.33.
[511] *Tadić* Jurisdiction Appeal, para.94 (emphasis added).
[512] *Milošević* AJ, para.33.

> civilian population is attacked or threatened with an attack. The offence would thus appear to lack a clear minimum threshold.[513]

365. The Appellant notes that the Tribunal may consider the term "grave consequences" to be intimately connected to the term "grave breaches" – a term used in API and referenced by the *Galić* Trial Chamber – and a clear gravity threshold to have therefore been foreseeable under customary international law during the indictment period.

366. The Appellant asserts that such reasoning is flawed, not only on the basis of the disparate origins of the terms, but also the dissimilar definitions which have been ascribed to them. The artificiality of treating the 'grave consequences' requirement as the result requirement for the crime of terror can be seen in the fact that this formulation may create two distinct sets of victims – those who suffer 'grave consequences' and those who are intended to be terrorised. Only the first set of victims is necessary under the existing definition.

367. Therefore, the definition for terror cannot be said to have satisfied the specificity required for the existence of a separate crime of terror. Without such specification, it cannot have been reasonably foreseen which acts committed in which way would have constituted the crime of terror during the indictment period.

368. The *Vasiljević* Trial Chamber stated that;

> [i]f customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because […] anything contained in a statute of the court in excess of existing customary international law would be a utilisation of power and not of law.[514]

369. The Appellant notes, "the requirement of sufficient clarity of the definition of a criminal offence is part of the *nullum crimen sine lege* requirement, and it must be assessed in that context."[515] Further;

> [a] criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this

[513] *Ibid.*, Ch.XIV, para.17.
[514] *Vasiljević* TJ, para.202.
[515] *Ibid.*, para.201.

> norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[516]

370. The Appellant submits, due to the absence of a sufficiently precise definition, with a clear gravity threshold which satisfies the third 'Tadić Condition' the elements of the crime of terror cannot be said to have been reasonably foreseeable during the indictment period. As a consequence, the Tribunal cannot exercise its jurisdiction over the crime of terror.

A.2.5 Consequences of the error

371. As a consequence of the error, the Appellant was convicted under Count 9 of the Indictment for alleged crimes over which the Tribunal is prohibited from exercising its jurisdiction due to the lack of specificity in the crime of terror under customary international law.

A.2.6 Remedy sought

372. The Appeals Chamber is invited to reverse the Appellant's conviction for Count 9, terror.

A.3 SARAJEVO AS A 'DEFENDED CITY'

A.3.1 Overview

373. The Trial Chamber erred by misconstruing and failing to give sufficient weight to the submissions made by the Appellant during the trial regarding Sarajevo as a defended city pursuant to Art.3(c) of the ICTY Statute.

374. In doing so, the Trial Chamber erred in law and fact by concluding the Appellant had the requisite *mens rea* for the crime of terror and convicting him for participation in a JCE the primary purpose of which was to spread terror through the civilian population of Sarajevo.

375. The Appeals Chamber is invited to reverse the Appellant's conviction for the Count 9, terror.

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[516] *Ibid.*, para.193.

A.3.2 Applicable law

Jurisdiction of the Tribunal

376. Art.3 of the Statute states:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:[517]
> a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> b) Wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> c) Attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> d) Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> e) Plunder of public and private property.

A.3.3 The Trial Chamber's Approach

377. When considering Sarajevo as a defended city, the Trial Chamber stated;

> [S]pecifically, in relation to the Defence's argument about Sarajevo as an 'undefended city', the Trial Chamber considers that the Defence's submission is based on the assumption that the indictment's mentioning of Article 3 of the Statute must be understood as a reference to Article 3(c). However, the Indictment does not refer to Article 3(c), the list of violations of the laws or customs of war in Article 3 of the Statute is explicitly non-exhaustive.[518]

A.3.4 The error

378. The Appellant clarifies, it did not, and still does not, assert that the indictment pertains or refers only to Art.3(c) in alleging the crimes relevant to Sarajevo. Rather, the Appellant reasserts, the reference to Article 3 in the indictment should be understood to *include* a reference to Art.3(c).

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[517] *Statute*, Art.3.
[518] Judgement, para.4733.

379. The Appellant reaffirms its submission that, while Art.3(c) prohibits the bombardment of undefended places, there is no prohibition against attacks or bombardments against defended locales, provided the undefended locale constitutes a military objective in the sense that its nature, location, purpose, or use make an effective contribution to military action in accordance with Art.52(2) of API.[519] Further, its total or partial destruction, capture, or neutralisation, in the circumstances ruling at the time, must offer a definite military advantage.[520]

380. The Appellant asserts, the Trial Chamber erred by failing to consider Sarajevo as a defended city which constituted a legitimate military objective. Had the Trial Chamber understood and considered the Appellant's submissions as to Sarajevo, no reasonable Trial Chamber could have concluded terror was the primary purpose of the campaign in Sarajevo.

381. In making this submission, the Appellant notes, Art.59 of API states, a locale will be considered undefended when a declaration of such has been made by a party to the conflict and the following conditions are met:[521]

(i) All combatants, as well as mobile weapons and mobile military equipment, have been evacuated from the locale;

(ii) No hostile use is made of fixed military installations or establishments;

(iii) No acts of hostility are committed by the authorities or by the population; and

(iv) No activities in support of military operations are undertaken.

A locale ceases to be un-defended when the above conditions are no longer met.[522]

382. The Appellant notes; "[t]he Prosecution never asserted that Sarajevo was an undefended city and that consequently any shelling was illegal."[523] Indeed, it is clear that Sarajevo does not qualify as an undefended locale due to the substantial military activities occurring throughout the city during the indictment period, including the large presence of ABiH

[519] API, Art.52(2).
[520] API, Art.52(2).
[521] API, Art.59(2).
[522] API, Art.59(7).
[523] Closing Arguments (T.44861-2).

personnel and objects, combatants, mobile mortar, offensive operations originating from the city, and regular military operations occurring in Sarajevo throughout the indictment period.[524]

383. The Appellant further notes, objects which, by virtue of their nature or location, make an effective contribution to military action can be considered military objectives.[525] This includes: weapons, buildings occupied by armed forces, equipment, transports, fortifications, depots, staff headquarters, communications centres; and any site which is of special importance for military operations in view of its location, either because it is a site that must be seized or because it is important to prevent the enemy from seizing it, or otherwise because it is a matter of forcing the enemy to retreat from it.[526]

384. The language used in the definition is encompassing in that it does not attempt to provide an exhaustive list of military objectives, nor limit the definition to any particular type of locale.

385. The Appellant submits that Sarajevo, by its nature and location constituted a valid military objective within the meaning of Art.52(2) of API to the Geneva Convention.[527]

386. In making this submission, the Appellant notes, Sarajevo was a strategically important city for all parties to the conflict. Politically, Sarajevo was the seat of power for the BiH government and headquarters of military operations. Militarily, it was critical for the SRK to engage and "hold" the ABiH to prevent their incursion into Bosnian-Serb held territory, the use of their large-number of personnel in other areas of BiH, and the linking up of ABiH forces in Sarajevo with ABiH forces in eastern BiH.[528] The consequence of this would have placed the SRK, and VRS more broadly, at a distinct military disadvantage.[529]

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[524] D653, para.40; Russell (T.38776); D1683, pp.1-2; D1815, p.2; D1568, p.2; D2015, pp.3-4; D2049, p3; Fraser (T.5907-08); D647; RM-120 (T.7688-89); D116, p.2; GRM-246 (T.25816-17, 25896); D489, para.13; D468, paras.7, 9, 13, 23, 28; Mijatović (T.21438); D489, para.16; Tusevljak (T.38460, 38470-71; D540, para.18; D589, para.23; D453, para.21; Sladoje (T.21101); D653, para.46; Suljić (T.8732-8733); D658, paras.17, 19; D470; D469; D686, para.20; D559, para.27; Sehovac (T.24036); D519; D608, para.21; D653, paras. 20, 36, 39; Simić (T.35988, 35990); D641, paras.26, 34; D622, para.39.
[525] API, Art.52(2).
[526] ICRC Commentary to API, para.2021.
[527] API, Art.52(1).
[528] D658, para.9; D686, paras.8-9; Radojičić (T.23109,T.23030); RM-511 (T.5033); D559, paras.4-5; D1062, para.14; D463, para.16; D453, para.11; D641, para.17.
[529] *Ibid.*.

Terror and Sarajevo as a legitimate military objective

387. The Appellant notes, the *mens rea* for the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of acts of violence or threats thereof. Spreading terror must be the primary purpose of the acts.[530]

388. The Appellant recalls its submissions in relation to the Sarajevo JCE in paragraphs 398-458, and that the Trial Chamber did not give any weight, within its analysis of the crime of terror or the alleged JCE, to the status of Sarajevo as a military objective nor the military advantage offered by holding Sarajevo throughout the indictment period.[531] The Appellant submits, absent this consideration, the Trial Chamber cannot exclude that the primary purpose of the actions of the Appellant or the SRK were made pursuant to Sarajevo as a military objective.

389. The Appellant notes, where the underlying facts are susceptible to more than one interpretation, one of which is objectively and reasonably inconsistent with the guilt of the accused, then the principle of *in dubio pro reo* requires that the interpretation consistent with the innocence of the accused be adopted and an acquittal returned.[532]

390. The Appellant submits, the Trial Chamber erred by concluding that the only possible inference was that the Appellant possessed the requisite *mens rea* for the crime of terror, and convicting him of such.

JCE and Sarajevo as a legitimate military objective

391. The Appellant's liability for the crimes of murder, unlawful attacks and terror was based upon his alleged contribution to and participation in a JCE, the primary purpose of which was to spread terror through the civilian population of Sarajevo.

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[530] *Galić* AJ, para.100-102; *Milošević* AJ, 31-33.
[531] Judgement, para.4733.
[532] *Limaj* TJ, para.10.

392. The Appellant notes, a JCE requires proof of, amongst other things; a common objective which amounts to or involves the commission of a crime provided for in the Statute.[533] Terror is a crime of specific intent. As such, evidence that the Appellant acted with the primary purpose to spread terror must also be proved beyond reasonable doubt.[534]

393. The Trial Chamber considered the commission of the crime of terror when concluding that a JCE existed and the Appellant intended to further the common plan of the JCE. To the extent that the specific intent of the Appellant towards the crime of terror is not made out, the elemental findings required to convict the Appellant for the crime of terror through a JCE cannot be substantiated.

394. The Appellant notes, in order to find an individual liable for the commission of a crime through the first form of JCE, a trier of fact must find beyond reasonable doubt that the commonly intended crime(s) did in fact take place.[535]

395. As such, the Appellant submits the Trial Chamber erred by considering the crime of terror in its analysis of the liability of the Appellant through a JCE.

A.3.5 Consequences of the error

396. As a consequence of the error, the Appellant was erroneously convicted under Count 9 of the indictment for the crime of terror.

A.3.6 Remedy sought

397. The Appeals Chamber is invited to reverse the Appellant's conviction for Count 9, terror, and remove considerations about this crime from the analysis of the alleged Sarajevo JCE.

[533] *Stanisic & Zupljanin* AJ, para.67.
[534] *Kovać* TJ, para.288.
[535] *Brđanin* AJ, para.430; see also *Tadić* AJ, para.228; *Krajiišnik* AJ, paras.200, 707; *Stanišić & Simatović* AJ, paras.82, 87.

A.4 THE EXISTENCE OF A JCE AND THE INTENT OF THE APPELLANT TO FURTHER THE JCE

A.4.1 Overview

398. The Trial Chamber erred by interpreting the comments made by the Appellant at the 16th Session of the Bosnian-Serb Assembly predominantly through the prism of the Sarajevo crime base. The Trial Chamber further erred by disregarding orders which indicated that the Appellant did not possess the intent to further the JCE. In doing so, the Trial Chamber failed to exclude other reasonable inferences consistent with the innocence of the Appellant.

399. As a consequence of these errors, the Trial Chamber erred by concluding that a JCE existed and the Appellant intended to act in furtherance of that JCE.

400. The Appeals Chamber is invited to reverse the conviction against the Appellant for the crimes of murder, unlawful attacks, and terror, or in the alternative, to reverse the findings of the Trial Chamber to the extent of the errors identified.

A.4.2 Applicable law

Joint Criminal Enterprise (JCE)

401. A JCE requires proof of, amongst other elements:

(i) A common objective which amounts to or involves the commission of a crime provided for in the Statute;[536] and

(ii) That the Appellant intended to act in furtherance of that common objective.[537]

[536] *Stanisic & Zupljanin* AJ, para.67.
[537] Judgement, para.3561; *Tadić* AJ para.229.

402. Where a crime requires special intent, the accused must also satisfy the additional requirements imposed by the crime.[538]

Reasonable Inference

403. Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.[539]

A.4.3 The Trial Chamber's approach

404. The Trial Chamber considered evidence related to the alleged JCE under two sections respectively titled: "Second joint criminal enterprise"[540] (the First Section) and "Ratko Mladić's alleged contribution to the second joint criminal enterprise"[541] (the Second Section).

405. The First Section concluded that there "existed a JCE with the primary purpose of spreading terror amongst the civilian population through a campaign of sniping and shelling".[542] The Second Section reviewed the alleged participation and *mens rea* of the Appellant and concluded that the Appellant significantly participated in the JCE and intended to further the objective of the JCE through the crimes of murder, unlawful attacks, and terror.[543]

406. The Trial Chamber, at times, reviewed the same evidence in both the First Section and in its consideration of the Appellant's *mens rea* of the Appellant discussed in the Second Section. The conclusions the Chamber drew about that evidence pertained to both sections.

407. The evidence discussed below was used to substantiate the Trial Chamber's findings in the First Section and the *mens rea* of the Appellant in the Second Section. The submissions made by the Appellant about the errors committed by the Trial Chamber therefore pertain to the conclusions drawn in both sections.

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[538] *Kvocka* TJ, para.288.
[539] *Vasiljević* TJ, paras.68-69; *Čelebići* AJ, para.458; *Krnojelac* TJ, para.67; *Limaj* TJ, para.10.
[540] Judgement, Ch.9.4.
[541] Judgement, Ch.9.5.
[542] Judgement, para.4740.
[543] Judgement, paras.4892-4893, 4921.

408. The Appellant will consider each of the alleged errors in turn.

A.4.4 Error 1: The Trial Chamber interpreted the intent of the Appellant primarily through the lens of their findings on the crime base

409. The Appellant asserts, the Trial Chamber erred by interpreting the 16th Session of the Bosnian-Serb Assembly predominantly through the lens of its findings on the crime base. In doing so, the Trial Chamber failed to consider, or give sufficient weight, to alternative inferences available on the evidence which were consistent with the innocence of the Appellant.

410. In Volume III of the Judgement, the Trial Chamber concluded that the crimes of murder, unlawful attacks, and terror had occurred in Sarajevo throughout the indictment period.[544]

411. The Trial Chamber considered the occurrence of these crimes when analysing the existence of a JCE in the First Section, stating, that;

> [based] on the foregoing, including the Trial Chamber's findings regarding crimes and their perpetrators in Sarajevo, the Trial Chamber finds that between 12 May 1992 and November 1995, there existed a JCE with the primary purpose of spreading terror among the civilian population through a campaign of sniping and shelling. In this respect, the Trial Chamber considered that the policy of the Bosnian-Serb leadership with regard to Sarajevo was outlined at the 16th Session of the Bosnian-Serb Assembly on 12 May 1992.[545]

412. The Trial Chamber relied upon the conclusion that the policy of the Bosnian-Serb leadership was outlined at the 16th Session of the Bosnian-Serb Assembly, to infer the existence of a JCE and the intent of the Appellant to further that JCE.[546]

413. Recalling the analysis of the *Gotovina* Appeals Chamber,[547] it may be inferred from this approach that the Trial Chamber evaluated the existence of a JCE primarily through the prism of the crime base.

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[544] Judgement, paras.3051 (Schs.F&G); 3190-3191; 3210.
[545] Judgement, para.4740.
[546] Judgement, paras.4897, 4919, 4920-4921.
[547] See *Gotovina* AJ, paras.87, 91.

414. In the case of *Gotovina*, the Appeals Chamber determined that the Trial Chamber had "considered inferences drawn from the Brioni Meeting alongside its finding that unlawful artillery attacks took place in order to establish the existence and parameter of the JCE."[548] However, the Brioni Transcript included no evidence that an explicit order was given to commence unlawful attacks, and Gotovina's statements regarding a strike on the settlement of Knin could be interpreted as a description of the army's capabilities rather than its aims.[549]

415. The Appeals Chamber in that case noted that the evidence before the Trial Chamber was indicative of a criminal intent only when viewed through the prism of the factual findings on the crimes.[550] Had the Trial Chamber reviewed the evidence outside that prism, the statements made by the accused could also reasonably have been interpreted as referring to lawful combat operations and public relations efforts, or as shorthand to describe the military forces stationed in an area or intending to demonstrate potential military power in the context of planning a military operation.[551]

416. The Appellant submits, the Trial Chamber in the present case similarly erred by interpreting the comments made by the Appellant at the 16th Session of the Bosnian-Serb Assembly primarily through the prism of their findings on the alleged crime base.

417. Had the Trial Chamber reviewed the 16th Session of the Bosnian-Serb Assembly independent of the crime base, it could not have concluded that the only reasonable inference was that a JCE existed or that the Appellant intended to further the alleged JCE.

418. The Appellant notes; for example, the comment that "[o]ne cannot take Sarajevo by spitting at it"[552] could be reasonably interpreted as referring to lawful combat operations; the warnings that "[t]he thing we are doing needs to be guarded as our deepest secret"[553] and "[o]ur people must know how to read between the lines"[554] could be understood as a warning not to divulge legitimate military strategies needlessly; and the statement that "the

[548] *Gotovina* AJ, para.81.
[549] *Ibid.*, para.81.
[550] *Ibid.*, para.82.
[551] *Ibid.*, para.93.
[552] P431, p.35.
[553] P431, p.34.
[554] P431, p.34.

head of the dragon of fundamentalism lies beneath our hammer"[555] could reasonably be construed as a proclamation of the strategic importance of Sarajevo as a defended city and valid military objective.[556]

419. The Appellant recalls that the Trial Chamber misconstrued the submission of the Appellant in regards to Sarajevo as a defended city.[557] As such, the Trial Chamber cannot be said to have turned their mind to the possibility that the comments were made pursuant to the Appellant's understanding of Sarajevo as a military objective rather than his intent to further the JCE.

420. To this end, the Appellant submits the Trial Chamber erred in concluding that there was no alternative reasonable interpretation of the 16th Session of the Bosnian-Serb Assembly consistent with the innocence of the Appellant.

421. The Appellant notes, the Trial Chamber relied on evidence of this nature to conclude that the Appellant possessed the intent to further the JCE. This finding therefore materially affected the conclusions of the Trial Chamber as to the liability of the Appellant for the crimes of murder, unlawful attacks, and terror.

A.4.5 Error 2: Relying on evidence drawn from crimes which have not been proven beyond reasonable doubt

422. The Appellant asserts, the Trial Chamber erred by relying on evidence which stemmed from crimes which were not proven beyond reasonable doubt. This includes evidence led by RM-511,[558] and the factual findings of the crimes of murder, unlawful attacks, and terror.[559]

423. The Trial Chamber drew upon evidence of RM-511 pursuant to Incident G.1 to interpret the existence of JCE and the intent of the Appellant.[560]

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[555] P431, p.35.
[556] Brief, paras.373-397.
[557] Brief, paras.373-397.
[558] Judgement, paras. 4700, 4707, 4739, 4748, 4755-4758, 4895, 4898.
[559] Judgement, paras.4739; 4921.
[560] Judgement, paras.4739, 4886, 4921.

424. The Appellant notes, in order to find an individual liable for the commission of a crime through JCE-I, a trier of fact must find beyond reasonable doubt that the commonly intended crime(s) did in fact take place.[561]

425. The Appellant recalls its submissions regarding Sarajevo as a defended city at paragraphs 373-397 and notes that bombardments by any means are prohibited only against undefended locales.[562] Sarajevo was not an undefended locale.[563] Therefore, evidence that Sarajevo was bombarded does not, of itself, evidence the commission of a crime.

426. The Appellant further notes its submissions regarding Scheduled Incident G.1 at paragraphs 464-496 and reasserts that the Trial Chamber cannot consider the facts alleged to be proven beyond reasonable doubt or to fulfil the elements required for a conviction of Count 5, murder, Count 9, terror, or Count 10, unlawful attacks.

427. Congruent to the principle that a crime must have taken place before liability can be imposed on the Appellant,[564] any evidence which derives from incidents which cannot be proved beyond reasonable doubt cannot be relied upon by the Trial Chamber to conclude the existence of a JCE.[565]

428. The Appellant notes, the Trial Chamber's reliance on evidence of this nature contributed to its conclusion that a JCE existed and that the Appellant intended to further the JCE.[566]

A.4.6 Error 3: Failure to give weight to orders issued by the Appellant and comments made by the Appellant to international personnel

429. The Appellant submits, the Trial Chamber erred by failing to give weight to the orders issued by the Appellant as evidence of his intent.

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[561] *Brđanin* AJ, para.430; see also *Tadić* AJ, para.228; *Krajiišnik* AJ, paras.200, 707. *Stanišić & Simatović* AJ, paras.82, 87.
[562] *Statute*, Art.3(c).
[563] Closing Arguments, (T.44861).
[564] *Brđanin* AJ, para.430; see also *Tadić* AJ, para.228; *Krajiišnik* AJ, paras.200, 707. *Stanišić & Simatović* AJ, paras.82, 87.
[565] Judgement, paras.4700, 4739, 4895, 4898, 4917, 4918, 4921.
[566] Judgement, paras.4733-4740, 4921.

430. The Trial Chamber noted it was presented with evidence of the orders issued by the Appellant throughout the indictment period.[567] When reviewing these orders, the Trial Chamber concluded that "Mladić prohibited firing at civilian targets without his approval and ordered that firing upon Sarajevo was only to take place in self-defence."[568] However, the Trial Chamber disregarded these orders as evidence of the Appellant's true state of mind because "the language of the orders demonstrates that Mladić was more concerned with insubordination than with the welfare of the civilian population."[569]

431. The Trial Chamber stated that this interpretation was supported "by Mladić's statement at the 16th Session of the Bosnian-Serb Assembly on 12 May 1992 that 'Serbian people' would need to know how to read between the lines."[570]

432. The Appellant recognises the discretionary right of the Trial Chamber to weigh the evidence before it as it deems appropriate,[571] and notes that the Appeals Chamber may only intervene when the Trial Chamber's choice of the method of assessment or its application thereof may have occasioned a miscarriage of justice.[572] The Appellant submits that in this instance the error of the Trial Chamber is of such gravity as to warrant the intervention of the Appeals Chamber.

433. In making this submission, the Appellant recalls paragraphs 28-33 and 309-310 on direct versus circumstantial evidence, and notes that orders of this nature constituted direct evidence of the Appellant's intent.

434. The Appellant submits, indications that a commander is repeatedly acting to prevent the targeting of civilians is a relevant consideration in determining the intent of the Appellant and the existence of a JCE. The issuance of orders which prohibit the targeting of civilians is therefore a relevant consideration in determining the intent of the Appellant, his actions towards preventing crimes, and otherwise furthering the alleged common plan. The language of the orders on its own cannot overturn this relevance.

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[567] Judgement, paras. 4739, 4919.
[568] Judgement, para.4919.
[569] Judgement, paras.4737, 4919.
[570] Judgement, para.4739.
[571] *Stanišić & Župljannin* AJ, para.218.
[572] *Kayishema & Ruzindana* AJ, para.119.

435. The Appellant further recalls, the obligation is not on the Appellant to prove his intent was not to further the JCE. Rather, it is trite law that the obligation resides with the Prosecution to evidence beyond reasonable doubt that the Appellant did intend to further the JCE. This approach is fundamental to the principle of *in dubio pro reo.*[573]

436. An absence of language in orders issued by the Appellant affirmatively demonstrating concern for the civilian population does not preclude that orders were issued for that purpose. Orders which prevent the targeting of civilians should therefore be considered as evidence which weighs against a finding that the Appellant intended to further the JCE; unless and until the Prosecution can evidence beyond reasonable doubt that they do not.

437. The Appellant submits, the Trial Chamber erred in failing to give weight to orders issued by the Appellant when considering the existence of a JCE and the Appellant's alleged intent to further that JCE.

A.4.7 Consequence of the errors

438. The Appellant submits, as a consequence of each of the errors committed by the Trial Chamber, alone or in combination, the Trial Chamber erred in concluding there was no inference available on the evidence consistent with the innocence of the Appellant.

439. The Appellant notes, the Trial Chamber's errors impact factual findings upon which the Trial Chamber relied to conclude the liability of the Appellant. On this basis the errors can be said to have materially affected the conclusions of the Trial Chamber.

440. The Appellant recalls, that the Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial. However, notes that the Appeals Chamber may intervene whenever the conclusions of the Trial Chamber leads to an unreasonable assessment of the facts of the case.[574]

441. The Appellant submits, the errors of the Trial Chamber in this circumstance are of such gravity as to warrant the intervention of the Appeals Chamber.

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[573] Brief, para.38.
[574] *Kayishema & Ruzindana* AJ, para.119.

A.4.8 Remedy sought

442. The Appeals Chamber is invited to reverse the conviction against the Appellant for the crimes of Count 5, murder, Count 9, terror, and Count 10, unlawful attacks; or, in the alternative, to reverse the findings of the Trial Chamber to the extent of the errors identified.

A.5 THE SPECIFIC INTENT OF THE APPELLANT

A.5.1 Overview

443. The Trial Chamber erred by applying a standard of proof for specific intent that cannot be differentiated from that of wilful intent.

444. As a consequence of the error, the Appellant was erroneously convicted of the crime of terror.

445. The Appeals Chamber is invited to reverse the conviction against the Appellant for this crime.

A.5.2 The Trial Chamber's approach

446. The Trial Chamber concluded the SRK acted with the intent to spread terror throughout the civilian population of Sarajevo.[575]

447. The Trial Chamber did so circumstantially by reviewing the alleged incidents in combination, and considering the nature, manner, timing and duration of the acts, the activities of the victims, the time of the acts and location of impact, use of MABs and the alleged fear felt by the civilian population during this time.[576]

A.5.3 The error

[575] Judgement, para.3201.
[576] Judgement, para.3201.

448. The crime of terror is a crime of specific intent in that it requires proof not only that the perpetrator wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of acts or threats of violence, but also that the acts in question were committed with the primary purpose of spreading terror amongst a civilian population.[577] Evidence that an act was committed wilfully or recklessly which resulted in grave consequences is insufficient to prove this specific intent. In this sense, the requirement of specific intent can be understood as requiring a higher standard of proof.[578]

449. Judge Liu commented in his dissenting opinion in the *Milošević* Appeals Judgement, that:

> [T]he primary purpose requirement is entirely novel to the crime of terror. All other specific intent crimes merely require that the requisite *mens rea* be established: there is no hierarchy of intent. Indeed, to my knowledge prior to the *Galić* case, the ranking of intent had no place in international criminal law. In my view, this is an arbitrary requirement, and furthermore, it is one that is impossible to determine with any certainty from purely circumstantial facts.[579]

450. The Appellant notes, when reviewing the alleged incidents to determine the wilful intent of the perpetrators, the Trial Chamber relied upon findings made about each incident in combination with the number, timing and frequency of shots, the area of impact, the activities of the victims, and the use of MABs to conclude the perpetrator wilfully made the civilian population the object of the acts.[580]

451. These indicia are extensively and substantively the same as drawn upon to conclude the specific intent of the perpetrators.[581] The only extra indicia drawn upon by the Trial Chamber to conclude terror was the primary purpose of the acts was: a) the period of time over which the alleged acts of sniping and shelling took place; and, b) the fear alleged to have been experienced by the civilian population of Sarajevo.

452. The Appellant recalls the period of time in which the acts are alleged to have occurred spans the indictment period, and includes the entire duration of the conflict. The Appellant recalls his submissions regarding Sarajevo as a defended city at paragraphs 373-397 and notes that Sarajevo constituted a valid military objective throughout this period.

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[577] *Galić* AJ, paras.100-102; *Milošević* AJ, paras.31-33.
[578] Refer, for example, to the comments of Judge Liu in *Milošević* AJ, Ch.XIV, para.19.
[579] *Milošević* AJ, Ch.XIV, para.19.
[580] Judgement, para.3196-3200.
[581] Compare Judgement paras.3196-3200 to para.3201.

453. Further, the Appellant recalls, the existence of fear is not an element of the crime of terror[582] and its existence alone does not substantiate the conclusion that terror was intended.

454. In the present instance, the Trial Chamber concluded in its analysis of the 'general background' of Sarajevo that people felt fear.[583] They did not conclude the origin of this fear, nor was it concluded in any of the alleged incidents that the victims, or those around them, felt fear. The Appellant notes it's submissions at paragraph 548, that there was evidence before the Trial Chamber of the ABiH making attacks in such a manner as to appear that those came from SRK held territories. The Appellant reasserts a nexus between the fear felt and the acts and/or perpetrator of the acts which caused that fear is of particular importance due to the existence of evidence before the Trial Chamber which indicates the ABiH sniped and attacked civilians within Sarajevo.

455. The Appellant submits, in the absence of a more precise indicia no reasonable Trial Chamber could determine with any certainty from this purely circumstantial evidence that terror was the primary purpose of the perpetrators of the alleged crimes.

456. As such, the Appellant submits, the Trial Chamber erred in concluding that the primary purpose of the acts alleged in its findings[584] was to spread terror among the civilian population, and the liability of the Appellant for this crime.

A.5.4 Consequences the error

457. As a consequence of the error committed by the Trial Chamber, the Appellant was found liable for the crime of terror pursuant to a JCE.

A.5.5 Remedy sought

458. The Appeals Chamber is invited to reverse the conviction against the Appellant for Count 9, terror.

[582] *Galić* AJ, paras.103-104.
[583] Judgement, para.1890.
[584] Judgement, para. 3189-3190, 3202-3206.

B. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT AND ABUSED ITS DISCRETION WHEN MAKING LEGAL FINDINGS OF MURDER AND UNLAWFUL ATTACKS AND CONCLUDING THE PRIMARY PURPOSE OF THE CAMPAIGN IN SARAJEVO WAS TO SPREAD TERROR AMONG THE CIVILIAN POPULATION

459. Sub-grounds 4.C, 4.D and 4.E have been subsumed into this sub-ground to assist the Appeals Chamber and avoid repetition.

B.1 OVERVIEW OF THE ERRORS

460. The Trial Chamber erred in law and fact when concluding the responsibility of the SRK for the alleged crime base in the following ways:

a) Failing to consider evidence of legitimate military activity in relation to incident G.1;

b) Relying on adjudicated facts in circumstances where they should reasonably have been considered rebutted;

c) Drawing erroneous conclusions as to the intent of the perpetrator when concluding the liability of the SRK; and

d) Drawing impermissible inferences in violation of the principle of *in dubio pro reo.*

461. The Trial Chamber further erred by considering the identified incidents (scheduled and unscheduled) and factual findings affected by these errors within the alleged crime base.

462. The Appellant will address each of these errors in turn.

B.2 APPLICABLE LAW

463. Prosecution must prove all predicate facts beyond all reasonable doubt before the Trial Chamber can conclude the commission of a crime.[585] Thus, before a finding of guilt can be made beyond a reasonable doubt, the Trial Chamber must find[586]:

i. That each element of each of the charged crimes has been proved beyond a reasonable doubt;

ii. That each element of any charged mode of liability has been proved beyond a reasonable doubt; and

iii. That any fact which is indispensable to or aimed at obtaining a conviction, must also be proved beyond a reasonable doubt.[587]

B.3 THE ARGUMENTS IN TURN

B.3.1 Scheduled Incident G.1

464. The Trial Chamber erred by concluding that the facts alleged in Scheduled Incident G.1 satisfied the elements of unlawful attacks and terror beyond a reasonable doubt.

465. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings on Scheduled Incident G.1 and remove G.1 from considerations of unlawful attacks and terror, the existence of a JCE, and the intent of the Appellant to further the aim of the alleged JCE.

B.3.1.1 The Trial Chamber's approach

466. The Trial Chamber reviewed the evidence presented by Prosecution witnesses Milan Mandilović, Bakir Nakas, RM-115, Fadila Tarčin, Nedzib Đozo and John Wilson

[585] *Haradinaj* TJ, para.161; *Halilović* AJ, para.125.
[586] *Blagoević* AJ, para.226.
[587] *Kayishema & Ruzindana* AJ, para.119.

pursuant to Scheduled Incident G.1. The evidence pertained to two specific incidents and the general shelling of Sarajevo, alleged to have occurred on the evening of 28 May 1992. The Chamber laid out a summary of the evidence before concluding that the SRK fired artillery, rockets and mortars against Sarajevo from 5PM on 28 May 1992 until early the next morning, following an order from the Appellant.[588] Scheduled Incident G.1 was then considered by the Trial Chamber pursuant to the crimes of unlawful attacks[589] and terror.[590]

467. The Appellant recalls its submissions regarding Sarajevo as a defended city at paragraphs 373-397 and submits, the Trial Chamber erred in fact and law by considering Scheduled Incident G.1 under the charges of unlawful attacks and terror because the evidence does not demonstrate beyond reasonable doubt that: 1) the SRK was responsible for the acts which caused serious injury or any other consequence of the same gravity; 2) the acts were committed wilfully; or, 3) the acts were directed against civilians not taking direct part in hostilities.

468. The Appellant will address each of these errors in turn.

B.3.1.2 Error 1: The evidence relied upon by the Trial Chamber does not demonstrate beyond reasonable doubt the nexus between the SRK and the acts which caused injury and/or grave consequences

469. In relation to Scheduled Incident G.1 the Trial Chamber concluded that injuries were sustained by two persons – Fadila Tarčin[591] and RM-115[592] – due to acts of the SRK.

470. The Trial Chamber stated that "[Fadila Tarčin] learnt from men in the neighbourhood, who had previously served with the JNA, that the shell was a large calibre howitzer shell and it had been launched from Borije, east of Širokača."[593]

[588] Judgement, para.2022.
[589] Judgement, para.3211.
[590] Judgement, para.3191.
[591] Judgement, paras, 2019, 2022.
[592] Judgement, paras.2018, 2022.
[593] Judgement, para.2019.

471. The Appellant further notes, the evidence of Fadila Tarčin that the shells were fired from SRK-held territory stemmed from comments made to her by her neighbours and thus may be classified as hearsay evidence. While hearsay evidence may be admitted if such evidence is deemed to have probative value; the weight and probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given evidence under oath and who has been cross-examined. The neighbours of Fadila Tarčin, who were not identified as military experts, did not testify in the case, thus, could not be cross-examined. As such, the evidence remains largely untested.

472. In determining the origin of fire for each incident the Trial Chamber appears to rely generally on the evidence of John Wilson.[594]

473. The Appellant notes, the evidence of John Wilson refers only to the responsibility taken by the Appellant for the shelling of Sarajevo that evening.[595] Recalling the Appellants submissions regarding Sarajevo as a defended city at paragraphs 373-397, bombardments against a defended city are not, of themselves, criminal. As such, evidence of a bombardment cannot be used to conclude the alleged attacks were unlawful. Rather, the evidence must demonstrate that the acts were indiscriminate or that the SRK or the Appellant was responsible for the acts which caused injury to Fadila Tarčin, RM-115 or any consequences of the same gravity. The evidence in this instance is circumstantial in that it demonstrates no direct nexus between the acts in question and the injuries alleged, nor does it substantiate that the bombing was indiscriminate.

474. The Trial Chamber in *Haradinaj* emphasised the importance of exercising extreme caution when drawing an inference of guilt beyond a reasonable doubt based upon seemingly persuasive circumstantial evidence; highlighting that "proof that crimes occurred, standing alone, is not sufficient to sustain a conviction of an individual for these crimes".[596]

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[594] Judgement, paras.2020-2021.
[595] Judgement, paras.2020-2022.
[596] *Orić* AJ, para.189.

475. The Appellant submits, given the significant reliance placed on hearsay and circumstantial evidence in this incident, no reasonable Trial Chamber could have concluded there was a nexus between the SRK and the acts which resulted in injury to Fadila Tarčin, RM-115, or any other consequence of the same gravity on the basis of the evidence before the Trial Chamber.

B.3.1.3 Error 2: The evidence does not demonstrate beyond reasonable doubt that the alleged attacks were wilfully directed at the civilian population

476. The Trial Chamber points to evidence presented by RM-511 and John Wilson, including the evidence that the Appellant had ordered and directed the bombardment so that "the civilians in these neighbourhoods be harassed throughout the night so they could not rest."[597] The Trial Chamber draws upon this evidence to conclude the Appellant wilfully directed acts of violence towards the civilian population, and did so with the primary purpose of spreading terror among the civilian population.[598]

477. A review of the evidence at its origin shows that witness RM-511 did not state that the Appellant had directed the bombardment of Sarajevo to harass civilians throughout the night.

478. The Appellant recalls, during evidence-in-chief, the Prosecutor tendered a recording, in which the Appellant is alleged to have directed a subordinate to apply artillery "so they cannot sleep, that we roll out their minds". [REDACTED].[599]

479. [REDACTED].[600]

480. The reference to civilians harassing was made only by the Prosecutor.[601] RM-511 does not state that the Appellant gave orders to deliberately target civilians or civilian objects, or that any acts be undertaken for the purpose of harassing the civilian population. The Appellant submits that the Trial Chamber has conflated the two

[597] Judgement, paras.2020-2022, 4700.
[598] Judgement, paras.2020-2023.
[599] [REDACTED].
[600] [REDACTED].
[601] [REDACTED].

statements in its Judgement which has led it to erroneously interpret the intent of the Appellant.

481. In making this submission, the Appellant notes, international law does not prohibit attacks on 'civilian areas' but rather attacks against civilians or the civilian population.[602] The Appeals Chamber has held that the unlawfulness of an attack cannot be concluded on the basis that a 'civilian area' was attacked.[603] Instead, the Trial Chamber must determine whether the attacks were indiscriminate or wilfully directed at a civilian target.

482. The Appeals Chamber of *Gotovina* held that statements of the accused to the effect that "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours" could be interpreted as a statement of Army's capabilities, rather than its aims, and therefore did not provide evidence of an intention to engage in indiscriminate shelling.[604]

483. The Appellant submits, the statements made by the Appellant to target Sarajevo could similarly be interpreted as evidence of the Appellant's intent to target military objective in all areas of Sarajevo.

484. The Appellant recalls, when assessing evidence of intent, the Trial Chamber must consider evidence in light of the principle of *in dubio pro reo*; which obliges the Trial Chamber to adopt an inference of the evidence which is consistent with the innocence of the Accused if reasonably available.[605]

485. The Appellant submits, an inference consistent with the innocence of the Appellant is available on the evidence. The Trial Chamber therefore erred by concluding that the only possible inference was that the acts were wilfully directed attacks at the civilian population.

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[602] API, Arts.51(2), 52(2).
[603] *Milošević* AJ, paras.55-56, 139, 143.
[604] *Gotovina* AJ, para.81.
[605] *Čelebići* AJ, para. 458.

B.3.1.4 Error 3: The evidence does not demonstrate beyond reasonable doubt that shells were directed against civilians or civilian targets.

486. The Trial Chamber concluded that members of the SKR fired artillery, rockets, and mortar against Sarajevo, and that the Appellant personally selected targets such as the Presidency, the town hall, police headquarters, and the children's embassy.[606]

487. The Appellant recalls that bombardments, by whatever means, are prohibited only against undefended locales[607] and refers to its submissions regarding Sarajevo as a defended city at paragraphs 373-397 and notes that Sarajevo was a defended city throughout the indictment period. The occasion of a bombardment does not of itself evidence the commission of a crime. Rather, the Trial Chamber must conclude that the evidence demonstrates beyond reasonable doubt that an attack was directed against an individual civilian or the civilian population or that the bombardment was indiscriminate.[608]

488. The Appellant notes, military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in circumstances ruling at the time, offers a definite military advantage.[609] This includes targets of opportunity such as mobile mortar.

489. The Appellant notes, targets of opportunity operated extensively in and around Sarajevo throughout the indictment period.[610] The Trial Chamber did not exclude the possibility that shells were fired at these targets of opportunity during the bombardment.

490. In considering the presence of targets of opportunity during the HV attack on Knin, the *Gotovina* Appeals Chamber held that the presence of mobile mortar "raises reasonable doubt about whether even artillery impacts sites particularly distance from

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[606] Judgement, para.2022.
[607] *Statute*, Art.3
[608] Per the elements required to prove murder, unlawful attacks and terror.
[609] API, Art.52(2).
[610] See for example: Segers (T.43760) P421, para.122; P320, para.53; Wilson (T.3929); D489, para.16; D658,para.14; Jordan (T.1817-1818); D1289, p.1; D1798; D1565, p.2; RM-120 (T.7687); D116, p.2; Mijatovic (T.21475); D1413, paras.9, 12, 17-18.

fixed artillery targets considered legitimate […] demonstrate that unlawful shelling took place".[611]

491. The Appellant notes, when considering Scheduled Incident G.1, the Trial Chamber relied primarily upon the evidence of John Wilson, which suggested the Appellant personally directed attacks towards the presidency, town hall, police HQ, and children's embassy.[612] The Appellant notes this evidence as hearsay, which was based upon a translation provided by a third source who is said to have identified the voice of the Appellant.[613] A review of the transcripts of the intercepted conversations[614] supports the allegation that the Appellant personally directed attacks only to the extent of the Presidency, Assembly, and police targets. Recalling the definition of a military objective,[615] the Appellant contends that these locations constitute valid military targets. No further evidence was presented in support of the contention that the Appellant directed fire towards the children's embassy.

492. The Appellant recalls again, untested evidence relating to the acts and conduct of the accused which is admitted into the trial record, must be corroborated by other evidence in order to form a basis for a conviction of an accused.[616] The Appellant notes, the Trial Chamber does not rely on any corroborating evidence to support its finding that the Appellant did fire at the children's embassy.[617] As such, the Appellant submits, it cannot be used or relied upon as evidence of the Appellant's intent.

493. The Appellant submits, when viewed at its source and measured against the standard set by the *Gotovina* Appeals Chamber, the evidence cannot be said to demonstrate that the acts were indiscriminate or were directed against a civilian object specifically.

B.3.1.5 Consequences of the errors

[611] *Gotovina* AJ, paras.63, 66.
[612] P329 p.2; P320, para.76; J.Wilson (T.3970, 3972, 3978).
[613] J.Wilson (T.3973).
[614] P330.
[615] API, Art.52(2).
[616] *Prlić* Decision Against Admitting Transcript, paras.53, 55-57.
[617] Judgement, para.2022.

494. As a consequence of the error, the Trial Chamber impermissibly considered Scheduled Incident G.1 pursuant to the crimes of unlawful attacks and murder.

495. Further, the Trial Chamber impermissibly considered Incident G.1, as well as the Appellants actions in planning and directing Incident G.1 and the evidence of RM-511, pursuant to its consideration of the existence of a JCE and the intent of the Appellant to further the aim of the alleged JCE.[618]

B.3.1.6 Remedy sought

496. The Appeals Chamber is invited reverse the Trial Chamber's findings on Schedule Incident and to remove Incident G.1 from considerations of unlawful attacks and terror; as well as its consideration as to the existence of a JCE and the intent of the Appellant to further the aim of the alleged JCE.

B.3.2 Use of adjudicated facts

B.3.2.1 Applicable law

Burden of proof

497. The presumption of innocence places the burden of establishing the guilt of the accused upon the Prosecution.[619] Taking judicial notice of an adjudicated fact does not shift the ultimate burden of persuasion, which remains with the Prosecution.[620]

B.3.2.2 The Trial Chamber's approach

498. In reviewing the scheduled and unscheduled incidents alleged against the Appellant, the Trial Chamber took notice of a number of adjudicated facts. The Appellant notes, the Trial Chamber relied upon adjudicated facts to conclude facts which constitute

[618] Judgement, para.4700, 4739, 4895, 4898, 4917, 4918, 4921.
[619] *Vasiljević* TJ, para12.
[620] *Karemera,* Interlocutory Decision, para.42.

elemental findings essential to a conviction of guilt for the crimes of murder, unlawful attacks, and/or terror.

499. The Appellant recognises, notice of adjudicated facts fosters judicial economy by avoiding the need for evidence-in-chief to be presented in support of a fact already previously adjudicated;[621] however, notes that this "does not shift the ultimate burden of persuasion, which remains with the Prosecution."[622]

500. The Trial Chamber relied upon adjudicated facts in the following circumstances: 1) the burden on Prosecution to establish the fact in contention should have reasonably been considered enlivened; and 2) the Prosecution brought evidence which was contradictory to, or did not support, the adjudicated facts.

501. The Appellant submits, the Trial Chamber erred in relying on adjudicated facts in each of these circumstances and will discuss each error in turn.

B.3.2.3 Error 1: Reliance on adjudicated facts when the burden on the Prosecution to reprove was enlivened

502. In the incidents listed below, the Trial Chamber concluded the SRK was responsible for acts of violence which resulted in death and/or serious injury to civilians or civilian objects. In each case, the Trial Chamber reached this conclusion on the basis of one or more adjudicated facts in circumstances where the Prosecution's burden to prove the fact should have reasonably been considered enlivened.

503. For example, in relation to Scheduled Incident F.11, the Trial Chamber relied upon AF2303 to conclude that the shots in question were fired by a member of the SRK.[623] In its Judgement, the Trial Chamber implies evidence was led by the Defence which contradicted these adjudicated facts.[624]

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[621] Judgement, para.5272.
[622] Judgement, para.5272.
[623] Judgement, paras.1945, 1953.
[624] Judgement, para. 1949-1950.

504. The Appellant notes, the Trial Chamber required that evidence rebutting an adjudicated fact be presented in order to reopen the evidentiary debate.[625] Recalling the Appellant's submissions on Adjudicated Facts at Ground 2, sub-ground A.2, paragraphs 96-105 the Appellant notes that the Trial Chamber adopted a heightened standard of rebuttal and erred by effectively reversing the burden of proof.

505. The Appellant submits the evidence presented by the Appellant challenged the accuracy of the adjudicated facts and offered a reasonable alternative to the allegations of the Prosecution. The evidence should have thus been considered sufficient to rebut the adjudicated facts. Recalling that "facts themselves cannot be weighed against evidence"[626] and further, that the burden of persuasion does not shift from the Prosecution,[627] the Appellant submits that, in such circumstances, the burden on the Prosecution to prove the evidentiary issue was enlivened. The Appellant notes, for each of the incidents listed below, Prosecution either led no evidence or evidence which was considered by the Trial Chamber to be insufficient to prove the alleged fact.

506. The Appellant submits, in the absence of evidence to establish the factual issue addressed by the adjudicated fact, no reasonable Trial Chamber could have concluded the factual base of the identified incidents to have been proven beyond reasonable doubt. Therefore, the incidents cannot be relied upon by the Trial Chamber when considering Count 5 murder, Count 9, terror, and Count 10, unlawful attacks.

507. The Appellant noted the adjudicated facts in question were used to conclude the acts and conduct of the Appellant's approximate subordinates. The Appellant recalls paragraphs 62-95 and asserts that it is a short step between concluding the acts and conduct of an approximate subordinate to a conviction against the Appellant. The Appellant submits that adjudicated facts should not be relied upon for this purpose.

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[625] Judgement, para.5272.
[626] Judgement, para.5275
[627] Judgement, para.5272.

B.3.2.4 Error 2: Relying on adjudicated facts when Prosecution evidence does not support the adjudicated facts

508. In the following incidents, the Trial Chamber concluded the SRK was responsible for acts of violence which resulted in death and/or serious injury to civilians or civilian objects. In each case, the Trial Chamber relied upon adjudicated facts in place of Prosecution evidence which the Trial Chamber concluded was insufficient to support the fact in contention.

509. The Appellant recalls, the Prosecution bears the burden of proving all material elements of a crime beyond reasonable doubt.[628] This standard is not limited to questions of guilt but extends to underlying facts.[629]

510. The Appellant submits, the Trial Chamber erred by relying on adjudicated facts to prove an alleged fact indispensable to a conviction in place of the evidence tendered by the Prosecution. By doing so, the Trial Chamber: 1) imposed a burden upon the Appellant which materially impaired his ability to test the evidence upon which he is accused; and 2) impermissibly entered the arena of the parties.

511. The Appellant will discuss these errors in turn.

B.3.2.4.1 The approach of the Trial Chamber materially impaired the Appellant's ability to counter the case against him

512. The Appellant submits, the Trial Chamber erred by relying on adjudicated facts to prove an alleged fact indispensable to a conviction in place of the evidence tendered by the Prosecution. By doing so, the Trial Chamber impermissibly imposed a burden on the Appellant which materially impaired his ability to run his defence.

513. For example, in relation to Scheduled Incident G.8, the Trial Chamber took notice

> of adjudicated facts regarding the perpetrator(s) of this incident […].The Trial Chamber has received evidence from both parties which deals with the origin of fire as stated in the adjudicated facts, namely that an

[628] *Martić* AJ, para.55.
[629] *Kupreškic* AJ, para.226.

> investigation carried out by UNPROFOR concluded that – at that time – it could not be determined from which side of the confrontation line the mortar shell had been fired. Additionally, it received evidence that an investigation carried out by the Bosnian MUP concluded that there were six potential firing origins, one of which was under the control of the ABiH and five of which were under the control of the SRK. These investigations do not provide – nor do they intend to provide – conclusive answers to the matters established in the adjudicated facts regarding the mortar shell's origin of fire and the entity controlling that position. Therefore, the Trial Chamber finds that this evidence does not contradict the adjudicated facts.[630]

514. The Appellant notes, adjudicated facts can be challenged through cross-examination or by leading evidence that contradicts the adjudicated fact.[631] By offering two methods by which an adjudicated fact may be challenged, the Trial Chamber has indicated rebuttal may be successfully enacted through one or both methods. As such, it may be possible to successfully rebut the adjudicated fact by cross-examination alone.

515. The method of rebutting an adjudicated fact by cross-examination is an important safeguard for maintaining the principle of *in dubio pro reo* and the Appellant's right to put both the adjudicated fact and the Prosecution case to the test. Removing the ability of the Appellant to rebut and adjudicated fact through cross examination may, in some circumstances, impair the ability of the Appellant to counter the case against them. In the example above, this was affected by the impermissibly high standard imposed by the Trial Chamber for the rebuttal of adjudicated facts, and the decision of the Trial Chamber to rely upon the adjudicated facts in place of the evidence led by Prosecution.

516. In making this submission, the Appellant highlights, the evidence led by the Prosecution was intended to support their allegation that the shell in question was fired from SRK held territory.[632] In this sense, the evidence can be understood as an effort by the Prosecution to provide conclusive answers to the matters established in the adjudicated facts. Where the Appellant successfully casts doubt upon the evidence

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[630] Judgement, para.2084.
[631] *Mladić,* Fourth Decision on Adjudicated Facts, para.19.
[632] See Prosecution FTB, paras.961-971.

led by Prosecution which goes the same fact as noted in the adjudicated fact, it may therefore be reasonably presumed the adjudicated fact has also been rebutted.

517. By announcing that the Prosecution evidence did not directly support the adjudicated fact only in the Judgement, the Appellant was not put on notice that cross-examination alone was insufficient to rebut an adjudicated fact in a circumstance when the evidence led by the Prosecution evidence did not directly evidence the adjudicated fact.

518. The Appellant recalls it's submissions about adjudicated facts at Ground 2, sub-ground A.2, paragraphs 96-105 and notes the ability of the Appellant to rebut the adjudicated facts in question was also materially impaired because the standard imposed for evidence led to rebut an adjudicated fact was impermissibly high and could not be realistically obtained.

519. As a consequence of the approach adopted by the Trial Chamber to the use of adjudicated facts, the Appellant was not in a position – due to both the standards imposed by the Trial Chamber and lack of notice – to be able to effectively counter the case against him.

B.3.2.4.2 Trial Chamber's impermissible entry into the arena of the parties

520. The Appellant further asserts, the Trial Chamber's reliance on adjudicated facts, in circumstances where Prosecution led evidence towards that fact, enabled the Trial Chamber to impermissibly enter the arena of the parties and save the Prosecution case.

521. In the example of Scheduled Incident G.8 above, the Trial Chamber noted that the investigations – including those relied upon by the Prosecution – "do not – nor do they intend to provide – conclusive answer to the matters established in the adjudicated facts regarding the mortar shell's origin of fire and the entity controlling that position".[633]

[633] Judgement, para.2084.

522. By concluding that the evidence led by Prosecution was insufficient to provide a conclusive answer regarding the origin of fire and the entity controlling that position, the Trial Chamber conceded the deficiencies in the evidence led by the Prosecution. Recalling the principle of *in dubio pro reo,* the standard of proving a case beyond all reasonable doubt would not normally be satisfied in such a circumstance. However, by relying on the adjudicated fact, the Trial Chamber was able to maintain a finding of guilt against the accused. In doing so, the Chamber effectively saved the Prosecution case.

523. The Appellant notes, the role of a Trial Chamber is to adjudicate on the evidence before it. It is trite law that a Trial Chamber must at all times remain impartial and cannot enter the arena of the parties. By adopting an approach whereby the Prosecution's case is saved through the use of adjudicated facts, the Trial Chamber has effectively entered the arena of the parties.

524. The Appellant submits, had the Trial Chamber not entered the arena and saved the Prosecution case, no reasonable Trial Chamber could have concluded the incidents, where this approach was used, to be proven beyond all reasonable doubt.

525. The Appellant contends, an error of this magnitude is sufficient to warrant the intervention of the Appeals Chamber.

B.3.2.5 Consequence of the errors

526. The errors committed by the Trial Chamber in its use of adjudicated facts invalidates the findings of the Trial Chamber for the following incidents: Scheduled Incidents F.5, F.11, F.12, F.13, F.15, F.16, G.4, G.7, G.8, G.18; unscheduled sniping incidents: 24 October 1994, 22 November 1994, 10 December 1994.

B.3.2.6 Remedy sought

527. The Appeals Chamber is invited reverse the Trial Chamber's findings on these incidents and to remove the listed incidents from consideration under the crimes of murder, unlawful attacks and terror.

B.3.3 The Trial Chamber failed to provide a reasoned opinion regarding its determination of the wilful intent of the perpetrators

528. The Trial Chamber erred by failing to conclude the wilful intent of the perpetrators of Scheduled Shelling Incidents G.6 and G.7. The Trial Chamber further erred by considering these incidents pursuant to the crimes of murder, unlawful attacks and terror.

529. The Appeals Chamber is invited to remove these incidents from further consideration under Counts 5, 9 and 10 of the Judgement.

B.3.3.1 Applicable Law

Crimes of murder, unlawful attacks and terror

530. The crimes of murder, unlawful attacks and terror all require proof that the perpetrator intentionally or wilfully committed the act in question.[634]

B.3.3.2 The Trial Chamber's approach

531. At paragraph 3196, the Trial Chamber considered the wilful intent of the perpetrators for the crime of unlawful attacks. The Chamber recalled a number of particular incidents before stating;

> [F]or the remaining sniping and shelling incidents, the Trial Chamber considered a number of factors in determining whether civilians or the civilian population were targeted.[635]

532. The Trial Chamber elaborated on a number of specific incidents. Scheduled Incidents G.6 and G.7 were not included in this elaboration.[636] Similar approaches were adopted

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[634] *Kvočka* AJ, para.261; *Galić* AJ, paras.100-102, 140; *Milošević* AJ, paras.31-33, 60; *Strugar* AJ, para.270,
[635] Judgement, para.3196.
[636] Judgement, para.3197-3200.

by the Trial Chamber when assessing these incidents under the crimes of murder and terror.[637]

B.3.3.3 The error

533. In the factual findings of Scheduled Incident G.6; the Trial Chamber concluded the liability of the SRK for the incident.[638] The Chamber did so based upon its earlier conclusion that the act was not directed at 'Kulin Ban', a legitimate military objective located 150 metres from the impact site.[639] This conclusion is drawn from AF2434.

534. The Trial Chamber further stated "[t]he attack came at a time when there was a lull in hostilities and no activities of a military nature were underway in the neighbourhood, nor were any soldiers visible."[640]

535. The Appellant recalls, the Trial Chamber has an obligation to provide a detailed reasoning for any conclusions which are material to a conviction and notes the provision of a reasoned opinion is essential to ensuring that the Tribunal's adjudications are fair.[641]

536. The Appellant notes, while AF2434 was relied upon to conclude the act was not directed towards that particular target, it does not, of its self, demonstrate the wilful intent of the perpetrator to engage a civilian target. It is trite law that the burden to evidence the wilful intent of a perpetrator remains with the Prosecution at all times.

537. Further, while the timing, manner, and nature of an attack may be an indicia of wilful intent, without further analysis, these factors alone do not evidence such intent. In this instance, the Trial Chamber did not provide such an analysis either within its factual findings of Scheduled Incident G.6. nor in its legal conclusions for the crimes of murder, unlawful attacks, or terror.[642]

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[637] Judgement, paras. 3051, Sch.G(b)&(c), 3057; 3211.
[638] Judgement, para.2050.
[639] Judgement, para.2043.
[640] Judgement, para.2050.
[641] *Bizimungu* AJ, para.18.
[642] Judgement, paras.3051, Sch.G(b)&(c), 3057; 3197-3200; 3211.

538. The Appellant submits, in the absence of a reasoned opinion, the wilful intent of the perpetrator cannot be concluded beyond all reasonable doubt. As such, the Trial Chamber erred by considering this incident pursuant to the charges of murder, unlawful attacks and terror.

539. The Appellant notes, this error was similarly committed by the Trial Chamber in its analysis of the wilful intent of the perpetrators to Scheduled Incident G.7.[643]

B.3.3.4 Consequence of the error

540. As a consequence of the error, the Trial Chamber erroneously considered Scheduled Incidents G.6 and G.7 pursuant to Count 5, murder, Count 9, terror, and Count 10, unlawful attacks.

B.3.3.5 Remedy sought

541. The Appeals Chamber is invited to reverse the Trial Chamber's findings on Scheduled Incidents G.6 and G.7 and to remove the affected incidents from the findings of Count 5, murder, Count 9 terror, and Count 10, unlawful attacks.

B.3.4 The Trial Chamber erred in law and fact when it made impermissible inferences and findings in violation of the principle of in dubio pro reo

542. The Trial Chamber erred in law and fact by concluding SRK responsibility for alleged incidents (both scheduled and unscheduled) on the sole basis that the act was alleged to have originated from SRK held territory.

543. As a consequence of the error, the infected incidents were considered pursuant to the crimes of murder, unlawful attacks, and terror.

[643] Judgement, para.2057; 3051, Sch.G(b)&(c), 3057; 3197-3200; 3211.

544. The Appellant invites the Appeals Chamber to remove these incidents from the fact base upon which the crimes of murder, unlawful attacks, and terror were concluded.

B.3.4.1 The Trial Chamber's approach

545. In the incidents listed below, the Trial Chamber concluded the SRK was responsible for acts of violence which resulted in death and/or serious injury to civilians or civilian objects. In each instance, the Trial Chamber reached this conclusion on the basis that the evidence demonstrated the attack originated in SRK held territory. These incidents were then considered by the Trial Chamber pursuant to the Count 5, murder, Count 9 terror, and Count 10, unlawful attacks.

546. For example, in relation to alleged Scheduled Incident F.5, the Trial Chamber stated;

> [b]ased on the foregoing, the Trial Chamber finds that on 2 November 1993, Ramiza Kundo was targeted, shot and injured in her leg. The victim was a Bosnian-Muslim woman dressed in civilian clothes, who was shot between her house and a well, carrying two water buckets. There were neither soldiers nor any military vehicles present in the immediate vicinity. On the basis that the shot originated from SRK-held territory, the Trial Chamber finds that Ramiza Kundo was shot by a member of the SRK.[644]

B.3.4.2 The error

547. The Appellant notes, the Trial Chamber has relied upon circumstantial evidence to reach the assumption that, because the shot originated in SRK held territory, the SRK were *ipso facto* responsible for launching it.

548. The Appellant recalls, evidence before the Trial Chamber indicated the propensity for ABiH to target civilians and civilian objects within BiH territory. The ABiH Sevé unit were, at times, specifically tasked to snipe civilians in BiH held Sarajevo in such a manner as to make it appear that the SRK were responsible.[645] The Appellant notes, the Trial Chamber did not address these considerations in their conclusions.

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[644] Judgement, para.1937.
[645] Garapilja (T.33909); D1425, pp.1-2.

549. It is trite law that proof that a crime occurred is, on its own, not sufficient to establish a nexus between the accused and the charged crimes, nor to sustain a conviction of the accused for those crimes, especially in the context of war crimes.

550. The Appellant notes, the circumstantial evidence relied upon by the Trial Chamber in each of these incidents is being drawn upon to conclude an essential element of each of the crimes alleged; that being, that the SRK perpetrated the attacks.

551. The Trial Chamber in *Haradinaj* highlighted the inherent danger that can result when inferences based on circumstantial evidence are drawn if the Prosecution is relieved of its burden to prove all predicate facts beyond a reasonable doubt. In that case – evidence that the murder was actually committed by the KLA.[646]

552. The Appellant submits without any apparent evaluation of exculpatory evidence or weighting given to such evidence, the Trial Chamber could not exclude that another reasonable interpretation may have been drawn on the available evidence. Furthermore, the Trial Chamber effectively implemented a standard whereby, absent positive evidence the SRK were not responsible for the attack, it assumed that they were. As a consequence of this approach, the Trial Chamber lowered the standard required of the Prosecution to prove the constituent elements of a crime to such a degree as to relieve Prosecution of their burden of proof.

B.3.4.3 Consequences of the error

553. The Appellant submits, the error committed by the Trial Chamber invalidates the findings for the following incidents: Scheduled Incidents F.2, F.9, G.18; unscheduled sniping incidents: 31 March 1993, 25 June 1993, 27 June 1993, 24 July 1993, 5 August 1993, 26 September 1993, 2 November 1993, 9 November 1993, 11 January 1994; unschedules shelling incidents: 6 & 7 september 1994, and prevents these incidents from being considered further pursuant to the crimes of murder, unlawful attacks, and terror.

[646] *Haradinaj* TJ, para.161.

B.3.4.4 Remedy sought

554. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings on these incidents and remove the listed incidents from consideration under the crimes of murder, unlawful attacks and terror.

B.4 DISCUSSION OF THE CUMULATIVE IMPACT OF THE ERRORS

555. After reviewing the evidence before it, the Trial Chamber concluded "between 12 May 1992 and November 1995, there existed a JCE with the primary purpose of spreading terror among the civilian population through a campaign of sniping shelling."[647] Further, the Trial Chamber found this plan was outlined at the 16th Session of the Bosnian-Serb Assembly on 12 May 1992.[648]

556. In considering the same alleged campaign, the *Milošević* Appeals Chamber held that "a campaign is a military strategy; it is not an ingredient of any of the charges in the indictment, be that terror, murder or inhumane acts."[649] The Appeals Chamber went on to note, the concept of a campaign as presented in that case was understood as;

> [a] descriptive term illustrating that the attacks against the civilian population in Sarajevo, in the form of sniping and shelling were carried out as a pattern forming part of the military strategy in place.[650]

557. The Appellant notes, in the present case, the Prosecution sought to evidence the alleged campaign of sniping and shelling through a selection of scheduled and unscheduled incidents which spanned the temporal scope of the indictment period.[651] The Trial Chamber noted that it is through this alleged campaign that the common plan to spread terror amongst the civilian population was enacted.[652]

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[647] Judgement, para.4740.
[648] Judgement, para.4740.
[649] *Milošević* AJ, para.266.
[650] *Ibid.*, para.266.
[651] Indictment, Schs.F&G.
[652] Judgement, para.4740.

558. The Appellant recalls paragraphs 41-60, 62-114, and 460-554 and notes, based upon these submissions, the following incidents cannot be considered to have been proven beyond reasonable doubt and as such, cannot be considered to form part of the crime base for Sarajevo: Scheduled Incidents F.1, F.5, F.2, F.5, F.9, F.11, F.12, F.13, F.15, F.16, G.4, G.6, G.7, G.8, G.13, G.18; unscheduled sniping incidents: 31 March 1993, 25 June 1993, 27 June 1993, 24 July 1993, 5 August 1993, 26 September 1993, 2 November 1993, 9 November 1993, 11 January 1994, 24 October 1994, 22 November 1994, 10 December 1994, and 1 July 1995; unschedules shelling incidents: 6 & 7 september 1994.

559. The absence of these incidents from the crime base substantially degrades both the numerical and temporal scope of the alleged campaign.

560. The removal of the incidents has a sequential impact on the findings of the Trial Chamber as to the crimes base of the JCE.

B.4.1 Consequences of totality of errors

561. As a consequence of the errors committed by the Trial Chamber when reviewing evidence of fact, the identified incidents were incorrectly considered pursuant to the crimes of murder, unlawful attacks, and terror.

562. These errors had a sequential impact of the Trial Chamber's conclusion that the crimes formed part of a campaign waged pursuant to a JCE.

B.4.2 Remedy sought

563. The Appeals Chamber is invited to reverse its findings to the extent of the errors identified and to remove the identified incidents from further consideration under Count 5, murder, Count 9 terror, and Count 10, unlawful attacks.

564. Following the removal of the identified incidents from the scope of the crime base, the Appeals Chamber is further invited to reconsider the Trial Chamber's findings on the JCE to spread terror amongst the civilian population of Sarajevo through a campaign of sniping and shelling.

C. [SUBSUMED INTO GROUND FOUR, SUB-GROUND B.]

565. This sub-ground has been subsumed into sub-ground (B) to assist the Appeals Chamber and to avoid repetition.

D. [SUBSUMED INTO GROUND FOUR, SUB-GROUND B.]

566. This sub-ground has been subsumed into sub-ground (B) to assist the Appeals Chamber and to avoid repetition.

E. [SUBSUMED INTO GROUND FOUR, SUB-GROUND B.]

567. This sub-ground has been subsumed into sub-ground (B) to assist the Appeals Chamber and to avoid repetition.

F. [WITHDRAWN]

568. This sub-ground has been withdrawn

G. [WITHDRAWN]

569. This sub-ground has been withdrawn

VI. GROUND FIVE: THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FINDING THAT THE APPELLANT PARTICIPATED IN THE JCE'S ALLEGED IN SREBRENICA IN COUNTS 2-8

A. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FINDING THAT MULTIPLE JCE'S EXISTED IN SREBRENICA AND THAT THE APPELLANT WAS A MEMBER OF THEM

570. The Appellant asserts that the Trial Chamber erred in finding him to be a member of a JCE with the common criminal objective to; (a) forcibly transfer Bosnian Muslims and, (b) to commit genocide, extermination and murders.

A.1 APPLICABLE LAW

571. The Appellant recalls paras.153, 187 213 setting out the legal elements of JCE-I.

572. The Prosecution must prove the underlying facts of the crimes beyond reasonable doubt.[653] To establish a fact on which the conviction relies, the inference drawn by a Trial Chamber must have been the *only* reasonable one that could be drawn from the evidence presented by the Prosecution.[654]

573. The Appellant recalls paragraphs 24-26, 28-40, and 738 setting out other applicable law setting out the appellate standards as to: a) hearsay; b) weighting of evidence; c) disregards of evidence; d) requirements of a reasoned opinion; e) circumstantial versus direct evidence; and f) application of *in dubio pro reo* to the evidence.

574. If an accused raises the defence of alibi, the Prosecution must disprove that he was not in a position to commit the crime charged.[655]

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[653] *Martić* AJ, para.55; *Kupreškić* AJ, para.226.
[654] *Čelibići* AJ, para.458.
[655] *Kamuhanda* AJ, para.38; *Nchamihigo* AJ, para.93.

A.2 THE APPELLANT WAS NOT PART OF A COMMON CRIMINAL OBJECTIVE TO FORCIBLY TRANSFER INDIVIDUALS

A.2.1 Overview

575. The Trial Chamber gave insufficient, if any, weight to exculpatory evidence of the Appellant acting pursuant to UN requests to coordinate humanitarian evacuations. The Appellant submits that if sufficient weight had been given to this evidence, no reasonable trier of fact would have concluded that the only reasonable inference was that he acted to further the common criminal objective of this JCE.

A.2.2 The Trial Chamber's approach

576. The Trial Chamber concluded that the Appellant and subordinates ordered the forcible transfer of civilians.[656] It relied on selective evidence from Franken, lower-level DutchBat personnel, as well as 'insider' witnesses, to support its findings that the Appellant ordered the departure of civilians.[657] The Trial Chamber found that his conduct in arranging the buses contributed to the common criminal objective.[658]

A.2.3 The error

577. The Trial Chamber gave insufficient weight to evidence of the Appellant's coordination and cooperation with high-level members of the UN, and Muslim civilian leadership. Illustrative examples of exculpatory evidence in this regard are discussed below.

578. The Trial Chamber failed to give sufficient weight to evidence that the Appellant worked in coordination with UN/UNPROFOR to evacuate civilians from Srebrenica. There was ample evidence establishing that evacuations were necessary for

[656] Judgement, para.5096.
[657] Judgement, paras.2474-2478; 2480-2559.
[658] Judgement, para.2480-2495.

humanitarian reasons.[659] Franken's evidence supported that DutchBat had been asked to organise the evacuation, but required the Appellant's assistance to do so.[660] General Nicolai (Deputy Chief-of-Staff of UNPROFOR BH Command) testified that Col. Karremans had been ordered by UN/UNPROFOR and the Dutch MoD to obtain the Appellant's assistance for the evacuation of civilians for humanitarian purposes.[661] Butler confirmed that UNPROFOR BH Command discussed coordinated evacuation plans with the Appellant at the Fontana Meeting.[662] At a high-level meeting, DutchBat, Col. Karremans, and Lt. Col. Boering, requested the Appellant's assistance to evacuate civilians in Srebrenica on behalf of the UN/UNPROFOR and Bosnian Muslim civilian leaders.[663] As the UN lacked the buses to achieve this,[664] the Appellant agreed to assist with humanitarian evacuations and obtained buses to fulfil this.[665] It was agreed that DutchBat would escort the buses.[666] The Trial Chamber failed to consider the Appellant's actions in this context.[667]

579. The Trial Chamber accepted that the Appellant had given civilians a choice to leave for Yugoslavia or the Federation, or stay in the RS.[668] These words were consistent with what the Appellant told civilians on the ground, as recorded on video, as well as the corrected translation to the lower-level DutchBat officers.[669]

580. The Appellant asserts that the evidence provided another reasonable inference, namely that acting in coordination with high-level DutchBat/UNPROFOR to evacuate civilians. The Trial Chamber's finding that the Appellant was a member of a common plan was not the *only* reasonable inference. As such, the Trial Chamber fell into discernible error in finding that this had been proved beyond reasonable doubt.

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[659] Nicolai (P1165, para.59; T.10654); Boering (T.10067-10068); Gajić (T.40294); Kingori (D15, para.26-27); RM-268 (P2176, p.19).
[660] T.10817-10818.
[661] P1165, para.59; T.10654.
[662] T.16825.
[663] P1147 (1:26:45-1:29:13); Boering (T.10067-10068).
[664] Ibid.
[665] Boering (T.10067-10068); Milutinović (D862, para.77).
[666] Judgement, para. 2972; D280, p.6.
[667] Judgement, paras.2480-2495; 4992; 4999; 5125.
[668] Judgement, para.2472; P1147, p.26-42; p.47-51, p.55-56.
[669] P1147, p.55 (corrected translation not provided contemporaneously to DutchBat).

A.2.4 Consequences of the error

581. The Trial Chamber erred by drawing inferences not supported by the totality of the evidence.[670] The Appellant submits that if sufficient weight had been given to this exculpatory evidence, no reasonable trier of fact could have concluded that the only reasonable inference was that he was part of a common plan to forcibly transfer.

A.2.5 Remedy sought

582. As a consequence of the error, the findings of guilt under JCE-I for the forcible transfer of Bosnian Muslims is invalidated. The elements of the *actus reus* cannot be satisfied beyond reasonable doubt. As such, the Trial Chamber erred by concluding guilt.

583. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings of forcible transfer under the mode of JCE-I, or in the alternative, reverse the findings to the extent of the errors identified.

A.3 THE APPELLANT WAS NOT PART OF A COMMON CRIMINAL OBJECTIVE TO COMMIT GENOCIDE, EXTERMINATION AND MURDER

A.3.1 Overview

584. The Trial Chamber gave insufficient, if any, weight to the absence of any direct or indirect evidence of a meeting occurring on 11-12 July 1995 wherein a criminal objective was discussed or agreed upon. The Appellant submits that if sufficient weight had been given to the totality of the evidence, including exculpatory evidence, no reasonable trier of fact would have concluded that the only reasonable inference was that he acted to further the common criminal objective of this JCE.

[670] *Karajišnik* TJ, para.834.

A.3.2 The Trial Chamber's approach

585. The Trial Chamber relied on hearsay evidence provided by M. Nikolić (an 'insider' witness[671]) to indirectly conclude that a meeting occurred, and that a plan to kill was formulated at said meeting.[672] Inferences were drawn from statements made by the Appellant and his purported command and control over the VRS and MUP units, to conclude that he was a member of the common criminal objective.[673]

A.3.3 The error

586. The Prosecution conceded that the common criminal objective to eliminate and execute males was not part of the original JCE, but was formed during a meeting at an unknown time and location on 11-12 July 1995.[674] The Trial Chamber relied on the Prosecution's closing arguments as evidence that this meeting took place.[675]

587. The Appellant avers that the Trial Chamber gave insufficient weight to the lack of evidence that this meeting actually took place on 11-12 July 1995.[676] The Trial Chamber relied on statements made by the Appellant at the second Fontana meeting on 12 July 1995, as well as his exercise of command and control over VRS and MUP units, to conclude that a common criminal objective had been formulated between 11-12 July 1995.[677] To support this finding, the Trial Chamber relied on hearsay evidence from M. Nikolić's testimony.[678] However, his evidence did not establish any link to the Appellant.[679] Further, the Trial Chamber's own finding confirmed that a meeting at the Bratunac Brigade on 11 July 1995 is **not** mentioned in Nikolić's evidence.[680] The Trial Chamber did not attempt to reconcile this with his conflicting account of a

[671] Defence FTB, paras.2523-2526.
[672] Judgement, para.4938.
[673] Judgement, paras.5129-5131.
[674] Prosecution FTB, paras.1063, 1105.
[675] Judgement, para.4926.
[676] Judgement, paras.4926-4927, 4970, 5096-5097, 5128.
[677] Judgement, para.5088, 5129-5131.
[678] Judgement, para.4938, 4939, 4956, 2662, 2668, 2685, 2694-2695, 2709, 2719, 2903, 5304, 4954.
[679] Judgement, para.4938. Note, that the Trial Chamber expressly rejected Nikoić's account of a roadside meeting with the Appellant and hand gesture, as indicative of an order to kill (para.5127).
[680] Judgement, para. 4953.

meeting that occurred the 11 July, learned from his interaction with Blagojević which did not include any discussion of killings.[681] The Trial Chamber thus erred as to his facts and as seen later, took an inconsistent approach as to relying on Nikolić despite these internal inconsistencies while discrediting 5 other witnesses for internal inconsistencies.

588. Included in the evidence relied upon by the Chamber is the unsworn, summary of out of court hearsay statements of Nikolić in a suspect interview as written in an OTP report by OTP investigator Bursik,[682] introduced by the defence to show Nikolić's changing story and overall unreliability as to attributing blame to Appellant as to a "hand gesture". In this regard it should be recalled that Bursik himself testified and described Nikolić as evasive in his dealing with him and did not believe Nikolić had been entirely truthful.[683] Based upon his knowledge over 7 years working for the Prosecution[684] Bursik further testified that the possibility Nikolić made false statements to the Prosecution "because [he] believed it would assist [him] obtain a plea" was consistent with his appraisal of Nikolić's personality.[685] Nikolić acknowledged making false statements precisely about the crimes that occurred in Srebrenica, because he "believed at the time they would assist me in obtaining a plea agreement."[686]

589. The Trial Chamber acknowledged Nikolić changed 12 of 15 paragraphs from his original stament of facts and acceptance of responsibility,[687] and itself found unreliable the "hand gesture" story of Nikolić contained in this same Bursik suspect interview.[688] However it failed to adequately consider the totality of the above in finding Nikolić's inference of a meeting and formation of a common criminal objective wherein Appellant was present as reliable.

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[681] D1228, p.1-2.
[682] Judgement, para. 4956, D1228.
[683] Bursik (T.38860-38861).
[684] Bursik (T.38860).
[685] Bursik (T.38871).
[686] P01503.
[687] Judgement, para. 5121.
[688] Judgement para. 5127.

590. Further the Trial Chamber erred in relying upon this summary[689] of a witness taken by an investigator of the Prosecution (a party) for purposes of ICTY litigation as evidence of the truth of the matters asserted therein, without admitting the same under Rule 92*bis* or Rule 92*Qtr*. Even though admitted through a defence witness, it falls under the category of evidence that applicable jurisprudence has held to be inadmissible for the truth of the matters asserted therein under either Rule 89(c) or Rule 92*bis,* especially when not in compliance with 92*bis* as going to "acts and conduct" of the Accused as charged in the indictment.[690] A summary of that material should not be regarded as reliable unless the material itself is in evidence from the declarant witness and can be assessed as to reliability.[691] In the instant case, due the Trial Chamber's own finding that the evidence of a 11th July meeting at the Bratunac Brigade was **not** in Nikolić's testimony[692], coupled with other serious issues relating to his reliability, it was error to rely on the summary of Investigator Bursik as to acts and conduct of Appellant through D1228. It is respectfully submitted that the above-referenced jurisprudence applies irrespective of what party tendered same, as a contrary result would nullify and act counter to the intent and purpose of the protections afforded by the above-referenced jurisprudence.

591. It should be recalled that D1228 was acknowledged by Bursik to be comprised of information obtained during three unrecorded suspect interviews of Nikolić in 2003,[693] an error in judgment he made jointly with Prosecutor McCloskey.[694] Bursik also acknowledged that Rule 43 required that all suspect interviews be audio or video recorded when undertaken by the Prosecution.[695] This fact calls into question the reliability of information contained in D1228, insofar as same was taken contrary to the rules and is not corroborated by a recording. The Trial Chamber failed to give adequate weight or consideration to this when relying on D1228 as to the Appellant's guilt.

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[689] Judgement, para. 4956, D1228.
[690] *Milutinović* Decision on Mitchell and Abrahams, para,14 [citing *Milosević* Decision on Investigator's Evidence, paras.23-24]; *Lukić* Decision on Masović, paras. 13, 15.
[691] *Milutinović* Decision on Mitchell and Abrahams, para ,14 [citing *Milosević* Decision on Investigator's Evidence, paras.23-24].
[692] Judgement, para. 4953.
[693] T.38881-38882.
[694] T.38875; 38877-38828; 38900-38901.
[695] T.38862.

592. Even though Nikolić testified, the summary (D1228) was not tendered through him under either of the applicable rules, but rather was introduced via Bursik. Indeed the Prosecution chose only to show D1228 (then 65ter 1D1005) to Nikolić solely to have him confirm the roadside encounter with Appellant and the "hand gesture" evidence,[696] which has been determined by the Chamber as unreliable and uncorroborated.[697] If the Prosecution intended to rely on the remaining contents of Bursik's summary (D1228) for proving Appellant's acts and conduct it should have questioned Nikolić on same or re-called him after Bursik. It did not. Most notably, the Prosecution did not rely on either the Bursik Summary (D1228), or the evidence of M. Nikolić, in their final brief or closing arguments to support their contention of a meeting between 11-12 July 1995 wherein the substance of the meeting involved a criminal common plan and objective for Genocide or Extermination involving Appellant.[698] The Trial Chamber noted both the Prosecution final brief and Closing argument submissions,[699] yet chose to rely on matters not raised by the Prosecution.

593. The Trial Chamber gave insufficient weight to the lack of corroborative evidence that any criminal meeting involving the Appellant even occurred, particularly given that they approached M. Nikolić's evidence with "great caution".[700] This can be contrasted with other meetings that the Appellant attended in this time period, which were well documented and left no time window for such a meeting to have occurred.[701] Further, the absence of any evidence before the Trial Chamber that the Appellant was present, or gave any explicit orders relating to the killings in Srebrenica.[702]

594. The Trial Chamber in its discussion of the evidence and reliance on Nikolić's evidence, found unreliable or gave no weight to 3 defence witnesses and 2 prosecution witnesses who testified contrary to Nikolić that the only known meetings held by Appellant with subordinates during this critical time period contained no discussion of any criminal objective let alone Genocide.[703] The Trial Chamber gave insufficient

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[696] T.12159-12160.
[697] Judgement, para. 5127.
[698] Prosecution FTB, paras.1063, 1105, 1174-1175, 1213-1226; T.44553, 44556.
[699] Judgement, para.4926.
[700] Judgement, para.5304.
[701] Judgement, paras.2457-2483; 4932-4937; 4996-5006.
[702] Judgement, para.4938.
[703] Judgement, paras. 4932, 4934, 4936, 4937.

weight to the totality of the evidence in relying on Nikolić without taking into full account Bursik's evidence as to Nikolić's untrustworthy nature and the totality of the other evidence from 5 witnesses of a legitimate meeting during the critical time period rather than a criminal one. No reasonable trier of fact could have concluded that the *only* reasonable inference was that the Appellant participated in a meeting whose purpose was to discuss any criminal objective based on the foregoing, especially as Nikolić is the sole source for same, at all times hearsay evidence. The Trial Chamber failed to offer appropriate weight nor analysis to this portion of Bursik's evidence.

595. The Trial Chamber gave insufficient weight to the military context in which the statements relied upon were made at the Fontana Meetings.[704] Evidence from both Prosecution and Defence military experts confirmed that the statements made at the second Fontana Meeting were consistent with military language, even if robust, directed against the armed 28th ABiH Division in Srebrenica.[705]

596. The Trial Chamber placed undue weight on the Appellant's position and role in the military and gave insufficient weight to the absence of any evidence showing direct orders to the VRS and MUP, as well as evidence of his alibi.[706] The evidence in relation to alibi is considered at paras.607-643, addressing the lack of command and control at the material times.

597. The Appellant submits that this finding is a grossly unfair outcome as the Appellant has been convicted despite a lack of evidence on an essential element of the mode of JCE-I.[707]

A.3.4 Consequences of the error

598. The Trial Chamber erred by drawing inferences unsupported by the totality of the evidence.[708] The Appellant submits that the erroneous approach taken by the Trial

[704] Judgement, paras. 5052, 5129.
[705] Butler (T.16831); M. Kovač (T.41395).
[706] Judgement, para.5098, 5088, 5129-5131.
[707] *Kordić* AJ, para.19.
[708] *Krajišnik* TJ, para.834.

Chamber to the weighting of evidence invalidates the findings, as there was another reasonable inference that could have been drawn.

A.3.5 Remedy sought

599. As a consequence of the error, the findings of guilt under JCE-I for genocide, extermination, and murder are invalidated. The elements of *actus reus* cannot be satisfied beyond reasonable doubt. As such, the Trial Chamber erred in concluding guilt.

600. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings genocide, murder, and extermination committed under the mode of JCE-I, or in the alternative, reverse the findings to the extent of the errors identified.

B. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY CONCLUDING THAT THE APPELLANT SIGNIFICANTLY CONTRIBUTED TO THE SREBRENICA JCE

601. The Trial Chamber erred by giving insufficient, if any, weight to exculpatory evidence of the *actus reus* elements under JCE-I.[709] The Appellant asserts that, in the finding of *actus reus* for the Srebrenica JCE, the Trial Chamber erred by failing to provide reasoned opinions and analysis on probative evidence, and based their findings on a lack of evidence. The cumulative effect of these errors meant that the Trial Chamber failed to meet the standard of proof, beyond reasonable doubt.

B.1 APPLICABLE LAW

602. The Appellant recalls the elements of JCE-I at paragraphs 153, 187, 213, and the legal considerations to establish that an accused significantly contributed to the common criminal objective at paragraph 213. Further, the Appellant notes that significant contribution to the JCE requires the Appellant to have performed acts that in some way were directed at furthering the JCE.[710]

603. The *de jure* or *de facto* position of the accused is also a relevant factor in determination of the scope of participation in the common purpose.[711]

B.2 THE TRIAL CHAMBER'S APPROACH TO THE SREBRENICA JCE

604. The Trial Chamber found that the Appellant significantly contributed to the Srebrenica JCE through his command and control over VRS and MUP units in the area.[712] The Trial Chamber found that, throughout July 1995, the Appellant (a) was in contact with the GSVRS and maintained command and control; (b) gave orders to VRS units which were implemented; (c) took measures to ensure the implementation

[709] *Stanišić & Župljanin* AJ, para.136.
[710] See Brief's footnote No. 313.
[711] *Kvočka* AJ, para.192; *Babić* Sentencing Judgement, para.60.
[712] Judgement, para.5097-5098.

of his orders, including while he was not physically present; and (d) was in communication with Milovanović on a regular basis.[713] Further, it found that "all of the principal perpetrators of the crimes forming part of the Srebrenica JCE were VRS or MUP members" under the operational command of the DK or the VRS Main Staff at the material time.[714]

605. The Appellant notes that it was an agreed fact that: (a) the Appellant was at the GSVRS Command post in Crna Rijeka on the evening of 13 July 1995, and left BiH on 14 July 1995 to travel to Belgrade at approximately 12:00pm; (b) travelled back to the GSVRS Headquarters in Crna Rijeka no later than the 17 July 1995.[715] The Trial Chamber found that the Appellant left BiH on 14 July 1995 to attend a meeting at Dobanovi and spent the night of the 14-15 July 1995 in Belgrade.[716] Further, on the morning of 15 July 1995, the Appellant visited his daughter's grave, then attended a meeting, and remained in Belgrade for the rest of the day and night.[717] The next day he attended a wedding.[718]

B.2.1 The error

606. The Appellant submits that the Trial Chamber failed to give sufficient, if any, weight to evidence that demonstrating his inability to command and control the VRS and MUP. The establishment of the Appellant's command and control over his subordinates formed the fundamental basis for the finding that he significantly contributed to further the common criminal objective of the JCE.[719]

B.2.2 Evidence substantiating the error

B.2.2.1 Evidence of the Appellant's alibi

[713] Judgement, para.5053.
[714] Judgement, para.5098, 5096.
[715] Judgement, para.5020.
[716] Judgement, para.5017.
[717] Judgement, para.5017.
[718] Judgement, para.5018.
[719] Judgement, para.5091-5095.

607. The Appellant recalls paragraph 605.

608. The Trial Chamber gave insufficient weight to the Appellant's absence from Srebrenica at the time the crimes were committed, and the impact of this on his ability to command and control forces. Illustrative examples will be explored below.

B.2.2.1.1 Orders alleged to have been sent by the Appellant

609. The Appellant submits that no reasonable trier of fact could have concluded that the *only* reasonable inference was that the Appellant continued to send orders while he was in Belgrade, thereby exercising command and control of the VRS.

610. The Trial Chamber relied on orders between 14–16 July 1995 to illustrate the Appellant's continued control over the VRS and MUP forces while he was in Belgrade.[720] The Trial Chamber concluded that orders P2122, P2123, P2124, and P2125 were signed by the Appellant, therefore leading to an inference that he issued the orders and was in command and had control while he was absent. It failed to provide a reasoned opinion on why it found that the Appellant knew about or even issued these orders.[721]

611. Furthermore, the Trial Chamber failed to give sufficient weight to the content of the orders. The orders related to the day-to-day running of the army, not any orders relating to military operations, Srebrenica or the Krivaja-95 operation.[722]Additionally, the orders were neither sent to any units in Srebrenica, nor any MUP forces.[723] Evidence that the operative centre did not request approval from the Appellant: to draft and issue orders that concerned the general day-to-day workings of the army, or to send telegrams directly relevant to this issue in the Appellant's name, was not given sufficient weight by the Trial Chamber.[724] Further, the Trial Chamber did not consider the unique identification numbers attached to the orders. All of the orders cited were either marked "04/" or "06/" – thereby indicating the organ and position within the

[720] Judgement, paras. 5022, 5024, 5025 (P2122; P2123; P2124; P2125).
[721] Judgement, paras.5022.
[722] Stevanović (T.35265-35264).
[723] P2122; P2123; P2124; P2125.
[724] Stevanović (T.35264-35264).

GSVRS that they originated from.[725] The Trial Chamber failed to give a reasoned opinion on why these orders could be directly or indirectly attributed to the Appellant, so as to establish his command and control at the material times.[726]

612. In this regard, the Trial Chamber accepted that "s.r/signed" on a document did not always mean that the individuals were aware of the documents and had actually signed it,[727] but did not consider the same in the context of orders P2122, P2123, P2124, and P2125.

B.2.2.1.2 Evidence of communications between GSVRS

613. The Trial Chamber failed to give sufficient weight to the change in the command structure in the Appellant's absence during the alibi period. In his absence, the VRS Chief-of-Staff, Milovanović, replaced him as *de jure* and *de facto* Commander.[728]

614. The Trial Chamber placed undue weight on the purported intercepts on 14 July 1995 and 16 July 1995 as evidence of his continued command and control:[729] (a) P1298 (14 July 1995 at 08:05hrs) merely confirms the Appellant's intention to leave the front line. He does not issue any order to be implemented in his absence; (b) P1655 (16 July 1995 at 16:15) the Appellant was informed by the GSVRS Duty Officer that Karadžić was issuing orders and that Pandurević had made arrangements for Muslims to pass through Tuzla. He was not provided with any further information about what was occurring on the ground, (c) P1656 (16 July 1995 at 08:30) where the conversation extended to the Appellant informing a man, in an unknown location, that he would see him that night - no orders were given, and there is no evidence of who the man he spoke to was, or his rank or role; and, (d) P1657 (16 July 1995 at 22:30) the Appellant spoke to Milovanović briefly, but did not give any orders or mention Srebrenica.

[725] P2122; P2123; P2124; P2125. *See* P4300.
[726] Judgement, paras. 5022, 5024, 5025.
[727] Judgement, para.4997; Stevanović (T.35250).
[728] Milovanović (T.16964-16977); Stevanović (T.35265).
[729] Judgement, para.5023.

615. Even if authentic,[730] the intercepts provided insufficient evidence of the Appellant's continuing command and control during the period he was away from the front line. The Appellant submits that had sufficient weight been given to the content of the intercepts, as well as the totality of the alibi evidence, a reasonable trier of fact would not have concluded that this evidence demonstrated the Appellant was exercising effective command and control of the VRS.

B.2.2.2 Evidence that MUP was not under the Appellant's effective control

616. The Trial Chamber failed to give sufficient, if any weight, to whether MUP were subordinated *de jure* and *de facto* to the VRS.

617. The Appellant submits that the Trial Chamber conflated 'cooperation and coordinated action' with 're-subordination'.[731] Groups retain their organisation and may not be split up or separated while performing joint combat operations.[732] This applied to re-subordinated Police units, who remained under the direct command of MUP.[733] Despite finding Nikolić's evidence was "generally credible and internally consistent",[734] the Trial Chamber failed to give sufficient weight to Nikolić's ground-experience that MUP "always had command and control over their own units when they would be carrying out *joint* tasks with the army", and other corroborative evidence.[735] The Trial Chamber gave undue weight to the joint elements of the MUP's cooperation with the VRS and gave insufficient weight to the practical reality that they had not been re-subordinated. For instance, the Appellant's order on 13 July 1995 relating to the combat zone was not sent to any MUP units.[736] Further, Borovčanin's Report contained key information about VRS orders on 13 July 1995, namely that "forces of the Army of Republika Srpska mostly regrouped in order to go to Žepa".[737]

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[730] See Brief paras. 624-628 (regarding dubious nature of intercepts).
[731] Brief paras. 218-224; Judgement, para.2878, 2882, and 4989, demonstrating the differing approach taken by the Trial Chamber to other MUP units 'cooperating' with the Drina Corps.
[732] Theunens (T.20615-20625); Kevac (30537-30545); Kovac (T.41921); P5248, p.2; Judgement, para.3826.
[733] Ibid.
[734] Judgement, para. 5304.
[735] M. Nikolić (T.12093).
[736] P1559.
[737] P724, p.3.

There is no mention of MUP being sent to Žepa. The Trial Chamber gave insufficient weight to evidence of MUP acting as a separate entity.[738]

618. Further, the Trial Chamber considered an alleged order given by the Appellant to MUP forces as evidence of re-subordination.[739] The Trial Chamber relied on Nikolić's evidence to establish this order. However, the Trial Chamber did not consider the totality of the evidence demonstrating MUP's coordination with the VRS, as opposed to, re-subordination.[740] It placed undue weight on the use of the term "killing", to establish a link between the Appellant and the commission of crimes by MUP. Prosecution Expert Butler confirmed that the language was consistent with conducting a legitimate combat activity.[741]

619. The Appellant submits, absent a proper weighting of evidence, no reasonable trier of fact could have concluded that the Appellant exercised command and control over MUP forces.

B.2.2.3 Orders given by the Appellant

620. The Trial Chamber accepted that Srebrenica was of significant strategic importance in the on-going conflict.[742] However, it erred by failing to give sufficient weight to the military context of legitimate orders given by the Appellant in Srebrenica prior and subsequent to Krivaja-95.[743] Instead, it erroneously concluded that the only reasonable inference on the basis of this was that the Appellant significantly contributed to the common criminal objective. Examples include: (a) Directive 4 ordered the adherence to the laws of war, including the Geneva Conventions;[744] (b) a series of other orders up to 1995, including those to the Drina Corps,[745] that did not contain criminal orders; (c) likewise other orders that required civilians to be removed

[738] Judgement, para.4957.
[739] Judgement, paras. 5063, 5068, 5115.
[740] Ibid.
[741] Butler (T.16285-16288, 16290).
[742] Judgement, paras.2321, 2358.
[743] Judgement, paras. 2323, 2374, 2376-2378, 2380, 2578, 2616, 2775, 2896, 2929, 2992; Defence FTB paras.800-801, 2854-2856.
[744] Judgement, paras. 2323, 2359, 5100.
[745] Judgement, paras.4329-4371.

from combat zones and harm.[746] These factors support that the Appellant was giving legitimate military orders, rather than ones directed towards the commission of crimes. The Trial Chamber failed to adequately consider the context and contents of these orders in its analysis of the Appellant's significant contribution.

621. The Trial Chamber relied on Krivaja-95 to establish that Directive 7(1) did not rescind Directive 7, issued by Karadžić.[747] It gave undue weight to the language of Directive 7, and insufficient weight to Prosecution Expert Butler's testimony that Krivaja-95 operation in July 1995 was a legitimate military operation.[748] Butler provided probative evidence, and the Trial Chamber failed to give a reasoned opinion for failing to give it sufficient weight in its considerations.[749]

622. With regards to orders relating to the media presence in combat zones, the Trial Chamber found that the Appellant's order of 13 July 1995 was intended to mislead the media and international community about the events in Srebrenica.[750] However, insufficient weight was given to other, similar orders, made both before and after these events to prevent classified military information from being leaked.[751] The Trial Chamber erred by failing to properly consider the language used in this order, within the context of all the orders issued during the conflict.[752]

623. These illustrative examples support the Appellant's submission that his orders during this period were consistent with legitimate military operations, in light of the military context of Srebrenica.

[746] D302; D303.
[747] Judgement, para. 2364-2386.
[748] Butler (T.16498-16499).
[749] Judgement, para. 2364-2386.
[750] Judgement, para.5081-5082, 5117, 5128; P1559.
[751] P6967; P5173; P6646; P6549; P4332; P5161; P6641; P5068; P5069; P4383; P5224; [REDACTED].
[752] Judgement, para.5081-5082, 5117, 5128.

B.2.2.4 Intercepts

624. The Trial Chamber relied on intercepts to establish the involvement of VRS forces, and the Appellant's complicity, in the commission of crimes in Srebrenica.[753] It erred by failing to give sufficient, if any, weight to contradictory evidence as to the authenticity of the intercepts.

625. The Trial Chamber relied upon RM-316 (from the CSB and AID) to establish that there was no evidence of the intercepts being forgeries, including those from the ABiH.[754] The Trial Chamber disregarded evidence of: (a) RM-316's limited, and unspecialised, training in this area;[755] and, (b) the partisan testimony of RM-316's due to his employment.[756] The Trial Chamber failed to adequately, or at all, consider this in their analysis of RM-316's evidence.

626. Further, the Trial Chamber failed to give sufficient weight to other evidence that undermined the authenticity and reliability of these intercepts.[757] For example: (a) RM-275, could not have authored the 1995 intercepts because he was not assigned to the unit until 1996;[758] (b) the lack of continuity or chain of custody proffered by the CSB, SDB and AID in providing the intercepts to the ICTY;[759] (c) the incorrect identification of VRS relay routes;[760] (d) wrong VRS frequencies cited;[761] and (e) the scepticism expressed by Butler about the authenticity.[762]

627. In addition, the Trial Chamber failed to adequately address inconsistencies within the intercepts it relied upon.[763]

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[753] Judgement, para.2480, 2992, 2996, 4945, 4950, 5001-5002, 5032, 5114, 5008, 5028, 5112, 5032.
[754] Judgement, para.5046.
[755] P1654 (p.9, 28); (T.13661-13662); see *contra* RM-279 (T.13512-13513, T.13488); Došenović (T.37801-37802, T.37820-37829); P164 p.44.
[756] RM-316 ([REDACTED], T.13623, T.13688); [REDACTED]; D735, para.23; [REDACTED]; Garaplija (T.33909, D980, pp. 3-12) and D1425, pp. 1-2 [Evidence that the CSB/SDB/AID operated a clandestine group during the war committing killings of civilians to then be falsely blamed on Appellant's forces.]
[757] Judgment, para.2480, 2992, 2996, 4945, 4950, 5001-5002, 5032, 5114, 5008, 5028, 5112, 5032.
[758] RM-279 (T.13575-13576); [REDACTED]
[759] Butler (T.16701-16702); [REDACTED].
[760] P1625; RM-279 (T.13338-13340); D909; Jevđević (T.31900-31920).
[761] Blagojević (D878, para.24-25); Jevđević (T.31935-31937); D879.
[762] Butler (T.16115-T.16117).
[763] Judgement, para.4945, 5001-5002, 5032, 5114; see, e.g. P1320/P1321, and P2126 [Purportedly stating that Commander Furtula not following orders of Appellant as to intervention platoon but identifying Boban Inđic in relation to same]; and P1332 [Purporting to be the same participants and the same

628. The Appellant submits that absent a proper weighting of evidence, no reasonable trier of fact could have concluded that the intercepts were reliable and probative.

B.2.2.5 Knowledge of, investigation and punishment of crimes

629. The Trial Chamber found that the Appellant failed to take adequate steps to investigate crimes and/or punish members of the VRS and other Serb forces, including the MUP, who were under his effective control when the crimes were committed.[764] The Trial Chamber concluded that this amounted to a significant contribution.[765]

630. The Appellant asserts that the Trial Chamber failed to give sufficient weight, if any, to evidence that: (a) crimes were not always reported to the Appellant; and, (b) the Appellant or the Appellant's subordinates ordered perpetrators to be prosecuted and punished. Further, the Appellant submits that the Trial Chamber disregarded direct evidence clearly relevant to its findings. Disregard is shown when evidence which is clearly relevant is not addressed by the Trial Chamber's reasoning.[766]

B.2.2.5.1 Evidence where the Appellant had no knowledge so prevention and/or punishment of crimes was not possible

631. The Trial Chamber concluded that there was no evidence that the military police were mis-reporting and/or falsifying reports to cover up the commission of crimes from the Appellant.[767] The Appellant submits that relevant, and exculpatory evidence which showed that the Appellant had no knowledge of crimes, so prevention and/or punishment was not possible, was not given sufficient weight in the Trial Chamber's considerations.

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subjectmatter as the prior discussion of Furtula not following orders but the intervention platoon is now referenced by iedentifying with Milan Lukić]; , and P1645/P1657[Both intercepts purporting to be the same conversation yet one says Krstić is coming to Žepa and the other names Appellant rather than Krstić] .

[764] Judgement, para.5094.
[765] Judgement, para.5098.
[766] *Kvočka* AJ, para.23.
[767] Judgement, para.5091.

632. For example, Zvornik Brigade Daily Combat Report dated 14 July 1995 (P03572) did not mention these crimes.[768] Rather it stated that there were "no unexpected events".[769] The Trial Chamber accepted that members of the Zvornik Brigade were falsifying records to conceal their involvement in the crimes.[770] To establish that the crimes were reported, the Trial Chamber placed undue emphasis on a Rule 92*bis* witness that such information would be reported up the chain of command.[771] M. Nikolić confirmed that he had never seen a written report about the killings, and that he concealed them from his Commanders.[772] Nikolić's report to the GSVRS supports this concealment as it only contained information that wounded Muslim prisoners and Muslim UN staff were being evacuated.[773] Evidence also confirmed that Nikolić provided misleading information about "asanacjia/sanitisation" up the chain of command to cover up reburials, as did other security officers.[774]

633. Another example is the Trial Chamber's reliance on a fuel order that had been signed by the Appellant, to establish his knowledge of the crimes and the reburial operation.[775] The Trial Chamber failed to give sufficient weight to the unique identification number on the order – "03/" not the Appellant's "01/", as part of this. At the material time the Appellant was with a US delegation and issued two orders with his unique identification number, "01/", announcing the results of the peace talks.[776] The Appellant recalls paras. 611-612 in this regard.

B.2.2.5.2 Evidence where the Appellant or the Appellant's subordinates knew of crimes and acted accordingly

634. The Trial Chamber relied on witness Drinić – admitted pursuant to Rule 92bis – to establish that no investigations were conduct by Bosnian-Serb military or civilian

[768] Judgement, para.4961.
[769] Judgement, para.4961.
[770] Judgement, para.4966.
[771] Judgement, para.4961.
[772] D1228, p.3.
[773] P1515.
[774] P1516; (T.11965-11966); [REDACTED]; [REDACTED].
[775] Judgement, para.3002-3005.
[776] P364, p.31-34; P4300; P4373.

organs.[777] The Appellant sought to recall Drinić and cross-examine him as to the basis of his evidence, but this was denied.[778] Drinić provided sole and decisive hearsay in this regard.

635. The Trial Chamber failed to give sufficient weight to evidence of parallel reporting and investigation processes, and the Appellant's inability to punish MUP perpetrators. Probative evidence showed that the crimes were reported to the civilian authorities and the MUP Commander.[779] As a result of this, officers were tasked with investigating VRS personnel to establish whether or not they were involved.[780] The two processes were separated due to the parallel chains of command. This evidence that the Appellant could not take direct steps to investigate crimes perpetrated by MUP officers,[781] was disregarded. The Trial Chamber's erroneous conflation of 'cooperation' with 're-subordination', resulted in this evidence being overlooked.

B.2.2.5.3 Crimes unpunished is insufficient evidence of significant contribution

636. The Trial Chamber found that, due to an absence of evidence, the Appellant failed to order the investigation and prosecution of crimes committed in Srebrenica.[782] These omissions were used as evidence of the Appellant's significant contribution to the Srebrenica JCE.[783] As the ICC Appeals Chamber in *Bemba* confirmed, the measures taken by a commander cannot be faulted merely because of shortfalls in their execution.[784] The Trial Chamber failed to consider the deficiencies in the institutional infrastructure, as well conflicts with the civilian leadership – including MUP and Karadžić. This will be discussed below.

637. The Trial Chamber gave insufficient weight to the conflicts between the Appellant and the civilian leadership on his ability to prevent and punish crimes. The Appellant notes that the parallel chains of command between the VRS and MUP prevented him

[777] Judgement, para.4963.
[778] T.25771.
[779] Judgement, para.5086.
[780] M. Nikolić (T.12089).
[781] Theunens (T.20618-20625).
[782] Judgement, paras.5094, 5098.
[783] Judgement, para.5098.
[784] *Bemba* AJ, para.180.

from taking affirmative action unilaterally against MUP perpetrators. However, evidence demonstrating that the Appellant complained to Karadžić and the MUP about crimes committed by MUP forces in Sanski Most, was disregarded by the Trial Chamber.[785] Further, the Appellant issued ultimatums on 23 September 1995 and 20 October 1995, stating that either the MUP Command prevent crimes and punish MUP perpetrators, or the VRS would take a military action against them.[786] Following this, the Appellant's key subordinates were removed in October 1995 and were replaced.[787] On 26 March 1996, there was a meeting to form a joint investigation commission between the MUP and VRS to investigate crimes committed in Srebrenica.[788]

638. The Appellant recalls paras.261-265 as to the institutional issues of the military justice system at the material time and the impact of these limitations on the Appellant's ability to enliven the investigation procedure.

639. The cumulative effect of the Trial Chamber's disregard of probative evidence resulted in an impermissible inference that the Appellant failed to order and investigate crimes.

B.3.2.6 Consequence of the Trial Chamber's error

640. The Appellant recalls that the *actus reus* of the Srebrenica JCE requires him to have significantly contributed to furthering the common criminal objective.[789] The Appellant notes that the Trial Chamber relied on the investigation and punishment of crimes as a critical factor in determining his contribution to the JCE.[790]

641. The Appellant asserts that the errors identified have a material impact on the Trial Chamber's findings that he significantly contributed to furthering the JCE in Srebrenica. The Trial Chamber failed to give sufficient weight to evidence of the Appellant's inability to exercise command and control over the MUP, and the VRS whilst he was in Belgrade, the defective intercept evidence, the Appellant's investigation of crimes when he had knowledge, and to fully appreciate not only the institutional limitations placed on the Appellant, but also the lack of cooperation and

[785] P03095; D1503.
[786] P03095; D1503.
[787] Defence FTB, para.3284-3289.
[788] Judgement, para.4963; P3353.
[789] Judgement, para.5098.
[790] Judgement, paras.5094, 5098.

engagement by the civilian leadership. Had the Trial Chamber provided a reasoned opinion on the available evidence, it would have found another reasonable conclusion consistent with the innocence of the Appellant. To avoid the violation of *in dubio pro reo*,[791] the Appellant invites the Appeals Chamber to reverse the findings of guilt.[792]

B.2.2.6 Remedy Sought

642. As a consequence of the error, the finding of guilt under the Srebrenica JCE is invalidated. The element of *actus reus* cannot be satisfied beyond reasonable doubt. As such, the Trial Chamber erred by concluding guilt.

643. The Appellant invites the Appeals Chamber to reverse the Trial Chamber's findings of liability under the Srebrenica JCE, or in the alternative, reverse the findings to the extent of the errors identified.

C. [SUBSUMED INTO GROUND FIVE, SUB-GROUND B AND D]

644. This sub-ground has been subsumed into sub-grounds B, as part of significant contribution, and D, *mens rea*, to assist the Appeals Chamber and to avoid repetition.

D. THE TRIAL CHAMBER ERRED IN LAW AND FACT WHEN IT REVERSED THE BURDEN OF PROOF AND VIOLATED *IN DUBIO PRO REO* BY FAILING TO PROVIDE A REASONED OPINION OR CONSIDER OTHER REASONABLE EXPLANATIONS FOR THE APPELLANT'S BEHAVIOUR OTHER THAN HIS GUILT

645. The Appellant submits that the Trial Chamber disregarded direct evidence clearly relevant to its findings and gave insufficient weight to exculpatory evidence that

[791] *Limaj* AJ, para.21.
[792] *Bemba* AJ, para.189.

provided another reasonable inference, other than the Appellant's shared intention to further the common criminal objective.

D.1 APPLICABLE LAW

646. A Trial Chamber must determine that members of the JCE, including the accused, had a common state of mind, namely the intention to commit statutory crimes through which the common objective was to be achieved.[793] For genocide, the Trial Chamber must find that the accused had the specific intention to destroy the group, in whole or in part.[794]

647. The Appellant recalls the relevant appellant standards at paragraphs 24-27.

648. In addition, any doubt must be resolved in favour of the accused.[795]

649. Disregard is shown when evidence which is clearly relevant is not addressed by the Trial Chamber's reasoning.[796]

650. The difference between direct and circumstantial evidence is recalled from paragraphs 28-33, and 191.

D.2 THE ERROR

651. The Trial Chamber relied on statements made by the Appellant at the Fontana meetings, statements made to the media and his knowledge of crimes, to establish that he shared a common state of mind with other members of the JCE.[797]

652. The Trial Chamber gave insufficient weight to the context in which the statements were made. Further, the absence of sufficient reasoning indicates that the Trial

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[793] *Tadić* AJ, para.228; *Krajišnik* AJ, para.200, 707.
[794] *Statute*, Art.4(2).
[795] *Čelebići* TJ, para.601.
[796] *Kvočka* AJ, para.23.
[797] Judgement, para.5088, 5128, 5085, 5093, 5099-5131.

Chamber has given insufficient weight to exculpatory evidence contrary to a finding of *mens rea*,[798] in particular specific intent for genocide. As such, the Trial Chamber erred by incorrectly concluding the requisite *mens rea* beyond reasonable doubt, thereby engaging the principle of *in dubio pro reo*. Illustrative examples of the error will be considered in turn.

D.2.1 Statements and affirmative action taken by the Appellant to adhere to international law by evacuating civilians and ensuring the welfare of POWs

653. The Trial Chamber linked statements from 11-12 July 1995 to find that the Appellant intended to remove civilians (the forcible transfer common criminal objective) and "take revenge" on Bosnian-Muslims (the genocide, extermination, and murder common criminal objective) of the JCE.[799]

654. The Trial Chamber relied on the statements made by the Appellant at the Fontana meetings on 11-12 July 1995 as evidence of his intention for both objectives of the Srebrenica JCE.[800] It further relied on contemporaneous statements made about "revenge on the Turks and the janissaries"[801] to establish his criminal intent.

655. The Appellant recalls paragraphs 595 in this regard that the language was consistent with legitimate military language aimed at ABiH forces, not civilians. In addition, the Trial Chamber failed to give sufficient weight to direct evidence of the actions of the Appellant after these statements were made. For instance, the Appellant and the UN coordinating humanitarian evacuations.[802]

656. The Trial Chamber failed to give sufficient, if any weight, to the Appellant's subsequent speeches and actions, such as: (a) where he made it clear that civilians had a choice whether to leave or not;[803] (b) statements made to captured POW's gave assurances that they would be treated in accordance with the law;[804] and, (c)

[798] *Štanišic & Župljanin* AJ, paras.137-138, 218, 536.
[799] Judgement, para.5126, 5106, 5088, 5128.
[800] Judgement, para.5088, 5128.
[801] Judgement, para.5126, 5106.
[802] Judgement, para.2472; P1147, p.26-42; p.47-51, p.55-56.
[803] Brief para. 579.
[804] RM-292 (T.12659, T.12662); RM-253 (T.12532); RM-364 (P1118).

cooperation during the Belgrade discussions (14-15 July 1995) with the UN, EU, UNPROFOR, culminating in a signed assurance that the ICRC would be granted access to POWs, that the Geneva Conventions would be adhered to.[805]

657. The Trial Chamber relied on: statements made by the Appellant that Muslims had made it through to Muslim territory, his denial of executions, and his explanations of mass graves as necessary for hygienic purposes to establish that he misled the media about conditions in Srebrenica.[806] The Appellant recalls paras.631-635, where the Trial Chamber erred by failing to give sufficient weight to information that was reported to him. The Appellant also asserts that the statements he made were consistent with the contents of the reports he received from his subordinates. The Trial Chamber gave insufficient weight to the Appellant's reliance on the information available to him at the material time and the fact that he repeated it to the media. This example illustrates that the Trial Chamber only drew the inference consistent with the Appellant's guilt, when another reasonable inference existed.

658. The Appellant submits that the Trial Chamber erred by failing to give sufficient weight to probative evidence, and failed to properly contextualise either his words or actions against the totality of the evidence. The context of the Appellant's statements and his cooperation with the UN negates his "shared intent" to ethnically cleanse Srebrenica of civilians and his specific intent to commit genocide in furtherance of the common criminal objective.

D.2.2 Orders made by the Appellant and subordinates

659. The Trial Chamber relied on the Krivaja-95 operation as evidence of the Appellant's intent to "ethnically cleanse" the civilian population through forcible transfer.[807] The Drina Corps order specifically instructed subordinates to abide by the Geneva Conventions in relation to POWs and civilians.[808] The Appellant recalls paras.620-623, where the Trial Chamber disregarded evidence about the legitimacy of the Krivaja-95 operation and other orders. The Appellant submits that the Trial Chamber

[805] D410.
[806] Judgement, para.5079.
[807] Judgement, para.2353.
[808] Judgement, para.2362.

erred by failing to give sufficient weight to the military context of the orders, when considering the inferences that could be drawn from the evidence about *mens rea*.

660. Similarly, the prohibitions on media presence in the combat zone were used by the Trial Chamber as evidence of the Appellant's knowledge and intent to conceal crimes from the international community.[809] [REDACTED] testified that:

> [REDACTED].[810]

661. The Trial Chamber erred by failing to give sufficient weight to the language of this order, and the Žepa operation, where the identified prohibitions were consistent with combat operations, as shown by other orders in other areas.[811]

D.3 CONSEQUENCES OF THE ERROR

662. The Appellant does not seek to argue that the Appeals Chamber should accept his interpretation of the evidence. Rather, the examples provided demonstrate the Trial Chamber's selective reliance on the Appellant's statements, without considering the totality of the evidence.

663. The Appellant submits that the Trial Chamber erred by failing to give exculpatory evidence sufficient weight in its reasoning. If this evidence had been given sufficient weight and viewed in its totality, no reasonable trier of fact could have concluded that the *only* reasonable inference was that the Appellant shared the necessary *mens rea* to achieve the common objective to forcibly remove civilians and specific intent to kill Bosnian-Muslim men and boys.

664. Consequently, the findings for the requisite *mens rea* under the Srebrenica JCE is invalidated. The element of *mens rea* cannot be satisfied beyond reasonable doubt, and as such the Trial Chamber erred by concluding guilt for forcible transfer, and genocide, extermination and murder.

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[809] Judgement, para.5014.
[810] [REDACTED]
[811] P5173, p.6; P6646, p.2; P6549; P4332; P5161; P6641; P5068; P5069; P43783; P5224; P5057; P6957.

D.4 REMEDY SOUGHT

665. Based on these errors, the Appellant invites the Appeals Chamber to reverse the Appellant's conviction for the crimes committed under the mode of JCE-I, or in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.

E. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT AND ABUSE ITS DISCRETION, BY FAILING TO GIVE REASONED OPINIONS OR EVALUATE THE MILITARY STATUS OF VICTIMS RELATED TO COUNTS 2 AND 4 (GENOCIDE AND EXTERMINATION IN SREBRENICA)

E.1 OVERVIEW

666. The Trial Chamber took judicial notice of AF1476, to establish that between 7,000–8,000 Bosnian-Muslim men were systematically murdered in Srebrenica. The Appellant submits that the Trial Chamber failed to give a reasoned upon on the use of this fact in its findings and consider the potential military status of the victims and/or the extent of combat casualties.

E.2 APPLICABLE LAW

667. A rebuttable presumption of accuracy is established when judicial notice is taken of an adjudicated fact under Rule 94(B).[812] The burden of persuasion does not shift to the Defence, only the initial burden to produce "credible and reliable evidence sufficient to bring the matter into dispute".[813]

668. The Appellant recalls that to show an error of law due to a lack of reasoned opinion an appellant needs to identify the specific issues, factual findings, or arguments, which the Trial Chamber omitted to address and to explain why this omission invalidates the decision.[814]

E.3 THE TRIAL CHAMBER'S APPROACH

E.3.1 The failure to give a reasoned opinion on the military status of victims

[812] *Karemera,* Interlocutory Decision, para.42.
[813] *Ibid.*, para.49.
[814] *Stanišić & Župljanin* AJ, fn467.

669. The Trial Chamber found that *all* of the victims of the killings in Srebrenica were not actively participating in hostilities at the time of the killings.[815] This effectively removed the possibility of any legitimate combat casualties.

670. The Prosecution alleged that during reburial operations, the remains of victims of the aforementioned incidents were exhumed and transported to different locations.[816] The Trial Chamber took judicial notice of AF1476 in this regard, which stated that between 7,000 and 8,000 Bosnian-Muslim men were systematically murdered in Srebrenica (Chapter 7.18).[817] The Trial Chamber understood this figure to refer to the killings of males separated in Potočari and captured from the column following the take-over of Srebrenica in July 1995.[818] It concluded that the connection established between the mass graves and the scheduled incidents in the Indictment were "consistent" with AF1476.[819]

671. The Trial Chamber confirmed the existence of both defending ABiH forces within Srebrenica and within the column of armed males which set out for Tuzla (which engaged in combat).[820] It concluded that Ewa Tabeau's evidence about the military status of victims was insufficiently reliable and, as such, disregarded it.[821] Instead, it relied on its own finding that *all* of the victims of the killings in Srebrenica were not actively taking part in hostilities at the time of the killings.[822]

672. The Trial Chamber did not consider whether the men were civilians or combatants. The adjudicated fact does not address this point nor did the Prosecution's evidence, yet the Trial Chamber found that *all* of the victims were civilians.[823] The Trial Chamber's finding that *all* of the victims were civilians was material to determining the Appellant's responsibility for the crimes. The omission impacts on the basis for the finding and the Appellant's convictions. In the absence of a reasoned opinion, the Trial Chamber's findings in this regard are invalidated.

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[815] Judgement, para.3546.
[816] Judgement, para.2698-2708.
[817] Judgement, para.3007.
[818] Judgement, para.3007.
[819] Judgement, para.3007.
[820] Judgement, para.2395, 2444, 2446, 2573-2586, 2615-2645.
[821] Judgement, para.5293, 5296.
[822] Judgement, para.3062, 3546.
[823] Judgement, para.3546.

E.3.2 Rebuttal evidence presented on the adjudicated fact

673. The Appellant recalls that heightened standard applied by the Trial Chamber's required the Appellant to prove that the only reasonable inference was that the adjudicated fact was wrong or to disprove the adjudicated fact.[824]

674. The Trial Chamber did not consider any of the evidence presented by the Appellant to rebut the adjudicated fact.[825] The Appellant submits that its evaluation of the evidence is erroneous as a result of the standard applied. For example: (a) evidence that bodies in the mass graves were killed at other times in combat;[826] (b) combat casualties from "kamikaze" attacks and combat in Zvornik;[827] (c) alternative explanations for deaths in the column other than VRS criminal activity;[828] and, (d) forensic expert evidence relating to the alleged blindfolds on bodies potentially being bandannas worn by combatants .[829]

675. The Appellant submits that this evidence was sufficient to enliven the evidentiary debate on the military status of the victims in AF1476 and rebut the adjudicated fact. As the Prosecution did not present any evidence in this regard, it would have been unable to re-establish the accuracy of the fact.

E.4 CONSEQUENCES OF THE ERROR

676. At a minimum, the Trial Chamber erroneously considered the adjudicated fact as evidence of the Appellant's intent to further the alleged JCE of Srebrenica; however, as a consequence of the error, the Appellant is unable to determine the extent to which the Trial Chamber relied upon the adjudicated fact and the impact this may have had his conviction.

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[824] Brief, paras.96-114.
[825] Judgement, para.3007.
[826] Defence FTB, para. 2707-2708.
[827] [REDACTED]; Kovačević (T.24601-24602).
[828] Defence FTB, 2738-2751.
[829] Judgement, para.5309; Defence FTB, para.2689-2698.

E.5 CONCLUSION

677. The Appellant invites the Appeals Chamber to articulate the basis of liability and, to the extent of the error, review the sentence imposed by the Trial Chamber.

F. [SUBSUMED INTO GROUND FIVE, SUB-GROUND E]

678. This sub-ground has been subsumed into sub-ground E to avoid repetition and assist the Appeals Chamber.

G. [SUBSUMED INTO GROUND FIVE, SUB-GROUNDS A, B AND D]

679. This sub-ground has been subsumed into sub-grounds A, B, and D to assist the Appeals Chamber and avoid repetition.

H. [SUBSUMED INTO GROUND FIVE, SUB-GROUND B]

680. This sub-ground has been subsumed into sub-ground (B) to assist the Appeals Chamber and avoid repetition.

I. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT AND ABUSED ITS DISCRETION BY RELYING ON DUBIOUS EVIDENCE AND WITNESSES WITHOUT CORROBORATION, RESULTING IN A MISCARRIAGE OF JUSTICE

681. The Appellant submits that the Trial Chamber erred by giving undue weight to: (a) decisive hearsay, and (b) adjudicated facts. The Appellant asserts that the reliance on these held the Appellant to an impossible evidentiary standard.

I.1 APPLICABLE LAW

682. With regards to hearsay evidence, paragraphs 738 are recalled.

683. As to adjudicated facts, paras.62-185 are recalled.

I.2 THE ERROR

684. The Appellant submits that the Trial Chamber erred by relying on uncorroborated hearsay to make findings linked to his significant contribution and his intent.

685. The Appellant recalls Ground 2, sub-ground A.2, paragraphs 96-114 with regards to the heightened standard applied by the Trial Chamber to adjudicated facts. The Appellant submits that the Trial Chamber erred by relying solely on adjudicated facts to prove the elemental requirements of the crime base.

I.3 EVIDENCE SUBSTANTIATING THE ERROR

I.3.1 Evidence the Appellant was unable to test

686. M. Deronjić was admitted pursuant to Rule 92*qtr*. He was the sole witness linking the Appellant's subordinate Berea to statements that the orders to kill "came from the

top".[830] The Trial Chamber relied on this as evidence of the Appellant's guilt.[831] Further, the Trial Chamber considered that a declaration signed by Deronjić regarding the evacuations, concealed that the civilian departures were not voluntary in nature.[832] The Trial Chamber relied on this evidence to establish that the Appellant was a member of and participated in the Srebrenica JCE and his intention to conceal crimes.[833]

687. The Appellant recalls paras.634-635 relating to the investigations of crimes. The Trial Chamber relied on Drinić's evidence to establish that no investigations were conducted by Bosnian-Serb military or civilian organs.[834]

688. The Trial Chamber relied on evidence admitted pursuant to Rule 92*bis* to establish the crime of murder incident E.15 and hold the Appellant responsible. Orić's testimony was uncorroborated by any other evidence.[835] The Appellant was unable to challenge this.

I.3.2 Consequences of the error

689. The Appellant recalls that a conviction must not rest in a decisive manner on the evidence of a witness that he is unable to cross-examine. This principle applies to findings that a trier of fact must reach beyond reasonable doubt.[836]

690. The Appellant submits that the Trial Chamber erred in law by relying on untested written testimonies to make findings which a trier of fact had to establish beyond reasonable doubt. These findings formed part of common criminal objective and were based on witnesses that the Appellant could not cross-examine. Without the Trial Chamber's erroneous reliance on these witnesses, it would not have been able to establish the elements of incident E.15, nor the essential elements of the existence of the Srebrenica JCE and the Appellant's participation in them.

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[830] Judgement, para.4940.
[831] Judgement, para.4940.
[832] Judgement, para.4967.
[833] Judgement, para.4968-4969, 5092, 5094.
[834] Judgement, para.4963.
[835] Judgement, para.2921.
[836] *Popović* AJ, para.96.

I.3.3 Adjudicated Facts

691. The Appellant recalls paragraphs 62-95 in relation to the Trial Chamber's reliance on adjudicated facts to establish that his proximate subordinates were the perpetrators of the crimes. Further, the Appellant recalls Ground 2, sub-ground A.2, paragraphs 96-114 relating to the heightened standard and the approach taken by the Trial Chamber to rebuttal evidence presented.

692. In relation to incident, E.9.2, the Trial Chamber relied on an adjudicated fact to establish the number of murder victims was 1000-1200.[837] However, the Prosecution's forensic evidence found that this number was limited to 132 bodies at the primary burial site and 43 DNA matches to a secondary site.[838] The Trial Chamber, in the absence of any evidence, concluded that all of the bodies were reburied in a secondary grave and relied on the 1,000-1,200 figure.[839] The adjudicated fact was rebutted by the Prosecution's forensic evidence, yet the Trial Chamber preferred the adjudicated fact.

I.3.4 Consequences of the error

693. The Appellant submits that the Trial Chamber's error of law resulted in a defective evidentiary approach to the adjudicated facts. The Trial Chamber's findings on the total number of victims were directly relevant to its legal analysis on genocide and extermination.

I.4 REMEDY SOUGHT

694. The Appellant invites the Appeals Chamber to reverse the findings made to the extent of the errors identified, and the basis of the convictions for Counts 2 – 8.

[837] Judgement, paras.2843, 2861.
[838] Judgement, paras.2846, 2849.
[839] Judgement, para.2861.

VII. GROUND SIX: THE TRIAL CHAMBER ERRED IN LAW AND FACT BY FINDING THAT THE APPELLANT INTENDED THE OBJECTIVE OF THE HOSTAGE TAKING JCE AND THAT HE COMMITTED THE *ACTUS REUS* AND SHARED THE REQUISITE INTENT FOR THE CRIME

A. THE TRIAL CHAMBER ERRED IN LAW BY APPLYING THE WRONG LEGAL STANDARD TO AFFIRM THAT THE DETENTION OF UN PERSONNEL CONSTITUTED THE CRIME OF TAKING OF HOSTAGES.

695. The Trial Chamber erred in law by convicting the Appellant for acts that did not constitute a crime under international customary law during the indictment period.

696. The Appellant submits that the absence of a legal basis for conviction breaches the principle *nullun crimen sine lege* and invalidates his conviction for Count 11 of the Indictment: taking of UN military observers and peacekeepers as hostages.

697. The Appellant invites the Appeals Chamber to reverse the conviction imposed on the Appellant for Count 11, hostage-taking.

A.1. THE TRIAL CHAMBER'S APPROACH

A.1.1 The Trial Chamber's limited jurisdiction

698. When reviewing the Appellant's liability for the crime of hostage taking, the Trial Chamber held that it is well established in the jurisprudence of the Tribunal that violations of Common Article 3 to the four Geneva Conventions of 1949 fall within the ambit of Art.3 of the Statute.[840] The Trial Chamber referenced decisions and judgements in *Čelebići, Kunarac, Mrkšić & Šljivančanin*[841] and reaffirmed the findings iterated in the *Tadić* Jurisdiction Decision when reaching this conclusion.[842]

[840] Judgement, para.3010.
[841] *Čelebići* AJ, paras.125, 133-136; *Kunarac* AJ, para.68; *Mrkšić* AJ, para.70.
[842] Judgement, para.3010.

699. The Appellant notes, passages in both *Čelebići*[843] and *Kunarac*[844] implicitly affirm the need for a Trial Chamber to conduct an analysis of its jurisdiction where jurisdiction may be in issue.[845] The Appellant notes, the Trial Chamber did not conduct such an analysis in this case. Had this analysis been conducted, the Trial Chamber would have noted there exist cogent reasons to depart from the findings of *Tadić*.

700. The Appellant submits that, by relying on *Tadić* to fit its jurisdiction, the Trial Chamber violated the principle *nullum crimen, nulla poena sine praevia lege* which requires a trier of fact to exercise great caution in finding that an alleged act, not regulated in Art.3 of the Statute, forms part of a crime.[846] Any norm in criminal law must always provide individuals with sufficient clarity of which conduct is considered a crime.

701. The Appellant submits that the Tribunal's jurisdiction is limited to the Statute. Only the Security Council has the Jurisdiction to revise or reinterpret the Statute.[847]

A.1.2 The events were not criminalized under customary international law

702. The Appellant submits that taking combatants as hostages was not criminalised to individuals in customary international law between May and June 1995. Rather, under customary international law, only state responsibility was penalised for the general prohibition against the taking of hostages. At the time of the events, individual criminal responsibility was only extended by Art.147 of the GC.IV which is relative to the protection of civilian persons, therefore it was only comprehensive to the taking of *civilian* hostages.[848]

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[843] *Čelebići* AJ, paras.168
[844] *Kunarac* AJ, para.68.
[845] *Čelebići* AJ, par.167, when affirming that 'the Geneva Conventions envisages that violations of common Article 3 could entail individual criminal responsibility under domestic law'; *Kunarac* AJ para.67, affirming that 'The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed'.
[846] *Blagojević* TJ, para.625.
[847] *Nyiramasuhuko* AJ, para.2136.
[848] GC.IV, Arts.146 & 147 provide for the individual criminalisation of grave breaches

703. The Appellant refers to sub-grounds B and C below, and notes UN personnel cannot be considered civilians pursuant to this charge.

704. In making this submission, the Appellant notes:

(i) A prohibition against taking hostages is not evinced in either the 1899 or 1907 Hague Regulations;[849] in the grave breaches provisions of the 1949 GC.I, GC.II, or GC.III (which is applicable to POWs); or in the grave breaches regime of API;[850]

(ii) The Appellant recognises, Art.3. of the first draft of the ICTY Statute included a reference to the taking of hostages; however, this reference was not carried through to the final Statute endorsed by the 1993 Report of the UN Secretary General to the UN Security Council.[851]

(iii) During the indictment period, only the *killing* of hostages was criminalised, namely by the Nuremberg Charter; the International Law Commission's Principles of International Law Recognised in the Charter of the Nuremberg Tribunal; and Control Council Law No. 10;[852]

(iv) The 1948 Judgement of the United States Military Tribunal in Nuremberg during the Hostages Trial recognised the legality of taking civilian hostages under certain conditions.[853]

705. The Appellant further notes, the *opinio juris* of state practise at the time was neither sufficiently widespread nor representative to be considered customary in nature. Rather, a significant number of state's practices only penalised state bodies for the taking of hostages, and/or imposed individual criminal responsibility only if the hostages were civilians or if the hostages were killed.

706. In support of this submission, the Appellant points to the military and criminal legislation of prominent NATO member states; including, a) The American Military Manual that replicated the grave breaches provisions criminalising only the taking of

[849] Hague Convention (II) and Hague Convention (IV).
[850] API Art.85.
[851] Secretary General's Report, para.44.
[852] UN Charter of the IMT, Art. 6(b); Nüremberg Principles, Principle VI(b); Control Council Law No. 10, Art.2(1)(b).
[853] *Hostages Case*, pp.61-62.

civilian hostages, and excluded the taking of combatants as hostages in the enumeration of 'other war crimes', i.e. customary law;[854] and b) The British Military Manual doing the same with the only difference being that under the 'other war-crimes' provision, it criminalised only the killing of hostages.[855] Finally, the Appellant stresses the fact that the taking of hostages did not form part of Art.144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia regulating War Crimes against POWs.[856]

707. The Appellant notes, the prohibition against taking hostages other than civilians, and the scope of this prohibition, was first included as a war crime only in the Rome Statue in 2002, and crystalized at this time.[857]

708. The Appellant submits, beyond the individual criminalisation of the killing of hostages or taking of civilian hostages, no individual criminal responsibility was imputed through customary international law during the indictment period. As such, the ICTY does not enjoy jurisdiction over the alleged acts of the Appellant or the VRS in this instance.

A.2. CONSEQUENCES OF THE ERROR

709. As a consequence of the error, the Appellant was convicted under Count 11 of the Indictment for conduct that did not constitute a crime at the time of the events; namely, 'the taking of UN military observers and peacekeepers as hostages'.[858]

A.3. REMEDY SOUGHT

710. The Appeals Chamber is requested to reverse the conviction for count 11 of the Indictment.

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[854] U.S. Field Manual 27-10, Art.502, 504.
[855] U.K. Manual of Military Law Part II, p.175, para.625-626.
[856] SFRY Criminal Code, Art. 144.
[857] ICC Statute, Art. 8. Entry into force 1 July 2002.
[858] Indictment, para.82.

B. THE TRIAL CHAMBER ERRED IN FACT AND LAW BY DERIVING ERRONEOUS CONCLUSIONS FROM ITS ASSESSMENT OF EVIDENCE RELATING TO THE DETENTION OF UN PERSONNEL.

711. On the basis of the argument put forward in sub-ground Six A, the Appellant further submits that the Trial Chamber erred in law and fact when it declined to make a finding of the status of UN personnel as combatants during the indictment period. A conclusion regarding the status of UN personnel is a fact critical for a conviction against the Appellant.

712. As a result of this error, the Appellant was erroneously convicted under Count 11 for the crime of taking hostages.

713. The Appellant invites the Appeals Chamber to reverse the conviction imposed under Count 11 of the Indictment.

B.1. APPLICABLE LAW

Civilian status

714. Art. 50 API states;

> A civilian is any person who does not belong to one of the categories of persons referred to in Art.4A(1), (2), (3) and (6) of the Third Convention and in Art.43.

715. Art.4 GC.III states;

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy.
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

Presumption of POW status

716. Art.45(1) API states;

> [a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, […] if he appears to be entitled to such status.[859]

717. Art.5 GC.III and Art.45 API establish a legal presumption of POW status in cases where there is doubt as to the entitlement of such status in order to ensure the individual's protection under that scheme of rules until his status is determined by a competent tribunal.[860]

Definition of a combatant

718. Art.43 API states that members of the armed forces of a Party to a conflict are combatants. The armed forces of a Party to a conflict consist of;

> [a]ll organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party.

Burden of Proof

719. In accordance with the principle of *in dubio pro reo*, the burden of proof remains at all times with the Prosecution. This means, a detained person must be considered to have been a combatant unless proven by the Prosecution to fall outside the scope of the definitions given at Art.4(A) and Art.43 API[861] rendering the person as a civilian

[859] GC.III, Art. 5; API. Art. 45(1).
[860] *Ibid.*
[861] *Prilić* TJ-Vol.III, para.621

as established by Art.50 API. In this sense, the Tribunal has applied a narrow interpretation of the term "civilian" throughout its jurisprudence.[862]

B.2. THE TRIAL CHAMBER'S APPROACH

720. At paragraph 3224 of the Judgement, the Trial Chamber stated;

> [w]ith regard to the status of the UN personnel, the Trial Chamber recalls applicable law on Common Article 3 in chapter 8.1.1 and finds that the determination of their status as combatants or civilians is irrelevant.[863]

721. Nevertheless, the Trial Chamber went on to say;

> [t]o the extent UN personnel were in possession of weapons prior to their arrest, they were disarmed at the time of their arrest and rendered *hors de combat* by their detention.[864]

B.3. THE ERROR

722. The Appellant submits, the Trial Chamber erred by finding that the determination of the UN personnel's status as either combatants or civilians was irrelevant.

723. The Appellant notes, a person who takes part in hostilities may be considered a combatant pursuant to Art.43 of API. If such a person were to fall into the power of an adverse Party, they shall be a POW.[865] Neither state nor individual criminal responsibility is imposed for the detention of prisoners of war (POWs).

724. On this basis, the Appellant contends that the status of UN personnel was of primary importance for a conviction against the Appellant, and therefore cannot be considered irrelevant.

725. In making this submission, the Appellant notes, the phrase *hors de combat* refers to people who are not actively participating in a conflict such as those who are injured,

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[862] *Blaskić* AJ, para.114; *Galić* AJ, fn.437; *Martić* TJ, para.55.
[863] Judgement, para.3224.
[864] Judgement, para.3224.
[865] Art.45, API.

ill or who have been detained.[866] It does not necessarily exclude that these people were combatants prior to their injury, illness or detention. A person's status within a conflict prior to detention, is classified under IHL. This includes delineation between those people who are civilians and those who are combatants.

726. A combatant may be detained as a POW pursuant to Art.44 API. Upon detention as a POW, a combatant becomes *hors de combat.*

727. The Appellant reiterates its assertion that UN personnel were a party to the conflict during the indictment period.

728. The Appellant recalls that the armed forces of a Party to a conflict consist of;

> [a]ll organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. The members of an armed force of a Party to a conflict are considered combatants.[867]

729. In making this submission, the Appellant asserts that UN personnel took a direct and active role in the conflict. For example, UNPROFOR provided support which was instrumental to the operations of the BiH, even in demilitarised zones, throughout the indictment period.[868] This included conducting military action in favour of the ABiH and engaging in active combat with Serb forces to take and hold territory on behalf of the ABiH.[869] Additionally, UNPROFOR provided intelligence to NATO,[870] trigged airstrikes,[871] identified targets for NATO to strike, and guided NATO to those targets.[872] UNPROFOR also engaged in lethal confrontation with Bosnian-Serb forces[873] and captured Serb military personnel after combat activity.[874]

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[866] *Strugar* AJ, para.175.
[867] Art.43, API.
[868] D1661 paras.2,44; D535, paras.47, 86; D801, p.1; D1361, p. 56-57; D00361, p.1; [REDACTED], p. 2-3; D00535, para.86; Mijatovic (T.21464–21466).
[869] D108, para.5; Riley (T.18338); P02546, p. 4.
[870] Smith (T.7451); [REDACTED]; [REDACTED]; Riley (T.18366).
[871] D1584, p. 8; P2558, para.12; D1356, para.12;
[872] Harland (T.805); Kalbarczyk (T.19365); [REDACTED]; GRM-037 (T.39019); [REDACTED]; D958, p. 3; Rose (T.6914); P7261, p. 5.
[873] P2559, para.4; [REDACTED]; [REDACTED]; D00801, p.1
[874] RM-120 (T.7768); D1585, p.1;

730. In consequence of the acts of UN personnel fall within the definition of a combatant pursuant to the above mentioned definition under Art.43 API.

731. The Appellant submits, the Trial Chamber therefore erred by failing to making a determination of the status of the UN personnel, and convicting the Appellant under Count 11 in the absence of this determination.

B.3. CONSEQUENCES OF THE ERROR

732. The Appellant avers that, had the Trial Chamber considered the UN personnel status under the Geneva Contentions and its Additional Protocols, it would have found, as any reasonable trier of fact would, that the UN personnel were combatants. As such, recalling Ground Six, sub-section A, the Trial Chamber could not have concluded that it enjoyed jurisdiction over the alleged crimes.

733. As a consequence of the Trial Chamber's error, the Appellant was convicted under Count 11 of the Indictment for crimes over which the Tribunal does not enjoy jurisdiction; name, the crime of taking UN personnel hostage.[875]

B.4. REMEDY

734. The Appeals Chamber is invited to reverse the Appellant's conviction for Count 11 of the Indictment.

[875] Indictment, para.82.

C. THE TRIAL CHAMBER ERRED IN LAW AND FACT BY ASSESSING CIRCUMSTANTIAL EVIDENCE IN A MANNER THAT VIOLATED THE PRINCIPLE OF *IN DUBIO PRO REO*.

C.1. APPLICABLE LAW

735. The Appellant recalls the legal elements of JCE-I delineated at paragraph 153.

736. The Appellant recalls paragraphs 32-33 that a Trial Chamber has discretion in weighing and assessing the evidence[876] and it is within the discretion of a Trial Chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[877]

737. The Appellant recalls paragraph 34 that there is a presumption that a Trial Chamber has evaluated all the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence.[878] This presumption may be rebutted when evidence which is clearly relevant to the Trial Chamber's findings is not addressed in its reasoning.[879]

738. The Appellant also notes that the Trial Chamber must be satisfied that the hearsay evidence relied upon is trustworthy and reliable.[880] Other relevant considerations in determining the probative value of hearsay evidence include: the context and character of the evidence, the absence of the opportunity to cross-examine the person who made the statements, "whether the hearsay is "first-hand" or more removed".[881] Importantly, an Appellant is not barred from raising the fact that a decision based on second-degree hearsay is unreasonable.[882]

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[876] *Stanišić & Župljanin* AJ, para.218.
[877] *Ibid.*, para.218.
[878] *Stanišić & Župljanin* AJ, para.536; *Strugar* AJ, para.24; *Limaj* AJ, para.86; *Krajišnik* AJ, para.19; *Galić* AJ, para.256.
[879] *Stanišić & Župljanin* AJ, para.536, fn1806.
[880] *Aleksovski*, Decision on Admissibility of Evidence AC, para.15.
[881] *Ibid.*, para.15.
[882] *Nahimana* AJ, para.509.

C.2. THE TRIAL CHAMBER'S APPROACH

739. The Trial Chamber was satisfied beyond reasonable doubt that a JCE existed around 25 May 1995 until approximately 24 June 1995.[883] The Trial Chamber found that the Appellant significantly contributed to the JCE's common objective of capturing UN personnel deployed in various parts of BiH and their detainment in strategic military locations to prevent NATO launching further military airstrikes on Bosnian-Serb military targets.[884]

740. Furthermore, the Trial Chamber found that the Appellant had, and shared, the requisite *mens rea* through his statements and conduct throughout the hostage-taking, including issuing orders to detain and place UN personnel, issuing threats to obtain the end of air strikes, and authorising their conditional release.[885]

C.3 ERROR 1: INSUFFICIENT WEIGHT GIVEN TO EXCULPATORY EVIDENCE OF THE APPELLANT'S SIGNIFICANT CONTRIBUTION TO THE JCE

741. The Appellant submits that the Trial Chamber erred in fact as it relied on inconsistent evidence, and failed to give sufficient weight to evidence contrary to the *actus reus* elements of JCE-I.

742. An example is when the Trial Chamber held that the Appellant had "visited some of the detained UNMOs between 2 and 4 June 1995 and ordered their filming".[886] The Trial Chamber relied on the evidence of Kalbarczyk, who had a number of inconsistencies in his testimony.[887] This evidence is also inconsistent with the direct evidence in the Appellant's military notebooks,[888] and the testimonies of the other UN prisoners who did not affirm seeing the Appellant in the facilities.[889]

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[883] Judgement, para.5156.
[884] Judgement, para. 5141.
[885] Judgement, para.5157.
[886] Judgement, paras.5153, 2309, 2238.
[887] P2801, p.5; Kalbarczyk (T.19365, 19370-19374); P2802, pp.1-2.
[888] P345, pp.165-167. This is a recording only two meetings in that time framework: (a) the first on 2 July 1995 at Zvornik-Vidikovac with Karadžić; (b) the second on 4 June 1995 at Lovnica with General Janvier. Both locations removed from the Koran Military Barracks where the witness was detained.
[889] Gelissen (P397, p.8); Evans (P396, p.9); Rechner (D393, p.12-13).

743. The Appellant asserts the Trial Chamber erred by failing to give sufficient weight, if any, to the 27 May 1995 order. The Trial Chamber relied on two orders dated 27 May 1995[890] and 30 May 1995[891] to establish that the Appellant directly ordered the placement of personnel in places that would be targeted by NATO,[892] and his significant contribution to the JCE.[893]

744. The Appellant notes that the order of 27 May 1995 originated from the Supreme Defence Counsel (headed by Karadžić and, of which the Appellant was not a member[894]) and was signed by Manojlović as "Deputy Commander", not by the Appellant.[895] Further, it did not consider the unique identification numbers attached to the orders. Both orders contained the "03/4" unique identification number.[896] As discussed at paragraph 633 in Ground V (Srebrenica), orders personally sent by the Appellant only had the number "01". The identifier of "03/4" meant that anyone in the GSVRS could have drafted and sent the order.

745. Further, the contents of the orders are inconsistent with the Appellant's military notebooks,[897] and his orders to professional subordinates.[898]

746. The Trial Chamber also held that the Appellant ordered the detention of UN personnel, and that some subordinates made threats toward the personnel.[899] The Trial Chamber erred by failing to give sufficient weight to the other orders issued by the Appellant, which were followed by his professional subordinates, and resulted in POWs being treated accordingly.[900]

747. The Trial Chamber erred by failing to give sufficient weight to exculpatory evidence in relation to the filming of UN personnel. The Trial Chamber found that the Appellant ordered the filming of detained UNMO's[901] but does not refer to evidence

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[890] P789.
[891] P5230.
[892] Judgement, paras.5137-5138, 5151-5152.
[893] Judgement, paras.5146-5156.
[894] Defence FTB, paras.551-555.
[895] Judgement, paras.5137-5138.
[896] P789, p.1; P5230, p.1.
[897] P345, pp.153.
[898] Judgement, paras.2219-2220, 2253, 2256, 2268.
[899] Judgement, paras.5157.
[900] Judgement, paras.2219-2220, 2253, 2256, 2268, 2227-2228, 2235, 2236, 2240, 2241, 2262, 2279, 2316.
[901] Judgement, para.5153.

to support this finding. One UN prisoner did not mention any filming around those dates.[902] Although Kalbarczyk mentions being filmed, he affirms that the Appellant was not present during their filming on 2 or 3 June,[903] and maintains that the filming was made by a civilian 'journalist'.[904] Lalović, the journalist conducting the filming testified that this was not ordered by anyone in the military but exclusively by his editors.[905]

748. The Trial Chamber refers to films made on different dates and locations and relies on witness Rechner's evidence that he overheard a conversation that the Appellant had ordered the transport of UN prisoners to be filmed.[906] This hearsay testimony was not corroborated by other UN prisoners present there,[907] and is inconsistent with the testimony of Lalović who denies any mention of the Appellant during the transportation of UN prisoners.[908]

749. Lastly, the Trial Chamber found that orders to detain UNPROFOR personnel were illustrative of the Appellant's significant contribution to the JCE.[909] The Appellant submits that orders to block, detain, and disarm were lawful under IHL,[910] and thus contrary to the alleged common criminal objective. Similarly, orders not to leak any information regarding the detained UN personnel and forbid contact except with Main Staff authorization[911] were legitimate orders to ensure the security of VRS personnel and of UN prisoners, particularly when under the threat of rescue operations.[912]

750. The Trial Chamber failed to give sufficient, if any, weight to evidence of the Appellant's orders to professional subordinates to treat the detainees as POWs in accordance with the Geneva Conventions, which were understood and followed.[913]

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[902] Evans (P396, p.9).
[903] Kalbarczyk (P2801, p.5).
[904] P2801, p.5.
[905] D858, para.3; Lalović (T.29887).
[906] Judgement, para.2238; [REDACTED], Rechner (T.18494, 18528-18529).
[907] Kalbarczyk (T.19352–19353).
[908] D858, para.15.
[909] Judgement, paras.5148, 5149.
[910] P6611, para.68; P2558, para.3.
[911] Judgement, para.5161.
[912] P6716, paras.7–11; P5230, p.1.
[913] Judgement, para.2219, 2220, 2253, 2256, 2268.

C.3.1 Consequence of the error

751. The Appellant submits that the manner in which the Trial Chamber relied on the evidence to satisfy its finding that the Appellant significantly contributed to the JCE was defective. This defective approach included: (i) insufficient weight to orders in opposition to the common criminal objective (ii) disregard of exculpatory evidence in relation to the filming of UN personnel (iii) insufficient weight given to orders in abidance of IHL. As a result, the Trial Chamber has erred by finding that the Appellant participated in the JCE beyond reasonable doubt.

C.4 ERROR 2: INSUFFICIENT WEIGHT WAS GIVEN TO EXCULPATORY EVIDENCE OF THE APPELLANT'S *MENS REA* FOR THE JCE

752. The Appellant submits that the Trial Chamber erred by giving insufficient weight to exculpatory evidence of the Appellant's requisite *mens rea* for the JCE.

753. The Trial Chamber failed to give sufficient weight to the proactive actions and conduct of the Appellant that reflect his intent to bring a peaceful end to the situation.[914]

754. The Appellant attempted to open direct and more efficient channels of communication to put an end to the hostilities and consequently the prisoner crisis, and he acted promptly to ensure their liberation.[915] When the political leadership decided on the release of prisoners,[916] the Appellant complied immediately by instructing his subordinates to comply.[917] Another illustrative example was the release order on 6 June from the political leadership[918] that was executed without delay by the Appellant.[919] In fact, after liberating 231 UN prisoners,[920] the Appellant continued his

[914]Judgement, paras.5154.
[915] P2196; P2198.
[916] P5231.
[917] P2480.
[918] P5232.
[919] P2481.
[920] P2197, p.1.

diplomatic efforts to seek the negotiated release of 4 VRS prisoners who remained under UNPROFOR captivity on 12 July 1995.[921]

755. Further, the Trial Chamber gave insufficient, if any, weight to Radoje Vojvodić's testimony and documentary evidence admitted through him.[922] Vojvodić testified that, on the orders of the GSVRS, he took responsibility for UN personnel by removing them from risk and harm inflicted by others, and treating them in accordance with IHL.[923] Documentary evidence from the ICRC and medical reports corroborated his testimony.[924] The ICRC report observed that the accommodation was adequate, meals were sufficient, and they were visited by doctors.[925] When recommendations were made, they were implemented by the GSVRS.[926] Medical reports confirmed that the detained personnel were seen and treated on multiple occasions.[927] One detainee was released from GSVRS custody on medical grounds.[928]

756. The Appellant recalls that IHL establishes that POWs can be detained until the definitive termination of hostilities, therefore negotiating a possible termination of hostilities is normal practice and a sign of good will on behalf of the Appellant to bring the prisoner's captivity to an end.[929] The UN itself recognised the Appellant's will to reach direct agreements and put an end to the situation, in comparison to the absence of such steps from the political leadership.[930]

757. In fact, the Trial Chamber recognised that it was the political leadership who had the ultimate power to decide on the capture, treatment and liberation of prisoners,[931] who staggered their liberation,[932] and who accepted responsibility for their decision to detain UN personnel.[933]

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[921] D1585, paras.4-6; P2560, p.1.
[922] Judgement, paras.2236, 2240, 2244, 2247, 2250, 2309, 2313, 2316.
[923] Vojvodić (D1224, paras.5-16; T.38790-38801).
[924] D1226; D1227.
[925] D1227, pp.2-4.
[926] D1227, p.4.
[927] D1226, pp.1-5.
[928] Vojvodić (D1224, para.12).
[929] P2196, p.5; P2198, pp. 4-5; GC.III, Art.118.
[930] P2198, p.4.
[931] P789, para.8; Judgement, para.2301, establishing that 'According to an order dated 13 June 1995, Karadžić ordered the release of all captured UNPROFOR and UNMO's on that day […] but excluded the release of 15 UNMO's said to be released in 18 June 1995'.
[932] Judgement, para.5139.
[933] Judgement, para.5137.

C.4.1 Consequences of the error

758. The Appellant submits that the Trial Chamber failed to give sufficient, if any weight to exculpatory evidence, thereby failing to establish the Appellant's *mens rea* beyond reasonable doubt.

C.5. REMEDY SOUGHT

759. The Appellant invites the Appeals Chamber to reverse the Appellant's conviction for Count 11, or in the alternative, reverse the Trial Chamber's findings to the extent of the errors identified.

D. [WITHDRAWN]

760. This sub-ground has been withdrawn

E. [WITHDRAWN]

761. This sub-ground has been withdrawn

VIII. GROUND SEVEN: ERRORS IN LAW AND FACT AS TO MODES OF LIABILITY

A. OVERVIEW

762. The Trial Chamber erred in law by failing to provide a reasoned opinion in its findings on superior responsibility, thereby failing to establish the Appellant's liability under Art.7(3) beyond reasonable doubt.

763. Noting the conviction for the commission of crimes on the basis of Art.7(1), the Appellant avers that liability under Art.7(1) has been addressed in paragraphs 152-335, 336-569, 570-694, and 695-761 of this brief in relation to the different JCE analyses. The below analysis considers the Trial Chamber's findings under Art.7(3) only.

A.1 APPLICABLE LAW

764. A conviction should be entered under Art.7(1) of the Statute only, while treating the accused's superior position as an aggravating factor in sentence.[934] The Trial Chamber may elect to enter a conviction on Art.7(1) if the facts of any given case satisfy both Art.7(1) and 7(3).[935] The accused's superior position will then be treated as an aggravating factor for sentence.[936] Although a Trial Chamber may not also convict an accused under Art.7(3), it must make the findings necessary for the establishment of responsibility under the provision to rely on it as an aggravating factor.[937]

[934] *Blaskić* AJ, para.91.
[935] *Galić* AJ, para.186.
[936] *Blaskić* AJ, para.91.
[937] *Strugar* AJ, paras.252-262; *Milošević* AJ, para.281.

A.1.1 Superior responsibility

765. In order to establish a finding of criminal responsibility under Art.7(3), the following factors must be proved beyond reasonable doubt: (1) that the accused was *de jure* or *de facto* a superior of the subordinate who perpetrated the crime, and exercised effective control over said subordinate; (2) the accused knew or had reason to know that a crime was going to be committed or had been committed; and (3) the accused did not take the necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[938]

Effective control

766. A superior's authority to issue orders does not automatically establish that he had effective control over his subordinates.[939] It is one of the indicators to be considered;

> [t]he indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[940]

767. Effective control requires more than a "substantial influence" over subordinates.[941]

Knowledge of or had reason to know

768. The accused does not need to have the same intent as the perpetrator of the criminal act, but it must be shown that the accused knew or had reason to know about the subordinates' actions.[942]

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[938] *Milošević* AJ para.280, fn816; *Kordić* AJ, para.827; *Blaskić* TJ, para.294.
[939] *Halilović* AJ, paras.68, 70, 139; see further API, Commentary, para.3544: "we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control".
[940] *Blaskić* AJ, para.69; *Aleksovski* AJ, para.72; *Čelebići* AJ, para.346.
[941] *Čelebići* AJ, para.266.
[942] *Nahimana* AJ, para.865.

Necessary and reasonable measures

769. Necessary measures "are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time", and reasonable measures "are those which the commander was in a position to take in the circumstances".[943] What constitutes 'necessary and reasonable measures' is established on a case-by-case basis, focusing on the 'material power' of the commander.[944] 'Material power' means a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.[945] To determine this, the Trial Chamber must assess at what point in time, what measures were at the commander's disposal in the circumstances,[946] and what crimes the commander knew or should have known about.[947] A commander is not required to employ every single conceivable measure available to him irrespective of considerations of proportionality and feasibility under the circumstances.[948]

770. On appeal, the legal framework must be applied to the Trial Chamber's conclusions to determine whether it made the findings necessary for the establishment of responsibility under Art.7(3).[949]

A.2 THE TRIAL CHAMBER'S APPROACH

771. The Appellant recalls paragraphs 5165-5166, where the Trial Chamber found it inappropriate to convict the Appellant pursuant to Arts.7(1) and 7(3) of the Statute in relation to the same counts based on the same facts.[950] The Trial Chamber did not enter convictions pursuant to superior responsibility, and entered convictions under Art.7(1) only.[951]

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[943] *Blaskić* TJ, para.333.
[944] *Bemba* AJ, para.121; *Blaskić* AJ, para.72; *Halilović* AJ, para.63.
[945] *Bemba* AJ, para.167.
[946] *Ibid.*, para.168, fn337.
[947] *Ibid.*, para.168.
[948] *Ibid.*, para.169.
[949] *Milošević* AJ, para.281.
[950] Judgement, Ch.9.10.
[951] Judgement, para.5165.

A.3 THE ERROR

772. The Appellant submits that the Trial Chamber erred in fact by failing to give a reasoned opinion in its findings on the necessary and reasonable measures taken by the Appellant to prevent the commission of crimes and/or punish the perpetrators under the mode of superior responsibility.

A.3.1 Legal issue 1

773. It may be presumed that the Trial Chamber has considered all of the evidence, and is not required to explain its decision in every detail.[952] The Appellant respectfully submits that this presumption is rebutted, as analysis of evidence clearly relevant to the Appellant's superior responsibility was not addressed in the Trial Chamber's reasoning.[953]

A.3.2 Legal issue 2

774. While jurisprudence dictates that a reasoned opinion must include findings which are essential to the determination of guilt on a particular count,[954] the Appeals Chamber in *Milošević* was satisfied that, although the Trial Chamber did not convict Milošević under Art.7(3), it made the findings for his responsibility and established it beyond reasonable doubt.[955] The Appellant submits that although the Trial Chamber's findings on Art.7(3) did not go to his conviction (instead included as an aggravating factor in sentencing considerations), the Trial Chamber was still required to be satisfied that the elements of Art.7(3) were proven beyond reasonable doubt.[956] As a result this has lowered the Prosecution's burden.

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[952] *Stanišić & Župljanin* AJ, para.218.
[953] *Stanišić & Župljanin* AJ, para.536, fn1806; Judgement, paras.3573-4612.
[954] *Stanišić & Župljanin* AJ, para.137, fn463.
[955] *Milošević* AJ, para.281.
[956] *Ibid.*

A.3.3 Example of error

775. In the OJCE analysis, the Trial Chamber made findings on two of the three elements of superior responsibility: the Appellant's exercise of effective command and control over VRS and other Serb forces,[957] and his knowledge of crimes. [958] The Trial Chamber also made findings on the non-punishment of crimes,[959] actions of the Appellant in submitting matters to the competent authorities for investigation and prosecution,[960] and analysis on the weaknesses of the military justice system.[961] However, the Trial Chamber failed to provide analysis on the Appellant's material ability or power to prevent or repress the commission of crimes committed by Serb forces, and the effect of the weaknesses in the military justice system on his material ability to submit matters to competent authorities.[962]

776. The Appeals Chamber in *Blaskić* held that what constitutes necessary and reasonable measures is not a matter of substantive law but of evidence, whereas the effect of such measures can be defined by law.[963] Taking this into consideration, the Appeals Chamber in *Bemba* then provided examples of relevant considerations, which can include;

> [o]utside parameters, operational realities, cost/benefit analyses when deciding what measures to take, bearing in mind a commander's overall responsibility to prevent and repress crimes, means that a commander may take into consideration the impact of measures on ongoing or planned operations.[964]

777. The Appellant submits it was incumbent upon the Trial Chamber to specifically identify what a commander should have done *in concreto*.[965] The Trial Chamber needed to demonstrate in its reasoning that the Appellant, as the Commander of the GSVRS, did not take specific and concrete measures that were available to him and

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[957] Judgement, para.4544, Chs.9.3.3, 9.3.4, 9.3.12.
[958] Judgement, paras.4630-4643.
[959] Judgement, paras.4195-4197, 4224-225, 4232,
[960] Judgement, Chs.9.2.12, 9.3.10.
[961] Judgement, Ch.9.2.12.
[962] *Bemba* AJ, para.5; *Popović* AJ, para.1928-1931.
[963] *Blaskić* AJ, para.72; *Celebići* AJ, para.198.
[964] *Bemba* AJ, para.170.
[965] *Ibid.*

which a reasonably diligent commander in comparable circumstances would have taken.[966]

778. The Trial Chamber erred by failing to provide findings as to whether the Appellant took all necessary and reasonable measures to prevent the commission of crimes and punish perpetrators as alleged in the Indictment. Without this element of superior responsibility being properly established and then proven beyond reasonable doubt, the mode of superior responsibility cannot be considered as a factor in sentencing.

779. The Trial Chamber similarly omitted to conduct the relevant analysis in relation to the remaining three JCEs.[967] The Appellant submits that the Trial Chamber was unable to establish his liability under Art.7(3) beyond reasonable doubt for these JCEs.

A.4 REMEDY SOUGHT

780. Based on this fundamental error, the Appellant invites the Appeals Chamber to revise the sentence accordingly.

[966] *Ibid.*
[967] Judgement, paras.4833-4840, 4893, 4917, 4959-4969, 4985, 5086-5098, 5123, 5144-5163.

IX. GROUND EIGHT: THE APPELLANT'S RIGHT TO A FAIR TRIAL WAS GROSSLY VIOLATED

A. THE TRIAL CHAMBER VIOLATED THE APPELLANT'S RIGHT TO A FAIR TRIAL BY FAILING TO ENSURE THAT THERE WAS 'EQUALITY OF ARMS'. THE APPROACH TAKEN TO THE DEFENCE IS NOT ONE THAT A REASONABLE TRIAL CHAMBER WOULD HAVE TAKEN AND, AS SUCH, THERE WAS A MISCARRIAGE OF JUSTICE.

A.1 OVERVIEW

781. The Trial Chamber abused its discretion by refusing to vary the deadline for the presentation of witnesses to allow [REDACTED] or [REDACTED] to testify. The error occasioned a miscarriage of justice.

782. Further, the Trial Chamber erred in law and in fact by closing the Defence case while evidentiary matters were pending (formally Ground Eight, sub-ground C). The Appellant notes that Ground Eight, sub-ground C, in the Notice has been subsumed into this sub-ground to avoid repetition and to assist the Appeals Chamber.

A.2 APPLICABLE LAW

783. The principle of equality of arms falls within the fair trial guarantees of the Statute under Article 21(1).[968] The equality of arms does not necessarily entitle an accused to the same amount of time to present his case – a principle of basic proportionality is applied to the time allotted to both sides.[969] Each party must have a reasonable opportunity to defend its interests under conditions which do not put him at a substantial disadvantage vis-à-vis his opponent.[970] The question is whether the accused was permitted a fair opportunity to present his case.[971]

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[968] *Tadić* AJ, para.44.
[969] *Orić* Interlocutory Decision, para.9.
[970] *Prlić* Translation Appeal, para.29.
[971] *Stakić* AJ, para.149.

784. A party can request a Trial Chamber to reconsider a ruling or decision it has made. Whether or not it does reconsider its decision is itself a discretionary decision.[972] The Trial Chamber may reconsider a decision it has previously made, "not only because of a change of circumstances but also where it is realised that the previous decision was erroneous or that it has caused an injustice".[973]

A.3 CHRONOLOGY

785. On 26 April 2016, the Trial Chamber set a deadline of the week of 30 May 2016 for the calling of the final Defence witnesses.[974] The Motions to admit documents from the Bar Table bearing the Rule 65*ter* numbers [REDACTED].[975] The Appellant identified the relevance of the documents as follows: (a) [REDACTED][976]; (b) [REDACTED][977]; and (c) [REDACTED].[978]

786. [REDACTED].[979]

787. [REDACTED].[980]

788. [REDACTED].[981] [REDACTED].[982]

789. On 16 August 2016, the Defence said on the record that it would be seeking reconsideration of this decision and did not close its case.[983] The Trial Chamber

[972] *Mucić* Sentence Appeal, para.49.
[973] *Milošević* Witness Appeal, para.7.
[974] T.43703.
[975] [REDACTED].
[976] [REDACTED].
[977] [REDACTED].
[978] [REDACTED].
[979] [REDACTED]; [REDACTED].
[980] [REDACTED]; [REDACTED].
[981] [REDACTED].
[982] [REDACTED].
[983] T.44317; T.44317-44319.

concluded that "certification or reconsideration motions do not have a suspensive effect".[984] It closed the Defence case.[985]

790. On 18 August 2016, a notice of objection to this and a request seeking a reasoned opinion on the matter, was filed.[986] [REDACTED][987]

791. [REDACTED].[988] [REDACTED].[989]

A.4 ERROR 1: WITNESS TESTIMONIES

792. The Trial Chamber failed to give sufficient weight to the relevance of the testimonies, as well as the interests of justice, in determining whether there was "good cause" to vary the deadline for the presentation of witnesses.

793. [REDACTED].[990] [REDACTED].[991] [REDACTED].

794. [REDACTED].[992] [REDACTED].[993] [REDACTED].

795. The Appellant submits that the Trial Chamber abused its discretion by denying the Defence motion to vary the deadline, to enable [REDACTED] and [REDACTED] to testify. [REDACTED].[994] [REDACTED].[995]

A.4.1 Consequences of the Error

[984] T.44317.
[985] T.44319.
[986] Defence Notice of Objection, para.10.
[987] [REDACTED].
[988] [REDACTED].
[989] [REDACTED].
[990] [REDACTED].
[991] [REDACTED].
[992] Brief fn.978.
[993] [REDACTED].
[994] [REDACTED].
[995] [REDACTED].

A.4.1.1 The impact of [REDACTED] evidence on the findings

796. The Appellant recalls, to disprove an adjudicated fact, the Trial Chamber applied a heightened standard and required the Appellant to disprove the adjudicated fact beyond reasonable doubt.[996]

797. The Trial Chamber took judicial notice of AF1476 to establish that between 7,000-8,000 Bosnian-Muslim men were systematically murdered after they were separated from the Bosnian-Muslim women and the elderly at Potočari.[997] The Trial Chamber disregarded Ewa Tabeau's evidence on the military status of victims,[998] instead finding that *all* the victims of killings in Srebrenica were not actively taking part in hostilities at the time of the killings.[999] The Trial Chamber gave insufficient, if any, weight to evidence supporting that the victims included legitimate military fatalities, as well as other explanations relating to the causes of death.[1000] [REDACTED].

798. [REDACTED]. [REDACTED].

799. [REDACTED].[1001] [REDACTED]. [REDACTED]. [REDACTED].[1002]

A.4.1.2 The impact of [REDACTED] evidence on the findings

800. The Appellant recalls the Trial Chamber's use of adjudicated facts to prove the origin of fire and the perpetrators.[1003] Further, that the heightened standard applied by the Trial Chamber required the Appellant to prove that the only reasonable inference was that the adjudicated fact was wrong.[1004]

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[996] Brief paras.100-105.
[997] Judgement, para.3007.
[998] Judgement, para.5293, 5296.
[999] Judgement, para.3062, 3546.
[1000] Bief paras.673-675.
[1001] [REDACTED].
[1002] [REDACTED]; [REDACTED]; [REDACTED].
[1003] Brief, paras.542-554.
[1004] Brief, paras.100-105.

801. The Trial Chamber rejected the Appellant's submissions that the shellings and snipings in Scheduled Incidents G.4,[1005] G.6,[1006] G.7,[1007] F.4,[1008] F.11,[1009] F.12,[1010] F.13,[1011] F.15,[1012] could have been fired either by the ABiH or from ABiH territory.

802. [REDACTED]. [REDACTED]. [REDACTED].[1013]

A.5 ERROR 2: DEFENCE CASE

803. The Trial Chamber erred in law by concluding that a motion for reconsideration on an evidentiary matter did not constitute a pending evidentiary matter before the Chamber.

804. During the exchange between Defence and the Trial Chamber on 16 August 2016, in relation to the Trial Chamber's decision on 15 August 2016, the Trial Chamber was put on notice of the Appellant's intention to seek reconsideration of the refusal to vary the deadline for the presentation of witnesses.[1014] As it considered this a pending evidentiary matter, the Defence did not rest its case.[1015]

805. The Trial Chamber erred in finding that the Appellant's motions for reconsideration were not pending evidentiary matters. Unlike motions for certification, reconsideration would have required the Trial Chamber to review its previous evidential decision on the basis that it was erroneous, caused an injustice, or in light of new facts or arguments that had not been considered at the time the decision was made.[1016] The Trial Chamber erred in closing the Defence case.[1017]

[1005] Judgement, paras.2035-2041, 2040.
[1006] Judgement, paras.2042-2050, 2049.
[1007] Judgement, paras.2051-2056, 2056.
[1008] Judgement, para.1926-1930, 1930.
[1009] Judgement, para.1944-1953, 1952.
[1010] Judgement, para.1954-1959, 1958.
[1011] Judgement, para.1960-1964, 1963.
[1012] Judgement, para.1965-1969, 1968.
[1013] [REDACTED].
[1014] T.44316-44317.
[1015] T.44316-44317.
[1016] *Galić* Prosecution Appeal Decision, para.49, 13.
[1017] T.44319.

A.6 CONCLUSION

806. The Appellant submits that it was in the interests of justice to vary the deadline to enable the anticipated testimony of [REDACTED] and [REDACTED] to be heard. The Trial Chamber abused its discretion and this invalidates the findings made on Srebrenica and Sarajevo to the extent identified above.

807. The Trial Chamber's decision to close the Defence case was made on an erroneous legal basis.

808. The Trial Chamber's approach prejudiced the Appellant's ability to present the Defence case.

A.7 REMEDY SOUGHT

809. The remedy sought will be considered in Ground Eight, sub-ground E.

B. THE TRIAL CHAMBER CONDUCTED THE TRIAL TO THE DETRIMENT OF THE APPELLANT'S HEALTH AND ERRED IN ASSESSING THE IMPACT OF THE APPELLANT'S MEDICAL CONDITIONS ON HIS BEHAVIOUR AT TRIAL

B.1 THE TRIAL CHAMBER DID NOT ADAPT THE PROCEEDINGS TO ENABLE THE APPELLANT TO EFFECTIVELY PARTICIPATE

B.1.1 Overview

810. The Trial Chamber abused its discretion by conducting the trial in a manner in which the Appellant could not effectively participate. The Appellant submits that this occasioned a miscarriage of justice.

B.1.2 Applicable law

811. There are no express provisions in the Statute addressing the fitness of an accused to stand trial. Arts.20 and 21 of the Statute, relating to an accused's procedural rights, implicitly require that an accused demonstrates a requisite level of mental and physical capacity.[1018] Where there is any question as to whether the accused is fit to stand trial, a Trial Chamber is tasked with determining whether an accused possesses the necessary capacitates to exercise his rights.[1019]

812. In determining the fitness of an accused to stand trial, the jurisprudence of the Tribunal has set out a non-exhaustive list of capacities to be evaluated, including the accused's ability to: (a) plead; (b) understand the nature of the charges; (c) understand the course of the proceedings; (d) understand the details of the evidence; (e) instruct counsel; (f) understanding the consequences of the proceedings; (g) testify.[1020] The standard to be applied is that of;

[1018] *Strugar* AJ, para.41; *Hadžić* Continuation Decision, para.37.
[1019] *Hadžić* Continuation Decision, para.37.
[1020] *Strugar* AJ, para.41.

> [m]eaningful participation which allows the accused to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings.[1021]

813. The accused's capacities should be;

> [v]iewed overall and in a reasonable and common sense manner, at such a level that it is possible for [him or her] to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights.[1022]

814. A finding that an accused has certain health conditions will not automatically render him unfit to stand trial. The question that must be considered is whether he is able to exercise effectively his rights in the proceedings against him. Suspension of proceedings has been deemed an appropriate remedy where medical evidence supports an accused's inability to meaningfully participate in proceedings.[1023]

815. An accused bears the burden to prove he is unfit to stand trial on the basis of supporting evidence.[1024] The burden is discharged if this can be shown on the balance of probabilities.[1025]

B.1.3 Chronology

B.1.3.1 The Prosecution's Case

816. The Prosecution presented its opening statements on 16 and 17 May 2012.[1026] The first Prosecution witness was called on 09 July 2012.[1027] The last Prosecution witness concluded his testimony on 12 December 2013.[1028] The Prosecution's case was closed on 26 February 2014.[1029]

[1021] *Strugar* AJ, para.55.
[1022] *Ibid.*, para.55.
[1023] *Popović* Health Decision, paras.11-12.
[1024] *Strugar* AJ, para.56.
[1025] *Ibid.*, para.56.
[1026] T.402-523.
[1027] T.537.
[1028] T.20685.
[1029] Scheduling and Closing Order.

817. [REDACTED].[1030]

818. [REDACTED].[1031] [REDACTED].[1032] [REDACTED].[1033] [REDACTED].[1034]

819. [REDACTED].[1035] [REDACTED].[1036]

820. [REDACTED]:

[REDACTED].[1037]

821. [REDACTED].[1038]

822. [REDACTED].[1039] [REDACTED].[1040]

823. [REDACTED]. [REDACTED],[1041] [REDACTED].[1042]

824. [REDACTED].[1043] [REDACTED],[1044] [REDACTED].[1045]

825. [REDACTED].[1046] [REDACTED].[1047] [REDACTED].[1048]

B.1.3.2 The Defence Case

826. The first Defence witness was called on 19 May 2014.[1049] The Prosecution reopened its case to present evidence in relation to the mass grave discovered in Tomašica on

[1030] [REDACTED].
[1031] [REDACTED].
[1032] [REDACTED].
[1033] [REDACTED].
[1034] [REDACTED].
[1035] [REDACTED].
[1036] [REDACTED].
[1037] [REDACTED].
[1038] [REDACTED].
[1039] [REDACTED].
[1040] [REDACTED].
[1041] [REDACTED].
[1042] [REDACTED].
[1043] [REDACTED].
[1044] [REDACTED].
[1045] [REDACTED].
[1046] [REDACTED].
[1047] [REDACTED].
[1048] [REDACTED].
[1049] T.21049.

22 June 2015 and closed its case on 08 July 2015.[1050] After denying the Appellant's request for an extension of the deadline to present its remaining witnesses, the Trial Chamber closed the Defence case on 16 August 2016.[1051]

827. [REDACTED].[1052] [REDACTED].[1053]

828. [REDACTED].[1054]

829. On 13 June 2014, the Appellant requested that the Trial Chamber adopt a four-day sitting schedule with Wednesday as a rest day.[1055] [REDACTED].[1056] [REDACTED].[1057] The Trial Chamber reduced the sitting schedule to four days on 17 September 2014.[1058]

B.1.4 The Trial Chamber's error

830. [REDACTED].[1059] The Appellant submits that the Trial Chamber abused its discretion in denying the request for a 4 day sitting schedule on 14 March 2014.

831. The Trial Chamber was under a duty to ensure that the trial was conducted fairly and in a manner that the Appellant could exercise his rights. Despite successive reports submitted from the UNDU Medical Officer and specialists advocating a four-day sitting schedule between June and October 2013 and between May and August 2014, the Trial Chamber proceeded with a sitting schedule that it was aware could prevent the Appellant from effectively participating and could have a detrimental impact on his health.

[1050] *Mladić* Decision on Prosecution Motion to Re-Open its Case-in-Chief; T.36085, 36885.
[1051] T.44319.
[1052] [REDACTED].
[1053] [REDACTED].
[1054] [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].
[1055] T.22668-22670, 22674-22675.
[1056] [REDACTED]; [REDACTED].
[1057] [REDACTED]
[1058] T.24701-24702; *Mladić* Decision on Future Trial Schedule.
[1059] [REDACTED].

B.1.5 Consequences of the error

832. The Appellant was tried for 5 months in the Prosecution's case and 4 months in the Defence's case without any adaptations to the sitting schedule. The medical evidence submitted to the Trial Chamber demonstrated the physical impact that the five-day sitting schedule was having on the Appellant during this period.

B.1.5.1 June to October 2013

833. [REDACTED];[1060] [REDACTED];[1061] [REDACTED];[1062] [REDACTED];[1063] [REDACTED].[1064] [REDACTED].[1065]

834. Dr Falke (UNDU Medical Officer) gave evidence before the Trial Chamber on 04 June 2013.[1066] He testified that, when under mental stress, the Appellant's blood pressure would rise to the point of being "abnormally high".[1067] He explained that "most of the time" the medical staff had to take his blood pressure, it was at this level.[1068] He noted that at one point there was a "period when they had to come in quite often".[1069]

835. The medical evidence before the Trial Chamber highlighted the detrimental impact a five-day sitting schedule was having on the Appellant's physical health. The chronic fatigue he suffered was directly linked to this. The Trial Chamber had ample medical evidence before it, confirming that a four-day sitting schedule was necessary to ensure the Appellant's effective participation and to safeguard his health.

[1060] [REDACTED].
[1061] [REDACTED].
[1062] [REDACTED].
[1063] T.12049-12050.
[1064] [REDACTED].
[1065] [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].
[1066] T12016-12073.
[1067] T.12035.
[1068] T.12036.
[1069] T.12036.

836. The sitting schedule was only rectified on Appeal on 22 October 2013. However, the Trial Chamber did not follow the recommendations of the Report and the UNDU Medical Staff to have Wednesdays off.[1070]

B.1.5.2 May to August 2014

837. The Trial Chamber resumed a five-day sitting schedule for the Defence case. During this period, the UNDU Medical Officer reported the following: [REDACTED];[1071] [REDACTED];[1072] [REDACTED];[1073] [REDACTED];[1074] [REDACTED];[1075] [REDACTED].[1076] [REDACTED].[1077]

838. The medical evidence before the Trial Chamber confirmed a nexus between the sitting schedule and the deterioration in the Appellant's physical and mental health. However, the Trial Chamber disregard the recommendations of the medical professionals and continued to conduct proceedings. Once again, the Trial Chamber had ample medical evidence before it confirming that a four-day sitting schedule was necessary to ensure the Appellant's effective participation and to safeguard his health.

B.1.6 Conclusion

839. The Appellant submits that the Trial Chamber was under a duty to ensure that proceedings were being conducted fairly and in a manner that enabled him to exercise his rights effectively for the 9 months identified. The medical evidence before the Trial Chamber demonstrated overwhelming support for a four-day sitting schedule, with Wednesday's off, to ensure the Appellant's effective participation in proceedings and to safeguard his health. In light of such evidence, the Trial Chamber abused its

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[1070] This was also supported by the Registry and the Prosecution. *See Mladić* Sitting Schedule Appeal, para.9-10.
[1071] [REDACTED]; [REDACTED].
[1072] [REDACTED].
[1073] [REDACTED].
[1074] [REDACTED].
[1075] [REDACTED].
[1076] [REDACTED].
[1077] [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].

discretion by failing to ensure the Appellant's ability to meaningfully participate in his trial or the fairness of the proceedings.

840. Meaningful participation requires more than a passive presence in Court.[1078] The Appellant submits that the Trial Chamber's error infringed his rights. It knowingly conducted the trial in a manner that (a) would hamper his ability to effectively participate in proceedings, and (b) was harming his health. The totality of the evidence supported that, without adaptations to the court proceedings, the Appellant's capacities were at such a level that it was not possible for him to effectively participate in the proceedings and exercise his rights.[1079] The Trial Chamber's failure to ensure the Appellant's ability to effectively participate in his trial and safeguard his medical welfare occasioned a miscarriage of justice.

B.1.7 Remedy Sought

841. This will be addressed in Ground 8, sub-ground E.

B.2 THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY RELYING ON COMMENTS PROTECTED BY LEGAL PROFESSIONAL PRIVILEGE AS EVIDENCE OF THE APPELLANT'S *MENS REA*

B.2.1 Overview

842. The Trial Chamber fell into discernible error by relying on comments made by the Appellant to Defence Counsel to establish *mens rea*. The Trial Chamber failed to consider the applicable law, namely Rule 97, to establish whether privilege had been waived. It failed to give sufficient weight to the circumstances in which the comments were heard. The Appellant submits that the error occasioned a miscarriage of justice.

[1078] Brief, paras.812-813.
[1079] *See Popović* Health Decision, para.11.

B.2.2 Applicable law

843. Pursuant to Rule 97:

> [A]ll communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and the third party then gives evidence of that disclosure.

844. In *Michaud v France* ("*Michaud"*), the ECtHR explained that:

> [T]his is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential. It is the relationship of trust between them, essential to the accomplishment of that mission, that is at stake. Indirectly but necessarily dependant thereupon is the right of everyone to a fair trial, including the right of accused persons not to incriminate themselves.[1080]

845. Art.21(2) provides that the accused shall be entitled to a fair trial. As part of this, an accused shall not be compelled to testify against himself or confess guilt (Art.21(4)(g)).

846. A Chamber shall apply the rules of evidence which will best favour the determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.[1081]

B.2.3 The witness testimonies of Maria Karall and Dora Sokola

847. The Trial Chamber referenced the "behaviour of the Accused during the proceedings" in the Judgement.[1082] [REDACTED].[1083] These related to comments heard by OTP staff members Maria Karall and Dora Sokola on 18 February 2013.

[1080] *Michaud* Judgement, paras.118.
[1081] Rules, Rule 89(B).
[1082] Judgement, para.5246.
[1083] [REDACTED].

848. On 4 June 2013, the Trial Chamber granted the Prosecution's application to admit utterances made by the Appellant on 18 February 2013.[1084] [REDACTED].[1085] The Trial Chamber did not engage with this submission nor did it refer to Rule 97 in its decision.[1086] It did not consider whether privilege had been waived.

849. On 12 September 2013, Maria Karall (an OTP staff member) testified.[1087] Before her testimony, Prosecution Counsel Ms. Marcus responded to the Defence's written and oral objections in the following way:

> [t]he position of the Prosecution is that Mr. Mladić waived his right to privilege by yelling the words across the courtroom. This was something that was put on the record on 23rd of August, 2012, at page 1482 where Mr. Mladić was warned that if he were to yell something across the courtroom, he may be subject to that as evidence against him.[1088]

850. As neither witness had testified at this point in time, there was no evidence before the Trial Chamber that the Appellant had in fact been "yelling" across the courtroom.[1089] The warning referred to was made by Judge Moloto on 23 August 2012.[1090] The Appellant notes that this warning was given after the Prosecutor Mr. Groome had raised a concern about instructions/comments being shouted to Defence Counsel during the proceedings.[1091] In this context, Judge Moloto stated that privilege would be waived.[1092]

851. Mr. Stojanović (Defence Counsel) reiterated the objections made in writing – that privilege had not been waived and that the volume of his speech was a direct result of his health problems.[1093] This was denied.[1094] The Trial Chamber did not refer to Rule 97 as part of its ruling, or consider the legal elements therein.[1095] The Trial Chamber's ruling was as follows:

[1084] *Mladić* Utterances Decision, para.1.
[1085] [REDACTED].
[1086] *Mladić* Utterances Decision.
[1087] T.16585-16610.
[1088] T.16586.
[1089] The Appellant notes that Rule 65*ter* summaries are not evidence.
[1090] T.1481.
[1091] T.1481.
[1092] T.1481.
[1093] T.16587-16589.
[1094] T.16589.
[1095] T.16589.

> [T]he first objection about the objection about the waiver of privileged communication, the argument ignored that by speaking very loudly, that the communication cannot be considered to be confidential any further, and the accused has been warned about that, or at least it has been brought to his attention. For the second issue, there is no conflict of interest. The witness who will appear is supposed to testify about the facts, nothing more, nothing less, and I take it, Ms. Marcus, that you'll keep that in mind. *The witness is not here to establish any mens rea or things of that kind*.[1096]

852. The Appellant's request for certification to appeal the 12 September 2013 oral ruling was denied.[1097]

853. Following this oral ruling, Karall, an OTP staff member, testified. Prosecution Counsel Ms. Marcus led her through her evidence-in-chief.[1098] She testified that on 18 February 2013 she was told by Prosecution Counsel Ms. Marcus to listen to what the Appellant said during the proceedings and "also listen to whatever he says during the break".[1099] Sokola and several of her colleagues had received an email asking for assistance in court to listen to any comments made by the Appellant "that might be made without having been recorded".[1100]

854. During the court session the Appellant did not communicate with Counsel, speak, or make any gestures.[1101] The witness, the bench, and the registry left the courtroom.[1102] Karall remained in Court as per Prosecution Counsel Ms. Marcus's instructions.[1103] The Appellant called his lawyers back to speak to him.[1104] The Appellant was initially sitting down as he spoke to them but then got up.[1105] Karall stated that the words were addressed to his lawyers, who had been invited to speak to him.[1106] She noted down the words said by the Appellant and told Prosecutor Mr. Groome immediately.[1107]

[1096] T.16589 [emphasis added].
[1097] *Mladić* Certification Decision 21.10.13, para.8.
[1098] T.16591.
[1099] T.16597.
[1100] T18165-18166.
[1101] T.16597.
[1102] T.16598-16599.
[1103] T.16597.
[1104] T.16598.
[1105] T.16604.
[1106] T.16598.
[1107] T.16601.

Karall did not return for the second session.[1108] Prosecution Counsel Ms. Marcus confirmed that there was no audio recording.[1109] As such, the only witness was Karall.

855. On 21 October 2013, Sokola (another OTP staff member) testified.[1110] Prosecution Counsel Ms. Marcus led her through her evidence-in-chief.[1111] She testified that on 18 February 2013 Prosecution Counsel Ms. Marcus had specifically assigned her[1112] to note "any utterances made by Mr Mladić off the record at any time when he was not being recorded, so during breaks, so to record […] anything he says".[1113] She entered the courtroom with this assignment during the first break.[1114] She conceded that she had been given "similar" assignments before, but not the same as on this occasion.[1115] Sokola believed this task extended to noting down comments made about his family or private affairs to Defence Counsel.[1116] She confirmed that Prosecution Counsel Ms. Marcus did not explain to her that communications with Counsel were privileged.[1117] She was told to note down whatever she could hear.[1118] Sokola accepted that the Appellant was speaking to his Defence Counsel when he made the remarks, and for the duration of the conversation that she was listening to.[1119] Sokola was the only witness that testified about the remarks made and the volume they were said at.

B.2.4 The Trial Chamber's error

856. First, the Trial Chamber failed to consider whether comments had been voluntarily disclosed under Rule 97(ii) or to even consider this Rule. Second, the Trial Chamber disregarded the circumstances in which the OTP staff members "overheard" the

[1108] T.16601.
[1109] T.16602.
[1110] T.18171-18183.
[1111] T.18162.
[1112] T.18172.
[1113] T.18171.
[1114] T.18171.
[1115] T.18172.
[1116] T.18173-18172.
[1117] T.18172.
[1118] T.18173.
[1119] T.18180.

remarks. Finally, the Trial Chamber failed to consider the Appellant's medical condition as part of the assessment of whether the remarks had been voluntarily disclosed.

B.2.4.1 The Trial Chamber ruled without conducting a voir dire *to determine whether the comment had been voluntarily disclosed*

857. The Trial Chamber did not cite Rule 97 in its written decisions or oral ruling.[1120] There was no evidence before the Trial Chamber that the Appellant consented to the disclosure of his communications with Counsel, or that he voluntarily disclosed them to either Karall or Sokola. The Trial Chamber based its finding that the remarks had been voluntarily disclosed because the Appellant had been "speaking very loudly".[1121] Yet, when the ruling was made, the Trial Chamber had not heard any evidence to this effect. The Rule 65*ter* summaries are not evidence and both witnesses were called *viva voce*. The Trial Chamber based its ruling on 12 September 2013 on Prosecution Counsel Ms. Marcus's submissions that the Appellant voluntarily disclosed the remarks by "yelling them across the courtroom"[1122] without conducting a *voir dire* to establish; (a) the circumstances in which the OTP witnesses came to hear the remarks; or (b) whether the Appellant had in fact voluntarily waived privilege in the manner alleged. The Trial Chamber treated Prosecution Counsel Ms. Marcus's submissions as evidence upon which to base its ruling.

858. The precarious circumstances in which the remarks were "overheard" was fundamental to the Trial Chamber's ability to rule on whether the Appellant had voluntarily disclosed the remarks to Karall and Sokola under Rule 97(ii).

859. The Appellant submits that the Trial Chamber erred in its premature determination that he had voluntarily disclosed communications.

[1120] *Mladić* Utterances Decision; *Mladić* Certification Decision 21.10.13; T.16589.
[1121] T.16589.
[1122] T.16586.

B.2.4.2 The failure to consider the circumstances in which the comments were "overheard"

860. After the Trial Chamber ruled that privilege had been waived, both witnesses testified under oath that Prosecution Counsel Ms. Marcus had tasked them with 'listening in' on the Appellant's communications.

861. Prosecution Counsel Ms. Marcus did not disclose to the Trial Chamber or Defence Counsel that she had tasked both witnesses to listen in and record whatever the Appellant said. During Karall and Sokola's evidence-in-chief, she did not elicit this information.[1123] Cross-examination was the first time the circumstances surrounding Karall and Sokola's presence in Court was revealed.

862. [REDACTED].[1124] [REDACTED].[1125] Further, in the Prosecution's motion to admit the Appellant's remarks it made no reference to Prosecution Counsel Ms. Marcus's instructions to the witnesses.[1126] The Appellant submits that Prosecution's failure to disclose Prosecution Counsel Ms. Marcus's conduct, to either the Trial Chamber or the Appellant in advance, is a significant omission. Even after this was disclosed, the Trial Chamber did not engage with this, or consider the impact of it on the Appellant's alleged voluntary disclosure of his communications.

863. The Appellant submits that the Trial Chamber should have considered the conduct of Prosecution Counsel Ms. Marcus against the Appellant's right to a fair trial and the sacrosanct right to have his communications with Defence Counsel protected by privilege.[1127] Prosecution Counsel Ms. Marcus tasked two OTP staff members to indiscriminately listen and note down the Appellant's communications with his Defence Counsel. This was not the situation envisaged by Judge Motolo on 23 August 2012.

[1123] T.16591-16593; 18165-18166.
[1124] [REDACTED].
[1125] [REDACTED].
[1126] *Mladić* Prosecution Utterances Motion, paras.7-14.
[1127] *Michaud* Judgement, para.118.

864. The Appellant did not have voluntarily disclosed the communications to the third party in these circumstances.

865. The Trial Chamber failed to provide a reasoned opinion on how the communications could have been voluntarily disclosed by the Appellant in these unique circumstances.[1128]

B.2.4.3 Evidence of voluntary disclosure of communications

866. The remarks were made in the context of the Appellant consulting with Counsel. This was accepted by both witnesses under cross-examination.[1129]

867. The Appellant submits that the circumstances in which a third party becomes privy to communications is fundamental to a determination of whether there has been voluntarily a disclosure of content. [REDACTED].[1130] [REDACTED].[1131] The alleged volume of the remarks cannot be divorced from the witness's violation of legal professional privilege.

868. The Trial Chamber fell into discernible error by ruling that the Appellant had voluntarily disclosed the remarks without hearing the testimonies of Karall and Sokola. The Appellant submits that, in light of the circumstances in which the evidence was acquired by the third parties, the remarks could not have been voluntarily disclosed.

B.2.4.4 The impact of the Appellant's health on his speech

869. The Appellant recalls paragraph 821, regarding the comments in the medical Report about his speech. The Appellant notes the finding that his speech was "loud, curt and rigid with clear neurological sequelae such as motor dysphasia and dysarthria".[1132]

[1128] *Mladić* Utterances Decision; T.16589; *Mladić* Certification Decision 21.10.13.
[1129] T.16589; T.18180.
[1130] [REDACTED].
[1131] [REDACTED].
[1132] First Defence Sitting Schedule Motion, Annex C, p.5, para.1

870. Despite Mr. Stojanović's explicit reference to the link between the Appellant's health problems and his speech, the Trial Chamber failed to consider this as part of its ruling.[1133] Undue weight was placed on the alleged volume of his speech as a justification for the finding that the communications had been voluntarily disclosed.

871. The Trial Chamber erred by failing to consider the Appellant's idiosyncrasies when considering whether he had voluntarily disclosed his communications with Counsel, or to provide a reasoned opinion on this point.

B.2.5 Consequences of the Error

872. The Trial Chamber explicitly said in its oral ruling that Karall's comments would not be used to establish *mens rea*.[1134] At no point did the Trial Chamber issue a decision stating that this ruling had been reconsidered and the remarks would be considered as evidence of *mens rea*. While it was silent on its intention with Sokola's evidence, its approach to Karall is instructive, given that both incidents occurred on the same day, under the same circumstances, and were the subject of a joint motion.[1135]

873. [REDACTED].[1136] The Appellant submits that the Trial Chamber's reliance on these comments occasioned a miscarriage of justice.

B.2.6 Conclusion

874. The Trial Chamber disregarded the contentious circumstances in which the evidence was obtained. The Trial Chamber fell into discernible error by relying on legally privileged communications with Defence Counsel as evidence of the Appellant's *mens rea*.

[1133] T.16589.
[1134] *Ibid*.
[1135] *Mladić* Utterances Decision, paras.1, 5-6.
[1136] [REDACTED].

B.2.7 Remedy sought

875. The Appellant invites the Appeals Chamber to articulate the correct legal standard and review the factual findings of the Trial Chamber. The Appellant further invites the Appeals Chamber to reverse the findings on all counts to the extent of the error identified where this evidence was relied upon.

C. [SUBSUMED INTO GROUND EIGHT, SUB-GROUND A]

876. The Appellant recalls that this ground has been subsumed into Ground 8, sub-ground A to assist the Appeals Chamber and avoid repetition.

D. DISCLOSURE VIOLATIONS WERE PERMITTED BY THE TRIAL CHAMBER AND NOT REMEDIED, THEREBY PREJUDICING THE APPELLANT

D.1 OVERVIEW

877. The Trial Chamber's management of the Prosecution's disclosure failings at the start of the trial gave the Prosecution an unfair advantage.

D.2 APPLICABLE LAW

878. Art.21(4)(b) of the Statute provides that the accused is entitled to have "adequate time and facilities for the preparation of his defence". Preparation time during the trial is one factor that the Appeals Chamber has considered as to whether a defence team was given adequate time to prepare.[1137] A Trial Chamber's assessment of the amount of pre-trial preparation requires an in-depth consideration of all facts.[1138] A Trial Chamber has discretion regarding trial scheduling matters. This is limited by the obligations of Arts.20 and 21 of the Statute to ensure that a trial is fair and expeditious, and that the accused has time to prepare his case.[1139]

D.3 THE ERROR

879. The Prosecution notified the Trial Chamber and the Defence on 25 April 2012 that a substantial part of Rule 66(A)(ii) material contained in Batch 5 of the 11 November 2011 disclosure schedule ("Batch 5") had not been disclosed to the Defence on 11 November 2011.[1140] This was redisclosed on 27 April 2012.[1141] On 11 May 2012 the Prosecution conceded that there had been a disclosure failure in relation to Batch 4-

[1137] *Krajišnik* Adjournment Appeal, para.23.
[1138] *Karadžić* Commencement Appeal, para.19.
[1139] *Ngirabatware* Trial Date Appeal, para.22.
[1140] *Mladić* Second Adjournment Decision, paras.4-5.
[1141] *Ibid*.

C.[1142] It failed to disclose around 7,000 exhibits from the Rule 65*ter* exhibit list.[1143] On 17 May 2012, the Prosecution informed the Trial Chamber that the 27 April 2012 disclosure of the missing Batch 5 documents in relation to the first 23 witnesses did not contain searchable documents.[1144] The Prosecution conceded that the failures "may have an impact on the fairness of the trial if the Defence does not have a reasonable opportunity to review the recently disclosed material prior to the commencement of the presentation of related evidence".[1145] Despite the gravity of the failures, the Trial Chamber postponed the trial for only 90 days.[1146] Following this, the Trial Chamber refused to grant additional time to process documents provided through EDS without meta-data.[1147] The Trial Chamber did not grant any additional time to the Defence.[1148]

880. The Appellant was deprived of a reasonable opportunity to review this substantial amount of material before the start of the trial. The Trial Chamber considered that "preparing a Defence is not exclusively done during the pre-trial phase".[1149] This fundamentally ignores the importance of establishing a case theory and determining a case strategy in light of the evidence served. The Appellant was inundated with material that had to be reviewed and was given limited time to consider it. The disclosure failings gave the Prosecution an unfair advantage from the outset of the trial.

Consequences of error and remedy sought

881. The consequences of the error and the remedy sought will be considered in Ground 8, sub-ground E.

[1142] *Mladić* Second Adjournment Decision, para.20.
[1143] *Ibid*.
[1144] *Mladić* Second Adjournment Decision, paras.20.
[1145] *Mladić* Second Adjournment Decision, paras.24.
[1146] *Mladić* Second Adjournment Decision, paras.27.
[1147] *Mladić* EDS Appeal, paras.7, 39-43.
[1148] *Mladić* EDS Appeal, paras.7, 39-44.
[1149] *Mladić* Second Adjournment Decision, para.25.

E. SYSTEMIC UNFAIRNESS/BIAS EXISTED THROUGHOUT THE PROCEEDINGS

882. To assist the Appeals Chamber, this sub-ground acts as a consolidated conclusion to the grounds of appeal raised on Counts 2-11 (Grounds 1-8(A-D)) and identifies, and explains, the remedies sought.

883. The errors in the Judgement and the proceedings are considered through the prism of the Appellant's fair trial rights to establish that, as an alternative to reversing the convictions entered, the Appeals Chamber should exercise its discretion and order a retrial, or, at least in part, remit the case against the Appellant.

E.1 OVERVIEW

884. As set out in Grounds 1-6, the remedy sought for each ground of appeal is the reversal of the convictions entered by the Trial Chamber on Counts 2 – 11, and for the Appeals Chamber to enter not guilty verdicts. The Appellant asserts that the errors identified invalidate the findings relating to, not only the establishment of the crimes, but also the Appellant's responsibility for them.

885. In the alternative, the Appellant submits that the cumulative effect of the errors identified in Grounds 1 – 8(A-D) of the Brief would require the Appeals Chamber to conduct a trial *de novo* to properly adjudicate on the extent and effect of the Trial Chamber's errors. The Appellant asserts that, in the circumstances of the present case, recourse to the "exceptional"[1150] remedy of a retrial is appropriate as an alternative to verdicts of not guilty. Given the "exceptional" nature of this remedy, the Appellant has identified the individual, and cumulative, effect of the errors to evidence the need for a retrial, should the Appeals Chamber decline to reverse the convictions.

[1150] *Stanišić & Simatović* AJ, para.127.

E.2 APPLICABLE LAW

886. An appeal is not a trial *de novo*.[1151] The discretion of the Appeals Chamber to consider errors of law committed by a Trial Chamber is not absolute.[1152] It is noted that:

> [t]he choice of remedy lies within [the] discretion [of the Appeals Chamber]. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty […]. The discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis.[1153]

887. However, there may be circumstances in which it would be inappropriate for the Appeals Chamber to conduct a review. The factors identified by the *Jelisić* Appeals Chamber should be considered as part of this. While an "exceptional measure",[1154] the Appeals Chamber may order a retrial in the appropriate circumstances pursuant to IRMCT Rule 144(C).

E.3 OVERVIEW OF THE ERRORS

888. The Appellant recalls that the errors have been set out in Grounds 1 – 8(A-D). These submissions will not be rehearsed in this sub-ground, rather the categories of errors will be considered in turn to demonstrate that the Appeals Chamber would be required to conduct a trial *de novo* to properly adjudicate on the errors committed by the Trial Chamber.

889. In this regard, the relevant errors considered in Grounds 1-8(A-D) fall into five categories: (1) failure to give a reasoned opinion; (2) failure to properly apply the burden and standard of proof; (3) errors relating to the JCEs; (4) the use of adjudicated facts; and, (5) violations of the Appellant's fair trial rights. These will be considered in turn.

[1151] *Stanišić & Simatović* AJ, para.127 fn450.
[1152] *Šainović* AJ, para.1604, fn5269.
[1153] *Jelisić* AJ, para.73.
[1154] *Stanišić & Simatović* AJ, para.127.

E.3.1 Error 1: Failure to properly apply the proper legal standard

890. The Appellant recalls paragraphs 118-124. Errors of this nature have been identified in: Grounds 3,[1155] 4,[1156] 5,[1157] 6,[1158] and 7[1159].

891. The Appellant submits that the examples demonstrate a persistently flawed approach, that the Prosecution's burden of proof was lowered, and the extent to which the errors permeate through the Judgement. The number of examples provided by the Appellant are sufficient to warrant the intervention of the Appeals Chamber and a revision of the Trial Chamber's approach throughout the Judgement. To assess the extent and effect of the Trial Chamber's errors in this manner, the Appeals Chamber would have to undertake a full review of the trial record.

E.3.2 Error 2: Failure to give a reasoned opinion

892. The Appellant recalls paragraphs 136-139. Errors of this nature have been identified in all of the JCEs: OJCE,[1160] Sarajevo JCE,[1161] Srebrenica JCE,[1162] and hostage taking JCE[1163].

893. The illustrative examples demonstrate the Trial Chamber's flawed approach to the establishment of the elements of crimes across the Judgement. The number of examples provided by the Appellant are sufficient to warrant the intervention of the Appeals Chamber, and for the Appeals Chamber to review the Trial Chamber's approach throughout the Judgement. To assess the extent and effect of the Trial

[1155] Brief, paras.162-169, 180-185, 261-263, 267.
[1156] Brief, paras.422-428, 443-458, 498-529.
[1157] Brief, paras.669-676, 585-600.
[1158] Brief, paras.711-733, 741-751.
[1159] Brief, paras.771-779.
[1160] Brief, paras.186-210, 211-269, 294-316, 317-334, 335.
[1161] Brief, paras.542-554.
[1162] Brief, paras.570-600, 601-643, 645-665.
[1163] Brief, paras.741-751, 752-758, 735-759.

Chamber's error, the Appeals Chamber would have to undertake a full review of the trial record.

E.3.3 Error 3: Errors relating to the JCEs

894. The errors relating to the JCEs include those identified in Errors 1 and 2 above.

895. With regards the Trial Chamber's approach to establishing the Appellant's *mens rea* in the OJCE, the Appellant submits that it employed a defective method.[1164] The Trial Chamber imported *mens rea* inferences into its *actus reus* analysis therefore making *mens rea* inferences before the *actus reus* had been established.[1165] The Trial Chamber's view was indelibly tainted and could only reach a conclusion of guilt.[1166] For the Appeals Chamber to properly adjudicate on this error, it would require all the evidence on the trial record to be considered again and for the Appeals Chamber to re-establish *actus reus* and *mens rea* by applying the correct methodology to determine whether a reasonable trier of fact could reach the same conclusion.

896. A similarly defective approach was taken by the Trial Chamber to establish the Appellant's requisite intent for the Sarajevo JCE.[1167] The Trial Chamber did not interpret the evidence objectively but made inferences of the Appellant's intent through the lens of their findings on the crime base.[1168] Once again, the Appeals Chamber would have to re-establish the Appellant's *mens rea* to determine whether a reasonable trier of fact could reach the same conclusion on the basis of the evidence on the trial record.

E.3.4 Error 4: The use of adjudicated facts

897. The Appellant recalls paragraphs 100-113 of the Brief.[1169]

[1164] Brief, paras.281-291.
[1165] Brief, paras.281-291.
[1166] Brief, paras.281-291.
[1167] Brief, paras.409-456.
[1168] Brief, paras.409-421.
[1169] Brief, Ground 2, sub-ground A.2.

E.3.4.1 The Appellant's 'proximate subordinates'

898. The Trial Chamber's reliance on adjudicated facts, either to prove the identity of the perpetrator or the origin of fire, is fundamental to the methodology employed to establish the elements of crimes.[1170] The fact that the adjudicated facts established that the perpetrators were the Appellant's proximate subordinates, led to the Trial Chamber taking the "short step" to finding his responsibility for the crimes.[1171] The volume of examples provided by the Appellant are sufficient to warrant the intervention of the Appeals Chamber, and for the Appeals Chamber to review the Trial Chamber's approach throughout the Judgement.

E.3.4.2 The heightened standard applied by the Trial Chamber

899. The Appeals Chamber would have to consider all of the evidence on the trial record for each incident where the Trial Chamber relied on unrebutted adjudicated facts to; first, determine whether the rebuttal evidence enlivened the evidentiary debate had the proper standard been applied; second, consider if the evidence presented by the Prosecution could re-establish the accuracy of the fact; third, if the adjudicated fact was rebutted, consider whether there was any other evidence that could prove the Appellant's responsibility for the crimes beyond reasonable doubt.

E.3.4.3 Adjudicated facts in the crime base segments

900. For instance, for OJCE the way in which the Trial Chamber relied on the adjudicated facts showed a systematically flawed approach to the evidence that established the crime base.[1172] This would require the Appeals Chamber to review all of the incidents to determine whether the error had infected other aspects of the crime base. The Appellant notes that, for the Sarajevo component of the Indictment in particular, this exercise would result in the Appeals Chamber reviewing schedules F and G, as well as the unscheduled incidents, in their entirety.

[1170] Brief, paras.107-108, 158-183; 498-527; 669-676.
[1171] Brief, paras.107-108, 158-183; 498-527; 669-676.
[1172] Brief, paras.158-180.

E.3.4.4 Conclusion

901. The Appellant submits that the volume of examples provided throughout the Brief, substantiate the existence, extent, and effect of the Trial Chamber's error. The Appellant asserts that these are sufficient to warrant the intervention of the Appeals Chamber, and for the Appeals Chamber to review the Trial Chamber's approach throughout the Judgement.

902. In effect, the appeal would have to become a trial *de novo* to properly consider whether the Trial Chamber's errors invalidate the factual findings made, and flowing from this, the basis of the Appellant's convictions under Art.7(1) on Counts 2-10.

E.3.5 Error 5: Violation of the Appellant's fair trial rights

903. The Appellant recalls paragraphs 786-809 (8-A), 817-841 (8-B.1), 857-875 (8-B.2) 880-881 (8-D). The Appellant submits that the cumulative effect of these errors prejudice his right to a fair trial.

E.5.5.1 Effective participation

904. It is trite law that an accused has the right to a fair trial, which includes an equality of arms and his ability to effectively participate in proceedings.[1173] The Trial Chamber's duty to ensure that the proceedings are conducted in a manner that upholds and ensures the fairness of proceedings is also trite.

905. The Appellant's ability to participate in his own trial is a fundamental right.[1174] The Trial Chamber conducted the proceedings with a five-day sitting schedule for five months during the Prosecution's case and four months during the Defence case, contrary to the recommendations of medical officers.[1175] The medical reports before

[1173] Brief, paras.783, 811-815.
[1174] Brief, paras.811-815.
[1175] Brief, paras.833-838.

the Trial Chamber showed that, viewed in a "reasonable and common sense manner"[1176], it was not possible for the Appellant to exercise his fair trial rights during the five-day sitting schedule.[1177]

906. [REDACTED].[1178] The successive reports placed before the Trial Chamber highlighted the symptoms of the Appellant's "burn-out" due to fatigue.[1179] Yet, consistent and persistent requests from the medical officers to reduce the sitting schedule to four days, to ensure the Appellant's effective participation and to safeguard his health, were disregarded. The Appellant submits that the Trial Chamber conducted the trial during these 9 months in a manner that was prejudicial.

E.5.3.2 Failure to investigate the Prosecution's conduct

907. The Trial Chamber did nothing in response to the admission that Prosecution Counsel Ms. Marcus had "tasked" OTP staff members with listening in on the Appellant's conversations indiscriminately. This is also a curious approach in the context of the Appellant's right to a fair trial. Despite Sokola conceding that she had been given "similar" assignments before,[1180] the Trial Chamber failed to make further inquiries about this. The questionable circumstances surrounding Karall and Sokola's assignment from Prosecution Counsel Ms. Marcus warranted judicial intervention, or at the very last, a judicial inquiry, into whether such behaviour was ethically permissible in the context of the Appellant's right to a fair trial.

E.5.3.3 'Equality of arms'

908. Taken together, the impact of the disclosure violations and the Trial Chamber's refusal to vary the deadline for the presentation of witnesses, put the Appellant at a substantial disadvantage vis-à-vis the Prosecution.[1181] The prejudicial impact of these together, hampered the Appellant's ability to prepare and present his defence.

[1176] *Strugar* AJ, para.55.
[1177] Brief, paras.833-840.
[1178] [REDACTED].
[1179] Brief, paras.833-841.
[1180] T.18172.
[1181] *See* Brief, paras.783-784, 796-808, 879-880.

E.3.6 Cumulative effect of the errors on the Appeals Chamber's ability to review the trial record to determine whether a reasonable trier of fact could reach the same conclusions

909. When considering the extent to which the Appeals Chamber would have to review the trial record to properly adjudicate on the Trial Chamber's errors, the Appellant submits that regard must be had to whether the Appeals Chamber would be able to fairly and accurately determine his criminal responsibility without having directly heard the witnesses or the evidence.[1182]

910. The cumulative effect of the errors identified, demonstrate that the Appeals Chamber would be required to conduct a trial *de novo* to properly consider the extent and effect of the Trial Chamber's errors. The Appellant submits that, without the benefit of directly hearing the witnesses, the Appeals Chamber could not fairly and accurately determine his criminal responsibility.[1183]

911. The Appellant submits that in the circumstances of the case, in the interests of fairness and justice, a retrial, or remittal in part, is the appropriate remedy should the Appeals Chamber decline to reverse the convictions and enter not guilty verdicts.

E.4 CONSEQUENCES OF THE ERRORS

912. The Appellant recalls that in *Stanišić & Simatović*, the Appeals Chamber considered the scale and complexity of the case as a relevant factor to whether it could fairly and accurately adjudicate on the Trial Chamber's errors.[1184] The Appellant notes that the scale and complexity of his case: an 11 count indictment, spanning from 1992 - 1995;[1185] 592 witnesses testified;[1186] the Trial Chamber heard nearly 400 hours of

[1182] *Stanišić & Simatović* AJ, para.124.
[1183] *See Stanišić & Simatović* AJ, para.124.
[1184] *Stanišić & Simatović* AJ, para.124.
[1185] Indictment.
[1186] Judgement, para.5251.

evidence;[1187] 9,914 exhibits were introduced;[1188] and, 2,000 adjudicated facts were admitted.[1189] Moreover, the errors alleged relate to four JCEs as well as the establishment of the crimes.

913. The cumulative effect of the errors identified by the Appellant are sufficient to warrant the intervention of the Appeals Chamber, and for the Appeals Chamber to review the Trial Chamber's approach throughout the Judgement.

914. The Appellant submits that the nature of the errors would require the Appeals Chamber to conduct a trial *de novo* to properly adjudicate on the extent and effect of the Trial Chamber's errors.

E.5 CONCLUSION

915. The Appellant asserts that, in light of the extent and cumulative effect of the errors, it would be contrary to the interests of justice for the Appeals Chamber to conduct a review to determine whether a reasonable trier of fact could reach the same conclusions, as this would require a trial *de novo*.

E.6 REMEDY SOUGHT

916. The Appellant invites the Appeals Chamber, as an alternative to entering not guilty verdicts on all the counts, to exercise its discretion and, pursuant to Rule 144(C), order a retrial, or remit the case in part.

[1187] Judgement, para.5251.
[1188] Judgement, para.5256.
[1189] Judgement, para.5262.

X. GROUND NINE: APPEAL AGAINST SENTENCE

A. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY DOUBLE COUNTING THE APPELLANT'S SUPERIOR RESPONSIBILITY

A.1 OVERVIEW

917. The Appellant submits that the Trial Chamber erred by aggravating his sentence with responsibility under Art.7(3), as it was not proved beyond reasonable doubt.

A.2 APPLICABLE LAW

918. A Trial Chamber has the discretion to find that direct responsibility under Art.7(1) is aggravated by the abuse of a perpetrator's position of authority.[1190] Only other modes of liability that have been proved beyond reasonable doubt will be taken into consideration as aggravating circumstances.[1191]

A.3 THE ERROR

919. The Appellant recalls paragraphs771-780. The Appellant submits that the Trial Chamber did not prove the elements of Art.7(3) beyond reasonable doubt. As a result, it fell into discernible error by aggravating the Appellant's sentence with superior responsibility under Art.7(3).

A.4 REMEDY SOUGHT

920. The Appellant invites the Appeals Chamber to revise the sentence accordingly.

[1190] *Čelibići* AJ, para.745; *Blaškić* AJ, para.90-91.
[1191] *Čelibići* AJ, para.763.

B. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT BY FAILING TO GIVE APPROPRIATE WEIGHT TO THE MITIGATING CIRCUMSTANCES, NAMELY THE APPELLANT'S AGE AND ILL HEALTH

B.1 OVERVIEW

921. The Appellant submits that the Trial Chamber abused its discretion by failing to give sufficient weight to his personal circumstances.

B.2 APPLICABLE LAW

922. Rule 101(B)(ii) states that in determining a sentence, the Trial Chamber shall take into account any mitigating circumstances. The personal and family circumstances of an accused can also be considered as part of this.[1192] The weight to be attached to mitigating circumstances is within the Trial Chamber's discretion.[1193]

B.3 THE ERROR

923. The Trial Chamber did not consider the Appellant's health as a mitigating factor on the basis that his "general condition is stable".[1194] The Trial Chamber was acutely aware of the Appellant's medical history and his ongoing medical issues during the trial.[1195] The Appellant recalls paragraphs 816-838 in this regard. The Appellant submits that the Trial Chamber failed to give sufficient weight to the totality of the medical evidence and his medical history.

924. The Trial Chamber did not give any weight to the Appellant's daughter's death as personal mitigation. While it was presented under the heading "diminished mental capacity",[1196] it constitutes evidence of his family circumstances. The tragic loss of

[1192] *Kunarac* AJ, para.362, 408; *Blaškić* AJ, para.696
[1193] *Čelibići* AJ, para.777.
[1194] Judgement, para.5203.
[1195] Judgement, paras.5247-5248.
[1196] Judgement, para.5200.

his daughter in conjunction with other details about his family, was not even considered.[1197]

925. The Appellant submits that the Trial Chamber fell into discernible error by failing to give sufficient consideration to his personal and family circumstances. A reasonable trier of fact would have given his ill-health in combination with his age, as well as his family circumstances, more weight as part of the sentencing exercise.

B.4 REMEDY SOUGHT

926. The Appellant invites the Appeals Chamber to give these factors due weight and regard and revise his sentence accordingly.

[1197] *See* Defence FTB, paras.3401.

C. THE TRIAL CHAMBER FAILED TO TAKE INTO ACCOUNT THE INDIVIDUAL CIRCUMSTANCES OF THE APPELLANT

C.1 OVERVIEW

927. The Appellant submits that the Trial Chamber abused its discretion by failing to give sufficient weight to his benevolent treatment of, and assistance to, victims.

C.2 APPLICABLE LAW

928. The weight to be attached to the individual circumstances of an accused is within the Trial Chamber's discretion.[1198]

C.3 THE ERROR

929. The Trial Chamber concluded that the Appellant's benevolent acts were "sporadic" and could be disregarded.[1199] The Appellant submits that the evidence referred to demonstrated that these were more than "sporadic".[1200] The Trial Chamber erred by giving insufficient weight to the evidence of such acts. A reasonable trier of fact would have given more weight to the totality of the evidence presented.

C.4 REMEDY SOUGHT

930. The Appellant invites the Appeals Chamber to give these factors due weight and regard and revise his sentence accordingly.

931. The Appellant invites the Appeals Chamber to consider the cumulative effect of the weight of his personal and individual mitigation in determining the appropriate reduction. The Appellant submits that the totality of his mitigating circumstances would reduce his sentence from life imprisonment.

[1198] *Čelibići* AJ, para.777.
[1199] Judgement, para.5198.
[1200] *Čelebići* AJ, para.776;

D. THE TRIAL CHAMBER ERRED IN LAW AND IN FACT, AND ABUSED ITS DISCRETION, BY IMPOSING A LIFE SENTENCE WITHOUT ADDRESSING OR GIVING REASONS ON THE ECtHR DECISION PREVENTING RETROACTIVE APPLICATION OF THE SENTENCING LAW OF THE BOSNIA AND HERZEGOVINA

D.1 OVERVIEW

932. The Appellant submits that the analysis on *nulla poena sine lege* and *lex mitior* conducted by the ECtHR in *Maktouf and Damjanvoić v Bosnia and Herzegovina*[1201] ('*Maktouf*') gives rise to compelling reasons to revisit the retrospective application of Rule 101(A) to impose a life sentence. Although it is not binding,[1202] *Maktouf* is persuasive. It suggests that the jurisprudence may have inadvertently overlooked the significance of the language used in Art.24 and Rule 101(A), in concluding that the sentencing practice at the ICTY did not violate the principle of *nulla poena sine lege*.[1203]

933. The Trial Chamber established that a life sentence could be imposed on the basis of said jurisprudence.[1204] The Appellant submits that it was led into discernible error by the oversight in the jurisprudence. As a result, it imposed a life sentence.[1205]

934. The Appellant notes that the ICTY is bound by its own Statute and Rules.[1206] In considering the weight to attach to *Maktouf*, the Appellant submits that the analysis of *nulla poena sine lege* and *lex mitior* in the context of the 1976 Criminal Code is instructive. The disparity emerging between the international and national sentencing practice on the basis of the approach taken by the ECtHR, gives further impetus to revisit whether the imposition of a life sentence at the international level is consistent with *nulla poena sine lege*.

[1201] *Maktouf* Judgement.
[1202] *Stanišić & Župljanin* AJ, para.598.
[1203] *See Tadić* Sentencing Appeal, para.21; *Čelebići* AJ, para.817; *Krstić* AJ, para.262; *Blaškić* AJ, para.681; *Stakić* AJ, para.398; *Simić* AJ, para.264; *Krajišnik* AJ, para.750.
[1204] Judgement, paras.5205-5209.
[1205] Judgement, para.5213.
[1206] *Nikolić* Sentencing Appeal, para.80-81.

D.2 APPLICABLE LAW

935. Art.7 ECHR states that:

> [N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the crime was committed.

936. A universal acceptance of the non-retroactivity of penal law has been established.[1207] The non-derogability of this right is enshrined in IHL.[1208] The principle of legality can be considered to be a norm of *jus cogens*.[1209]

937. Art.24(1) of the Statute (adopted in 1993) states:

> [T]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

938. Rule 101(A) (adopted in 1994) states that a convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.

D.3 THE APPROACH TAKEN BY THE ECTHR IN *MAKTOUF*

939. The ECtHR examined the legality of the Bosnian State Court's retrospective application of the 2003 Code to war crimes committed in 1993 under the second limb of Art.7(1) ECHR - *nulla poena sine lege*.[1210]

940. The war crimes committed during the 1992-1995 war constituted offences under national law.[1211] Both applicants were sentenced under the 2003 Code.[1212] The ECtHR rejected the Government's submissions that: (a) there was a general exception to *nulla*

[1207] UDHR, Art.11(2); ICCPR, Art.15; IACHR, Art.9; ACHPR, Art.7(2); CRC, Art.40(2); ICC Statute, Arts.11, 24; CFREU, Art.49; ArCHR, Art.6.
[1208] GC.III, Art.99; GC.IV, Arts.65, 67; API, Art.75(4)(c); APII, Art.6(2)(c).
[1209] *Maktouf* Judgement, Concurring Opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić, paras.2-9.
[1210] *Maktouf* Judgement, paras.54-74.
[1211] *Ibid.*, para.55.
[1212] *Ibid.*, para.10-20.

poena sine lege for crimes constituting "general principles of international law"; (b) the increased sentencing powers were a progressive development in criminal law through judicial interpretation; and, (c) that a duty under IHL law to punish war crimes adequately required the rule of non-retroactivity to be set aside.[1213] The ECtHR unanimously held that the State Court had violated *nulla poena sine lege* by applying the 2003 Code for the purpose of sentencing.[1214] It concluded that the sentencing provisions of the 1976 Code should have been applied.[1215]

941. The Appellant notes, the Government's submissions, that the inadequacy of sentence provided an exception to non-retroactivity in IHL, were rejected on the basis that the rule of non-retroactivity of crimes and punishments is codified in the Geneva Conventions.[1216]

942. In light of *Maktouf*, there have been successful appeals against sentences of over 20 years for genocide and war crimes in the Bosnian State Court. Illustrative examples include: Milorad Trbić's sentence of 31 years was reduced to 20 years for his participation in the executions in Zvornik and digging the primary graves (he was a security officer in the Zvornik Brigade);[1217] Duško Jević and Mendeljev Đurić's sentences of 31 and 28 years respectively were reduced to 20 years for events in Potočari, Kravica and on road communications between Bratunac and Konjevic Polje;[1218] and, Radomir Vuković (a member of the 2nd Šekovići Detachments) had his sentence reduced from 30 to 20 years for his role in the events that occurred in Kravica.[1219]

943. The divergent approach to the application of the 1976 Code creates fragmentation between international and national law.

[1213] *Ibid.*, paras.72-74.
[1214] *Ibid.*, para.70.
[1215] *Ibid.*, para.76.
[1216] *Ibid.*, para.74.
[1217] *Trbić* Verdict.
[1218] *Jević* Verdict.
[1219] *Vuković* Verdict.

D.4 THE TRIAL CHAMBER'S APPROACH

944. The Trial Chamber cited a number of Appeals Chambers' judgements to support its finding that a life sentence could be imposed without violating *nulla poena sine lege*.[1220] On the basis of the jurisprudence, the Trial Chamber set out three justifications for this conclusion. These will be considered in turn.

D.4.1 The Trial Chamber was not obliged to conform with the practice of the 1976 Code

945. The Trial Chamber cited numerous cases which interpreted Art.24 and Rule 101(A) together to establish that the Tribunal was not bound by the sentencing practices of the former Yugoslavia.[1221] For instance, in *Tadić*, the Appeals Chamber relied on the discretion to impose a life sentence afforded by Rule 101(A) as evidence that the Tribunal was not bound by any maximum term of imprisonment applied in the former Yugoslavia.[1222] However, the Rules of Procedure and Evidence were not adopted until 11 February 1994.[1223] Rule 101(A) was retroactively applied to define the term of imprisonment, referred to in Art.24, as life imprisonment and to distinguish between the sentencing practices at international and domestic levels.

946. The Appellant recalls, Art.24 states that;

> [T]he penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

The language of Art.24 was included in the draft Statute annexed to the Secretary-General's Report produced pursuant to Resolution 808 (1993).[1224] The Security Council adopted this on 25 May 1993 when it established the Tribunal.[1225] In considering whether the Tribunal should apply domestic law or IHL, the Secretary-General concluded that: "[w]hile [IHL] provides a sufficient basis for subject-matter

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[1220] Judgement, paras.5205-5208, fns17807, 17809, 17810, 17821.
[1221] Judgement, para.5205, fn17807.
[1222] *Tadić* Sentencing Appeal, para.21.
[1223] IT/32.
[1224] Secretary-General's Report, para.115.
[1225] Resolution 827, para.2.

jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties".[1226] The context within which the Secretary-General considered this is instructive. In determining whether domestic or international law should be applied, the *travaux préparatoires* highlight that deference was shown to the domestic sphere for the purpose of sentence. The domestic sentencing practice of the former Yugoslavia was deliberately, and explicitly, imported into the fabric of the Tribunal's sentencing practice under Art.24. The subsequent adoption of Rule 101(A) does not change the text of the Statute. Rather, it creates another penal law with a competing sentence to Art.24, in the absence of any international sentencing practice.

D.4.2 The accused would have been aware that the crimes constituted serious violations of international humanitarian law[1227]

947. To establish that a Trial Chamber could impose a life sentence without violating the principle of *nulla poena sine lege,* the *Čelebići* Appeals Chamber reasoned that an accused must have been aware that the most serious violations of humanitarian law were punishable by the most severe penalties.[1228] The Appeals Chamber relied on Rule 101(A) to evidence that a life sentence would have been accessible and foreseeable to an accused at the time the offences were committed.[1229]

948. The *Čelebići* Appeals Chamber relied on *SW v United Kingdom* ("*SW*") to support that their conclusion did not breach the principle of *nulla poena sine lege*.[1230] In *SW*, the ECtHR had considered the application of *nullum crimen sine lege* to marital rape.[1231] The applicants relied on the common law exception of marital rape to argue that the domestic court's conviction for rape violated their Art.7(1) ECHR right.[1232] The ECtHR unanimously held that Art.7 had not been violated.[1233] It did so on the basis that the courts had interpreted the law to reflect the change to social attitudes

[1226] Secretary-General's Report, para.36.
[1227] Judgement, para.5205, fn17809.
[1228] *Čelebići* AJ, para.817, fn1400.
[1229] *Ibid.*, para.817, fn1399.
[1230] *Ibid.*, para.817, fn1400.
[1231] *SW* Judgement, paras.34-47.
[1232] *Ibid.*, paras.37-39.
[1233] *Ibid.*, para.47.

and, as the offence of rape already existed in law, the conviction for marital rape was accessible and foreseeable.[1234] The Appeals Chamber in *Čelebići* cited *SW* to support its conclusion that, as long as a sentence is accessible and foreseeable, the principle of *nulla poena sine lege* cannot be breached.[1235]

949. In fact, *SW* did not discuss the accessibility and foreseeability of the sentence but merely of the criminalisation of the act. The ECtHR held that, as long as the criminalisation of the act was accessible and foreseeable, the principle of *nullum crimen sine lege* would not be breached.[1236] By relying on this case, the Appeals Chamber in *Čelebići* conflated the accessibility and foreseeability of a conviction with the accessibility and foreseeability of a sentence. The Appeals Chamber concluded that, during the indictment period, the crimes of which the accused had been convicted were accessible and foreseeably under the ICTY statute. Yet, it failed to consider what sentence would have been accessible and foreseeable at the time the acts were committed. As such, the Appeals Chamber conflated the principle of *nullum crimen sine lege* with the principle of *nulla poena sine lege*.

Accessibility and foreseeability

950. The *Čelebići* Appeals Chamber simply relied on the existence of Rule 101(A) to establish that a life sentence was accessible and foreseeable but failed to consider Art.24, which provided for recourse to Yugoslavian sentencing laws. Had the Appeals Chambers considered the difference between the two provisions, the principle of *lex mitior* would have been engaged.

951. On the basis of Art.24, a life sentence would not have been accessible and foreseeable. The text simply states that a "penalty imposed by the Trial Chamber shall be limited to imprisonment". However, the crucial feature of Art.24 is the explicit reference to the obligation incumbent on a Trial Chamber to have recourse to the sentencing practice of the former Yugoslavia. The 1976 Code was in force at the time of

[1234] *Ibid.*, paras.34-47, 39.
[1235] *Čelebići* AJ, para.817, fn1400.
[1236] *SW* Judgement, paras.43-47.

committing the offences and was therefore accessible and foreseeable to an accused. This provided a maximum sentence of 20 years, instead of the death penalty, for genocide and war crimes.[1237] Given that Art.24 excludes the imposition of the death penalty, the only accessible and foreseeable sentence to an accused was one of 20 years under Art.24.

952. Art.24 was adopted in 1993, and Rule 101(A) in 1994. Art.24 limits the sentencing powers of the Tribunal to 20 years, while Rule 101(A) allows a life sentence to be imposed. Both the Statute and the Rules are binding on the Tribunal. Following the *Čelebići* Appeals Chamber's reasoning and citations, the maximum sentence that could be imposed without violating *nulla poena sine lege* and *lex mitior* is 20 years. This is consistent with the *Nikolić* Appeals Chamber's finding that "if the law relevant to the offence of the accused has been amended, the less severe law should be applied".[1238]

953. The Appellant notes, the ICTY jurisprudence has interpreted Art.24 to mean that Trial Chambers are not *bound* by Yugoslavian general practice regarding prison sentences.[1239] However, given the wording of Art.24 that the Trial Chambers shall have *recourse* to the general sentencing practice in Yugoslavia, the interpretation of Art.24 adopted by the ICTY jurisprudence was not accessible or foreseeable to an accused.

D.4.3 The 1976 Criminal Code provided an inadequate sentence

954. The *Kurnarac* Appeals Chamber held that, "[i]t is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own".[1240] Through this reasoning, the Appeals Chamber created an exception to the rule of non-retroactivity on the basis of a duty to punish crimes

[1237] SFRY Criminal Code, Arts.38(2), 37.
[1238] *Nikolić* Sentencing Appeal, para.81.
[1239] *Kordić* AJ, para. 1085*; Nikolić* Sentencing Appeal, paras.17, 69; *Jokić* Sentencing Appeal, para.38; *Galić* AJ, para.398; *Hadžihasanović* AJ, paras.335, 346; *Krajišnik* AJ, paras.749, 811; *Boškoski* AJ, para.212; *Tadić* Sentencing Appeal, para.21; *Čelebići* AJ, paras.813, 816, 820; *Jelisić* AJ, para.117; *Kupreškić* AJ, para.418; *Kunarac* AJ, paras.347-349; *Krstić* AJ, para.260; *Blaškić* AJ, paras.681-682.
[1240] *Kunarac* AJ, para.377.

adequately in international law. It did not consider the codification of the principle of non-retroactivity enshrined in the Geneva Conventions,[1241] nor how this could be reconciled with the principles of *nulla poena sine lege* and *lex mitior*.

D.5 DISCUSSION

955. The Appellant submits that the jurisprudence overlooked the distinction between Art.24 and Rule 101(A). Art.24 imports a sentence of 20 years into the fabric of the Tribunal's sentencing practice, while Rule 101(A) enables a life sentence to be imposed. Given that both the Statute and the Rules are binding on the Tribunal, the less severe sentence should be imposed on the basis of *lex mitior*.

956. The 1976 Code was in force when the crimes, of which the Appellant has been convicted of, were committed. It imposed a maximum sentence of 20 years for genocide and war crimes.[1242] The Appellant could not have foreseen that a life sentence would be imposed by the ICTY for the same crimes and crimes against humanity, on the basis of Art.24. The Appellant submits, imposing a life sentence on the basis of Rule 101(A) violates *nulla poena sine lege* and *lex mitior*. As highlighted by the ECtHR in *Maktouf,* any perceived inadequacy of the 1976 Code's sentencing practice cannot justify the retrospective application of a higher sentence.[1243]

957. In these circumstances, it is desirable to reopen the issue of the Tribunal's sentencing powers and identify whether the imposition of a life sentence violates *nulla poena sine lege* and *lex mitior*. The Appellant submits that the inadvertent oversights in the jurisprudence, that led the Trial Chamber into discernible error, give rise to compelling reasons to revisit this. Further, the divergent approaches taken at the domestic and international level compounds the need for the Appeals Chamber to revisit the legal standard.

[1241] *Ibid.*, para.377.
[1242] Brief, fn.1237
[1243] Brief, fn.1216.

D.6 REMEDY SOUGHT

958. The Appellant invites the Appeals Chamber to articulate the correct legal standard and review the factual findings of the Trial Chamber. Further, the Appellant invites the Appeals Chamber to reverse the life sentence imposed by the Trial Chamber and substitute this for a sentence of 20 years.

XI. RELIEF SOUGHT

959. The Appellant has identified the Trial Chamber's errors, and the consequences thereof, in the Brief. The Appellant submits that the errors of law and/or fact invalidate the Trial Chamber's findings on Counts 2-11. The Appellant invites the Appeals Chamber to:

(a) reverse the convictions entered by the Trial Chamber on Counts 2-11 of the Indictment and enter not guilty verdicts on all counts;

(b) in the alternative, pursuant to IRMCT Rule 144(C), order a retrial.

960. Should the Appeals Chamber find that the errors invalidate the Trial Chamber's findings on Counts 2-11 only in part, the Appellant invites the Appeals Chamber to:

(a) reverse the Trial Chamber's findings to the extent of the errors found;

(b) revise the findings that relate to the basis of the convictions; and/or

(c) reduce the Appellant's sentence accordingly.

Word count: 66,606

RESPECTFULLY SUBMITTED BY:

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JURISPRUDENCE

Table of Mladić case documents

Abbreviation	Full citation
[REDACTED]	[REDACTED].
Defence FTB	*Prosecutuor v. Ratko Mladić*, IT-09-92-T, Final Trial Brief of Ratko Mladić, 01 November 2016.
Defence Notice of Objection	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Defence Notice of Objection to the Chamber's Closing of its Case, 18 August 2016.
[REDACTED]	[REDACTED].
[REDACTED]	[REDACTED].
Defence Response to Utterances Motion	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Defence response to Prosecution's Motion for Admission of the Utterances of the Accused, 02 April 2013.
[REDACTED]	[REDACTED].
[REDACTED]	[REDACTED].
Defence Witness List	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Defense Supplemental Sumission of Preliminary Witness and Exhibit Lists under Rule 65*ter*(G), 16 May 2014.
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First Defence Sitting Schedule Motion	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to Health Concerns of the Accused, 15 January 2013.
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[REDACTED]	[REDACTED].
[REDACTED]	[REDACTED].
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Mladić EDS Appeal	*Prosecutor v. Ratko Mladić*, IT-09-92-AR73.2, Appeals Chamber, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Material, 28 November 2013.
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Mladić Prosecution Utterances Motion	*Prosecutor v. Ratko Mladić*, IT-09-92-T, Prosecution Motion for Admission into Evidence the Utterances of the Accused, 18 March 2013.

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Aleksovski Decision on Admissibility of Evidence AC.	*Prosecutor v. Zlatko Aleksovski,* IT-95-14/1-A, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.
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Blagojević AJ	*Prosecutor v. Vidoje Blagojević & Dragan Jokić,* IT-02-60-A, Appeals Chamber, Judgement, 09 May 2007.
Blagojević TJ	*Prosecutor v. Vidoje Blagojević & Dragan Jokić*, IT-02-60-T, Trial Chamber, Judgement, 17 January 2005.
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Milošević AJ	*Prosecutor v. Dragomir Milošević,* IT-98-29/1-A, Appeals Chamber, Judgement, 12 November 2009.
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Perišić Decision on Convictions	*Prosecutor v. Momčilo Perišić*, IT-04-81-PT, Trial Chamber, Decision on Motion for Judicial Notice of ICTY Convictions, 25 September 2008 *Prosecutor v Momčilo Perišić*, IT-04-81-PT, Trial Chamber, Decision on Motion for Judicial Notice of ICTY Convictions, 25 September 2008.
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Simić AJ	*Prosecutor v. Blagoje Simić,* IT-95-9-A, Appeals Chamber, Judgement, 28 November 2006.
Stakić AJ	*Prosecutor v. Milomir Stakić,* IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006.
Stanišić & Simatović AJ	*Prosecutor v. Jovica Stanišić & Franko Simatović,* IT-03-69-A, Appeals Chamber, Judgement, 09 December 2015.
Stanišić Third Decision on Adjudicated Facts	*Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Trial Chamber, Decision on Third Prosecution's Motion for Judicial Notice of Adjudicated Facts, 23 July 2010.
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Tadić Sentencing Appeal	*Prosecutor v. Duško Tadic,* IT-94-1 and IT-94-1-A bis, Appeals Chamber, Judgement in Sentencing Appeals, 26 January 2000.
Tolimir Decision on Adjudicated Facts	*Prosecutor v. Zdravko Tolimir,* IT-05-88/2-PT, Trial Chamber, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 17 December 2009.
Tolimir AJ	*Prosecutor v. Zdravko Tolimir,* IT-05-88/2-A, Appeals Chamber, Judgement, 08 April 2015.
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Bizimungu AJ	*Augustin Bizimungu v. Prosecutor,* ICTR-00-56B-A, Appeals Chamber, Judgement, 30 June 2013.
Kalimanzira AJ	*Prosecutor v. Callixte Kalimanzira*, ICTR-05-88-A, Appeals Chamber, Judgement, 20 October 2010.
Kamuhanda AJ	*Prosecutor v. Kamuhanda*, ICTR-99-54A-A, Appeals Chamber, Judgement, 16 September 2005.
Karera AJ	*Prosecutor v. François Karera*, ICTR-01-74-A, Appeals Chamber, Judgement, 02 February 2009.
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Karemera Interlocutory Decision	*Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, Joseph Nzirorera,* ICTR-98-44-AR73(C), Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.
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Date Created/ *Daté du* :	**11 September 2018**	**Date transmitted/ *Transmis le* :**	**11 September 2018**	**No. of Pages/ *Nombre de pages* :** **263**
Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
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